

A.F.R.

Neutral Citation No. - 2024:AHC:66661

Court No. - 80

Case :- HABEAS CORPUS WRIT PETITION No. - 949 of 2023

Petitioner :- Master Hiras And Another

Respondent :- State Of U.P. And 5 Others

Counsel for Petitioner :- Maimoona Fatima, Mohd Nasir

Counsel for Respondent :- G.A.

Hon'ble Dr. Yogendra Kumar Srivastava, J.

1. Heard Sri Mohd Nasir, learned counsel for the petitioners and Ms. Divya Ojha, learned AGA-I appearing for the State-respondents.

2. The petition has been filed with the assertion that the petitioner no. 1 (*corpus*), who is the minor son of the petitioner no. 2, born on 01.01.2022, had been illegally detained by the respondent no. 4 (wife of the brother of the petitioner no. 2), who is stated to be having strained relationship with the husband.

3. Pursuant to the *rule nisi* issued earlier, the petitioner no. 1 (*corpus*) was produced in Court, on 12.03.2024, by respondent no. 4.

4. It was brought to the notice of the Court that the respondent no. 4 (wife of brother of the petitioner no. 2), was at an earlier point of time, living with the joint family, and on 27.11.2022, the respondent no. 4 is stated to have left her home taking the petitioner no. 1 (*corpus*) with her.

5. It was pointed out that the respondent no. 4, since then, was staying at her maternal home, and the petitioner no. 1 (*corpus*)

was being illegally detained by her.

6. It was contended that the petitioner no. 1 (*corpus*), being an infant of age about 2 years, the father would be the natural guardian, and the biological mother would be entitled to a right of custody (*hizanat*), as per the personal law.

7. It was also pointed out that the mother of the petitioner no. 1 (*corpus*) and the respondent no. 4, were 'related to each other' and that proceedings of criminal nature as well as a matrimonial case, are pending, between the respondent no. 4 and her husband (i.e. the brother of the petitioner no. 2).

8. Taking into view that the custody of the petitioner no. 1 (*corpus*) with the respondent no. 4, could not *prima facie* be supported legally, the petitioner no. 1 (*corpus*) was permitted to go along with the petitioner no. 2 (his father) and his mother, who were present in the Court, on the previous date.

9. Today, upon the case being taken up, it was pointed out that the petitioner no. 1 (*corpus*) has been brought to the Court by the petitioner no. 2 (his father) and also his mother.

10. The petitioner No. 2, has been identified by his counsel, Sri Mohd. Nasir.

11. Learned AGA-I, on the basis of an enquiry made from the petitioner no. 2 and his wife (parents of the petitioner-*corpus*), in Court, submits that they have stated that the petitioner no. 1 (*corpus*) is under their guardianship and custody, and is being taken care of.

12. A writ of *habeas corpus* is prerogative process for securing the liberty of the subject by affording effective means of

immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody would have to be treated as equivalent to illegal detention for the purpose of granting a writ directing custody of the minor child.

13. The law relating to guardians and wards is governed in terms of the Guardians and Wards Act, 1890¹, and an order with regard to guardianship may be passed under the aforesaid enactment, upon an application filed by a person claiming entitlement.

14. The provision with regard to making of an application regarding claims based on entitlement of guardianship is under the GWA and under Section 12 thereof the court is empowered to make interlocutory orders for protection of a minor including an order for temporary custody and protection of the person or property of the minor.

15. Section 17 of the GWA relates to matters to be considered by the court in appointing a guardian, and in terms thereof it is provided that the court while deciding the question of guardianship of a minor, shall, as far as possible, do so consistently with the law to which the minor is subject, keeping in view the welfare of a minor. Thus, the provisions of the personal law are to be applied consistently with the provisions of the GWA, and insofar as the question of custody is concerned, the rights of parties in the present case, are to be governed by the personal law.

¹ GWA

16. The matters relating to "Guardianship of Person and Property" are provided under Chapter XVIII of **Principles of Mahomedan Law**² and Part-A thereof pertains to "Appointment of Guardians". In terms of Section 349, all applications for the appointment of a guardian of the person or property or both of a minor, are to be made under the GWA.

17. Further, Section 351 of Principles of Mahomedan Law, which is in terms of Section 17 of the GWA, imposes a duty upon the court in appointing guardian to make the appointment consistently with the law to which the minor is subject, keeping in view the welfare of the minor.

18. The subject matter relating to "Guardianship of a Person of a Minor" is dealt with under Part-B of Chapter XVIII of Principles of Mahomedan Law, and Sections 352 thereof, which relates to the right of mother to custody of infant children, is set out hereinbelow:-

"352. Right of mother to custody of infant children.

—The mother is entitled to the custody (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (e), unless she marries a second husband in which case the custody belongs to the father (f)."

19. It would be seen that in terms of Section 352, abovementioned, the mother is entitled to custody (*hizanat*) of her male child until he has completed the age of seven years.

20. In a petition seeking issuance of a writ of *habeas corpus* relating to the custody of a minor child, the principle duty of the Court would be to ascertain whether the custody of the child is

2 Mulla, Principles of Mahomedan Law, 22nd Edition

unlawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child be handed over to the care and custody of some other person. In doing so, the paramount consideration would undoubtedly be the welfare of the child and the role of the High Court in examining such cases would have to be on the touchstone of principles of *parens patriae* jurisdiction.

21. *Habeas corpus* proceedings would not ordinarily lie to justify or examine the legality of the custody of the minor child, and the question in this regard would have to be addressed by the Court in exercise of its discretionary jurisdiction. The prerogative writ of *habeas corpus*, is in the nature of an extraordinary remedy, and is to be issued taking into consideration, the circumstances of a particular case.

22. In child custody matters, the remedy ordinarily lies under the statutory law, or the personal law, as applicable in the facts of the case; however, in cases which justify the exercise of the extraordinary discretionary jurisdiction under Article 226, a writ of *habeas corpus* would be issued where it is demonstrated that the detention of minor child, is illegal or without any authority of law.

23. In the facts of the present case, the petitioner no. 1 (*corpus*), who is the minor son of the petitioner no. 2, born on 01.01.2022 was being detained by the respondent no. 4 (wife of the brother of the petitioner no. 2), who is stated to be having a strained relationship with her husband. The petitioner no. 1 (*corpus*), being an infant of aged about two years, the petitioner no. 2 (his father), would be the natural guardian, and the biological

mother of the petitioner-*corpus* would be entitled to a right of custody (*hizanat*) as per the personal law.

24. Looking to the entirety of the facts, which are before the Court, the detention of the petitioner no. 1 (*corpus*), by the respondent no. 4, cannot, in any manner, be legally supported.

25. Having regard to the aforesaid, the *rule* issued earlier is made **absolute**.

26. The petition stands **disposed of**.

27. The petitioner No. 1 (*corpus*) is permitted to be taken back by the petitioner No. 2 (his father), to the place from where he has been brought.

28. The demand draft stated to have deposited in the name of respondent no. 4, be returned in original to the petitioner no. 2, upon an application to be made before the Registrar General, in this regard.

Order Date :- 16.4.2024

Aiman/Arun K. Singh

[Dr. Y.K. Srivastava, J.]