

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No. 1568 of 2022

Arising Out of PS. Case No.- Year-0 Thana- District-

1. Ms. Samridhi Gupta D/O Rajeev Gupta Resident of 4/122, Vivek Khand, Gomti Nagar, P.S.- Gomti Nagar, Lucknow Through Her Natural Guardian and Father - Rajeev Gupta, Aged about 42 years, Son of Radhey Shyam Gupta, Resident of 4/122, Vivek Khand, Gomti Nagar, P.S.- Gomti Nagar, Lucknow
2. Master Saubhagya Gupta Son of Rajeev Gupta Resident of 4/122, Vivek Khand, Gomti Nagar, P.S.- Gomti Nagar, Lucknow Through His Natural Guardian and Father - Rajeev Gupta, Aged about 42 years, Son of Radhey Shyam Gupta, Resident of 4/122, Vivek Khand, Gomti Nagar, P.S.- Gomti Nagar, Lucknow
3. Rajeev Gupta S/O Radhey Shyam Gupta R/o 4/122, Vivik khand, Gomti nagar, P.S- Gomti Nagar, Dist- Locknow, state- Uttar Pradesh

... .. Petitioner/s

Versus

1. The State of Bihar through Secretary (Home), Govt. of Bihar, Patna Bihar
2. The Station Officer, P.S- Phulwari Shareef, Patna. Bihar
3. The Senior Superintendent of Police, Patna Bihar
4. Smt. Achala Harsh Wife of Rajeev Gupta, D/O Late Awadh Prasad Gupta Resident of Flat No.- 401, Awadh Prabha Enclave, Near B.M.P.- 16, Police Station - Phulwari Shareef, Patna (Bihar) and Prabha Kunj, Anandpuri, Thana Road, Khagaul, Near Khagaul Police Station, Patna (Bihar)
5. Smt. Prabha Devi Gupta Wife of Late Awadh Prasad Gupta Resident of Flat No.- 401, Awadh Prabha Enclave, Near B.M.P.- 16, Police Station - Phulwari Shareef, Patna (Bihar) and Prabha Kunj, Anandpuri, Thana Road, Khagaul, Near Khagaul Police Station, Patna (Bihar)
6. Smt. Neha Wife of Piyush, D/O Awadh Prasad Gupta Resident of Flat No.- 101, Awadh Prabha Enclave, Near B.M.P.- 16, Police Station - Phulwari Shareef, Patna (Bihar)

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.
For the Respondent/s : Mr.A.G

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE CHANDRA PRAKASH
SINGH

ORAL ORDER

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

- 5 22-06-2023 1. This writ in the nature of Habeas Corpus has been preferred by the petitioner No. 3 (hereinafter referred as



‘petitioner’) seeking for the following reliefs:

“For issuance of a writ of habeas corpus directing and commanding the opposite parties to release the petitioner Nos. 1 & 2 (hereinafter referred as ‘children’) forthwith from their illegal custody.”

2. The brief facts of the case as per the petitioner are that marriage of the petitioner was solemnized with the respondent no. 4 on 27.11.2005 according to the Hindu Vedic rites and rituals. Out of the said wedlock, two children were born- elder daughter namely Samridhi and the younger son namely Saubhagya. Everything was normal in the family till the year 2016, but in the month of May, 2016, the respondent no. 4 along with the two children came to Patna, but did not return back. It has further been stated that after several attempts by the petitioner, the respondent no. 4 returned back on 12.12.2016. Thereafter, the respondent no. 4 again went to Patna in early May and returned back in June 2017. It has further been stated that on 14.08.2017, the petitioner made comfortable arrangements for the respondent no. 4 and her children to go to Patna to reside with her parents. However, the respondent no. 4 did not return back to the petitioner at Lucknow and as such, on



17.10.2017, the petitioner preferred a petition for restitution of conjugal rights under section 9 of the Hindu Marriage Act, 1955 before the Family Court at Lucknow. The respondent no. 4 also filed a maintenance petition under section 125 of Code of Criminal Procedure, 1973 on 25.08.2017. Thereafter, a writ petition in the nature of Habeas Corpus was filed by this petitioner on 06.07.2019 before the High Court of Judicature at Allahabad, Lucknow Bench bearing Writ petition no. 24789/2019. The respondent wife moved the Hon'ble Supreme Court whereupon vide Transfer Petition Civil no. 198/2018, the proceedings in case no. 2764 of 2017 titled 'Rajeev Gupta versus Achala Harsh' pending before the Court of Principal Judge, Family Court, Lucknow (Uttar Pradesh) was transferred to the Court of Principal Judge, Family Court, Patna (Bihar) and the proceedings in Writ petition no. 24789/2019 titled as 'Samrithi Gupta and Saubhagya Gupta through their father Rajeev Gupta versus Achala Harsh and others' was transferred before this Court. Pursuant to the order passed by the Hon'ble Apex Court, the present habeas corpus petition has been preferred by the petitioner.

3. Vide order dated 03.05.2023, time was granted to the private respondents to file Counter Affidavit. From perusal of the



record, it is found that no such Counter Affidavit has been filed yet.

4. The matter was taken up for hearing whereupon the learned Counsel for the petitioner submitted that the petitioner is the natural guardian of the two minor children who have been illegally detained by the respondents. On the other hand, it was submitted by the learned Counsel for the respondents that respondent no. 4 is the mother and as such, a natural guardian of the two minor children and consequently, the children cannot be said to be in an illegal detention or unlawful custody.

5. Upon hearing the submissions advanced on behalf of the parties and the upon perusal of the entire material available on the record, the core issue that arises for consideration in this present case is “Whether the custody of the two minor children with their mother can be termed as ‘illegal detention’ so as to necessitate the issuance of a writ in the nature of Habeas Corpus under Article 226 of the Constitution?”

6. It is settled legal position that writ in the nature of Habeas Corpus can be issued only in those cases where a person is deprived of his personal liberty by means of unlawful or unjustified detention by some other individual. In the case of ***Kanu Sanyal v. District Magistrate, Darjeeling*** reported in



(1973) 2 SCC 674, it was held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody requiring him to produce the body of such person before the Court. Thus, the writ of Habeas Corpus cannot be sought in those cases where the detention itself is found to be not illegal.

7. In the present case, the children are in the custody of their mother, who is their natural guardian, as provided in section 6(a) of the Hindu Minority and Guardianship Act, 1956 (hereinafter '1956 Act'). Section 6(a) of the 1956 Act provides that :

“The natural guardians 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-

- 1. 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.*
- 2. in case of an illegitimate boy or an*



*illegitimate unmarried girl—the mother,
and after her, the father;*

*3. 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.”*

A bare reading of the provision makes it abundantly clear that for a minor boy or an unmarried girl, the natural guardian is considered to be the father and ‘after’ him, the mother. Here, the word ‘after’ cannot be strictly read to mean ‘after the lifetime’. Giving the word ‘after’ such a strict interpretation would be against equity, justice, reasonableness, fairness and against the provisions of our grundnorm- the Constitution. As such, the word ‘after’ has to be read liberally to mean ‘in the absence of’. A similar view was taken by the Supreme Court in the case of ***Githa Hariharan (Ms) and another versus Reserve Bank of India and another*** reported in ***(1999) 2 SCC 228*** that :



“8. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word “after” in the section would have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the mother acts as the guardian of the minor during the lifetime of the father, without the matter going to the court, and the validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of Section 6(a). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as a guardian only after the lifetime of the father and not during his lifetime.

9. Is that the correct way of understanding the section and does



the word “after” in the section mean only “after the lifetime”? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e., six years after the Constitution. Did Parliament intend to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on the grounds of sex? In our opinion — No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction which may be open, the statute remains within the constitutional limits, the court will prefer the latter on the ground that the legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory



provisions.”

8. The main consideration in such cases is not the legal right of one party over the other. Rather, what is of paramount consideration is welfare of the child. A father cannot be said to have superior legal right over and above the right of the mother as rendering of masculine protection is not the exclusive domain of the father. In the case of ***Dr. (Mrs.) Veena Kapoor versus Shri Varinder Kumar Kapoor*** reported in ***(1981) 3 SCC 92***, it was held that :

“2. It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party.”

9. Considering the fact that the respondent no. 4 in the present case is none other than the biological mother of the minor children, we hold in light of the discussions made above, that custody of the children with their mother does not come within the term of ‘unlawful custody’ or ‘illegal detention’. A similar view has been taken by the Hon’ble Supreme Court in the case of ***Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others***, reported in ***(2019) 7 SCC 42*** wherein it has



been observed that:

“14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child.

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 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 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.
(emphasis applied)

In the case of **Sayed Salemuddin v. Dr. Rukhsana** reported in **(2001) 5 SCC 247** wherein para no. 11, it was observed by the Hon'ble Supreme Court that :

“11. ... it is clear that in an application seeking a writ of habeas corpus for custody of minor children the principal



consideration for the court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration for the court. ...”

10. In matters relating to custody of children, where the custody with either parent is prima facie found to be not illegal, a detailed inquiry is needed to be done to ascertain the fact as with whom the welfare of the children will ultimately lie. In writ jurisdiction, the exercise of powers is summary in nature and the rights are determined only on the basis of affidavits. In such cases, the Court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases that the rights of the parties to the custody of the minor children can be determined in exercise of such extraordinary jurisdiction. A few exceptional cases which would necessitate the exercise of such powers are :



1. where the detention is found to be illegal and without authority of law;
2. where custody of the children is taken away from a party in whose favour a judicial order has already been passed;
3. where the party having custody is of unsound mind, or has renounced the world, or is suffering from such mental disorder as will prejudicially affect the welfare of the child.
4. where the ordinary remedy provided by the law is either not available or is ineffective
5. where the party having custody of the child has a criminal background.
6. where the welfare of the children requires that the present custody should be changed and the



children should be put in the care
and custody of somebody else.

We consider it appropriate to add as a word of caution,
that the above mentioned instances are only illustrative and not
exhaustive. No straight jacket formula can be devised in such
cases and the courts have to ultimately decide on the basis of
facts and circumstances of each case.

11. In light of the discussions made above, we find that the two
minor children are in the custody of their mother, who is their
natural guardian. There is absence of any extenuating factor in
the present case that would necessitate the exercise of
extraordinary jurisdiction of this court in child custody matters.
As such, the petitioner is directed to approach the appropriate
Family Court with competent jurisdiction for seeking custody of
the children.

Accordingly, the writ petition is disposed of.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

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