IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.783 of 2021

Arising Out of PS. Case No.-450 Year-2021 Thana- MUZAFFARPUR TOWN District-Muzaffarpur

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Smt. G.S.S. Sitara W/O Sajjan Raj Shekhar, D/O G Shyam Prasad R/O Mohalla-Ward No. 10, Govt. Quarters, Sikendrapur, Magistrate Colony, P.S-Town, District- Muzaffarpur, Pin Code-842001.

... ... Petitioner

Versus

1. The State of Bihar through Home Secretary Govt. of Bihar, Patna.
2. The Superintendent of Police, Muzaffarpur.
3. The Superintendent of Police, Sheohar.
4. Sajjan Raj Shekhar S/O Raja Shekhar R/O Village-at Present Posted as District Magistrate Sheohar, P.S-Town, District-Sheohar, Pin Code-843329

... ... Respondents

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Appearance :
For the Petitioner : Mr. Saroj Kumar Sharma, Advocate
For the Respondent no. 4: Mr. Ashok Kumar Chaudhary, Sr. Advocate
For the Respondent/s : Mr. Nadeem Seraj, GP-5

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 12-04-2022

This writ application has been preferred seeking guardianship of the minor female child of the petitioner who is said to be in the alleged inappropriate custody of the husband of the petitioner (respondent no. 4). A writ in the nature of writ of Habeas Corpus has been applied for invoking the extraordinary writ jurisdiction of this Court.

Brief Facts

2. The petitioner and respondent no. 4 were married to each other in accordance with Hindu rites and customs in the

State of Tamil Nadu on 04.09.2017. The petitioner was earlier working as a Senior Systems Engineer in a well-known IT company. Respondent no. 4 is in Indian Administrative Service, presently posted as District Magistrate of Sheohar in the State of Bihar. The petitioner and respondent no. 4 got a female child/daughter named 'Heera' on 27.11.2018 at Chennai and at presently she is little more than 3 years of age. The daughter is presently in the custody of Respondent No. 4. Later, the couple got a male child/son who is with the petitioner.

3. The petitioner and respondent no. 4 seem to have developed matrimonial discord leading to registration of Muzaffarpur Town P.S. Case No. 450 dated 18.06.2021 for the offences alleged under Section 498A, 279, 337 and 338 of the Indian Penal Code. It is the case of the petitioner that respondent no. 4 has no control over his rage. The petitioner had been allegedly assaulted violently on 1st of March, 2021 and 3rd of March, 2021 as a result whereof she was compelled to shift to the government quarter in Muzaffarpur along with her two kids. It is her case that she was shifted to government quarter in Muzaffarpur by the higher bureaucracy as a result of her mother's complaint to the Bihar Police on 1st of March, 2021.

4. The petitioner alleges that on 27th March 2021, the

respondent no. 4 visited the circuit house at Muzaffarpur, he took the girl child with him after promising the petitioner that he would return her after couple of days, but he never returned the minor girl who was at the relevant time aged about only 29 months. The petitioner, therefore, alleges that the respondent no. 4 has cunningly separated the girl child from the petitioner for about 3 months. After 3 months, he brought her on the occasion of the birthday party of the second child at Muzaffarpur, it is the case of the petitioner that she begged before respondent no. 4 to leave the girl child/her daughter for at least two days with her but the respondent no. 4 and his mother adamantly refused to do so.

5. The petitioner further alleges that she has filed a maintenance petition for herself and the two babies and the mother of the petitioner has also lodged a domestic violence complaint against respondent no. 4. She is meeting her expenses with the help from her mother.

6. The petitioner further submits that the respondent no. 4 is the District Magistrate of Sheohar and has got little time for family members, much less for babysitting. It is alleged that respondent no. 4 has made his own daughter roam around his bungalow like an orphan, wilting under great psychological

pressure as if she is a motherless kid. The petitioner claims that her daughter is now left in the sprawling DM bungalow with none showing any maternal love. The lady who is given the duty of babysitting just does her duty and the mother-in-law who comes on and off to look after the daughter of the petitioner has a lot of health issues and is definitely not in a position of babysitting. The petitioner alleges that her daughter is left with questionable male servants and that let her feel insecure about her daughter. The petitioner claims that the respondent no. 4 has been continuing with custody of the minor female child contrary to Sections 7, 8 and 25 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act of 1890') read with Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as 'the Act of 1956').

7. In the writ petition as well as in the counter affidavit and rejoinder, at several places personal allegations have been made by the petitioner and respondent no.4 against each other which I do not find much relevant except to understand the family background of the parties for purpose of considering the issues involved in the present case, I am, therefore, not going into irrelevant allegations which either the petitioner or the respondent no. 4 has made against each other

by way of pleadings. Those are the matters which are still under investigation/adjudication and it would not be proper for this Court to make any comment upon such issues.

Stand of Respondent No. 4

8. The respondent no. 4 has filed a counter affidavit. He has denied the allegations of the petitioner and alleges that it is the petitioner who has always treated the respondent no. 4 with cruelty and indulged in abusing the respondent no. 4 and his parents as well as other family members. According to respondent no. 4 the petitioner has got anger issues and she, apart from causing assault upon respondent no. 4, used to threaten that she will commit suicide. It is his stand that the petitioner willfully, in a fit of anger, voluntarily left the house of respondent no. 4 on 01.03.2021 and went to Muzaffapur where she is staying in a government quarter.

9. The respondent no. 4 has claimed that he is the father of the girl child, namely, Heera. He further submits that in terms of Section 6(a) of the Act of 1956, he is the guardian of 'Heera', therefore, his custody over his own daughter cannot be termed inappropriate and unlawful. The respondent no. 4 has informed that he was constraint to file a petition for judicial separation in the Family Court, Gopalganj being Matrimonial

Case No. 241 of 2019. The respondent no. 4 wanted to take a break from the relationship and again revisit the relationship after cooling off period but according to him it is the petitioner who thwarted the efforts taken by respondent no. 4. The petitioner was on family way expecting the second child at the relevant time and as such respondent no. 4 understanding his responsibility compromised with the petitioner and resumed joint family life in order to take care of his wife. According to him, though the compromise was entered into before the learned 4th Additional Family Court Judge at Chennai on 03.02.2020 but the petitioner failed to abide by the terms of the compromise. Since the petitioner failed to mend her ways and continued to harass, torture and abuse the respondent no. 4, respondent no. 4 has filed a petition for divorce under Section 13 of the Hindu Marriage Act, 1955 giving rise to Divorce Case No. 16 of 2021 in the court of learned Principle Judge, Family Court, Sheohar which is pending adjudication.

10. Respondent no. 4 has further pleaded that on 17.03.2021 when he visited the circuit house, Muzaffarpur where the petitioner was staying at the time with both the children and her mother, Heera (minor daughter of the petitioner and respondent no. 4) was found in a drowsy, weak condition

and suffering from fever. Heera's whole body was covered with red patches due to aggravated Urticaria. It is stated that the petitioner was not administering medicine and food to Heera on time resulting in such worse condition. According to respondent no. 4, when he confronted the petitioner with the said situation of Heera, she became defensive and did not give an appropriate reply.

11. The respondent no. 4 claims that he being worried about the well-being and safety of Heera requested the petitioner to send Heera with him for better treatment to which the petitioner readily agreed. It is, thus, the case of the petitioner that the respondent no. 4 took Heera with him with consent of the petitioner. It is submitted that at this stage the petitioner has come out with a concocted, false and fabricated story about forced separation of her with her daughter and this has been done only to malign the image of respondent no. 4 and to get undue sympathy from the Hon'ble Court.

12. The respondent no. 4 has brought on record the medical prescriptions and photographs of the girl child annexed as Annexure 'R4/5' with the counter affidavit to show that she is getting treatment and is still under medication. Respondent no. 4 has denied the allegations of the petitioner and has submitted in

the counter affidavit that he is taking proper care of Heera and is devoting time with her, moreover mother of respondent no. 4 has been staying with him in Sheohar since March, 2021 and is completely devoted to Heera and she is showering her love and affection upon her. It is stated that apart from the respondent no. 4 and his mother, there are other staff members including a lady staff to exclusively take care of Heera around the clock.

13. It is further stated in the counter affidavit that Heera has been admitted to play school/nursery in Sheohar after the lockdown. Her mental and physical development has shown remarkable improvement and the respondent no. 4 is in constant touch with the school authorities. She has been making good friends and developing good social behaviour. Respondent no. 4 has opened Sukanya Samridhi Account in favour of Heera when she was 18 months old with an investment of Rs.5,000/- per month with a maturity period of 21 years of age. This amount would be useful for her higher education later on.

14. It is lastly submitted that the petitioner and her mother has bias towards male child and that is why Heera was constantly underfed. The respondent no. 4 claims that he is a good father and is doing all his duties. He is afraid that if the custody of Heera is handed over to the petitioner then she will

definitely go the Chennai and stay in the house of her mother where alcoholism is the order of the day. It is submitted that the petitioner's parents got divorced in the early 2000s and the petitioner even filed a property suit against her father. It is further stated that the mother of the petitioner is presently living with one Mr. Giridhar who is afflicted with Herpes simplex virus and under such circumstances 'Heera' cannot be safely kept there. It is his submission that it is beyond the capacity of the petitioner to provide a safe and healthy environment for Heera to grow and develop.

15. Learned Senior Counsel for the respondent no. 4 has drawn the attention of this Court towards Annexure 'R4/1' which is printout of the Whatsapp chats between the petitioner and the respondent no. 4. It has been submitted that the kind of abusive language used by the petitioner in her chats would indicate her bad temperament. According to learned Senior Counsel, in her rejoinder, the petitioner does not dispute the Whatsapp messages mentioned in Annexure 'R4/1' to the counter affidavit of respondent no. 4.

16. On behalf of the Respondent No. 4 interlocutory applications have been filed raising issue of maintainability of a habeas corpus writ petition in the facts and circumstances of this

case. This court vide order dated 23.12.2021 took a view that the interlocutory application will be considered along with the writ petition.

17. This Court has heard learned counsel for the petitioner and learned Senior Counsel for respondent no. 4 on the writ application as well as the interlocutory applications. In course of hearing, this Court vide its order dated 07.12.2021 directed respondent no. 4 to produce the minor child and fixed the case for 21st December, 2021 but on the said date, the Court was not available and on 23.12.2021 when the matter was taken up, prayer for adjournment was made on behalf of respondent no. 4. This Court vide order dated 23.12.2021 granted adjournment but with a cost of Rs.25,000/- awarded to the petitioner to meet her travelling from Chennai (Tamilnadu) and other miscellaneous expenses fixing the next date on 06.01.2022. In the meantime, due to ongoing spread of Omicron Variant Covid-19 and sudden surge in the number of covid cases, the Court reverted to virtual mode of hearing from 4th January, 2022. The petitioner and the respondent no. 4 joined the Court proceeding through video conferencing. The baby girl was found sitting with Respondent No. 4 coolly playing with a toy. The mother of Respondent No. 4 was also found sitting.

Learned counsel for the parties as well as the parties were given full hearing. They were represented through their learned Advocates.

18. Learned counsel for the State was also present. After hearing all the parties, this Court directed listing of the matter under heading 'For Orders' on 21st January, 2022. On 21st January, 2022, the judgment was reserved.

Preliminary Question

19. One I.A. No. 1 of 2021 has been filed on behalf of the respondent no. 4 with a prayer to decide the question of maintainability of a Habeas Corpus writ in the facts of the present case. Respondent no. 4 has also filed I.A. No. 2 of 2021 raising similar objection.

20. While dealing with the writ application, I will first take up the interlocutory applications filed on behalf of respondent no. 4 raising an issue of maintainability.

21. Mr. Ashok Kumar Chaudhary, learned Senior Counsel for the respondent no. 4 has submitted that a writ in the nature of writ of Habeas Corpus for declaration of the petitioner a guardian of the minor child cannot lie. It is his further submission that the petitioner has got her remedy under the Act of 1890. As regards the custody of 'Heera' with Respondent No.

4, it is submitted that a writ of habeas corpus would be available only when there is an unlawful detention of the 'Corpus' by any person. In this case since 'Heera' is in custody of her father, she cannot be said to be in unlawful custody much less unlawful detention.

22. It is his submission that in this case, the petitioner has herself set out a case stating that on 27th March, 2021 respondent no. 4 visited the circuit house at Muzaffarpur where the petitioner was residing with her both the children and he took girl child (Heera) with him after promising the petitioner that he would return her after couple of days. In consonance with this case of the petitioner, the respondent no. 4 has pleaded that when during his visit to the circuit house at Muzaffarpur he found that Heera was not in a good health, he brought her with the consent of the petitioner in order to get her treated and in this connection respondent no. 4 has made specific statements in paragraph '12' of the counter affidavit supported by the medical prescriptions and photographs of Heera annexed as Annexure 'R4/5'. The petitioner has though filed a rejoinder to the counter affidavit, she has not specifically denied the said statement.

23. Learned Senior Counsel submits that in the case of **Tejaswini Goud and Others Vs. Shekhar Jagdish Prasad**

Tewari and Others (2019) 7 SCC 42, the Hon'ble Supreme Court has held that this extraordinary remedy may be invoked only in exceptional cases where ordinary remedy provided by law is either unavailable or is ineffective. It has also been held that the exercise of power of a Writ Court being summary in nature, it may direct the parties to approach the civil court where detailed inquiry can be exercised. It is further pointed out that the Hon'ble Supreme Court has held that in child custody matters, the powers of the High Court in granting writ is qualified only in cases where detention of a child is by a person who is not entitled to her legal custody.

24. It is submitted that father is the natural guardian under Section 6(a) of the Act of 1956. According to him, there is a special statute namely the Act of 1890 whereunder the competent court can entertain an application, if so brought by the petitioner for declaring her guardian of Heera and such application is to be decided in accordance with the procedure prescribed under the said statute only.

25. According to him, the petitioner has got an equally efficacious alternative remedy under Section 25 of the Act of 1890. It is submitted that instead of availing the statutory remedy, the petitioner has directly approached this Court.

Preliminary Objection-contested by the petitioner

26. On the other hand, learned counsel for the petitioner has argued that Section 6(a) of the Act of 1956 carves out an exception of interim custody and it specifies that in case of the child being less than 5 years of age the custody should be given to the mother. It is submitted that though in the writ application the prayer has been couched giving an impression that the petitioner is looking for a writ in the nature of habeas corpus for guardianship of the minor female child, the present writ application is in fact against unlawful and inappropriate custody of minor female child with respondent no. 4. It is submitted that the preliminary objection raised on behalf of the respondent no.4 is liable to be rejected in order to consider the entire facts and circumstances of the case and to take a view as to whether or not the present custody of the minor female child with respondent no. 4 is contrary to law and against the welfare of the child. It is his submission that even though the issue of guardianship and permanent custody is not required to be gone into in the present writ application and that may be left open for the parties to contest in accordance with law before appropriate forum, in case upon consideration of the entire materials on record, this Court finds that respondent no. 4 is continuing in

unlawful custody of the minor female child, the custody of the said child would be required to be restored to the petitioner subject to such terms and conditions which this Hon'ble Court may deem fit and proper keeping in view the welfare of the child.

Preliminary Objection-considered

27. Having heard learned counsel for the petitioner and learned Senior Counsel for respondent no. 4, I find that the basic premise on which the preliminary objection has been raised on behalf of the respondent no. 4 is Section 6(a) of the Act of 1956 itself. But before I would discuss Section 6(a), it would be appropriate to have a glance over the definition of the word "guardian" as appearing under Section 4(b) of the Act of 1956 which reads as under:-

> "guardian means a person having the care of the person of a minor or of his property or of both his person and property, and includes (i) a natural guardian, (ii) a guardian appointed by the will of the minor's father or mother, (iii) a guardian appointed or declared by a Court, and (iv) a person empowered to act as such by or under any enactment relating to any Court of wards." Further Section 4(c) defines the word "natural guardian" which means any of the guardians mentioned in Section 6."

28. Section 6 talks of the natural guardians of the Hindu minor in respect of the minor's person as well as in

respect of the minor's property. Section 6 is, thus, reproduced hereunder for a ready reference:-

> **" 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;
>
> (b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;
>
> (c) in the case of a married girl—the husband:
>
> Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—
>
> (a) if he has ceased to be a Hindu, or
>
> (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).
>
> Explanation.—In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.**"**

29. On perusal Section 6(a) says that it is the father who is the natural guardian of a boy or an unmarried girl and according to this Section 6 clause (a), after the father, the mother is the natural guardian but there is an exception by way of proviso to this clause which says that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. It is the proviso to clause (a) of Section 6 of the Act of 1956 which is the anchorsheet of the arguments of the

petitioner. Learned counsel for the respondent no.4 has relied upon the judgment of the Hon'ble Supreme Court in the case of **Tejaswini Gaud (Supra).**

30. In the said case, the mother Zelam of the girl child was diagnosed with breast cancer while carrying the pregnancy of the said female child. The said female child was with her father till 29.11.2017 when all of a sudden the father was hospitalized and he was diagnosed with tuberculosis and other diseases. While he was undergoing treatment, the appellant no. 1 Tejaswini Gaud one of the two sisters of Zelam took the mother and the female child to their residence for continuation of the treatment. Later on in October, 2018 the mother of the female child succumbed to her illness and the child continued to be in custody of the appellant no. 1 and her husband in Pune. When the father of the child was denied the custody of the child, he gave a complaint to the Dattawadi Police Station, Pune and thereafter he approached the High Court by filing the writ petition seeking custody of minor child. The father happened to be post-graduate in Management and was working as Principal Consultant with WIPRO Limited. The habeas corpus petition was allowed by the Hon'ble High Court. In the aforesaid factual background, when the appellant before

the Hon'ble Supreme Court contended that the writ of habeas corpus cannot be issued when efficacious alternative remedy is available to the father of the child under the Act of 1956, the Hon'ble Supreme Court examined the scope and ambit of the habeas corpus proceedings, maintainability thereof and finally upheld the order of the Hon'ble High Court with certain directions and observations.

31. In paragraph '14' of the judgment, their lordships observed that "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 of habeas corpus has jurisdiction."

32. In the case of **Rajiv Bhatia Versus State (NCT of Delhi)** reported in **(1999) 8 SCC 525,** a habeas corpus

petition was filed by the mother of the girl alleging that her daughter was in illegal custody of her husband's elder brother. Her husband's elder brother relied upon the adoption deed which was contested by the mother of the girl but the High Court examined the legality of the deed of adoption which was not approved by the Hon'ble Supreme court and held that the High Court was not entitled to examine the legality of the deed of adoption and then come to the conclusion one way or other with regard to the custody of the child.

33. In the case of **Nithya Anand Raghavan Versus State (NCT of Delhi)** reported in **(2017) 8 SCC 454,** the Hon'ble Supreme Court considered the principles for issuance of writ of habeas corpus concerning the minor child which was brought to in violation of the order of a foreign court, it was held as under "the High Court while dealing with the petition for issuance of 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."

34. When I go through the averments made in the writ application and the reliefs prayed therein, I find that in this case the petitioner is looking for a direction to respondent no. 4 to return the minor female child to her keeping in view the proviso to clause (a) of Section 6 of the Act of 1956. Even as for discussion sake, I assume that the father being a natural guardian in terms of Section 6(a) of the Act of 1956, his custody of the minor female child cannot be said to be illegal, in order to consider the case of the petitioner seeking return of the minor female child to her, it would be necessary to consider the totality of the facts and circumstances of the case and the welfare of the child which is of paramount consideration. At this stage, I would refer the judgment of the Hon'ble three Judges Bench of the Hon'ble Supreme Court in the case of **Dr. (Mrs.) Veena Kapoor versus Shri Varinder Kumar Kapoor** reported in **(1981) 3 SCC 92**. In the said case, the petitioner-mother of the minor child aged about one and half year filed a habeas corpus alleging that the respondent was in illegal custody of the child. The High Court dismissed the writ petition on the ground that the custody of the child with the respondent cannot be said to be

illegal. The Hon'ble Supreme Court termed the dismissal of the habeas corpus petition as "on the narrow ground" and directed the learned District Judge to make a report on the question as to whether the custody of the child should be handed over to the petitioner-mother, taking into consideration the interest of the minor.

35. I am, therefore, of the considered opinion that the present writ application cannot be held non-maintainable. Rejection of the petition on the solitary ground that the custody of the child with respondent no. 4 cannot be said to be illegal would not meet the expectation of law and the jurisdiction conferred upon this Court which is of extraordinary nature and then it would also be contrary to the judicial pronouncements as discussed above.

36. I.A. No. 1 of 2021 and I.A. No. 2 of 2021 are, therefore, rejected.

Consideration on Merit

37. I would now proceed to consider the following two issues which have come up for consideration:-

(I)Whether on a complete reading of clause (a) of Section 6 of the Act of 1956 the custody of the minor female child aged less than five years with respondent No. 4 is illegal;

and

(II) whether in case it is found that the custody of the minor child below five years of age with respondent No. 4 cannot be termed “illegal”, would it be appropriate to exercise the extraordinary writ jurisdiction of this Court to direct return of the child to the petitioner keeping in view the welfare of the child.

First issue – considered

38. I have discussed in the preceding paragraphs what Section 6(a) of the Act of 1956 says. A careful reading of Section 6 shows that it talks of the natural guardians of a Hindu minor in respect of minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), therefore, Section 6 provides that both the person and property of the minor are to be with the natural guardians. There cannot be any doubt on a reading of clause (a) that it recognizes both father and mother as natural guardian of a boy or an unmarried girl. According to clause (a), the father is said to be the guardian and after him the mother, thus, this provision is establishing a kind of hierarchy between father and the mother of the child with respect to the guardianship rights.

39. Section 6(a) of the Act of 1956 gives a primacy to

the father and the mother has been declared natural guardian only after the father. This provision has invited a great deal of debate and was challenged before the Hon'ble Supreme Court in the case of **Geetha Hariharan Vs. The Reserve Bank of India** reported in **(1999) 2 SCC 228**. The Hon'ble Supreme Court being conscious of the discriminatory nature of the provision gave a progressive interpretation holding that the term 'after' need not necessarily mean 'after the lifetime', but includes, inter alia a condition where the father is deemed absent by virtue of mutual understanding between the father and the mother that the latter is put exclusively in charge of the minor. The Court in India has always recognized India's commitment to women's rights and India is a party to the Convention on the Elimination of All Discrimination Against Women, 1971. Section 6(a) is, therefore, required to be read in the light of the judgment of the Hon'ble Supreme Court in the case of **Geetha Hariharan (supra).** I would,, therefore proceed to consider this matter after taking a view that both father and mother are equal guardian of a boy or an unmarried girl and they stand on the same pedestal.

40. The proviso to clause (a) of Section 6 of the Act of 1956 says that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. This

would be required to be read with Section 13 of the Act of 1956 which reads as under:-

> **"13. Welfare of minor to be paramount consideration**-(1) in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minors shall be the paramount consideration.
>
> (2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of the opinion that his or her guardianship will not be for the welfare of the minor."

41. At this stage, I would briefly note that Section 7 of the Act of 1890 which provides for power of the Court to make order as to guardianship has also laid down the test of the welfare of the minor for an order appointing a guardian of his person or property or both. Section 9 of the Act, 1890 says that an application with respect to the guardian of the person of the minor shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. In respect of guardianship of the property of the minor, an application may be filed either to the district court having jurisdiction in the place where the minor ordinarily resides or to a district court having jurisdiction in a place where he has property. Section 25 of the Act of 1890 reads as under:-

> "25.**Title of guardian to custody of ward.—**

> (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.
>
> (2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882)1.
>
> (3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

42. Section 12 of the Act of 1890 confers power upon the court to make interlocutory order for production of minor and interim protection of his/her person and property.

43. A complete reading of the aforesaid provisions make it crystal clear that the father is one of the natural guardians and his having the custody of the minor child whether a boy or an unmarried girl cannot be termed illegal ipso facto. In the facts of the present case where the admitted case of the petitioner is that she had allowed the respondent no. 4 to take the female child Heera with him, for whatever reasons, in absence of any evidence on the record showing otherwise, the custody of the minor with respondent no.4 is not illegal. Proviso to clause (a) of Section 6 of the Act of 1956 though carves out an exception but it does not render the custody of a minor child

aged below five years with his/her father illegal.

44. Section 13 of the Act of 1956 would be the guiding factor in such situation. It is the welfare of the minor which will be of paramount consideration and court would be required to apply the legal test i.e. the **'best interest of the child test'**. In other words the courts have postulated this test as the **"least detrimental alternative"** as an alternative judicial presumption.

Second Issue – considered

45. A discussion on the aforesaid legal test and the principles to be applied, would lead to this Court to answer the second issue framed hereinabove. I have taken note of the averments made in the writ application and the counter affidavit in the beginning itself. The couple have got two children. Heera is the first child who is aged about 3 and half years. She is with respondent no.4. Second child is a son who is about one year old only and is presently with the petitioner. In the writ petition the petitioner states that she is a resident of Chennai and has worked in the renowned I.T. Company as a Sr. Systems Engineer before her marriage with respondent no.4. There is, however, no statement disclosing her present engagements, occupation or profession. She has not disclosed regarding her source of

independent income. The petitioner has filed a maintenance case seeking maintenance of herself and her two kids from respondent no.4. She has no permanent place of residence in the State of Bihar and presently she is living in the government quarter at Muzaffarpur which is apparently a temporary kind of arrangement where she has been allowed to stay, by the senior bureaucrats as claimed by her. In course of argument while interacting with the petitioner the court asked her as to where she was presently residing, the court was told that she had arrived from Chennai and will have to again go back to Chennai where she is living with her mother, to mitigate the hardship of the petitioner this Court vide its order dated 23.12.2021 directed the respondent no.4 to pay a sum of Rs.25,000/- to the petitioner to meet her travelling expenses and other miscellaneous expenses. When this Court made a query as to whether she is working some where presently the Court was informed that presently she is not in any job, therefore, she has no independent source of income. In her first rejoinder the petitioner has stated that she was allowed to stay in the government quarter at Muzaffarpur by the Commissioner of Tirhut Division, all the amenities and maid servants were privately provided by the petitioner’s mother and a government constable name Sushma

was allocated by the Commissioner to take care of the baby but her roll was recently transferred to Muzaffarpur to Sheohar police department without the knowledge of the petitioner. The petitioner admits that her mother has got second marriage after having been single for 17 years after her divorce but has denied the photographs brought by the respondent no.4 on record. She has also denied that her mother is suffering from any disease. In paragraph '11' of her rejoinder the petitioner has shown the kind of hardship being faced by her in meeting her expenses with a paltry sum of Rs.10,000/- per month which she receives from respondent no.4. She claims to have been meeting her expenses from the amount provided by her mother.

46. The petitioner has alleged against respondent no.4 stating that he has misused and abused his position and has manipulated pictures of Heera to show that she had suffered from illness. I have already said in the beginning that both the parties have made allegations against each other which may require adjudication and, therefore, I would not go into that issue for the present.

47. On the other hand, learned Senior Counsel submits that the paramount interest of Heera is presently secured while in custody of Respondent No. 4. He has cited

reasons such as the health issues of Heera, her ongoing education at Sheohar and further that the petitioner who has admittedly no independent source of income and she is fighting for her maintenance would not be in a position to provide safe and healthy environment for Heera to grow and develop. Even on emotional aspects, Mr. Chaudhary submits that the father is so much attached with Heera that in course of hearing Heera was seen sitting on the lap of her father, very coolly playing with toys. She has, thus, adjusted well with her father and grandmother. Her grandmother is there to take care of her all the times. Learned Senior Counsel submits that the petitioner is always welcome in the premises of the Respondent No. 4 to meet Heera and spend quality time with her. During exchange of messages also he has invited the petitioner to meet 'Heera'.

48. Learned senior counsel has drawn the attention of this Court towards paragraph '15' of his counter affidavit, the respondent no.4 has given the daily routine of Heera. He has informed this Court that apart from the respondent no.4 and his mother, there are other staff members including a homeguard and a lady staff to exclusively take care of Heera round the clock. The respondent no.4 has opened an account in the name of Heera under Sukanya Scheme and is depositing a sum of

Rs.5,000/- per month with a maturity period of 21 years of age. She has been admitted in a local school at Sheohar and according to respondent no.4 Heera is showing remarkable improvement both mentally as well as physically and the respondent no.4 is in constant touch with the school authorities . Heera is dropped and picked up from school everyday by a secured car with guard. During hearing through video conferencing 'Heera'was produced. She was cooly sitting with her father (respondent no.4), therefore she has now adjusted herself with respondent no.4 and the grandmother. In course of argument, the respondent no.4 and the learned senior counsel representing the respondent no.4 both have assured this Court that in case the petitioner wants to visit and spend time with Heera the respondent no.4 would have no objection to that extent.

49. The law relating to custody of minors has been exhaustively considered by the Hon'ble Supreme Court in a catena of decisions. In **Gaurav Nagpal Vs. Sumedha Nagpal (2009) 1 SCC 42** the principles of English and American law in this regard were considered by the Hon'ble Supreme Court and held that legal position in India is not in any way different. Referring the judgments of the Bombay High Court in

Saraswati Bai Shripad Ved Vs. Shripad Vasanji Ved AIR 1941 (Bom.) 103; **Rosy Jacob Vs. Jacob A. Chakramakkal (1973) 1 SCC 840** and **Thirty Hoshie Dolikuka Vs. Hoshiam Shavdaksha Dolikuka (1982) 2 SCC 544** the Hon'ble Supreme Court quoted in paragraph 50 and 51 as follows:-

> "50. That when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Ganguli's case the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.
>
> 51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases."

50. In the case of **Mousmi Moitra Ganguli vs. Jayant Ganguli (2008) 7 SCC 673** it has been held that it is the

welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of the Hon'ble Supreme Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents.

Best interest of the child – considered

51. I find from the aforesaid judicial pronouncements that It is not the right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor.

52. In the facts of the present case, it is the respondent no.4 who is much better placed than the petitioner to take care of her all round developments including her health issues, education and he alone can provide a conducive environment to the minor girl Heera at this stage. He being

father of ‘Heera’ his love and affection towards his own daughter cannot be doubted. He is providing all amenities and facilities to ‘Heera’ which are commensurate to his status. Contrary to this, the petitioner has no independent source of income and presently she is meeting her expenses from the money being provided by her mother. If Heera also goes with her, she will have the burden of two kids, apart from this she is also fighting litigation and one of them is for maintenance. She is, thus required to devote her time to the litigations which would keep her away from her children, this is likely to affect the education of the girl child Heera who has already attained school going age and has been admitted in a school at Sheohar and is going there. The mother of the petitioner is living at Chennai and how she would manage the entire things for the petitioner and her two kids, remains a question. The grandmother of Heera is with her and that takes care of her emotional aspects to a great extent. In course of hearing through virtual mode, I found ‘Heera’ was sitting comfortably with her father. She was playing with a toy in her hand and looked like fully adjusted with her father.

53. In the background of the pleadings and the discussions abovementioned when I consider the welfare of the

minor female child and apply the legal test of the best interest of the child and least detrimental alternative, I find that respondent no.4 is as on today better placed to take care of Heera. While there can be no doubt about the fact that Heera needs love and affection of her both parents, at this stage I find that the best interest of Heera lies in allowing her to continue in the custody of the respondent no.4.

54. I further find that at this stage, the welfare of the female child Heera also lies in granting a visitation right to the petitioner to ensure that she gets love and affection of her mother. I am, therefore, of the opinion that subject to adjudication as to the guardianship of the minor child Heera, in accordance with the provisions of the Act of 1890 and the Act of 1956 by a competent court of law where both the parties can adduce their respective evidences, for the present the welfare of the child lies in allowing her to continue in the custody of her father (respondent no.4) with visitation rights to the petitioner.

Visitation right to the petitioner

55. The petitioner will have a visitation right and shall have access to the child at the residence of respondent no.4 during all the week day's when the school is opened between 4.00 pm to 6.00 pm. The respondent no.4 shall ensure the

comfort of the petitioner during such time of her stay in his house. During Sunday and holidays the petitioner shall have access to the child from 2.00 pm to 6.00 pm and on two such holidays in a month the petitioner is permitted to take the child from the residence of respondent no.4 during 2.00 pm to 6.00 pm and shall leave the child with respondent no.4 by 6.00 pm. For such outside movement the respondent no.4 shall provide a car with fuel, driver and security guard to facilitate safe movement of Heera with her mother inside the town areas.

56. Since, I have noticed that the petitioner is presently depending upon her mother and she is required to travel to Sheohar to meet 'Heera' it would involve some expenses, her visit to meet her daughter is in the interest of the child, therefore to mitigate any hardship in visiting due to financial constraint, I direct respondent no. 4 to pay a sum of Rs. 20,000/- per month to the petitioner so long as the present arrangement continues.

57. For any modification of the visitation right, either parties will be at liberty to approach this Court. The respondent no.4 shall not do or cause to be done any such act or omission which may result in depriving the petitioner from her visitation rights as mentioned hereinabove.

58. While parting with this judgment, I would record that the observations made in this judgment are only for the purpose of this case and no part of it shall be taken as a finding of this Court in a proceeding of guardianship before a competent court of law. Ordered accordingly.

59. The writ application stands disposed of accordingly.

(Rajeev Ranjan Prasad, J.)

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

I have had the privilege of reading the judgment of my learned brother Rajeev Ranjan Prasad, J. He has exhaustively dealt with the issues required to be examined by this Bench. The factual background and the contentions advanced on behalf of the parties have been set out in the judgment of my esteemed brother. There is no need to repeat them. I agree with the conclusion arrived at and the operative part of the judgment.

2. However, keeping in view of the importance of the issues raised in this writ petition, I wish to add only a few words of mine.

3. Insofar as the issue whether a writ of *habeas* corpus for changing the custody of a child from one spouse to another is

maintainable or not is concerned, in the case of **Gaurav Nagpal v. Sumedha Nagpal** since reported in **(2009) 1 SCC 42**, it was held that ordinarily, the basis for issuance of a writ of *habeas corpus* is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child. Paragraph nos. 29 to 34 of the aforesaid case is quoted herein below:

> *"29. In Halsbury's Laws of England, Fourth Edition, Vol. 24, para 511 at page 217 it has been stated;*
>
> *"**Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration**, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father." (emphasis supplied) It has also been stated that if the minor is of any age to exercise a choice, the court will take his wishes into consideration. (para 534; page 229).*
>
> *30. **Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is `welfare of the child'.***
>
> *31. In Habeas Corpus, Vol. I, page 581, Bailey states;*
>
> *"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest*

mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests
of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for the best interests of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

32. In Mc Grath, Re, (1893) 1 Ch 143 : 62 LJ Ch 208, Lindley, L.J. observed;

The dominant matter for the consideration of the Court is the welfare of the child. *But the welfare of the child is not to be measured by money only nor merely physical comfort. The word `welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded. (emphasis supplied)*

American Law

33. Law in the United States is also not different. In

American Jurisprudence, Second Edition, Vol. 39; para 31; page 34, it is stated;

***"As a rule, in the selection of a guardian of a minor, the best interest of the child is the paramount consideration**, to which even the rights of parents must sometimes yield". (emphasis supplied) In para 148; pp.280-81; it is stated;*

"Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. ***In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.***

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the

permanent interests of the child would be sacrificed by a change of custody. ***In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment".*** *(emphasis supplied)*

34. In Howarth v. Northcott, 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758; it was stated;

"In habeas corpus proceedings to determine child custody, 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 infant 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".

It was further observed;

"The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, ***but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate".***

(emphasis supplied)

It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as

with the welfare of the child."

(emphasis supplied)

4. The proceedings in the case of **Gaurav Nagpal (supra)** arose out of an application under the Guardians and Wards Act, 1890 but the Hon'ble Supreme Court discussed the law relating to custody of child in various countries and held that it has been clearly indicated that the law is not concerned so much with the illegality of the detention as with the welfare of the child. It was held that the legal position in India follows the above doctrine held by the English and American Laws.

5. As early as in 1982 in the case of **Veena Kapoor Dr. (Mrs.) v. Varinder Kumar Kapoor** since reported in **(1981) 3 SCC 92**, the appellant who was the wife of the respondent filed a *habeas corpus* petition in the High Court of Punjab and Haryana asking for the custody of the child alleging that the respondent was in illegal custody of the child. The petition having been dismissed by the High Court gave rise to a Special Leave Petition before the Hon'ble Supreme Court. It was held by a three Judges Bench of the Hon'ble Supreme Court that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of one party or the other. Para-2 of the aforesaid case

is quoted herein below:

> *"2. It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal."*

6. A Division Bench of this Court in the case of **Nibha Kumari v. The State of Bihar & Ors.** since reported in **2003(2) PLJR 60**, in a writ petition filed by the wife for a custody of her ten months old son against the respondent-husband and in-laws followed the judgment of the Hon'ble Supreme Court rendered in the case of **Gohar Begum v. Suggi @ Nazma Begum,** since reported in **AIR 1960 Supreme Court 93** that existence of an alternative remedy under the Guardian and Wards Act is no bar to exercise of jurisdiction under Article 226 of the Constitution. It was further held that even though the father's custody of child cannot be said to be illegal, it does not mean that the Court should refuse to exercise its jurisdiction in all cases.

7. In the case of **Elizabeth Dinshaw (Mrs.) v. Arvand M.**

Dinshaw And Another since reported in **(1987) 1 SCC 42**, it was held that whenever a question arises before the Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant consideration of what would best serve the interest and welfare of the minor. It was also a proceeding of writ of *habeas corpus* instituted by the mother wherein the father had taken away the child from America to India in violation of the order passed by the American Court.

8. The Hon'ble Supreme Court considered the issue once again in the case of **Rajesh K. Gupta v. Ram Gopal Agarwala and Others** since reported in **(2005) 5 SCC 359** arising out of the order passed by the Delhi High Court in a writ petition for *habeas corpus*. It was held in Para-7 of the aforesaid case as under:

> *"7. It is well settled that in an application seeking a writ of habeas corpus for custody of a minor child, the principal consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. I**t is equally well settled that in case of dispute between the mother***

> ***and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties.*** *[See Veena Kapoor (Dr.) v. Varinder Kumar Kapoor [(1981) 3 SCC 92] and Syed Saleemuddin v. Dr. Rukhsana [(2001) 5 SCC 247 : 2001 SCC (Cri) 841] .]* ***It is, therefore, to be examined what is in the best interest of the child Rose Mala and whether her welfare would be better looked after if she is given in the custody of the appellant, who is her father."*** *(emphasis supplied)*

9. In the recent case of **Yashita Sahu v. State of Rajasthan and Others** since reported in **(2020) 3 SCC 67**, the child was taken away by the wife from USA to India in contravention with the order passed by Norfolk Court. The husband had filed a writ of *habeas corpus* before the Rajasthan High Court for protection of his minor child. The aforesaid writ petition gave rise to the criminal appeal before the Hon'ble Supreme Court. One of the issues which fell for consideration was whether a writ of *habeas corpus* is maintainable if the child is in the custody of another parent and it was held in Para-10 is as under:

> *"10.* ***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 [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , Nithya Anand Raghavan v. State (NCT of Delhi) [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] and Lahari Sakhamuri v. Sobhan Kodali [Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] 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."*
>
> *(emphasis supplied)*

10. In **Yashita Sahu (Supra)**, the Hon'ble Supreme Court clearly held that while deciding matters of custody of a child, primary and paramount consideration is the welfare of the child. If welfare of the child so demands, then technical objections cannot come in the way. It further held that a child has human right of love and affection of both the parents and Courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of his/her parents and then

discussed the visitation rights and contact rights.

11. In **Nithya Anand Raghavan v. State (NCT of Delhi) and Another** since reported in **(2017) 8 SCC 454** which had arisen from a decision passed by the Delhi High Court in a writ petition for issuance of *habeas corpus* for production of the minor daughter allegedly an illegally removed by the mother from the custody of the father from the United Kingdom (UK), a three Judges Bench of the Hon'ble Supreme Court considered the scope of writ of *habeas corpus* and following the judgment of the Court in **Sayed Saleemuddin v. Dr. Rukshana and Others** since reported in **(2001) 5 SCC 247** and **Elizabeth Dinshaw (Supra)**, 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. Thereafter it was held in paragraph nos. 28 to 30 as under:

> *"28. 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 & Ors., (2001) 5 SCC 247, 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 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. 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. Dr. Rukhsana & Ors., 2001(2) R.C.R.(Civil) 613 : 2001(2) R.C.R. (Criminal) 591 : (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 the case of Mrs. Elizabeth (supra), 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 v. State of NCT of Delhi & Ors., 2005(1) R.C.R.(Civil) 737 : 113 (2004) Delhi Law Time 823 relied upon by the appellant). It is not necessary to multiply the authorities on this proposition.

29. 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.

30. 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."

12. In **Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others** since reported in **(2019) 7 SCC 42**, Hon'ble Supreme Court while considering the claim of father vis-à-vis the claim of minor aunt and her husband held that

habeas corpus proceedings is not to justify or examine the legality of the custody. A *habeas corpus* proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. It was further held that 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 or without any authority of law.

13. Thus, it can safely be summarized from the aforesaid decisions of the Hon'ble Supreme Court as well as the High Courts that in a writ petition for changing the custody of a child from one spouse to another, the only issue for consideration is the consideration regarding the welfare of the child. If it is in the welfare of the child to entertain such an application, no technical objections can come in the way and the Courts have ample power to entertain such writ applications for changing the custody of minor from one spouse to another. It is a summary proceeding and, in many cases, the orders passed by the Courts have been held to be subject to the order which may be passed in appropriate proceedings under the Guardians and Wards Act, 1890, such as, **Amyra Dwivedi (Minor) through her mother, Pooja Sharma Dwivedi v. Abhinav Dwivedi and Another** since reported in **(2021) 4 SCC 698**.

14. So far as the issue raised in the present application by the petitioner in view of Clause 6(a) of Hindu Minority and Guardianship Act, 1956 that since the child Heera has not completed the age of five years, her custody is mandatorily required to be handed over to the petitioner is concerned, in numerous judgments, some of which have been quoted above, we have seen that the Hon'ble Supreme Court has not been strict about following the specific provisions of the Guardians and Wards Act, 1890 in the matters of custody of child. It would be evident from the readings of the aforesaid judgments that in such matters leniency has been allowed by the Court to decide in the best interest of the minor.

15. It is well settled that rights of parents have to give way to the paramount consideration of the welfare of the child. The Hon'ble Supreme Court in **Nithya Anand Raghavan (Supra)** held that the role of 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.

16. In the case of **Nil Ratan Kundu and Another v. Abhijit Kundu** since reported in **(2008) 9 SCC 413**, the Hon'ble Supreme Court held that a Court while dealing with custody

cases, is neither bound by statutes nor by the strict rules of evidence or procedure nor by precedent. The Court has to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings.

17. In the case of **Gaytri Bajaj v. Jiten Bhalla** since reported in **(2012) 12 SCC 471**, the Hon'ble Supreme Court held that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor.

18. Similarly, in the case of **Sheoli Hati v. Somnath Das** since reported in **(2019) 7 SCC 490**, the Hon'ble Supreme Court held that while taking a decision regarding custody or other issues

pertaining to a child welfare of the child is of paramount consideration.

19. Thus, it can be culled out from the aforesaid decisions of the Hon'ble Supreme Court that it is not the statutory provisions which would bind the Court under all circumstances to handover the custody of a minor child who has not completed the age of five years to the mother.

20. With the aforestated views of mine, I reiterate my agreement with the judgment of brother Rajeev Ranjan Prasad, J.

(Ashwani Kumar Singh, J.)

Sushma2/Arvind/Rohit-

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