

2024.PHHC:106868



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

CRWP-6377-2024

Reserved on: 02.08.2024

Pronounced on: 27.08.2024

Anju Sharma

.... Petitioner

Versus

State of Haryana and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE GURBIR SINGH

Present: Mr. Ketan Chopra, Advocate, for the petitioner.

Mr. Gurmeet Singh, AAG, Haryana.

Mr. Sanaf Khan, Advocate, for respondents No.4 to 7.

GURBIR SINGH, J.

1. This petition has been filed under Article 226 of the Constitution of India by the mother for issuance of a writ in the nature of Habeas Corpus for the release of detenue her son, namely, Aayansh, aged about 2.5 years, from the illegal custody of respondents No.4 to 7.

2. In brief the facts necessary for the disposal of present petition are that the petitioner is a resident of Ambala Cantt. The marriage of petitioner was solemnized with respondent No.4 on 18.11.2015. Out of said wedlock, one boy, namely, Aayansh was born on 26.02.2022. She was being harassed by her in-laws i.e. respondents No.4 to 7 on one pretext or the other and also mercilessly beaten up by respondent No.4. In order to

save her matrimonial home and for betterment of her child, the petitioner kept bearing all the sufferings given by the private respondents. On 19.05.2024, respondent No.4, after giving beatings to the petitioner, threw her out of the home with the minor child. Hoping that things will be sorted out in a day or two, she went to the house of her aunt, but when respondent No.4 did not come to take the petitioner and the minor son back, she went to her parental home on 22.05.2024 and since then, she has been residing there along with her minor son.

2.1 It has also been pleaded that respondent No.4 is habitual of living in adultery. The petitioner even caught hold respondent No.4 while chatting on mobile with a prostitute. When the petitioner confronted respondent No.4 that he was maintaining illicit relations while cohabiting marriage with her, she was thrown out of the matrimonial home. She filed a case under the DV Act and another case under Section 125 of Cr.P.C. for claiming maintenance. On coming to know about said cases, respondent No.4 started pressurizing to claim the custody of minor son. When she disagreed that minor son was totally dependent upon her, he extended threats that he had all means and would do anything possible in order to take the custody of the minor son. On 26.06.2024, her minor son was found missing from her parental home and on checking the CCTV footage, it was seen that respondent No.4 in connivance with his sister i.e. respondent No.7, while covering their faces, picked up the minor son, illegally from the custody of mother, on a scooter bearing No.HR-85-E-8934. The photograph

of respondent No.4 is annexed herewith as Annexure P-2. The petitioner immediately lodged an FIR on the same day i.e. 26.06.2024, bearing No.253 under Section 365 IPC at Police Station Ambala Cantt. (Annexure P-3). Respondent No.4 preferred anticipatory bail and the learned Additional Sessions Judge, Ambala, vide order dated 29.06.2024, granted him interim anticipatory bail. It has been pleaded that her minor son was illegally taken away and is in unlawful custody of private respondents No.4 to 7.

2.2 The official respondents No.1 to 3 filed reply by way of affidavit of Rajat Gulia, HPS, Deputy Superintendent of Police Ambala Cantt., District Ambala that the FIR No.253, dated 26.06.2024 (supra) was registered on the complaint of petitioner. On 27.06.2024, the Investigating Officer in the company of petitioner reached at the house of accused-respondent No.4, but he, minor son and Payal (sister of respondent No.4) were not found there. Thereafter, on the advice of petitioner, the police party reached at the house of maternal uncle of respondent No.4 at Shahbad but they were also not found there. It has been further submitted that in the application so filed by respondent No.4 for grant of anticipatory bail, it was admitted by him that the minor child was in his custody. Vide order dated 29.06.2024, he was granted anticipatory bail and directed to join investigation. Pursuant to said order, respondent No.4 joined investigation on 01.07.2024, but refused to hand-over the custody of minor child to the petitioner. Although State opposed the anticipatory bail application on the

ground that minor was only about 2 ½ years old and could not live without his mother as he was dependent upon the breast-feed of petitioner-mother, but the trial Court vide order dated 29.06.2024 made the interim bail absolute.

2.3 Respondent No.4 also contested the petition and has filed reply. It is admitted that the petitioner is his legally wedded wife. Their marriage took place on 18.11.2015 in Ambala and out of said wedlock, a male child, namely, Aayansh was born to them on 26.02.2022, who is presently in his custody. It has been submitted by respondent No.4 that he has fulfilled all the matrimonial duties towards the petitioner and their child, providing more than adequate maintenance and support. After the birth of Aayansh, petitioner engaged in extramarital affairs with a male colleague from their Company. Respondent No.4 caught the petitioner red-handed at a location in Noida. The petitioner was having working hours from 9:00 AM to 6:00 PM and during that period, respondent No.4 took care of their child and fulfilled all duties towards him. The letter confirming her employment is attached as Annexure-A. When Aayansh was of only five months, the petitioner resumed her duties at her office and was unable to care for or to feed him, the respondent No.4 was the only caretaker of the minor and during that period, Aayansh was fed with substituted milk, specifically Nestle Nanpro. The summary of purchase orders and bills for the Nanpro milk is attached herewith as Annexure B(colly). At the beginning of the petitioner's pregnancy, respondent No.4 opted to work

from home to care for the petitioner and continued working from home to care for Aayansh even after his birth. Whenever the child did not feel well, respondent No.4 took appointments from the doctor through online mode and consulted with the doctor from time to time. The appointment letters attached herewith as Annexure-C (colly). Since the petitioner was unable to take care of Aayansh, so he enrolled him at Mini Munchkins Child Care School on 16.10.2023, located within their residential society. Since March, 2024, Aayansh has been attending Foster Kids School within the same residential area. If custody of minor is given to the petitioner then it may lead to absence from school. Copy of attendance register, receipt and admission letter are attached herewith as Annexure-D (colly). The petitioner is preoccupied for caring her both the parents (as her father is bedridden and mother is suffering from high blood pressure, so stated by her in her petition filed under the DV Act) making it a challenge for her to also give full care for Aayansh. Past instances of the petitioner overstaying at her parental home have caused significant inconvenience to Aayansh and respondent No.4. It has been further submitted that in the CCTV footage, referred to by the petitioner, it can be clearly observed that the minor child was left alone on the road amidst ongoing traffic. The footage also shows two stray dogs nearby. The closest human to the child was an unknown labourer working in the factory next door. Neither the petitioner nor any of her family members can be seen attending the child. False allegations of merciless beatings by respondent No.4 to the petitioner on the instigation of

respondents No.5 to 7 have been leveled. Throughout the 9 years of marriage, no such incident has been reported to any authority. Respondents No.4 to 7 never received a single penny in the name of shagun or gifts. She left the matrimonial home to visit her aunt (Massi) without even informing respondent No.4 and thereafter, left for her parental home at Ambala. On 01.06.2024, when the petitioner was at her parental home, she handed over the child Aayansh to respondent No.4 who stayed with him for 2 days. The petitioner warned respondent No.4 that she would not allow him to see Aayansh again. Respondent No.4 is the father and legal guardian of Aayansh and the child cannot be considered in illegal custody. Aayansh has never been in the custody of respondents No.5 to 7. The custody of Aayansh is with respondent No.4 and he has been working from home for the past two months. The petitioner quit her job voluntarily after respondent No.4 discovered her WhatsApp chat with one of her office colleagues. That matter was subsequently discussed with the family of petitioner and after internal deliberation, her family suggested to quit her job to safeguard the child's future and her marriage.

3. Learned counsel for the petitioner has argued that as per Section 6 of Hindu Minority and Guardianship Act, 1956, the custody of a minor, who has not completed the age of five years, shall ordinarily be with the mother. Respondent No.4 in connivance with his sister Payal i.e. respondent No.7 has illegally taken away the child from the custody of the

petitioner. Petitioner has come to know that respondent No.4 has left the minor in the custody of respondents No.5 to 7. They have approach with the local authorities of their area i.e. respondent No.3 due to which, no action has been taken by any official on the illegal conduct of respondents No.4 and 7. It has been further argued that petitioner is a well educated lady and possesses good educational qualification and was even working but she was forced by respondent No.4 to leave her job so as to enable the petitioner to be dependent upon him. Respondent No.4 is a permanent resident of Ambala and is currently working at Noida and it is not possible for him to look after the minor child and thus, he has left the minor with respondents No.5 to 7. He has relied upon *Mrs. Kanika Goel Versus State of Delhi through SHO and another, 2018(3) R.C.R. (Civil) 844; Tejaswini Gaud and others Versus Shekhar Jagdish Prasad Tewari and others, Law Finder Doc Id # 1452762; Roxann Sharma Versus Arun Sharma, 2015 AIR (Supreme Court) 2232; Mansi Versus The State of Punjab and others, Law Finder Doc Id # 2062221; Rashneet Kaur Versus State of Haryana and others, Law Finder Doc Id # 2000108; Neha Versus State of Haryana and others, Law Finder Doc Id # 1721215; Mandeep Kaur Versus State of Punjab and others, Law Finder Doc Id # 1765367; Arvinder Kaur Versus State of Punjab and others, Law Finder Doc Id # 1776199; Kirandeep Kaur Versus State of Punjab and others, Law Finder Doc Id # 2001283; Aparna Jigarbhai Vala Versus State of Gujarat, Law Finder Doc Id # 2544821.*

4. Learned counsel appearing on behalf of respondents No.4 to 7 has argued that filing of present petition is the abuse of process of law. This petition is not maintainable at all. The petitioner can avail appropriate remedy by filing a petition under the Guardians and Wards Act, 1890 for claiming custody of the minor child. Respondent No.4 is properly looking after the child. Even earlier also, he was looking after the child. It is further submitted that while deciding the custody of minor, primary and paramount consideration should be the welfare of the child and custody cannot be decided on the rights of the parties. Reliance is placed on ***Poonam Kalsi Versus State of Punjab and others, CRWP No.7913 of 2020, decided on 20.04.2022*** and ***Hasaan Raza @ Taiyab and another Versus State of U.P. and others, Habeas Corpus Writ Petition No.983 of 2023, dated 31.01.2024.***

5. I have heard the submissions of learned counsel for the parties and have gone through the case file.

6. The law is well settled that a remedy of the writ petition in the nature of habeas corpus is available when the minor is illegally and improperly detained. In case ***Tejaswini Gaud and others (supra)***, the Hon'ble Supreme Court, while deciding whether writ petition is maintainable or not, held that ordinarily remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be. It is only in exceptional cases, the rights of parties to the

custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus. The relevant extract from said judgment reads as under:-

“13. 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.

14. In ***Gohar Begum*** where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued. In ***Gohar Begum***, the Supreme Court dealt with a petition for habeas corpus for recovery of an illegitimate female child. Gohar alleged that Kaniz Begum, Gohar’s mother’s sister was allegedly detaining Gohar’s infant female child illegally. The Supreme Court took note of the position under the Mohammedan Law that the mother of an illegitimate female child is entitled to its custody and refusal to restore the custody of the child to the mother would result in illegal custody of the child. The Supreme Court held that Kaniz having no legal right to the custody of the child and her refusal to make over the child to the mother resulted in an illegal detention of the child within the meaning of Section 491 Cr.P.C. of the old Code. The Supreme Court held that the fact that Gohar had a right under the Guardians and Wards Act is no justification for denying her right under Section 491 Cr.P.C. The Supreme Court observed that Gohar Begum, being the natural guardian, is entitled to maintain the writ petition and held as under:-

“7. On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants.

In *Queen v. Clarke* (1857) 7 EL & BL 186: 119, ER 1217 Lord Campbell, C.J., said at p. 193:

“But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty.” The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of Section 491 would clearly be applicable to the case and the appellant entitled to the order she asked.”

8. We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have not given any reason in support of their view and we are clear in our mind that view is unsustainable in law.

.....

10. We further see no reason why the appellant should have been asked to proceed under the Guardian and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under Section 491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right under Section 491. That is well established as will appear from the cases hereinafter cited.”

15. In ***Veena Kapoor***, the issue of custody of child was between the natural guardians who were not living together. Veena, the mother of the child, filed the habeas corpus petition seeking custody of the child from her husband alleging that her husband was having illegal custody of the one and a half year old child. The Supreme Court directed the District Judge concerned to take down evidence, adduced by the parties, and send a report to the Supreme Court on the question whether considering the interest of the minor child, its mother should be given its custody.

16. In ***Rajiv Bhatia***, the habeas corpus petition was filed by Priyanka, mother of the girl, alleging that her daughter was in illegal custody of Rajiv, her husband’s elder brother. Rajiv relied on an adoption deed. Priyanka took the plea that it was a fraudulent document. The Supreme Court held that the High Court was not entitled to examine the legality of the deed of adoption and then come to the conclusion one way or the other with regard to the custody of the child.

17. In ***Manju Malini*** where the mother filed a habeas corpus petition seeking custody of her minor child Tanishka from her sister and brother-in-law who refused to hand over the child to the mother, the Karnataka High Court held as under:-

“24. The moment respondents 1 and 2 refused to handover the custody of minor Tanishka to the petitioner the natural and legal guardian, the continuation of her custody with them becomes illegal detention. Such intentional act on the part of respondent

Nos.1 and 2 even amounts to the offence of kidnapping punishable under S.361 of IPC. Therefore there is no merit in the contention that the writ petition is not maintainable and respondent Nos.1 and 2 are in legal custody of baby Tanishka.”

18. 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.

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 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.”

6.1 In case ***Rajeswari Chandrasekar Ganesh Versus State of Tamil Nadu and others, Writ Petition (Criminal) No.402 of 2021, decided on 14.07.2022***, it is held that writ petition of habeas corpus is maintainable

at the instance of one parent against the other and in child custody matters, the only relevant consideration is the welfare of the child.

6.2 Section 6 (a) of Hindu Minority and Guardianship Act, 1956 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)

(c) ”

The above said section provides that the custody of minor who has not completed the age of 5 years, shall ordinarily be with the mother. Thus there is a presumption that welfare of a child of such tender age should be in the custody of mother but that presumption is rebuttable, which means the father has to disclose cogent reasons that the welfare of the child is jeopardized if the custody is retained by the mother.

6.3 In case *Roxann Sharma (supra)*, it is held that if child is below 5 years, the father’s suitability to custody is not relevant since the mother is per se best suited to care for the infant during his tender age. It is for the father to plead and prove the mother’s unsuitability. Section 6(a) of the Hindu Minority and Guardianship Act preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old.

6.4 Coming to the case in hand, it is not in dispute that the parties i.e. petitioner and respondent No.4 are legally married and out of their wedlock, minor son Aayansh was born on 26.02.2022. The petitioner along with minor son had been residing at her parental house in Ambala Cantt. On 26.06.2024 at about 7:00/7:30 P.M., the minor child was picked up and taken away by two persons. The entire incident was recorded in the CCTV footage. On the same day, petitioner lodged FIR under Section 365 IPC at Police Station Ambala Cantt. (Annexure P-3) against her husband-respondent No.4 and respondent No.7-Payal (sister of her husband) that they had picked up the minor child. Although police failed to locate the minor child despite visiting the house of respondent No.4 and his maternal uncle, but respondent No.4 moved an application on 27.06.2024 for grant of anticipatory bail. Vide order dated 29.06.2024, the court of learned Additional Sessions Judge, Ambala, granted interim bail to respondent No.4. In the said order, learned counsel appearing for respondent No.4-Aman Kumar referred copy of one email sent to the police wherein it was clearly intimated that the minor child was in his safe and sound custody. Respondent No.4 in his reply in this case also stated that he had already informed the police department on 26.06.2024 that the child was safe and secure with him. However, neither copy of the email is annexed with the reply filed by respondent No.4 nor it is mentioned in the reply filed by official respondents that such email was received on 26.06.2024. The stand of the official respondents is that in the anticipatory bail, respondent No.4-

accused had admitted that he had sent email to the police regarding the safe custody of the minor child with his father. The official respondents neither denied the receipt of email nor admitted the receipt of said email.

7. From the entire facts, it is established that the minor child, who was about 2 years 4 months old at that time and now is about 2 years 6 months old, was picked up from the custody of the mother and immediately child came in possession of his father. So, no further enquiry is required for coming to the conclusion whether child was in custody of the petitioner-mother or not and how the child came in possession of respondent No.4-father. This fact is clearly established that child, 2 ½ years old, was in custody of the petitioner-mother and the child was illegally taken away and immediately thereafter was found in the custody of respondent No.4-father. Since there was no order passed by any court for handing over the custody of the child to the father, so custody of the minor child at this tender age by the father cannot be considered as legal. Respondent No.4 has placed certain documents that he got appointments online for getting the child examined from the doctor from time to time, but generally in normal routine father takes such appointment. In the family, a person who is tech savvy, gets appointment online and makes purchases online and places orders online for delivery of products. It does not mean that mother was not taking care of the child. The father-respondent No.4 has failed to establish that mother is not suitable to take care of the child of about 2 ½ years old. The father, who gets custody of a child of such a tender age, in an unlawful

manner, cannot be considered that it is for the welfare of child that child should remain in his custody. The authorities cited by learned counsel for the respondents No.4 to 7 are of no help to respondent No.4.

7.1 A mother's love is the very definition of sacrifice and dedication. At the age of 2 ½ years, the bondage between child and mother is more than bondage with the father. Although feelings of father towards his child are always strong but those cannot be more than the feelings of mother at this tender age. A child who does not get mother's love may be unaffectionate and uncaring in his life. For becoming healthy citizen, it is necessary that one must have love for family, for humanity and also for his friends which is only possible if child at tender age gets love of mother. At such a tender age, there is no substitute for mother's love. Love of father cannot be better in any manner from mother's love. Welfare of such a child who is less than five years is in the custody of mother, unless there is exceptional circumstance to show otherwise.

8. In the light of above discussion, the present petition is allowed. Respondents No.2 and 3 are directed to ensure that the custody of minor child is handed over by respondent No.4 to the petitioner-mother immediately in the presence of Chief Judicial Magistrate-cum-Secretary, District Legal Services Authority, Ambala, or any officer deputed by the District and Sessions Judge, Ambala, for this purpose. Respondent No.4 shall produce the minor child at 10:00 AM on 30.08.2024 in the ADR Centre, Ambala, for compliance of this order.

9. The petitioner shall allow respondent No.4 to meet the minor child on 1st and 3rd Saturday in the ADR Centre, Ambala from 02:00 PM to 03:00 PM. The aggrieved party, however, is at liberty to approach the Civil Court, if so advised, seeking custody of the minor child. Said court shall proceed to decide the same in accordance with law without being influenced by the observations made hereinabove.

(GURBIR SINGH)
JUDGE

August 27, 2024
sanjeev

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