



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

D.B. Habeas Corpus Petition No. 376/2023



Respondent(s)

For Petitioner(s) : Mr. Rajesh Panwar, Sr. Adv. assisted
by Mr. Ayush Gehlot.
For Respondent(s) : Mr. M.A. Siddiqui, GA cum AAG,
assisted by Mr. Rohit Mutha.
Mr. Dharendra Singh, Sr. Adv. assisted
by Ms. Priyanka Borana.

**HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI
HON'BLE MR. JUSTICE RAJENDRA PRAKASH SONI**

Judgment

Reportable

12/02/2024

PER DR. PUSHPENDRA SINGH BHATI, J :

1. This present Habeas Corpus Writ Petition has been preferred for claiming custody of a minor son. However, learned counsel of



the petitioner restricts his prayer as to maintainability of the present petition.

2. Brief facts of the case are that the petitioner and the daughter (Smt. Priya Jain) of the respondents no.4 & 7 solemnized marriage on 25.04.2016 as per Hindu customs and rituals, and out of the said wedlock, a child (son) was born on 06.12.2019. Thereafter, due to some matrimonial discord, the petitioner and his wife started living separately from each other from the year 2020, whereafter, in the year 2023, the proceedings relating to matrimonial dispute were initiated and during the course of such proceedings, the petitioner's wife (Smt. Priya Jain) expired due to road accident.

3. Mr. Rajesh Panwar, learned Senior Counsel assisted by Mr. Ayush Gehlot appearing on behalf of the petitioner submits that the son of the petitioner is in custody of his maternal grandparents as well as maternal uncle (*Mama*) and the son is a minor aged 3 years and 10 months, and therefore, the petitioner, being father, is the legal and natural guardian of the said child.

3.1. Learned Senior Counsel further submits that despite all sincere efforts, the petitioner could not get custody of his minor son, and thus, he has an apprehension that his son is being illegally detained by the private respondents, and therefore, the present petition is maintainable.

3.2. Learned Senior Counsel also submits that the petitioner's minor son cannot be detained illegally by the private respondents, and also if there is an illegal detention, then the habeas corpus is



maintainable before this Hon'ble Court, as per the law settled by the Hon'ble Apex Court.

3.3. In support of such submissions, learned counsel relied upon the judgments rendered by the Hon'ble Apex Court in the cases of **Rajeswari Chandrasekar Ganesh Vs. The State of Tamil Nadu & Ors. (Writ Petition (Criminal) No. 402/2021, decided on 14.07.2022); Tejaswini Gaud & Ors. Vs Shekhar Jagdish Prasad Tewari & Ors (2019) 7 SCC 42; Yashita Sahu Vs. State of Rajasthan & Ors. (Criminal Appeal No. 127/2020, decided on 20.01.2020).**

Relevant portion of the judgment rendered in **Rajeswari Chandrasekar Ganesh (Supra)** is reproduced as hereunder:

"91. Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the



question of the interest which the State, as parens patriae, has in promoting the best interests of the child.”

Relevant portion of the judgment rendered in **Tejaswini Gaud & Ors. (Supra)** is reproduced as hereunder:

“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 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 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.

21. In the present case, the appellants are the sisters and brother of the mother Zelum who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India."

4. On the other hand, Mr. M.A. Siddiqui, learned GA cum AAG, assisted by Mr. Rohit Mutha appearing on behalf of the respondent-State; Mr. Dharendra Singh, learned Senior Counsel assisted by Ms. Priyanka Borana appearing on behalf of the private respondents, opposed the aforesaid submissions made on behalf of the petitioner, while submitting that the present habeas corpus petition is not maintainable because of availability of an alternative remedy, and there is also a provision for adjudicating the claim pertaining to child custody, thus, the present petition is liable to be dismissed on this count alone.

4.1. In furtherance, learned Senior Counsel for the private respondents submits that the when there is proper and



appropriate remedy available under the Hindu Minority & Guardianship Act, 1956, then the Hon'ble Court, in the ordinary course, may not exercise its jurisdiction under Article 226 of the Constitution of India, especially while adjudicating the habeas corpus petition.

4.2. Learned Senior Counsel further submits that the child is living with his maternal grandfather and maternal uncle (*Mama*) after the sad and sudden demise of his mother, and is currently admitted in Class LKG in a School, further, the private respondents are capable to maintain the child and ensure his academic and welfare prospects, and therefore, no case of illegal detention of the child is at all made out, and in absence of the same, the present petition is liable to be dismissed.

5. Heard learned counsel of the parties as well as perused the record of the case alongwith the judgments cited at the Bar.

6. This Court at the outset observes that the present petition has been heard and is being decided on the question of maintainability only. In the present case, the petitioner-father seeks custody of his minor son aged about almost 4 years, after the sad and sudden demise of his wife, from the maternal grandfather as well as maternal uncle (*Mama*).

7. This Court further observes that in the case of the ***Tejaswini Gaud & Ors (Supra)***, the Hon'ble Apex Court held that the writ of habeas corpus lies only in case, where the ordinary remedy provided by the law is either not available or is ineffective. The Hon'ble Apex Court in the said case further held that "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."

7.1. This Court also observes that in the case of **Rajeswari Chandrasekar Ganesh (Supra)**, the Hon'ble Apex Court followed the judgment rendered in **Tejaswini Gaud & Ors (Supra)** and held that "The question of maintainability of a Habeas Corpus petition under Article 226 of the Constitution of India for the custody of a minor was examined by this Court in *Tejaswini Gaud and others v. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42*, and it was held that the petition would be maintainable where the 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 the ordinary remedy provided by the law is either unavailable or ineffective....."

7.2. This Court further observes that only in certain exceptional circumstances, the habeas corpus petition is held to be maintainable; in a case where illegal detention of a minor child is substantially proved and established, then such case falls under exceptional category. In the present case, after the matrimonial dispute, the petitioner's wife started living separately, whereafter due to the road accident, she expired, and the minor child since then is living with his maternal grandfather and maternal uncle (*Mama*). Therefore, it cannot be said that the minor child is under



illegal detention so as to warrant exercise of jurisdiction under Article 226 of the Constitution of India.

8. This Court also observes the writ of habeas corpus is not maintainable unless it falls under the exceptional category, as above, otherwise, any person can approach the Court without exhausting the alternative remedy so available to him/her.

9. This Court further observes that ordinarily, in relation to a claim for custody of a child, there is effective remedy provided under the Statute, in which the detailed inquiry is to be conducted and final conclusion is to be arrived at while keeping into consideration, in particular, the welfare of a minor child. In the present case, the minor child is living with his maternal grandfather and maternal uncle (*Mama*) and the petitioner is father of the child, and therefore, a detailed inquiry is required in the present case, and then the remedy, which would subserve the paramount cause of welfare of the child, requires to be resorted to, but looking into the overall facts and circumstances, this Court finds that it is not a fit case, in the form of habeas corpus petition, for arriving at a just conclusion as to the welfare and other prospects of the child.

10. This Court also observes that the issue raised in a habeas corpus petition will always be subject to factual matrix of that particular case, and more particularly, in the cases pertaining to custody of a child, the Court will have to take into due consideration, recent changes, if any, in regard to the custody, which could determine the paramount welfare of the child in such cases. Any immediate and recent change in custody of a child,



largely impacting his/her welfare, would certainly be a good cause for making effective adjudication by the Court.

11. This Court is conscious of the fact that the powers under Article 226 of the Constitution of India, while maintaining habeas corpus petition, are wide, and Chapter-III of the Constitution of India, particularly, Article 21 has to be construed while giving widest amplitude to the adjudication.

12. The factual matrix of the present case, in no way, reflects that the petitioner-father is being deprived the custody of his minor son recently, rather it is a matter of record that the child after his birth was with his parents for a short period, and after the petitioner's wife (mother) started living separately from him, the child was under the custody of his mother; for almost four years, the petitioner (father) had no role in upbringing of the child, and the maternal home had a complete role in his upbringing. Such instance of separate living, as revealed from the record, arose on count of grave dispute between the father and the mother of the child.

13. This Court holds that the custody issues which exist for a long period of time, as involved herein, may not be dealt with, in habeas corpus petition, except under certain extraordinary circumstances. In the present case, the litigation between mother and father shows agony and acrimony between the two sides which relates to the period soon after the birth of the child. Thus, in view of the peculiar factual matrix of the present case, reflecting that the petitioner-father is not having custody of his



minor for past four years, no immediate adjudication in the present habeas corpus petition is called for.

14. As per the settled proposition of law, for assessing the paramount welfare of the child, sometimes a wider connotation and detailed inquiry is required to enable the parties concerned to establish their claims on strong factual as well as legal foundation.

15. Since the overall facts and circumstances of the case clearly reflect that the same does not fall within the category of exceptional cases, where the ordinary remedy provided under the law is either unavailable or ineffective, the same is sufficient to disallow the adjudication in the present habeas corpus petition.

16. Thus, in light of the aforesaid observations and looking into the factual matrix of the present case as well as the aforementioned precedent laws, the present petition is **dismissed** on the sole ground of its maintainability in the form of habeas corpus petition. However, the petitioner shall be at liberty to raise all his legal issues regarding custody of the child, including the aspect of paramount welfare of the child, which shall be dealt by the competent court, strictly in accordance with law. The limitation period for the petitioner shall begin from the date of receiving a certified copy of this order, in pursuance of the liberty so granted to the petitioner in the present order. All pending applications stand disposed of.

(RAJENDRA PRAKASH SONI),J (DR.PUSHPENDRA SINGH BHATI), J.

36-SKant/-