

A.F.R.

Court No. - 84

Case :- HABEAS CORPUS WRIT PETITION No. - 1026 of 2019

Petitioner :- Master Manan @ Arush

Respondent :- State Of U.P. And 8 Others

Counsel for Petitioner :- Bhishm Pal Singh

Counsel for Respondent :- G.A.,Abhay Nitin Singh

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri Bhishm Pal Singh, learned counsel for the petitioner, Sri Abhay Nitin Singh, learned counsel for the respondent nos. 6 to 9 and Sri Vinod Kant, learned Additional Advocate General, alongwith Sri Pankaj Saxena, learned A.G.A.-I for the State respondents.

2. Pursuant to the directions issued earlier, the corpus (minor child) of age about seven and a half years, has been brought in Court by the respondent no. 6, who is stated to be his father, and has been identified by the counsel for the said respondent.

3. The basic facts which are undisputed are that the mother of the corpus is living separately from her husband (respondent no. 6) since the year, 2017. It has been pointed out that on 22.8.2019 the corpus (minor child) was taken away by the respondent no. 6 (father) to Ajmer, and that he is living with his father since then under his care and custody. A mutual agreement on a notarial affidavit is stated to have been entered into between the parents of the minor child on 02.09.2019. Amongst the various conditions which were agreed upon between the

parties, one was with regard to the minor child having been handed over to the mother with a further stipulation that he would remain with the mother, subject to certain conditions.

4. The present petition, which has been filed through the mother of the minor child, contending that the custody of the minor has not been handed over to her and that the minor is being illegally detained by the respondent no. 6 (father of the minor child) and the other respondents i.e. respondent nos. 7, 8 and 9.

5. From the submissions made by the counsel for the parties, it appears that there is a serious dispute with regard to the terms and conditions of the agreement, which is stated to have been entered into between the husband and the wife, with both the parties alleging that the other has not abided by the terms thereof.

6. The dispute between the parties, which is sought to be agitated by means of the present petition, essentially is, regarding the custody of the minor child, who is presently about seven and a half years of age (date of birth-09.08.2013).

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. It was stated thus:-

"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

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

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..."

12. 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 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. 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

5. (2019) 7 SCC 42

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."

13. 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.

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

16. In the present case, it is undisputed that the child is with his father since 22.8.2019 under his care and custody. It is not the case of either party that the child was forcibly taken away by the father from the custody of the mother. The pleadings and the material on record indicates the existence of a dispute with regard to the handing over the custody of the child to the mother, pursuant to some agreement between the parties, the terms of which, are now being disputed.

17. It has been pointed out that the date of birth of the child is 09.08.2013, and accordingly, the child being more than 5 years of age, the custody of the child with the father, in view of the provisions under Section 6(a) of The Hindu Minority and Guardianship Act, 1956, cannot be said to be *prima facie* illegal.

6. 2021 (2) ADJ 320

18. 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.

19. The contention which has been sought to be raised by the counsel for the petitioner with regard to the mother's claim for custody and visitation rights, are matters which are to be agitated in appropriate proceedings.

20. 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 proceedings before the appropriate forum.

21. Having regard to the aforestated facts, this Court is not inclined to exercise its extraordinary jurisdiction in the matter.

22. The petition thus fails and is accordingly, dismissed.

Order Date :- 18.2.2021

Shalini

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