

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

230

CRWP-10817-2020
Date of decision: 14.01.2022

PRIYANKA RANI

.....Petitioner

Versus

STATE OF PUNJAB AND OTHERS

.....Respondents

CORAM: HON'BLE MR. JUSTICE SANT PARKASH

Argued by : Mr. Baltej Singh Sidhu, Senior Advocate with
Mr. Chandan Singh, Advocate
for the petitioner.

Mr. Tanvir Joshi, AAG, Punjab
for respondents No. 1 to 4.

Mr. Salil Dev Singh Bali, Advocate
for respondents No. 5 to 11

SANT PARKASH, J.

The case has been taken up for hearing through video conferencing.

1. The petitioner has filed the present petition under Article 226 of the Constitution of India for issuance of a writ in the nature of habeas corpus directing respondents No.2 to 4 to get detenue-Pariza, minor daughter of the petitioner, released from illegal custody of respondents No.5 to 11 and hand over her custody to the petitioner.

2. The petitioner has averred in the petition that she was married to respondent No.5 Ramandeep on 22.11.2014 as per Hindu rites and ceremonies. Out of the wedlock, one daughter namely Pariza was born on 30.12.2015. Matrimonial dispute arose between the

petitioner and her husband & family members. On 13.09.2020, the petitioner and her minor daughter were abused and physically assaulted by the private respondents. The petitioner finding no help, made a call to her father whereupon her father along with her brother reached house of respondents No. 5 to 8. The petitioner along with her minor daughter Pariza somehow managed to come out of the house of respondents No.5 to 8. Thereafter, respondents No. 9 to 11 came on the spot and snatched the deteneu- Pariza from the petitioner and took her inside the house. The accused persons caused injuries to the petitioner, her father and brother.

3. The petitioner moved an application for grant of custody of the minor child before the Senior Superintendent of Police, Fazilka and also to the Child Development Presiding Officer, Jalalabad but no action had been taken on the same.

4. Learned Counsel for the petitioner has vehemently contended that the deteneu Pariza is around the age of five years and a female child, therefore, the petitioner being biological mother is entitled for her custody. Further, the petitioner is under worry due to bad conduct of the private respondents towards the deteneu, who shall spoil her future and welfare. Therefore, the petition may be allowed and custody of the minor child may be ordered to be handed over to the petitioner-mother by issuance of a writ of habeas corpus. It is a settled principle of law that 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.5 to 11.

5. Learned Counsel for the State, on the basis of reply filed on behalf of respondents No. 1 to 4, has submitted that there has been a matrimonial dispute between petitioner and respondent No. 5 along with their family members, which has resulted into multifold litigation. Further, during enquiry on the matter regarding the custody of the minor child, it has become clear that neither minor daughter Pariza has been snatched from the petitioner as alleged in the petition nor is she living in any sort of pathetic situation. The detenue-Pariza is having deep rooted love and affection with respondent No. 5 as well as her grand parents i.e. Respondent Nos. 6 and 7 and she is being looked after and maintained.

6. Learned State Counsel has further submitted that the present petitioner wants to take custody of the child without following the due course of law. The petitioner and her parental family forcibly tried to take custody of detenue-Pariza from respondent No. 5. Respondent No. 5 has filed Civil Suit for injunction bearing No. CS132/2020 which is pending before the Court learned Civil Judge (Junior Division) Jalalabad and the order of status quo regarding the custody of minor child Pariza has been passed.

7. Learned Counsel for respondent Nos. 5 to 11, taking the contents of reply filed on their behalf, submitted that detenue namely Pariza on the present date is more than five years and is studying in Sacred Heart Convent School, Jalalabad which is one of the best school of the area. The girl child Pariza is being taken well care by the respondents and respondent No. 5 is regularly paying her school fees.

The petitioner namely Priyanka Rani is lady of quarrelsome nature from

the beginning and never wanted to live with respondent No. 5 – Ramandeep and his family. The petitioner used to leave her matrimonial home many times and respondent No. 5 used to get her back from her parental home. The petitioner made false complaint to the police regarding assaulting the petitioner and her family members. Respondent No. 5 had filed Civil Suit for permanent injunction against the petitioner for restraining the petitioner and her family from illegally taking the minor daughter Pariza from his custody and vide order dated 21.03.2020 the Court directed the parties to main status quo. The petitioner made complaint before the Child Welfare Committee, Fazilka which was dismissed vide order dated 15.10.2020 recording that since there was status quo order, therefore, she could get the custody of the child from Court and there was no need of Committee to interfere.

8. Learned Counsel for respondents No. 5 to 11 has further submitted that if the petitioner is aggrieved of having the custody of detenue Pariza, 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.

9. The petitioner by way of additional affidavit filed replication to the reply filed by respondents No. 5 to 11 in which it has been stated that the petitioner was admittedly staying with respondents No. 5 to 11 when the Civil Suit for injunction and the petition under Section 9 of the Hindu Marriage Act were filed. The said suits were filed at the back of the petitioner and order of status quo was obtained without any proper service to the petitioner. The order dated 21.03.2020 is not binding in any way and only restricts the forcible or

illegal removal of the child and does not in any way preclude the filing of the present petition of habeas corpus.

10. The petitioner has further pleaded that in case of a minor daughter, it is the mother which can act as a best parent. No amount of money or wealth can replace a mother's love for the child. At the time of filing of the present petition, the age of her minor daughter Pariza was less than 5 years and the present petition of Habeas Corpus is maintainable before this Court and the same be allowed and the custody of minor daughter Pariza be restored to the petitioner forthwith.

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

12. 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.

13. 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. 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. 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.”

15. In another decision, *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.”

16. 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.

17. 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.

18. Record reveals that the petitioner and her family members forcibly tried to take custody of minor child Pariza from respondent No.5 and due to this reason, respondent No. 5 filed Civil Suit for injunction restraining the petitioner from illegally taking the custody of minor child from her and the Court concerned vide order dated 21.03.2020 directed the parties to maintain status quo.

19. 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 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 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 reply filed on behalf of

respondents No. 1 to 4 that minor child is having deep rooted love and affection with respondent No. 5 as well as with her grand parents i.e. Respondent No. 6 and 7 and she is being looked after and maintained in well manner.

20. 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.

21. In view of the observations made above, this Court finds that minor child namely Pariza has not been kept in illegal custody of respondents No. 5 to 11. 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.

22. Nothing in this order shall be treated as expression of any opinion on merits of the case so as to bind or influence appropriate court under relevant provisions of law seeking the relief claimed in this petition, if any so filed by the petitioner.

14.01.2022
kavneet singh/Avin

(SANT PARKASH)
JUDGE

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