

Reserved on 04.11.2020

Delivered on 01.12.2020

HABEAS CORPUS WRIT PETITION No.362 of 2020

1. Km. Rachna

2. Km. Anchal

Vs.

State of Uttar Pradesh & 4 Others

Counsel for Petitioners : Sri Avinash Pandey
Sri Shagir Ahmad, Senior
Counsel, Amicus
Counsel for State-Respondent : Sri J K Upadhyay, AGA

Hon'ble Pritinker Diwaker, J.
Hon'ble Pradeep Kumar Srivastava, J.

(By: Pritinker Diwaker, J)
(01.12.2020)

This petition has been filed by the petitioners, seeking a writ of habeas corpus, commanding respondent no.4-Superintendent, Children Home (Girl) District Saharanpur, to release corpus-petitioner no.2-Km. Anchal, who has been allegedly illegally detained in the Children Home (Girl) District Saharanpur.

2. Facts of the instant case are that on 16.2.2020, FIR was lodged by Smt. Sudha, mentioning therein that on 15.2.2020, her minor daughter Km. Anchal (hereinafter referred to as 'petitioner no.2-corpus') aged 17 years has been enticed by one Arjun S/o Rishipal. She has alleged that while leaving the house, petitioner no.2-corpus had taken certain ornaments and cash amount. She has further alleged that the father, mother and brother of Arjun have helped him in taking petitioner no.2-corpus. Based on this FIR, offence under Sections 363 and 366 of IPC was registered against

Arjun, his parents and relatives.

Later, petitioner no.2-corpora was recovered on 4.3.2020 and on the same day, her Section 161 Cr PC statement was recorded wherein she has stated that as quite often she was beaten by her mother, out of frustration, on 15.2.2020, without informing her family members, she had gone to the house of her friend, namely, Km. Rachna-petitioner no.1, sister of Arjun. She has further stated that she was never taken away by any one and of her own free-will, she was living with her friend. She, however, has refused for her medical examination. As per High School Certificate, her age has been found 17 years, whereas as per Radiological examination conducted on 6.3.2020, her age was found about 20 years. In her statement recorded under Section 164 of Cr PC on 7.3.2020, she has reiterated that of her own she had gone to the house of petitioner no.1 and that nobody had forcibly taken her. On 13.3.2020, petitioner no.2-corpora was produced before the Chief Judicial Magistrate, Saharanpur and it was submitted by the police that as per High School Certificate, age of petitioner no.2-corpora comes to 17 years and 20 days and, therefore, suitable order be passed in relation to her custody. Mother of petitioner no.2-corpora filed an application before the Magistrate to the effect that petitioner no.2-corpora is minor and, therefore, in the interest of justice, she be sent to Balika Vikas Grih/Child Development Home. After considering all the facts of the case, a finding was recorded by the Magistrate, determining the age of petitioner no.2-corpora to be 17 years and the Magistrate has directed for producing her before Bal Kalyan Samiti/Child Welfare Committee (hereinafter referred to as 'the Committee') for issuance of further direction with regard to the custody of petitioner no.2-corpora. Pursuant to the order passed by the Magistrate, petitioner no.-2-corpora was produced before Committee and the order was passed by the Committee for keeping her in Children Home (Girl). Pursuant to this order, petitioner no.2-

corpus is in Children Home (Girl) Saharanpur.

3. Aggrieved with this order, present petition has been preferred for issuance of a writ of habeas corpus. The main grounds, which have been raised by the petitioners, are:

(i) that in 164 of Cr PC statement, petitioner no.2-corpus has categorically stated that she was being subjected to torture by her mother and brother, therefore, she left her house;

(ii) that petitioner no.2-corpus was living happily with petitioner no.1, i.e. her friend;

(iii) that once the custody of petitioner no.2-corpus has already been denied by her parents and petitioner no.2-corpus wants to go with petitioner no.1, she could not have been sent to Children Home (Girl) and that she has been kept in Children Home (Girl) against her wish;

(iv) that petitioner no.2-corpus is not minor and, therefore, she cannot be kept against her wish; and

(v) that even if petitioner no.2-corpus is minor, then also she cannot be kept in Children Home (Girl) against her wish.

4. In compliance of the order passed by the Magistrate, the Committee has passed the order impugned, sending petitioner no.2-corpus to the Children Home (Girl) and pursuant to this order, petitioner no.2-corpus is in Children Home (Girl). It is this order, which has been challenged by the petitioner before this Court, seeking issuance of a writ of habeas corpus on the ground that the detention of the corpus is illegal and, therefore, she be set free forthwith. In this regard, reliance has been placed upon various judgments of this Court.

5. On the other hand, opposing the arguments of the petitioners, learned State Counsel has argued that the writ of habeas corpus is not maintainable as the order impugned has been passed by the

Committee pursuant to the order of the Magistrate and the judicial order, right or wrong, cannot be assailed in a petition seeking writ of habeas corpus. State Counsel submits that petitioner no.2 has an efficacious alternative remedy of filing an appeal under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act') and the judicial order can only be challenged before the appellate Court. He submits that while passing the order impugned, the Committee has exercised the power of Magistrate and in view of the provisions of Section 27 of the Act, for all purposes, the Committee acts like the Magistrate. Once the order has been passed by the Magistrate, it can only be assailed before the appropriate Court by filing an appeal. In support thereof, he placed reliance on the various judgments passed by this Court.

6. We have heard learned counsel for the parties and perused the record.

7. Undisputedly, the Committee has passed the order pursuant to the order dated 13.3.2020 passed by the Magistrate. Provisions of Section 27 (9) of the Act makes it clear that while passing such orders, the Committee exercises the power of Judicial Magistrate. Section 27 of the Act reads as under:

"27. Child Welfare Committee.—(1) The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.

(2) The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on the matters concerning children.

(3) The District Child Protection Unit shall provide a Secretary and other staff that may be required for secretarial support to the Committee for its effective functioning.

(4) No person shall be appointed as a member of the Committee unless such person has been actively involved in health, education or welfare activities pertaining to children for at least seven years or is a practicing professional with a degree in child psychology or psychiatry or law or social work or sociology or human development.

(5) No person shall be appointed as a member unless he possesses such other qualifications as may be prescribed.

(6) No person shall be appointed for a period of more than three years as a member of the Committee.

(7) The appointment of any member of the Committee shall be terminated by the State Government after making an inquiry, if—

(i) he has been found guilty of misuse of power vested on him under this Act;

(ii) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii) he fails to attend the proceedings of the Committee consecutively for three months without any valid reason or he fails to attend less than three-fourths of the sittings in a year.

(8) The District Magistrate shall conduct a quarterly review of the functioning of the Committee.

(9) The Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(10) The District Magistrate shall be the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders."

8. Further, before entering into the merits of the case, we feel it appropriate to refer to some important provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015. Sub-section (4) of Section 1 of the Act reads as under:

"(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including --

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection."

Sub-section 14 (iii) (a) of Section 2 of the Act is as under:

"(14) "child in need of care and protection" means a child—

... ..

(iii) who resides with a person (whether a guardian of the child or not) and such person—

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child"

Sections 29 and 37 of the Act are as under:

"29. Powers of Committee. (1) The Committee shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.

(2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection."

37. Orders passed regarding a child in need of care and protection.- (1) The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to

take a view, pass one or more of the following orders, namely:—

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Childrens Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;

(h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for—

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed."

Section 101 of the Act reads as under:

"101. Appeals.- (1) Subject to the provisions of this Act, any person aggrieved by an order made by the Committee or the Board under this Act may, within thirty days from the date of such order, prefer an appeal to the Childrens Court, except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate:

Provided that the Court of Sessions, or the District Magistrate, as the case may be, may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time and such appeal shall be decided within a period of thirty days.

(2) An appeal shall lie against an order of the Board passed after making the preliminary assessment into a heinous offence under section 15 of the Act, before the Court of Sessions and the Court may, while deciding the appeal, take the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board in passing the order under the said section.

(3) No appeal shall lie from,—

(a) any order of acquittal made by the Board in respect of a child alleged to have committed an offence other than the heinous offence by a child who has completed or is above the age of sixteen years; or

(b) any order made by a Committee in respect of finding that a person is not a child in need of care and protection.

(4) No second appeal shall lie from any order of the Court of Session, passed in appeal under this section.

(5) Any person aggrieved by an order of the Children's Court may file an appeal before the High Court in accordance with the procedure specified in the Code of

Criminal Procedure, 1973 (2 of 1974)."

Section 102 of the Act is as under:

"**102. Revision.**- The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

9. In the case of **Menu Patel v. State of UP**¹, it has been held by this Court:

"9. The issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of *Smt. Kalyani Chowdhary v. State of U.P.* reported in 1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

Further, in **Smt. Neelam vs. State of Uttar Pradesh & Ors**², a Division Bench of this Court has again held that:

"The issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of *Smt. Kalyani Chowdhary v. State of U.P.* reported in

1 2015 SCC OnLine All 5892

2 Habeas Corpus Writ Petition No.36519 of 2015, decided on 20.7.2015

1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

In **Pushpa Devi v. State of Uttar Pradesh & Ors**³, it has been held by this Court:

"In any event, the question of age is not very material in the petitions of the nature of habeas corpus as even a minor has a right to keep her person and even the parents cannot compel the detention of the minor against her will, unless there is some other reason for it.

We have no mind to enter into the question and decide as to when a particular minor is to be set at liberty in respect of her person or whether she shall be governed by the direction of her parents. The question of custody of the petitioner as a minor, will depend upon various factors such as her marriage which she has stated to have taken place with Guddu before the Magistrate.

Apart from the above factors, the more important aspect is as to whether there is any authority for detention of the petitioner with any person in law. Though, it is said that she has been detained in the Nari Niketan under the directions of the Magistrate, the first thing to be seen should be as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. It is very clear that this petitioner would not be accused of the offence under Sections 363 and 366 I. P. C. We are taking the version because she could only be a victim of it. A victim may at best be a witness and there is no law at least now has been quoted before us whereunder the Magistrate may direct detention of a witness simply because he does not like him to go to any particular place. In such

3 1994 HVVD (All) C.R. Vol. II 259

circumstances, the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal. Even the Magistrate is not a natural guardian or duly appointed guardian of all minors."

A Division Bench of this Court in the case of **Smt. Raj Kumari v. Superintendent, Women Protection, Meerut & Ors.**⁴ had taken a similar view and laid down the following dictum:

"In view of the above, it is well settled view of this Court that even a minor cannot be detained in Government Protective Home against her wishes. In the instant matter, petitioner has desired to go with Sunil Kumar besides this according to the two medical reports, i. e. of the Chief Medical Officer and L. L. R. M., College Meerut, the petitioner is certainly not less than 17 years and she understands her well being and also is capable of considering her future welfare. As such, we are of the opinion that her detention in Government Protective Home, Meerut against her wishes is undesirable and impugned order dated 23.11.96 passed by the Magistrate directing her detention till the party concerned gets a declaration by the civil court or the competent court of law regarding her age, is not sustainable and is liable to be quashed."

Yet this Court, in another case in **Smt. Preeti Nishad through her Husband, Mahendra Kumar v. State of Uttar Pradesh**⁵, observed as under:

"The main objection of Sri S. N. Tilhari, learned A.G.A. that the petitioner should be asked to file revision at this stage will be defeating the spirit of Article 21 of the Constitution of India. The petitioner is neither an accused nor an offender of law. She is simply a citizen of this country who has done no wrong. She is major. The C.M.O. concerned has given her age to be around 20 years. This is based on medical examination and x-ray report. So far the certificate submitted by the father is concerned, it appears to be fabricated. corpus has clearly mentioned that she has never studied in the school from where the age certificate has been

4 1997 (2) A.W.C. 720

5 Habeas Corpus No.146 of 2015.

obtained. It is not a matriculation certificate. It is a lower class certificate issued recently after the controversy arose. It cannot be trusted compared to the C.M.O. report and her own version before the Court.

She has made statement before this Court that she does not want to live in any Nari Niketan or Sudhar Griha. She does not even want to live with his father. Somehow due to incorrect judicial order she is languishing in Nari Niketan for the last seven months. It will be a travesty of justice if this Court dismisses this petition on any alternative remedy. The law on the subject is very clear. The Court cannot shut its eyes and relegate a citizen to further harassment and illegal detention. Neither the S.D.M. nor the A.D.J. had any jurisdiction to send a lady to a protective home without her consent. The respective orders passed by them are set aside."

While concluding in the case of **Smt. Neelam** (supra), this Court held as follows:

"Now coming to the second objection canvassed by learned A. G. A. before this Court that the detention of the petitioner cannot be said to be illegal as she has been sent to Nari Niketan in pursuance of a judicial order, we hold that the second objection raised by learned A. G. A. is also without any merit in view of the principle laid down by the a Division Bench of this Court in the case of Pushpa Devi (supra) that a victim may at best be a witness and there is no law at least now has been quoted before us whereunder the Magistrate may direct detention of a witness simply because he does not like him to go to any particular place.

Thus, merely because the petitioner has been sent to Nari Niketan pursuant to a judicial order which per se appears to be without jurisdiction, her detention cannot be labelled as "legal" rendering this Habeas Corups writ petition liable to be dismissed as not maintainable."

In the case of **Rahul Kumar Singh & Anr. v. State of Uttar Pradesh & Ors.**⁶ it has been held by this Court:

"The issue whether a minor, can be sent to Nari

⁶ Habeas Corpus Writ Petition No.47442 of 2015, decided on 15.9.2015

Niketan against her wish, is no longer res-integra and stands conclusively settled by a catena of decisions of this Court. In the case of **Smt. Kalyani Chowdhary v. State of U.P. reported in 1978 Cr. L.J. 1003 (D.B.)**, a Division Bench of this Court has taken the view that:

"No person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

In the case of **Kajal & Anr. v. State of Uttar Pradesh & Ors.**⁷, it has been held as under:

"It may also be appreciated that the issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of *Smt. Kalyani Chowdhary v. State of U.P.* reported in 1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

... ..

Thus, merely because the petitioner has been sent to Nari Niketan pursuant to a judicial order which per se appears to be without jurisdiction, her detention cannot be labelled as "legal" rendering this Habeas Corpus writ petition liable to be dismissed as not maintainable."

10. Above judgments, thus, lay down the law that writ of habeas corpus is maintainable even if the same has been filed against a

⁷ Habeas Corpus Writ Petition No.3914 of 2018, decided on 22.2.2019

judicial order of the Magistrate, sending the corpus to Juvenile Home/Nari Niketan/Child Care Home or any other Home duly authorized/recognized.

11. In some other judgments passed by this Court, a contrary view has been taken wherein it has been held that if a corpus has been sent to the Juvenile Home/Nari Niketan/Child Care Home pursuant to the order passed by the Committee, detention of the corpus cannot be said to be illegal, requiring issuance of a writ of habeas corpus. One such view has been taken by this Court in the case of **Saurabh Pandey v. State of Uttar Pradesh**⁸, which reads as under:

"10. Once the corpus is found a child, as defined by Section 2 (12) of the J.J. Act, 2015, and, allegedly, a victim of a crime (in this case Case Crime No.475 of 2018 detailed above), she would fall in the category of child in need of care and protection in view of clauses (iii), (viii) and (xii) of sub-section (14) of section 2 of the J.J. Act, 2015. Hence, the order passed by the Child Welfare Committee placing the corpus in a protection home would be within its powers conferred by section 37 of the J.J. Act, 2015.

11. In view of the above, as the corpus is in Women Protection Home pursuant to an order passed by the Child Welfare Committee, which is neither without jurisdiction nor illegal or perverse, keeping in mind the provisions of the J.J. Act, 2015, the detention of the corpus cannot be said to be illegal so as to warrant issuance of a writ of habeas corpus. If the petitioner is aggrieved by the order of the Child Welfare Committee, the petitioner is at liberty to take recourse to the remedy of an appeal provided under Section 101 of the J. J. Act, 2015."

In the case of **Smt. Shahjahan v. State of Uttar Pradesh & Ors.**⁹, it has been observed as under:

"6. Having considered the submissions raised and the aforesaid background, once the petitioner has

8 2019 SCC OnLine All 4430

9 2015 SCC OnLine All 5224

already filed a revision in relation to the custody of the same victim against the order dated 8.10.2014 that is stated to be pending, it cannot be said that the victim is under unlawful custody.

8. The victim, therefore, does not appear to be in unlawful custody and, therefore, the present Habeas Corpus Writ Petition in the aforesaid background would not be maintainable. It is open to the petitioner to seek her remedy in the revision which she has filed before the appropriate Court."

Further, in the case of **Km. Mona @ Reema v. State of Uttar Pradesh**¹⁰, it has been held as under:

"After considering the facts and circumstances of the case, the corpus was sent to Muzaffarnagar by learned A.C.J.M., Court No. 3, Muzaffarnagar on 9.5.2013. It is a very serious case in which a girl of the Bihar State has been kidnapped who herself lodged the FIR in police station, Nai Mandi, Muzaffarnagar (U.P.). On the application moved by the I.O. she has been sent to Nari Niketan, Meerut by learned A.C.J.M., Court No. 3, Muzaffarnagar vide order dated 9.5.2013. The order dated 9.5.2013 is not suffering from any illegality and irregularity. The order has been passed in welfare of the corpus. The deponent of this writ petition Nadeem Ahmad is real brother of the accused Intazar, it appears that this petition has been filed with ulterior motive without disclosing the credential of the person who has filed this writ petition on behalf of the corpus Km. Mona @ Reema. The corpus has been sent from Muzaffarnagar to Meerit in pursuance of the judicial order dated 9.5.2013, in any case her detention is not illegal. The present writ petition is devoid of merit, therefore, the prayer for setting the corpus on her liberty is refused."

In the case of **Guria Bhagat @ Guria Rawani v. State of Jharkhand & Ors**¹¹, it has been held as under:

"5. Thus, in no circumstances, it can be said that the custody of the petitioner with the Nari Niketan at Deoghar is an illegal custody. If the petitioner is aggrieved by the order of Judicial

10 2014 SCC OnLine All 7099

11 2013 SCC OnLine Jhar 2149

Magistrate, First Class, Dhanbad, she is at liberty to challenge the same in accordance with law before an appropriate forum. So far this writ of Habeas Corpus is concerned, the same is not tenable at law as the custody of the present petitioner with the Nari Niketan at Deoghar is by virtue of the order of Judicial Magistrate, First Class, Dhanbad dated 26.9.2013 and more particularly, when the application preferred by the petitioner for her release has been rejected by the Judicial Magistrate, First Class, Dhanbad by a detailed speaking order dated 22.10.2013. These two orders, make the custody of the petitioner with the Nari Niketan at Deoghar is a legal one. Unless these two orders are challenged in an appropriate matter before the appropriate forum as per the law applicable to the petitioner as well as the respondent, there is no substance in this writ petition. Hence, the same is hereby dismissed, reserving the liberty with the petitioner to challenge the orders passed by the Judicial Magistrate, First Class, Dhanbad."

In **Smt. Himani v. State of Uttar Pradesh & Ors.**¹², it has been held that:

"9. Considering the facts, circumstance of the case, submission made by learned counsel for the petitioner, learned A.G.A. for the State of U.P., counsel appearing on behalf of respondent no.4 and counsel appearing on behalf of Pt. Vigyan Prakash Sharma, it appears that in the present case the corpus was allegedly kidnapped by Devendra Singh alias Bunty on 20.6.2012, its FIR has been lodged on 2.7.2012 in case crime no. 111 of 2012 under sections 363, 366 I.P.C., Police Station Nangal District Bijnor. According to the school certificate, the date of birth of the corpus is 10.5.1996, but according to the first medical examination report she was aged about 19 years but according to second medical examination done by Medical Board, constituted by C.M.O. Bijnor, she was found above 18 years and below 20 years of age. According to the statement recorded under section 164 Cr.P.C., she has not supported the prosecution story, she stated that she had gone in the company of Devendra Singh alias Bunty with her free will and consent. The Marriage certificate filed with this petition as Annexure-2 shows that it has been issued by Pt. Vigyan Prakash Sharma, Purohit of

12 2013 SCC OnLine All 13088

Sri Jharkhand Mahadeo Mandir on 24.2.2012 mentioning therein that the corpus and Devendra Singh have performed marriage in the temple on 24.2.2012 at 5.30 P.M. but marriage certificate shows that it was not bearing the signatures of family members of corpus and Pt. Vigyan Prakash Sharma was not legally authorized to issue such type of marriage certificate but Pt. Vigyan Prakash Sharma who appeared before this Court tendered his unconditional apology and assured the Court that in future he shall not issue such type of certificate, therefore, this Court is restrained to proceed further against Pt. Vigyan Prakash Sharma by accepting unconditional apology tendered by him. According to the school record, the date of birth of the corpus is 10.5.1996, according to her date of birth she was minor aged about 16 years on the date of the alleged incident. In such an age, she was playing with emotions and she was not capable to foresee her future prospects of her life. The corpus has refused to go in the company of her father. In such circumstances, the learned Judicial Magistrate/Civil Judge (J.D.) Najibabad, District Bijnor sent the corpus to Nari Niketan Moradabad vide order dated 24.7.2012. The order dated 24.7.2012 is not suffering from any illegality or irregularity. The corpus has been detained in Nari Niketan Moradabad in pursuance of the judicial order dated 24.7.2012, therefore, her detention is not illegal. The present petition is devoid of the merits. The prayer for quashing the impugned order dated 24.7.2012 is refused."

In the case of **Akash Kumar v. State of Jharkhand & Ors.**¹³, it has been held by the Jharkhand High Court that:

"4. Having heard learned counsel for both the sides and looking to the facts and circumstances of the case, we see no reason to entertain this writ of Habeas Corpus mainly for the following facts and reasons:

(i) It appears that the custody of this petitioner is with the respondent State in pursuance of the judicial order passed by the Judicial Magistrate, 1st Class, Ranchi in G.R. No. 2366 of 2013 dated 27th May, 2013 which is at Annexure-5 to the memo of this writ application. Once the custody with the State is in pursuance of the judicial order, it cannot be said that the State is having illegal custody of the petitioner and, hence, the writ of

13 2014 (19) R.C.R. (Criminal) 816

Habeas Corpus is not tenable, at law.

(ii) Learned counsel for the petitioner has relied upon Sections 6, 7 and 14 of the Juvenile Justice Act, 2000 and submitted that the order passed by the Judicial Magistrate, 1st Class in G.R. No. 2366 of 2013 is de hors the provisions of this Act and, hence, custody with the respondent is illegal. The contention for issuance of prerogative writ of Habeas Corpus under Article 226 of the Constitution of India, is not accepted by this Court. For issuance of the writ of Habeas Corpus in exercise of power under Article 226 of the Constitution of India, it must be established by the petitioner that the custody with the State of any person is illegal. Here, there is no illegal custody of the petitioner with the respondents, on the contrary, this is as per the order passed by the Judicial Magistrate, 1st Class, Ranchi in G.R. No. 2366 of 2013 dated 27th May, 2013 (Annexure-5). The order passed by the concerned trial court may be illegal, but, the custody with the respondent State is absolutely legal. It is one thing that the order passed by the Judicial Magistrate, 1st Class, Ranchi may be illegal and it is altogether another thing so far as custody with respondent-State is concerned, otherwise, in all bail matters, there shall be writ of Habeas Corpus. If the argument of the counsel for the petitioner is accepted, in bail application also under Section 439 of the Code of Criminal Procedure, where person is in judicial custody by virtue of the order passed by the learned trial court, writ of Habeas Corpus should be filed. This is a fallacy in the argument canvassed by the counsel for the petitioner. Until and unless the order passed by the Judicial Magistrate, 1st Class, Ranchi in this case is quashed and set aside by the competent court in appropriate proceeding, the custody of the petitioner with the respondent-State is legal."

Similar view has been taken by the Madhya Pradesh High Court in the case **Irfan Khan v. State of MP & Ors.**¹⁴

The Gujarat High Court, in **Manish S/o Natvarlal Vaghela vs. State of Gujarat**¹⁵ has dealt the similar question and held that:

"11. It is pertinent to note that the allegations of the petitioner are regarding non-compliance of various

14 2016 (3) MPLJ 449

15 Special Criminal Application No.5659 of 2019, decided on 23.12.2019

provisions of the Act and Rules. Against this, the Child Welfare Committee has come with a case that after following procedure and getting order from the Court, it has given the child to adoptive father. Therefore, when the child has been given in adoption by the order of the Court to adoptive parents, then that act cannot be treated as an illegal act of granting custody of minor. Even if there is lack of following due procedure under the Act and Rules by the Child Welfare Committee that can be agitated by the petitioner under the provisions of appeal/revision, as referred to above by taking out separate proceedings. When there is an efficacious alternative remedy available, writ of habeas corpus cannot be issued especially when the Child Welfare Committee has got necessary orders from the Court before handing over the custody of minor to adoptive parents.

14. Considering the facts on record, the corpus is not under any illegal confinement, therefore, this petition with a prayer for issuance of writ of habeas corpus is not maintainable. Not only that Juvenile Justice (Care and Protection of Children) Act, 2015 provides complete mechanism for custody, care and protection of a child and the Child Welfare committee is competent to pass order in this regard and if there is any grievance against such order, remedy of appeal is also available. In view of this, the petitioner is having alternative remedy and this petition with a prayer to issue writ of habeas corpus is not maintainable. Therefore, present petition is dismissed."

Similar situation was there in Patna High Court in the case of **Shikha Kumari v. State of Bihar**¹⁶ wherein the matter was referred to the larger Bench and it has held by the Bench that:

"67. Thus, it is evident that a writ of habeas corpus would not be maintainable, if the detention in custody is pursuant to judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction. It is further evident that an illegal or irregular exercise of jurisdiction by a Magistrate passing an order of remand cannot be treated as an illegal detention. Such an order can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or

16 2020 CRI. LJ 2184

appellate forum under the statutory provisions of law but cannot be reviewed in a petition seeking the writ of habeas corpus.

68. We, accordingly, sum up our conclusions in respect of the first three issues for determination as follows:-

Question No.1 : "Whether, in a petition for issuance of writ of habeas corpus, an order passed by a Magistrate could be assailed and set-aside ?"

Answer : Our irresistible conclusion in view of the ratio laid down by the Supreme Court in the aforementioned cases is that a writ of habeas corpus would not be maintainable, if the detention in custody is as per judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction. Consequently an order of remand passed by a Judicial Magistrate having competent jurisdiction cannot be assailed or set aside in a writ of habeas corpus.

Question No.2: "Whether an order of remand passed by a Judicial Magistrate could be reviewed in a petition seeking the writ of habeas corpus, holding such order of remand to be an illegal detention ?"

Answer: An illegal or irregular exercise of jurisdiction by a Magistrate passing an order of remand can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate court under the statutory provisions of law. Such an order of remand passed by a Judicial Magistrate of competent jurisdiction cannot be reviewed in a petition seeking the writ of habeas corpus.

Question No.3: "Whether an improper order could be termed/viewed as an illegal detention ?"

Answer: In view of the clear, unambiguous and consistent view of the Supreme Court in the aforesaid cases, we unhesitatingly conclude and hold that an illegal order of judicial remand cannot be termed/viewed as an illegal detention."

12. The two sets of judgments delivered by this Court reflect that

one view of this Court is that a writ of habeas corpus is maintainable against the order passed by the Committee/Court, sending the corpus to the Juvenile Home/Nari Niketan/Child Care Home, whereas according to other view, if a judicial order has been passed by the competent Court, veracity of the same cannot be decided in a writ of habeas corpus and the same is required to be challenged before the competent Court.

13. Apart from above mentioned cases, attention of this Court has also been drawn on many other cases wherein issuance of a writ of habeas corpus has been held to be maintainable, whereas in some cases, the view of this Court is otherwise.

14. Considering the various provisions of the Act and the law laid down by various Courts, we are of the view that this matter is required to be heard by a larger Bench, so that question as to whether writ of habeas corpus is maintainable against the order passed by the Judicial Magistrate/Committee, sending the corpus to the Juvenile Home/Nari Niketan/Child Care Home, can finally be decided. Likewise, yet another question is required to be addressed, as to whether even a minor can be kept in the Juvenile Home/Nari Niketan/Child Care Home against his/her wishes?

15. We, accordingly, formulate the following questions to be decided by the larger Bench:

(1) Whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee appointed under Section 27 of the Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home ?;

(2) Whether detention of a corpus in Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home pursuant to an order (may be improper) can be termed/viewed as an illegal detention ?; and

(3) Under the Scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and as such, the proposition that even a minor cannot be sent to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home against his/her wishes is legally valid or it requires a modified approach in consonance with the object of the Act ?

16. Let the matter be placed before Hon'ble the Chief Justice, on administrative side, for constituting a larger Bench.

17. However, it is clarified that pendency of this Reference shall not come in the way of the 'corpus' to avail other remedies available to him/her under the law questioning his/her detention.

18. We would like to acknowledge and appreciate the efforts and assistance rendered by Mr Shaghir Ahmad, learned Senior Advocate, Amicus.

Dated:01.12.2020

RKK/-

(Pritinker Diwaker, J)

(Pradeep Kumar Srivastava, J)