



229 IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRWP-5135-2024(O&M)
Date of Decision: 25.02.2025

Rajinder Kaur alias Simranjit Kaur

...Petitioner

Versus

State of Punjab and others

...Respondents

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Vikas Gupta, Advocate
for the petitioner.

Mr. Nitesh Sharma, DAG Punjab.

Ms. Annie, Advocate
for respondent No. 4.

Harpreet Singh Brar, J. (Oral)

1. The present criminal writ petition has been filed under Article 226 of the Constitution of India seeking issuance of a writ in the nature of Habeas Corpus, for release of detainee- Arman Singh, 4.5 years old son of the petitioner, who is in illegal custody of respondent No.4.

2. Learned counsel for the petitioner, *inter alia*, contends that the petitioner was married to respondent No.4 on 22.09.2016 and the detainee- Arman Singh was born to them on 17.09.2019. The petitioner was shunned out of the matrimonial home on 29.11.2021 along with her minor daughter, and the detainee was deceitfully snatched from her. Since the detainee is of tender age of 4.5 years, the petitioner is his natural guardian and as such, respondent No.4 is wrongfully keeping him in his custody. Reliance in this regard is placed on



the judgments rendered by the Hon'ble Supreme Court in *Yashita Sahu vs. State of Rajasthan and others (2020) 3 SCC 67* and *Roxann Sharma vs. Arun Sharma 2015(2) R.C.R.(Civil) 93*.

3. *Per contra*, learned counsel for respondent No. 4 submits that he is the biological father of detainee and as such, he can also be the natural guardian of minor child.

4. Having heard learned counsel for the parties and after perusing the record, it transpires that the matter was referred to mediation vide order dated 04.11.2024, however as per mediation report dated 03.12.2024, no settlement could be arrived at.

5. This Court has noticed an increasing tendency amongst disgruntled parents to move a writ petition in the nature of habeas corpus, in order to settle custody of their children. A two Judge bench of the Hon'ble Supreme Court in *Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari 2019 AIR SC 2318*, speaking through Justice R. Banumathi, has opined as follows:

“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.”(emphasis added)

6. It is trite law that welfare of the minor would reign supreme while deciding upon the matter of his custody. The Hon'ble Supreme Court in ***Rosy Jacob vs. Jacob A. Chakramakkal (1973) 1 SCC 840*** and ***Mausami Moitra Ganguli vs. Jayant Ganguli 2008 (4) R.C.R. (Civil) 551*** and this Court in ***Saurabh Sharma vs. Nishi 2023(4) R.C.R.(Civil) 586*** has consistently held that the welfare and interest of the child are of paramount consideration with respect to custody of a child. Section 6 of Hindu Maintenance and Guardianship Act, 1956 (hereinafter 'HMGA') categorically states that the custody of minor child upto the age of 5 years shall ordinarily be with the mother. In doing so, the legislature has recognised the indispensable and inimitable role of a mother in the upbringing of a young child. A mother's love for her children is selfless and the lap of the mother is God's own cradle for them. Therefore, children of tender years ought not to be deprived of said love and affection. A two Judge bench of the Hon'ble Supreme Court in ***Rajeshwari Chandrasekar Ganesh vs. State of Tamil Nadu and others 2022***



SCC OnLine SC 885, speaking through Justice J.B. Pardiwala, the following was observed:

*91. Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. **In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute.** The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. **The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced.** In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as parens patriae, has in promoting the best interests of the child.*

92. The general principle governing the award of custody of a minor is succinctly stated in the following words in Halsbury's Laws of England, Fourth Edition, Vol. 24, Article 511 at page 217 :

"... Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father." (emphasis added)

7. As such, the parties would be at liberty to settle the matter of custody of the detainees by pursuing the appropriate remedy under the Guardians and Wards Act, 1890 Hindu Minority and Guardianship Act (HMGA) or any other relevant statute. However, since the detainee is scheduled to appear for exams for Class L.K.G. from 24.02.2025 to 15.03.2025, this Court directs respondent No. 4 to produce the detainee- Arman Singh before learned Chief Judicial Magistrate, Tarn Taran, on 16.03.2025 i.e. upon conclusion of exams,

who will hand over be detenue’s custody to the petitioner.

8. Accordingly, the present petition is allowed. Pending miscellaneous application(s), if any, shall also stand disposed of.

25.02.2025
Ajay Goswami

[HARPREET SINGH BRAR]
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>