

**Court No. - 89**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 1224 of 2019

**Petitioner :-** Abhinay Jain

**Respondent :-** State Of U.P. And 2 Others

**Counsel for Petitioner :-** Udai Narain Khare, Gopal Khare

**Counsel for Respondent :-** G.A., Ved Prakash Ojha

**Hon'ble Anil Kumar Ojha, J.**

Heard learned counsel for the petitioner, learned counsel for the respondent Nos. 2 and 3, learned A.G.A. for the State and perused the record.

Learned counsel for the petitioner submitted that the petitioner is the father of corpus i.e. Respondent No. 3, Adarsh Jain who is residing with his mother i.e. Respondent No. 2. Respondent No. 2 has changed the name of child and his father's name in official records whereas admittedly Respondent No. 3, Adarsh Jain was born out of wedlock of the petitioner, Abhinay Jain and Respondent No. 2, Smt. Megha Jain. Further submitted that visitation rights should be granted in favour of petitioner.

Per-contra, learned counsel for the Respondent Nos. 2 and 3 vehemently opposed the prayer, however, admitted the fact that names of Respondent No. 3, Adarsh Jain and his father, Abhinav Jain have been changed inadvertently in some official records which Respondent No. 2 will get it corrected.

Learned counsel for the Respondent Nos. 2 and 3 drew attention of the Court towards page no. 11 of the Counter-Affidavit wherein parties have specifically agreed that Respondent No. 3, Adarsh Jain will reside with her mother, Smt. Megha Jain.

Perusal of the record reveals that parties filed divorce petition on the basis of mutual consent before the competent court, Principal Judge, Family Court, Lalitpur. In para 8, following has been stated:

**8.** यह कि हम याचीगण के नुत्फे से जो पुत्र आदर्श उत्पन्न हुआ वह याची सं०-2 के पास है और उसी के पास रहेगा। याची सं०-2 ही उसका लालन पालन करेगी एवं अपने नाबालिग पुत्र आदर्श के भरण पोषण हेतु किसी भी प्रकार का कोई प्रकरण न्यायालय में दायर नहीं कर सकेगी। याची सं०-2 को जो एक मुस्त धनराशि याची सं०-1 से प्राप्त हो रही है उसमें नाबालिग पुत्र के भरण पोषण की राशि भी शामिल है इस कारण यदि भविष्य में यदि याची सं०-2 याची सं०-1 से नाबालिग पुत्र हेतु किसी भी प्रकार कोई भरण पोषण धनराशि मांगी जाती है तो वह इस समझौते के आधार पर स्वतः निरस्त समझी जावेगी।

Thus from the perusal of the aforesaid extract of the Divorce Petition filed on the basis of mutual consent, it is clear that petitioner No. 3, Adarsh Jain will reside with her mother, Smt. Megha Jain so the filing of this Habeas Corpus Writ Petition for releasing of the Respondent No. 3 from the illegal detention of Respondent No. 2 lacks merit.

During course of arguments, learned counsel for the petitioner submitted that

visitation rights be provided to the petitioner. Learned counsel for the petitioner relied upon the judgement of hon'ble Apex Court passed in case of Yashita Sahu v. State of Rajasthan & Ors. in Criminal Appeal No. 127 of 2020 (Special Leave Petition (CRL) No. 7390 of 2019) wherein in paragraph nos. 9, 19 and 21 Hon'ble Apex Court has held as follows:

*"9. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw & Ors., Nithya Anand Raghavan v. State (NCT of Delhi) & Anr. and Lahari Sakhamuri v. Sobhan Kodali among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.*

*19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. **Even if the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.***

*21. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks and holidays. In cases like the present one, where the parents are in two different continents, effort should be made to give maximum visitation rights to the parent who is denied custody."*

In view of the Law laid down by Hon'ble Apex Court and considering the entire facts and circumstances of the case, particularly the fact that Respondent No. 3, Adarsh Jain was born out of wedlock of petitioner, Abhinay Jain and Respondent No. 2, Smt. Megha Jain; petitioner being father of the corpus Adarsh Jain, is entitled for visitation rights.

Keeping in view the above facts and circumstances of the case, I deem it appropriate to give visitation rights to the petitioner as follows:

(1) Petitioner is granted visitation rights to meet his son i.e. Respondent no. 3 once in every month, in the first Sunday of beginning month for two hours from 11:00AM to 01:00PM at the residence of Respondent No. 2.

(2) Petitioner is also granted visitation rights to meet his son i.e. Respondent No.

3 on the festival of Holi and Diwali, just the preceding day of the festival for two hours at the residence of Respondent No. 2.

(3) Petitioner and Respondent No. 2 shall not create any disturbance in any manner at the residence of Respondent No. 2.

With the above directions, this Habeas Corpus Writ Petition is disposed of.

**Order Date :-** 7.4.2022/A. Mandhani