

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.945 of 2023

Arising Out of PS. Case No.-281 Year-2021 Thana- RAMPUR District- Gaya

Abhishek Kashyap, Son of Binda Kumar Singh, Resident of Mohalla- Laxmi Nagar, P.S. -Rampur, District- Gaya

... .. Petitioner/s

Versus

1. The State of Bihar through the Director General of Police, Bihar at Patna Bihar
2. The Senior Superintendent of Police, Patna, Distt- Patna Bihar
3. The Senior Superintendent of Police, Gaya, Distt- Gaya Bihar
4. The Officer-In-Charge, Vikram Distt- Patna Bihar
5. The Officer-In-Charge, Rampur, Distt- Gaya Bihar
6. Ranarajupratap Singh, Son of Late Ranaranvijay Singh, Resident of Village- Karsakothi, PS- Bikram, Distt- Patna
7. Divitkashyap @ Aashu@ Anshu, Son of Abhishekkashyap, Resident of Village- Laxminagar PS- Rampur, Road No. 2, Distt- Gaya Currently under the custody of Ranarajupratap Singh, Son of Ranaranvijay Singh, Resident of Village- Karsakothi, PS. Bikram, Distt-Patna

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Sumit Kumar Singh, Advocate Mrs. Alka Singh, Advocate
For the State	:	Mr. Md. Fazle Karim, AC to SC-1
For Respondent No. 6	:	Mr. Avinash Kumar, Advocate Mr. Krishna Chandra, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 11-10-2023

Heard learned counsel for the parties.

2. Learned counsel for respondent No. 6 has not raised
any issue of maintainability of the present writ petition and has



submitted that he does not have any objection as regards maintainability of the writ petition.

3. There are certain facts which are not in dispute. The petitioner is the father of respondent No. 7, who is a male child. Respondent No. 6 is the father-in-law of the petitioner and thus maternal grandfather of respondent No. 7. The petitioner's wife died of injuries sustained by her caused otherwise than under normal circumstances, three and half years after the date of marriage. A criminal case has been instituted against the petitioner registered as Rampur (Gaya) P.S. Case No. 281 of 2021 for the offence punishable under Section 304-B/ 34 of the Indian Penal Code in connection with which he was taken into custody. The petitioner's son thereafter stayed in the family of respondent No. 6. The petitioner is on bail since 17.10.2022. He has filed this writ application seeking issuance of a writ in the nature of writ of *habeas corpus* directing respondent No. 6 to hand over the custody of respondent No. 7 to him.

4. Respondent No. 6 has entered appearance, filed counter affidavit and has resisted the petitioner's case for handing over the child through the process of writ proceeding. A plea has been taken, *inter alia*, that the petitioner has statutory alternative remedy of seeking custody of the child under Section



7(g) of the Family Courts Act, 1984.

5. Learned counsel appearing on behalf of the petitioner has relied on the Supreme Court's decisions in case of ***Tejaswini Gaud & Ors. vs. Shekhar Jagdish Prasad Tewari & Ors.*** reported in (2019) 7 SCC 42 and ***Yashita vs. State of Rajasthan & Ors.*** reported in (2020) 3 SCC 67 to contend that this writ application in the nature of *habeas corpus* is maintainable. He has submitted that the welfare of the child is of paramount consideration in such matters and that respondent No. 6 does not have the adequate financial and other resources to properly maintain the child (respondent No. 7). He has submitted that respondent No. 6 resides in Bikram, which is a sub-divisional headquarter, whereas the petitioner lives in a bigger town at Gaya which is a distinct headquarter. He contends that the petitioner has sufficient resources to take due care of the welfare of respondent No. 7. He further submits that the writ petition is maintainable and it is a fit case where this Court should interfere exercising jurisdiction under Article 226 of the Constitution of India by directing handing over the custody of respondent No. 7 to respondent No. 6.

6. Learned counsel representing the respondent No. 6 has submitted that the question as regards the best interest of



respondent No. 7 can be appreciated also by the family court which has jurisdiction to deal with the custody of a child. He further submits that it will not be in the best interest and welfare of the child too, to hand over his custody to the petitioner who is facing a criminal case of serious nature.

7. There cannot be any quarrel over the legal position that in appropriate cases, issues relating to custody of child can be entertained by this Court exercising jurisdiction on a *habeas corpus* petition under Article 226 of the Constitution of India. The Supreme Court's decisions, on which the learned counsel for the petitioner placed reliance, do not, however, relate to the circumstance when the person claiming custody of the child was facing criminal prosecution.

8. It has been pointed out by the learned counsel for the petitioner that the petitioner had approached the learned Judicial Magistrate 1st Class, Gaya under Section 97 of the CrPC in this regard. The said application was outrightly misconceived in the Court's opinion. Section 97 of the CrPC reads as under :-

"97. Search for persons wrongfully confined. If any District Magistrate, Sub- divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search- warrant, and the person to whom such warrant is directed may search for the person so confined; and such search



shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper."

9. Learned counsel for the petitioner has not been able to point out as to how the custody of respondent No. 7 with respondent No. 6 would amount to an offence so as to invoke Section 97 of the CrPC. Secondly, an application under Section 97 of the CrPC could have been made before the District Magistrate of the concerned district. It is not the case of the petitioner that the child was in custody of respondent No. 6 within the district of Gaya.

10. After having heard learned counsel for the petitioner and learned counsel for respondent No. 6, we are satisfied that this is not a fit case where this Court, in exercise of writ jurisdiction, should issue a writ in the nature of a writ of *habeas corpus* by directing handing over the custody of respondent No. 7 to his father (the petitioner), who is facing a criminal prosecution.

11. We do not find any compelling circumstance as to why this Court should entertain the present writ application when the petitioner has effective remedy of approaching the family court under Section 7(g) of the Family Courts Act claiming custody of the child.



12. This application is accordingly dismissed, however, with a liberty to the petitioner to approach the family court under Section 7(g) of the Family Courts Act for the relief which he is seeking in the present proceeding.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Rajesh/Ashok

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	17.10.2023
Transmission Date	17.10.2023

