2026:AHC:79268

AFR

HIGH COURT OF JUDICATURE AT ALLAHABAD

HABEAS CORPUS WRIT PETITION No. - 387 of 2026

Smt Anjali Devi And 2 Other

.....Petitioner(s)

Versus

State Of U.P. And 3 Other

.....Respondent(s)

Counsel for Petitioner(s)	:	Pradeep Kumar Singh, Rahul Shukla
Counsel for Respondent(s)	:	Amit Kumar Chaudhary, G.A.

Court No. - 89

HON'BLE ANIL KUMAR-X, J.

1. Heard learned counsel for the petitioners and Sri R.K.Singh, learned AGA for the State as also perused the record.

2. The present habeas corpus writ petition has been filed seeking issuance of a writ, order or direction in the nature of habeas corpus commanding respondents to produce petitioner no. 1 (corpus) before this Court and to set her at liberty.

3. Learned counsel for the petitioner submitted that the marriage of petitioner no. 1 was solemnized with respondent no. 4 on 07.02.2010 in accordance with Hindu rites and rituals. Out of the said wedlock, petitioner no. 2, Devansh, aged about 14 years, and petitioner no. 3, Awani, aged about 10 years, were born. It is further submitted that relations between petitioner no. 1 and respondent no. 4 became strained, and petitioner no. 1 was driven out of her matrimonial home. Thereafter, on 04.06.2022, respondent no. 4 allegedly came to the matrimonial home of petitioner no. 1 and forcibly took away both the minors (corpus) at gunpoint. Since then, petitioner nos. 2 and 3 are stated to be in the illegal custody of respondent no. 4. Learned counsel for the petitioner further submitted that several applications were filed before different forums seeking custody of the minors; however, no effective action has been taken by the authorities. It is also submitted that a habeas corpus petition for seeking custody of a minor child, even from the other parent, is maintainable.

4. In support of his submissions, learned counsel has placed reliance upon the judgment of this Court in **Smt. Rinku Ram @ Rinku Devi and another vs. State of U.P. and 7 others**. Drawing attention to paragraph 16 of the

said judgment, it is submitted that the Division Bench has clearly held that where a child is in the custody of another parent, the Court can invoke its extraordinary jurisdiction in the best interest of the child. Accordingly, it is prayed that a direction be issued to respondent no. 4 to hand over custody of the corpus to the petitioner.

5. Learned AGA and learned counsel for the respondent submitted that both minors have been residing with respondent no. 4 since the year 2022, and the petitioner has not availed any remedy under the Guardian and Wards Act till date. It is contended that the appropriate remedy for seeking custody of the minors is to approach the competent Family Court by filing a petition under the Guardian and Wards Act. It is further submitted that custody disputes between parents ordinarily cannot be adjudicated in a writ petition under Article 226 of the Constitution of India. The judgment in **Smt. Rinku Ram (supra)**, relied upon by the petitioner, is distinguishable on facts. In that case, the custody of the minor was forcibly taken in violation of an order passed by the Child Welfare Committee, which had directed that custody be handed over to the mother. No such circumstance exists in the present case. Therefore, the present petition, seeking custody of minors from the father at the instance of the mother, is not maintainable.

6. Heard learned counsel for the parties and perused the record. Considering the submissions advanced, it is evident that the Division Bench of this Court in **Smt. Rinku Ram (supra)**, in paragraph 16, observed that the extraordinary writ jurisdiction may be invoked where the welfare of the child so demands. It was observed in Paragraph-16:-

"*16. In our opinion, the view taken by the learned Single Judge is contrary to the decision of the Hon'ble Supreme Court in Yashita Sahu Vs. State of Rajasthan and others: (2020) 3 SCC 67, wherein, after placing reliance on judgments in Elizabeth Dinshaw Vs. Arvand M. Dinshaw and others: (1987) 1 SCC 42, Nithya Anand Raghavan Vs. State (NCT of Delhi) and another: (2017) 8 SCC 454 and Lahari Sakhamuri Vs. Sobhan Kodali: (2019) 7 SCC 311, it has been held that it is too late in the day to urge that a writ of habeas is not maintainable if the child is in the custody of another parent and the court can invoke its extraordinary writ jurisdiction for the best interest of the child.*"

7. However, the said observation was made in the peculiar facts of that case, where the child had been forcibly taken in violation of an order passed by the Child Welfare Committee. It is well settled that ordinarily a writ of habeas corpus for custody of a minor child is not maintainable when the custody is sought by one parent from the other parent. In this regard,

reference may be made to the judgment of the Hon'ble Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**, wherein the Hon'ble Supreme Court has held in paragraphs 18 and 19 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 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.*

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."

8. The crux of the above observation is very clear that habeas corpus in child custody matters is an extraordinary remedy, used only when the custody of a child is illegal or without authority of law. It is not meant to decide detailed custody rights but to ensure the welfare of the child through a summary process. Normally, such disputes should be resolved under the Guardians and Wards Act or the Hindu Minority and Guardianship Act. The High Court exercises this power only in exceptional cases and may direct parties to approach the civil court if a detailed inquiry is required.

9. A question arises whether a bald allegation by one parent against the other parent that the minors were forcibly taken away would be sufficient to invoke the jurisdiction of a writ of habeas corpus. The basic requirement for invoking the writ of habeas corpus is that the corpus must be shown to be in illegal detention. Therefore, a further question arises as to whether a minor residing in the custody of one parent, against the wishes or consent of the other parent, would by itself give rise to a presumption that such custody is illegal.

10. In order to answer the aforesaid issue, it is necessary to examine the ingredients of Section 361 of the Indian Penal Code, which defines kidnapping from lawful guardianship in the following terms:-

"*Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, out of the keeping of the lawful guardian of such minor, without the consent of such guardian, is said to kidnap such minor from lawful guardianship*."

11. The emphasis of the provision is on taking a minor "out of the keeping of the lawful guardian". The said expression clearly signifies that the offence would be attracted only when the minor is removed from the custody of a person who is legally recognized as the guardian, and the person taking the minor is not himself a lawful guardian. Where the person taking the minor is himself a lawful guardian, the essential ingredient of the offence fails.

12. In this context, reference may be made to Section 6 of the Hindu Minority and Guardianship Act, 1956, which reads as below :

"*6. Natural guardians of a Hindu minor – The natural guardians 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;"

13. It is evident that statute itself recognizes the father as a natural guardian. Further, the definition of the term "Guardian" as defined under Section 4(2) of the Guardians and Wards Act, 1890, also requires consideration which reads thus :

"*4.(2) "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property.*"

14. Bare perusal of Section 6 of the Hindu Minority and Guardianship Act, 1956 and Section 4 (2) of the Guardians and Wards Act, 1890 defines a guardian as a person having the care of the person of a minor or of his property or of both. The combined reading of these provisions makes it clear that both parents have a legally recognized status in relation to the minor, and disputes regarding custody are essentially civil disputes to be adjudicated by the competent court.

15. In view of the aforesaid legal position, mere allegation that the father has forcibly taken the minors from the custody of the mother, even if accepted on its face value, would not lead to the conclusion that the minors are in illegal detention. The father, being a natural guardian, cannot be said to have taken the minors out of lawful guardianship so as to attract any criminality. Such forcibly taking away will constitute an offence only if it has been done in violation of a legal order or legal prohibition. It was explicitly explained in **Shri Ashok Kumar Seth vs. State of Orissa 2002 SCC OnLine Ori 138** , particularly paragraph 8 of the said decision, which runs as below :

"*8. It is thus clearly readable from the position of law as noted and discussed above that unless there is legal prohibition by order of a Court of competent jurisdiction, the father cannot be booked for taking away his minor child from the custody of his wife because he is the natural guardian and therefore, the offence under Section 363, I.P.C. cannot be attracted against him for taking the child from the custody of the mother…..*"

16. In the above decision the Orissa High Court equally held that the father cannot be booked for taking away his minor child from the custody of his wife because he is the natural guardian, and therefore, the offence punishable under Section 363 of the IPC cannot be attracted against him.

17. Consequently, such allegation by itself would not justify invocation of the extraordinary writ jurisdiction of habeas corpus. It is well settled that habeas corpus is an extraordinary remedy, to be exercised sparingly and only in cases where the custody is shown to be wholly illegal or without authority of law, as held by the Hon'ble Supreme Court in **Tejaswini Gaud (Supra)**. The observation in judgment of **Smt. Rinku Ram (supra)** were made in the same context and is not applicable in every case of custodial dispute between the parents.

18. Applying the aforesaid principles to the facts of the present case, it is evident that the minors, who are above five years of age, have been residing with the father since the year 2022. No exceptional or extraordinary circumstance has been brought on record to indicate that their custody is illegal or detrimental so as to warrant interference by this Court in exercise

of its writ jurisdiction. The remedy of habeas corpus cannot be permitted to be used as a substitute for the remedies available under the Hindu Minority and Guardianship Act, 1956 and the Guardians and Wards Act, 1890, where a detailed adjudication on the issue of custody, guided by the welfare of the child, can appropriately be undertaken.

19. Accordingly, this Court is of the considered opinion that the present petition is not maintainable and no interference is called for.

20. Accordingly, this petition is dismissed.

April 10, 2026
Ujjawal

(Anil Kumar-X,J.)