2024 INSC 370

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2194 OF 2022

NIRMALA ...APPELLANT (S)

VERSUS

KULWANT SINGH & ORS. ...RESPONDENT (S)

J U D G M E N T

B.R. GAVAI, J.

1. The present appeal is filed against the final judgment and order of the Punjab and Haryana High Court,[1] dated 23rd August, 2022. The High Court vide the impugned judgment allowed the petition filed under Article 226/227 of the Constitution of India, by the respondent No. 1 herein,[2] who is the father of the detenu/minor child and directed the appellant herein,[3] i.e., the

[1] Hereinafter, High Court
[2] Hereinafter, respondent-father
[3] Hereinafter, appellant-grandmother

maternal grandmother to hand over the custody of the minor child to respondent-father.

2. Aggrieved by the impugned judgment, the appellant-grandmother has filed the present petition. Notice was issued by this Court on 23rd September, 2022 and it was directed that in the meantime, the child shall remain in the custody of the appellant-grandmother. Thereafter, leave was granted by this Court on 21st November, 2022 and the interim order was confirmed to last until the decision of this appeal.

3. The facts, in brief, giving rise to the present appeal, are as follows:

3.1 The marriage took place between Dr. Kulwant Singh (respondent-father) and one Sangeeta on 5th July, 2014. This marriage was the second marriage for both of them.

3.2 From the marriage, one child, namely Garvit[4] was born on 5th July, 2015.

[4] Hereinafter, minor child

3.3 In 2019, the mother of the minor child, Sangeeta, went missing and so, on 5th April, 2019, a First Information Report[5] was registered under Section 346 of the Indian Penal Code, 1860.[6] On the next day, i.e., 6th April, 2019, father of Sangeeta (who is the husband of the appellant-grandmother), lodged a complaint at the Women police Station, Rohtak, stating that his daughter was continuously harassed by her husband and in-laws, and that since his daughter is missing since yesterday, he fears that her husband and in-laws have done something wrong with her.

3.4 On 9th April, 2019, Sangeeta's body was found in a canal and so, Section 304B IPC was added in the FIR. The matter was further investigated by the police and thereafter, ultimately the police prepared a cancellation report in the FIR in the year 2019, and the said cancellation report was submitted to the competent Court on 31st August, 2021.

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[5] FIR No. 108 @ P.S. Civil Lines, Rohtak dated 5th April, 2019 (hereinafter, FIR)
[6] Hereinafter, IPC

3.5 During the investigation phase, the respondent-father had voluntarily handed over the minor child to the appellant-grandmother. Not only that, but the respondent-father had by way of an affidavit dated 1st May, 2019, appointed the appellant-grandmother as "Guardian" of the minor child and the "Caretaker" of a property,[7] that was gifted by the Aunt of respondent-father (Birmi Devi) to the minor child. Since then, the custody of the minor child has been with the appellant-grandmother.

3.6 On 29th July, 2019, the respondent-father filed an application/complaint[8] with the Child Welfare Committee, Rohtak,[9] and sought the custody of the minor child on the ground that the appellant-grandmother took the minor child by cheating and fraud.

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[7] Plot No. D-102 situated at Anantpuram, Jind Road, The Indraprastha Cooperative House Building Society Ltd., Rohtak
[8] No. 3312
[9] Hereinafter, CWC

3.7 The CWC took note of the affidavit recording the interaction with the minor child in the counselling session and recorded the statement of the appellant-grandmother, respondent-father, Uncle and Aunt of the respondent-father and Aunt of the minor child/sister of the respondent-father (one Sunita Devi).

3.8 Based on the statements/counselling affidavits and other documents available on record, the CWC vide order dated 5th February, 2020, decided that the minor child is *"a child in need of care and protection"* as defined under Section 2(14) of the Juvenile Justice (Care and Protection of Children) Act, 2015,[10] and the respondent-father being the biological father and employed in a reputed government post, is able to take care and nurture the child, *in result*, it directed the SHO,[11] to take the custody of the minor child from the appellant-grandmother and hand him over to the respondent-father.

[10] Hereinafter, JJ Act
[11] Sadar Police Station

3.9 Aggrieved by the decision of the CWC, the appellant-grandmother filed a Criminal Appeal on 11th February, 2020 under Section 101 of the JJ Act,[12] challenging the order dated 5th February, 2020, passed by the CWC.

3.10 The Appellate Court,[13] allowed the appeal, set aside the order under challenge and held that neither the minor child was *"a child in care of need and protection"* as defined under Section 2(14) of the JJ Act nor the CWC had any jurisdiction to pass any order regarding the minor child. The Appellate Court further held that, the CWC has exceeded its jurisdiction by passing the order under challenge. Therefore, the order dated 5th February, 2020, passed by the CWC is not only illegal, but without jurisdiction also and the same is not in accordance with the provisions of the JJ Act.

3.11 Aggrieved by the decision of the Appellate Court, the respondent-father filed a Criminal Writ Petition on 5th February,

[12] Criminal Appeal No. 93/2020
[13] Additional Sessions Judge, Rohtak

2021 before the High Court,[14] under Article 226/227 of the Constitution of India for a writ in the nature of Habeas Corpus, seeking release of the minor child from the alleged illegal custody of the appellant-grandmother.

3.12 Vide impugned order dated 23rd August, 2022, the learned Single Judge of the High Court, taking into consideration the principle that *"welfare of the child is of paramount consideration"*, allowed the petition filed by the respondent-father. The High Court held that the welfare of the child, who at that time was 7 years old, will be best in the hands of the father. The High Court further directed that the appellant-grandmother and her husband shall also have visiting rights in case they so desire and for the next one year, they shall have a right to visit the house where the child resides for a period of 8 hours at least once a month. The High Court also kept open the rights of the parties

[14] CRWP-1485-2021 (O&M)

for invoking any remedy that may be available under any special law for the time being in force and in accordance with law.

3.13 Aggrieved by the decision of the High Court, the appellant-grandmother is before this Court. It must be noted that throughout the pendency of the present appeal, the custody of the minor child has remained with the appellant-grandmother.

4. We have heard Shri Narender Hooda, learned senior counsel appearing for the appellant-grandmother and Smt. Rukhmini Bobde, learned counsel appearing for the respondent-father.

5. Shri Narender Hooda submits that the learned Single Judge of the High Court has erred in allowing the petition. He submits that in the facts of the present case, the learned Single Judge of the High Court ought to have taken into consideration that it is the respondent-father who had placed the custody of the minor child with the appellant-grandmother and as such, the custody of the minor child could not have been considered as an illegal custody. He further submits that in such circumstances, the

learned Single Judge ought not to have entertained the petition under Article 226 of the Constitution of India and relegated the respondent-father to the remedy available to him in law under the Guardians and Wards Act, 1890.

6. Shri Hooda further submits that the minor child is living with his grandparents from the day when the mother of the minor child i.e., the wife of the respondent-father had died. It is submitted that uprooting the minor child from the company of his grandparents at this tender age would cause a psychological trauma to the minor child. He submits that taking into consideration the best interest of the minor child, the leaned Single Judge of the High Court ought not to have passed the impugned order. He relies on the judgment of this Court in the case of ***Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba vs. State of West Bengal and others***[15].

[15] 2021 SCC OnLine SC 3434

7. Per contra, Smt. Rukhmini Bobde, learned counsel, submits that the respondent-father is a natural guardian being the father of the minor child under Section 6 of the Hindu Minority and Guardianship Act, 1956. She submits that the respondent-father is a well-educated person and is Ph.D. in Economics from Maharshi Dayanand University, Rohtak and he is serving as an Assistant Professor in Centre for Research in Rural and Industrial Development, Chandigarh. She submits that the respondent-father earns well and is in a better position to look after the minor child.

8. Smt. Bobde submits that, as a natural guardian, the respondent-father can shape the career of the minor child in a better manner. She submits that the minor child when interacted before CWC has specifically stated that he wants to live with both his father as well as his grandmother. She submits that the appellant-grandmother was appointed as a guardian vide affidavit dated 1st May 2019 executed by the respondent-

father only for the purposes of being caretaker of the Plot which was gifted to the minor child by his aunt (Birmi Devi). Smt. Bobde submits that the said affidavit cannot be construed to be appointment of the guardian for all the purposes. She submits that, in any case, when the statute itself provides for as to who shall be the natural guardian, the said affidavit would not have much significance. Smt. Bobde in support of his submissions relied on the judgment of this Court in the cases of ***Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others***[16] and ***Yashita Sahu vs. State of Rajasthan and others***[17].

9. Though allegations and counter allegations have been made by the parties against each other, we do not propose to go into them as they may cause prejudice to the rights of either of the parties in the proceedings that may arise between them.

[16] (2019) 7 SCC 42
[17] (2020) 3 SCC 67

10. The question on the maintainability of the Habeas Corpus petition with regard to custody of the minor child has come up for consideration before this Court in several matters.

11. This Court in the case of ***Tejaswini Gaud and others*** (supra) after considering the earlier cases, observed thus:

> "**19.** Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or

others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is 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.

> **21.** 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."

12. It can thus be seen that this Court has held that the habeas corpus is a prerogative writ which is an extraordinary remedy. It has been held that recourse to such a remedy should not be permitted unless the ordinary remedy provided by the law is either not available or is ineffective. It has been held that 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. It has further been held that 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.

13. This Court further held that 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. It has been held that there are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. It has further been held that what is important is the welfare of the child. It has been further held that 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.

14. In the facts of the said case, this Court found that the child being a minor, aged 1½ years, cannot express its intelligent preferences and in the facts and circumstances of said 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.

15. The same legal position has been reiterated by this Court in the cases of ***Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba*** (supra) and ***Rajeswari Chandrasekar Ganesh vs. State of Tamil Nadu and others***[18].

16. It can thus be seen that no hard and fast rule can be laid down insofar as the maintainability of a habeas corpus petition in the matters of custody of a minor child is concerned. As to whether the writ court should exercise its extraordinary jurisdiction under Article 226 of the Constitution of India or not will depend on the facts and circumstances of each case.

[18] 2022 SCC OnLine SC 885

17. In the present case, it will be relevant to refer to the case pleaded by the respondent-father. The learned Single Judge of the High Court himself recorded the submissions of the respondent-father in the impugned judgment as under:

> "He further submitted that when the wife of the petitioner died, then at that point of time due to psychological and social reasons, the child was sent to the maternal grand-parents which was the need of the hour at that time since the petitioner himself was also under psychological stress and a family environment was required for the child especially from the grand-parents and that was the sole reason as to why the son of the petitioner who at that point of time was of the age of 5 years was sent to them to be taken care of."

18. It can thus be clearly seen that according to the case of the respondent-father himself, in the peculiar facts and circumstances of the case, a family environment was required for the child especially from the grandparents and that he had placed the custody of the minor child with the appellant-grandmother for taking his care. It can thus clearly be seen that

it is not a case that the appellant-grandmother had illegally kept the custody of the minor child. It is the respondent-father who had placed the custody of the minor child with the appellant-grandmother.

19. We are of the considered view that in the peculiar facts and circumstances of the case, the High Court ought not to have entertained the habeas corpus petition under Article 226 of the Constitution of India. Since a detailed enquiry including the welfare of the minor child and his preference would have been involved, such an exercise could be done only in a proceeding under the provisions of the Guardians and Wards Act, 1890.

20. In any case, we are of the view that compelling a minor child at the tender age of 7 years to withdraw from the custody of his grandparents with whom he has been living for the last about 5 years may cause psychological disturbances.

21. In our view, an exercise for promoting the bond between the minor child and the respondent-father in a graded manner and

thereafter considering the grant of custody of minor child to the respondent-father taking into consideration the paramount interest of the welfare of the minor child would be required to be done in the present matter. Such an exercise would not be permissible in the extraordinary jurisdiction under Article 226 of the Constitution of India.

22. We therefore find that the High Court was not justified in entertaining the petition under Article 226 of the Constitution of India. The impugned judgment and order of the Punjab and Haryana dated 23rd August 2022 in CRWP-1485-2021 (O&M) is quashed and set aside. The writ petition filed by the respondent-father is dismissed.

23. However, we clarify that no observation in the impugned judgment and order and in the present judgment and order would be binding on the proceedings if taken by the respondent-father under the Guardians and Wards Act, 1890 and the

proceedings would be decided in accordance with law on its own merits.

24. In the light of the aforesaid, we direct that in the event the respondent-father files an application under the provisions of the Guardians and Wards Act, 1890, the competent Court shall decide the same expeditiously. We further direct that in the event such an application is made, an order at least with regard to visitation rights would be passed within a period of 4 weeks from the making of such an application.

25. The appeal is allowed in the above terms. Pending applications, if any, shall stand disposed of.

.....J.
[B.R. GAVAI]

.....J.
[SANDEEP MEHTA]

NEW DELHI;
MAY 03, 2024