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IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

106+238

CRWP-11120-2021 (O&M)
Date of decision: 31.08.2024

Sangeeta Kanwar

...Petitioner

Versus

State of Haryana and others

...Respondents

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present:- Mr. Rohit Mittal, Advocate
for the petitioner.

Mr. Arjun Lakhanpal, Addl. A.G., Haryana.

Mr. Deepak Vashishth, Advocate
for respondent No. 5.

MANISHA BATRA, J. (Oral)

1. CRM-W-571-2022

Allowed as prayed for, subject to all just exceptions.

Documents are taken on record as Annexures R-1 and R-2.

2. CRWP-11120-2021 (O&M)

The present petition has been filed by the petitioner under Article 226 of the Constitution of India seeking issuance of writ in the nature of habeas corpus for obtaining the custody of her minor sons, who are in the custody of respondent No. 5.

3. Brief facts of the case relevant for the purpose of disposal of the present petition are that the marriage of the petitioner was solemnized with

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respondent No. 5-Bhagwan Singh on 08.02.2012. Out of the said wedlock, two male children, namely Aman and Anshuman, were born on 22.09.2013 and 04.01.2016, respectively. However, the matrimonial relation of the petitioner with respondent No. 5 witnessed rough weather as she was harassed and maltreated by him. Ultimately, in August, 2019, she was thrown out of the matrimonial house along with minor children after giving beatings to her. The petitioner tried to prevail good sense upon respondent No. 5 but he did not mend his ways. Thereafter, the petitioner started living at her parental house along with her minor children. However, on 25.09.2020, respondent No. 5 came to the parental house of the petitioner and took away both the children forcibly with him and refused to return them back to her.

4. Learned counsel for the petitioner has submitted that respondent No. 5 has forcibly taken the custody of the minor children from the petitioner and the act of respondent No. 5 is not only illegal but also amounts to cruelty to the petitioner as well as children as the children were of tender age and they needed the care and company of their mother for their upbringing. The petitioner had filed a divorce petition against respondent No. 4 before the Family Court at Narnaul. While submitting that respondent No. 5 is treating the minor children with cruelty, it is urged that since the minor children are in illegal custody of respondent No. 5, a writ of habeas corpus be issued for their release. To fortify his argument, learned counsel for the petitioner has relied upon the judgments of this Court rendered in **CRWP-9996-2020**, titled as ***Ramita Rani vs. State of Punjab and others***, decided on 02.03.2021, **CRWP-8319-2020**, titled as ***Mandeep Kaur vs. State of Punjab and others***, decided

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on 10.05.2021 and **CRWP-3013-2020**, titled as ***Neha vs. State of Haryana and others***, decided on 01.06.2020.

5. Status report has been filed by the respondent-State. It is submitted therein and learned State counsel has argued that after issuance of notice of motion in this case, a detailed inquiry was made and it was found that the petitioner was residing at Rewari with one Mahesh Sharma in live-in-relationship. Respondent No. 5 was also joined into inquiry and it was concluded in the inquiry that the petitioner has levelled false allegations against respondent No. 5. The minor children are residing happily with their father i.e. respondent No. 5 and he is bearing all the responsibilities properly, whereas the petitioner is living with aforesaid Mahesh Kumar in live-in-relationship.

6. Reply, on behalf of respondent No. 5, has also been filed, wherein while denying the allegations as levelled by the petitioner, it is argued that since respondent No. 5 is natural father of the children, he cannot be stated to be in illegal custody of the children and the present petition is not maintainable. It is submitted that respondent No. 5 has never caused any cruelty to either of the children and rather, he is properly taking care of them, being their father and is also discharging his responsibilities properly. It is also submitted that even he had never caused any harassment to the petitioner and she had left the company of respondent out of her own free will in order to reside with her friend in live-in-relationship. It is, thus, argued that the petition is liable to be dismissed.

7. I have heard learned counsel for the parties at considerable length and have also gone through the record carefully.

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8. The petitioner was married to respondent No. 5 on 08.02.2012 and out of the wedlock, two male children were born on 22.09.2013 and 04.01.2016, respectively. Since the relationship between the parties became sour, due to the reasons best known to them, they started living separately since August, 2019. As per allegations of the petitioner, initially the children were living with her at her parental house but respondent No. 5 had taken them with him forcibly. The question that arises before this Court for consideration is as to whether the custody of the minor children with respondent No. 5 can be stated to be illegal, warranting issuance of a writ in the nature of habeas corpus directing their release from his custody. In the considered opinion of this Court, the answer to this question should be in the negative. As per Section 6 of the Hindu Minority and Guardianship Act, 1956 (*for short* 'Act, 1956), the custody of a child under the age of 05 years shall ordinarily be with the mother. For ready reference, Section 6 of the Act, 1890 is reproduced below:

“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;**

9. In ***Ramita Rani***'s case (*supra*), the age of the child, whose custody was sought by the petitioner-mother was only 04 years, and it was in that backdrop that it was held that the writ of habeas corpus would be

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maintainable to seek the custody of the minor child and the custody of the child was handed over to the petitioner-mother. Even in ***Mandeep Kaur***'s case (supra) and ***Neha***'s case (supra), the position was similar and the custody of the minor children, who were below the age of 05 years, was handed over to their mothers. However, in the case in hand, the age of child Aman, being born on 22.09.2013, is 10 years, 11 months and 09 as on day, whereas the age of child Anshuman, being born on 04.01.2016, is 08 years, 07 month and 27 as on today, which means that both the children are obviously above the age of 05 years. Hence, as per Section 6 of the Act, 1956, it cannot be stated that the custody of the children shall ordinarily be with the mother i.e. the petitioner. Even the ratio of law as laid down in aforecited judgments would not applicable to the present case. A writ of habeas corpus in child custody matters can be invoked only in those cases where the person having the child is not entitled to his/her legal custody. The child custody matters remedy lies only under Guardianship and Wards Act and it cannot be bypassed by filing a habeas corpus petition unless the corpus of the child is in illegal or unauthorized custody. Reliance in this can be placed upon ***Pavan Kumar Kathuroju v State of Telangana, 2024 SCC OnLine SC 31***. Reliance can also be placed upon the authority cited as ***Nirmala vs. Kulwant Singh and others : 2024 AIR Supreme Court 23445***, wherein Hon'ble Supreme Court, while relying upon ***Yashita Sahu v. State of Rajasthan and others (2020) 3 SCC 67***, has held that the habeas corpus is a prerogative writ which is an extraordinary remedy and 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

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High Court in granting the writ is qualified only in cases where the detention of a minor is by a person who is not entitled to his legal custody and in child custody matters, the writ of habeas corpus is maintainable only where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law. Similar view was expressed by Hon’ble Supreme Court in *Rajeswari Chandrasekar Ganesh v. State of Tamil Nadu and others 2022 SCC OnLine SC 885*.

10. In the present case, the children are residing with their father, who is their natural guardian. Presently, they are above the age of 10 years and 08 years, respectively. Their custody with their father cannot be stated to be illegal at all. Certain claims and counter claims with regard to conduct of the parties have also been made by the parties against each other, which certainly cannot be decided in this petition. Even, during inquiry by the police authorities, it has been found that the petitioner is living in live-in-relationship. However, without casting any aspersion on the moral character of the petitioner and considering the position of law as laid down in aforecited judgments, this Court is of the view that the remedy available to the petitioner for obtaining custody of the children is to file an appropriate petition under the Guardianship and Wards Act, 1890 and not to seek grant of writ of habeas corpus. Accordingly, the present is dismissed, being devoid of any merit.

31.08.2024

Waseem Ansari

(MANISHA BATRA)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes