

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

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**CRWP-2317-2024 (O&M)**

**Decided on 18.04.2024**

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Ranjit Singh

... Petitioner

VS.

State of Punjab & Ors.

... Respondents

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**CORAM: HON'BLE MR.JUSTICE SANDEEP MOUDGIL**

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Present: Mr. GS Bawa, Advocate for the petitioner

Mr. Rajiv Verma, DAG Punjab

Mr. Pawandeep Singh, Advocate for respondents No.4 to 7

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**Sandeep Moudgil, J.**

(1). The jurisdiction of this Court has been invoked under Article 226 of the Constitution of India seeking a writ in the nature of Habeas Corpus for directing respondents No.2 and 3 to search and produce the detainee namely Namandeep Singh, aged about 6 years, son of the present petitioner-Ranjit Singh, who is stated to be in illegal confinement of respondents No.4 to 7.

(2). The brief facts involved herein can be read with the gist as the petitioner is the biological father of the alleged detainee, namely, Namandeep Singh – aged about 6 years (in short, ‘the detainee-child’) who is stated to be in illegal custody of respondents No.4 to 7 i.e. in-laws of the petitioner. The mother of the detainee-child and wife of the petitioner fell prey to COVID-19 pandemic and ultimately expired on 31.05.2021 leaving behind the detainee-child and the petitioner who lived together. The wife of the petitioner was as Teacher at Chheharta, Amritsar and as such, the detainee-child was admitted in DAV Public School Amritsar in December, 2020 and the petitioner is

working as Accountant in Tarn Taran Cooperative Bank, therefore, under the emotional pressure and request made by respondents No.4 to 7, the petitioner left his son with the respondents No.4 to 7 as a stop-gap arrangement in the year 2022. In the meantime, the petitioner got re-married with Tejinder Kaur on 21.01.2024, for the welfare and proper upbringing of the detenue-child. Once, thereafter when the petitioner requested the respondents No.4 to 7 to return the custody of child, they flatly refused and started threatening the petitioner with dire consequences.

(3). Learned counsel for the petitioner contends that the detenue-child is only 6 years of age and private respondents are continuously tutoring him with hatred and animosity against the petitioner who is his biological father. It is averred that during the life of biological mother of the detenue-child, Prabhjot Kaur, there was not even a single complaint against the petitioner but things started taking a wrong turn owing to the cold behavior from his in-laws' immediately after the death of Prabhjot Kaur. He further averred that the petitioner was constrained to file petition under Guardians and Wards Act, 1890 claiming the custody of the detenue-child which is still pending.

(4). Learned counsel for the petitioner exhorted that in view of Section 6 of the Hindu Minority and Guardianship Act, 1956, father has the paramount right to the custody of minor-Namandeep and he cannot be deprived of his custody except in accordance with law. Learned counsel submitted that in view of the fact that at the time when his first wife, namely, Prabhjot Kaur was alive, the admission of the detenue-child was got done at Amritsar itself and considering the welfare of the child, he had to be handed

over, as a stop-gap arrangement, to the respondents No.4 to 7 so that the initial academic years of the child does not suffer in shifting as the petitioner was working at Tarn Taran. It was vehemently urged that the father being a 'natural guardian' as per the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956, the respondents No.4 to 7 have no legal right for the custody of the minor child. Reliance has been placed on **Tejaswini Gaud & Ors. Vs. Shekhar Jagdish Prasad Tewari & Ors. (2019) 7 SCC 42.**

(5). On the other hand, Mr. Pawandeep Singh, Advocate has filed memo of appearance on behalf of respondent No.4 to 7, which is taken on record. He averred that the daughter of the respondent no.4 to 7 was married with the petitioner on 10.06.2016 and the detenue-child, namely, Namandeep Singh was born on 09.03.2018, who since then has been looked after by the maternal parents i.e. respondent No.4 to 7 for the reason that both the husband and wife were working and detenue-child used to stay at maternal house. Further, after the death of the daughter of the respondent No.6 namely Prabhjot Kaur on 31.05.2021, the child was abandoned by the petitioner and the whole family and as such, respondent no.4 to 7 had been looking after the detenue-child since 2021.

(6). It is argued that since 2021 till 11.03.2024, the petitioner never took care of the detenue-child and since then, respondents No.4 to 7 have maintained the child in a happy and loving environment for last more than 4 years. However, after his second marriage, the petitioner started to advance threats to respondent No.4 to 7 to get the custody of the child.

(7). Mr. Pawandeep Singh, Advocate further urged that since pension of the petitioner's wife legally goes in favor of the child, therefore,

the petitioner threatened that he will cause harm to Namandeep Singh as he has earlier got aborted his first child in 2017 and as such, now in order to safeguard the detenue-child from the hands of the petitioner, the respondent No.4 to 7 approached the Family Court, Amritsar by filing the petition as GW/5/2024 under Guardian and Wards Act on 01.08.2024 in order to take custody of the child by lawful means which is pending for 27.05.2024.

(8). He further averred that the petitioner cannot be allowed to raise the question of illegal confinement as there was alternative remedy available to him but when the respondents No. 4 to 7 approached the Family Court, Amritsar, the petitioner by misleading the facts filed the present petition which is not maintainable on account of availability of alternative remedy and moreover, it is respondent No.4 to 7 who approached the Family Court Amritsar on 08.01.2024 and therefore the present Habeas Corpus subsequently filed on 11.03.2024 is not maintainable as the matter is *sub judice* before the Family Court at Amritsar. Reliance has been placed on the Supreme Court judgment in **Smt. Anjali Kapoor vs. Rajiv Baijal, Civil Appeal No.2628 of 2009** decided on 17.04.2009 as well as the judgment rendered by High Court of Rajasthan in **DB Habeas Corpus Petition No.376/2023** decided on 12.02.2024.

(9). Considering the allegations made in the instant petition, this Court vide order dated 13.03.2024 appointed the Warrant Officer to visit the alleged place of detention and submit his report. Thereafter, the Warrant Officer submitted his report dated 15.03.2024. As per the said report, the detenue-child, who was seemingly under fear and scared, refused to identify his father (the petitioner).

(10). Keeping in view the overall interest and betterment of the detainee-child, this Court widened its jurisdiction and directed the State counsel to investigate the matter and file its status report and also directed respondents No.4 to 7 to remain present in Court along with the minor child (the detainee) on 18.04.2024.

(11). Status report of even date has been filed by the State counsel today in Court which is taken on record. In the status report, it is informed that the SHO, PS Chheharta, Amritsar investigated the matter and while reiterating the facts, as narrated above in this petition, submitted that since the detainee-child was admitted in School at Amritsar, the detainee-child starting residing in maternal home with private respondents and is still living there and the petitioner used to visit his in-laws to meet his son and paid his school fees upto October, 2023 and that the detainee-child is studying in 1<sup>st</sup> Class.

(12). Heard learned counsel for the parties and gone through the record.

(13). Counsel for the parties do not dispute the fact that the child being a minor, it would be very difficult to ascertain his wishes and matters relating to custody and the guardianship shall have to be decided by this Court in exercise of its *parens patriae* jurisdiction for the welfare of the child.

(14). The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Sayed Saleemuddin vs. Dr. Rukhsana and others, (2001) 5 SCC 247** wherein it was held that in a habeas

corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the Court would be to ascertain whether the custody of the child can be said to be 'unlawful' or 'illegal' and whether the 'welfare of the child' requires that the present custody should be changed. Similar view was reiterated in **Nithya Anand Raghvan v State (NCT of Delhi) and another, (2017) 8 SCC 454.**

(15). It was an argument raised on behalf of respondents No.4 to 7 that in child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act, 1956 or the Guardians and Wards Act, 1890, as the case may be.

(16). 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.

(17). 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. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case

that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant become entitled to the writ as of right.

(18). The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, may be invoked with utmost caution and only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

(19). The role of the High Court in examining cases of custody of a minor, in a petition for a writ of habeas corpus, would have to be on the touchstone of the principle of *parens patriae* jurisdiction and the paramount consideration would be the 'welfare of the child'. In such cases, the matter would have to be decided not solely by reference to the legal rights of the parties but on the predominant criterion of what would best serve the interest and welfare of the minor.

(20). This doctrine of *parens patriae* was discussed by the Supreme Court in **Charan Lal Sahu Versus Union of India [1990(1) SCC 613]** holding that it becomes the duty of a Constitutional Court to adhere to the aforesaid principle when such like situation arises for the purpose of grant or restoration of custody of a child and to ascertain as to who will be the best person to whom the custody should be given notwithstanding any other factor including the relationship between the parties since the dominant factor is ultimately the welfare of the child and no other technicality.

(21). So far as the maintainability of the present petition is concerned, the learned counsel for both the parties could not possibly dispute as to the proposition of law that a writ in the nature of Habeas Corpus is certainly maintainable in the case in hand. Therefore, before considering the merits of the present case, it must be understood that the dominant factor is custody of child whether would be based on "Welfare of a child is of paramount consideration" being the only litmus test to determine as to with whom the custody of the detenue-child ought to vest. The facts and circumstances of the case are to be seen by not only comparing merits and demerits of both the parties but also by envisaging the overall need and care of the child as also the future of the child.

(22). The possible yardstick for determining the custody of a child especially of a nascent age has various parameters including the relationship of the child with the person seeking custody, the financial status of the party and apart from the same, the overall circumstances as to who should be considered the best in the interest of the child for taking custody. The relationship of a child with the parties is only one of the factors and cannot become a sole determinative factor since the dominant factor is the welfare of child whereas all the other factors including the relationship are subservient to the dominant factor.

(23). Section 6 of the Hindu Minority and Guardianship Act, 1956 specifically stipulates that the natural guardian of a child is a father. However, a departure can be made from the same due to the circumstances which are provided therein itself. Section 6 of the 1956 Act, reads as under:-

**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.*

(24). The expression 'natural guardian' has been defined in Section 4(c), to mean any of the 'guardians' as mentioned in Section 6 of the of the 1956 Act. This section refers to three classes of guardians viz., father, mother and in the case of a married girl the husband. The father and mother therefore, are natural guardians in terms of the provisions of Section 6 read with Section 4(c). Incidentally, it is to be noted that in the matter of interpretation of statute, the same meaning ought to be attributed to the same word used by the statute as per the definition section.

(25). As per the averments of counsel for the respondents no.4 to 7, since 2021 to 11.03.2014, the petitioner never took care of his child and it is

only the Respondents no.4 to 7, who have maintained the child with love and care whereas petitioner is only interested in the pension of his wife and they fear Namandeep with his life since the petitioner has got aborted his first child in 2017. However, in the considered view of this court, none of the grounds taken by the respondents No.4 to 7, is sufficient enough to deprive the father of the custody of his child wherein admittedly the petitioner has timely paid school fees of Namandeep upto october 2023 and he is earning well enough to maintain his child while bearing his monetary expenses and further, the petitioner remarried only to provide a better environment to minor-Namandeep for his nurturing and proper upbringing. The consideration which is to guide the Court is no doubt whether it will be for the welfare of the child to return to the custody of his guardian. It is, however, scarcely necessary to point out that the decision of that question depends upon the circumstances of each case and the relationship between the guardian and the ward when the application is made. Here the petitioner is the father and natural guardian of the child. He is not only a person who is presumably most interested in the welfare of the child but he is also under the legal obligation of maintaining the child suitably to his means. The respondents No.4 to 7, being maternal grandparents of the child, are also persons interested in the welfare of the child and proper person to look after the child in the absence of his mother but they are under no legal obligation like the petitioner-father to keep the child in their custody and maintain it suitably to their means. They can, at any moment, require the father to take over the child and the latter will be bound to do so. The rights and duties of

the guardian of the person of an infant are clearly stated in *Mayne's Hindu Law* thus:-

*The guardian has a prima facie right to the possession' of the infant, a right which arises out of his obligations in respect of his children. He cannot, therefore, be deprived of it, even by the desire of the minor himself except upon sufficient grounds. In the case of parents, especially, it is obvious that the custody of their children is a matter of greater moment to them than the custody of any article of property. But his guardianship is in the nature of a sacred trust and the father cannot, therefore, substitute another in his stead. He may entrust the custody and education of his children to another but the authority he thus confers is essentially a revocable authority, and, if the welfare of his child requires it he can notwithstanding any contract to the contrary take such custody once more into his own hands. If, however, his authority has been acted upon in such a way as to create association or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, the Court will interfere to prevent its revocation. Mayne's Hindu Law Exn. 9 Para. 212.*

(26). Section 24 of the Guardians and Ward's Act, 1890 also clearly lays down the Duties of guardian of the person wherein it has been provided that “a guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires”.

(27). Thus a guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education and such other matters as the law to which the ward is subject requires.

(28). It therefore, follows that when the guardian of the person of a ward applies for the custody of the ward, he is only asking the Court to help him to discharge the duty cast upon him by law, with reference to his ward and it is for those who oppose such an application to make out that the welfare of the ward will be better served if being kept out of the custody of his guardian and retained in the custody of the person who are opposing the application for custody. Father is charged with the duty of bringing up his child properly. He has, therefore, a paramount right to the custody of his children of which he cannot be deprived unless it is clearly shown that he is unfit to be his guardian.

(29). The question, therefore, which had to be considered in this case was whether the objections raised by the respondents No.4 to 7 even, if true, make out an indelible ground that the father was unfit to be the guardian of his child. It cannot, in my opinion, be successfully contended that either by his marrying a second wife who is now living with him or even by his having ill-treated the child's mother during her lifetime (even assuming the ill treatment to be true), he has rendered himself unfit to have the custody of his child. In the opinion of this Court, if the father is leading an immoral life, it will be for the Court to consider whether he is of such a character that it would not be to the welfare of the child that he should have his custody. The allegation is extremely vague as having no incriminating material put forth before this court.

(30). In the present case, on the one hand the petitioner is the father who is the natural guardian admittedly being a biological father and on the other hand, respondents No.4 to 7 are the maternal grandparents and in-laws

of petitioner, with whom the child resides. The undisputed facts of the present case are that after the unfortunate death of the wife of the petitioner, the custody was temporarily given to respondents No.4 to 7 in view of the situation in the family at that point of time. Learned counsel for respondents No.4 to 7 had submitted that the petitioner did not care to come and meet the child. However, during the course of arguments, learned counsel for the petitioner has denied the same and has stated that rather he had tried his level best not only to meet the child but also to take the child along. Learned counsel for the petitioner has based his primary argument not only on Section 6 of the Hindu Minority and Guardianship Act, 1956 but also on the law laid down by the Supreme Court in the aforesaid judgments. He has submitted that there is no impediment or embargo as to why the petitioner who is the biological father and natural guardian under law should be deprived of the custody of his own child. He has also submitted that the petitioner is working as Accountant in the Tarn Taran Cooperative Bank and there can be no presumption that he will not take care of the child. Rather, it is only under emotional pressure of Respondents no. 4 to 7, that the petitioner allowed minor-Namandeep to stay with his maternal grandparents since he did not want Namandeep to face the trauma of losing his mother and infact focus on his academic years. In addition, he was being diligent enough in performing his duties as a father since he has regularly and in time paid the school fees of minor-Namandeep upto October 2023. On the other hand, the learned counsel for respondents No.4 to 7 has objected on the ground that the detenue-child was abandoned by the petitioner. However, it cannot be said that the child was abandoned by the petitioner as there is no document or sufficient material

available on record to show the same as against the petitioner's averment that the detainee-child was handed over to respondents No.4 to 7 on their request as it would have been inconvenient for the child to travel to and fro from Tarn Taran to Amritsar where he was posted. The second argument raised by learned counsel for respondents No.4 to 7 was that the custody of detainee-child was not illegal and therefore, no relief can be granted in exercise of powers under Article 226 of the Constitution of India for seeking a writ in the nature of Habeas Corpus.

(31). In **Tejaswini Gaud and others's** case (supra), the Supreme Court, while considering the question of maintainability of a habeas corpus petition under Article 226/227 of the Constitution of India for custody of a minor, held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective.

*"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. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.*

x x x

*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.*

(32). The Supreme Court in **Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698** held that Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. Section 6(a) itself recognises that both the father and the mother ought to be treated as natural guardians and the expression 'after' therefore shall have to be read and interpreted in a manner so as not to defeat the true intent of the legislature. In the present case, the mother has already died, the natural guardian would be the father as is clear from Section 6(a) of the 1956 Act.

(33). Therefore, the question that would arise in the present case would be as to in the aforesaid circumstances what will be the best for welfare of the child. From the perusal of the record and the arguments advanced by the learned counsel for the parties, this Court does not find any kind of embargo or impediment against the petitioner while considering from all angles. Therefore, considering the totality of aforesaid facts and circumstances of the present case, this Court is of the view that the welfare of the child who is of the age of 6 years will be best in the hands of the petitioner-father being the natural guardian under Section 6 of the 1956 Act.

(34). In equity, a discretionary power has been exercised to control the father's or guardian's legal rights of custody, where exercise of such right cannot but be termed to be capricious or whimsical in nature or would materially interfere with the happiness and the welfare of the child. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not measured either by money only, or by physical comfort only rather a striking balance has to be maintained between both so as to provide a comfortable life to the child. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as his physical well being and nor can the ties of affection be disregarded. This Court has to consider therefore, the whole of the circumstances of the case, the position of the parent, the position and age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child.

(35). *Prima facie*, it would not be for the welfare of the child to be taken away from its natural parent and given over to other people who have

not that natural relation to it. Every wise man would say that, generally speaking, the best place for a child is with his parent.

(36). It is to be borne in mind that from perusal of Section 6(a) of the 1956 Act, the father is the natural guardian but there may be cases where there is a conflict in claim of father as natural guardian of the male child and welfare of the child. Such cases are far and few. It is only in extreme case of illiteracy, poverty or delinquency of the father that his claim to the custody of child can be disregarded. Otherwise the courts would strain to reconcile the claim of the father based on his right as natural guardian of the male child with the welfare of the child, the balance tilting in favor of the welfare of the child it being of paramount and supreme importance.

(37). Therefore, the custody of the detainee-child with respondents No.4 to 7 being the maternal grandparents, cannot be said to be legal or lawful in the eyes of law since there can be no substitute for the affection of a natural parent i.e while the maternal grandparents may have immense love and affection towards the child, it cannot substitute the love and affection of a natural parent and in such circumstances, the custody of the minor child ought to be restored with the natural guardian i.e. petitioner who is father of the detainee-child and as such, the welfare of the child, who is 6 years of age, will be best in the hands of the father.

(38). The minor detainee-Namandeep lost his mother at a very tender age and is now being deprived of love of his father for no valid reason. Further, the petitioner has neither abandoned nor deprived the child of a right to his love and affection rather, circumstances were such that after the death of his wife, Respondent no.4 to 7 volunteered to take care of the child.

Merely because Respondent no 4 to 7 took care of the child for sometime does not give them the right to retain the custody of the child permanently. the Consequently, this writ petition is allowed and it is directed that the custody of the detenue-child be handed over to the petitioner by respondents No.4 to 7.

(39). It shall be the duty of the petitioner to take proper care and diligence in the upbringing of the child in the company of the second mother and this court expects that the minor child- Namandeep Singh is brought up her own son. Moreso, in the light of judgment rendered by Delhi High Court in ***“Mohd Irshad & anr vs Nadeem M.A.T. APP.(F.C) 218/2018”*** it has been held that *mere second marriage of father, who lost his first wife, cannot be considered as a disqualification from continuing as a natural guardian of his child.*

(40). Ordered accordingly.

18.04.2024  
V.Vishal

- 1. Whether speaking/reasoned?
- 2. Whether reportable?

(Sandeep Moudgil)  
Judge

Yes/No  
Yes/No