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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
(269)

CRWP-3873-2024 (O & M)
Date of decision: 16.05.2024

Monika
V/s
State of Punjab and ors.
.... Petitioner
...Respondents

CORAM: HON’BLE MR. JUSTICE JASJIT SINGH BEDI

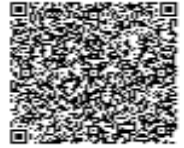
Present: Mr. Surinder Gaur, Advocate,
for the petitioner.
Ms. Guramrit Kaur, DAG, Punjab.
Mr. Paras Jagga, Advocate,
for respondents No.4 to 6.

JASJIT SINGH BEDI, J. (Oral)

The prayer in the present criminal writ petition under Article 226 of the Constitution of India is for the issuance of a writ or order or a direction in the nature of Habeas Corpus directing the respondents No.4 to 6 to produce the minor child, namely, Vansh in this Court and to hand over the custody to the petitioner.

2. The brief facts of the case as emanating from the pleadings are that the petitioner-Monika solemnized a marriage with respondent No.4- Vinod Sahoo on 08.12.2009 and on 04.11.2020, they were blessed with twins, namely, Vansh (male child) and Vanshika (female child).

3. On account of matrimonial discord, a quarrel took place on 07.07.2023 between the petitioner on the one hand and respondents No.4 to 6 on the other. Respondent No.4 took the petitioner and the minor daughter-



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Vanshika and dropped them to the parental home of the petitioner at Sonapat. However, he retained the minor boy-Vansh with him despite repeated requests being made by the petitioner to the respondents No.4 (her husband).

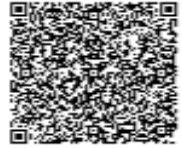
4. Ultimately, an FIR No.57 dated 06.11.2023 under Sections 323, 377, 406, 498-A, 506 and 34 IPC, came to be registered at the instance of the petitioner against respondents No. 4 to 6. During the course of hearing in the anticipatory bail petition of the respondents No.4 to 6, a settlement was arrived at. A copy of the said settlement dated 28.11.2023 is attached as Annexure P-1 to the present petition.

5. Based on the aforementioned settlement, the respondents No.4 to 6 were granted the concession of anticipatory bail.

6. Despite repeated requests by the petitioner to the respondents No.4 to 6 to abide by the terms of the compromise and set-up a separate residence at Ludhiana, no such attempt had been made by the respondent No.4. Requests were also made to him to give custody of the male child-Vansh to the petitioner but to no avail.

7. Due to the denial in handing over of the custody of the 03 years old minor child-Vansh to the petitioner, the instant petition had been filed.

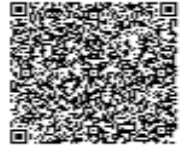
8. When this matter had initially come up for hearing, the parties were directed to appear before the Mediation and Conciliation Centre of this Court to explore the possibilities of a compromise as the female child-Vanshika was residing with the petitioner and the male child-Vansh with the respondents No.4 to 6. However, no settlement could be arrived at and the matter has matured for hearing.



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9. The learned counsel for the petitioner contends that the custody of the minor child-Vansh who was less than the age of 05 years ought to be handed over to the petitioner who is the mother and natural guardian. It was the respondent No.4 (husband) who had dropped the petitioner and the minor daughter to the parental house of the petitioner at Sonapat and had retained custody of the minor son despite protests by the petitioner. Pursuant to the filing of the FIR, a settlement had been arrived at but the respondents No.4 to 6 had not adhered to the terms of the settlement. Despite making repeated attempts to secure custody of the minor son, the respondents No.4 to 6 had refused to hand over the custody. Therefore, the instant criminal writ petition had been filed and the custody ought to be handed over to the petitioner who is the mother and natural guardian.

10. The learned counsel for the respondents No.4 to 6, on the other hand, contends that it was the petitioner who had left the matrimonial home alongwith the minor daughter while leaving behind the minor son with the answering respondents. Therefore, the answering respondents could not be said to be in illegal custody, moreso, when respondent No.4 himself was the father of the children. The allegation of the answering respondents not adhering to the terms of the settlement was also incorrect inasmuch as it was the petitioner-wife who was trying to wriggle out of the same on one pretext or the other. Even during the pendency of the instant petition, while the petitioner would make a statement in Court that she was ready and willing to go back and reside in Ludhiana in a separate accommodation as per the terms of the settlement, on stepping out the Court, she would take a different stand and would say that she does not wish to reside with the respondent No.4 at any cost. Be that as it may, the instant proceedings were not



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maintainable and the petitioner was well withing her rights to file an appropriate petition under the Guardianship and Wads Act, 1890 and seek custody of her minor son. He, therefore, prays that the present petition was liable to be dismissed.

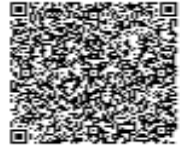
11. I have heard the learned counsel for the parties.

12. The Hon'ble Supreme Court in '***Nirmala versus Kulwant Singh & ors (Criminal Appeal No.2194 of 2022 decided on 03.05.2024)***', has held as under:-

"10. The question on the maintainability of the Habeas Corpus petition with regard to custody of the minor child has come up for consideration before this Court in several matters.

11. This Court in the case of Tejaswini Gaud and others (supra) after considering the earlier cases, observed thus:

"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

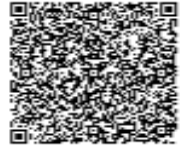


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detention of a minor child by a parent or others was illegal and without any authority of law.

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.

21. In the present case, the appellants are the sisters and brother of the mother Zelum 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



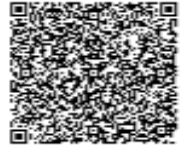
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intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India.”

12. It can thus be seen that this Court has held that the habeas corpus is a prerogative writ which is an extraordinary remedy. It has been held that recourse to such a remedy should not be permitted unless the ordinary remedy provided by the law is either not available or is ineffective. It has been held that 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. It has further been held that 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.

13. This Court further held that 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. It has been held that 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. It has further been held that what is important is the welfare of the child. It has been further held that 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.

14. In the facts of the said case, this Court found that the child being a minor, aged 1½ years, cannot express its intelligent preferences and in the facts and circumstances



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of said 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.

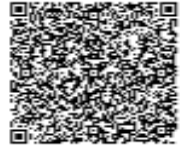
15. The same legal position has been reiterated by this Court in the cases of Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba (supra) and Rajeswari Chandrasekar Ganesh vs. State of Tamil Nadu and others.

16. It can thus be seen that no hard and fast rule can be laid down insofar as the maintainability of a habeas corpus petition in the matters of custody of a minor child is concerned. As to whether the writ court should exercise its extraordinary jurisdiction under Article 226 of the Constitution of India or not will depend on the facts and circumstances of each case.

17. In the present case, it will be relevant to refer to the case pleaded by the respondent-father. The learned Single Judge of the High Court himself recorded the submissions of the respondent-father in the impugned judgment as under:

“He further submitted that when the wife of the petitioner died, then at that point of time due to psychological and social reasons, the child was sent to the maternal grand-parents which was the need of the hour at that time since the petitioner himself was also under psychological stress and a family environment was required for the child especially from the grand-parents and that was the sole reason as to why the son of the petitioner who at that point of time was of the age of 5 years was sent to them to be taken care of.”

18. It can thus be clearly seen that according to the case of the respondent-father himself, in the peculiar facts and



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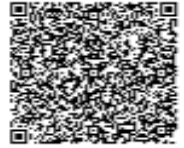
circumstances of the case, a family environment was required for the child especially from the grandparents and that he had placed the custody of the minor child with the appellant-grandmother for taking his care. It can thus clearly be seen that it is not a case that the appellant-grandmother had illegally kept the custody of the minor child. It is the respondent-father who had placed the custody of the minor child with the appellant-grandmother.

19. We are of the considered view that in the peculiar facts and circumstances of the case, the High Court ought not to have entertained the habeas corpus petition under Article 226 of the Constitution of India. Since a detailed enquiry including the welfare of the minor child and his preference would have been involved, such an exercise could be done only in a proceeding under the provisions of the Guardians and Wards Act, 1890.

20. In any case, we are of the view that compelling a minor child at the tender age of 7 years to withdraw from the custody of his grandparents with whom he has been living for the last about 5 years may cause psychological disturbances.

21. In our view, an exercise for promoting the bond between the minor child and the respondent-father in a graded manner and thereafter considering the grant of custody of minor child to the respondent-father taking into consideration the paramount interest of the welfare of the minor child would be required to be done in the present matter. Such an exercise would not be permissible in the extraordinary jurisdiction under Article 226 of the Constitution of India.

22. We therefore find that the High Court was not justified in entertaining the petition under Article 226 of the Constitution of India. The impugned judgment and order



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of the Punjab and Haryana dated 23rd August 2022 in CRWP-1485-2021 (O&M) is quashed and set aside. The writ petition filed by the respondent-father is dismissed.

23. However, we clarify that no observation in the impugned judgment and order and in the present judgment and order would be binding on the proceedings if taken by the respondent-father under the Guardians and Wards Act, 1890 and the proceedings would be decided in accordance with law on its own merits.

24. In the light of the aforesaid, we direct that in the event the respondent-father files an application under the provisions of the Guardians and Wards Act, 1890, the competent Court shall decide the same expeditiously. We further direct that in the event such an application is made, an order at least with regard to visitation rights would be passed within a period of 4 weeks from the making of such an application”.

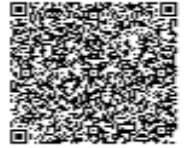
The Hon’ble Supreme Court in ‘**Seema & Anr. Versus The State of Haryana and ors. (SLP (Crl.) No.4689 of 2023 decided on 04.01.2024)**’, has held as under:-

“1. Leave granted.

2. The appeal challenges the interim order dated 24th March, 2023 passed by the High Court of Punjab and Haryana at Chandigarh directing the present appellants to handover the custody of the minor child (Sachin) to respondent No.4 herein.

3. Indisputably, the matter is related to custody of the minor children who were born out of the wedlock between appellant No.1 and respondent No.4.

4. It could thus be seen that the appropriate remedy for respondent No.4, if he wanted the custody of the minor child (Sachin) was to file a proceeding under the Guardians and Wards Act, 1890.



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5. It is settled law that in case of a dispute between the husband and wife, with regard to the custody of their child, ordinarily a habeas corpus petition would not be tenable.

6. In any case, it could be seen that by way of an ad interim order in the criminal writ petition, almost the final relief has been granted by the High Court.

7. On that short ground alone, we are inclined to allow the appeal and the impugned interim order dated 24th March, 2023 is hereby quashed and set aside.

8. The High Court shall proceed to decide the criminal writ petition on its own merits and in accordance with law.

9. Needless to state that the observations made, as stated above, are upon a prima facie consideration of the matter.

10. Pending application(s), if any, stand(s) disposed of”.

13. A perusal of the aforementioned orders would show that a writ of Habeas Corpus is an extraordinary remedy and recourse to such a remedy can be had only if the remedy provided by the law is either not available or is ineffective. A writ petition of Habeas Corpus is maintainable only in those cases where it is proved that the detention of a minor child is illegal or without any authority of law. Thus, the ordinary remedy lies under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be.

14. Coming back to the facts of the instant case, while on the one hand, it is the case of the petitioner-wife that the respondent No.4 (husband) had dropped her and her minor daughter to her parental home at Sonapat, it is the case of the respondent No.4 that it was the petitioner who had left the



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matrimonial home taking along her minor daughter but leaving behind her minor son. Be that as it may, by no stretch of imagination can it be said that the respondent No.4 who is the father of the children is in illegal custody of the minor child-Vansh. It can also not be conclusively held at this stage, in summary proceedings that the father’s custody of the minor child would be to his detriment. Thus, the parties are well withing their rights to avail their alternative civil remedies by filing an appropriate petition under the Guardianship and Wards Act, 1890 seeking custody of the children.

15. In view of the above, I find no merit in the present petition and the same stands dismissed.

16. However, in the event that either of the parties filed a petition seeking custody under the provisions of the Guardianship and Wards Act, 1890, the competent Court shall decide the same expeditiously but in any case, not later than 03 months from the date of the filing of the said petition.

(JASJIT SINGH BEDI)
JUDGE

May 16, 2024
sukhpreet

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No