

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 9903 of 2021

With  
CRIMINAL MISC.APPLICATION (DIRECTION) NO. 1 of 2022  
In R/SPECIAL CRIMINAL APPLICATION NO. 9903 of 2021

=====

MANYATA AVINASH DOLANI  
Versus  
STATE OF GUJARAT & 5 other(s)

=====

Appearance:

MR ANAND B GOGIA(5849) for the Applicant(s) No. 1  
MR RB GOGIA(5850) for the Applicant(s) No. 1  
MS MUSKAN A GOGIA(6624) for the Applicant(s) No. 1  
MANMEETSINGH P CHHABRA(9140) for the Respondent(s) No.  
4, 5, 6  
MR AMMAR M MANSURI PINJARA(11757) for the Respondent(s)  
No. 4, 5, 6  
MR HK PATEL, APP for the Respondent(s) No. 1  
RULE SERVED for the Respondent(s) No. 2, 3

=====

CORAM:HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI  
and  
HONOURABLE DR. JUSTICE A. P. THAKER

Date : 30/09/2022

CAV ORDER

(PER : HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

1. This petition is filed under Article 226 of the Constitution of India in which the petitioner - mother of the corpus has prayed that a writ of habeas corpus be issued directing the respondent Police Authorities to produce the minor child viz. Jiyansh (corpus) i.e. son of the petitioner before this Court and handover/restore the custody of the corpus to the petitioner mother.

2. Heard learned advocate Mr. Anand Gogia for the petitioner, learned advocate Mr. Manmeetsingh P. Chhabra for respondent Nos. 4, 5 and 6 and learned APP Mr. H. K. Patel for respondent Nos. 1, 2 and 3.

3. Learned advocate for the petitioner submitted that petitioner got married with the respondent No.4 in the year 2013. Out of the said wedlock, the petitioner and respondent No.4 are having a son viz. Jiyansh. However, because of certain disputes, the petitioner has initiated proceedings under Section 125 of the Code of Criminal Procedure, 1973 and under Section 498A of the Indian Penal Code, 1860 against the respondent husband and his family members. At this stage, it is contended that on 02.10.2021, at about 8:00 to 8:15 p.m., petitioner along with her mother and minor son Jiyansh i.e. the corpus went for miscellaneous shopping to the nearby market on two wheeler. After some time, when the petitioner and her mother noticed that respondent Nos. 4 to 6 and one unknown person were following them, they immediately returned from the market. It is further submitted that when the petitioner, her mother and corpus reached near their building, respondent Nos. 4 to 6 and unknown person, by using force, snatched away the son of the petitioner, who is aged about 4 years, from the hands of the petitioner and also gave threats. The petitioner, therefore, immediately called the police by dialing '100'. Thereafter, the petitioner and her relatives went to Airport Police

Station and informed the Police Authorities about the incident. The Police Authority on its own prepared the brief complaint (Janvajog Entry) which was refused to sign by the petitioner as the same did not contain the correct details, which were described to the Police Authorities. A request was also made to the concerned Police Authority to verify the CCTV footage of the nearby shops. At this stage, learned counsel has referred to the documents which are annexed with the petition.

4. Learned advocate for the petitioner further contended that thereafter, at about 11:25 p.m., petitioner submitted a written complaint to the Police Authority and informed about the incident. Statements of the petitioner and her relatives were also recorded. However, no steps were taken by the respondent Police Authorities and as the son of the petitioner is in illegal custody of respondent Nos. 4 to 6, the petitioner has immediately filed present petition.

WEB COPY

5. At this stage, learned advocate Mr. Gogia for the petitioner has referred to the order dated 06.10.2021 passed by this Court and submitted that this Court issued urgent notice which was made returnable on 08.10.2021. Learned advocate has, thereafter, referred to the order dated 08.10.2021 passed by this Court and submitted that after considering the submissions canvassed on behalf of

the petitioner as well as the private respondents and after considering various decisions rendered by this Court as well as the Hon'ble Supreme Court, this Court directed the respondents to handover interim custody of the corpus to the present petitioner - mother. Learned advocate has also referred to the various orders passed by this Court in the present proceedings and submitted that till today the custody of the corpus is with the petitioner. However, the respondent No.4 is permitted to take interim custody of the child from 11:00 a.m. to 8:00 p.m. on every Sunday.

6. Learned advocate Mr. Gogia, thereafter, referred to the notice dated 23.09.2021 issued by learned advocate for respondent Nos. 4 to 6 to the present petitioner, copy of which is placed on record at page 149 of the compilation. It is submitted that the said notice is placed on record by the private respondents along with their affidavit. It is submitted that even as per the case of the respondents in the said notice, the present petitioner left her matrimonial house in March 2019 along with the corpus. Thus, when it is the case of the private respondents that the custody of the corpus is with the present petitioner since March, 2019 when she left house of the private respondents, the contention raised by the respondents in their affidavit that custody of the corpus was with respondent No.4 - father of the corpus is not believable.

7. Learned advocate for the petitioner, at this stage, has referred to further affidavit filed by the petitioner, copy of which is placed on record at page 384, and more particularly has referred to para 4 and 5 of the said affidavit. After referring to the same, it is contended that in the facts of the present case, looking to the age of the corpus, if permanent custody of the corpus is handed over to the petitioner mother, she will take proper care of the minor child - corpus.

8. Learned advocate for the petitioner has placed reliance upon the following decisions:

1. The decision rendered by the Division Bench of this Court in the case of *Bhavnaben D/o. Lebabhai Rabari v. State of Gujarat*, reported in *2021 (3) GLH 537*;

2. The decision rendered by the Hon'ble Supreme Court in the case of *Rajeswari Chandrasekar Ganesh v. The State of Tamil Nadu & Ors.* in *Writ Petition (Criminal) No. 402 of 2021 on 14.07.2022*; and

3. The decision rendered by Punjab & Haryana High Court in the case of *Gippy Arora v. State of Punjab & Others* in *Criminal Writ Petition No.543 of 2008*.

9. Learned advocate for the petitioner, therefore, urged that this petition be allowed.

10. On the other hand, learned advocate Mr. Chhabra has opposed this petition. At the outset, learned advocate for the private respondents has submitted that present petition seeking issuance of a writ of habeas corpus for the custody of the minor child is not maintainable. It is submitted that as per the decision rendered by the Hon'ble Supreme Court in the case of *Tejaswini Gaud and others v. Shekhar Jagdish Prasad Tewari and others*, reported in (2019) 7 SCC 42, 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. It is further submitted that 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. Learned advocate, therefore, urged that this petition is not maintainable.

11. Learned advocate for the private respondents, thereafter, contended that as per Section 6 of the Hindu Minority and Guardianship Act, the respondent No.4, father of the corpus is a natural guardian of the corpus, who is aged about more than 5 years and therefore respondent No.4 is having legal right to

claim the custody of the child. On this ground also, this petition may not be entertained.

12. Learned advocate Mr. Chhabra appearing for the respondent Nos. 4 to 6, thereafter referred page 83 to 127 of Criminal Misc. Application No.1 of 2022 filed by the private respondents in this petition. After referring to the said photographs, it is submitted that petitioner left her matrimonial home in March 2019 and went to her parental house. However, the son viz. Jiyansh was taken care of by both i.e. the petitioner and respondent No.4 and there was no interference by anyone regarding child's welfare. It is further submitted that petitioner used to take the corpus Jiyansh at the place of the respondent and same way respondent also used to leave Jiyansh to petitioner's place. Thus, the private respondents were always taking care of the corpus and therefore there was no necessity on the part of the private respondents to snatch away the custody of the child from the petitioner. Learned advocate has also referred the notice dated 03.07.2021 issued by the petitioner, copy of which is placed on record at page 97. It is submitted that in the said notice also the petitioner has stated that the respondents are giving unnecessary gifts and taking him for shopping to influence the child against the petitioner.

13. Learned advocate Mr. Chhabra for the private respondents thereafter contended that as per the

averments made by the petitioner in the application filed under Section 125 of the Code before the concerned Court, the petitioner is residing with her mother, married brother and his family in a 2 BHK flat and income of her brother is also not enough and therefore she has asked for maintenance from the respondent No.4. On the other hand, respondent No.4 is a businessman. It is submitted that respondent No.4 is residing with his father and mother and looking to the financial condition of the respondents, they can take proper care of the corpus. Learned advocate, therefore, urged that looking to the welfare of the child, custody of the child be given to the respondent No.4 and private respondents. Learned advocate has placed reliance upon the decision rendered by the Allahabad High Court in the case of *Shradha Kannaujia (Minor) and Another v. State of U.P. and others* in *Habeas Corpus Writ Petition No.716 of 2020*.

14. Learned advocate for the private respondents, therefore, urged that this petition be dismissed.

15. We have considered the submissions canvassed by learned advocates appearing for the parties. We have also perused the material placed on record and the decisions upon which reliance is placed by the learned advocates appearing for the parties. It would emerge from the record that the petitioner - mother of the corpus has filed this petition, wherein, it



has been alleged that custody of her child i.e. corpus has been illegally taken over by respondent No.4 - husband of the present petitioner and father of the corpus. Learned advocate for the respondent has raised the preliminary contention that the present petition under Article 226 of the Constitution of India for custody of minor child is not maintainable. In support of the said contention, learned counsel has placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of **Tejaswini Gaud and others (supra)**. The Hon'ble Supreme Court in the aforesaid case has observed in para 14 and 19 as under:

*"14. 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 3 [Gohar Begum v. Suggi @ Nazma Begam and others](#) AIR 1960 SC 93 4 [Smt. Manju Malini Sheshachalam D/o Mr. R. Sheshachalam v. Vijay Thirugnanam S/o Thivugnanam & Others](#) 2018 SCC Online Kar 621 law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.*

xxx xxx xxx

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 is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

16. Thus, from the aforesaid observations made by the Hon'ble Supreme Court, it is clear that in child custody matters a writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law. Thus, we are of the view that present petition is maintainable.

17. Now, it is the case of the petitioner that she got married with respondent No.4 in the year 2013 and out of the said wedlock, the petitioner delivered a child viz. Jiyansh - corpus. However, because of the disputes between the petitioner and respondent No.4,

petitioner has initiated various proceedings. It is specifically stated on affidavit that on 02.10.2021 at about 8:00 to 8:15 p.m., the respondent Nos. 4 to 6, by using force, snatched away the son of the petitioner - corpus, who is aged about 4 years, from the hands of the petitioner and thereafter the corpus was kept in illegal custody of respondent Nos. 4 to 6. In support of the said contention, petitioner has placed on record necessary documents. At this stage, it is pertinent to note that the respondents have filed an affidavit in the present matter and along with the said affidavit, a notice dated 23.09.2021 issued by the respondent Nos. 4 to 6 through their advocate to the present petitioner, is also placed on record at page 149. If the averments made in the said legal notice are carefully seen, it is revealed that even it is the case of the private respondents that petitioner has left her matrimonial house in March, 2019 along with her son Jiyansh - corpus. Thus, from the said notice which was issued on 23.09.2021, it is clear that the custody of the corpus was with the petitioner. It is also relevant to note at this stage that the said notice was issued on 23.09.2021, whereas the incident of snatching away of the corpus had taken place on 02.10.2021 i.e. within a period of approximately 8 to 10 days from issuance of the aforesaid notice. Thus, from the aforesaid facts and circumstances of the present case it is revealed that at the relevant point of time, custody of the child was with the present petitioner.

18. It is further revealed from the record that on 06.10.2021, this Court issued urgent notice to the respondents and matter was kept on 08.10.2021. On 08.10.2021, this Court, after considering the objections raised by the private respondents and after considering various decisions, has passed an order handing over the interim custody of the corpus to the petitioner mother. Thus, from 08.10.2021 onward the custody of the corpus is with the petitioner - mother of the corpus. It also reveals that thereafter this Court has passed further order by which respondent No.4 is permitted to take interim custody of the corpus from 11:00 a.m. to 8:00 p.m. on every Sunday.

19. Now, it is the case of the private respondents in Criminal Misc. Application No.1 of 2022 filed by them that child Jiyansh was enjoying the company of both the parents i.e. father and mother and both had mutually decided that for a period of 7 - 8 days in a month, the child used to live with the father i.e. respondent No.4 and for next 7 - 8 days with mother i.e. the present petitioner. However, no such document is placed on record except the affidavits of the neighbours.

19.1.It is also pertinent to note that the respondents have produced certain photographs along with separate application filed by them and thereafter contended that the private respondents

were having custody of the child. It is pertinent to note that such photographs are not produced by the private respondents along with the reply filed in the main petition. Moreover, separate Criminal Misc. Application No.1 of 2022 has been filed only in March, 2022 and prior to the filing of the said application, this Court has passed an interim order on 16.11.2021 by which the respondent No.4 - husband of the present petitioner was permitted to take interim custody of the child with him during 11:00 a.m. to 6:00 p.m. on 19.11.2021. Thereafter also, by way of another order dated 22.11.2021, this Court has also permitted the private respondents to take interim custody of the child from 11:00 a.m. to 8:00 p.m. on every Sunday till the report is filed by the learned Mediator and thereafter the said arrangement is continued from time to time. Thus, on the basis of the said order, the private respondents are getting custody of the corpus on every Sunday and hence it is quite possible that during the said period, the photographs produced by the private respondents along with separate application filed by them have been captured by them.

20. At this stage, the decisions relied on by the learned advocates appearing for the parties are required to be referred to. In the case of *Bhavnaben D/o. Lebahai Rabari (supra)*, Division Bench of this Court has observed in para 9.1 and 21.5 as under:

"9.1 According to the petitioner, the writ of Habeas Corpus would be maintainable in relation to the custody of the minor child since retaining at the custody by the respondent No.4 is unlawful and illegal. The custody of the minor child is to be examined on the touchstone of the principle of *parens patriae*. The Division Bench of this Court in case of [Sejalben Arpitshah vs. State of Gujarat](#), reported in (2019) (3) GLR 2247 relying on the various decisions of the Apex Court has held that the mother should not be deprived of her right considering the tender age of the child and she being the girl child, the father and the grandparents may be taking good care of the child, but they cannot substitute the mother.

xxx xxx xxx

21.5 The Court extensively examined the law on the subject to hold thus:

38. xxx xxx xxx

49. Same sentiments were earlier expressed in [Rosy Jacob v. Jacob A.Chakramakka](#), (1973) 1 SCC 840 in the following words:

"15. ...The children are not mere chattels : nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society..."

50. The role of the mother in the development of a child's personality can never be doubted. A child gets the best protection through the mother. It is a most natural thing for any child to grow up in the company of one's mother. The company of the mother is the most natural thing for a child. Neither the father nor any other person can give the same kind of love, affection, care and sympathies to a child as that of a mother. The company of a mother is more valuable to a growing up female child unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The company of the mother is always in the welfare of the minor child. [Vide Vivek Sing (Supra)]."

20.1. In the case of *Rajeswari Chandrasekar Ganesh (supra)*, the Hon'ble Supreme Court observed and held in para 85, 86, 89, 91 and 115 as under:

"85. This Court considering the welfare of the child also stated that : (SCC p. 855, para 15) "15...The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society..."

86. In *Elizabeth Dinshaw (supra)*, this Court has observed that whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant

*criterion of what would best serve the interest and welfare of the child.*

xxx xxx xxx

89. The question as to what would be the dominating factors while examining the welfare of a child was considered in *Walker v. Walker & Harrison*, 1981 New Ze Recent Law 257 and it was observed that while the material considerations have their place, they are secondary matters. More important are stability and security, loving and understanding care and guidance, and warm and compassionate relationships which are essential for the development of the child's character, personality and talents. It was stated as follows :

"Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."

xxx xxx xxx

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.

xxx xxx xxx

115. We would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when

*resolving disputes between the rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult."*

20.2. In the case of **Gippy Arora (supra)**, the Punjab & Haryana High Court has observed and held in para 15 and 18 as under:

"15. After careful perusal of the judgments cited by counsel for the respondents, I am of the considered opinion that in none of the said judgments it has been laid down as a rule of law that in all cases of production and custody of the child by a natural guardian should be dismissed merely because it is for another Court i.e. Court of Guardian Judge to determine the question of welfare of the minor child in custody of another person. In view of the ratio of the judgments i.e. Manju Tiwari's case (supra) and a Division Bench of Kerala High Court in Eugenia Archetti Abdullah's case (supra), this Court is of the opinion that High Court can exercise jurisdiction vested in it under [Article 226](#) of the Constitution of India with respect to the issuance of a writ of habeas corpus when the custody of the child has been taken away by one of the natural guardian by playing a fraud upon the another. It is established from various documents produced on the record that the child in the present case is 11 months old. The custody was with mother but respondent No.2 had come to Amritsar in the month of June, 2008. Respondent No.2 had approached the petitioner wife. He was permitted to take Dasasya Singh with him for two days but on the third day he took him

away from Amritsar on June 12, 2008 (Thursday) without telling the petitioner. Thereafter he filed a petition under Section 13 of the Hindu Marriage Act before the Family Court at Ahmedabad on June 24, 2008 and obtained a status quo order regarding the custody of the child in a fraudulent manner. Such a conduct of respondent No.2 on the face of it reflects that he has committed breach of trust with petitioner. He has played a fraud by deliberately deceiving the petitioner with a design to secure the custody of Master Dasasya Singh by taking unfair advantage of the circumstances. It is a clear case of deception in order to gain the custody of the child causing simultaneous loss to another. The Supreme Court in the case of S.P. Chengalvarjuna Naidu (dead) by L.Rs. v. Jagannath, 1994 AIR(SC)853 observed as follows:-

Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

xxx xxx xxx

18. The contention of counsel for respondent No.2 would have found weight in case he had acted in a fair manner. After having fraudulently taken away the custody of the child from an area falling within the jurisdiction of this Court, he has taken a stand that the petitioner is not of sound

*mind as such welfare of the child lies with respondent No.2. A person who seeks the equity must do equity. It does not lie in the mouth of respondent No.2 to play a fraud with the petitioner and later on claim that he has got a preferential right to keep the custody of the child. The manner in which the child has been taken away from the petitioner cannot have the approval and sanction of law. He should have adopted a legal procedure to take the custody of the child."*

20.3. In the case of ***Shradha Kannaujia (Minor) and Another (supra)***, High Court of Judicature at Allahabad has observed in para 7, 8 and 9 as under:

*"7. It is well settled that writ of habeas corpus is a prerogative writ and an extraordinary remedy. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in case of Sayed Saleemuddin vs. Dr. Rukhsana and others (2001)5 SCC 247 and it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. In said case it was held as under:-*

*"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the*

*children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court..."*

8. Similarly, in the case of *Nithya Anand Raghvan v State (NCT of Delhi)* and another 2017 8 SCC 454, it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and 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. The relevant observations made in the judgement are as follows:-

"44. 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*, (1973) 2 SCC 674, 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.*

*45. 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. Rukhsana, (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 Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42, 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 Vs. State (NCT of Delhi), 2004 SCC OnLine Del 699, relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.*

*46. 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.*

*47. 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 exceptional 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."*

*9. The issue of maintainability of a habeas corpus petition under Article 226 of the Constitution of India in matters of custody of minor was also considered in case of Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others (2019) 7 SCC 42, 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. The observations made in the judgment in this regard are as follows:-*

*"14. 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 court has jurisdiction.*

*x x x*

*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 is 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 of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

21. Thus, from the latest decision rendered by the Hon'ble Supreme Court in the case of **Rajeswari Chandrasekar Ganesh (supra)**, it is clear that whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights

of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child. 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. Further the question of custody cannot be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. It is further held that the welfare of the child must be decided on a consideration including the general psychological, spiritual and emotional welfare of the child. While resolving the disputes between the rival claimants for the custody of a child, the aim of the Court must be to choose the course which will best provide for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult.

22. Thus, keeping in view the aforesaid decision rendered by the Hon'ble Supreme Court, if the facts of the present case, as discussed hereinabove are examined, it reveals that the private respondents have contended that respondent No.4 is a businessman and residing with his parents and financial condition of the private respondents is also very good and hence they can take proper care of the corpus. It is

also the case of the private respondents that the petitioner - mother of the corpus is residing with her brother and his family in a 2 BHK flat and income of brother of the petitioner is also not enough.

23. However, as observed by the Hon'ble Supreme Court, financial condition of a party alone cannot be looked into. At the relevant point of time, this Court has also interacted with the petitioner, corpus as well as the respondents in the chamber when this Court has tried to resolve the dispute between the parties. As the corpus is aged about approximately 5 years and the custody of the corpus was with the petitioner - his mother since the time when she left her matrimonial home in March, 2019, as stated by the private respondents in the legal notice issued by them to the petitioner, this Court is of the view that custody of the corpus is required to be given to the petitioner mother. Once again, it is also pertinent to note that petitioner mother has filed this petition alleging that private respondents have snatched away the custody of minor child on 02.10.2021. Further, by way of order dated 08.10.2021, interim custody of the minor child is given to the petitioner mother. Thus, in the paramount interest and welfare of the minor child Jiyansh - corpus, this Court is of the view that the interim order passed by this Court, whereby, interim custody of the corpus was given to the present petitioner, is required to be confirmed and the

custody of the corpus is required to be given to the present petitioner.

24. Accordingly, the petition is allowed. The custody of the minor child Jiyansh - corpus is ordered to be given to the present petitioner. However, it is always open for the private respondents to file appropriate proceedings before appropriate forum for visitation right. As and when such proceedings are filed, the same shall be decided on its own merits. Accordingly, connected application also stands disposed of.

(VIPUL M. PANCHOLI, J)

(DR. A. P. THAKER, J)

At this stage, after the order is pronounced, learned advocate Mr. Chhabra appearing for private respondents requested that this order be stayed. However, it is pertinent to note that this Court has already granted interim custody to the petitioner and till today, interim custody of the corpus is with the petitioner-mother and for the reasons recorded in the order, we do not accede to the said request hence the same is rejected.

(VIPUL M. PANCHOLI, J)

(DR. A. P. THAKER, J)

LAVKUMAR J JANI