

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRWP-1485-2021 (O&M)
Date of Decision: 23.08.2022

Kulwant Singh

....Petitioner(s)

Versus

State of Haryana and others

.....Respondent(s)

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. Sardavinder Goyal, Advocate, for the petitioner.

Mr. Saurabh Girdhar, Assistant Advocate General, Haryana.

Mr. Dinesh Arora, Advocate, for respondent No.2.

JASGURPREET SINGH PURI, J.(Oral)

The present petition has been filed under Article 226/227 of the Constitution of India seeking issuance of a writ in the nature of Habeas Corpus for directing the respondents No. 1, 3 and 4 to get released the detainee child namely Garvit aged about 5 ½ years (now about 7 years) from the custody of respondent No.2 and hand over the same to the petitioner who is the father of the aforesaid child.

Facts of the case

The petitioner namely Dr. Kulwant Singh got married with one Sangeeta on 05.07.2014 which was an arranged marriage. This marriage between the parties was second marriage for both of them. The petitioner Kulwant Singh was earlier also married but his marriage was dissolved by way of a decree of divorce under Section 13-B of the Hindu Marriage Act. Similarly, the aforesaid Sangeeta was also married and her marriage was

also dissolved by a decree of divorce as per the learned counsel for the parties. Thereafter, the petitioner and the aforesaid Sangeeta got married and from the wedlock, a male child was born namely Garvit who is about 7 years of age as of today and his date of birth is 05.07.2015. The aforesaid Sangeeta, however, unfortunately died on 09.04.2019 after she went missing and her body was found drowned in a canal. Thereafter, an FIR was registered under Section 346 IPC but during the investigation, the provision of Section 304-B IPC was added and Section 346 IPC was dropped. The matter was further investigated by the police and thereafter, ultimately the police prepared a cancellation report in the aforesaid FIR in the year 2020 and thereafter, as per the learned Assistant Advocate General, Haryana the cancellation report was submitted to the competent Court on 31.08.2021. However, as per the learned counsel for respondent No.2, no protest petition has been filed at this stage but the same may be filed in due course. It is the case of the petitioner that the petitioner is the father of the child and is the natural guardian under the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956.

**Submissions made by learned counsel
for the petitioner**

It has been submitted by the learned counsel for the petitioner that the petitioner is the natural guardian being the father of the child under Section 6 of the Hindu Minority and Guardianship Act, 1956 and now the petitioner is a single parent due to the unfortunate demise of the wife of the petitioner and being the natural guardian, he is the only person who can take care and raise the child in a well and proper manner by not only providing best education facilities available but also by making him comfortable psychologically as well as morally and it is only the company

of the father who is the natural guardian by which the career of the child can be well-shaped and safe. He further submitted that there is neither any impediment nor any embargo for the petitioner for getting restored the custody of the child. He submitted that although earlier there had been allegations against the petitioner and there had been a matrimonial dispute with the first wife but there is no allegation with regard to any cruelty or any other such kind of allegation with his second wife namely Sangeeta and it was only after her death that the FIR was lodged which was earlier lodged under Section 346 IPC but thereafter on the insistence by the parents of his wife, the provision of Section 304-B IPC was added. Thereafter, when the matter was thoroughly investigated by the police, Section 304-B IPC was dropped and rather cancellation report was also submitted before the learned trial Court in which more than one year has elapsed, no protest petition has been filed by the complainant or any other person.

The learned counsel for the petitioner submitted that the petitioner is a well educated person and he is Ph.D. in Economics from Maharshi Dayanand University, Rohtak and he is serving as an Assistant Professor in Centre for Research in Rural and Industrial Development, Chandigarh and he has also attached his salary slip as Annexure P-7. He further submitted that in view of the aforesaid educational qualifications and social status of the petitioner, he is competent enough to look after his own son and to bring him up in a proper manner. He further submitted that rather on the other hand, the respondent No.2 is the maternal grand-mother of the child (Nani) and is living in Rohtak whereas the petitioner is living in Chandigarh and can not only afford but is under an obligation to provide better education to the child who is at the tender age of 7 years and better

opportunities are available in Chandigarh as compared to Rohtak. He further submitted that respondent No.2 is a lady of the age of 68 years and her husband who is the maternal grand-father is about the age of 70 years and they are old people. Apart from the maternal grand-parents, in the same family 2 brothers of his wife are also residing. One brother is unmarried and the second brother is married and is having a daughter but there is also a matrimonial dispute among them and atmosphere of the family of respondent No.2 is not conducive for the purpose of upbringing the child who is at a very tender age. He further submitted that when the wife of the petitioner died, then at that point of time due to psychological and social reasons, the child was sent to the maternal grand-parents which was the need of the hour at that time since the petitioner himself was also under psychological stress and a family environment was required for the child especially from the grand-parents and that was the sole reason as to why the son of the petitioner who at that point of time was of the age of 5 years was sent to them to be taken care of. He further referred to an affidavit Annexure P-3 which was executed by the petitioner wherein respondent No.2 was appointed as a guardian of his son for the purpose of taking care of the plot which was transferred in the name of the son of the petitioner. He further submitted that it was only for the purpose of taking care of the plot that such an affidavit was executed at that point of time and it was not for the purpose of giving any guardianship to respondent No.2. He further submitted that even otherwise also, thereafter the gifted plot has since been cancelled and therefore, the affidavit Annexure P-3 would have no significance at this point of time since it pertained to a plot only.

The learned counsel for the petitioner further referred to a

judgment of the Hon'ble Supreme Court in ***Yashita Sahu Versus State of Rajasthan and others [2020(3) SCC 67]*** and submitted that firstly, the present petition which is a petition for grant of a writ in the nature of Habeas Corpus is maintainable on behalf of the petitioner who is the father and natural guardian of the child and secondly, it is a settled law that in such like cases where the custody of small child is involved, the primary and only test is that the welfare of the child is of paramount consideration. He further submitted that it was held by the Hon'ble Supreme Court that when the welfare of a child is involved, then any kind of technical objections cannot come in the way because the litmus test for ascertaining the custody of a child would be the welfare of the child. He further submitted that it is not a case where the custody is sought by the parents inter se but it is a case where the custody is sought by the father as against the maternal grand-mother who is of the age of 68 years and the factors which can play role in ascertaining the custody of a child would be different as compared to the factors which are required to be considered when a custody is to be considered vis-a-vis both the parents. He further submitted that as per the aforesaid judgment in ***Yashita Sahu Versus State of Rajasthan and others (Supra)***, it was held that normally the child becomes a victim in battles of custody in the fight of egos arising out of litigation between the two spouses and experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child and, therefore, the Court must verify as to what is said by each of the spouses. In the present case, the custody is sought by the father as against the maternal grand-mother and not from the other spouse since the

petitioner is a single parent after the unfortunate demise of the wife of the petitioner. He further submitted that this is not only the requirement of a child but it is his basic human right and just because the maternal grand-parents are wanting the custody for their own interest cannot deprive the child of his lawful rights which are not only available and vested upon him statutorily but also in view of the aforesaid facts and circumstances.

The learned counsel for the petitioner further relied upon another judgment of Hon'ble Supreme Court in ***Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others*** [2019 (7) SCC 42] in which it was observed that a writ of Habeas Corpus is a prerogative process for the purpose of securing the liberty of the subject by affording an effective means for immediate release from an illegal or improper detention. A writ of Habeas Corpus also extends its influence to restore the custody of a minor to his guardian when he is wrongfully deprived of the same. The detention of a minor by a person who is not entitled to his legal custody is treated to be an equivalent to illegal detention for the purpose of granting writ and directing custody of the minor child and for restoration of the custody of a minor from a person who according to the relevant personal law, is not his legal or natural guardian, in appropriate cases, the writ Court has got jurisdiction.

The learned counsel for the petitioner while relying on aforesaid judgment submitted that even if the custody where the child is at the moment residing is not an illegal custody, still writ in the nature of Habeas Corpus will lie when in a situation the lawful guardian has been deprived of the custody and is seeking restoration of the same from the person who would not be entitled for the custody. He also referred to latest

judgment of the Hon'ble Supreme Court in ***Rajeswari Chandrasekar Ganesh Versus State of Tamil Nadu and others***, CRWP No.402 of 2021, decided on 14.07.2022 wherein the Hon'ble Supreme Court also referred to the earlier judgment in ***Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others (Supra)*** wherein it was observed that the writ also extends its influence to restore the custody of a minor to his lawful guardian when wrongfully deprived of it. It was also held in ***Rajeswari Chandrasekar Ganesh Versus State of Tamil Nadu (Supra)*** that it is well established that in issuing a writ in the nature of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provisions in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State as *parens patriae* for the protection of its minor ward and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a Court of equity. The primary objective of Habeas Corpus petition as applied to the minor children is to determine in whose custody the best interests of the child will probably be advanced. Para No.91 of the aforesaid judgment is reproduced as under:-

“91. Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable

powers and exerts the force of the State, as parens patriae, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as parens patriae, has in promoting the best interests of the child.

**Submissions made by learned counsel
for the State**

The Assistant Advocate General, Haryana has stated that the present dispute is with regard to the custody of minor and as such, the State does not have any role to play. However, on facts he stated that in the FIR which was lodged against the petitioner, the police has already presented cancellation report to the competent Court on 31.08.2021.

**Submissions made by learned counsel
for respondent No.2**

The learned counsel for respondent No.2 who is the maternal grand-mother of the child submitted that so far as the maintainability of the Habeas Corpus petition is concerned, he does not dispute the same. However, the learned counsel has raised five other arguments while opposing the relief claimed by the petitioner in the present petition in the facts and circumstances of the present case.

1. The learned counsel submitted that the petitioner himself abandoned the child which is clear from Annexure P-3

which is an affidavit executed by the petitioner after the death of his wife and once the petitioner has abandoned the child himself, then while ascertaining the welfare of the child, the Court has to consider the aforesaid facts for the purpose as to whether the custody should be restored back to the petitioner or not.

2. Although a writ of Habeas Corpus in custody matters is maintainable as has been laid down by the Hon'ble Supreme Court but in the present case it was a case where the custody of the child with respondent No.2 who is the maternal grand-mother is not an illegal custody and since it is not an illegal or unlawful custody, a writ of Habeas Corpus will not lie and rather the remedy available to the petitioner is to approach the competent Court of jurisdiction under the Special law.
3. FIR was lodged against the petitioner in which Section 304-B IPC was added and a cancellation report was filed by the police to the competent Court of jurisdiction but respondent No.2 or any other concerned person still has a right to file a protest petition and respondent No.2 and her husband are in the process of filing the protest petition and therefore, it cannot be said that the said FIR has become insignificant because it can still be revived.
4. The petitioner before approaching this Court has also approached the Child Welfare Committee under the provisions of Juvenile Justice (Care and Protection

Children) Act, 2006 and vide order dated 05.02.2022 (Annexure P-5), the Child Welfare Committee directed the handing over the child to the petitioner. However, on an appeal being filed by respondent No.2, the order passed by the Child Welfare Committee was set aside on the ground that the Child Welfare Committee had got no jurisdiction to entertain or to even pass any order with regard to the restoration of the custody of a child since the child was not in conflict with law and liberty was also granted to approach the Court of competent jurisdiction.

5. The conduct of the petitioner would also disentitle the petitioner for grant of restoration of the custody of the child. He submitted that the petitioner used to maltreat his wife and as a consequence of such maltreatment, she died. He further submitted that respondent No.2 and her husband have natural love and affection for the child and are not only capable but are also giving him proper education by getting him admitted in a convent school of CBSE level at Rohtak and the child is fully comfortable in their company. Apart from the same, respondent No.2 has got two sons. One of them is not married and the other son is married and is having a female child and son of the petitioner also enjoys the company of his cousin sister and therefore, a comfortable atmosphere has been provided to

the aforesaid child namely Garvit. He further submitted that there is no ground available with the petitioner for seeking and getting restoration of the custody in the aforesaid facts and circumstances and in fact it is almost 3 years that the child is with the respondent No.2 but the petitioner has made no efforts to meet the child.

Apart from the above, the learned counsel for respondent No.2 has also placed reliance upon judgments of Hon'ble Supreme Court in *Kirtikumar Maheshankar Joshi Versus Pradipkumar Karunashankar Joshi [1992(3) SCC 573]* and also in *Nil Ratan Kundu and another Versus Abhijit Kundu [2008 (9) SCC 413]* and has contended that it is not necessary to give the custody to the natural guardian and the same can also be given to the grand-parents in the facts and circumstances of a case.

Consideration of arguments

It is a case where on the one hand, the petitioner is the natural guardian being father of the child who is of the age of 7 years and on the other hand, respondent No.2 is the maternal grand-mother of the child with whom the child aged 7 years is residing at present. So far as the maintainability of the present petition is concerned, the learned counsel appearing on behalf of respondent No.2 has already submitted that he is not disputing the proposition of law that a writ in the nature of Habeas Corpus is certainly maintainable in custody matters but considering the facts and circumstances of the present case the petition cannot succeed because there is no unlawful custody.

Therefore, before considering the merits of the present case, it must be understood that the dominant factor in the present case which

pertains to the grant of custody of child would be “Welfare of a child is of paramount consideration” and which is the only litmus test to determine as to with whom the custody should vest. There is no straight jacket formula or no pigeon-hole theory for determining the custody of a child but in a given case, the facts and circumstances of the case are to be seen by not only comparing merits and demerits of both the parties but also by visualising not only the present need and care of the child but the Court must also visualise the future of the child in the coming years. Therefore, the measuring rod for determining the custody of a child especially of a nascent age has various parameters including the relationship of the child with the person seeking custody, the financial status of the party and apart from the same, the overall circumstances as to who should be considered best in the interest of the child for taking custody. The relationship of a child with the parties is only one of the factors and cannot become a sole determinative factor since the dominant factor is the welfare of child whereas all the other factors including the relationship are subservient to the dominant factor. As per Section 6 of the Hindu Minority and Guardianship Act, 1956, the natural guardian of a child is a father. However, a departure can be made from the same due to the circumstances which are provided under the proviso to the aforesaid provisions.

In addition to the above, Section 13 provides that welfare of minor shall be of paramount consideration.

The exercise of *parens patriae* jurisdiction by a Constitutional Court would also require due consideration and weightage while considering the issue of custody of a child. This doctrine of *parens patriae* was originated in the United Kingdom way back in the 13th Century which

implies that it is the King who is the guardian of the nation and was also under a duty to look after the interests of its subjects who are in fact not able to look after themselves. This doctrine of *parens patriae* was discussed by the Hon'ble Supreme Court in ***Charan Lal Sahu Versus Union of India [1990(1) SCC 613]***. Therefore, rather it becomes the duty of a Constitutional Court to adhere to the aforesaid principle when such like situation arises for the purpose of grant or restoration of custody of a child and to ascertain as to who will be the best person to whom the custody should be given notwithstanding any other factor including the relationship between the parties since the dominant factor is ultimately the welfare of the child and no other technicality.

The Hon'ble Supreme Court in ***Yashita Sahu Versus State of Rajasthan and others (Supra), Tejaswinii Gaud and others versus Shekhar Jagdish Prasad Tewari and others (Supra) and also in Rajeswari Chandrasekar Ganesh Versus State of Tamil Nadu and others (Supra)*** held that welfare of the child is to be seen according to the facts and circumstances of each and every case. In other words, there can be no straight jacket formula for determining the same and every case is dependent upon the facts and circumstances of its own. In the present case, on the one hand the petitioner is the father who is the natural guardian and on the other hand, respondent No.2 is the maternal grand-mother with whom at present the child is residing. The undisputed facts of the present case are that after the unfortunate death of the wife of the petitioner, the custody was temporarily given to respondent No.2 in view of the situation in the family at that point of time. The learned counsel for respondent No.2 had submitted that the petitioner did not care to come and meet the child during the last

three years. However, during the course of arguments, learned counsel for the petitioner has denied the same and has stated that rather he had tried his level best not only to meet the child but also to take the child but the same was refused by respondent No.2 and her family members. Learned counsel for the petitioner has based his primary argument not only on Section 6 of the Hindu Minority and Guardianship Act, 1956 but also on the law laid down by the Hon'ble Supreme Court in the aforesaid judgments. He has submitted that there is no impediment or embargo as to why the petitioner who is the father and natural guardian should be deprived of the custody of his own child. He has also submitted that the petitioner is Ph.D. in Economics and is working as an Assistant Professor in a Government Institution and there can be no presumption that he will not take care of the child. On the other hand, the learned counsel for respondent No.2 has objected on the ground that the child was abandoned by the petitioner. He has relied upon Annexure P-3 which is an affidavit but a perusal of the same would show that the said affidavit pertains to appointment of respondent No.2 for being a care taker of a plot which was transferred in the name of the child and which according to the learned counsel for the petitioner was thereafter cancelled. Therefore, it cannot be said that the child was abandoned by the petitioner as there is no other document or sufficient material available on record to show the same. The second argument raised by learned counsel for respondent No.2 was that the custody of respondent No.2 was not illegal and therefore, no relief can be granted in exercise of powers under Article 226 of the Constitution of India for seeking a writ in the nature of Habeas Corpus. However, the argument raised by the learned counsel for respondent No.2 is not sustainable in view of the law laid down

by the Hon'ble Supreme Court in ***Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others (Supra)***. The relevant paragraph of the aforesaid judgment is reproduced as under:-

“14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.”

The third argument which was raised by the learned counsel for respondent No.2 was that the FIR although has been cancelled but the complainant and respondent No.2 still have a right to file a protest petition and therefore, it cannot be said that the cancellation report has attained finality. Such an argument is also not sustainable in view of the fact that almost more than 1 year has elapsed, no protest petition has been filed and a supposition or a presumption cannot be made that the further process will be carried out in the FIR. Even if assumingly a further process is carried out in the protest petition, still at the most the petitioner can be termed as an under trial and therefore, no presumption can arise at this stage against the petitioner. Therefore, the argument raised by the learned counsel for respondent No.2 is not acceptable. The fourth argument which was raised by him was that earlier the petitioner had filed an application before Child Welfare Committee under the provisions of Juvenile Justice (Care and Protection Children) Act, 2006 in which custody was directed to be transferred to him but the same was set aside by the learned Appellate

Court on the ground that the Child Welfare Committee did not have any jurisdiction to pass an order and he may approach the appropriate Court in accordance with law is also not sustainable in view of the fact that the learned counsel for respondent No.2 cannot rely upon any order passed by any other authority which did not have any jurisdiction and apart from the same, the mere fact that a liberty was granted for approaching any other Court cannot take away the inherent jurisdiction of High Court for exercising its powers under Article 226 of the Constitution of India. Therefore, this argument would also not be sustainable. The fifth argument which was raised by the learned counsel for respondent No.2 was with regard to the conduct of the petitioner. He had submitted that the petitioner had been maltreating his wife and there are other accusations against the petitioner with regard to his relationship with his own aunt. However, on the other hand the learned counsel for the petitioner has submitted that earlier the petition under Section 13-A of the Hindu Marriage Act was filed against the first wife and counter claim was filed by his first wife on the same ground which has been taken by learned counsel for respondent No.2. in the present case and vide Annexure R-2 the argument with regard to the conduct of the petitioner having extra marital relationship was found to be baseless and it was thereafter that a separate petition under Section 13-B of the Hindu Marriage Act was filed and a decree of divorce was granted from the first wife. A perusal of the record as well as the arguments raised by the learned counsel for the petitioner would suggest that there is no sufficient material available to arrive at a conclusion or even to presume that the conduct of the petitioner had been not proper. There is no allegation of any maltreatment with child by the petitioner.

Apart from the above, the petitioner is the father and natural guardian of the child of the age of 7 years, The petitioner lives in Chandigarh and respondent No.2 with whom the child is living is in Rohtak and therefore, the argument raised by the learned counsel for the petitioner that in Chandigarh, better education can be provided does carry weight. At the time for considering as to with whom the custody should vest, the Court should also visualise the future of the child not only in terms of education but also in terms of many other important factors such as socio-economic factors. Respondent No.2 is a lady of the age of 68 years and her husband is about 70 years is also one of the relevant factors to be considered for ascertaining the custody of the child.

The learned counsel for respondent No.2 had also relied upon judgments of Hon'ble Supreme Court in ***Kirtikumar Maheshankar Joshi Versus Pradipkumar Karunashankar Joshi (Supra)*** and ***Nil Ratan Kundu and another Versus Abhijit Kundu (Supra)***. However, the aforesaid judgments are distinguishable from the present case.

In ***Kirtikumar Maheshankar Joshi Versus Pradipkumar Karunashankar Joshi (Supra)*** the father was facing criminal charge under Section 498-A IPC whereas in the present case the FIR against the petitioner was lodged under Section 346 IPC and thereafter, the provision of Section 304-B IPC was added but the police has already filed cancellation report before the competent Court about a year ago but till date as per learned counsel for respondent No.2 no protest petition has been filed before the Court.

In ***Nil Ratan Kundu and another Versus Abhijit Kundu (Supra)*** there were allegations of maltreatment by the husband and was

facing trial under Section 498-A IPC whereas in the present case the aforesaid FIR against the petitioner has already been recommended to be cancelled by the police and cancellation report has been filed before the competent Court.

Therefore, the question that would arise in the present case would be as to in the aforesaid circumstances what will be the best for welfare of the child. From the perusal of the record and the arguments advanced by the learned counsel for the parties, this Court does not find any kind of embargo or impediment against the petitioner while considering from all angles.

Therefore, considering the totality of aforesaid facts and circumstances of the present case, this Court is of the view that the welfare of the child who is of the age of 7 years will be best in the hands of the father who is the petitioner.

Consequently, it is directed that the custody of the child who is with respondent No.2 shall be handed over to the petitioner by respondent No. 2 on 25.09.2022 at 2.00 P.M at Chandigarh. Furthermore, respondent No.2 and her husband shall also have visiting rights in case they so desire and for the next one year, they shall have a right to visit the house where the child resides for a period of 8 hours at least once a month. The petitioner is directed to ensure cooperation and comfort of respondents No.2 and her husband during the time they stay with the child. In case any modification in the visiting rights is required, then parties shall be at liberty to file an appropriate application before this Court.

The present petition stands allowed.

It is made clear that this order would not affect rights of any of

the parties for invoking any remedy under any Special law for the time being in force and in accordance with law.

23.08.2022

rakesh

(JASGURPREET SINGH PURI)
JUDGE

Whether speaking	:	Yes/No
Whether reportable	:	Yes/No