

**AFR**

**Court No. - 85**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 632 of 2021

**Petitioner :-** Sushil Kumar Tiwari And 4 Others

**Respondent :-** State Of U.P. And 5 Others

**Counsel for Petitioner :-** Maqsood Ahmad Beg, Naiyar  
Masroof Siddiqui

**Counsel for Respondent :-** G.A.

**Hon'ble Dr. Yogendra Kumar Srivastava, J.**

1. Heard Sri Maqsood Ahmad Beg, learned counsel for the petitioners and Sri Vinod Kant, learned Additional Advocate General assisted by Sri Arvind Kumar, learned Additional Government Advocate appearing for the State respondents.

2. The petitioner no. 1 asserting himself to be the father of the petitioner no. 2-corpus, has filed the present habeas corpus petition alleging that the corpus is under illegal custody of his mother-respondent no. 4.

3. Pleadings in the petition are to the effect that the marriage of petitioner no. 1 was solemnized with respondent no. 4 on 09.06.2010 and the petitioner no. 2 was born on 23.08.2015 and that the petitioner no. 1 and the respondent no. 4 are living separately for the past several years. It is averred that the petitioner no. 1 has filed a divorce petition and the respondent no. 4 has also instituted certain legal proceedings against the petitioner no. 1. An application stated to have been filed before the local police authorities some time in the year 2020, has been appended along with the petition wherein it is stated that the petitioner-corpus (stated to be of age about five years at that point of time) had been taken away by his mother-respondent no. 4, about three years earlier. Based on the aforestated facts, the present petition seeking a writ of habeas corpus has been filed.

4. Sri Vinod Kant, learned Additional Advocate General appearing along with Sri Arvind Kumar, learned Additional Government Advocate for the State respondents, submits that instructions have been received to the effect that criminal proceedings, pursuant to a complaint case instituted by the respondent no. 4, are pending, which fact has not clearly been placed on record. It is further submitted that as per the admitted facts, the petitioner no.2-corporus being in the custody of his biological mother since the time when he was an infant of about two years of age, the same cannot be held to amount to illegal detention, and accordingly the present petition seeking a writ of habeas corpus would not be entertainable. Reliance has been placed upon recent decisions of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others<sup>1</sup>**, **Master Manan @ Arush vs. State of U.P. and 8 others<sup>2</sup>**, **Krishnakant Pandey (Corpus) And 2 Others vs. State of U.P. And 3 Others<sup>3</sup>**, **Master Tarun @ Akchhat Kumar And Another vs. State of U.P. And 3 Others<sup>4</sup>**, **Priyanshu (Minor) vs. State of U.P. And 5 Others<sup>5</sup>**, **Vahin Saxena (Minor Corpus) and another Vs. State of U.P. and others<sup>6</sup>** and **Reshu @ Nitya and others Vs. State of U.P. and others<sup>7</sup>**

5. In order to appreciate the rival contentions, the ambit and scope of exercise of powers for grant of a writ of habeas corpus in such matters would be required to be adverted to.

6. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad Ikram Hussain vs.**

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1 2021 (2) ADJ 320

2 2021 (5) ADJ 317

3 2021 2 AWC 1053 ALL

4 2021 (6) ADJ 23

5 2021 (7) ADJ 438

6 2021 SCC OnLine All 593

7 Habeas Corpus Writ Petition No. 9 of 2020, decided on 22.10.2021

**State of U.P. and others<sup>8</sup> and Kanu Sanyal vs. District Magistrate Darjeeling<sup>9</sup>.**

7. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Sayed Saleemuddin vs. Dr. Rukhsana and others<sup>10</sup>**, and it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:-

"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court..."

8. Taking a similar view in the case of **Nithya Anand Raghvan v State (NCT of Delhi) and another<sup>11</sup>**, it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. The relevant observations made in the judgement are as follows:-

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in *Kanu Sanyal v. District Magistrate, Darjeeling*, (1973) 2 SCC 674, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in

8 AIR 1964 SC 1625

9 (1973) 2 SCC 674

10 (2001) 5 SCC 247

11 (2017) 8 SCC 454

which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in *Sayed Saleemuddin v. Rukhsana*, (2001) 5 SCC 247, has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In *Elizabeth Dinshaw v. Arvand M. Dinshaw*, (1987) 1 SCC 42, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of *parens patriae* jurisdiction, as the minor is within the jurisdiction of the Court [see *Paul Mohinder Gahun Vs. State (NCT of Delhi)*, 2004 SCC OnLine Del 699, relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

9. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**<sup>12</sup>, and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

"14. 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.

x x x

19. 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.

20. 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

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12 (2019) 7 SCC 42

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."

**10.** The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant would become entitled to the writ as of right.

**11.** In an application seeking a writ of habeas corpus for custody of minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether his welfare requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody he presently is.

**12.** Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

**13.** The role of the High Court in examining cases of custody of a minor, in a petition for a writ of habeas corpus, would have to be on the touchstone of the principle of *parens patriae*

*jurisdiction* and the paramount consideration would be the welfare of the child. In such cases the matter would have to be decided not solely by reference to the legal rights of the parties but on the predominant criterion of what would best serve the interest and welfare of the minor.

**14.** In a given case, while dealing with a petition for issuance of a writ of habeas corpus concerning a minor child, directions may be issued for return of the child or the Court may decline to change the custody of the child, keeping in view all the attending facts and circumstances and taking into view the totality of the facts and circumstances of the case brought before the Court; the welfare of the child being the paramount consideration.

**15.** In the facts of the present case it is undisputed that the petitioner no. 2, presently of age about six years, is stated to be under the exclusive care and custody of his mother-respondent no.4, since the time when he was an infant of about two years of age. It is also admitted position that the petitioner no. 1 and the respondent no. 4 are living separately for quite some time and also certain other legal cases are pending between the parties.

**16.** The subject matter relating to custody of children during the pendency of the proceedings under the Hindu Marriage Act, 1955<sup>13</sup> is governed in terms of the provisions contained under Section 26 thereof. The aforesaid section applies to "any proceeding" under the HMA and it gives power to the court to make provisions in regard to: (i) custody, (ii) maintenance, and (iii) education of minor children. For this purpose the court may make such provisions in the decree as it may deem just and proper and it may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the

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<sup>13</sup> HMA

decree.

**17.** The provisions under Section 26 of the HMA were considered in **Gaurav Nagpal v Sumedha Nagpal**<sup>14</sup>, and it was held as follows:-

"Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible."

**18.** In a petition for a writ of habeas corpus concerning a minor child, the Court, in a given case, may direct to change the custody of the child or decline the same keeping in view the attending facts and circumstances. For the said purpose it would be required to examine whether the custody of the minor with the private respondent, who is named in the petition, is lawful or unlawful. In the present case, the private respondent is none other than the biological mother of the minor child. This being the fact, it may be presumed that the custody of the child with his mother is not unlawful. It would only be in an exceptional situation that the custody of a minor may be directed to be taken away from the mother for being given to any other person-including father of the child, in exercise of writ jurisdiction. This would be so also for the reason that the other parent, in the present case, the father, can take resort to the substantive statutory remedy in respect of his claim regarding custody of the child.

**19.** In a child custody matter, a writ of habeas corpus would be entertainable where it is established that the detention of the minor child by the parent or others is illegal and without authority of law. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a view that

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<sup>14</sup> (2009) 1 SCC 42



a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum. The remedy ordinarily in such matters would lie under the Hindu Minority and Guardianship Act, 1956<sup>15</sup> or the Guardians and Wards Act, 1890<sup>16</sup>, as the case may be.

**20.** Counsel for the petitioners has not disputed the aforesaid legal and factual position and the only grievance, which is sought to be raised, is with regard to a claim for visitation rights on behalf of the father.

**21.** The contention which has been sought to be raised by the counsel for the petitioner with regard to the father's claim for custody and/or visitation rights, are matters which are to be agitated in appropriate proceedings.

**22.** Having regard to the aforesaid, this Court is not inclined to exercise its extraordinary jurisdiction to entertain the present petition seeking a writ of habeas corpus.

**23.** The petition stands dismissed accordingly.

**Order Date :- 6.12.2021**  
Pratima

(Dr.Y.K.Srivastava,J.)

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<sup>15</sup> HMGA

<sup>16</sup> GWA