

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

222

CRWP-9429-2023 (O&M)
Date of decision: 18.10.2024

Rakesh Bansal ...Petitioner

Versus

State of Punjab and others ...Respondents

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present:- Mr. Ashok Goel, Advocate
for the petitioner.

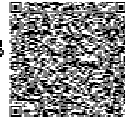
Mr. Satjot Singh, AAG, Punjab.

Mr. Vikram Kumar, Advocate
for respondent Nos. 4 and 5.

MANISHA BATRA, J. (Oral)

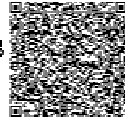
1. The present petition has been filed by the petitioner under Article 226 of the Constitution of India read with Section 482 of Cr.P.C. making prayer for issuance of a writ in the nature of Habeas Corpus directing the officials respondents to protect the life and liberty of the alleged detainees as well as himself at the hands of respondent No. 4 and to get them released from the illegal custody of respondent No. 4.
2. 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 respondent No. 5-Jyoti Bansal (alleged detainee) on 05.09.2016 and one male child namely Tarun @ Polu (alleged detainee) was born out of the wedlock on 28.02.2018. The petitioner previously resided at Sector 32, Chandigarh in his

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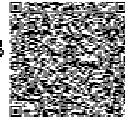
ancestral house and subsequently shifted to Kharar by purchasing an apartment in the name of himself, his wife Jyoti Bansal and his maternal aunt Laxmi Devi. It was alleged that respondent No. 4-Anmol Khan allured wife of the petitioner and under his influence and at his instance, she wanted to leave her matrimonial house. The petitioner came to know about this fact only on 13.08.2023 and resisted this act. On the same day, when he was going for his job, respondent No. 4 stopped him on the way and extended threats to kill him, if he did not give divorce to his wife and also asked him to give her share in the apartment to his wife while calling bad names to her. The wife of the petitioner also left her matrimonial house in the absence of the petitioner on the same day and also took their minor son and her belongings, along with herself. She telephonically informed the petitioner about this fact. His wife in connivance with respondent No. 4 also occupied the aforesaid apartment at Kharar, which was jointly owned by the petitioner and his wife and when the petitioner tried to go there, he was threatened by respondent No. 4, who picked a sword and tried to attack upon him. The petitioner submitted that respondent No. 4 was keeping his wife and minor child in illegal custody. He apprehended safety of his wife and minor son to be at stake and also apprehended danger to his own life and liberty at the hands of respondent No. 4. As such, he made prayer for issuing direction to official respondents for the release of alleged detainees, who are his wife and son, from the illegal custody of respondent No. 4 and for protecting his life and liberty as well. In support of his arguments, learned counsel for the petitioner has relied upon the authority cited as ***Yashita Sahu vs. State of Rajasthan and others : 2020 AIR (Supreme Court) 577***, wherein it was held by Hon'ble Supreme Court that a

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writ of Habeas Corpus is maintainable even if the child is in custody of another parent. He has also relied upon the authority cited as ***Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others : 2019 AIR Supreme Court 2318.***

3. Respondent No. 4 has filed reply taking preliminary objection as to the maintainability of the present petition by submitting that respondent No. 5, wife of the petitioner, and himself had jointly executed an agreement of live-in-relationship on 19.08.2023 and she had been staying in that relationship with him with her free consent and without any pressure. Minor son of respondent No. 5 was also living with them. The petitioner was indulged in the vices of gambling and had wasted all the money earned by him in these vices. Even jewelries of respondent No. 5 had been lost in gambling by him. He used to force respondent No. 5 to develop illicit relations with unknown persons. She did not want to live with the petitioner and wanted to divorce him. She had left her matrimonial house on her own and she along with her son was being taken good care of by respondent No. 4, who was also bearing their expenses. Respondent No. 5 was also working and was deriving monthly income of Rs. 19,000/-. She is natural guardian of her son and, hence, the custody of the latter cannot be stated to be illegal in any manner whatsoever. The pleas as taken in the petition have been controverted and dismissal of the same has been prayed for. In support of his arguments, learned counsel for respondent No. 4 has relied upon judgment of this Court rendered in CRWP-8319-2020, titled as Mandeep Kaur vs. State of Punjab and others, decided on 10.05.2021, besides placing reliance upon ***Anmol***

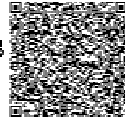


Shivhare (Minor) vs. State of U.P. and others : 2021 (1) ILR (Allahabad) 556.

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

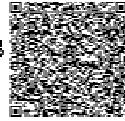
5. This is an admitted position that the petitioner was married to respondent No. 5-Jyoti Bansal on 05.09.2016 and they were blessed with a son on 28.02.2018, namely Tarun @ Polu, who is of the age of 06 years, 07 months and 21 days as on today. The claim of the petitioner is that respondent No. 4-Anmol Khan had allured the wife of the petitioner and under his influence, she had left her matrimonial house on 23.08.2023 along with minor child and started residing with respondent No. 4. He has also alleged that he apprehended threat to his life and liberty from respondent No. 4. He has, thus, prayed for release of his wife and minor son as well as for protecting his life and liberty at the hands of respondent No. 4. However, vide order dated 22.09.2023, passed by this Court, respondent No. 5-Jyoti Bansal had appeared in Court in person along with the minor child and had made a categorical statement that she did not want to stay with the petitioner as she was in relationship with respondent No. 4. Hence, it cannot be stated that respondent No. 5 is in illegal detention of respondent No. 4 in any manner, being a mature woman who, as per her own free will, is residing with him in a live-in-relationship. Now the next question that arises before this Court for consideration is as to whether the custody of the minor child with respondent No. 5, who is his biological mother, can be stated to be illegal, warranting issuance of a writ in the nature of habeas corpus directing his release in favour of the petitioner?

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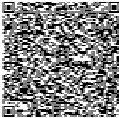
6. No doubt, this Court while dealing with a petition for issuance of a writ of habeas corpus with regard to custody of a minor child may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances. However, such decision must depend on the totality of the facts and circumstances of each case brought before the Court. 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. In 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***'s case (supra) 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 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***.

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7. In the present case, there is no dispute about the fact that respondent No. 5-Jyoti Bansal is the mother of alleged detainee Tarun @ Polu, who was born out of the wedlock of the petitioner and respondent No. 5. Hence, it cannot be stated that his custody with respondent No. 5 is illegal in any manner. There is nothing on record to show that after respondent No. 5 separated from the petitioner, he had filed any appropriate petition before a competent Court of law seeking custody of the minor child and was either given his custody or was given some visitation rights, so that it can be stated that by separating the child from the petitioner or denying his visitation rights, respondent No. 5 has defied the said order. So far as the ratio of law laid down in *Yashita Sahu's* case (supra) and *Tejaswini Gaud's* case (supra) is concerned, the same is not disputed at all. However, the same is not applicable to the peculiar facts and circumstances of the present case. In *Yashita Sahu's* case (supra), the Norfolk Juvenile and Domestic Relations District Court at USA had given the joint, legal custody and shared physical custody of the child to both the parents with each parent having individual parenting time. However, in complete defiance of the said order, the mother had left USA for India and it was in that backdrop that the Hon'ble Supreme Court of India had directed her to reunite the child with the father, apart from giving certain other directions. Similarly, in *Tejaswini Gaud's* case (supra), the custody of the minor child was given to her father as after the death of her mother, she was in the custody of her aunts (*Massis*), who were not found to be the legal guardian of the child. However, in the present case, the child is admittedly in the custody of his mother. The tender age and precarious state of child's health make the vigilance of the mother indispensable to his proper care and every

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instinct of humanity unerringly proclaims that no substitute can supply the place of a mother whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate.

8. Certain allegations and counter allegations with regard to misbehavior and conduct of the parties to *lis* have also been made by them. However, at this stage, there is no need to dilate upon the same and without casting any aspersion on the moral character of the petitioner or respondent No. 5 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 child 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.

18.10.2024

Waseem Ansari

(MANISHA BATRA)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes</i>
<i>Whether reportable</i>	<i>Yes</i>