

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

118)

CRWP no.454 of 2019 (O&M)

Date of Decision: 04.02.2022

Balwinder Kaur

...Petitioner

Versus

State of Punjab and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Dr. Sumati Jund, Advocate, for the petitioner.
Mr. Saurav Khurana, DAG, Punjab.
Ms. Reeta Kohli, Sr. Advocate (learned Mediator).
Ms. Amarjit Kaur, Advocate, for respondents no.4 to 8.

Amol Rattan Singh, J. (Oral)

Case heard by way of video conferencing.

By this petition, the petitioner sought a direction in the nature of 'habeas corpus' for appointment of a warrant officer to search the house of respondents no. 4 to 8, or any other place pointed out by the petitioner, in order to trace out and produce the (alleged) detainee, namely Amrit Singh, who has been (allegedly) illegally confined by respondents no.3 to 6.

This matter has been continuing for the past 2 years and almost 9 months now, with various detailed orders also having been passed from time to time, with it to be observed by this court that at the time when the petition was filed, the child of the petitioner and respondent no.4 was about 2 years and 10 months old and consequently, since in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, the natural custody of any child below 5 years of age is with the mother, this petition had been

entertained by this court, with the petitioner seeking such custody she being the mother, but with it also observed by this court (either on contention of learned counsel for respondents no.4 to 8 or otherwise), that as per well settled law, despite the aforesaid provision in the Act of 1956, eventually it is the welfare of the child which is to be the paramount consideration before the court.

Consequently, at one point of time learned counsel for the petitioner had been directed to place on record, firstly, the proof of income of the petitioner, as also to place on record documents to show where the child would be given admission if his custody was to be handed over to the petitioner, presently he being with his father and grandparents in Derabassi, District Mohali (near Chandigarh), and with the mother living in Village Akbarpur, Tehsil and District Ropar, though with the said village being close enough to the district headquarters (as contended).

Though learned counsel for the petitioner had shown that she had about the same income (at least on record), as respondent no.4, i.e. the father, and that the child would be given admission in a school not too far from the village, which possibly would be of the same standard or at least near about the same standard as that where the child is going to presently, yet, since the child had been living with the father for quite some time, the parties had been directed to enter into mediation before the learned Mediator (Ms. Reeta Kohli, learned senior counsel), in the Mediation and Conciliation Center of this Court, with the report of the learned Mediator submitted

from time to time.

Eventually on 17.01.2022, the following order had been passed by this court:-

“Case heard via video conferencing.

To be shown in the urgent motion list.

By this petition, filed under the provisions of Article 226 of the Constitution of India read with Section 482 of the Cr.P.C, the petitioner seeks issuance of an ‘appropriate writ’, in the nature of habeas corpus, for appointment of a warrant officer to search the house of respondents no.3 to 7, or any other place pointed out by her, in order to trace out and produce the alleged detainee, namely her minor son, Amrit Singh, who is stated to have been illegally detained by respondents no.3 to 7 (with respondent no.3 being the boys’ father).

The matter being custody of a child who is now stated to be almost six years old, and the matter having been referred to Mediation, the report of the learned Mediator in the Mediation and Conciliation Centre of this Court, dated 22.12.2021, as on record, stating to the effect that despite best efforts of both the parties, the matter could not be settled and consequently the case file has been put up before this Court for adjudication.

Learned counsel for the petitioner submits that even during the course of mediation and thereafter, the petitioner had offered to come back to the matrimonial home, i.e. the home of respondent No. 4, with in fact respondent No. 4 having filed a petition under the provisions of Section 9 of the Hindu Marriage Act, 1955, but with him thereafter having refused to accept the petitioner back in the matrimonial home.

In view of the above, when this Court was actually inclined to direct that pending any proceedings that the parties may chose to institute as regards custody of the child, before the competent court in terms of the Guardian and Wards Act, 1890 (or any other civil proceedings), learned counsel for respondent No. 4 seeks time to try and get the matter settled by discussions with the said respondent.

Adjourned to 28.1.2022.

The learned Mediator, i.e. Ms. Rita Kohli, Senior Advocate, is requested to also come present on the next date of hearing, to exactly determine the stand of each party before the Mediator.”

Today, both learned counsel for the parties, as also Ms. Reeta Kohli, senior counsel (learned Mediator) are present in court through video conferencing; and upon query to the learned Mediator, she submits that though initially at the time when mediation proceedings had been entered into, the child was far more willing to come to the mother, i.e. the petitioner, as time has gone by, possibly because he is growing older and is in the company of his father and grandmother most of the time, and the mother has been only able to meet him periodically and possibly not at all during the period of this pandemic for the past year and a half or so, he is reluctant to even come to mediation proceedings and is not comfortable, apparently at least, to go to the mother beyond a certain point of time.

Learned counsel for the petitioner however reiterates all that she has been contending throughout, to the effect that since the child has been in the company of his father and grandparents, it would be natural that he would be more comfortable in their company rather than with the mother; and therefore, only on that ground the mother should not be denied custody.

Learned counsel for respondents no.4 to 8, on the other hand, submits to the contrary, virtually in terms of what learned senior counsel (learned Mediator) has submitted.

In rebuttal, learned counsel for the petitioner reiterates what she had submitted earlier before this court, to the effect that the petitioner is even willing to go back and reside with respondent no.4, as already recorded

in an earlier order, but with respondent no.4 now not wishing to take her back and with him also in the process of withdrawing his petition filed under Section 9 of the Hindu Marriage Act, 1955, before the competent court.

Ms. Reeta Kohli, learned Mediator, submits that possibly the marriage may not be working out at all and therefore nothing further can be said on that aspect in these proceedings, with which contention I wholly agree.

Consequently, this petition is disposed of, with the petitioner at liberty to institute proceedings under the provisions of the Guardians and Wards Act, 1890, or any other civil proceedings she may wish to resort to, because eventually it has to be observed by this court that this petition has been filed under Article 226 of the Constitution invoking extra ordinary jurisdiction of this court, and in the circumstances, actually evidence may need to be led, to be examined closely by the learned court seized of any such proceedings.

It is made clear that till such proceedings are instituted by the petitioner (if so), the petitioner would have a right to visit the child every Sunday, for a period of 3 to 4 hours.

As regards being allowed to take the child home on every weekend as has been submitted learned counsel for the petitioner, that discretion is left to the competent court in any such proceedings instituted as have been referred to herein above.

Though initially this court was inclined to allow the child to at least go for one weekend in each month to live with the mother during the interregnum, however, since the child at this stage (obviously because he is not meeting the mother too often), is not comfortable with her too much as per the learned Mediator, that direction is not presently being given, but it is directed that the petitioner would be allowed to enter the house of respondents no.4 to 8 on each Sunday between 11.00 a.m. to 3.00 p.m and with the SSP, Mohali and the SHO, Police Station Derabassi, to ensure that a lady police official accompanies the petitioner on each date that she comes to visit the child, and with the lady police official to ensure that the mother is allowed entry inside the home of respondents no.4 to 8 for that period to meet the child in a separate room inside the home, alone with the child, during that period of 4 hours on each Sunday, but with the lady police official thereafter, i.e. after also ensuring that the child and the mother are in one room, to come outside the premises of the house and thereafter to ensure that no untoward incident takes place during that period.

This interim arrangement would continue till proceedings under the provisions of the Guardians and Wards Act, 1890 are initiated (if so initiated), after which, naturally, the matter would rest with that court to pass appropriate orders as regards the visiting rights and custody of the child, including the right of the mother to keep the child over the weekends

(in a gradual manner), at her village.

The petition is disposed accordingly in the above terms.

[It is to be also observed here that though this court had in an earlier order observed that if respondent no.4 did not accept the petitioner back despite her willing to go back to him, this court may be inclined to direct that custody be given to the petitioner; however, in view of what has been stated by the learned Mediator about the child not presently being too comfortable with the mother after some time (as his 'comfort zone' is with his father and paternal grandmother), that order is not being passed, with the petitioner to avail of her other civil remedy, if she chooses, for that purpose.]

04.02.2022
vcgarg

(AMOL RATTAN SINGH)
JUDGE

Whether reasoned/speaking: Yes
Whether reportable: Yes