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Poonam Kalsi v. The State Of Punjab, **2022 PLRonline 0592**

PUNJAB AND HARYANA HIGH COURT

Sant Parkash J.

Poonam Kalsi v. The State Of Punjab

CRWP-7913-2020

20.04.2022

Hindu Minority and Guardianship Act, 1956 S. 6(a) – Guardians and Wards Act, 1890 – Mother claimed custody of a child from the father – Held that the custody of the father could not be said to be illegal and therefore as there were disputed questions of fact as to who was in a better position to take care of the minor child, the parties were free to approach the Civil Court for the redressal of their grievances – Custody of child.

Held, Taking into consideration the provisions of law and the factual matrix which is disputed, I am of the opinion that custody of the father as a natural guardian cannot be said to be illegal or unlawful and therefore, it would not be appropriate to issue a writ of habeas corpus in favour of the petitioner. In the case of disputed questions of facts, it is a matter of evidence to be led by both the parties as to which party will be in a better position to take care of the minor child which is concededly the paramount consideration. [Para 28]

Mr. Navraj Singh, Advocate for the petitioner. Mr. H.S.Multani, AAG, Punjab Mr. Ashok Giri, Advocate for respondents No. 4 to 9

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SANT PARKASH, J.

1. The petitioner has filed the present petition under Article 226 of the Constitution of India for issuance of a writ in the nature of habeas corpus for appointment of a warrant officer to raid the premises of respondent Nos. 4 to 9 and to recover the detenue namely Lovepreet Bains aged 3 years (minor son of the petitioner) from illegal confinement of respondent Nos. 4 to 9.

2. The petition has been filed on the averments that husband of the petitioner used to beat her on instructions of his mother without any reason and caused injures on the neck of the petitioner. On 26.07.2020, the petitioner made a written complaint to the police officials that her in-laws forcibly took the custody of her minor son of 3 years. The petitioner also

made a request before the Senior Superintendent of Police Rural Jalandhar as well as to SHO and DSP regarding handing over the custody of minor son to the petitioner but no action has been taken on the same.

3. It has been further averred that the husband and in-law family of the petitioner are habitual offender as more than 198 FIRs under the NDPS Act have been registered against them.

4. That respondent No. 4 i.e. husband of the petitioner has filed suit for permanent injunction restraining the defendants from interfering into peaceful life of plaintiff in any manner and further restraining the defendants not to forcibly take away the minor child namely Lovepreet Bains from the custody of plaintiff. The said civil suit is pending before the Court of learned Additional Civil Judge (Senior Division) Nakodar. No interim injunction has been granted therein.

5. The petitioner by way of CRM-W-380-2022 placed on record the photographs of her husband while he was in America. In her application she stated that her husband i.e. respondent No. 4 went to America and left his minor child in India with her mother in law and her mother-in-law is not the natural guardian of the minor son. Therefore, the petitioner craves for indulgence of this Court to get the custody of her minor son from respondents No. 4 to 9.

6. Learned Counsel for the petitioner has contended that the detenue Lovepreet Bains is around the age of three years therefore, the petitioner being biological mother is entitled for her custody. Further, the petitioner is under worry due to bad conduct of the private respondents towards the detenue, who shall spoil his future and welfare.

Therefore, the petition may be allowed and custody of the minor child may be ordered to be handed over to the petitioner-mother by issuance of a writ of habeas corpus.

7. In support of his arguments, learned Counsel for the petitioner has placed reliance on judgment passed by Co-ordinate Benches of this Court in case CRWP No. 9723 of 2020 titled as ‘Pinki Agarwal Vs. State of Punjab and others’, decided on 20.12.2021 ; CRWP No. 1423 of 2019 titled as ‘Mandeep Kaur Vs. State of Punjab and others’, decided on 03.11.2020; CRWP No. 3013 of 2020 titled as ‘Neha Vs. State of Haryana and Ors.’, decided on 01.06.2020 and judgment passed by Hon’ble Supreme Court in case titled as ‘Syed Saleemuddin Vs. Dr. Rukhsana’ 2001(2) RCR (Civil) 613.

8. Learned Counsel for the State, on the basis of reply filed on behalf of respondents No. 1 to 3, has submitted that there has been a matrimonial dispute between petitioner and her husband. There is no such illegal detention of the younger child Lovepreet Bains as alleged by the petitioner in the present petition. Out of two children, elder child is living with the mother and the younger child is living with father. The petitioner is required to adopt the legal procedure under Law of Guardianship for taking the guardianship of the child by filing suit in the competent court of law.

9. Learned Counsel for respondent Nos.4 to 9, taking through the contents of reply filed on

their behalf, submitted that if the petitioner is aggrieved of having the custody of detenue Lovepreet Bains, then she can avail appropriate remedy available to her under law and filing of the present petition is nothing but an abuse of process of law. The petitioner has equally efficacious remedy of filing petition under the Guardians and Wards Act, 1890 for custody of the minor child. Therefore, the present habeas corpus petition is not maintainable. The marriage of the petitioner was solemnized with respondent No. 4 in the year 2014 and out of the wedlock two sons were born. One son namely Khushpreet Bains aged about 6 years is residing with mother whereas the other son is with respondent No. 4. The said fact has not been deliberately mentioned by the petitioner in her petition. Respondent No.4 is well off economically as he is owner of Dairy Farm, shops and also runs Taxi business. He has sufficient sources to maintain the child and respondent No. 4 is not involved in any criminal activity.

10. Learned Counsel for respondents while relying upon judgments passed by this Court in case CRWP-10817-2020 titled as 'Priyanka Rani Vs. State of Punjab and Others', decided on 14.01.2022, as well as judgments passed by Co-ordinate Benches of this Court in cases CRWP No. 10833-2020 titled as Manisha Gupta Vs. State of Punjab and others, decided on 15.03.2022 ; CRWP No.10366 of 2021 titled as 'Amanpreet Kaur Bale Vs. State of Punjab and Others, decided on 03.11.2021 and judgment passed by Hon'ble Apex Court in case 'Sumedha Nagpal Vs. State of Delhi and others', 2001 SCC (Cri) 698 has further submitted that while deciding the custody of minor, prima facie consideration is paramount welfare of the child and custody is not to be decided upon the rights of the parties under the law.

11. I have heard learned Counsel for the parties and perused the record.

12. At the very outset, question of the maintainability of present writ petition seeking custody of minor child has attracted the attention of this Court. In a landmark judgment, the Apex Court in case Gohar Begum v. Suggi alias Nazma Begum and others, 1960 AIR (SC) 93, has laid down that the remedy of the writ in the nature of habeas corpus is available where the minor child is illegally or improperly detained. Thus, the writ of habeas corpus for custody of minor child is certainly maintainable. It is a settled principle of law 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 parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. It is also well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

13. After concluding that writ for habeas corpus is maintainable, it has to be seen whether custody is illegal or improper keeping in view the peculiar circumstances of the case.

14. In case Pinki Agarwal (Supra), it has been held as under :-

".....10. Section 6 of the Act of 1956 stipulates that custody of a minor who is less than five years has to be with her/his mother. For ready reference, said section is reproduced as

under:-

6. Natural guardians of a Hindu minor-The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother." (Emphasis supplied)."

As per the Act of 1956, the custody of a minor, who has not completed the age of 5 years, shall ordinarily be with the mother, unless it can be established that the mother is incompetent or unable to look after the minor. A mother plays an important role in shaping, in nurturing and moulding a young tender mind. She is in fact the child's first teacher, guide and mentor and provides a safe emotional haven to her children. There is a presumptive truth that a mother is better suited to fulfil the needs of a minor, unless proved to the contrary. The term 'Welfare of the Child' has a wide connotation and cannot be limited to fulfilling the financial needs only. It is in this background that the legislature in its wisdom has tried to ensure that the custody of a minor child who has not attained the age of 5 would remain with the mother….."

15. In case Mandeep Kaur (Supra), it has been held as under :-

24. As between the parties who are Hindus, the HMG Act lays down the principles on which custody disputes are to be decided. As per Section 6 (a) of the HMG Act, natural guardian of a Hindu Minor in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) is the father, in the case of a boy or an unmarried girl and after him, the mother. However, proviso to Section 6(a) of the HMG Act provides that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

25. In Roxann Sharma v. Arun Sharma (SC) : 2015 (2) R.C.R. (Civil) 93 Hon'ble Supreme Court observed as under:-

"12. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised if the custody retained by the mother. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this Section or for that matter any other provision including those contained in the G&W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

27. In the present case the question of welfare and interest of the minor daughter has to be

judged on the consideration of universally acknowledged superiority of the mother's instinctive selfless love and affection of her children, particularly the infants. The lap of the mother is the natural cradle where the safety and welfare of the infant can be assured and there is no substitute for the same. Mother's protection for the infant is indispensable and no other protection will be equal in measure and substance to the same. No amount of wealth or mother like love can take place of mother's love and care. Motherly care and affection is indispensable for the healthy growth of the infants.

16. In case Neha Vs. State of Haryana (Supra), it has been held as under :-

13. Another aspect that is particularly noteworthy herein is, the tender age of the minor daughter. She is merely four years and ordinarily, per Section 6 of 1890 Act, custody of a minor who is less than five years has to be with her mother. For ready reference, said section is reproduced as under:-

"6. Natural guardians of a Hindu minor- The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother."

No doubt, the above provision postulates that the custody shall "ordinarily" be with the mother. But the word "ordinarily" is to be construed to mean that unless, prima facie, it is shown otherwise by the father that child would be better taken care of by deprivation of motherhood.

Father must then give some cogent reasons, indicative of the welfare and interest of the child being jeopardized or the exclusive motherhood being imminently non- conducive to the upbringing of child. In the family scenario and circumstances herein, there is no such cogent reasoning forthcoming so as to deny statutory right of a mother. Said motherhood right, in fact, is essentially more for the benefit and welfare of the minor child. Spirit of section 6 hypothesizes that, given the tender age of a minor, suitability of custody is not the predominant factor, what is more relevant or should weigh, is the requisite biological and natural environment, which gives rise to a general presumption that mother is first and best suitable for child care of a minor that age.

14. In the aforesaid background, while there is no dissention with the proposition that respondent No.4 being father of the minor daughter herein, cannot be stated to be in her illegal or unlawful custody, however, since the minor daughter is less than five years, the mother is, therefore, entitled to the benefit of Section 6, ibid. That apart, prima facie, this Court is of the opinion that until the prayer of the parties qua custody of the minor child is decided by Guardian court, the welfare and interest of the minor child would be better in the hands of mother- petitioner."

17. In case Syed Saleemuddin (Supra), Hon'ble Supreme Court granted the custody of the

children to their mother till the family Court disposed of the petition for the custody of the children.

18. In view of the above referred judicial precedents, it has emerged that in view of proviso to Section 6(a) of the HMG Act, the custody of a minor child who has not completed the age of five years shall ordinarily be with the mother.

19. On the other hand, learned Counsel for the respondents while referring to the judgments in Priyanka Rani (Supra) ; Manisha Gupta (Supra) ; Amanpreet Kaur Bale (Supra) and Sumedha Nagpal (Supra) has tried to made out a case for dismissal of the present petition on the ground that only the petition under the Hindu Minority and Guardianship Act, 1956 or the Guardian and Wards Act, 1890 is maintainable for seeking custody of the minor child. Criminal writ petition for issuance of writ of habeas corpus is not maintainable. Therefore, the petitioner may be asked to approach the Family Court concerned for redressal of her grievances. Further, as per provisions of Section 6 of Hindu Minority and Guardianship Act, 1956, father is a natural guardian of the minor child and it is only on demise of the father, that the mother becomes the natural guardian. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child and the custody is not to be decided on legal rights of the parties.

20. In the present case, the petitioner has sought custody of her minor son on the ground she being his biological mother entitled to his custody, the private respondents are habitual offender and are involved in many cases under the NDPS Act and his son not being looked after and well maintained.

21. In the case of custody of a minor, paramount consideration as contemplated under Section 7 of the Guardians and Wards Act, 1890 is relevant to take note of which is reproduced as under:-

“7. Power of the Court to make order as to guardianship.- (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made –

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardian the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court. (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”

22. In case, Tejaswini Gaud and Ors. Vs. Shekhar Jagdish Prasad Tewari and others : 2019 PLRonline 3500 (SC), Hon’ble Supreme Court observed as under:-

“19. 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, 1890 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."

23. From the perusal of record and legal proposition, this Court is of the considered view that the most important consideration which must always weigh with the Court in making orders for the appointment of guardians of minors is the welfare of the minor, and in that view of the matter, the legal rights of the mother, in the case in hand, must be understood subject to provisions of Section 7. Under Section 7 of the Act, the Court should be guided by the sole consideration of the welfare of the minor, and what would be for the welfare of the minor must necessarily depend upon the facts and circumstances of each particular case.

24. The duty of a court exercising its parens patraie jurisdiction as in cases involving custody of minor children is all the more onerous. Sentiments and welfare of the minor are supreme consideration which cannot be ignored.

25. Record reveals that the petitioner filed many complaints against her husband and in-laws family to the police wherein the petitioner has levelled allegations of harassment and beating by her husband, selling of narcotics by her husband and father-in-law and keeping younger child by husband and the said complaints have been consigned/filed after enquiry. Learned Counsel for the private respondents has also placed on record copy of order dated 22.07.2019 passed by learned Judge, Special Court, Jalandhar wherein respondent No. 4 i.e. father of the minor child has been acquitted of the charges under Sections 15 and 25 of the NDPS Act. Also, respondent No. 4 has filed application before the learned trial Court seeking custody of elder son namely Khushpreet Bains who is now residing with the petitioner.

26. It is true that mother being a natural guardian of a minor child has a preferential right to claim custody of her son. However, the utmost consideration before this Court is the well being of the minor and not the legal right of a particular party. The term guardian has to be taken in its widest possible sense. It has to be measured not only in terms of money and physical comfort but also should include moral and ethical welfare of the child. The term 'custody' should not be interpreted in its strict sense as physical custody. Custody means custody in the sense of supervision and control over the child. The mother's or father's right to the custody of a their minor child is no longer absolute. It is circumscribed by the consideration of the welfare of the minor. The welfare of the child is decisive for the claim of custody. In case of custody of a minor child, the Court is expected to strike a just and proper balance between the requirements of welfare of the minor child and rights of parents over the minor child. The Court should also take into consideration the preference

of the minor child to stay with either parent or grand parent.

27. A Division Bench of this Court in its judgment dated 23.05.2019 passed in LPA No.3716 of 2018 in case titled as 'Reetu Verma vs. State of Haryana and others', observed as under:

" The parties are husband and wife, having a minor son namely Jiyanshu Verma. Admittedly, on account of matrimonial dispute minor son is in the custody of the father-respondent, as every time they have appeared before us, the child has been brought by him. Habeas Corpus petition was filed by the appellant-wife seeking custody of the minor child for herself. Learned Single Judge dismissed the habeas corpus petition on the ground that the custody of a minor child with a natural guardian cannot be said to be illegal and relegated the parties to avail the remedy under the Guardian and Wards Act. Before this Court innumerable efforts have been made by us for an amicable settlement between the two, to secure the interest of the child so that he is not deprived of either love of father or the mother. On more than two occasions we interacted with the parties in the Chamber to bring an amicable settlement but the same failed. Lastly, on the suggestion of learned counsel appearing for the parties, we referred the matter to the mediation, where also the parties have failed to arrive at an amicable settlement. Since the question of the custody of the minor child and the welfare of the child being supreme it can only be decided on the basis of evidence as to which of the two parents are in a better position to look after the welfare of the child and a conclusion in respect of same only be arrived at by way of an evidence.

Hence, in our considered opinion the impugned order and judgment does not require any interference and it would be in the interest of justice that the appellant is relegated to avail the remedy under the Guardian and Wards Act to seek the custody of the minor child before the appropriate Court. With this, intra court appeal stands dismissed."

28. Taking into consideration the provisions of law and the factual matrix which is disputed, I am of the opinion that custody of the father as a natural guardian cannot be said to be illegal or unlawful and therefore, it would not be appropriate to issue a writ of habeas corpus in favour of the petitioner. In the case of disputed questions of facts, it is a matter of evidence to be led by both the parties as to which party will be in a better position to take care of the minor child which is concededly the paramount consideration.

29. In view of the observations made above, this Court finds that minor child namely Lovepreet Bains has not been kept in illegal custody of private respondents. Finding no merit in the instant petition, the same is dismissed with liberty to the petitioner to approach an appropriate court under relevant provisions of law seeking the relief claimed in this petition.

30. Nothing in this order shall be treated as expression of any opinion on merits of the case so as to bind or influence appropriate court under relevant provisions of law seeking the relief claimed in this petition, if any so filed by any of the parties.