

**Neutral Citation No. - 2023:AHC-LKO:40558**

**A.F.R.**

**Reserved on 27.04.2023**

**Delivered on 09.06.2023**

**Court No. - 9**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 67 of 2023

**Petitioner :-** Mirah Pandey Thru. Mother Ira Sharma Another

**Respondent :-** State Of U.P. Thru. Prin. Secy. Home Lko. And 3 Others

**Counsel for Petitioner :-** Manushresth Misra, Sushil Kumar Singh

**Counsel for Respondent :-** G.A., Manoj Kumar Misra

**Hon'ble Shamim Ahmed, J.**

1. Heard Sri Shubham Aggarwal along with Ms. Suksham Aggarwal and Sushil Kumar Singh, the learned counsel for the petitioner-Smt Ira Sharma as well as Smt. Kiran Singh and Prem Prakash, the learned Additional Government Advocate-I for the State-respondent Nos. 1 to 3 and Sri Manoj Kumar Misra, learned counsel for the respondent No.4 and pleadings between the parties have already been exchanged.

2. The petitioner-Ira Sharma has filed this Habeas Corpus petition with the following reliefs:

*“i) to issue a writ, order or direction in the nature of Habeas Corpus commanding the respondents to produce the corpus of detenues, namely Rayan Pandey and Mirah Pandey at the earliest before this Hon'ble Court and to handover the custody of the said minor children to petitioner being their mother.*

*ii) to issue directions to the respondent no.4 through respondent No.1 and 2 for making necessary provisions for interaction and conversations between the petitioner/ mother and the minor children immediately and during pendency of the present writ petition by mode of voice and video calls.*

*iii) to issue any other order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case in favour of the petitioner in the interest of justice.*

*iv) Allow the writ petition with costs."*

3. This Court on 20.04.2023 had passed the following order:

*"Sri Manoj Kumar Misra, Advocate has filed his Vakalatnama today in Court on behalf of opposite party No.4. The same is taken on record.*

*In compliance of order dated 02.03.2023 opposite party No.4-Dhreerendra Pandey @ Dheerendra Vikram Pandey along with detenues, namely, Mirah Pandey-daughter and Rayan Pandey-son is present before this Court in person accompanied by Sub Inspector Sri Rajneesh Dwivedi and lady constable Ms. Archana Yadav, Police Station Kotwali Nagar, District Gonda.*

*Smt Ira Sharma, petitioner is also present before this Court in person. She has been identified by her counsel Mr. Shubham Aggarwal.*

*Heard Shri Shubham Aggarwal alongwith Ms. Suksham Aggarwal, the learned counsel for the petitioner-Smt Ira Sharma as well as Sri Manoj Singh and Prem Prakash, the learned A.G.A.-I for the State and Sri Manoj Kumar Misra, learned counsel for the opposite party No.4.*

*Learned counsel for the opposite party No.4 has filed counter affidavit today in Court after serving the copy of the same to learned counsel for the petitioner. The same is taken on record.*

*Learned counsel for the petitioner prays for and is allowed four days time to file rejoinder affidavit.*

*Smt Ira Sharma, petitioner submits that she is staying in India till 2nd may, 2023. She further prays that she may be given at least one hour time in the evening between 6.00 p.m. to 7.00 p.m. to meet her children, during her stay in India and she wants to talk to her children on mobile and on video call.*

*Mr. Dhreerendra Pandey @ Dheerendra Vikram Pandey-opposite party No.4 has no objection to the request made by the petitioner-Smt Ira Sharma.*

*As prayed, Smt Ira Sharma, petitioner is permitted to meet her children in the evening between 6.00 p.m. to 7.00 p.m.during her stay in India up to 02.05.2023 at the current residence of opposite party No.4 i.e. Omax R-2, Building 15, Flat 1104, Lucknow and she is also permitted to talk to her children for ten minutes in the evening on mobile and on video call, but not after 9.00 p.m.*

*It is made clear that during visit of Smt Ira Sharma at the residence of opposite party No.4 and during mobile call, Mr. Dhreerendra Pandey @ Dheerendra Vikram Pandey-opposite party No.4 will not create any hindrance.*

*Put up this case on 27.04.2023 for further hearing before this Court.*

*On the next date fixed, Mr. Dhreerendra Pandey @ Dheerendra Vikram Pandey,opposite party No.4 and Smt. Ira Sharma, petitioner shall again appear in person before this Court but detenues, namely, Mirah Pandey-daughter and Rayan Pandey-son need not to appear unless called for and their custody during that period shall remain with their father Mr. Dhreerendra Pandey @ Dheerendra Vikram Pandey-opposite party No.4.”*

4. On 27.04.2023 this Court had passed the following order:

*“In compliance of order dated 20.04.2023 opposite party No.4-Dhreerendra Pandey @ Dheerendra Vikram Pandey and petitioner-Smt Ira Sharma are present before this Court in person and they have been identified by their respective counsels.*

*Pleadings between the parties have been exchanged. The case is being heard finally today.*

*Heard Sri Shubham Aggarwal along with Ms. Suksham Aggarwal and Sushil Kumar Singh, the learned counsel for the petitioner-Smt Ira Sharma as well as Smt. Kiran Singh and Prem Prakash, the learned Additional Government Advocate-I for opposite party Nos. 1 to 3 and Sri Manoj Kumar Misra, learned counsel for the opposite party No.4-Dhreerendra Pandey @ Dheerendra Vikram Pandey.*

*Judgment reserved.*

*Till the pronouncement of the judgment, interim arrangement made by this Court vide order dated 20.04.2023 shall continue. It is further provided that petitioner-Ira Shama, if she is in abroad, she is allowed to have conversation with her children Mirah Pandey-daughter and Rayan Pandey-son by mobile phone, whats app call or video call during 8.00 p.m to 8.30 p.m. as per Indian Standard Time. ”*

5. Learned counsel for the petitioner submits that the petitioner-Ira Sharma got married to respondent No.4-Dheerendra Pandey @ Dheerendra Vikram Pandey at Dharamshala, Himanchal Pradesh on 15.02.2008 as per Hindu Rites and Ceremonies. Thereafter, the couple relocated to U.S.A. for their bright future. After shifting to U.S.A., due to their wedlock two children, one male child namely Master Rayan Pandey born on 02.10.2013 and one female child namely Mirah Pandey born on 03.04.2018 and were having American Passport and it was further submitted that after the second child was born the relationship between the husband and wife started to turn more absurd and regular dispute arose.

Thereafter, the petitioner and respondent No.4 entered into an amicable settlement through a document titled as “Matrimonial Settlement Agreement” (hereinafter referred to as “M.S.A.”) on 02.06.2022. After entering into a settlement, the petitioner and respondent No.4 approached family court and got divorce by mutual consent by the court of competent jurisdiction at U.S.A. i.e. Superior Court of New Jersey Chancery Division: Family Part Somerset Country vide Docket No. FM-18-267-22. True copy of the Matrimonial Settlement Agreement and Decree of Divorce as granted by the Courts of the USA have been filed as Annexure Nos. 3 and 4 to this habeas corpus petition.

6. Learned counsel for the petitioner further submits that the respondent No.4 is running an IT Company in U.S.A. with his brother

and is earning in millions of U.S. Dollars per annum but the petitioner did not take a single penny as Alimony or any amount of maintenance from the respondent No.4 at the time of divorce.

7. Learned counsel for the petitioner has drawn attention of this Court towards Article III of the M.S.A. and submits that the days were fixed for the physical custody of the children but the respondent No.4 kept the petitioner in dark and on certain pretext took the children from U.S.A. to India at his native place, without obtaining consent of petitioner for permanent relocation of children while the children, being born and settled in USA and having being attached to their mother and they never wanted to come to India with the respondent No.4. He further submits that initially, respondent No.4 used to make the children speak to the petitioner and allowed petitioner to interact with her children, but, later on he did not allow the children to talk to petitioner over video call or even on phone voice call for several weeks.

8. Learned counsel for the petitioner further submits that after some time the behavior of respondent No.4 turned very abnormal and the petitioner came under suspicion and started to feel very unsafe regarding children.

9. Learned counsel for the petitioner further submits that the son and daughter of petitioner, namely Rayan Pandey and Mirah Pandey, who are aged about 9 and 4 years respectively at present are in illegal detention of the respondent No.4-father against the judgment of the Court of U.S.A. for which he is not legally entitled as he is flouting the orders of the Hon'ble Court of USA.

10. Learned counsel for the petitioner further submits that the petitioner approached Station House Office, Civil Lines, Gonda and Superintendent of Police, Gonda, U.P. and brought into their notice about the entire incident, but they did not conduct the investigation to locate the whereabouts of the children of petitioner. Learned counsel

for the petitioner further submits that the respondent No.4 has no love and affection towards the children and the petitioner being mother is legally entitled to get the custody of her children being natural guardian and she is earning handsome figure and can take care.

11. Learned counsel for the petitioner further prays for handing over the custody of said minor children to petitioner who is biological mother of minor children, so that the children can be taken to United States of America where they were born and the present habeas corpus petition may be allowed by this Hon'ble Court.

12. Per Contra, Sri Manoj Kumar Misra, learned counsel for the respondent No.4 filed counter affidavit, which is on record and submits that the petitioner-Ira Shama is a most irresponsible lady who does not have any respect or love and care for any relation nor for her husband and for minor children. She has been sent to jail for committing cruelty against the respondent No.4. She is an alcoholic lady with very short temperament. She used to even beat her children. Even she is so self-centered that she had left her son alone in America when he was only five years old child and came to India just for her career. Even she left her very young daughter at Dharamshala, Himachal Pradesh to live with her maternal grandmother and she herself went to Bangalore in the name of her work. However, from May, 2020 till July, 2020 Ira Sharma-the petitioner stayed at Dharamshala due to the Nationwide lockdown and once again in August, 2020 she went to Bangalore leaving her two years old daughter at Dharamshala. He further submits that when the children were infected with Covid, her focus was on finding a new job instead of the well-being of the children. On top of that, even though she was not working at that time, but she started keeping Rayan Pandey-son in day-care (creche) for the entire day even though Covid was still at peak in the U.S. resulting Rayan Pandey-son got sick several times and once had to be hospitalized too. She did not show any love and affection towards the children. He further submits that while signing

the MSA, petitioner-Ira Sharma deliberately, willfully and knowingly insisted to add a condition which allows her to leave her children in custody of respondent No.4 so that she will be at liberty to move to any country in the name of her profession. This fact, itself shows that petitioner-Ira Sharma does not have any love and affection towards her children.

13. Sri Manoj Kumar Misra, learned counsel for the respondent No.4 has placed reliance on the Clause 10.1 of the Article X of MSA to show the conduct of the wife and the reason for divorce and the mental cruelty cause to the husband, which is being reproduced herein-below:

*“10.1 Husband filed his complaint for divorce under the causes of action of extreme cruelty, adultery, and irreconcilable differences. Upon final dissolution, Husband agrees to withdraw his count of extreme cruelty and proceed solely under the counts of adultery and irreconcilable differences. Wife filed her counterclaim for divorce under the causes of action of irreconcilable differences and extreme cruelty. Upon final dissolution, Wife agrees to withdraw her count of extreme cruelty and proceed under the cause of action of irreconcilable differences.”*

14. Learned counsel for the respondent No.4 has also placed reliance on the decree of divorce and submitted that in the decree of divorce a finding has been recorded that respondent No.4 has been able to prove the charges of adultery against petitioner-Ira Shama. The relevant extract of the decree of divorce is being reproduced herein-below:

*“This MATTER having come before the Court for an uncontested hearing, and the plaintiff, Dheerendra Pandey, having been represented by Itham S. Rose, Esq, of Offit Kurman, P.A. and the defendant, Ira Sharma, having been represented by Taryn R. Zimmerman, Esq.*

*Of the De Tommaso Law Group, LLC, and the parties having entered into a Marital Settlement Agreement dated June 2, 2022, and it appearing the plaintiff and defendant were joined in the bond of matrimony of February 15, 2008, and each having proven a cause of action of irreconcilable differences, and no reasonable prospect of reconciliation exists between them; along with plaintiff proving a cause of action of adultery and successfully serving the co-respondent; and*

*IT FURTHER APPEARING that at the time the within causes of action arose, the plaintiff was a bona fide resident of this State and has ever since and for more than one year next preceding the commencement of this action, continued to be such a bona fide resident, and*

*IT FURTHER APPEARING that jurisdiction herein has been acquired pursuant to the Rules of Court; and*

*IT FURTHER APPEARING that a certain Marital Settlement Agreement dated June 2, 2022 was entered into between the plaintiff and the defendant, was submitted to this Court by counsel for the parties and is annexed hereto, with no testimony having been taken by the Court as to the terms of said Agreement;*

*IT IS thereupon, on this 7<sup>th</sup> day of June, 2022 by the Superior Court, Chancery Division, of the State of New Jersey;*

*ORDERED AND ADJUDGED by virtue of the power and authority of this Court and of the acts of the Legislature in such cases made and provided, that the plaintiff, Dheerendra Pandey, and the defendant, Ira Sharma, are hereby divorced from the bonds of matrimony from each other, for the causes aforesaid, and the said parties and each of them be and same are hereby freed and discharged from the obligations thereof and the marriage between the parties be and the same hereby is dissolved; and*

*IT IS FURTHER ORDERED AND ADJUDGED that the Marital Settlement Agreement between the parties hereto, a copy of which is attached hereto but not merged herewith be and hereby is permitted by this Court to be made a part of and is incorporated in this Judgment with the understanding that the Court took no testimony upon and did not pass upon the merits of said Agreement, except that the Court has determined that both parties have voluntarily executed the Agreement and that each has accepted the terms thereof as fair and equitable; and*

*IT IS FURTHER ORDERED AND ADJUDGED that the parties have adequately addressed the issue of the standard of living and the likelihood of maintaining a reasonably*



*comparable standard of living as required by Crews v. Crews, 164 N.J. 11 (2000).*

*IT IS FURTHER ORDERED AND ADJUDGED that the parties are directed to comply with each and every obligation to which they have subscribed in the aforementioned written Marital Settlement Agreement; and*

*IT IS FURTHER ORDERED AND ADJUDGED that the attorneys for plaintiff and the attorneys for defendant be and hereby are discharged as the attorney of record after 45 days from the date of this judgment; and*

*IT IS FURTHER ORDERED AND ADJUDGED that all issues pleaded and not resolved in the judgment are deemed abandoned.”*

15. Sri Manoj Kumar Misra, learned counsel for the respondent No.4 further submits that petitioner-Ira Shama herself consented to get both the children admitted to some reputed school in India by e-mail and she will keep on visiting India and whenever she will be in India she will visit her children at Lucknow, the place of stay of respondent No.4 and it was under these circumstances that respondent No.4 had got both the children admitted in G.D. Goenka Public School, Sector B Sushant Golf City, Shaheed Path, Lucknow affiliated to CBSE Board, New Delhi, where they are studying in Class IV and I. The e-mail sent by petitioner-Ira Sharma to respondent No.4-Dheerendra Pandey is quoted herein-below:

*“I will check with them again. They have asked me to call tomorrow morning.*

*Also, find attached my passport copy and aadhar card. I am only providing you for using it in school admission for kids.*

*Best Regards,*

*Ira Sharma*

*Cell 201-560-7693”*

Copy of the e-mails in which petitioner-Ira Sharma herself had consented for admission of the children in India and the Admission Record of the children and e-mails are annexed as Annexure No.CA-2 to the counter affidavit.

16. Learned counsel for the respondent No.4 further submits that the respondent No.4 does not have any objection if the petitioner-Ira Sharma wishes to visit the children in Lucknow during her stay in India, provided the same does not hamper their studies. He further submits that the admission of both the children were done at the aforesaid school with the consent of mother-Ira Sharma. She has given copy of her Aadhar Card and Passport by e-mail on 22.08.2022. Thus, it is not a case of any illegal detention but the children are living and studying with their father with the consent of her mother.

17. Learned counsel for the respondent No.4 further submits that in case of any dispute as per Matrimonial Settlement Agreement there is a Provision in Clause 3.11 of the agreement for Return to Mediation, which is being reproduced herein-below, thus this habeas corpus petition is not maintainable.

*“3.11 Return to Mediation: The parties agree that if any differences arise from this agreement, they will first attempt to resolve these concerns amicably between themselves. If the parties reach an impasse, they agree that they will attempt to resolve these issues through mediation and understand that they may contact the Somerset Country Family Mediation program before filing a motion for Court intervention. The parties agree that either of them may initiate this process by contacting the mediator and scheduling a session. Both parties agree to participate in future mediation sessions with a good faith effort at resolution.”*

18. Smt Kiran Singh and Sri Prem Prakash, learned A.G.A-I have also supported the argument advanced by learned counsel for the respondent No.4.

19. After considering the arguments as advanced by learned counsel for the parties this Court finds that minor child should not be deprived of the love and affection of both the parents as deprivation results in a grave psychological impact upon the impressionable and innocent disposition of a child in his formative years and in this case the minor children are being deprived of the love and affection of their parents and the parents are not able to interact with their children meaningfully. Whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. Further the question of custody cannot be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. It is further held that the welfare of the child must be decided on a consideration including the general psychological, spiritual and emotional welfare of the child. While resolving the disputes between the rival claimants for the custody of a child, the aim of the Court must be to choose the course which will best provide for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult.

20. In the present case it is not in dispute that the petitioner-Ira Sharma got married to respondent No.4-Dheerendra Pandey @ Dheerendra Vikram Pandey at Dharamshala, Himanchal Pradesh. Thereafter, the couple relocated to U.S.A. for their bright future. After shifting to U.S.A., due to their wedlock two children, one male child namely Master Rayan Pandey born on 02.10.2013 and one female child namely Mirah Pandey born on 03.04.2018 and were having American Passport. After some time the relationship between the husband and wife started to turn absurd and regular dispute arose. Thereafter, the petitioner and respondent No.4 entered into an amicable settlement through a document titled as Matrimonial Settlement Agreement on 02.06.2022. After entering into a settlement, the petitioner and respondent No.4 approached family court and got divorce by mutual consent by the court of competent jurisdiction at U.S.A. i.e. Superior Court of New Jersey Chancery Division: Family Part Somerset County vide Docket No. FM-18-267-22. and from perusal of the decree of divorce, finding has been recorded that respondent No.4 has been able to prove the charges of adultery and irreconcilably differences against the wife Ira Shama, thus this type of situation gives a negative impact on the psychological behavior of the minor children and is also not in the welfare of the children.

21. In the case of **Nithya Anand Raghvan v State (NCT of Delhi) and another 2017 8 SCC 454**, it was held by Hon'ble Apex Court 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 para 44 to 47 in the judgement are being reproduced herein below:

"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 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 exceptionable 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."

Similarly, in the case of **Dhanwanti Joshi Vs Madhav Unde ( 1998) 1 SCC 112**, the Hon'ble Apex Court was pleased to observe in para 27, 29, 30 of the judgment as under:

"27.....However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. It was also held that whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on

considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor.” (emphasis supplied) Again in paragraphs 29 and 30, the three-judge bench observed thus:-

“29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child’s welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full Nithya Anand Raghavan vs State Of Nct Of Delhi on 3 July, 2017 development of the child’s character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in *Mckee v. McKee* that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the



best interests of the child has been explained in L (Minors), In re and the said view has been approved by this Court in Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants), in re has been approved by this Court in Elizabeth Dinshaw.”

Similarly, in the case of **Shradha Kannaujia (Minor) and Another ,Vs State of U.P. and 5 others** in Habeas Corpus No. 716 of 2020 a co-ordinate Bench of this Hon’ble court was pleased to observe as under:

“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 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.”

22. In the present case petitioner-Ira Sharma herself consented to get both the children be admitted to some reputed school in India by e-mail and she will keep on visiting India and whenever she will be in India she will visit her children at Lucknow, the place of stay of respondent No.4 and it was under these circumstances that respondent No.4 had got both the children be admitted in G.D. Goenka Public School, Sector B Sushant Golf City, Shaheed Path, Lucknow affiliated to CBSE Board, New Delhi, where they are studying in Class IV and I. It is not in dispute that the admission of both the children was done at the aforesaid school with the consent of the mother Ira Sharma for this reason she herself has provided her Aadhar Card and Passport copy as per e-mail dated 22.08.2022 sent to the respondent No.4, thus the case set up by the petitioner Ira Sharma that the minor children are

under illegal detention of respondent No.4 have no force and there appears force in the argument of learned counsel for the respondent No.4 that the present habeas corpus writ petition is not maintainable as the children are not under illegal custody of the father and are studying in India with the consent of the mother Ira Sharma and for custody she may approach the correct forum in accordance with law.

23. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined by Hon'ble Apex Court in the case of **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others Criminal Appeal No. 838 of 2019 order dated 06.05.2019** 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."*

24. A co-ordinate Bench of this in **Master Manan @ Arush Vs State of U.P & 8 others, decided on 18.02.2021** was pleased to observe in para 16 and 17 as under :

*"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 Guardian ship Act, 1956, cannot be said to be prima facie illegal."*

25. A co-ordinate Bench of this Court in Habeas Corpus Writ Petition No. 467 of 2021 **Vahin Saxena ( Minor Corpus) ans Another Vs State of U.P. and three others** decided on 27-08-2021 was pleased to observe in para 22 as under:

*"22. In a child custody matter, 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, 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. The remedy ordinarily in such matters would lie under the Hindu Minority and Guardianship Act, 1956<sup>13</sup> or the Guardians and Wards Act, 1890<sup>14</sup>, as the case may be.”*

26. It is, therefore, seen that 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 the welfare of the children 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 the children presently are.

27. It is well settled law by a catena of judgments that while deciding the matter of custody of children, primary and paramount consideration is welfare of the children so demands then technical objections cannot come in the way. However, while deciding the welfare of the children it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the children. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at way with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents.

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.

28. This Court is not going into various allegations and counter allegations made by both the spouses. I am clearly of the view that it is in the best interest of the children to have parental care of both the parents, if not joint then at least separate. I have no doubt that the children needs both parents and the children would be equally happy, if not happier, in the company of the mother as well, the children would perhaps be happier if they could have both their parents. Unfortunately, the parents are unable to resolve their differences and stay together. Be that as it may, the children have a right to access both parents, and get the love and affection of both parents. Whatever the differences arose between the spouses, the children cannot be denied company of both.

From perusal of the e-mail dated 22-08-2022 in which petitioner-Ira Sharma herself had consented for admission of the children in India, it is clear that the mother was well aware of the custody of detinue/children, who are with their father in India, as such it cannot be said that it was an illegal custody / detention.

It is also noteworthy that on the previous date of argument on 20.04.2023 when the Court had asked the detinue-Master Rayan Pandey (son) in open court, whether he wants to go with her mother, he refused to go with her mother and submits that he want to live with his father and submits that he is studying in class IV in G.D. Goenka Public School, Lucknow other detinue, Mirah Pandey is minor girl and she is aged about four and half years and she is also studying in Class Ist in G.D. Goenka Public School, Lucknow and as there was an allegation against the mother Ira Sharma of committing adultery and that was the one of the ground for divorce between Ira

Shama and Dheerendra Pandey @ Dheerendra Vikram Pandey, thus this Court is of the view that the girl child Mirah Pandey shall remain in custody with her father in the interest of Justice as the welfare love affection company protection is in the custody of the father/respondent no. 4.

Master Rayan Pandey and Mirah Pandey are studying in G.D. Goenka Public School, Sector-B, Sushant Golf City, Shaheed Path, Lucknow and are residing with their father in Lucknow and their studies cannot be disturbed for the present academic session, therefore, in view of the discussion and observation made above, this court issues following directions :

(i) The custody of both the children; Master Rayan Pandey(son) and Mirah Pandey (daughter) shall remain with father respondent No.4-Dhreerendra Pandey @ Dheerendra Vikram Pandey.

(ii) Since the mother-Ira Sharma lives in U.S.A., she is permitted to meet the children during her stay in India in the evening between 6:00 PM to 8:00 PM at the current residence of respondent no. 4 i.e Omax R – 2 Building 15, Flat 1104 Lucknow with the condition of giving one week prior information to the respondent No.4-Dhreerendra Pandey @ Dheerendra Vikram Pandey (father) regarding her arrival at Lucknow. It is further provided that if she is in abroad, she allowed to have conversation with her children Mirah Pandey-daughter and Rayan Pandey-son by mobile phone, whats app call or video call during 8.00 p.m to 8.30 p.m. as per Indian Standard Time.

(iii) If the mother of children wants to give any gifts on account of love and affection or do anything for well

being of children then father/ respondent no. 4 or any of his family members will not make any objection. However, mother shall keep in mind that such thing will be given, which are for use and safe for the children health.

(iv) The petitioner Ira Sharma is at liberty to approach the appropriate forum for claiming the custody of the children under the Hindu Minority and Guards Act 1956 or under the Guardians and Wards Act, 1890 as the case may be in accordance with law.

29. With the above observations/directions, this habeas corpus petition is finally **disposed of**.

**Order Date :- 09.06.2023**

**Arvind**

**(Shamim Ahmed, J.)**