

(2022-1)205 PLR 069

PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice Jasgurpreet Singh Puri.

SHUBEG SINGH – Petitioner,

versus

STATE OF PUNJAB and others – Respondents.

CRWP-1950-2019 (O&M)

(i) Constitution of India, Article 226 - Writ of Habeas Corpus - For taking custody of the child from one of the parents - Is clearly maintainable.

[Para 17]

(ii) Constitution of India, Article 226 - Custody of child - Child repeatedly stated that he wanted to stay with his mother and not with his father - This Court wanted to go into the reasons for the same but the same could not be ascertained in view of the tender age of the child and there was also a likelihood that he may also be facing emotional stress but the child categorically and repeatedly stated that he wanted to remain with his mother - However, till a such right of custody is adjudicated by a competent Court or any other legally permissible mode whatsoever, this Court is of the opinion that the custody of the child should remain with the mother - The retention of child with the mother cannot be termed as an illegal custody. [Para 17]

(iii) Constitution of India, Article 226 - Writ of Habeas Corpus - Suit filed by father for injunction for restraining the mother from taking forcible custody of the minor son pending - Habeas Corpus filed by the mother seeking custody of child wherein father was not made a party, dismissed - Petition under Section 25 of the Guardian and Wards Act before the learned Principal Family Court, for the custody of the child, pending - During the pendency of the petition before the Family Court for the grant of custody, the mother took away the child from the school and FIR was registered against her under Sections 346/120-B - Writ in the nature of Habeas Corpus filed by father - So far as the forcibly taking away of the child by the mother is concerned, although an FIR was lodged against her but the fact would remain that mere lodging of an FIR and continuation of a prosecution against the mother cannot override the welfare of the child - Court has not been able to find out any embargo or impediment or any other disadvantageous or factor as to why the mother should not continue with the custody of the child - While arriving at this conclusion this Court has also considered that as per the allegations made by the mother, the petitioner is in active connivance with police officials and is repeatedly threatening the mother which she has stated in her

application - There is nothing on record to show as to whether the mother has applied any force or coercion to retain the custody of child except the FIR which pertains to wrongful confinement only.

Cases referred to:-

1. 2020(3) SCC 67, *Yashita Sahu v. State of Rajasthan*.
2. 2019 AIR SC 2318, *Tejaswini Gaur v. Shekhar Jagdish Tewari*.

Mr. Satwant Singh Rangji, for the petitioner. *Mr. Randhir Singh Thind, DAG, Punjab*.

Ms. Kanwal S. Walia, for respondent No.5. *Through Video Conferencing*

Jasgurpreet Singh Puri , J. (Oral) - (27th August, 2021) - The present petition has been filed under Article 226 of the Constitution of India seeking a writ in the nature of Habeas Corpus for directing the official respondents to trace out and produce before the Court the minor son of the petitioner namely Shahbaaz Singh who according to the learned counsel for the petitioner is in the illegal custody of respondent No.5 who is the wife of the petitioner and mother of alleged detainee.

2. Before discussing the merits of the case, a brief background of the case needs to be mentioned here.

3. The petitioner and respondent No.5 married with each other on 02.01.2012 and on 21.11.2014 they were blessed with a baby boy namely Shahbaaz Singh. However, matrimonial dispute arose between the petitioner and respondent No.5 and on 08.12.2018 the petitioner (father) filed a civil suit for injunction for restraining the respondent No.5 (mother) from taking forcible custody of the minor son vide Annexure P-1. Notice in the suit as well as the interlocutory application was also issued by the learned Civil Judge, Patiala. However, no interim order was passed nor any kind of injunction order was passed and rather the matter was also sent to the Mediation Centre but according to the learned counsel for the parties, the mediation had failed. Thereafter, respondent No.5 (mother) approached this Court seeking a writ in the nature of Habeas Corpus in Criminal Writ Petition No.17 of 2019 on the ground that the sister of the petitioner had illegal custody of the child and therefore, a writ in the nature of Habeas Corpus was sought. However, this Court vide order dated 08.01.2019 (Annexure P-3) observed that there is no allegation that the child was snatched away or taken away forcibly and that mother of child is also residing on the first floor separately in the matrimonial house. The father of child who is present petitioner was not made party in that petition and it was observed by this Court that if the mother of child who is respondent No.5 in this petition wanted custody of the minor child, then for that purpose remedy lies before the Guardian Judge by filing a petition, who will determine the dispute regarding the custody of the minor keeping in view the paramount consideration and welfare of the child, as per law and, therefore, the petition was dismissed by holding that it was not maintainable.

4. Thereafter, vide Annexure P-4 the respondent No.5 (mother) filed a petition under Section 25 of the Guardian and Wards Act before the learned Principal Family Court, Patiala for the custody of the child and again the matter was sent to the Mediation Centre but the mediation again failed.

5. Even prior to the proceedings before the Family Court, the petitioner has filed a petition for divorce under Section 13 of the [Hindu Marriage Act](#) against respondent No.5 on the grounds of cruelty and desertion but the same is also pending before the learned Court at Patiala.

6. However, as per the allegations of the petitioner, during the pendency of the petition before the learned Family Court for the grant of custody, the respondent No.5 on 07.11.2019 took away the child from the school and on the next day i.e. on 08.11.2019 an FIR was registered against respondent No.5 under Sections 346/120-B IPC pertaining to wrongful confinement vide Annexure A-3 against her. Thereafter on 27.11.2019 the respondent No.5 withdrew the petition under Section 25 of the Guardian and Wards Act. The aforesaid FIR is still pending investigation and the petitioner (father) has now filed the present petition seeking a writ in the nature of Habeas Corpus on the ground that the child is in illegal custody of respondent No.5 (mother). The present petition was filed on 09.12.2019 and on 30.01.2020 on joint request of the learned counsel for the parties, the matter was referred to the Mediation and Conciliation Centre of this Court but now according to the learned counsel for the parties, this mediation has also failed and finally on 11.09.2020 the matter has been sent back to this Court.

7. The learned counsel for the petitioner has submitted that since the child was in the custody of the petitioner, the respondent No.5 had no power to take away the child from the school and to keep him with her. He submitted that as per the petition filed by her before the learned Family Court under the Guardian and Wards Act, she had averred that the minor child was taken away by the petitioner on the pretext that he needs a proper education in some boarding school and it has also been averred by respondent No.5 herself in the petition that she does not have any source of income nor any movable or immovable property in her name and is not in a position to maintain herself and furthermore, no interim directions were issued by the Family Court and, therefore, it was unlawful on the part of respondent No.5 to have taken away the child from the school and that was the reason as to why the FIR was lodged under Sections 346/120-B IPC. He further submitted that in the absence of any orders from the Court, the respondent No.5 (mother) was estopped from taking away the child from the school. He further submitted that in case the custody of the child is given to the mother, then it will amount to putting a stamp on an illegal action of respondent No.5.

8. On the other hand, the learned counsel for respondent No.5 has submitted that in fact the present writ petition seeking a writ in the nature of Habeas Corpus is not maintainable. She submitted that respondent No.5 is the mother of a minor child who is now of the age of 6 years and there is no order of any competent Court to debar the respondent No.5 for keeping the custody of the minor child. She submitted that in fact the petitioner has not given the true facts of the case. She submitted that the background of the matrimonial

dispute was that sister of the petitioner namely Gagandeep Kaur was not able to conceive any child because of an unfortunate miscarriage which resulted into the removal of uterus and the entire family of the petitioner wanted that the male child of the petitioner and respondent No.5 be given to the sister of the petitioner and on the basis of this background the entire matrimonial dispute started which resulted in such an unfortunate situation where not only the parents but also an innocent child of 6 years is facing an emotional trauma. The learned counsel further submitted that the argument raised by the learned counsel for the petitioner that there is an estoppel for respondent No.5 to take the custody of the child is totally unsustainable and against the law. She submitted that firstly there can be no estoppel for the mother to take the custody of her child and secondly, there is no order either interim or final order by any competent Court of law creating an embargo and an impediment for respondent No.5 to keep the custody of the child. In the petition under the Guardian and Wards Act no interim order was passed in this regard. Even in the suit for injunction filed by the petitioner himself vide Annexure P-1 which was only for the purpose of seeking an injunction for not taking away forcibly the custody of the minor child, there is no interim order passed by the Court and, therefore, it is deemed to have been declined.

9. She has further referred to the application filed by her in this case seeking protection of her life and liberty for herself and her son at the hands of the petitioner as the petitioner in connivance with the senior police officials even at the rank of Deputy Superintendent of Police whose name has also been mentioned in the application are not only threatening but also putting imminent pressure upon the respondent No.5 to compromise the matter as the petitioner desires and also to take away the custody of the child. She further referred to para No.8 of the application wherein it has been stated that the petitioner has started his nefarious acts and by using his high handedness and has started harassing and humiliating respondent No.5 alongwith the senior police officials who called her regularly and respondent No.5 thereafter made a representation in this regard to the SSP but no action was taken in this regard. She further referred to para No.10 of the application wherein it has been stated by her that the crux of the matter was that she was being harassed for bringing less dowry despite spending Rs.60 lakhs on the marriage and respondent No.5 was being pressurized and harassed and even beaten up for handing over the baby boy to her sister-in-law namely Gagandeep Kaur. The reason for the same was that the uterus of Gagandeep Kaur was removed and she had only a girl child and that the petitioner and his family started pressurizing her that if she would give birth to a male child then she would have to give him to the said sister-in-law.

10. The learned counsel further submitted that since the petitioner is hand in glove with the senior police officials it made it very convenient for him to lodge an FIR against respondent No.5 who is the mother of the child. She further submitted that the child is living with respondent No.5 of his own willingness and there was no question of any abduction or confinement of the child and rather the child had volunteered himself to go with respondent No.5 and, therefore, the FIR was also vitiated by way of malafide and was frivolous in nature.

11. Learned counsel further submitted that in fact in such like cases the welfare of the child is of paramount consideration. She submitted that although she had stated in the petition

under the Guardian and Wards Act that she is not working and she has no movable and immovable property in her name but now she is living with her parents and as per instructions received from respondent No.5, the father of the respondent No.5 has large piece of agriculture land and one of the brothers of respondent No.5 is also settled abroad and they are two brothers and one sister only. She further submitted that apart from the same, the respondent No.5 has also filed a petition under Section 125 Cr.P.C. before the competent Court at Patiala which is still pending seeking maintenance on behalf of the respondent No.5 as well as child. She further submitted that the child is already admitted in the school at Patiala and regular fee is being paid for that purpose and he is also scoring very well due to the cordial atmosphere which is being built up at the house of respondent No.5 alongwith her parents. She further submitted that a writ in the nature of Habeas Corpus would not lie against one of the parents unless it can be shown that an acute prejudice can be caused in this regard. She relied upon a judgment of the Hon'ble Supreme Court in '*Rajesh K Gupta v v. Ram Gopal Agarwala and others*' Criminal Appeal No. 633 of 2005 to contend that in given facts and circumstances of the case, the welfare of the child is of utmost importance and is of paramount consideration. She submitted that in the aforementioned case also the mother was not working and the parents of the mother of the child were in a well-off position to support her. She has therefore, prayed for the dismissal of the present petition.

12. Mr. Rangi, learned counsel for the petitioner has submitted with regard to the maintainability of the Habeas Corpus petition by referring to the judgments of the Hon'ble Supreme Court in '*Yashita Sahu v. State of Rajasthan and others*'¹ [2020 (3) SCC 67,] '*Tejaswini Gaur and others v. Shekhar Jagdish Tewari and others*'² [2019 AIR SC 2318] and a judgment of this Court in CRWP No.123 of 2013, titled as '*Ajay Bansal v. State of Punjab and another*' to contend that a writ of Habeas Corpus is maintainable even against one of the parents of the child. The learned counsel has also submitted that in fact the sister of the petitioner has two children one is a daughter and one is the boy namely Navkiranjit Singh. However, the said boy is an adopted child from her another brother (Jeth).

13. Mr. Randhir Singh Thind, DAG, Punjab has submitted that it was a case of a matrimonial dispute between the petitioner and respondent No.5 and so far as the FIR is concerned, the same is still under investigation.

14. I have heard the learned counsel for the parties.

15. It is a writ petition filed under Article 226 of the Constitution of India seeking a writ in the nature of Habeas Corpus and an objection was raised by the learned counsel for respondent No.5 with regard to the maintainability of the writ in the nature of Habeas Corpus for taking custody of the child from one of the parents. However, a perusal of the judgments referred by the learned counsel for the parties, this Court is of the view that a writ in the nature of Habeas Corpus seeking custody of a child from one of the parents is certainly maintainable. However, it is always in the facts and circumstances of each and every case, while considering the welfare of the child as of paramount consideration, that this Court would exercise the power with utmost diligence and caution. No straight jacket formula can be made regarding custody of a child as to whether it should be given to one of

the parents who has filed the petition or not. In the present case, the background of the case as well as the sequence of events would suggest that on the basis of a matrimonial dispute between petitioner and respondent No.5, the custody of the child was disputed by them. Multiple litigations were also being faced by both the parties and some of which are still pending including Section 13 of Hindu Marriage Act, Section 125 Cr.P.C., Domestic Violence Act and civil suit filed by the petitioner.

16. The real consequence of the entire dispute and litigation between the parents is that not only the parents are suffering from the unfortunate situation but a small child of the age of 6 years is also undergoing emotional trauma. Thrice the mediation has failed at different levels which would signify that both the parents are adamant. Therefore, this Court would apply the only litmus test which is available to the Court i.e. welfare of the child is of paramount consideration. In all the judgments referred by the learned counsel for the parties it has been held that it is the welfare of the child which is to be seen in the facts and circumstances of each and every case. All the technicalities apart, it is a question of rights of both the parents but above all, the welfare of the child is to be given primacy by this Court while exercising the powers under Article 226 of the Constitution of India.

17. Therefore, today this Court interacted with the child who has been produced by way of video conferencing by the respondent No.5 alongwith her counsel. The child namely Shahbaaz Singh repeatedly stated that he wanted to stay with his mother and not with his father. This Court wanted to go into the reasons for the same but the same could not be ascertained in view of the tender age of the child and there was also a likelihood that he may also be facing emotional stress but the child categorically and repeatedly stated that he wanted to remain with his mother. So far as the forcibly taking away of the child by the respondent No.5 is concerned, although an FIR was lodged against her but the fact would remain that mere lodging of an FIR and continuation of a prosecution against respondent No.5 cannot override the welfare of the child.

18. Admittedly, there was no interim order against any of the parties and mediation has failed at three levels but the dispute could not be solved. So far as the upbringing and maintaining the child is concerned, although she may not be working or having her own income but her parental family does have adequate resources as per learned counsel for respondent No.5 and apart from the same, proceedings under Section 125 Cr.P.C. are also pending. Therefore, at this stage, this Court has not been able to find out any embargo or impediment or any other disadvantageous or factor as to why respondent No.5 should not continue with the custody of the child. While arriving at this conclusion this Court has also considered that as per the allegations made by the respondent No.5, the petitioner is in active connivance with police officials and is repeatedly threatening the respondent No.5 which she has stated in her application. There is nothing on record to show as to whether the respondent No.5 has applied any force or coercion to retain the custody of child except the FIR which pertains to wrongful confinement only.

19. The custody of the child can be determined by the competent Court after leading evidence. Both the petitioner as well as respondent No.5 shall be at liberty to make appropriate application/petition under the Guardian and Wards Acts or under any other law

for the time being in force to get the rights of custody adjudicated from the competent Court of law.

20. However, till a such right of custody is adjudicated by a competent Court or any other legally permissible mode whatsoever, this Court is of the opinion that the custody of the child should remain with respondent No.5. The retention of child with respondent No.5 who is his mother cannot be termed as an illegal custody.

21. Since respondent No.5 had moved a separate application for seeking protection of life and liberty at the hands of the petitioner, it would also be just and proper to direct the Senior Superintendent of Police, Patiala to assess the threat perception qua respondent No.5, the minor child as well as her family members and after doing the same, shall ensure protection, in case it is so required. The needful be done as expeditiously as possible. The learned Deputy Advocate General is requested to convey the orders to the Senior Superintendent of Police, Patiala in this regard.

22. It is further made clear that this order is only as an interim arrangement considering the entire background of the case as well as the factual sequence of events and nothing contained in this order shall be deemed to be any observation with regard to the final rights of the petitioner as well as respondent No.5 and would have no effect when the matter regarding the custody is taken up by any competent Court for deciding the rights of the custody as this order has been made only for the welfare of the child at this stage only.

In view of the above, the present petition is disposed of accordingly.

R.M.S.

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Petition disposed of.