

AFR

Court No. - 84

Case :- HABEAS CORPUS WRIT PETITION No. - 174 of 2021

Petitioner :- Krishnakant Pandey (Corpus) And 2 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Kuldeep Singh, Vipin Vinod

Counsel for Respondent :- G.A.

Hon'ble Dr. Yogendra Kumar Srivastava, J.

1. Heard Sri Kuldeep Singh, learned counsel for the petitioners and Sri Arvind Kumar, learned AGA for the State-respondents.

2. By mean of the present petition the petitioner no.3 stating himself to be the father of petitioner nos. 1 and 2 (minor children of age about 9 and 7 years respectively), has sought to assert that the two children are in illegal custody of Respondent No.4, who is their mother.

3. The principal grievance which is sought to be raised by the counsel for the petitioners is with regard to the custody of two minor children and a claim for grant of visitation rights. Proceedings under Section 12 of the Domestic Violence Act and Section 125 Cr.P.C. initiated by the Respondent No.4 are also stated to be pending. An FIR under Sections 498A, 323, 504, 506, 392 IPC and 3/4 of Dowry Prohibition Act is stated to have been lodged by the respondent no. 4 which was registered as Case Crime No. 399 of 2013 and the criminal case is said to be pending.

4. As per the pleadings in the petition the Respondent No.4 (wife) left her matrimonial home on 15.07.2013 on account of a matrimonial discord and a petition under Section 9 of the Hindu Marriage Act registered as Case

No. 164 of 2013 (Manoj Kumar Pandey vs. Priya Pandey) was filed before the Family Court which is stated to be pending.

5. It is sought to be contended that some efforts for reconciliation between the parties were made sometime in the year 2019. However, the fact remains undisputed that the Respondent No.4 (wife) has not returned to her matrimonial home and that she is living separately with her minor children.

6. Learned AGA appearing for the State-respondents submits that in view of admitted fact that respondent no.4 left her matrimonial home way back in the year 2013 along with her minor children and is living separately it cannot be said that the minor children are any kind of illegal custody. He further pointed out that a petition for restitution of conjugal rights has been filed by the petitioner no.3 (husband) which is pending and also cases under the Domestic Violence Act, Section 125 Cr.P.C. and also a criminal case registered pursuant to an FIR lodged by the Respondent No.4 (wife) are also pending.

7. In a petition seeking a writ of habeas corpus in a matter relating to a claim for custody of a child, the principal issue which is to be taken into consideration is as to whether from the facts of the case, it can be stated that the custody of the child is illegal.

8. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad**

Ikram Hussain vs. State of U.P. and others¹ and Kanu Sanyal vs. District Magistrate Darjeeling².

9. 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.

10. 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 another³**, and 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.

11. Taking a similar view in the case of **Sayed Saleemuddin vs. Dr. Rukhsana and others⁴**, 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.

12. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for

1. AIR 1964 SC 1625
2. (1973) 2 SCC 674
3. (2017) 8 SCC 454
4. (2001) 5 SCC 247

custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**⁵, 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.

13. In an application seeking a writ of habeas corpus for custody of minor children, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the children can be said to be unlawful and illegal and whether their welfare requires that the present custody should be changed and the children should be handed over in the care and custody of somebody else other than in whose custody they presently are.

14. 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, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

15. In a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its

5. (2019) 7 SCC 42

extraordinary jurisdiction and may direct the parties to approach the appropriate court. The aforementioned legal position has been considered in recent decisions of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others**⁶ and **Master Manan @ Arush vs. State of U.P. and others**⁷.

16. In the present case it is undisputed that the respondent no. 4 (wife) along with her minor children, is living separately from the petitioner no. 3 (husband) since the year 2013.

17. In a petition for a writ of habeas corpus, the Court would be required to examine, at the threshold, whether the minor is in lawful or unlawful custody of the private respondent named in the petition. In a case, as the present one, once it is ascertained that the private respondent is none other than the biological mother of the minor children, the custody of the children with their mother cannot, *prima facie*, be stated to be illegal.

18. In the facts of the case, as aforesaid, only in exceptional situation, the custody of the minor children may be directed to be taken away from the mother for being given to any other person, including the father of the children, in exercise of writ jurisdiction.

19. It may be reiterated that a writ of habeas corpus, 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.

20. Proceedings for restitution of conjugal rights under

6. 2021 (2) ADJ 320

7. (Habeas Corpus Writ Petition No. 1026 of 2019, decided on 18.02.2021)

Section 9 of the Hindu Marriage Act initiated on a petition stated to have been filed by the petitioner no. 3 (husband), being pending, any claim with regard to ancillary reliefs pertaining to custody or visitation rights may be agitated in the said proceedings and the present petition seeking a writ of habeas corpus is not liable to be entertained in the facts of the case.

21. The petition stands accordingly dismissed.

Order Date :- 18.02.2021

Imroz/Pratima

(Dr.Y.K.Srivastava,J.)