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Case :- HABEAS CORPUS WRIT PETITION No. - 256 of 2022

Petitioner :- Takbeer Khan (Minor)Thru. His Mother Rehana**Respondent :-** State Of U.P. Thru. Prin. Secy. Home Lucknow And 3 Others**Counsel for Petitioner :-** Gibran Akhtar Khan,Mohammad Asmar Ansari**Counsel for Respondent :-** G.A.,Brijesh Kumar Yadav,Prabhoo Dayal**Hon'ble Karunesh Singh Pawar,J.**

1. Case called out in the revised list.
2. Learned counsel for the petitioner and learned A.G.A. for the State-respondent is present however, none appears on behalf of respondent No.4.
3. Since the respondent No.4 did not appear on the last date i.e. 22.11.2023 therefore, stop order was passed by the court that in case no one appears for respondent No.4, the matter may be decided finally hence this Court proceeds to decide the matter finally.
4. This petition has been filed by the mother of the detenu-Takbeer Khan, aged about 3 years and 7 months now, praying for a direction for respondent Nos.2 and 3 to recover and produce the detenu before this Court after liberating him from the custody of opposite party No.4.
5. This Court vide interim order dated 15.09.2022 granted visiting rights to the deponent. It is submitted on behalf of the petitioner that neither the opposite party No.4 is represented before this Court nor the visiting rights granted to the deponent vide interim order dated 15.09.2022 are being properly complied with. At times they are complied and at times they are not complied.
6. Learned counsel for the petitioner submits that detenu is presently in the custody of opposite party No.4-Intiyaj Khan, husband of the deponent. Both deponent and opposite party No.4 have married on 09.05.2017. It is submitted that after the marriage, the respondent No.4 used to beat Rehana

(mother of the detenue) under influence of alcohol. Out of their wedlock, their son Takbeer Khan (detenue) was born on 03.03.2020. Due to atrocities committed by respondent No.4, the deponent returned to her parental home along with her son in the year 2021. After some time, she again went to her matrimonial home and started living with her husband (opposite party No.4) however, the conduct of opposite party No.4 did not change. In the meantime, a case under Sections 363, 366, 376 IPC read with Section 3/4 POCSO Act was registered as Case Crime No.1337 of 2017 at P.S. Thakurganj, District Lucknow in which opposite party No.4 was charge-sheeted and remained in jail for almost a year and ultimately was released on bail on 18.01.2019. After being released, opposite party No.4 again involved in extra marital affairs with another woman which was objected by the deponent-Rehana and she informed the same to her parents. After which, opposite party No.4 on 15.06.2022 compelled her to leave her matrimonial house however, forcefully detained the detenue-Takbeer Khan from the custody of Rehana since then she is making all efforts to bring back her son Takbeer Khan. The deponent also went to Police Station-Para, District-Lucknow on 20.07.2022 and gave application which is on record as Annexure-3 to the petition.

7. It is submitted on behalf of the petitioner that the detenue-Takbeer Khan has been illegally detained by opposite party No.4 who is a drunkered and an accused in a rape case and has already been in custody over a period of one year and thus, considering the overall interest of the detenue, it will not be safe to leave the detenue in the custody of such person who is facing rape charges and is alcoholic.

8. Learned A.G.A. has submitted that a perusal of annexure 2 of the petition shows that father of the detenue namely, Intiyaj Khan is facing rape charges in Case Crime No.1337 of 2017, under Sections 363, 366, 376 IPC read with Section 3/4 POCSO Act, P.S. Thakurganj, District Lucknow.

9. Perused the record.

10. It is not disputed that detenue while filing the petition was 2 years old and presently around 3 years and 7 months old. It is also not disputed between the parties that opposite party No.4 is facing rape charges. Specific

averments regarding the Case Crime No.1337/2017, under Sections 363, 366, 376 IPC read with Section 3/4 POCSO Act have been levelled in para 9 of the petition which have not been denied by respondent No.4 while filing the counter affidavit rather it has been stated that opposite party No.4 has been falsely roped due to ulterior motive and trial is going on and he is on bail. The opposite party No.4 while filing the counter affidavit has raised a preliminary objection that petition has been filed on misleading facts and by concealing the divorce/compromise which took place between the parties on certain terms and conditions and as per those terms and conditions, the alleged detinue was left with the custody of opposite party No.4. The copy of the compromise is on record as Annexure-CA-1 which is extracted below:-

"मैं इन्तियाज खान पुत्र वसीम खान निवासी बुद्धेश्वर बादल खेड़ा थाना पारा का हूँ मेरी शादी/निकाह दिनांक-9/5/2017 को रेहाना पुत्री रशीद खान नि० मतीनपुरवा खुर्रमनगर लखनऊ के साथ हुआ था। विवाह उपरान्त दोनो पक्षों में मतभेद उत्पन्न हो गये हैं अब साथ-साथ रहना सम्भव नहीं है इस कारण दोनो पक्ष अपने-अपने परिवार की सहमति से तलाकनामा/सुलहनामा कर रहे हैं इन्तियाज खान तीन तलाक दे दिया है जिसे समक्ष गवाहान रेहाना स्वीकार करती है। दहेज की लिस्ट के अनुसार इन्तियाज खान ने रेहाना को दहेज का सामान वापस कर दिया है रेहाना ने भी इन्तियाज खान का सामान वापस कर दिया है आज दिनांक 15/6/2022 से दोनो पक्षों के पति पत्नी के रिश्ते समाप्त हो गये हैं अब कोई एक दूसरे से कोई वास्ता व सरोकार नहीं रखेगे न ही कोई किसी के ऊपर मुकदमा आदि दाखिल करेगे दोनो पक्ष अपनी-अपनी शादी/निकाह अलग-अलग करे किसी को कोई आपत्ति नहीं होगी कोई किसी से भविष्य में मिलेगा नहीं। बेटे तकवीर खान को इन्तियाज खान ले रहे हैं।

लिहाजा यह तलाकनामा/सुलहनामा समक्ष गवाहान लिखवा दिया ताकि सनद रहे व वक्त जरूरत पर काम आवे।"

11. The opposite party No.4 has admitted that he is facing rape charges. While deciding the writ of habeas corpus, this Court is not adjudicating the rights of either of the parties. The undisputed fact that opposite party No.4 is facing rape charge is required to be considered by this Court as it questions the very character of opposite party No.4 in ***Nil Ratan Kundu and another versus Abhijit Kundu*** reported in ***[(2008) 9 SCC 413]***. It was held that character of the proposed guardian is required to be considered to determine the suitability of the spouse to have custody of the minor child. The relevant para 72 of ***Nil Ratan Kundu*** (supra) are extracted below:-

"72. In our considered opinion, on the facts and in the circumstances of the case, both the Courts were duty bound to consider the allegations against the respondent herein and pendency of criminal case for an

offence punishable under Section 498A, IPC. One of the matters which is required to be considered by a Court of law is the 'character' of the proposed guardian. In Kirit Kumar, this Court, almost in similar circumstances where the father was facing the charge under Section 498-A, IPC, did not grant custody of two minor children to the father and allowed them to remain with maternal uncle. Thus, a complaint against father alleging and attributing death of mother and a case under Section 498-A, IPC is indeed a relevant factor and a Court of law must address to the said circumstance while deciding the custody of the minor in favour of such person. To us, it is no answer to state that in case the father is convicted, it is open to maternal grand parents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and appropriate order ought to have been passed."

12. A perusal of the judgment in **Nil Ratan Kundu's** case (supra), it is clear that pendency of a criminal case is definitely one of the important considerations for assessing the character of the proposed guardian. The opposite party No.4 in this case is facing heinous charge like rape which cannot be lost sight of while exercising the jurisdiction of habeas corpus. The primary consideration for this Court is to protect and watch for the right of the minor child which has approached this Court. The ultimate well being and welfare of the child as well as future prospect of the child have to be borne in mind while adjudicating this jurisdiction. This Court is not concerned with the right of the respective parties such as compromise/divorce etc. in these proceedings. The deponent of the petition is none other than the mother of the detinue, aged about 3 years and 7 months old. According to the Mohammedan Law, mother is entitled to custody (*hizanat*) of a male child until he completes the age of 7 years. The Co-ordinate Bench of this Court in the case of **Amal Irfa vs. State of U.P. & 2 others, HABC No.12616 of 2014** has held as under:-

"13. Mulla in Principles of Mohammedan Law Para 353 (18th Edition) has observed:

" Right of mother to custody of infant children. The mother is entitled to the custody (Hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father."

14. A.H.A Fyzee in Book Outline of Mohammedan Law IVth Edition has stated:

"Mother: Custody of an infant child belongs to the mother and this right is known as Hizanat. The mother is entitled in Muslim Law to the custody of her male child till the age of 7 years and of her female child till puberty"."

13. This writ petition has been filed by the mother of the detenu seeking the custody of her child from opposite party No.4 father of the detenu which has been held to be very much maintainable by the Supreme Court in the case of **Yashita Sahu vs. State of Rajasthan** reported in **[(2020) 3 SCC 67]** emphasis is on para 10 which is extracted below:-

"9. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw vs. Arvand M. Dinshaw, (1987) 1 SCC 42: 1987 SCC (Crl) 13], Nithya Anand Raghavan vs. State (NCT of Delhi) [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104 and Lahari Sakhamuri vs. Sobhan Kodali [Lahari Sakhamuri vs. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 59] among others. In all these cases the writ petitions were entertained. Therefore, we reject the contention of the appellant-wife that the writ petition before the High Court of Rajasthan was not maintainable."

14. The opposite party No.4 remains under the influence of alcohol. He is an illiterate, careless and rigid kind of person who has also illicit relationship with other woman and the fact remains that deponent is the mother of the detenu, aged about 3 years and 7 months, and ordinarily the custody of the minor who is just 3 years and 7 months of age vests with the mother as observed by the Supreme Court in the case of **Roxann Sharma vs. Arun Sharma** reported in **[AIR 2015 (SC) 2232]**.

15. A coordinate Bench of this Court in **Reshu alias Nitya and others versus State of U.P. and others (2021)6 ALJ 632** while considering the similar allegations and also considering the judgment in **Nil Ratan Kuundu's** case (supra) in detail has held as under in para 58 :

"58. The aforementioned facts do not indicate that the custody of the minor with the respondent no. 4 can in any manner be said to amount to an illegal and improper detention. The child from her infancy, when she was of a tender age, appears to be living with her maternal grand-father. This together with the fact that the father who is claiming custody is

named as an accused in a criminal case relating to the death of the mother of the corpus, would also be a relevant factor. The other considerations which would have a material bearing would be the necessity of the child being provided loving and understanding care, guidance and a warm and compassionate relationship in a pleasant home, which are essential for the development to the child's character and personality."

16. Thus, keeping in view the law laid down by the Supreme Court in the case of ***Nil Ratan Kundu*** (supra) the fact that deponent is facing trial for the heinous offence committed upon the minor and considering the tender age of the detinue, in peculiar facts of this case, this Court is of the view that custody of the detinue should be given to the deponent-Rehana.

17. Accordingly, the writ of habeas corpus is issued directing the opposite party No.4 to hand over the custody of the detinue to the deponent of the petition namely, Rehana forthwith. The respondent Nos.2 and 3 shall ensure the compliance of this order.

18. Before parting with, it is made clear that this Court has passed this order considering the emergent need to intervene and looking to the welfare and safeguarding in the interest of detinue. This Court has not adjudicated the rights of the parties to have the custody of the detinue. All pleas are left open to the parties to get their rights decided regarding the custody of the detinue before the competent court. This order shall be subject to any order passed by the said court in the appropriate proceedings.

With the aforesaid observations, the petition stands ***disposed of***.

Order Date :- 12.12.2023

Saurabh Yadav/-