

ORDER

The present writ petition is filed in the form of Habeas Corpus by the father of respondent No.4 seeking direction to the respondents for production of respondent No.4-Amaya.G.Jain before this Court and hand-over her custody to the petitioner in the interest of justice.

I. FACTS OF THE CASE:

2. It is the case of the petitioner that the petitioner and the third respondent's marriage was solemnized on 30.06.2009 and respondent No.4-baby girl was born out of the wedlock. The said child was born premature and was under treatment in various Hospitals. It is further stated that respondent No.3 had taken away the baby girl from the petitioner's custody on 05.10.2021 and since then the petitioner is not allowed to talk with the baby girl and respondent No.3 is not even showing her, despite the petitioner's repeated request. It is further stated that respondent No.3 used to frequently run away from her matrimonial home saying that she was forcibly married to the petitioner and was filing false and frivolous cases against the petitioner and his family members.

Therefore, the petitioner had left with no other option other than to file divorce petition before the family court in M.C.No.5149/2016. During the pendency of the trial, the petitioner and his family members were eagerly trying to settle the issues with respondent No.3 and as a result of the same, the divorce petition came to be withdrawn and from there onwards, the petitioner and respondent No.3 started living together in Bengaluru. But once again, respondent No.3 has left her matrimonial home along with her minor child, who is under treatment, putting child's life in danger. Thus, it is stated that the petitioner is filing Restitution Conjugal Rights Petition under Section 9 of the Hindu Marriage Act, 1955 against respondent No.3 before the family court. Therefore, the petitioner has filed the present writ petition for the relief sought for.

3. Respondent No.3 being natural mother of respondent No.4-minor child filed objections to the present writ petition and specifically contended that the present writ petition in the form of Habeas Corpus filed against her is not maintainable and the same is liable to be dismissed. It is further contended that the matrimonial case in M.C.No.5149/2016 filed seeking divorce came to be

withdrawn by the petitioner. Thereafter at the intervention of senior members of both families, the petitioner and respondent No.3 were re-united and had led matrimonial life. They were blessed with a female child i.e., respondent No.4. Respondent No.3 submits that the said minor child is with her and the minor child is hale and healthy. She is growing very well and getting regular treatment in Kathouli, which is one hour journey to reach Delhi. It is further contended that as per Annexure-R1, the medical prescription, the child is in safe custody of respondent No.3-natural mother of the minor child. This aspect of the matter is also well within the knowledge of the petitioner and his family members and despite the same, the petitioner willfully filed the present writ petition only to harass respondent No.3. Therefore, sought for dismissal of the writ petition.

**II. ARGUMENTS OF THE LEARNED
COUNSEL FOR THE PARTIES:**

4. We have heard Sri. Anish Jose Antony, learned counsel for the petitioner through virtual mode and Sri. Thejesh.P, learned High Court Government Pleader for Respondent Nos.1 and 2,

Sri. Fayaz Sab, learned counsel for respondent Nos.3 and 4 through physical mode.

5. Sri. Anish Jose Antony, learned counsel for the petitioner reiterating the grounds urged in the present petition contended that respondent No.3-wife of the petitioner has taken away the baby girl from the custody of petitioner illegally and she is not allowing him to talk with his daughter and not even showing her to him despite repeated request. Thereby, the writ petition in the form of Habeas Corpus is maintainable in view of the dictum of the Hon'ble Supreme Court in the case of **Tejaswini Gaud and Others Vs. Shekhar Jagdish Prasad Tewari and Others** reported in **(2019) 7 SCC 42**. It is further contended that the father being a natural guardian of a minor child has a preferential right to claim custody of his son in view of the dictum of the Hon'ble Rajasthan High Court in the case of **Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148**.

6. Learned counsel would further contend that in view of the provisions of the Juvenile Justice (Care & Protection) Act, 2015, the best interest of the child is of paramount consideration and

should involve fulfillment of his/her basic rights and needs—socially, physically and emotionally for overall development of the child. Further, learned counsel for the petitioner-husband contended that merely the statement made by the 3rd respondent-wife on oath that the 4th respondent-child is in her safe custody since she is a natural mother of Respondent No.4, cannot be believed and the petitioner is not aware as to whether the child is alive or dead. Therefore, he sought to allow the present writ petition.

7. Per contra, Sri. Fayaz Sab, learned counsel for respondent Nos.3 and 4 reiterating the contentions urged in the statement of objections, contended that there is no dispute between the petitioner and respondent No.3 that they are husband and wife and out of their wedlock, respondent No.4 was born. He further contended that though the husband/petitioner filed M.C.No.5149/2016 seeking divorce from respondent No.3, subsequently the said petition came to be dismissed as withdrawn. The minor child is residing with her natural mother-respondent No.3 and the present writ petition in the form of Habeas Corpus is not maintainable. Learned counsel further contended that the petitioner

is misusing the provisions of Article 226 of the Constitution of India by filing the present writ petition in the form of Habeas Corpus. If at all the petitioner is really willing the custody of his daughter, he could have approached the family court seeking custody of the minor child under the provisions of the Guardians and Wards Act, 1890 or under the provisions of the Hindu Minority and Guardianship Act, 1956. Instead of doing so, the petitioner is misusing the provisions of Habeas Corpus and thereby unnecessarily troubling the minor child and respondent No.3. The minor child is hale and healthy and she is in safe custody of respondent No.3, who is her natural mother. The petitioner knowing fully well all these aspects, filed the present writ petition only to harass his wife and minor child. Therefore, he sought to dismiss the writ petition.

8. The learned HCGP appearing for respondent Nos.1 and 2, contended that in view of the relationship of the parties, the child is with her mother-respondent No.3, writ petition in the form of Habeas Corpus is not maintainable and sought to dismiss the writ petition.

III. THE POINT FOR DETERMINATION:

9. In view of the above rival contentions urged by the parties, the only point that would arise for our consideration is:

"Whether the petitioner can maintain the writ petition in the form of Habeas Corpus seeking direction to Respondent Nos.1 and 2 for production of Respondent No.4-minor child from the Respondent No.3 his wife, before this Court?"

10. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties and objections filed by respondent Nos.3 and 4. Perused the material on record carefully.

IV. CONSIDERATION:

11. It is undisputed fact that the petitioner and respondent No.3 are husband and wife and their marriage was solemnized on 30.06.2009. It is also not in dispute that respondent No.4 was born from their wedlock as per Annexure-B on 23.11.2019. As per the pleadings of the writ petition at para-8, the minor child-respondent No.4 is with respondent No.3 who is none other than her natural

mother. It is also not in dispute that the petition filed by the petitioner seeking divorce from respondent No.3 in M.C.No.5419/2016 before the family court came to be dismissed as withdrawn. It is specifically contended by the respondent No.3 in the objections that the petitioner and respondent No.3 were re-united and thereafter respondent No.4 was born to them. Respondent No.4 is hale and healthy and taking regular treatment and is in safe custody of respondent No.3, who is her natural mother. The petitioner knowing fully well the said fact, has filed the present writ petition. Though learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in the case of ***Tejaswini Gaud and Others Vs. Shekhar Jagdish Prasad Tewari and Others*** reported in **(2019) 7 SCC 42**, it was the case, where the question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined 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. Admittedly in the present case, it is not in dispute that respondent No.4 is residing with respondent No.3 and it is not the case of the petitioner that respondent No.3 illegally detained respondent No.4 without any authority of law. It is the fact that the petitioner and respondent No.3 both are husband and wife and their child is in safe custody of respondent No.3. If any grievance against respondent No.3 with regard to the custody rights as alleged in the present writ petition, in all fairness, the petitioner could have filed petition seeking custody of the child before the family court. Thereby, he is misusing the provisions of Article 226 of the Constitution of India, by filing the writ petition in the form of Habeas Corpus.

12. The judgment of the Hon'ble Supreme Court in the case of **Tejaswini Gaud** (supra) relied upon by the learned counsel for the petitioner, it was a case where 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. Admittedly, the petitioner has not produced any material documents to show that respondent

No.3 has detained respondent No.4 illegally in violation of any court order, nor he has filed any petition seeking custody of respondent No.4 for custody rights. In the absence of any material documents produced, the present writ petition filed in the form of Habeas Corpus is nothing but abusing the process of law and also with a malafied intention to harass respondent No.3 and her daughter-Respondent No.4, which is impermissible. Therefore, judgment in the case of **Tejaswini Gaud** (supra) has no application to the facts and circumstances of the present case.

13. One more judgment relied upon by the learned counsel for the petitioner is **Goverdhan Lal's case** (supra), where it is observed that the father being a natural guardian of a minor child has a preferential right to claim custody of his son. If that is so, the petitioner could approach the appropriate court for custody of his child. There is no dispute with regard to the law laid down, but the fact remains that the petitioner should have approached proper Court without misusing the process of the Court by filing the writ petition in the form of Habeas Corpus, which is nothing, but abusing

the process of the law and daring ride on the court, which is impermissible.

14. Learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in the case of ***Nithya Anand Raghavan -vs- State (NCT of Delhi) and another*** reported in **(2017) 8 SCC 454**. It was a case wherein the High Court inter alia directed the mother to produce her daughter Nethra and to comply with the order dated 8.1.2016 passed by the High Court of Justice, Family Division, Principal Registry, United Kingdom (UK), within three weeks from the date of the impugned order therein or in the alternative to hand over the custody of the daughter to the father within three weeks from the date of the order. The said order was violated by the mother. In those circumstances, the Hon'ble Supreme Court, set aside the orders passed by the High Court. Admittedly in the present case, there is no such direction to the mother by any of the Courts, either foreign Court or any Court in India directing her to hand over the child to the petitioner, who is the father. In the absence of any orders passed by any of the Courts, the custody of the minor daughter

with the mother, cannot be held to be unlawful. If the petitioner is really aggrieved, he has to invoke the provisions of Guardians and Wards Act, for the proper relief. In the present case, the petitioner is misusing the powers of this Court by filing the present writ petition under Article 226 of the Constitution of India seeking writ of habeas corpus. Therefore, the judgment relied upon by the learned counsel for the petitioner has no application to the facts and circumstances of the present case.

15. The judgment in the case of ***Nithya Anand Raghavan*** stated supra has also been considered by the Hon'ble Supreme Court in the latest judgment in the case of ***Yashita Sahu -vs- State of Rajasthan (AIR 2020 SC 577)***, wherein the Hon'ble Supreme Court held that the parent who is denied custody of the child is entitled to sufficient visitation rights for social, physical and psychological contact of child with any of the parent.

16. It is well settled law that presenting a petition for Habeas Corpus is for the person for whose release the petition is filed, must be in "detention". He must be under detention by the authorities or by any private individual. It is the "detention" legal

or illegal which gives the cause of action for maintaining the writ of Habeas Corpus. If the averments in the writ petition read as a whole do not disclose the detention, in other words, there is no allegation of illegal detention, the writ petition is liable to be rejected in limine. The principles of Order VII Rule 11 of CPC equally apply to a writ of Habeas Corpus. However, in the case of minor girls, or young women who are kidnapped by persons in the business of trafficking in women for the purpose of forcing them to prostitution, may be the parents would not be in a position to specifically give the details of the persons who have detained them or they may not be knowing the reason for missing of their wards. In such cases, on that ground the relief cannot be denied. It would be an exception to the aforesaid rule. The material on record clearly depicts that in the course of investigation, it is found that respondent No.4 is in lawful custody of her mother, natural guardian-Respondent No.3.

17. In view of the above, the act of the petitioner is nothing but an attempt to overreach the Court and is nothing, but an attempt to mislead the police. It is our experience that this type of

frivolous writ petitions in the recent days is on the rise. Because it is a Habeas Corpus writ petition and the personal liberty of a citizen is involved, this Court being the Constitutional Court has to reach out to the rescue of those innocent people. We are giving top priority to those cases. We are putting pressure on the Police to investigate and secure and release these persons. But we find from our experience that in most of the cases, there is no cause much less sufficient cause for the parties to approach this Court. Litigants and members of the Bar appear to have not understood the importance and seriousness of this extraordinary writ of Habeas Corpus. It is high time that we have to send a clear message that the Courts will not encourage such litigants and tolerate such abuse of the judicial process.

18. In the present case, admittedly the petitioner and respondent No.3 are husband and wife and the writ petition filed by the petitioner seeking divorce from his wife came to be dismissed as withdrawn. It is also not in dispute that out of their wedlock, baby girl was born and the said minor child is naturally with the custody of respondent No.3-Mother. As stated in the objections filed

by respondent Nos.3 and 4, knowing fully well that the minor child is in safe custody of her mother, the petitioner filed the present writ petition in the form of Habeas Corpus for the relief sought for unnecessarily wasting public precious judicial time and unnecessarily misusing police force, which is meant to protect the people. Thereby, the petitioner instead of approaching proper and appropriate court for custody of his minor child, has misused the State machinery as well as approached this Court knowing fully well that his daughter is safe, hale and healthy with his wife. It is nothing but the abuse of the judicial process. Thereby, the petitioner is not entitled for the relief sought in the petition and the writ petition in form of Habeas Corpus is liable to be dismissed with costs.

19. Sri Anish Jose Antony, learned counsel for the petitioner-husband contended that merely the statement made by the 3rd respondent - wife on oath that the 4th respondent - child is in her safe custody since she is a natural mother of Respondent No.4, cannot be believed and the petitioner is not aware as to whether the child is alive or dead. The said contention cannot be

accepted because the petitioner has not filed any rejoinder to the present writ petition. Moreover, the very writ petition filed for writ of Habeas Corpus, is not maintainable as already stated by us.

20. Our view is fortified for the dictum of the Hon'ble Supreme Court in the case of **KISHORE SAMRITE vs. STATE OF UTTAR PRADESH AND OTHERS** reported in **MANU/SC/0892/2012 : (2013)2 SCC 398**, Para-32, 32.1 to 32.8 held as under:

"32. The cases of abuse of process of court and such allied matters have been arising before the courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

32.1. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of

facts and came to the courts with "unclean hands". Courts have held that such litigants are neither entitled to be heard on the merits of the case nor are entitled to any relief.

32.2. The people, who approach the court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where then litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

32.3. The obligation to approach the court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have overshadowed the old ethos of Irrigative values for small gains.

32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

32.6. *The court must ensure that its process is not abused and in order to prevent abuse of process of court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the court would be duty-bound to impose heavy costs.*

32.7. *Whether a public interest is involved, the court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.*

32.8. *The court, especially the Supreme Court, has to maintain the strictest vigilance over the abuse of process of court and ordinarily meddlesome bystanders should not be granted "visa". May societal pollutants create new problems of unredressed grievances and the court should endure to take cases where the justice of the list well justifies it.*

21. The Hon'ble Supreme Court in the case of **P.S.R. Sadhanantham v. Arunachalam**, reported in **MANU/SC/0083/1980 : (1980) 3 SCC 141** at Para-15 and 16 has held as under:

"15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:

"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance amount these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured to be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement the most basic "human-right" – of a system which purports to guarantee legal rights."

16. We are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bonafide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action, pro bono proceedings, are. We cannot dwell in the home of processual obsolescence when our Constitution highlights social justice as a goal. We hold that there is no merit in the contentions of the writ petitioner and dismiss the petition."

22. It is well settled law that with the passage of time, it has been realized that people used to feel proud to tell the truth in the courts, irrespective of the consequences, but that practice no longer proves true, in all cases. The court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost, but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the court with clean hands. It is the bounden duty of the court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the court must ensure that there is no

wrongful, unauthorized or unjust gain to anyone as a result of abuse of process of court. One way to curb this tendency is to impose realistic or punitive costs.

V. CONCLUSION:

23. For the reasons stated above, we answer the above point in negative holding that the petitioner-father of the minor child has not made out any ground to allow the writ petition and has abused the judicial process. Thereby, writ petition is liable to be dismissed imposing cost of Rs.50,000/- (Rupees Fifty thousand only) on the petitioner payable to the Police Welfare Fund, within one month from the date of receipt of the order.

VI. RESULT:

24. In view of the above, we pass the following:

ORDER

- (i) The writ petition is dismissed as devoid of any merits.
- (ii) The petitioner shall pay the cost of Rs.50,000/- (Rupees Fifty thousand only) to the Police Welfare Fund, within one month from the date of receipt of copy of this order.

- (iii) The Registrar Judicial is directed to send the copy of this order to the Jurisdictional Deputy Commissioner to recover the said amount from the petitioner as arrears of land revenue, in case, petitioner fail to deposit the same within the time stipulated.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

SMJ