

120 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRWP-3191-2023
DECIDED ON: 13th APRIL, 2023

SAMRIDHI CHAUHAN

...PETITIONER

VERSUS

STATE OF HARYANA AND OTHERS

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Neeraj Gupta, Advocate
for the petitioner.

Mr. Gagandeep Singh Chhina, AAG, Haryana.

Mr. Manpreet S. Dhaliwal, Advocate
for respondent No.2.

SANDEEP MOUDGIL, J

The jurisdiction of this Court under Article 226 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 detenue namely Shambhavi Singh, daughter of the petitioner, who is stated to be in illegal custody of respondent No.3-Shailendra Pal Singh.

2. Learned Counsel for the petitioner has contended that the alleged detenue namely Shambhavi Singh is minor, therefore, the petitioner, being biological mother, is entitled to her custody. It is asserted that respondent No.3 and his family members started harassing the petitioner and sent her to Gurugram on 04.11.2018, along-with her daughter (alleged detenue) and since then she is residing at Gurugram with her. Assertion is that on 12.03.2003, respondent No.3 came to Gurugram and requested that

he wants to spend some time with his daughter (alleged detainee) and the petitioner gave her consent to the same. It is further asserted that instead of spending time with the alleged detainee, respondent No.3 took her to Jodhpur at his residence and since then she is detained illegally by respondent No.3.

3. It is further asserted that the school authorities have issued a circular that the school is opening on 05.04.2023, thus the child is required to be at Gurugram for continuing her education and the petitioner being the biological mother of the alleged detainee is entitled to get her custody. Accordingly, 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 respondent No.2 while relying upon the judgment passed by this Court in case **CRWP-7913-2020, titled as "Poonam Kalsi vs. State of Punjab and others"**; decided on 20.04.2022, has 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.

6. Learned Counsel for respondent No.3 has further submitted that if the petitioner is aggrieved and seeking 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. It is also argued on behalf of respondent No.3 that the petitioner has other efficacious remedy of filing petition under the Guardians and Wards Act, 1890 for taking the custody of the minor children and, therefore, the present habeas corpus petition is not maintainable.

7. The marriage of the petitioner was solemnized with respondent No. 3 in the year 2016 and out of the said wedlock, one daughter namely Shambhavi Singh was born on 01.08.2017.

8. Learned State Counsel in the context of the afore-said judgment passed by this Court, has submitted that the petitioner is required to adopt the legal procedure under Law of Guardianship for taking the guardianship of the child by filing suit in the competent court of law.

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

10. 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.

11. 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.

12. 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.

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 patriae* 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 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 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. Returning back to the circumstances involved in the instant case, the petitioner is unable to make out a case for issuance of a writ in the nature of habeas corpus, which is to be used only for seeking release of a person from illegal custody. The child (alleged detainee) is with the biological father and there is no iota of any material to establish the custody with the father (respondent No.3) as illegal. As far as the question of custody of a child is concerned, various other factors need to be looked into and tested by adducing evidence to reach, as to what will be in the welfare of minor child which has to be of paramount consideration. Therefore, the question of custody and entitlement of the same out of two parents cannot be adjudicated in the jurisdiction under Article 226 of the Constitution of India, for which alternate and efficacious remedies have been duly provided under law.

19. 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.”

20. Taking into consideration the provisions of law and the factual matrix which is disputed, I am of the considered view that custody of the biological 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.

21. In view of the observations made above, this Court finds that the minor child namely Shambhavi Singh can not be said to be in illegal custody of respondent No.3, who is her biological father. The instant petition is, hence, dismissed with liberty to the petitioner to take an appropriate as per law for seeking the relief claimed in this petition.

22. 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.

13th APRIL, 2023

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Whether speaking/reasoned Yes/No

Whether reportable Yes/No

(SANDEEP MOUDGIL)
JUDGE