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5. The case of the side opposite, in nutshell, is to the effect that the petitioner No.1 is the second wife of late _____, who died on 27.01.2024 and thereafter, the petitioner No.1 on her own volition and free will left to Firozabad from her matrimonial house situated at Kunda Pratapgarh leaving behind her three minor children and opposite party No.3 and 4 took all the care, which was required for minors and as such, the present petition is liable to be dismissed.

6. Considered the aforesaid and perusal of the record.

7. The brief facts of the case is to effect that the petitioner no. 1 got married with _____ and they were blessed with three children. Her husband died on 27.01.2024 and thereafter, the respondents no. 3 and 4 refused to give the custody of the minor children to the petitioner no. 1.

8. This Court has keenly considered the rival submissions of parties, both about the maintainability and the sustainability of the first petitioner's claim. The Court proposes to dispose of the challenge as to maintainability, first in order.

9. This issue fell for consideration of the Supreme Court in **Syed Saleemuddin v. Dr. Rukhsana and Ors., (2001) 5 SCC 247**. It was held by their Lordships thus:

"11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the

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children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

10. Again, the question engaged the attention of the Supreme Court in **Nithya Anand Raghavan vs. State (NCT of Delhi) and another, (2017) 8 SCC 454**. In **Nithya Anand Raghavan**, it was held:

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling [Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674 : 1973 SCC (Cri) 980] , has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana [Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247 : 2001 SCC (Cri) 841] , has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see Paul Mohinder Gahun v. State (NCT of Delhi) [Paul

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Mohinder Gahun v. State (NCT of Delhi), 2004 SCC OnLine Del 699 : (2004) 113 DLT 823] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

11. This question about the maintainability of a petition for a writ of habeas corpus came up for consideration before their Lordships of the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42**. The question has been elaborately examined by their Lordships in Tejaswini Gaud, and it has been held:

"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

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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. Hon'ble Apex Court in the case of **Rajeswari Chandrasekar Ganesh v. The State of Tamil Nadu & Ors. in Writ Petition (Criminal) No. 402 of 2021 on 14.07.2022** observed as under:

"85. This Court considering the welfare of the child also stated that : (SCC p. 855, para 15) "15....The children are not mere chattels: nor

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are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society...."

86. In *Elizabeth Dinshaw* (supra), this Court has observed that whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

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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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115. 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

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child so that he or she will be equipped to face the problems of life as a mature adult."

13. Thus, A writ of habeas corpus can certainly be issued in matters relating to custody of a child where the child is in custody of a relative or a person, who is not the lawful guardian, though not an utter stranger. A kinsman or a relative of the child, who holds the child in custody back from the lawful guardian, would entitle the lawful guardian to seek restoration of custody through a writ of habeas corpus. The question, whether the person who applies for the writ is the lawful guardian or not, is generally to be determined with reference to the personal law, applicable to parties. However so, the Court may also inquire into for the purpose of determining the legality of the custody, from which liberation is sought, vis-a-vis the right of the person asking for the writ, the question of welfare of the minor.

14. The issue before this Court, in the instant case, is as to whether the custody of minors should be given to the biological mother (petitioner no. 1) or the minors should remain in the custody of respondents no. 3 and 4, who are step brother and step sister-in-law, respectively, of the petitioners no. 2 to 4, named above.

15. In order to decide the aforesaid, this Court took note of the observations made by this Court passed in the case of **Sahil and Another Vs. State of U.P. and Others, 2020 SCC OnLine All 1044 : AIR 2020 All 213**. In this case, the parties were governed by Muslim Personal Law and the parties in the present case are also governed by Muslim Personal Law.

16. In the case of **Sahil (supra)**, this Court, after considering the various pronouncements on the issue of custody of minor as also the relevant provisions of law, observed as under:

19. It is clear from the position of law as it stands that so far as the custody of a minor child is concerned, the mother is entitled to it until the

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child is of tender age, unless there be a clear disentitlement inferable. This right of the mother to the child's custody is not based on the personal law of parties alone, but on a well acknowledged principle arising from human nature - and if this Court may dare say from the animal nature of man - that the mother is best oriented to look after the welfare of her infant or young child. The mother has always been regarded to be best equipped to take care of the needs of a young child, and secure his/ her welfare compared to a father. This right of the mothers is subject only to known exceptions, like her marriage to a stranger or the mother living a demonstrably immoral life. The mother's right is so well established, that in case of a minor of tender years, any other relative holding the child in his/ her custody while the mother is around, would be unlawful custody. Of course, the principle would not apply if the mother is disentitled under some reputed exception.

17. Upon due consideration of the aforesaid facts as also the observations made by this Court, quoted above, this Court finds force in the claim of the petitioner no. 1, who is biological mother of the petitioners no. 2 to 4, and also of the view that the biological mother be regarded to be the best to take care of the young needs of the minors and she would secure the welfare of the minors compared to the respondents no. 3 and 4, who are step son and step daughter-in-law, respectively, of the petitioner no. 1 and, step brother and step sister-in-law, respectively, of the petitioner no. 2 to 4.

18. In view of the aforesaid, this Habeas Corpus Writ Petition succeeds and is allowed.

19. The custody of the minors i.e. the petitioners no. 2 to 4 namely _____, _____, _____, respectively, who are present before this Court, is provided to to the petitioner no. 1/Smt.

The minors shall remain in custody of the petitioner no. 1.

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20. However, it is always open for the private-respondents to prefer appropriate proceedings before appropriate forum for visitation rights. As and when the proceedings are filed, the same shall be decided on its own merits.

21. Let this order be communicated forthwith by the Senior Registrar of this Court to the learned District Judge, Pratapgarh, the learned Chief Judicial Magistrate, Pratapgarh, and the Superintendent of Police, Pratapgarh.

22. Let the copy of this order be provided to the parties also to Shri Arun Kumar Singh, Sub-Inspector, P.S. Kunda, District - Pratapgarh free of cost.

Order Date :- 14.6.2024
Gurpreet/Mohit Singh