

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRWP-11206-2023
Reserved on: 21.12.2023
Pronounced on: 04.01.2024
2024: PHHC: 000045

Rajwinder Kaur

. . . . Petitioner

Vs.

State of Punjab and others

. . . . Respondents

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Present: - Mr. Rajwinder Kaur, petitioner-in-person with
Mr. Vipan Kumar Sharma, Advocate, for the petitioner.

Mr. Sarabjit Singh Cheema, AAG, Punjab.

Mr. Raj Kaur-respondent No.7 in person along with
Mr. Harkirat S. Sandhu, Advocate, for respondents No.7 & 8.

DEEPAK GUPTA, J.

Petitioner-Rajwinder Kaur is the mother of alleged detainee child
Tamanpreet Kaur, aged about 8 years.

2. By way of this writ petition filed under Article 226 of the
Constitution of India, petitioner prays for issuance of a writ in the nature of
Habeas Corpus to direct the official respondents to produce the detainee
Tamanpreet Kaur, daughter of the petitioner, who is stated to be in unlawful
and illegal custody of private respondents No.4 to 8; and further to issue
direction to respondent No.4 to allow the petitioner to meet the detainee in
the house of said respondent No.4 and further to issue any such writ or
direction, as deemed fit by this Court.

3.1 According to the petitioner, after her marriage with Bulla son of
Fakir Chand, a daughter named Tamanpreet Kaur was born to her on

11.11.2015. Due to matrimonial differences, they mutually agreed to separate. By way of a panchayati divorce, petitioner separated from the husband. The custody of the detenue child was handed over to her. Thereafter, the petitioner remarried respondent No.4-Nishan Singh on 06.10.2016 and out of this wedlock, another daughter namely Diljot Kaur was born in 2017. Respondents No.5 to 8 are the parents and brothers of respondent No.4-Nishan Singh i.e., the second husband of the petitioner.

3.2 It is alleged that after the birth of Diljot Kaur in 2017, the behavior of respondents No.4 to 8 changed towards the petitioner and the minor girl born from the first marriage and that they threw the petitioner out of the matrimonial home and illegally detained the minor girl namely Tamanpreet Kaur. Petitioner approached the police, who called the private respondents in the police station and it was agreed by the private respondents that they will take care of the minor child Tamanpreet Kaur and that petitioner will have visitation rights to meet the girl. For the future of the child, petitioner agreed. However, after some time, petitioner was not even allowed to talk or meet with any of the children. It is also alleged that petitioner found that detenue Tamanpreet Kaur was being treated by the private respondents as a servant and their behavior towards her was cruel, as they were not even providing basic needs to the detenue. Petitioner then approached the police officials by filing a representation dated 27.10.2023 to Sr. Superintendent of Police, Tarn Taran, copy of which is Annexure P2. Petitioner contends that being the natural mother, she is the lawful guardian of minor Tamanpreet Kaur, who is being illegally detained by the private respondents.

3.3 With these submissions, present petition has been filed for issuance of the writ in the nature of habeas corpus.

4. On 29.11.2023, this Court, after noticing that petitioner was the natural mother of minor child Tamanpreet Kaur and that private respondents No.4 to 8 had nothing to do with the legal guardianship of the detainee, issued notice of motion and directed the official respondents to produce the minor detainee- Tamanpreet Kaur before the Court.

5. On 11.12.2023, the detainee child was produced, who appeared along with respondent No.7 i.e., mother of the second husband of the petitioner. This Court passed the following order on that day: -

“Power of Attorney has been filed on behalf of respondent No.7, who is stated to be grandmother of detainee. Said respondent No.7 is present in person along with detainee child.

After hearing both the sides, it emerges that petitioner is the natural mother of the detainee. Respondent No.4 - Nishan Singh, is her second husband. Respondent No.7 is the grandmother of detainee, but not the real grandmother as she is the mother of second husband of the petitioner, whereas the detainee is the daughter of petitioner from her first husband. Thus, it emerges that the private respondents have no real relationship whatsoever with the detainee.

In the afore-said circumstances, custody of detainee child is directed to be restored to the petitioner.

The official respondents No.1 to 3 shall ensure that no hindrance is caused in taking over the custody of the minor child- detainee by the petitioner from private respondents. In case, any such obstacle is created, necessary action as per law shall be taken.

Disposed of.

At this stage, after passing of the afore-said order, as the custody of the child- detainee was being handed over to the petitioner, the child- detainee Tamanpreet Kaur, stated to be aged 08 years, started crying loudly stating that she will not accompany the petitioner.

In these circumstances, the Court asked Shri Randhir Singh, learned Additional Advocate General, Haryana, present in the Court to assist this Court.

After some time, Shri Randhir Singh, learned Addl. AG, Haryana, after consulting with Investigating Officer, who is present in Court, informed that when the child- detenue was quite small, the petitioner had left her. Though the child- detenue was later on taken by the petitioner but she used to maltreat detenue and it is for that reason that child- detenue is not ready to accompany the petitioner.

In the afore-said circumstances, let the respondent State file a detailed reply on 13.12.2023.

In the meantime, the custody of the child- detenue is directed to be stayed with the private respondents. However, request of learned counsel for the petitioner is accepted to the extent that the petitioner shall be allowed to meet the child- detenue, though in the presence of police officials.”

6. Pursuant to the aforesaid order, reply has been filed on behalf of respondents No.1 to 3, by way of affidavit of Sh. Harinder Singh, PPS, Deputy Superintendent of Police, Crime against Women and Children, District Tarn Taran, as per which it was found that petitioner had earlier moved a complaint dated 26.10.2023 to the Sr. Superintendent of Police, Tarn Taran. Necessary enquiry was conducted by respondent No.3 i.e. SHO, Police Station, Women Cell, Tarn Taran, who recorded statement of both the parties. Petitioner did not make any statement and prayed to treat her complaint as her statement. In that complaint, it was alleged by the petitioner that her minor daughter was being illegally detained, being deprived from school education and was being kept as a slave. The inquiry officer recorded the statement of minor child i.e., alleged detenue Tamanpreet Kaur, who disclosed that some time ago, her mother i.e., petitioner took her and her sister Diljot Kaur from Gurdwara Bauli Sahib, Goindwal to Moga on

motorcycle along with a person namely Deep, where they resided for 8 days. Petitioner did not take care of them nor gave any food to eat. Both the sisters were locked in separate rooms, where they cried. The said minor Tamanpreet Kaur further told that she did not wish to go with her mother. She also told that she was studying in First Standard/Class at Gobind Puri Boarding Modern School, Sri Goindwal Sahib. In their separate statements, respondents No. 4 & 7 i.e., second husband and mother-in-law of the petitioner recorded that educational expenses and the maintenance charges of the alleged detainee were being borne by them. They also leveled various allegations against the petitioner. The respectable persons of the locality produced their duly signed panchayatnama supporting the version of respondents No.4 & 7. As per the reply of official respondents, after conducting enquiry, it emerged that alleged detainee Tamanpreet Kaur was never kidnapped by the private respondents at any point of time; that she was residing with private respondents at their residence with her own sweet will and without any kind of pressure, threat or coercion; and that they were taking care of her in every manners.

7. Respondent No.7 filed a separate reply supporting the version of the official respondents and further submitted that they are emotionally attached to both the children and are ready to make any kind of unconditional undertaking to the Court to assure the safety and happiness of the children and to provide all the facilities to them as per their capacity including their proper education.

8. This Court after hearing counsel for both the sides, called the detainee child Tamanpreet Kaur in Chamber on 21.12.2023 and interacted

with her. The child stated in expressed words that she did not want to accompany her mother-petitioner and that she wanted to go with respondent No.7.

9.1 It is contended by ld. counsel for the petitioner that being the real mother, petitioner is the lawful guardian of the minor child Tamanpreet Kaur, whereas respondents No.4 to 8 have no relationship with the child, inasmuch as the child was born from the first wedlock of the petitioner, whereas respondent No.4 is the second husband and other private respondents are the brothers/parents of respondent No.4.

9.2 By referring to a decision of Hon'ble Supreme Court in *Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others*, 2019(3) RCR (Civil) 104, it is contended that for restoration of the custody of the minor from the person, who is not his legal or natural guardian, the Writ Court has the jurisdiction. It is further contented that detention of a minor by a person, who is not entitled to his legal custody is to be treated as equivalent to the illegal detention for purpose of granting writ directing custody of the minor child.

9.3 Further reliance is placed upon a decision of this Court in *Rashneet Kaur Vs. State of Haryana and others*, 2022(3) RCR (Civil) 192, wherein the Coordinate Bench of this Court held that maternal care and affection is indispensable for the healthy growth of a child. Directions were given to the grand-parents of the child to handover the custody of the child to the mother.

10.1 On the other hand, it is urged by ld. counsel for the private respondents that though said respondents are not the lawful guardians of the minor detenue Tamanpreet Kaur, having regard to the provisions of Hindu Minority and Guardianships Act, 1956 [for short 'the Act'], but it is the private respondents, in whose care and custody, the minor has been brought up since her childhood. Ld. counsel argued that it is the welfare of the child, which is of paramount consideration and that the wishes of the child cannot be ignored.

10.2 Ld. counsel has drawn attention towards the reply filed by the official respondents, clearly indicating as to how the detenue child was treated by the petitioner, when she took her away and further drawn attention towards the fact that in the open Court itself, the detenue started crying loudly stating that she did not want to accompany the petitioner and in these circumstances, this Court had to change its order as passed on 11.12.2023.

10.3 By referring to *Nil Ratan Kundu and another Vs. Abhijit Kundu, 2008(3) RCR (Civil) 936*, Ld. counsel contends further that in such like circumstances, the Court is required to exercise '*Parens patriae jurisdiction*' and is neither bound by the Statutes nor by the strict rules of evidence or procedure nor by precedents. By keeping in view the paramount consideration of the welfare and wellbeing of the child, court is required to give due weight to the child's ordinarily comfort, contentment, health, education, intellectual development and favourable surroundings besides moral and ethical values. It is that when minor is old enough to form an intelligent preference or judgment, the Court must consider such preference

as well, though the final decision rests with the court as to what is conducive to the welfare of the minor.

11. Rebutting the aforesaid contention, it is urged by ld. counsel for the petitioner that minor child Tamanpreet Kaur being just 8 years of age is not in a position to understand her welfare at this young age. It is further urged that as of now, the minor is under the influence of the private respondents and that with the passage of time, as the minor starts living with the petitioner, said minor will develop bonding with her mother-petitioner and that welfare of the child will be best served by handing over the custody of the child to the petitioner.

12. I have considered submission of both the sides.

13.1 In *Tejaswini Gaud and others (supra)*, as relied upon by ld. counsel for the petitioner, the child in question named Shikha was born on 14.08.2017. During the pregnancy period, mother was detected with cancer. When the said mother was undergoing treatment, child Shikha was with her father till November 2017. As father was suddenly hospitalized and was diagnosed with some serious ailment, so while undergoing treatment, the custody of the child was given to sister of the mother of the child i.e., *Mausi*. Unfortunately, mother expired in October 2018. Child continued to be in custody of her *Mausi* and her husband. After recovering from his ailment, father sought custody of the child in November 2018 and filed a complaint to the police. He then filed writ petition before the High Court seeking custody of the minor child. At that time, the child was 1 year and 3 months old. The High Court allowed the petition and directed the custody of the child to be

handed over to the father, though *Mausi* of the child and her husband were granted access to the child.

13.2 *Mausi* along with her husband filed appeal before Hon'ble Supreme Court. First objection raised was that writ of habeas corpus cannot be issued, when efficacious alternate remedy is available to respondents No.1 i.e., husband under the Act and that it is not a fit case for issuance of a writ of habeas corpus, as it is issued only in case of illegal detention. It was also contended that custody of the child is to be decided not only on consideration of the legal rights of the parties, but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.

13.3 On the other hand, contention was raised on behalf of the respondent-father of the child that in view of Section 6 of the Hindu Minority & Guardianship Act, father has the paramount right to the custody of the children and he cannot be deprived of the custody of the minor child unless it is shown that he is unfit to be her guardian.

13.4 Hon'ble Supreme Court after referring to the catena of precedents, observed 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.”

13.5 Hon'ble Supreme Court further held as under: -

“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.”

14. As is clear from the above legal position, though in child custody matters, the writ of habeas corpus is maintainable, where it is proved that detention of the minor child by a parent or others was illegal and without any authority of law but at the same time, what is important is the welfare of the child. It has also been observed by Hon’ble Supreme Court that ordinary remedy lies only under the Hindu Minority and Guardianships Act, 1956 or

the Guardian and Wards Act, 1890, as the case may be. It has also been held that there are significant differences between the inquiry under the Guardian and Wards Act, 1890 and the exercise of powers by a Writ Court, which is summary in nature. Where Court is of the view that detailed enquiry is required, the Court may decline to exercise the extra ordinary jurisdiction and direct the parties to approach the Court and that it is only in exceptional cases that rights of the parties to the custody of the minor child will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

15. In the case of *Tejaswini Gaud and others (supra)*, it was found by Hon'ble Supreme Court that child being a minor, just aged one and a half year, cannot express its intelligent preferences and it is in these facts and circumstances of the case that father being the natural guardian was held to be justified in invoking the extra ordinary remedy seeking custody of the child under Article 226 of the Constitution of India.

16. The facts of the present case are quite distinguishable. No doubt that in this case also, the private respondents are not the lawful guardians of the minor Tamanpreet Kaur, whereas petitioner being the real mother is the natural guardian, but at the same time, court cannot ignore the fact that minor Tamanpreet Kaur is now aged 8 years, who is strongly attached to respondent No.7 and has flatly refused to accompany her mother-petitioner to the extent that when this Court directed handing over the custody of the child to petitioner-mother, the minor started crying loudly in the Court and later on also expressed before this Court her clear intention that she wanted to accompany respondent No.7 and not the mother.

17.1 In the case of *Nil Ratan Kundu and another (supra)*, it has been held by Hon'ble Supreme Court that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child. Hon'ble Supreme Court also took note of Section 17 of the Guardian and Wards Act, 1890, which provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. Further reference was made to Section 13 of Hindu Minority and Guardianships Act, 1956, as per which in the matter of appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

17.2 Hon'ble Supreme Court further referred to *Saraswathibai Shripad v. Shripad Vasanji*, AIR 1941 Bom 103, wherein the High Court of Bombay held that it is not the welfare of the father nor the welfare of the mother that is the paramount consideration to the Court and rather, it is the welfare of the minor and the minor alone, which is the paramount consideration.

17.3 Hon'ble Supreme Court in *Nil Ratan Kundu and another (supra)* also held that the word 'welfare' used in Section 13 of the 1956 Act must be interpreted liberally and that said word 'Welfare' must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being.

17.4 The Hon'ble Supreme Court then concluded as under: -

*“In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. 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. In selecting a guardian, the Court is exercising **parens patriae jurisdiction** and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.”*

18. In the facts and circumstances of the present case, by applying the legal position as explained in ***Nil Ratan Kundu and another (Supra)***, this Court finds that minor Tamanpreet Kaur, being aged above 8 years, is old enough to form an intelligent preference as to with whom she wants to stay. This Court cannot ignore the wishes as expressed by the child. As the report filed by the official respondents would reveal that the minor is studying in Ist Standard/Class at Gobind Puri Boarding Modern School, Sri Goindwal Sahib and all the educational and maintenance expenses are being borne by respondents No.4 and 7. The report further reveals that petitioner had once taken away the minor child along with a person namely Deep, where the minor was confined in a room and was not even provided with proper food

etc. The impact of the conduct of the petitioner on the psyche of the child as of now is that she is not ready to accompany her in any situation.

19. Considering all the aforesaid facts and circumstances, this Court is not inclined to issue writ of Habeas Corpus as sought by the petitioner, so as to handover the custody of the minor child Tamanpreet Kaur to the petitioner and so, declines the writ. At the same time, considering the fact that petitioner is the real mother of the minor and that with the passage of time, minor may develop some bonding for the mother, it is directed that petitioner will be allowed by the private respondents to meet the minor child daily during any time between 10:00 AM to 06:00 PM. It is however made clear that by way of this order none of the private respondents are being declared as the lawful guardian(s) of the minor Tamanpreet Kaur. It is for the time being that the custody of the minor child has been directed to be retained with the said private respondents. Petitioner will be at liberty to approach the competent forum under appropriate provisions of law for availing appropriate remedies available to her, where the rights of the parties can be determined on the basis of evidence.

Present petition is accordingly dismissed.

04.01.2024
Vivek

(DEEPAK GUPTA)
JUDGE

1. Whether speaking/reasoned?	Yes/No
2. Whether reportable?	Yes/No