

**CRWP-5367-2024****1****IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH****114****CRWP-5367-2024****Date of Decision : July 02, 2024****KAMALDEEP KAUR ALIAS KAMALDEEP****-PETITIONER****V/S****STATE OF HARYANA AND OTHERS****-RESPONDENTS****CORAM: HON'BLE MR. JUSTICE KULDEEP TIWARI**

Present: Ms. Pushpinder Kaur Minhas, Advocate
for the petitioner.

Mr. Rajesh Gaur, Addl. A.G., Haryana.

Mr. S.S. Momi, Advocate
for the respondents No.5 to 7.

*********KULDEEP TIWARI, J. (ORAL)**

1. The illegal detention of her two minor daughter/alleged detenus, namely, (i) Manreet Kaur, aged 2½ years; and (ii) Mansirat Kaur, aged about 08 months; has compelled the petitioner to knock the doors of this Court through instituting the instant writ of habeas corpus, thereby seeking release of her minor daughters from the illegal detention of respondent Nos.5 to 7 (petitioner's in-laws).

2. What emanates from the record available before this Court, is that, on 05.02.2021, the petitioner was married to one Sukhmeet Singh (son of respondent No.5), whereupon, two minor daughters/alleged detenus were born. However, unfortunately demise of the petitioner's husband occurred in a roadside accident on 04.03.2024, and thereupon, the respondent No.5 (petitioner's father-in-law) created such an exploitative and sexually abusive at-



mosphere in her matrimonial house that it became impossible for her to survive there. Refusal of the petitioner to develop physical intimacy with the respondent No.5 resulted in her becoming ousted from her matrimonial house, but without her minor daughters, who were detained by the private respondent (in-laws of the petitioner). Consequently, the petitioner has filed the instant petition seeking release of her minor daughters from the illegal detention of the private respondents.

3. A Co-ordinate Bench of this Court had, on 06.06.2024, after considering the tender age of the minor daughters, directed the Senior Superintendent of Police, Kaithal, to look into the matter with the assistance of the Child Welfare Committee and then to submit a report on his/her affidavit.

4. In defiance of the order dated 06.06.2024, a status report, on affidavit of Upasana, Superintendent of Police, Kaithal was filed before this Court on 14.06.2024. A perusal of this status report makes revelations that the Child Welfare Officer visited the house of respondent No.5 and found that the minor daughters/alleged detenus were being looked after and protected by the family members of respondent No.5.

5. On 14.06.2024, the learned counsel for the respondents No.5 to 7 requested for an adjournment, thereby enabling him to file reply to the instant petition, which was accordingly granted. However, it was clarified that reply, if any, be filed three days prior to the date fixed and in case of failure to do so, it was clarified that the matter would be considered on its own merits, without further awaiting any reply.

6. Today, the learned counsel for the respondents No.5 to 7 has submitted that, since he could file the reply within the stipulated period, therefore,



he may be granted an adjournment to file reply before Registry of this Court. This Court declined the request of the learned counsel for the respondents No.5 to 7, but, granted him liberty to file the reply in the Court itself, whereupon, he filed reply and the same is taken on record.

7. The learned counsel for the respondents No.5 to 7 has argued that, prior to institution of the instant petition, the petitioner had filed an application under Section 97 of the Cr.P.C. before the learned Magistrate concerned, thereby seeking custody of the minor children, but, this application was dismissed vide order dated 31.05.2024. Since the petitioner has not assailed the dismissal order dated 31.05.2024, therefore, it has acquired finality and as such, the instant writ of habeas corpus, on the same cause of action, is not maintainable.

8. The learned counsel for the respondents No.5 to 7 has further argued that, in fact, a Panchayati Compromise dated 15.05.2024 has been arrived at between the petitioner and the private respondents, wherein, the petitioner stated that she voluntarily left her matrimonial house, besides stating that she has no concern with her minor daughters.

9. Finally, the learned counsel for the respondents No.5 to 7 has placed reliance upon a verdict rendered by the Hon'ble Apex Court in "*Nil Ratan Kundu and Anr. V/s Abhijit Kundu*", 2008(3) R.C.R. (Civil) 936, to contend that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents. In the peculiar facts and circumstances of the present case, the welfare of the minor children lies with their grandfather and not their mother.

10. The learned State counsel has, by placing reliance upon the status



report (supra), submitted that although the minor children are being looked after and protected by the family members of respondents No.5, however, as per proviso to Section 6 of The Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the 'Act of 1956'), the first right of custody of minor children lies with the mother (petitioner) and there is nothing on record to suggest that handing over custody of the minor children is not in their interest and welfare.

11. This Court has heard the submissions made by the learned counsels for the parties. It is not under dispute that the alleged detenus, namely, Manreet Kaur and Mansirat Kaur are aged respectively about 2½ years and 08 months. As per proviso attached to Section 6 of the Act of 1956, which is extracted hereinafter, the custody of a minor, who has not completed the age of five years, shall ordinarily be with the mother.

“6. Natural guardians of a Hindu minor.—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—

(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 the 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 expressions “father” and “mother”



do not include a step-father and a step-mother.”

12. In the instant case, one of the petitioner’s minor daughters, who is aged about 08 months, is completely dependent on her mother’s breastfeeding for nourishment and as such, she cannot be deprived of her fundamental right to get the love and affection of her mother, who is well capable to take care of her. Even the physical and biological needs of an 8 months’ old child lies in the association of her mother. Furthermore, there is nothing on record which may impel this Court to draw an inference that the custody of the minor children with the petitioner is against their welfare. Rather, taking into account the tender age of the minor children, coupled with the peculiar facts and circumstances of this case, this Court is *prima facie* of the view that the custody of the minor children with their biological mother/petitioner is in their interest and welfare.

13. Insofar as dismissal of petitioner’s application under Section 97 of the Cr.P.C. is concerned, what emanates from a perusal of the dismissal order dated 31.05.2024 passed thereon, is that, this dismissal order does not create any hurdle for the petitioner to maintain the instant writ of habeas corpus, especially when the learned Magistrate concerned has held the said application to be non maintainable, vis-a-vis, the relief sought therein and also when liberty was granted to the petitioner to avail alternate remedy for getting the custody of the minor children. The relevant extract of order dated 31.05.2024 reads as under:-

“11. Under these circumstances, by no stretch of imagination can it be held that the children are confined or that they are confined under such circumstances that the confinement amounts to an offence. The case in hand relates to the custody of the minor children and the applicant in



the present case is trying to give it the colour of illegal confinement by moving the application under section 97 of Cr.P.C. Needless to say that, if at all the applicant wants the custody of the minors children, she should have applied for getting the custody of the minors children relevant provisions of the Act but certainly Section 97 Cr.P.C. was not remedy. Therefore, the court is of the considered opinion that the custody with grandfather cannot be said to be illegal confinement amounting to an offence. Accordingly, the present application under Section 97 Cr.P.C. being not maintainable is hereby dismissed.

12. However, the applicant is free to adopt legal procedure for taking the custody of her minor children under the provisions of Hindu Minority and Guardianship Act, 1956 and Guardians and Wards Act, 1890.”

14. This Court has also perused the judgment relied upon by the learned counsel for the respondents No.5 to 7. The Hon’ble Supreme Court has in ***Nil Ratan Kundu’s case*** categorically held that the first and foremost consideration is welfare of the child and not the right of parents. It has been further held that a Court while dealing with custody cases is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child.

15. This Court has examined the instant case on the anvil of the ratio laid down in ***Nil Ratan Kundu’s case*** and is of the view that, *prima facie*, the welfare of the minor daughters lies with their biological mother (petitioner), especially when her nourishment depends on her mother’s breastfeeding. Consequently, this Court deems it appropriate to direct the private respondents to, on 03.07.2024, hand over interim custody of the minor children/alleged detenus to the petitioner in the office of Superintendent of Police, Kaithal. After the interim custody of the minor children becoming successfully handed over



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to the petitioner, the Superintendent of Police, Kaithal is directed to, within three days thereafter, file a compliance report before this Court.

16. Liberty is reserved to both the parties to make an appropriate motion under the appropriate provisions of law before the appropriate authority/court concerned, if so advised, thereby seeking custody of the minor children.

17. Disposed of accordingly.

18. A copy of this order be supplied to the learned State counsel as well as to the learned counsel for the respondents No.5 to 7 for strict compliance.

July 02, 2024
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(KULDEEP TIWARI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No