

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

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**CRWP-4221-2022
Date of decision: 05.05.2022**

SHIPRA

.....Petitioner

VERSUS

STATE OF PUNJAB AND OTHERS

....Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present: Mr. Parunjeet Singh, Advocate
for the petitioner.

VINOD S. BHARDWAJ. J.(Oral)

The instant Criminal Writ Petition has been filed under Article 226 of the Constitution of India for issuance of writ in the nature of Habeas Corpus and for appointment of a Warrant Officer, with a roving writ to search for the alleged detinue namely Mithli Sahni, aged 12 years, allegedly the son of the petitioner.

2. Learned counsel appearing on behalf of the petitioner acknowledge that the petitioner and respondent No.5 lived and cohabited together as husband and wife at Ludhiana and that the child namely Mithli Sahni was born out of the said wedlock on 06.12.2012. It is submitted that owing to matrimonial dispute between the parties, the petitioner was allegedly turned out of the matrimonial house on 28.07.2021. He further submits that the petitioner was thereafter constrained to file a petition under Section 13 of the Hindu Marriage Act, 1955 for seeking a decree of divorce from respondent No.5 on

grounds of cruelty.

3. It is contended that a compromise was eventually drawn between the parties and the case filed by the petitioner was withdrawn on the pre-condition that the petitioner as well as the minor child would reside with the respondent No.5 in their matrimonial house.

4. He further submits that a petition under the Guardian and Wards Act bearing GW No. 129 of 2021 titled as "*Sunil Kumar versus Shipra*" was filed by respondent No.5-father of the minor Mithli Sahni and as such it was established that custody of the minor child was with the petitioner. He further submits that on 03.11.2021, the respondent No.5 took the petitioner along with the minor son to the matrimonial house but on 21.04.2022, the said respondent started misbehaving with the petitioner and turned her out of the matrimonial house. At the relevant point of time, the child was at school and that when the petitioner went to pick up the child from the school, she came to know that respondent No.5 had already picked up minor child from the school.

5. Learned counsel for the petitioner contends that she has inquired that child is not going to the school for the last 2 weeks and has apprehensions about the well-being of the child.

6. He further places a reference to the judgment of this Court in the matter "*Mandeep Kaur versus State of Punjab*" reported as 2021 (1) R.C.R. (Civil) 152 to contend that writ of Habeas Corpus is maintainable even if custody of child with father is not illegal. He places reliance on the fact that the welfare of the child is of paramount importance and thus the writ Court should direct action and seek production of the detinue to restore the custody of the minor child to the

petitioner.

7. I have considered the submission advanced by learned counsel appearing on behalf of the petitioner and have gone through the documents appended along with the petition.

8. It is not disputed that the parties to the dispute are governed by provisions of Hindu Guardian and Wards Act and that as per provision of the said Act, the father is natural guardian of the child and mother becomes natural guardian only in the absence or demise of the father. It is also not in dispute that the custody of the child is with the father. There is no valid basis for this Court to assume that the child has been illegally detained. There is also no basis to assume that there is any imminent danger of physical harm to the safety and security of the said child. Ordinarily, this Court would resolve to invoking its jurisdiction under writ of Habeas Corpus once it apprehends that there is danger to the life and security of the detainee, however, where such allegations are not substantiated, the proceedings under the writ of Habeas Corpus are not maintainable and appropriate proceedings are required to be undertaken by the estranged parties before the Court of Guardians and Wards. A writ of Habeas Corpus cannot be used as a panacea to circumvent the procedure prescribed in law for seeking custody of the child. There is no reason why the petitioner could not have taken recourse to approach the Court under Guardian and Wards Act for seeking custody of the child. Needless to mention that the said Court being the primary Court was well equipped with sufficient powers to ensure that the best interest of the minor is well-determined and to pass appropriate orders taking into consideration the totality of circumstances

and after examining the demeanour of the contesting parties as well.

9. Upon careful analysis of the facts of the instant case as well as the documents appended along with petition, I am of the view that the issue arising before this Court is not regarding the question of maintainability of a writ in the nature of Habeas Corpus since the issue as to whether availability of an alternative efficacious remedy would prohibit exercise of a writ jurisdiction is well settled to the effect that it is not a bar. However, the same would be an entirely different situation where the petitioner has an alternative and efficacious statutory remedy and has filed a writ of Habeas Corpus as alternative to approaching the competent forum viz. the Family Court under the Hindu Guardian & Wards Act.

10. The question which thus arises next is as to whether the custody of the minor son with the father can be held to be 'unlawful or illegal'. The jurisdiction that has been invoked is the jurisdiction as *parens patriae* whereby Court becomes the principal guardian or protector of the interest of the child. The parties hereto have been litigating for the custody of the child and the proceedings are already pending before the Court of Guardian and Wards.

11. Reference is made in the present petition regarding the same. Relevant extract whereof is reproduced hereinafter below:-

“9. Resultantly, the matter was settled and a compromise was drawn and the HMA case filed by the petitioner was withdrawn on the precondition that the petitioner and her son would reside with the Respondents No.5 in their matrimonial home. In this regard the case status report of HMA case No. 1998/2021 which was duly withdrawn by the petitioner is annexed herewith as Annexure P-1.

10. *It is also pertinent to mention here that the Respondent No.5 had filed a petition under the Guardians and Wards At i..e GW No.129 of 2021 titled as Sunil Kumar vs. Shipra. The said pettion would also prove that the custody of the minor/detenuue was actually with the mother-petitioner. Lastly, in terms of the settlement arrived between the parties, the said matter was also withdrawn by the Respondent No.5. In this regard a copy of the case Status alongwith the Summons issued to the Petitioner in the present case are annexed herewith as Annexure P-2.”*

12. Perusal of the documents as well as the pleadings no where establishes that custody of the child with his father is either illegal or unlawful. The reference in this regard has to be made to the substantive provisions of Section 6 of Hindu Minority and Guardianship Act, 1956. The relevant provision of the same is reproduced hereinafter below:-

6. Natural guardians of a Hindu minor.—The natural guardian of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.—In this section, the expression

“father” and “mother” do not include a step-father and a step-mothe.

13. A perusal of the same would show that father is a natural guardian of the minor child and it is only on demise of the father, that the mother becomes the natural guardian. Hence, by operation of law the rights of the father are recognized as a preferential right.

14. The same thus requires to understand as to what would constitute “illegal & unlawful”. The Full Bench of Madras High court in the matter of **Kuppammal and others Vs. The Dist. Collector and Dist. Magistrate, Thiruvallur District, Thiruvallur and Others decided on 13.02.2001 in HCP Nos.11,41,66, 76 and 103 of 2000** has observed as under:

13. The writ of habeas corpus is primarily issued calling upon a person who had detained another to produce the detained individual in order to let the Court to know on what ground a detenue has been confined and set him at liberty if there is no legal justification for such detention. When once the Court comes to the conclusion that the detention is unlawful, the confinement cannot be permitted and consequently direction has to be issued to set the detenue at liberty.

14. The confinement of a person is either unlawful or considered to be unlawful in the following cases:

(i) Where the detention is not authorised or under the shelter of any law or the detention law under which the detention ordered is void.

(ii) Where the authority who had ordered detention is not the one specified or authorised in that behalf.

(iii) Where though the specified authority ordering detention is competent and also acts under a valid law yet if such authority had failed to follow the procedure prescribed in that behalf.

(iv) In some cases even when the authority had followed the procedure prescribed if action of said authority is vitiated by one or more of the defects or infirmity recognised in this respect by principles of administrative law such as;-

- (a) abuse of power;*
- (b) mala fides;*
- (c) perversity;*
- (d) non-application of mind;*
- (e) arbitrariness;*
- (f) extraneous consideration or a fortiori reason or like.*

15. It is equally well settled that strict compliance with the prescribed procedure or all legal requirements are considered as essential by various judicial pronouncements of the Apex Court and this Court. The detaining authority is required to follow strictly and scrupulously the forms and rules of law prescribed in that behalf or by the statutory provision under which the order of detention is being made after arriving at a subjective satisfaction.....

16. At the same time, it is also settled principle that the Courts will not interfere with the subjective satisfaction arrived at by the detaining authority if such subjective satisfaction is based upon some material from which a person with clear mind will arrive at the same subjective satisfaction or order detention. In other words a detention is unlawful if it is not in accordance with the law or if there is any deviation of the procedure established by law or such procedure has not been complied with. The detention, though under a valued law, if it infringes fundamental rights or if continuance of detention on the facts of the case renders the detention unconstitutional or if such detention is found to be unlawful or the detaining authority exceeds its authority or abuses it or exercises the power vested in it mala fide, then the detention order is liable to be set aside.”

15.

As the law confers the custody of a minor child with father,

the custody by father cannot be held to be illegal or unlawful as per the circumstances noticed by the Madras High Court.

16. It would also be pertinent to refer to the judgment of Hon'ble Supreme Court in the matter of ***Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tiwari (2019) 7 SCC 42***, wherein the Hon'ble Supreme Court has observed as under:-

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor is by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important

is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

21. In the present case, the appellants are the sisters and brother of the mother Zelum who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent- father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India.

17. Further, a Division Bench of this Court in its judgment dated 23.05.2019 passed in LPA No.3716 of 2018 in case titled as **Reetu Verma vs. State of Haryana and others**, observed as under:

“ The parties are husband and wife, having a minor son namely Jiyanshu Verma. Admittedly, on account of matrimonial dispute minor son is in the custody of the father-respondent, as every time they have appeared before us, the child has been brought by him. Habeas Corpus petition was filed by the appellant-wife seeking custody of the minor child for herself Learned Single Judge dismissed the habeas corpus petition on the ground that the custody of a minor child with a natural guardian cannot be said to 1 of

2 be illegal and relegated the parties to avail the remedy under the Guardian and Wards Act. Before this Court innumerable efforts have been made by us for an amicable settlement between the two, to secure the interest of the child so that he is not deprived of either love of father or the mother. On more than two occasions we interacted with the parties in the Chamber to bring an amicable settlement but the same failed. Lastly, on the suggestion of learned counsel appearing for the parties, we referred the matter to the mediation, where also the parties have failed to arrive at an amicable settlement. Since the question of the custody of the minor child and the welfare of the child being supreme it can only be decided on the basis of evidence as to which of the two parents are in a better position to look after the welfare of the child and a conclusion in respect of same only be arrived at by way of an evidence.

Hence, in our considered opinion the impugned order and judgment does not require any interference and it would be in the interest of justice that the appellant is relegated to avail the remedy under the Guardian and Wards Act to seek the custody of the minor child before the appropriate Court. With this, intra court appeal stands dismissed.”

18. Apart therefrom, in the matter of **Manohar Lal and another Vs. State of Punjab and others** passed in **LPA No.476 of 2020** decided on 05.08.2020, by Division Bench of this Court observed as under:

“14.....Of course, the position would be viewed from a different perspective, where there are competing claims between the biological parents of the child or where parties to the lis purport to have an authority or lawful right to retain/claim custody of the child. Something that requires evidence and full scale inquiry.....”

19. It is evident from the reading of the said judgments that a prerogative writ of Habeas Corpus, in a child custody matter, mother is qualified to initiate a Writ in cases where minor is detained by a person who is not entitled to legal custody of the minor.

20. Furthermore, the petitioner has also failed to indicate any such circumstance that would reflect that welfare of the child would be best served if left in the custody of the petitioner. The petitioner has also not placed any document regarding her source of income to establish that she is better equipped at taking care of her minor son.

21. It is also evident from the compromise effected between the parties that custody of the child had been vested with the father, and, as such the father cannot be accused of keeping the child in violation of any order of procedure known to law. Moreover, the rights vested in the father are placed at a higher pedestal by the statute as well. Even though, such rights are not also absolute and are subject to determination by the Court persuaded by what would be in the best interest of minor. There is no reason why the petitioner cannot raise all the disputed issues before the Family Court for seeking custody under the Guardian & Wards Act. Taking recourse to writ jurisdiction under Habeas Corpus to be resorted to ordinarily under a circumstances where there is an imminent threat to the life and liberty of such minor/detenué or where there is an overwhelming possibility of the minor being removed and taken away in a clandestine manner from the custody of lawful guardian or away from jurisdiction of a Court or in breach/violation of any order passed by a competent authority/Court of law. In the absence of evidence of any such emergent situation and where there is no satisfactory explanation as

to why the statutory remedy under the Guardian and Wards Act is not effective, efficient and available to the petitioner, the High Court would not step into the shoes of the Family Court to collect evidence for adjudication of rights under the Guardian & Wards Act. Once an elaborate mechanism is prescribed under the statutory scheme, there should be existence of cogent & convincing circumstances that would necessitate stepping in by the High Court instead of directing petitioner to avail of their remedies as per statute & in the manner & procedure prescribed in law.

22. In view of the afore-noticed facts and the position in law, I am of the opinion that custody of the father as a natural guardian cannot be held illegal or unlawful unless the same is in breach of some authority or order of law. Availability of an alternative efficacious remedy although may not be a bar to the issuance of Habeas Corpus, however, such competing claims between natural guardian should preferably be examined by the Court of Guardian and Wards, which is more equipped to determine the welfare of the child and offers complete opportunity to the contesting parties to establish their claims and examine as to what would be in the best interest of the minor. Besides, availing of simultaneous remedy would itself be a reason for Writ Court to be slow in intervention as disputed questions of facts should preferably be resolved after affording the parties effective opportunity to lead their evidence. The facts of the case do not call for existence of any circumstance as would justify intervention by the Court, in a Writ of Habeas Corpus.

23. In this view of the matter, learned counsel appearing on

behalf of the petitioner seeks permission to withdraw the instant petition with liberty to take recourse to the appropriate remedies available to him in accordance with law.

Dismissed as withdrawn with liberty as aforesaid.

MAY 05, 2022
Vishal Sharma

(VINOD S. BHARDWAJ)
JUDGE

Whether speaking/reasoned	:	Yes/No
Whether Reportable	:	Yes/No