

227 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRWP-8983-2022
DECIDED ON: 15th DECEMBER, 2022

SARBJEET KAUR

...PETITIONER

VERSUS

STATE OF PUNJAB AND OTHERS

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Sonpreet Singh Brar, Advocate and
Ms. Damanpreet Kaur Brar, Advocate
for the petitioner.

Mr. Aman Dhir, DAG, Punjab.

Mr. Ankit Kharbanda, Advocate
for respondent No.2.

None for respondent No.3.

SANDEEP MOUDGIL, J

The jurisdiction of this Court under Articles 226 & 227 of the Constitution of India has been invoked for the issuance of a writ in the nature of Habeas Corpus to secure the release of the detainee namely Harsimrat Kaur aged 8 years and Ozmeet Kaur aged 6 years, daughters of the petitioner, who are stated to be in illegal custody of respondent No.3-Sumandeep Kaur.

2. Learned Counsel for the petitioner has contended that the alleged detainee namely Harsimrat Kaur and Ozmeet Kaur are minor, therefore, the petitioner, being biological mother, is entitled for their custody. Assertion is that the respondent No.2 is having extra-marital affair with respondent No.3-

Sumandeep Kaur and respondent No.2 and his family members have started

brainwashing of the minors by saying that now respondent No.3 is their mother. It is asserted that respondent No.3 has given birth to a male child namely Panthbir Singh on 07.01.2020 and on the date of birth certificate of Panthbir Singh, names of respondent No.2-Rinku Kumar and respondent No.3-Sumandeep Kaur have been mentioned as his Father and Mother. Even on the Aadhaar Card of respondent No.3 her address is mentioned as that of the address of respondent No.2, which is the petitioner's matrimonial home.

3. It is further asserted that the petitioner is worried that due to bad conduct of the private respondents towards the detainee, they shall spoil future and welfare of minors. Respondent No.2 is a notorious and criminal minded person and is involved in FIR No. 8, dated 14.01.2022, registered at Police Station STF, SAS Nagar, Mohali, under Sections 21 and 23 of NDPS Act, Section 25 of Arms Act, 1959 and Sections 4 and 5 of Explosive Act, 1908, Sections 13, 16, 18 and 20 of Unlawful Activities Prevention Act, 1967 and is behind the bars since 12.03.2022. Therefore, the petition may be allowed and custody of the minor child may be ordered to be handed over to the petitioner-mother.

4. In support of his arguments, learned Counsel for the petitioner has placed reliance on judgments passed by Co-ordinate Benches of this Court in case **CRWP No. 1068-2022 titled as 'Gautam Khanna vs. State of Punjab and others'**, decided on 16.05.2022 and **CRWP No. 7332-2022 titled as "Mansi vs. The State of Punjab and others"** decided on 07.11.2022.

5. Learned Counsel for the State, on the basis of reply filed on behalf of official respondents, has submitted that there is a matrimonial dispute between petitioner and her husband. He does not controvert the fact with regard

to the registration of FIR and also the fact that Panthbir Singh is born out of the loins of respondents No.2 and 3. The petitioner is required to adopt the legal procedure under Law of Guardianship for taking the custody and guardianship of the child by filing suit in the competent court of law.

6. Learned Counsel for respondent No. 2 has submitted that if the petitioner is aggrieved of having the custody of alleged detainee, then she can avail appropriate remedy available to her under law and filing of the present petition is nothing but an abuse of process of law. The petitioner has equally efficacious remedy of filing petition under the Guardians and Wards Act, 1890 for taking the custody of the minor children. Therefore, the present habeas corpus petition is not maintainable. The marriage of the petitioner was solemnized with respondent No. 2 in the year 2013 and out of the wedlock, two daughters namely Harsimrat Kaur and Ozmeet Kaur were born. Respondent No.2 has sufficient sources to maintain the child.

7. Learned Counsel for respondent No.1 in the context of the afore-said judgments passed by this Court, has further submitted that while deciding the custody of minor, prima facie consideration is paramount welfare of the child and custody is not to be decided upon the rights of the parties under the law.

8. I have heard learned Counsel for the parties and perused the record.

9. At the very outset, question of the maintainability of present Habeas Corpus petition seeking custody of minor child has attracted the attention of this Court. In a landmark judgment, the Apex Court in the case of

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.

10. 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.

11. On the other hand, learned Counsel for the respondent No.2 has tried to make out a case for dismissal of the present petition on the ground that only the petition under the Hindu Minority and Guardianship Act, 1956, or the Guardian and Wards Act, 1890, is maintainable for seeking custody of the minor child. Criminal writ petition for issuance of writ of habeas corpus is not maintainable. Therefore, the petitioner may be asked to approach the Family Court concerned for redressal of her grievances. Further, as per provisions of Section 6 of Hindu Minority and Guardianship Act, 1956, 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. In selecting proper guardian of a minor,

the paramount consideration should be the welfare and well-being of the child and the custody is not to be decided on legal rights of the parties.

12. In the present case, the petitioner has sought custody of her minor daughters on the ground that she being their biological mother is entitled to their custody; the respondent No.2 is the habitual offender and is involved in a case under the NDPS Act and is in custody since 12.03.2022 and their daughters are not being looked after and well maintained.

13. In the case of custody of a minor, paramount consideration as contemplated under Section 7 of the Guardians and Wards Act, 1890 (for short 'the 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.”

14. In case, ***Tejaswini Gaud and Ors. Vs. Shekhar Jagdish Prasad Tewari and others : 2019 (3) R.C.R. (Civil) 104***, Hon'ble Supreme Court observed as under:-

“19. 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, 1890 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.”

15. 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 7. Under Section 7 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.

16. 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.

17. It is true that mother, being a natural guardian of a minor child, has a preferential right to claim custody of her daughters. However, the utmost consideration before this Court is the well being 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 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.

18. 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 Jiyanishu 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 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.***”

19. Taking into consideration the provisions of law and the factual matrix which is disputed, I am of the considered view that custody of the father as a natural guardian cannot be said to be illegal or unlawful and therefore, 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.

20. In view of the observations made above, this Court finds that the minors Harsimrat Kaur and Ozmeet Kaur are not said to be in illegal custody of

respondent No.2. 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 for seeking the relief claimed in this petition.

21. Nothing in this order shall be construed as an expression of any opinion on the merits of the case so as to bind or influence appropriate court under relevant provisions of law if any such petition is filed by the petitioner.

15th DECEMBER, 2022
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(SANDEEP MOUDGIL)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>