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

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CRWP-8029-2024 (O&M)
Date of decision: 08.05.2025

Silky Sharma

...Petitioner

Versus

State of Punjab and others

...Respondents

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present:- Mr. Rajiv Joshi, Advocate
for the petitioner.

Ms. Sakshi Bakshi, AAG, Punjab.

Mr. Vipin Mahajan, Advocate
for respondents No. 5 to 7.

MANISHA BATRA, J. (Oral)

1. 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 son namely Narotam Sharma, who is alleged to be in illegal custody of respondents No. 5 to 7.
2. Brief facts of the case as set up by the petitioner are that the marriage of the petitioner was solemnized with respondent No. 5-Kamal Kishore on 12.03.2020 at Jalandhar. Out of the said wedlock, a male child was born on 27.01.2022, who is the alleged detainee. It is alleged that shortly after the marriage, her in-laws had started to harass her. Her husband-respondent No. 5 was a habitual drunkard and used to give beatings to her. The matrimonial relation of the petitioner with respondent No. 5 witnessed rough weather as she was harassed and maltreated by him. Ultimately, she was thrown out of the matrimonial house on 29.06.2024 by snatching the minor child from her custody.

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She requested to the private respondents to give her the custody of the child but they did not do so. The petitioner tried to prevail good sense upon the private respondents but they did not mend their ways. The matter was also reported to the police but no action was taken.

3. Learned counsel for the petitioner has submitted that respondent No. 5 has forcibly taken the custody of the minor child 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 child as he was of tender age and needed the care and company of his mother for his upbringing. While submitting that respondent No. 4 is mistreating the minor child and not maintaining him properly, it is urged that a writ of habeas corpus be issued for release of the alleged detainee. To fortify his argument, learned counsel for the petitioner has relied upon the judgments of this Court rendered in ***Kamaldeep Kaur vs. State of Haryana and others : 2024 SCC Online P&H 8923***, ***Rashneet Kaur vs. State of Haryana and others : 2022 SCC Online P&H 4267***, ***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 : 2021 SCC Online P&H 1060***.

4. Status report has been filed by the respondent-State. It is submitted therein and learned Assistant Advocate General, Punjab has submitted that an application was moved by the petitioner on 31.07.2024 before the Commissioner of Police, Jalandhar against the private respondents, on which, detailed inquiry is being conducted.

5. Reply, on behalf of respondents No. 5 to 7, has also been filed, wherein while denying the allegations as levelled by the petitioner, it is submitted that since respondent No. 5 is natural father of the child, he cannot be

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stated to be in illegal custody of the child and the present petition is not maintainable. It is submitted that respondent No. 5 has never mistreated the child and rather, he is properly taking care of him, being his 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 as she was having extra marital affair. Respondent No. 5 has already filed a divorce petition under Section 13 of the Hindu Marriage Act, which is pending. It is, thus, argued that the petition is liable to be dismissed. Learned counsel for respondent No. 4 has relied upon the authority of Hon'ble Supreme Court cited as ***Roxann Sharma vs. Arun Sharma : 2015 (2) RCR (Civil) 93*** to contend that the use of word 'ordinarily' in Section 6 of the Act, 1956 cannot be over-emphasized as it ordains a presumption, albeit a rebuttable one in favour of the mother. He has also relied upon a judgment rendered by the High Court of Allahabad in ***Amit vs. Nirmal Sahu : 2009 (5) RCR (Civil) 258***, wherein it was held that in Section 6 of the Hindu Minority and Guardianship Act, 1956 (*for short* 'Act, 1956), the word 'ordinarily' does not mean 'necessarily'. He has also relied upon the judgments rendered by this Court in ***Poonam Kalsi vs. State of Punjab and others : 2022 (3) RCR (Civil) 262*** and ***Manisha Gupta vs. State of Punjab and others : 2023 (3) RCR (Civil) 46***, wherein it has been held that the custody of the minor child with the father as a natural guardian cannot be said to be illegal or unlawful.

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

7. The petitioner was married to respondent No. 5 on 12.03.2020 and out of the wedlock, one male child (alleged detenue) was born on 27.01.2022.

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Since the relationship between the parties became sour, due to the reasons best known to them, they started living separately. As per allegations of the petitioner, respondent No. 5 has forcibly taken the custody of the minor child and is not properly maintaining him. The question that arises before this Court for consideration is as to whether the custody of the minor child with respondent No. 5 can be stated to be illegal, warranting issuance of a writ in the nature of habeas corpus directing his release from his custody?

8. At the outset, it may be mentioned that as per Section 6 of the 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. On a bare reading of the above mentioned provision, it is clear that the father of a minor is his natural guardian and it is only on his demise that the mother becomes the natural guardian.

10. The petitioner has invoked jurisdiction of this Court for issuance of a writ in the nature of habeas corpus. Such writ is primarily issued calling upon a person who had detained another to produce the detained individual in order to let the Court to know on what ground a detainee has been confined and set him at liberty if there is no legal justification for such detention. When once the Court comes to the conclusion that the detention is unlawful, the confinement cannot

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be permitted and consequently direction has to be issued to set the detinue at liberty. Reliance in this context can be placed upon a Full Bench judgment of the High Court of Madras reported as ***Kuppammal and others vs. The Dist. Collector and Dist. Magistrate, Thiruvallur District, Thiruvallur and Others***, decided on 13.02.2001 in ***HCP Nos.11,41,66, 76 and 103 of 2000***, wherein it was observed that the confinement of a person is either unlawful or considered to be unlawful in cases where the detention is not authorised or under the shelter of any law or the detention law under which the detention ordered is void, where the authority who had ordered detention is not the one specified or authorised in that behalf, where though the specified authority ordering detention is competent and also acts under a valid law yet if such authority had failed to follow the procedure prescribed in that behalf and in some cases even when the authority had followed the procedure prescribed if action of said authority is vitiated by one or more of the defects or infirmity recognised in this respect by principles of administrative law such as abuse of power, mala fides, perversity, non-application of mind, arbitrariness or extraneous consideration or a fortiori reason or like.

11. Reference can further be made to ***Tejaswini Gaud vs. Shekhar Jagdish Prasad Tiwari : (2019) 7 SCC 42***, wherein it was observed by Hon'ble Supreme Court that habeas corpus proceeding is not to justify or examine the legality of the custody. Habeas corpus proceeding 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

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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 is 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. With regard to child custody matters, the following observations were further made by the Hon'ble Apex Court :

“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.”

12. In the present case, the age of the child, whose custody is sought by the petitioner/mother, is below 05 years. So far as the custody of the child below the age of 05 years is concerned, the mother *per se* is considered to be the best

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suited to take care of such child during his tender age. However, at the same time, the custody of a minor child with either of the natural guardians cannot said to be illegal. With regard to rival claims of the parties that only one of them can look after the best interest of the minor, can be ascertained by the appropriate Court if a petition seeking permanent custody of the child is filed before it as such Court would be seized of the entire material to be produced by the parties in support of the competing claims and would obviously be more equipped to determine the welfare of the child by giving complete opportunity to the contesting parties. 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 considered opinion that no case has been made out to issue any writ of habeas corpus directing the private respondents to hand over the custody of the minor child to the petitioner. In view thereof, finding no merit in the petition, the same is dismissed.

08.05.2025

Waseem Ansari

(MANISHA BATRA)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes