

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

(230)

**CRWP-10833-2020
Date of decision : 15.03.2022**

Manisha Gupta

.....Petitioner

VERSUS

State of Punjab and others

.....Respondent

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

Present:- Mr. Hitesh Chopra, Advocate, for the petitioner.

Mr. Sukhbeer Singh, AAG, Punjab.

Mr. Gursher Singh Bhandal, Advocate, for
respondent Nos.3 and 4.

VINOD S. BHARDWAJ, J. (Oral)

The case has been taken up through Video Conferencing via Webex facility in the light of Pandemic Covid-19 situation and as per instructions.

1. The question which arises for consideration in the instant petition is as to whether a writ of Habeas Corpus should be issued when the proceedings for the custody of minor are pending between the husband and wife before the Court of Guardian and Wards-Family Court and an order vesting interim custody of the minor has already been passed in favour of the respondent?

2. The instant petition has been filed under Article 226/227 of the Constitution of India for issuance of a writ/order/direction in the nature of Habeas Corpus against respondent No.3-father to produce respondent No.4-minor child namely Parv (D.O.B 17.11.2011) who is alleged to have been illegally and unlawfully removed from the custody of the petitioner.

FACTS

are that the petitioner claims to be married to respondent No.3 i.e. Vijay Kumar Masoan. The marriage amongst the parties was solemnized on 03.03.2011 according to the Hindu rites and ceremonies at Shanti Kunj, Haridwar. After the solemnization of marriage, the parties started residing in Bangalore where they lived at different location till September, 2019.

4. It is alleged by the petitioner that the respondent No.3 had concealed the fact of his earlier marriage with one Payal Bhatia, resident of Delhi and that he had divorced said Payal Bhatia after 3 months of marriage with her. However, with a view to save her matrimonial life, she did not make an issue of the same despite coming to know of the same. A male child namely Parv was born out of the wedlock on 17.11.2011. It was alleged that the respondent No.3-Vijay Kumar Masoan was short tempered, arrogant and quarrelsome person and did not allow the petitioner to resume work, as a result whereof, the petitioner had to avail maternity leave for almost one and half years. The hostility of the respondent No.3 are alleged to have escalated leading to the petitioner resigning from her job. She further alleges that the respondent No.3 used to threaten the petitioner that he would eliminate the petitioner and that he would not tolerate minor son Parv in the house. The petitioner claims that perceiving threat to her life, she came back to Pathankot along with her son and got him admitted in a school. Further, proceedings under Section 125 Cr.P.C., as well as complaint under Sections 498-A/506/341/34 IPC were also initiated. It is alleged in the petition that on 08.10.2020, the respondent No.3 along with respondent No.4 came to the house of the petitioner and took away the minor son along with them and all her efforts to contact the minor child have remained unfruitful ever since. She has further averred in the petition itself

that she had filed a case under Section 25 of Guardian and Wards Act for the custody of the minor child namely Parv Kumar Masoan before the District Court at Pathankot.

Notice was duly served upon the respondents to seek their response. The same has also been filed. An attempt was made to amicably resolve the matter between the parties.

MEDIATION & CONCILIATION

5. The parties were relegated to the possibility of a mediation. However, the mediation proceedings amongst them failed to arrive at any settlement. Resultantly, the case was sent to the High Court for adjudication.

RESPONSE BY STATE

6. That State of Punjab had filed its status report by way of an affidavit of Rajinder Singh, PPS, Deputy Superintendent of Police, City, Pathankot, wherein it was stated as under:-

“2. The petitioner is wife of respondent No.3 namely Vijay Kumar Masoan and has filed application vide reference No.771-MISC/25-06-2020, 2072-MISC/19.10.2020 and reference no. 1013 dated 09.12.2020 against the Respondent No.3 regarding forcibly abducting her minor son namely Parv.

3. That both the parties has filed the matrimonial cases against each other in different courts of law. The petitioner has filed cases before the Family Court Pathankot and Respondent No.3 has filed a case regarding Custody of minor child at the Family Courts, Bangalore, Karnataka. That minor child having 9 years of age is residing with Respondent No.3 and studying at there. That since the matter is pending before the Learned Court regarding the custody of their minor child and therefore replying respondents has not interfere in the

process of law as the matter is under consideration before the Courts and both the parties were directed by the replying respondent to abide by the decision of the Hon'ble Courts.

4. The investigation was conducted by the Deputy Superintendent of Police, City Pathankot and report was submitted on dated 07.12.2020. That final report was submitted by Deputy Superintendent of Police, Crime against woman and Children, Pathankot on dated 30.12.2020 annexed herewith as Annexure R-1/T.”

A perusal of the report attached as Annexure R-1/T shows that the parties had agreed to abide by the decision of the court as the matter was under consideration before the Court of law.

RESPONSE BY FATHER-RESPONDENT NO.3

7. *Per contra*, respondent No. 3-Vijay Kumar Masoan, has filed his response wherein he has alleged that the petitioner is suffering from bipolar disorder since her childhood and that the said respondent had taken all steps necessary to help the petitioner and to seek best treatment for her. Because of the mental disorder, the petitioner was erratic in her behaviour, poor in her judgment and was violent. Equally so, in certain phases of depression she would display extreme sorrow and anxiety and suicidal tendencies. He has placed reliance on the medical prescription and medical certificate of the petitioner reflecting the diagnosis of the petitioner as claimed. He has alleged that petitioner brought away the minor child to Punjab without consent and without giving any information to the respondent No.3. The education of the child at Bangalore was resultantly discontinued. It is further stated that the respondent visited Pathankot nearly 4 times to meet his minor child and observed substantive deterioration of the health of the child on account of lack of care. He has also specifically

averred that petitioner had herself handed over custody of the minor child to the respondent No.3 on 05.10.2020 by coming to Hotel Opulence, Pathankot. The relevant averment in the preliminary submissions is reproduced hereinafter below :

*5. As such respondent No.3 went to Pathankot on 05.10.2020 upon his son asking and who had been further backed by the petitioner as she was not on taking terms with respondent No.3 hence even the petitioner agreed that minor child must go to his father and the petitioner sent the message through minor child to the respondent No.3 to come and take the minor kid. Whatsapp chat in this regard is already appended as Annexure R-3/3. In fact it is the petitioner who hand over the custody of the minor child to respondent No.3 on 05.10.2020 upon persistent request by minor child and she herself had come to hotel Opulence, Pathankot and handed over custody of the minor child Parv Masoan to respondent No.3 along with his clothes. One of the chatting wherein deponent is sending his Opulence hotel address to the phone number of his minor child and recording wherein respondent No.3 and minor child giving message through video call to petitioner that they are going are appended as **Annexure R-3/5 & R-3/6**.*

6. That it was an utter surprise to respondent No.3, that the petitioner after herself handover the custody of minor child to respondent No.3 with her free consent on 05.10.2020, after 10 days has lodged a false and frivolous complaint against deponent on 15.10.2020 and subsequently even filed case under Guardian and Wards Act. From aforementioned submission petitioner did all this as pre-planned conspiracy just to harass respondent No.3 and to create evidence against deponent.”

8. He further places reliance upon the whatsapp chat and recordings. It is significant to point out that even though a rejoinder to the

said written statement was filed on behalf of respondent No.3, however, the averments contained in para 5 and 6 of the preliminary submissions reproduced above was not controverted or denied. An averment however, is stated in response to para No.3 to the effect that if the petitioner was interested to hand over the custody of the child to the respondent No.3, there was no occasion for her to file the applications thereafter.

REPORT BY MEDIATION

9. It is also pertinent to point out that a report was also obtained from the mediation to determine the interest and desire of the minor child Parv wherein it was stated as under:-

- “(d) As he became more and more comfortable, he categorically stated that he does not wish to hurt of any of his parent by siding with anyone in particular.*
- (e) During Mediation proceedings, on the second day i.e. 02.02.2021, 'Parv' was much more relaxed, playful, exuberant,, creative, happy and assertive. He expressed himself fully and clearly. So much so he was candid enough to state that he would be happy and satisfied, if he gets to meet both mother and father periodically.*
- (f) To resolve the issue, minor 'Parv' himself suggested that mother can come to Bangalore, stay in the flat because his father is planning to shift to another flat near his office. With this arrangement, he suggested that he would like to spend two months with father and two months with Mother and gets to continue in the same school at Bangalore.*

STATUS OF PROCEEDINGS BEFORE PRINCIPAL JUDGE, FAMILY COURT :-

10. During the resumed hearing of the case today, counsel appearing on behalf of respondents No.3 and 4 has forwarded an order dated

22.02.2022 passed in case No.17 dated 27.10.2020 in IA/1/2022 by Principal Judge, Family Court, Pathankot, on an application for grant of interim custody of the minor son in the proceedings under Section 25 of the Guardian and Wards Act. The judgment in question was not disputed by the learned counsel appearing on behalf of petitioner. A perusal of the said judgment shows that the interim custody of the child has been handed over by the Principal Judge, Court of Guardian and Wards to the father-respondent No.3. The petitioner has been granted a right to meet the child once a month and further the visitation rights have been granted to the mother/petitioner herein to visit Bangalore any time to meet the minor. The relevant para of the order passed by the Principal Judge, Family Court, Pathankot is extracted as under:-

“12. As discussed above, the welfare of the child is the paramount consideration in such like cases. Both the parents have equal right to enjoy them time with their children. Even the child need company, love and affection of both the parents. No doubt the child of the parties is presently residing and studying in Bangalore, the petitioner being mother is having equal right to enjoy his company. The company of both the parents naturally enhances the growth, well being and ethics of a minor. Since the question of jurisdiction is to be considered by framing of issue being mixed question of law and fact, this court is of the view that the visitation rights will serve the purpose completely because the change of custody at this stage will not be in the welfare of the minor. More over, it will not make the minor a shuttle to move from one place to other at different intervals to reside and study time and again just because of matrimonial dispute between his parents.

13. In view of the above discussion, the respondent-father is directed to bring the minor child once a month at some

public/common place in Pathankot or other city near to the place of petitioner-mother, at time and date to be decided with mutual consent by both the parties at least two days prior to the date of meeting directly or through their learned counsel. To avoid any disturbance in the study of the minor the respondent/father is further directed to facilitate the meeting of minor child with petitioner-mother through video call/chat every Sunday. In addition to above, if the petitioner mother visits Bangalore any time to meet the minor, the respondent-father shall also facilitate the meeting of petitioner with the minor while keeping in view the school hours and other educational activities of the minor so as to avoid any disturbance to his study and educational activities. The parties are also directed to intimate this court regarding the meeting/visitation as allowed on the next following date of hearing.

14. *It is made clear here to the parties that after framing of issues, the present matter will be dealt with expeditiously as possible keeping in view the pendency of cases before the Court. Therefore, both the parties are requested to assist the Court on each and every date of hearing for the purpose the case will be fixed so as to avoid any delay. Accordingly, the present application for interim custody of minor stand disposed of.”*

ARGUMENTS BY PETITIONER

11. While substantiating his arguments to seek intervention by the High Court in a writ of Habeas Corpus despite the order having been passed by the Family Court, the learned counsel for the petitioner has placed reliance on the judgment in the case of ***Gohar Begum vs. Suggi alias Nazma Begum and Others (SC) 1960 AIR (SC) 93***, to contend that a remedy under the Guardian and Wards Act is no bar to issuance of a writ of Habeas Corpus and that High Court has the power to order delivery of the

child. He thus, contends that the writ should be issued in her favour and to support his argument, he places reliance also to the judgment of Hon'ble Supreme Court in the matter of ***Dr. Mrs. Veena Kapoor v. Varinder Kumar Kapoor (SC) 1982 AIR (SC) 792.***

ARGUMENTS OF RESPONDENT NO.3

12. *Per contra*, counsel for the respondent No.3 has placed reliance upon the judgment of ***Nil Ratan Kundu Vs. Abhijit Kundu (2008) 9 SCC 413*** and the extract thereof is reproduced as under:-

52. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor."

13. I have heard learned counsel for the parties and have gone through the facts of the instant case as well as the documents appended along with. Besides, the precedent judgments of Supreme Court that have been referred to by the parties have also been considered.

ANALYSIS

14. Upon careful analysis of the judgments cited by the respective

parties in support of their contentions, I am of the view that the issue arising before this Court is not as regards 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 already taken recourse to a statutory remedy and has also filed a writ of Habeas as an additional simultaneous remedy, which happens to be the position in the instant case.

15. 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.

16. Perusal of the documents as well as the pleadings nowhere establishes that custody of the child with his father is either illegal or unlawful. 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-mother.

17. 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.

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.”

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.

Further it is evident that interim custody of the child has also been vested with the father, as such, the father cannot be accused of keeping the child in violation of an order passed by a Competent Court or in violation of a procedure known to law. On a first brush, it is the act of the petitioner in bringing the child to Pathankot that appears to be in violation of law & hence, illegal. The order passed by the Family Court vesting interim custody with the father rather supplements that welfare of the child is better served with the father. The right vested in the father is placed at a higher pedestal by the statute. However, such rights are not absolute and are always subject to determination by the court as to what would be in the best interest of the minor.

18. It is evident that from the perusal of the confidential report as also the order passed by the Principal Judge, Family Court, Pathankot that the minor child has not expressed any desire to move with his mother-petitioner herein. The Court has duly taken paramount welfare of the child in its consideration and has passed an appropriate order in this regard. The petitioner has every right to raise a challenge to such an order in a procedure known to law. However, without raising a challenge to such an order, it is not open to the petitioner to contend that the Principal Judge, Family Court had passed an illegal order or that the order is not sustainable. Needless to

mention that the family Judge would have had a greater access to assess the welfare of the child after having the opportunity of observing the demeanor of the parties as well as the child. The petitioner has also failed to indicate any such circumstance as would be indicative of the fact that the welfare of the child would be best served in case the child is left in the custody of the petitioner. No reasons have been given or circumstances indicated by the petitioner to point out that the observations recorded by the Principal Judge, Family Court are misconceived or are unsustainable in law.

19. 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 Zalam 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.

20. 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 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 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.”

21. 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.....”

22. 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. As a matter of fact, there are competing claims amongst the biological parents and an interim arrangement has already been made vide an order passed by the Principal Judge, Family Court, Pathankot. The petition under Section 25 of the Guardian and Wards Act is still pending adjudication before the Principal Judge, Family Court and the same has already been recorded by the Principal Judge in his orders, to be decided expeditiously. The parties are thus, at liberty to seek expeditious disposal and determination of the said petition where the Court would be seized of the entire material produced by the parties in support of their competing claims and to ascertain the best interest of the minor.

23. In view of the facts as afore-noticed 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

opportunity to lead their evidence. The fact of the case do not call for existence of any circumstance as would justify intervention by the Court, in a Writ of Habeas Corpus. Finding no merit in the instant petition, the same is accordingly dismissed.

(VINOD S. BHARDWAJ)
JUDGE

15.03.2022
anil

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