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Mansi v. State of Punjab, (2023-1)209 PLR 758

PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice Jasjit Singh Bedi.

MANSI – Petitioner,

Versus

THE STATE OF PUNJAB and others – Respondents.

CRWP-7332-2022 (O&M)

(i) Hindu Minority and Guardianship Act, 1956 (32 of 1956) Section 6 – Custody of minor child – Though the provisions of the special statutes govern the rights of the parents or guardians, however, the interest and welfare of the minor is the supreme consideration in cases concerning custody of the minor child – Due weightage should be given to the child's comfort, health, education, intellectual development and familiar surroundings – The question of the interest and welfare of a minor child has to be judged on the consideration of the acknowledged superiority of the mother's love and affection for the children – The lap of the mother is a natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same – Maternal care and affection is therefore indispensable for the healthy growth of a child.

[Para 11]

(ii) Constitution of India, Article 226 – Writ of Habeas Corpus was certainly maintainable by one parent against another and it is the principle duty of the Court to ascertain whether the custody of the child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and be handed over to another. [Para 12]

(iii) Mental Health Act, 1987 (14 of 1987) Section 2(21) – Even if the petitioner/mother was admitted in an institution for care and rehabilitation, even in such a situation, ordinarily a child under the age of 03 years ought not to be separated from her during her stay in such an institution – In the present case, firstly, the petitioner is not staying at any mental health establishment where she is receiving care or treatment – On the contrary, she is working with a multinational company – There can be no justifiable reason to deny her the custody of the child who is barely 02 years and 03 months old – In fact, denial of custody to the petitioner who is the natural and biological mother of the child would be detrimental to the mental health of not only the child but the mother as

well. **[Para 14]**

Cases referred to:-

1. (2023-1)209 PLR 755 (SC) (SN), 2023 SCeJ 0170, 2023 PLRonline 481501 (SC), *Rajeswari Chandrasekar Ganesh v. State of Tamil Nadu.*

2. 2019 PLRonline 3500 (SC), *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari.*

3. CRWP-3251-2022, decided on 13.06.2022, *Rashneet Kaur v. State of Haryana.*

4. 2022 PLRonline 0592 , *Poonam Kalsi v. State of Punjab.*

5. 2019 PLRonline 3501 *, Reetu Verma v. State of Haryana.*

Mr. Rahul Sharma, for the petitioner. *Mr. Jaiteshwar Singh, Asst. A.G., Punjab. Mr. Arjun Veer Sharma,* for respondent Nos.4 to 6.

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Jasjit Singh Bedi, J. –*(7th November, 2022)* – The prayer in the present petition under Articles 226/227 of the Constitution of India is for the issuance of a Writ of Habeas Corpus directing respondent Nos.1 to 3 to produce the minor child of the petitioner namely, Riaan Shahi who is less than 02 years old (at the time of filing of the petition) from the illegal detention of respondent Nos.4 to 6 and allow him to join the company of the petitioner who is the mother.

2. The brief facts of the case as emanating from the pleadings are that the petitioner, who is qualified as B.Tech (I.T.) and is a resident of Panchkula, solemnized a love marriage with respondent No.4 on 04.12.2017 and out of the said wedlock one son namely Riaan Shahi was born on 20.08.2020. Respondent Nos.4 to 6 (being her husband and in-laws) were extremely greedy and on account of inadequate dowry, she was mistreated by them and faced a lot of harassment. The details of the atrocities have been submitted to the Police in a separate complaint dated 26.07.2022 (Annexure R-8).

The petitioner and respondent No.4 were employed at Noida but on account of the Covid-19 pandemic, as a lockdown was imposed, they both came to reside and work from home with respondent Nos.5 and 6 at Pathankot.

3. On 22.07.2022, the petitioner's employer (TSYS Noida) called the petitioner back to office with the directions that her physical presence was mandatory henceforth and accordingly, the petitioner requested respondent No.4 to return to Noida on which he started quarrelling with her and gave her physical beatings. On 23.07.2022, the family members of respondent No.4 also started quarreling with the petitioner and gave beatings to her. The real sister of respondent No.4 who resides adjoining to the house of respondent Nos.4 to 6 came to the house of respondent Nos.4 to 6 and gave slaps on the face of the petitioner and in the evening she was thrown out of the matrimonial home while retaining the minor child who

was less than 02 years old and dependent on the mother's feed.

Despite all attempts to take her child along with her, the respondent Nos.4 to 6 remained adamant and had retained the child against the wishes of the petitioner. On being thrown out of the matrimonial home, she travelled by bus to Panchkula and reached the house of her parents. She submitted a complaint dated 26.07.2022 (Annexure R-8) against the respondent Nos.4 to 6 and referred to the fact that they did not allow her to take her child when she was ousted out of the matrimonial home.

It is stated that the sole purpose of respondent Nos.4 to 6 was to retain the child so as to be used as a bargaining chip in order to protect themselves from the process of law. She has not been permitted even to speak to her minor child and despite her father making attempts to resolve the dispute, he was told by respondent No.4 that they had retained the child with them and he (father of the petitioner) could keep the petitioner.

Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of *Rajeswari Chandrasekar Ganesh v. State of Tamil Nadu & Others,*[1] (2023-1)209 PLR 755 (SC) (SN), 2023 PLRonline 481501 (SC), 2023 SCeJ 0170, to contend that a writ of Habeas Corpus is maintainable at the instance of one parent against the other and in child custody matters, the only relevant consideration was the welfare of the child. In the present case, since the child was less than 02 years old (at the time of the filing of this petition) and was on the mother's feed his custody should be handed over to the petitioner as he has been illegally detained by respondent Nos.4 to 6.

4. On 29.07.2022, notice of motion was issued by this Court and on 22.09.2022, respondent Nos.4 to 6 who are the husband and in-laws of the petitioner respectively appeared in the Court through their counsel.

The matter was referred to the Mediation and Conciliation Centre of this Court on 23.09.2022 but an amicable settlement could not be arrived at. Respondent Nos.4 to 6 however filed their reply in the shape of an affidavit of respondent No.4. In the said reply, Annexure R-2 comprising of three documents dated 04.06.2021, 16.06.2021 and 14.07.2021 were attached. As per the said documents, the petitioner was stated to have been suffering from depression, had adjustment disorders, was aggressive and therefore was on medication for the same. It was the case of the private respondents that the mental condition of the petitioner did not entitle her to the custody of the child.

As the veracity of the said documents was disputed, this Court on 27.09.2022 asked the Senior Superintendent of Police, Pathankot to verify the three slips/OPD tickets.

Pursuant thereto, a short reply dated 10.10.2022 was submitted by way of an affidavit of Harkamalpreet Singh Khakh, PPS, Senior Superintendent of Police, District Pathankot which is already on record. As per the said reply, the OPD tickets/prescriptions were found to be genuine as was evident from the stamps attested and remarks made by the doctors/officials of District MMG Hospital, Ghaziabad and Heart Car Neuro Care Maternity and Surgery Centre of J.R. Hospital at Muradabad.

5. Coming back to the reply submitted by respondent Nos.4 to 6, it is stated that the petitioner and respondent No.4 were working at TATA Consultancy Services at Gurgaon, where they got involved with each other and ultimately solemnized their marriage at Pathankot. The child Riaan Shahi was born on 20.08.2020 at Noida. Pursuant to residing at Pathankot with respondent Nos.4 to 6 on account of the lockdown, the petitioner started pressurizing respondent No.4 to move back to Noida and they shifted back where they stayed up to July, 2021. During this period, the petitioner did not take adequate care of the minor child who got an eye infection, which was got treated by respondent No.4. Similarly, he was not given proper diet and mother's feed due to which the child had to be hospitalised often.

Even prior to the birth of the child, the petitioner suffered from a mental condition and used to slap herself in anger and would lock herself in the washroom for hours. She was self-abusive, scratched and beat herself on her arms and hands and moreso after the birth of the child. Effectively, she was short tempered, quarrelsome and suffered from a neurological problem due to which respondent No.4 had to pay visits to various neurologists at different cities. As she was eager to go abroad she took the IELTS examination twice but failed leading to further depression. The mother of the petitioner had in fact been pressurizing her to take the exams and move to the United States (U.S.) where her younger brother was settled and this worsened her depression. Ultimately, pursuant to her second failed attempt to crack the IELTS in October, 2019, the petitioner consumed Harpic (toilet cleaner) to commit suicide. She was rushed to Neuro Hospital Sector 20, Noida by respondent Nos.4 and this fact is evident from the WhatsApp chat between the petitioner and respondent No.4 which is attached as Annexure R-1 to the reply.

After the birth of the child at Noida, when respondent No.4 asked the petitioner to move to Pathankot on account of the lockdown, she refused to do so and respondent Nos.5 and 6 had to move to Noida to look after the child. However, subsequently they all moved to Pathankot, where the earlier conduct resurfaced and she was aggressive, abusive and shouted for no reason and attempted to cause injuries to herself. She was ignorant of the needs of the child and it was respondent Nos.4 and 5 who took care of him. In fact, the petitioner was fond of late night parties and indulged in drinking alcohol. Ultimately, on her asking, respondent No.4 along with the minor child and the petitioner moved back to Noida where they stayed up to July, 2021. Once again, the child was not taken care of leading to his eye being infected. He became increasingly weak on account of lack of proper diet and mother's feed leading to his hospitalization.

On account of her worsening mental condition she was taken to District MMG Hospital, Ghaziabad on 04.06.2021, where she was treated by Dr. Saket Nath Tiwari, firstly on 04.06.2021 and thereafter on 16.06.2021. As there was no improvement in her condition, the petitioner, respondent No.4 and the child decided to visit Lansdowne, Uttarakhand and checked into the Green Palms Hotel on 12.07.2021 and checked out on 14.07.2021. While on their way to Nainital, the petitioner's condition worsened and she started shouting and tried to jump out of the car while holding the minor son in her lap. The situation was handled with difficulty by respondent No.4 who took the petitioner to J.R. Hospital, Muradabad, where Dr. D. Kumar Singh, MBBS, MD, BNB (Neuro) (BHU), the Neuro Physician

attended to the petitioner. Pursuant thereto, the petitioner was brought back to Noida after cancelling the tour. The petitioner was not consuming the prescribed medicines and it later came to light that she was selling of the same. The prescriptions are attached collectively as Annexure R-2 to the reply.

As the condition of the petitioner did not change, a decision was taken to shift back to Pathankot for the sake of the welfare of the child in July, 2022. Once at Pathankot, the condition of the petitioner remained the same. She continued to quarrel and pick up fights on petty matters. On 23.07.2022 at about 11.00 AM, while the petitioner was chatting on the phone with someone, respondent No.4 inquired from her as to whom she was chatting with. She became aggressive, picked up a wooden table and threw it towards respondent No.4. He immediately called his mother, respondent No.6 but she continued her misbehavior. Thereafter, she packed her clothes in a bag and while doing so started to throw households articles towards respondent No.4. He handed over the child to respondent No.5 and came inside the room to pacify the petitioner but to no avail. Ultimately she took her bag and went outside. Fervent requests were made to her not to leave. She was chased and brought back to the matrimonial home but the petitioner remained adamant to leave for Panchkula. Finally as the petitioner left the house, Respondent No.4 and the minor child started moving towards the bus stand but as his attempts to restrain her from leaving failed, he got the petitioner boarded on the bus at Panchkula at 05.20 PM in the evening. The entire occurrence was recorded on a CCTV camera installed in the vicinity, wherein the respondent Nos.4 and 5 and his brother-in-law namely Ajay Kumar are seen making efforts to make the petitioner understand time and again. The pen-drive containing the CCTV footage is annexed as Annexure R-3 and the relevant photographs including those extracted from the CCTV footage showing that the petitioner left the matrimonial home and the child of her own are annexed as Annexure R-4 to the reply.

In May, 2022 the child had been admitted at Little Kingdom International School at Sujanpur, Pathankot and the relevant documents in this regard were annexed as Annexure R-5 to the reply. It was the respondent No.4 who was taking care of the child in the best possible manner which is evident from his vaccination chart. The copy of the vaccination chart is annexed as Annexure R-6 to the reply.

Pursuant to the lifting of the lockdown, the petitioner as well as respondent No.4 were asked to join their respective companies but seeing the ignorant attitude of the petitioner towards the child, the respondent No.4 had changed the company he was employed with in order to work from home at Pathankot. The relevant letter in this regard is annexed as Annexure R-7 to the reply.

Even after the petitioner left the matrimonial home and filed the present petition, she came to the house of Smt. Rajesh Rani Mehan, the aunt (Tai) of the respondent No.4 at Ludhiana and acted in a hyper manner while yelling at respondent No.4 and giving him multiple blows with the blunt weapon. The attempt was to take illegal custody of the minor child. A DDR No.81-A dated 01.08.22 was registered with the Police at Police Station Division No.5, Ludhiana and the photographs extracted from the CCTV footage from the house of the Tai

of respondent No.4 showing the trespass by the petitioner is annexed as Annexure R-9 to the reply.

The respondent No.5 had also approached the Senior Superintendent of Police, Pathankot seeking protection of the life and liberty of himself and his family members, wherein the entire incident that took place at Ludhiana has been narrated. The application dated 09.08.2022 containing the relevant extract of the CCTV footage is annexed as Annexure R-10 to the reply.

On 16.09.2022, while the respondent No.4 was on the way with the minor child to the house from the school two unknown persons tried to snatch him away. He immediately rushed to the house and raised a hue and cry. On seeing the Mohalla residents gathered, the unknown persons fled away stating that they would take the custody of the minor son from respondent No.4.

Thus, it is the contention of the answering respondent Nos.4 to 6 that though it was not disputed that a Writ of Habeas Corpus was maintainable but in the present case, the child was in the legal guardianship of his father and had not been illegally detained. In fact, the petitioner had deserted the matrimonial home along with respondent No.4 and the child on account of her mental condition. Looking at her mental condition and attending circumstances, the welfare of the child lay in the lap of the answering respondent Nos.4 to 6 and not with the petitioner.

6. The learned counsel for the petitioner contends that there is no dispute that the present petition for the issuance of writ in the nature of Habeas Corpus is maintainable. Since the welfare of the child was of paramount importance and in the present case as the child was about 02 years old and was on the mother's feed, his custody ought to be handed over to the petitioner. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of *Rajeswari Chandrasekar Ganesh v. State of Tamil Nadu & others* (supra), *Tejaswini Gaud & others v. Shekhar Jagdish Prasad Tewari & others,* [2] 2019 PLRonline 3500 (SC), (2019) 7 SCC 42 and this Court in *Rashneet Kaur v. State of Haryana & others*[3] (CRWP-3251-2022, decided on 13.06.2022).

He contends that the WhatsApp chat between the petitioner and respondent No.4 (taken on record as mark 'A' and not denied by respondent No.4) would show that the petitioner was taunted by the respondent-husband that he will ensure that she remains mired in child custody litigation for a number of years.

He contends that, despite the reply of the State, the medical prescriptions are fabricated documents (Annexure R2 or R1/1). The writing on the accompanying OPD Register at page 155, where the name of the petitioner was shown at Sr. No.43 seems to have been written with the different ink. Similarly, there seems to have been an interpolation/overwriting on page 157 at Sr. No.144907-144909 in the Register dated 16.07.2021. Similar is the case in the register dated 14.07.2021 as is evident from page 159 where her names seems to have been added later in a different handwriting. He contends that the prescriptions (Annexure R2 or R1/1) also referred to the fact that the identity of the person is not verified by the said

document meaning thereby that who had actually gone for treatment on the relevant date, if at all, is unknown and therefore, the said prescription slips are fabricated documents. Even otherwise, the petitioner and respondent No.4 were residents of Noida and the question of going for treatment to Ghaziabad would not arise. Similarly, the prescription dated 14.07.2021 pertains to Muradabad. On that date, the petitioner-respondent No.4 and the child were actually at Lansdowne, Uttarakhand and checked out from Hotel Green Palms only on 15.07.2021 as was apparent from the Google Pay Screenshot (taken on record as mark 'B'). In fact the Hotel register photocopy would show that the correction has been made in the check out date from 14.07.2021 to 15.07.2021 (taken on record as mark 'C').

He contends that taking the allegations of the mental condition of the petitioner to be true, as per the Mental Health Act, 2017, even if the women was admitted for treatment at Rehabilitation Centre, even then, a child under the age of 03 years should ordinarily, not be separated from her during the course of her treatment. In the present case, the petitioner is not admitted in any such Rehabilitation Centre and therefore at any rate, the custody of the child must be handed over to her. The petitioner was working in the corporate sector with a multinational company and could not be said to be so unwell so as to disentitle her to the custody of her child. In fact she had been promoted as Associate Senior Engineer on 29.06.2021. He contends that in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, where the minor child had not completed the age of 05 years, the custody should ordinarily be with the mother.

7. On the other hand, the learned counsel for respondent Nos.4 to 6 while admitting the fact that the present petition for issuance of a writ of Habeas Corpus was maintainable, contended that the facts narrated above clearly establish that the petitioner was suffering from a mental condition, had suicidal tendencies and attempted to commit suicide by consuming Harpic as was evident from the WhatsApp chat (Annexure R-1) and therefore, the welfare of the child was best served in the custody of the answering respondents who are none other than the father and the paternal grand- parents. This was moreso, when she had willfully deserted the child and respondent No.4. He further vehemently denies the contention of the petitioner that the medical documents (Annexure R2 or R1/1) were fabricated and submits that they pertained to the petitioner and none else. In fact, the tampering with the Hotel Register (Mark 'C') would show that the petitioner, respondent No.4 and the child checked out on 14.07.2021 from the Hotel Green Palms and went to the doctor at Muradabad on 14.07.2021 itself. He thus contends that there was no merit in the present petition and same ought to be dismissed. If the petitioner was aggrieved in any manner, she was free to avail her civil remedies in accordance with law as the child could not be said to be in illegal custody of the respondent Nos.4 to 6 who are the father and parental grandparents respectively. Reliance is placed on the judgments in *Poonam Kalsi v. State of Punjab & others,*[4] 2022 PLRonline 0592,and *Reetu Verma v. State of Haryana & others,*[5] 2019 PLRonline 3501 (LPA No.3716 of 2018, decided on 23.05.2019).

8. I have heard the learned counsel for the parties at length.

9. Before proceeding further it would be necessary to examine the relevant provisions of

The Hindu Minority and Guardianship Act, 1956 which are as under:-

“6. Natural guardians of a Hindu minor.–The natural guardians 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;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl–the mother, and after her, the father;

(c) in the case of a married girl–the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section–

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.–In this section, the expressions “father” and “mother” do not include a step-father and a step-mother.

13. *Welfare of minor to be paramount consideration.—*

(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

10. The Hon’ble Supreme Court and this Court has on various occasions dealt with the issue in hand and some of the relevant judgments in this regard cited by the respective parties are as under:-

In *Rajeswari Chandrasekar Ganesh v. State of Tamil Nadu & Others* (supra), a US-based mother claimed custody of her children stating that the father had clandestinely removed the children from the USA contrary to the shared parenting plan of the Ohio, USA Courts and took them to India. This led to the filing of a Habeas Corpus Petition under Article 32. The Hon’ble Supreme Court while handing over the custody to the US-based mother held as under:-

“91.Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other

words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. 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. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as parens patriae, has in promoting the best interests of the child."

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114. The petitioner is a resident of the USA and has acquired H1B visa via sponsorship and has a good job at Ranstad, USA. The petitioner is earning handsome salary and has the resources to provide for a comfortable life to her children in the USA. The petitioner is comfortably settled in the USA and is accustomed to different kind of lifestyle, culture, society, etc.

115. We take notice of the fact that the petitioner worked very hard to secure admission in the Cleveland State University and completed her studies with the GPA of more than 3, while taking care of her children. This is indicative of the fact that she is a hard working woman and would be in a position to take good care of her minor children in accordance with the shared parenting plan.

116. It would be too much for this Court to tell the petitioner that she may periodically visit India to meet her children but the children should not be asked to go back to the USA with their father, i.e. the respondent no.2.

117. In the overall view of the matter, we have reached to the conclusion that the respondent no.2, at the earliest, should be directed to go back to the USA with both the minor children and abide by the shared parenting plan as ordered by the Court at Ohio. Although, the shared parenting plan as ordered by the Court at Ohio stood terminated at the instance of the petitioner-mother, yet the same can be revived once again by the authorities by going before the concerned court at Ohio. It is for the parties to take the necessary steps in this regard. The respondent no.2 shall immediately apply for the visa on the strength of this order. If the respondent no.2 is in a position to obtain a job in the USA on the strength of a work permit or any other document, then it is well and good. However, we are sure of one thing that it will be in the interest and welfare of both the children to go back to the USA for the purpose of their education, etc. The allegations levelled by the respondent no.2 that the petitioner suffers from some mental illness appears to be absolutely wild and reckless. Even otherwise this issue is a highly disputed question of fact.

118. We would therefore hold that in the case at bar the dominant consideration to which

all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will 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. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between the rival claimants for the custody of a child, 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.

FINAL CONCLUSION:

119. We allow this writ petition with the following directions:

(1) The respondent no.2-father shall, within one week from today, apply to the authority concerned for visa to travel to the USA with the two minor children.

(2) The concerned authority may keep the observations made by this Court in the present judgment in mind and, in the larger interest of the two minor children, consider grant of visa to the respondent no.2-father. Once the visa is granted, the respondent no.2 shall, within one week thereafter, proceed to travel to the USA.

(3) Once the two minor children reach the USA, thereafter, it will be open for the petitioner-mother to take care of her children.

(4) We leave it open to the respondent no.2-father to chalk out his own plan.

(5) If the respondent no.2 wants to stay back in the USA, it is always open for him to do so in accordance with the law of the country. If the respondent no.2 decides to come back to India, then in such circumstances, the petitioner-mother shall make both the minor children speak to their father on-line at least once every week.

(6) In any event, if the visa is declined to the respondent no.2, then in such circumstances, the petitioner-mother shall travel to India and pick up her two minor children and go back to the USA. In such an eventuality, the respondent no.2 and his family members are directed to fully cooperate and not create any impediment of any nature. If it comes to the notice of this Court that the respondent no.2 or any of his family members have created any impediment for the petitioner-mother, then the same shall be viewed as the contempt of this Court's order. In addition, it will be open to the petitioner- mother to contact the jurisdictional Commissioner/ Superintendent of Police, who shall thereafter ensure that the custody of the children is immediately/ forthwith handed over to the petitioner-mother and submit compliance report in that regard to this Court. In case of any impediment despite the peremptory direction, the petitioner-mother may apply for appropriate directions from this Court, if so advised.

(7) We leave it open for the parties to go back to the Court at Ohio and revive the shared

parenting plan as was arrived at vide order dated 12th May 2021.

120. Before we close this matter, we would like to convey to the parties that their two minor children are watching them very closely. Showing the children that their parents can respect each other and resolve the conflict respectfully will give them a good foundation for the conflict that may, God forbid, arise in their own lives. The parties should try to do their best to remain relaxed and focused. It is critical to maintain boundaries between the adult problems and children. It is of utmost interest to protect the innocence of children and allow them to remain children. They must not be burdened by any adult problem. Minor children do not have the coping skills or the intellectual ability to understand any issues like the financial constraints, adult relationship issues or their parents unhappiness.

121. We find the observations made by the Delhi High Court, in the case of K.G. v. State of Delhi and another, dated 16.11.2017 in Writ Petition (Criminal) No. 374/2017 and Criminal Miscellaneous Application No. 2007/2017, quite commendable, that the best welfare of the child, normally, would lie in living with both his/her parents in a happy, loving and caring environment, where the parents contribute to the upbringing of the child in all spheres of life, and the child receives emotional, social, physical and material support – to name a few. In a disturbed marriage, unfortunately, there is bound to be impairment of some of the inputs which are, ideally, essential for the best interest of the child." [emphasis supplied]

In *Tejaswini Gaud & others v. Shekhar Jagdish Prasad Tewari & others* (supra), where the maternal aunt claimed custody over the child vis-a-vis the respondent-father in the absence of the mother who had died on account of cancer, the Hon'ble Supreme Court while handing over custody of the child to the respondent-father held as under:-

"18. 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.

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 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.

20. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per section 6 of the Hindu Minority and Guardianship Act, the first respondent-father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence,in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India.

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25. Welfare of the minor child is the paramount consideration:-The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child."

[emphasis supplied]

In *Rashneet Kaur v. State of Haryana & others* (supra), where the wife claimed the custody of a girl child from her husband and in- laws stating that the child had been brought back to India from Australia by the paternal grand-parents (in-laws) for a short duration and now was not being returned back to her custody in Australia, this Court while granting custody to the mother, held as under:-

"16. A perusal of Section 6 of The Hindu Minority and Guardianship Act, 1956 along with various judgments (supra) would show that in child custody matters, the ordinary remedy lies under the Hindu Minority and Guardianship Act, 1956 and The Guardianship and Wards Act, 1890 as the case may be. There are significant differences between an inquiry by the Civil Courts and the exercise of powers by a Writ Court which is of summary nature where rights are determined on the basis of affidavits. Therefore, where the court is of the view that a detailed inquiry is required the Court may decline to exercise the extraordinary jurisdiction of a Writ Court and direct the parties to approach the Civil Court. Therefore, it is only in exceptional cases, where the rights of the parties to the custody of the minor will be determined in the exercise of extraordinary jurisdiction in a petition for Habeas Corpus.

Thus, where in the circumstances of a particular case the ordinary remedy of the Civil Courts is either not available or is ineffective a writ of Habeas Corpus is certainly maintainable, moreso, where it is shown that the detention of the minor child by a parent or others was illegal, without any authority of law and was also to the detriment of the child.

17. Thus it is apparent that the paramount consideration ought to be the welfare of the child and due weight should be given to the child's comfort, contentment, health, education, intellectual development, familiar surroundings etc. The question of the welfare and interest of a minor child has to be judged on the consideration of the acknowledged superiority of the mother's love and affection for her children. The lap of the mother is a natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same. No amount of wealth or mother like love can substitute for a mother's love and care and, therefore, maternal care and affection is indispensable for the healthy growth of a child.

18. In the present case, the girl child, namely, Avneet Turka was born on 01.08.2017 and is, therefore, less than five years old. She was brought back to India by respondent no. 7 and 8 on 23.1.2020 after which due to COVID-19 the petitioner-mother was unable to see her till March 2022. Therefore, it is apparent that when the child left the company of the petitioner she was approximately 2½ years old and spent her growing years in the company of her grandparents i.e. respondent no. 7 and 8. As per the father, the child had refused to go with the petitioner at the time when the petitioner left for her parental home on 28.03.2022. I may point out here that even if the statement of the father is taken as the truth that the child had refused to go with the mother, that by itself does not have any significance as a child of such tender age does not know what is in her best interest. It may be reiterated that the child had not met her mother in two years between January 2020 to March 2022. Apparently, for the reasons beyond her control the petitioner was unable to come back to India. The minor girl child may have developed a bond with the respondent nos.7 & 8 with whom she is residing for the last more than two years because of which she might have stated that she does not wish to go with her mother. However, in the long term for the benefit and welfare of the child, by no stretch of imagination can it be said that the welfare of the child would be better taken care of by the grandparents viz-a-viz the mother. Even otherwise, in the case of child who is less than 05 years old (which is the case here) the custody should ordinarily be with the mother. In fact nothing significant has been pointed out by the respondent nos.7 & 8 as to why the custody of the child ought not to be with the mother.

19. So far as the question of sharing the custody of the child is concerned, the mother is a resident of Australia and so is the father. The respondent no. 7 and 8 (grandparents of the child) are residents of India, and, therefore, the statement of the father that the petitioner and respondent nos.7 & 8 could share custody is illogical and unreasonable and cannot be accepted. Issues of the education of the child, her health, etc., would arise and these are best dealt with by the mother unless it is shown that the mother is completely incapable of maintaining the minor child.

20. In view of the above discussion, the present petition is allowed. Respondent no. 3 & 4 are directed to ensure that the custody of the minor child, namely Avneet Turka is handed over by respondent no. 7 and 8 (grandparents) to the petitioner (mother) immediately. Pursuant thereto, an affidavit regarding compliance of this order shall be furnished by respondent no. 3 and 4 to this Court within one week of the handing over of the custody of minor child to the petitioner."

[emphasis supplied]

In *Poonam Kalsi v. State of Punjab & others* (supra), where the mother claimed custody of a child from the father, this Court 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. The relevant paragraphs from the judgment are as under:-

"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 v. 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." [emphasis supplied]

In *Reetu Verma v. State of Haryana & others* (supra) where the mother claimed custody of the child from the father, this Court held 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." [emphasis supplied]

11. A perusal of the aforementioned judgments would show that the Court while deciding child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, however, the interest and welfare of the minor is the supreme consideration in cases concerning custody of the minor child. Due weightage should be given to the child's comfort, health, education, intellectual development and familiar surroundings. The question of the interest and welfare of a minor child has to be judged on the consideration of the acknowledged superiority of the mother's love and affection for the children. The lap of the mother is a natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same. Maternal care and affection is therefore indispensable for the healthy growth of a child.

12. What can also be discerned from these judgments (supra) is that a Writ of Habeas Corpus was certainly maintainable by one parent against another and it is the principle duty of the Court to ascertain whether the custody of the child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and be handed over to another.

13. The relevant provisions of the Mental Healthcare Act, 2017 as referred to by the petitioner's counsel read as under:-

Section 21 of the Mental Healthcare Act, 2017.

"Right to equality and non- discrimination.- (1) Every person with mental illness shall be treated as equal to persons with physical illness in the provision of all healthcare which shall include the following, namely:-

(a) there shall be no discrimination on any basis including gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class or disability;

(b) emergency facilities and emergency services for mental illness shall be of the same quality and availability as those provided to persons with physical illness;

(c) persons with mental illness shall be entitled to the use of ambulance services in the same manner, extent and quality as provided to persons with physical illness;

(d) living conditions in health establishments shall be of the same manner, extent and quality as provided to persons with physical illness; and

(e) any other health services provided to persons with physical illness shall be provided in same manner, extent and quality to persons with mental illness.

(2) A child under the age of three years of a woman receiving care, treatment or rehabilitation at a mental health establishment shall ordinarily not be separated from her during her stay in such establishment:

Provided that where the treating Psychiatrist, based on his examination of the woman, and if appropriate, on information provided by others, is of the opinion that there is risk of harm to the child from the woman due to her mental illness or it is in the interest and safety of the child, the child shall be temporarily separated from the woman during her stay at the mental health establishment:

Provided further that the woman shall continue to have access to the child under such supervision of the staff of the establishment or her family, as may be appropriate, during the period of separation.

(3) The decision to separate the woman from her child shall be reviewed every fifteen days during the woman's stay in the mental health establishment and separation shall be terminated as soon as conditions which required the separation no longer exist:

Provided that any separation permitted as per the assessment of a mental health professional, if it exceeds thirty days at a stretch, shall be required to be approved by the respective Authority.

(4) Every insurer shall make provision for medical insurance for treatment of mental illness on the same basis as is available for treatment of physical illness.

14. Coming back to the facts of the present case, the entire case of the answering respondent Nos.4 to 6 is that the petitioner is mentally disturbed and therefore having abandoned the child was not entitled to his custody. To establish their claim, the respondents have relied upon the documents Annexure R2 or R1/1 which seem to be suspicious in light of the conflicting claims of both parties. However, assuming them to be genuine, in terms of the provisions of the Mental Healthcare Act, 2017, even if the petitioner was admitted in an institution for care and rehabilitation, even in such a situation, ordinarily a child under the age of 03 years ought not to be separated from her during her stay in such an institution. In the present case, firstly, the petitioner is not staying at any mental health establishment where she is receiving care or treatment. On the contrary, she is working with a multinational company namely, TSYS at Noida (currently working from home at Panchkula) and is qualified as a B.Tech (IT). Therefore, there can be no justifiable reason to deny her the custody of the child who is barely 02 years and 03 months old. In fact, denial of custody to the petitioner who is the natural and biological mother of the child would be detrimental to the mental health of not only the child but the mother as well. It may also be pertinent to mention here that the bond between a mother and child is hard to replicate. Therefore, in the case of a mother, specially where the custody concerns a child less than 05 years old, she ought to be granted custody unless she is so mentally or physically incapacitated that handing over custody to her would be physically or mentally detrimental to the health of the child.

In the instant case, from the lengthy pleadings and arguments, the respondent Nos.4 to 6

have not been able to establish that the petitioner was so ill that she was in any manner incapable of maintaining the minor child. It also appears to be a case where the minor child was detained by the answering respondents when the petitioner left the matrimonial home on 23.07.2022 as was discernible from the complaint dated 26.07.2022 (Annexure R-8) made by the petitioner to the Deputy Commissioner of Police, Panchkula.

15. In view of the above discussion, the present petition is allowed. Respondent nos.2 & 3 are directed to ensure that the custody of the minor child, namely Riaan Shahi is handed over by respondent nos.4 to 6 to the petitioner (mother) immediately in the presence of the District Program Officer, Department of Social Security Women and Child Development Administration Complex, Milkpur Chowk, Pathankot-145025 or any officer authorised by him and the Civil Surgeon, Civil Hospital, Shahpur Road, Pathankot-145001 or any doctor authorised by him. Pursuant thereto, an affidavit regarding compliance of this order shall be furnished by respondent nos.2 and 3 to this Court within one week of the handing over of the custody of the minor child Riaan Shahi to the petitioner.

16. However, it is made clear that the petitioner-wife shall grant unfettered access to respondent Nos.4 to 6 subject to the convenience of both the parties and keeping in view the welfare of the child.

17. The aggrieved party is however at liberty to approach the appropriate Civil Court if so advised seeking custody of the child and if such an application was made, the said Court would proceed to decide the same within a period of 03 months of the filing of such an application uninfluenced by any observations made herein, which have been made only to decide the present case.

18. Disposed of in the above terms.

R.M.S. – *Petition allowed.*