

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Criminal Writ Petition No.4626 of 2020

Date of Decision: *January 5th, 2022*

Sukhjit Kaur

..... Petitioner

VERSUS

State of Punjab & others

..... Respondent

. . .

CORAM: HON'BLE MR. JUSTICE SANT PARKASH

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PRESENT: - Mr. Deepak Aggarwal, Advocate, for the petitioner.

Mr. Tanvir Joshi, Assistant Advocate General, Punjab for
respondent Nos.1 to 3.

Mr. Rajinder Kumar Singla, Advocate, for respondent
Nos.4 and 5.

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Sant Parkash, J

This is a petition under Article 226/227 of the Constitution of India for issuance of a writ in the nature of Habeas Corpus with a roving writ to search/release of Amreen Kaur, aged 5 years (minor daughter of petitioner) from the custody of respondent Nos.4 and 5 i.e. father-in-law and mother-in-law of petitioner.

Briefly the facts of the present case are that petitioner and her husband Lakhwinder Singh were blessed with a daughter namely Amreen Kaur, aged 5/6 years. On 27.05.2020, petitioner alongwith her husband, daughter and in-laws had 'kheer' in dinner, whereafter the entire family complained of food poisoning and admitted in Pooja Nursing Home & Hospital, Raman, District Bathinda. Though the family (except

Lakhwinder Singh) was discharged after having treatment but Lakhwinder Singh died on 30.05.2020. Thereafter, in-laws of petitioner got registered an FIR bearing No.74 dated 02.06.2020 under Sections 307, 302 IPC at Police Station, Raman, Bathinda, against her on the allegations that she was responsible for the death of her husband. During investigation, police did not find petitioner's guilt but respondent Nos.4 and 5 forcibly took away her minor daughter.

Learned counsel for the petitioner has vehemently contended that respondent Nos.4 and 5 have no legal authority to detain the minor daughter of petitioner. Her minor daughter is just 5/6 years old and she is not maintaining good health. Once the natural guardian i.e. mother of the minor is alive, no other person can claim the custody of minor child. Hence, the petitioner craves for indulgence of this Court to get the custody of her minor daughter from respondent Nos.4 and 5.

Learned counsel for the State, on the basis of reply filed on behalf of respondent Nos.1 to 3, has submitted that respondent No.4 – Baljit Singh made a statement before Harnek Singh, SI/SHO, Police Station, Raman, wherein he alleged that on 27.05.2020, some poisonous substance was mixed in the rice pudding (kheer) which was consumed by the family members of petitioner – Sukhjinder Kaur @ Sukhjit Kaur with an intention to kill them. Apart from this, when he intended to serve rice pudding to his grand daughter, she refused to eat by saying that her mother had asked her not to eat it. During investigation, Dr. Gurinder Kaur declared cause of death of Lakhwinder Singh due to respiratory failure. During investigation, police found the petitioner innocent and a cancellation report dated 04.01.2021 was approved by the SSP, Bathinda.

Learned counsel for respondent Nos.4 and 5, taking the contents of reply filed on their behalf, submitted that Sub divisional Judicial Magistrate, Talwandi Sabo, vide order dated 29.09.2020 rejected the cancellation report and directed the official respondents to investigate the matter further. Learned counsel has further submitted that petitioner used to quarrel with her husband and respondent No.4 for getting transferred land in her name. On 27.05.2020, petitioner served poisonous sweet dish (kheer), as a result of which, Lakhwinder Singh, son of respondent Nos.4 and 5 lost his life in hospital. Respondent Nos.4 and 5 also remained indoor patients at Jindal Multispecialty Hospital, Talwandi Sabo and discharged on 02.06.2020. On the statement of Baljit Singh – respondent No.4, FIR No.74 dated 02.06.2020 under Sections 307, 302 IPC was registered at Police Station, Raman, against the petitioner. Not only this, petitioner herself abandoned her minor daughter and left matrimonial home. Petitioner has no love & affection with her minor daughter. Moreover, there are disputed questions of law and facts which cannot be decided while availing the remedy under Article 226/227 of the Constitution of India and can only be decided after due trial by the Guardian Court. The minor child Amreen Kaur, since her birth, is residing with her grand parents in a joint family. Minor Amreen Kaur is not in illegal custody, rather under protection of her grand parents. After the death of their only son, they are looking after and bringing her up by providing every facility. Learned counsel has submitted that in case of writ of Habeas Corpus for custody of minor children, Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that their custody should be changed and the children should be left in care and custody of

somebody else. Even the cancellation report presented by the police has been rejected by the court of competent jurisdiction.

I have heard learned counsel for the parties and perused the record.

At the very outset, question of the maintainability of present writ petition seeking custody of minor child has attracted the attention of this Court. In a landmark judgment, the Apex Court in case **Gohar Begum v. Suggi alias Nazma Begum and others, 1960 AIR (SC) 93**, has laid down that the remedy of the writ in the nature of habeas corpus is available where the minor child is illegally or improperly detained. Thus, the writ of habeas corpus for custody of minor child is certainly maintainable. It is a settled principle of law that whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. It is also well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

After concluding that writ for habeas corpus is maintainable, it has to be seen whether custody is illegal or improper keeping in view the peculiar circumstances of the case. The allegations of petitioner are that she being mother of minor Amreen Kaur, is her natural guardian. Once the natural guardian is alive, no other person can claim her custody. Thus,

respondent Nos.4 and 5 have no legal authority to detain her daughter who is just 5/6 years old.

To the contrary, the stand of answering respondents is that petitioner used to quarrel with her husband and respondent No.4 on matter of transferring land in her name. She served poisonous sweet dish whereafter respondents had to hospitalize and lost their only son. Not only this, petitioner herself left her matrimonial home and abandoned her minor daughter. Besides, FIR No.74 dated 02.06.2020 under Sections 307, 302 IPC, Police Station, Raman, Bathinda, was registered against the petitioner for causing death of her husband. However, cancellation report was submitted by investigating agency but that report was rejected by the court of competent jurisdiction. Moreover, as per the directions of this Court, an opportunity was given for reconciliation wherein the minor child expressed her willingness to stay with her grand parents.

In the case of custody of a minor, paramount consideration as contemplated under Section 7 of the Guardians and Wards Act, 1890 (for short, 'Act') is relevant to take note of which is reproduced as under:-

“7. Power of the Court to make order as to guardianship.- (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made –

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardian the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring

another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”

Similar question came before the Apex Court in the case of

Kirtikumar Maheshanker Joshi v. Pradip Kumar Karunashanker

Joshi, *AIR 1992 Supreme Court 1447*, wherein their Lordships of the Apex

Court have observed as under:-

“After talking to the children, and assessing their state of mind, we are of the view that it would be in the interest and welfare of the children to hand over their custody to their father Pradip Kumar. We are conscious that the father, being a natural guardian, has a preferential right to the custody of the minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well-being, we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage.”

From the perusal of record and legal proposition, this Court is of the considered view that the most important consideration which must always weigh with the Court in making orders for the appointment of guardians of minors is the welfare of the minor, and in that view of the matter, the legal rights of the mother, in the case in hand, must be understood subject to provisions of Section 17. Under Section 17 of the Act, the Court should be guided by the sole consideration of the welfare of the minor, and what would be for the welfare of the minor must necessarily depend upon the facts and circumstances of each particular case. Moreover, whether mother (petitioner herein) is fit or unfit to be the guardian of the minor is a question of fact.

The duty of a court exercising its *parens patraie* jurisdiction as in cases involving custody of minor children is all the more onerous.

Sentiments and welfare of the minor are supreme consideration which cannot be ignored.

Record reveals that on 17.12.2020, parties were called in office of District Legal Services Authority, Bathinda, but petitioner did not come present. As per report dated 24.07.2020 submitted by the Chief Judicial Magistrate, Bathinda, a meeting was arranged between the parties. Minor child was allowed to meet her mother for at least two hours. But minor Amreen Kaur even refused to sit with her mother. Besides, she even refused to turn her face towards her mother (petitioner herein) and stated that she wanted to go home with her grand parents only i.e. respondent Nos.4 and 5.

It is true that mother being a natural guardian of a minor child has a preferential right to claim custody of her daughter. However, the utmost consideration before this Court is the wellbeing of the minor and not the legal right of a particular party. The term guardian has to be taken in its widest possible sense. It has to be measured not only in terms of money and physical comfort but also should include moral and ethical welfare of the child. The term 'custody' should not be interpreted in its strict sense as physical custody. Custody means custody in the sense of supervision and control over the child. The mother's or father's right to the custody of a their minor child is no longer absolute. It is circumscribed by the consideration of the welfare of the minor. The welfare of the child is decisive for the claim of custody. In case of custody of a minor child, the Court is expected to strike a just and proper balance between the requirements of welfare of the minor child and rights of parents over the minor child. The Court should also take into consideration the preference of the minor child to stay with either parent

or grand parent. In the case in hand, it is established from the report of CJM, Bathinda, that minor child wanted to stay with grand parents.

Taking into consideration the provisions of law and the factual matrix which is disputed, it would not be appropriate to issue a writ of habeas corpus in favour of the petitioner. In the case of disputed questions of facts, it is a matter of evidence to be led by both the parties as to which party will be in a better position to take care of the minor child which is concededly the paramount consideration.

In view of the observations made above, this Court finds that minor child namely Amreen Kaur has not been kept in illegal custody of her grand parents. Finding no merit in the instant petition, the same is dismissed with liberty to the petitioner to approach an appropriate court under relevant provisions of law seeking the relief claimed in this petition.

**(Sant Parkash)
Judge**

January 5th, 2022
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Whether Speaking/ Reasoned:
Whether Reportable:

Yes/ No
Yes/ No