

**A.F.R.**

Neutral Citation No. - 2024:AHC:66116

**Court No. - 80**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 82 of 2024

**Petitioner :-** Mithilesh Maurya And Another

**Respondent :-** State Of Up And 5 Others

**Counsel for Petitioner :-** Hemlata Srivastava

**Counsel for Respondent :-** G.A.,Saurabh Kumar Pandey

**Hon'ble Dr. Yogendra Kumar Srivastava,J.**

1. Heard Sri Sandeep Srivastava holding brief of Ms. Hemlata Srivastava, learned counsel for the petitioners, Sri Pankaj Srivastava, learned A.G.A.-I appearing for the State-respondents and Sri Saurabh Kumar Pandey, learned counsel appearing for the respondent nos. 4, 5 and 6.
2. Submission of the counsel for the petitioners and also the case set up in the petition is to the effect that the respondent no. 4, who is the wife of the petitioner no. 1, left her matrimonial home on 19.08.2018 along with the petitioner no. 2 (corpus), an infant of age about one month at that point of time.
3. Proceedings under Sections 9 and 13 of the Hindu Marriage Act, 1955<sup>1</sup>, maintenance proceedings under Section 125 of the Code of Criminal Procedure, 1973<sup>2</sup>, and also a criminal case are stated to be pending between the parties.
4. Counsel for the petitioners submits that the only relief that he seeks to press in the present petition is for grant of visitation rights.
5. Counsel for the State-respondents and also the counsel for the contesting respondent no.4 submit that since the relief sought in the present petition is confined to grant of visitation rights and proceedings relating to matrimonial disputes between the parties are pending before

---

1 HMA

2 the CrPC

the Family Court, the present petition seeking a writ of habeas corpus would not be entertainable.

6. The fact with regard to the petitioner no. 1 and respondent no.4 (i.e. the husband and wife) living separately since August, 2018 is undisputed. It is also an admitted fact that divorce proceeding between the husband and the wife is pending before the Family Court, and that the petitioner no. 2 who is a minor is presently under the custody of her mother.

7. It is also an admitted position between the parties that the petitioner no. 2 (minor daughter) who was born on 12.07.2018, has continuously stayed with her mother since August, 2018, when she is stated to have left her matrimonial home.

8. The claim of the petitioner no. 1 is confined to a relief for grant of visitation rights.

9. The writ of habeas corpus is a prerogative writ, an extraordinary remedy, evolved under the common law and incorporated in our constitutional law, having the objective to protect and safeguard individual liberty.

10. In '**Judicial Remedies in Public Law**'<sup>3</sup>, the writ of habeas corpus has been described as follows:-

"The writ of habeas corpus is a writ of right but not of course. This means that the applicant has to show a prima facie case that he is being unlawfully detained."

11. The above principle with regard to a writ of habeas corpus being a writ of right and not a writ of course and that it may be granted only on reasonable ground or probable cause being shown, has been

---

3 Judicial Remedies in Public Law by Clive Lewis, 3<sup>rd</sup> Edition

reiterated in **Mohammad Ikram Hussain v State of U.P. and others**<sup>4</sup>, **Kanu Sanyal v District Magistrate Darjeeling**<sup>5</sup>.

12. The nature and scope of writ of habeas corpus was considered in the case of **Kanu Sanyal** (supra) and the Supreme Court after tracing the development of the writ of habeas corpus by Common-Law Courts in England held that the writ of habeas corpus is essentially a procedural writ dealing with the machinery of justice but not the substantive law with an object to secure release of a person who is illegally restrained of his liberty.

13. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a *prima facie* case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.

14. In the instant case, the minor child, soon after her birth, and ever since she was infant of about one month, has been in the custody of her mother (respondent no.4), who had admittedly left her matrimonial home, and is living separately since then.

15. The law relating to guardians and wards is governed in terms of the Guardians and Wards Act, 1890<sup>6</sup> and an order with regard to guardianship upon an application filed by a person claiming entitlement may be passed under the aforesaid enactment.

16. Looking to the subject nature of disputes concerning the family and the need to adopt an approach radically different from that adopted in an ordinary civil proceeding, the Family Courts Act, 1984 was

---

4 1964 AIR 1625

5 (1973) 2 SCC 674

6 GWA

enacted for establishing family courts for speedy settlement of family disputes and the jurisdiction in respect of suits and proceedings relating to matrimonial matters and also relating to guardianship and custody of a minor is vested in the family courts.

17. The Hindu Minority and Guardianship Act, 1956<sup>7</sup> was enacted to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The Act is supplemental to the GWA, and in terms of Section 2 thereof its provisions are in addition to and not in derogation to the GWA.

18. The petitioner no.2 (minor daughter) was an infant of age about one month at the point of time when her mother is said to have left her matrimonial home, and in terms of Section 6(a) of the HMGA, the custody of a minor with his/her mother, could not *prima facie* be said to be illegal.

19. The provision with regard to making of an application regarding claims based on entitlement of guardianship is under the GWA and under Section 12 thereof the court is empowered to make interlocutory orders for protection of a minor including an order for temporary custody and protection of the person or property of the minor.

20. Proceedings for restitution of conjugal rights under Section 9 of the HMA and also a petition for divorce under Section 13 of the HMA, are stated to be pending between the parties.

21. The subject matter relating to custody of children during the pendency of the proceedings under the HMA is governed in terms of the provisions contained under Section 26 thereof. The aforesaid section applies to 'any proceeding' under the HMA and it gives the power to the court to make provisions in regard to: (i) custody, (ii)

---

<sup>7</sup> HMGA

maintenance, and (iii) education of minor children. For this purpose the court may make such provisions in the decree as it may deem just and proper and it may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the decree.

22. In the case at hand, proceedings under the HMA being pending between the parties before the Family Court, the jurisdiction of the court under Section 26 may be invoked for seeking orders with regard to custody of the minor and the relief in respect of visitation rights.

23. The court where the aforesaid proceedings are pending would be empowered to pass all such orders and make provisions with regard to custody and grant of visitation rights, from time to time, in discharge of its duty relating to the care and custody of the minor keeping in view what would best serve the interest of the child.

24. 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 **Nithya Anand Raghvan v State (NCT of Delhi) and another**<sup>8</sup>, and referring to the earlier decisions in **Sayed Saleemuddin v Rukhsana**<sup>9</sup>, **Elizabeth Dinshaw v Arvand M. Dinshaw**<sup>10</sup> and **Paul Mohinder Gahun v State (NCT of Delhi) & others**<sup>11</sup> 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 observations made in the judgment in this regard are as follows:-

"44. ...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

---

8 (2009) 1 SCC 42

9 (2001) 5 SCC 247

10 (1987) 1 SCC 42

11 2004 SCC Online Del 699

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) & Ors.* 2004 SCC OnLine Del 699, relied upon by the appellant). It is not necessary to multiply the authorities on this proposition.

x x x

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."

25. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others v Shekhar Jagdish Prasad Tewari and others**<sup>12</sup> 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

---

12 (2019) 7 SCC 42

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."

26. It is therefore seen that in an application seeking a writ of habeas corpus for custody of a minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare

of the child requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody the child presently is.

27. It is well settled that in matters of custody the welfare of child would be of a paramount consideration and the role of the court in examining the cases of custody of a minor is on the touchstone of **‘principle of *parens patriae* jurisdiction’**.

28. Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, would be qualified only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

29. In a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court.

30. In the facts of the present case, the respondent no. 4 along with her minor daughter who was an infant of about one month, at that point of time (i.e. in August, 2018), is stated to have left her matrimonial home and since then the minor is said to be in the custody of her mother.

31. The two parents are admittedly living separately since the time that the respondent no.4 is stated to have left her matrimonial home, and matrimonial disputes are pending between the parties, in the form of proceedings under Sections 9 and 13 of the HMA, maintenance



proceedings under Section 125 CrPC and also a criminal case are stated to be pending between the parties.

32. Admittedly, the relief sought in the present writ petition is restricted to a claim for visitation rights.

33. A writ of habeas corpus, as has been consistently held, though a writ of right is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child.

34. Habeas Corpus writ would not ordinarily issue for grant of visitation rights particularly where proceedings between the parties are pending before the Family Court.

35. Insofar as a claim with regard to visitation rights is concerned, it is always open to the party concerned to avail the remedy by moving an appropriate application before the Family Court where proceedings with regard to the matrimonial disputes between the parties are stated to be pending.

36. It is made clear that the observations made, herein above, are *prima facie* in nature and the same are without prejudice to the rights and contentions of the parties, which may be agitated in the proceedings before the court concerned.

37. Having regard to the aforesaid, this Court is not inclined to exercise its extraordinary prerogative jurisdiction for issuance of a writ of habeas corpus, in the facts of the case.

38. The writ petition stands accordingly **dismissed**.

**Order Date :- 16.4.2024**

Sachdeva

**[Dr. Y. K. Srivastava, J.]**