

**Court No. - 89**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 716 of 2020

**Petitioner :-** Shradha Kannaujia (Minor) And Another

**Respondent :-** State Of U.P. And 5 Others

**Counsel for Petitioner :-** Shyam Narayan Verma

**Counsel for Respondent :-** G.A.,Ajay Kumar Singh,Rajeev Kumar Rai,Rajeev Kumar Rai

**Hon'ble Raj Beer Singh,J.**

1. Case is taken up through video conferencing.
2. This habeas corpus writ petition has been filed by seeking following reliefs:

*i. Issue a writ order or direction in the nature of mandamus directing and commanding the respondent no.2 and 3 to appear personally before this Hon'ble Court and to produce corpus child namely Shradha Kannaujia (Minor) from the custody of the respondent no.4 to 6.*

*ii. Issue a writ order or direction in the nature of mandamus directing the respondents to handover in the custody of minor child (corpus) to her mother/petitioner no.2 and ensure the life of corpus (minor child).*

*iii. Issue such other further writ order or direction which this Hon'ble Court may deem fit and proper in the nature and circumstances of the present case.*

*iv. Award the costs of the petition to the petitioners.*

3. Heard learned counsel for the petitioners, learned counsel for the private respondents and learned A.G.A. for the State.

4. It has been argued by the learned counsel for the petitioners that petitioner No.2 is mother of corpus/minor girl, aged four years. The marriage of petitioner No.2 with respondent No.4 has taken place in the year 2014 and they were blessed with a girl child on 18.11.2016. Learned counsel argued that petitioner No.2 was harassed by her husband and other private respondents and on 26.09.2020 they have driven her out from the

matrimonial home and her minor girl (corpus) was snatched by the private respondents. It was submitted that the respondent No.4 is not treating the petitioner No.1 well and that she has been illegally detained by the respondent No. 4 to 6. In this connection the petitioner No.2 has approached police authorities but of no avail. No information is being given to the petitioner No.2 regarding petitioner No.1. It was submitted that the custody of petitioner No.1 be handed over to the petitioner No.2.

5. Learned counsel for the private respondents has opposed.

6. Perusal of record shows that in pursuance to earlier order, the petitioner No.1/ corpus was produced before this Court by the respondent No.4, however as she is a minor child of four years age, thus, it was found difficult to ascertain her wishes. The petitioner No.2 is mother of petitioner No.1 and respondent No.4 is her father. It appears that there has been some matrimonial dispute between petitioner No.2 and respondent No.4 and that a petition under Section 13B Hindu Marriage Act, 1955 for divorce has already been filed.

7. It is well settled that writ of habeas corpus is a prerogative writ and an extraordinary remedy. 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 case of **Sayed Saleemuddin vs. Dr. Rukhsana and others (2001)5 SCC 247** and 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. In said case it was held as under:-

*"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 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..."*

8. Similarly, in the case of **Nithya Anand Raghvan v State (NCT of Delhi) and another 2017 8 SCC 454**, 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. The relevant observations made in the judgement are as follows:-

*"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.*

*45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247, has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or 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. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see Paul Mohinder Gahun Vs. State (NCT of Delhi), 2004 SCC OnLine Del 699, relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.*

*46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner*

*can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.*

*47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptional situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."*

9. The issue of maintainability of a habeas corpus petition under Article 226 of the Constitution of India in matters of custody of minor was also considered in case of **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others (2019) 7 SCC 42**, 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 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."*

10. What emerges from above stated authorities is that the exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be considered 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 would become entitled to the writ. In an application seeking a writ of habeas corpus for custody of 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 his/her welfare requires that the present custody should be changed and the child should be handed over in the care and custody of someone else. Proceedings in the 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.

11. In the instant case it is not disputed that the petitioner No. 1 is aged about four years and she is stated to be under the care and custody of her father / respondent No.4, who living with his parents (respondent No. 5 & 6). It is also admitted position that the petitioner No. 2 and the respondent No. 4 are living separately, as the petitioner No. 2 has alleged that she was driven out from the matrimonial home. It is also clear from the averments of the petition that a petition under section 13-B Hindu Marriage Act has already been filed in the court. Thus, the matter relating to custody of child during the pendency of the proceedings under the Hindu Marriage Act, 1955 HMA is governed in terms of the provisions contained under Section 26 thereof. The aforesaid section applies to "any proceeding" under the HMA and it gives power to the court to make provisions in regard to: (i) custody, (ii) maintenance, and (iii) education of minor children. For this purpose the court may make such provisions in the decree as it may deem just and proper and it may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the decree. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible. As observed earlier, 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 the main consideration is 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 respondents are none other than the biological father and grand parents of the minor child. This being the position, it can not be said that the custody of the child with private respondents is unlawful. However, it is open to the mother / petitioner No. 2 to take resort to the substantive statutory remedy in respect of his claim regarding custody of the child. As stated earlier, in matter of custody of a child, a writ of habeas corpus would be entertainable, where it is established that the detention of the minor child by the parent or others is illegal and without authority of law. In a writ court, where rights are determined on the basis of affidavits and that in a case where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum.

12. Considering the facts of the matter as well as the aforesaid position of law, it is apparent that the remedy in such matters would lie under the Hindu Minority and Guardianship Act, 1956 or Guardians and Wards Act, 1890 GWA, as the case may be. In view of aforesaid, this Court is not inclined to exercise its extraordinary jurisdiction to entertain the present petition seeking a writ of habeas corpus.

13. The petition lacks merit and it is hereby **dismissed**.

**Order Date :-** 21.01.2022

A. Tripathi