

**Court No. - 84**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 192 of 2021

**Petitioner :-** Master Tarun @ Akchhat Kumar And Another

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

**Counsel for Petitioner :-** Rajesh Maurya

**Counsel for Respondent :-** G.A.

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

1. Heard Sri Rajesh Maurya, learned counsel for the petitioners and Sri Ratnendu Kumar Singh, learned A.G.A. appearing for the State respondents.

2. The present petition for a writ of habeas corpus has been filed on behalf of two minor children of age about 11 years and 5 years respectively, by one Ramesh Chandra Kanaujiya asserting himself to be their father and natural guardian. It is sought to be contended that the two minor children, who are living with respondent no. 4 their mother, are under her illegal custody, and accordingly Ramesh Chandra Kanaujiya, being the father, has claimed their custody.

3. The records of the case reflect that earlier a Habeas Corpus Writ Petition No. 561 of 2020 (Meenu Devi Kanaujiya Vs. State of U.P. and 3 others) was filed by Ramesh Chandra Kanaujiya on behalf of his wife for a writ of habeas corpus by claiming that she was under an illegal detention. In the aforesaid writ petition, pursuant to issuance of a *rule nisi*, the wife, Smt. Meenu Kanaujiya, was produced before the Court on 10.11.2020 and considering the stand taken by her, it was held that no case of illegal confinement or illegal detention had been made out and in view thereof the *rule nisi* stood discharged and

the petition was dismissed.

4. The pleadings in the petition indicate that the respondent no. 4 is working as a staff nurse at Community Health Centre, Dasna in District Ghaziabad.

5. It is undisputed that the respondent no. 4 is living independently and separately from her husband and the two minor children, petitioner nos. 1 and 2, are under her care and custody. The judgment and order dated 10.11.2020 passed in earlier Habeas Corpus Writ Petition No. 561 of 2020 also indicates that the respondent no. 4 is living separately from her husband on her own free will.

6. Learned counsel for the petitioners has not disputed the aforesaid fact with regard to the respondent no. 4 living separately and having her own independent source of income and the two minor children being under the care and custody of the respondent no. 4, their mother.

7. Learned A.G.A. appearing for the State respondents points out that the custody of the minor children with their mother in the facts and circumstances of the case cannot be stated to be illegal and any claim which is sought to be set up on behalf of the father with regard to guardianship or custody may be agitated before the appropriate forum and a petition for a writ of habeas corpus would not be entertainable in the facts of the case.

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 others**<sup>1</sup> and **Kanu Sanyal**

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1. AIR 1964 SC 1625

**vs. District Magistrate Darjeeling<sup>2</sup>.**

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 another<sup>3</sup>**, 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 others<sup>4</sup>**, 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 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

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2. (1973) 2 SCC 674

3. (2017) 8 SCC 454

4. (2001) 5 SCC 247

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**<sup>5</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 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

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5. (2019) 7 SCC 42

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. 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 extraordinary jurisdiction and may direct the parties to approach the appropriate court. The aforementioned legal position has been considered in a recent decisions of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others**<sup>6</sup>, **Master Manan @ Arush vs. State of U.P. and 8 others**<sup>7</sup> and **Krishnakant Pandey (Corpus) And 2 Others vs. State Of U.P. And 3 Others**<sup>8</sup>.

16. It is undisputed that two minor children are under the care and custody of their mother, respondent no. 4, who is living independently and separately from her husband. It is not the case of the petitioner that the children were forcibly taken away by the mother from the custody of the father.

17. In a petition for a writ of habeas corpus concerning a minor child, the Court, in a given case, may direct to change the custody of the child or decline the same keeping in view the attending facts and circumstances. For the said purpose it would be required to examine whether the custody of the minor with the private respondent, who is named in the petition, is lawful or unlawful. In the present case, the private respondent is none other than the biological mother of the minor children. This being the fact, it may be presumed that the custody of the children

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6. 2021 (2) ADJ 320

7. 2021 0 Supreme (All) 230

8. 2021 0 Supreme (All) 220

with their mother is not unlawful. It would only be in an exceptional situation that the custody of a minor may be directed to be taken away from the mother for being given to any other person - including father of the child, in exercise of writ jurisdiction. This would be so also for the reason that the other parent, in the present case, the father, can take resort to the substantive statutory remedy in respect of his claim regarding custody of the child.

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. Counsel for the petitioners has not disputed the aforesaid factual position and the only grievance, which is sought to be raised, is with regard to a claim for visitation rights on behalf of the father.

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

21. In view of the aforestated facts, this Court is not inclined to entertain the writ petition seeking a writ of habeas corpus, in the facts and circumstances of the case.

22. The petition stands accordingly dismissed.

**Order Date :- 15.3.2021**

Pratima

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