

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

CRWP-2082-2022
Date of Decision: 20.04.2022

Somvir

.....Petitioner

Versus

State of Haryana and others

....Respondents

CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr. Shalender Mohan, Advocate, for the petitioner.

HARNARESH SINGH GILL, J. (Oral)

The petitioner, by way of this petition for habeas corpus, seeks custody of his daughter Nisha aged 3 years, alleging that respondent Nos. 5 to 7 had illegally taken away her and as such, the minor child is in the illegal custody of the said respondents.

Learned counsel for the petitioner would submit that his daughter aged 3 years is in illegal custody of respondent Nos. 5 to 7; that respondent Nos. 5 and 6 are the maternal grandparents of the child whereas respondent No. 7 is the maternal uncle; that as per law, the petitioner being father and natural guardian of the child, is entitled to the custody of the child, but he has been deprived of the same, when the said respondents had taken away the child with them. Thus, laying emphasis on the fact that the petitioner being available to look after and take care of his daughter, the custody of the child be restored to the petitioner.

As would appear from the facts on record, marriage of the petitioner was solemnized with Preeti Sharma (deceased) on 23.11.2017. However, said Preeti Sharma, committed suicide on 03.12.2021 by hanging. FIR No.1144 dated 17.12.2021 under

Sections 498-A and 304-B IPC was registered at Police Station Dhamapur, District Jabalpur, against the petitioner. As per the allegations contained in the FIR, Preeti Sharma had committed suicide on account of the torture and harassment caused by the petitioner for bringing less dowry and that the death of Preeti Sharma, was found to have occurred not under the normal circumstances.

It is, thus, apparent that the petitioner is an accused in the aforesaid FIR. His wife committed suicide barely within four years of their marriage. The police has, prima-facie, found the death to have occurred not under the normal circumstances, which is why the aforesaid FIR has been registered under Sections 498-A and 304-B IPC against the petitioner.

Learned counsel for the petitioner, when confronted with the aforesaid factual position, states that the petitioner must be considered to be innocent until proven guilty and thus, on that ground he cannot be denied the custody of his child, which he is otherwise legally entitled to. However, the said plea suffers from fallacy.

The issue of custody of the child is a very sensitive and has to be dealt with after taking into consideration the paramount welfare of the child. The petitioner, who is accused of having driven his wife to commit suicide, cannot be granted any equitable relief, when it comes to handing over him the custody of the minor child. Rather, culpability of the crime, he is accused of, would not only emotionally devastate and destruct the growing years of the minor, but would completely compromise her over all mental growth.

Even otherwise, the child is in the custody of the maternal grandparents and maternal uncle and thus, the said people cannot be termed to be foreigners to the custody of the child. In the

given facts and circumstances, they are the best people to take care of the child.

The issue is not res-integra. Hon'ble Apex Court in Nil Ratan Kundu and another v. Abhijit Kundu, (2008) 9 SCC 413, held that the paramount consideration in the matter of custody of the child, would be the welfare of the child, and the court, exercising 'parens patriae' jurisdiction, must give due weightage to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings as well as physical comfort and moral values and the character of the proposed guardian is also required to be considered. It was held that the pendency of a criminal case, wherein the father has been charged of causing the death of the minor's mother, was a relevant factor required to be considered before an appropriate order could be passed. The relevant extracts from the judgment would read as under:-

"52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations...

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63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty bound to consider the allegations against the respondent herein and

pendency of criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the "character" of the proposed guardian. In Kirtikumar, this Court, almost in similar circumstances where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person."

Recently, Allahabad High Court in Awanish Pandey and another Vs. State of U.P. and others, 2021(149) ALR 355, while relying upon various judgments of the Hon'ble Supreme Court, has held that when the father is accused of the offences under Sections 498-A and 304-B IPC, the custody of the child with the maternal grandparents cannot be termed to be illegal. It was held as under:-

"9. In an earlier decision in the case of Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi, (1992) 3 SCC 573, where in almost similar circumstances the father was facing a charge under Section 498-A I.P.C., it was held that though the father being a natural guardian, has a preferential right to the custody of the children, but in the facts and circumstances of the case, it would not be in the interest of children to hand over their custody to the father.

10. In a recent decision in Rachit Pandey (minor) and another v. State of U.P. and 3 others, 2021 (2) ADJ 3203, this Court after referring to the authoritative pronouncements in the case of Nithya Anand Raghvan v. State (NCT of Delhi) and another, (2017) 8 SCC 454, Sayed Saleemuddin v. Dr. Rukhsana and others, (2001) 5 SCC 247 and Tejaswini Gaud and others v. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42, has held that in an application seeking a writ of habeas corpus for custody of a minor child, the principal consideration for the Court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child should be handed over in the care and

custody of someone else other than in whose custody the child presently is. It was held that the prerogative writ of habeas corpus, is in the nature of extraordinary remedy, which may not be used to examine the question of custody of a child except where in the circumstances of a particular case, it can be held that the custody of the minor is illegal or unlawful.”

This Court is of the considered opinion that the petitioner being the accused of having driven his wife to commit suicide, cannot be handed over the custody of the child, as such course of action is not considered to be of paramount welfare of the child.

In view of the above, the present petition is dismissed.

(HARNARESH SINGH GILL)
JUDGE

20.04.2022
ds

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