



Reportable

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 3821 OF 2023

Somprabha Rana & Ors.

... Appellants

versus

The State of Madhya Pradesh & Ors.

... Respondents

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. This appeal arises from a very unfortunate dispute about the custody of a female child (for short, ‘the child’) whose present age is two years and seven months. The mother of the child unfortunately died an unnatural death on 27th December 2022. It is alleged that the death of the mother was by hanging. The 4th respondent is the father of the child. The 2nd and 3rd respondents are the paternal grandparents of the child. The 5th respondent is the sister-in-law of the 4th respondent (his brother’s wife). The 1st to 3rd appellants are the real sisters of the deceased mother. The 4th and 5th appellants are the child’s maternal grandparents, who were not the parties before the High Court. The 5th respondent is also a real sister of the child’s

mother. The 5th respondent is the wife of the 4th respondent's brother.

2. The 2nd to 4th respondents invoked the jurisdiction of the Madhya Pradesh High Court by filing a petition seeking a writ of Habeas Corpus under Article 226 of the Constitution of India. A case made out in the petition was that the 4th respondent and the mother of the child were residing in Indore, where the unnatural death of the mother occurred. A First Information Report was registered against the 2nd and 4th respondents for offences punishable under Sections 304-B and 498-A of the Indian Penal Code and Sections 3 and 4 of the Dowry Prohibition Act, 1961. According to the case of the 2nd to 5th respondents, the 2nd and 3rd appellants came to Indore on 28th December 2022. When the 4th respondent was busy completing the formalities of the post-mortem, without the consent of the 4th respondent, the 2nd and 3rd appellants took away the minor child. The 4th respondent - the father, was arrested in connection with the offence on 19th February 2023 and was granted bail after filing the charge sheet on 19th April 2023. The petition under Article 226 filed by the 2nd to 5th respondents proceeded on the allegation that the 2nd and 3rd appellants illegally took over custody of the child. It must be noted here that on the date of death of the mother, the age of the child was 11 months.

3. By the impugned judgment dated 23rd June 2023, the Division Bench of the High Court of Madhya Pradesh at Indore allowed the writ petition. It issued a writ of Habeas corpus

directing the appellants to hand over custody of the child to the 2nd to 5th respondents. On 7th July 2023, this Court issued notice and granted a stay of the operation of the impugned judgment. On 5th December 2023, this Court granted leave and continued the stay. However, this Court observed that it would be open for the husband to apply for custody before the appropriate Court. As of this date, the husband has not applied for custody by filing proceedings under the Guardians and Wards Act, 1890 (for short, “the GW Act”). The appellants made such an application under the GW Act, but it was withdrawn later. This is the statement made by the learned counsel for the appellants. Now, the question is whether the High Court was justified in disturbing the custody of the child, whose age was one year and five months at the time of passing the impugned judgment.

SUBMISSIONS

4. The learned senior counsel appearing for the appellants urged that by the impugned judgment, without making any inquiry, the High Court has ordered the child's custody to be disturbed based only on the legal rights of the child's father and grandparents. He submitted that in the facts of the case, the High Court ought not to have entertained a petition for Habeas Corpus. He submitted that even if the petition was to be entertained, it was the duty of the Court to see what was in the best interests of the minor and custody could not have been disturbed at such tender age without considering the question of the welfare of the minor child.

5. Learned senior counsel appearing for the respondents extensively relied upon decisions of this Court in the cases of ***Tejaswini Gaud & Ors. v. Shekhar Jagdish Prasad Tewari & Ors.***¹, ***Swaminathan Kunchu Acharya v. The State of Gujarat***² and ***Gautam Kumar Das v. NCT of Delhi & Others***³. Learned senior counsel would urge that the case of ***Gautam Kumar Das***³ is identical on facts where the High Court had declined to entertain the petition for Habeas corpus by expressing a view that statutory remedy should be adopted for seeking custody. However, this Court interfered and granted the father custody of the minor child. He submitted that the father and his parents reside together and, therefore, are in a position to take the best possible care of the child. He submitted that the appellants have not allowed the father to see even the face of the child. The learned senior counsel appearing for the appellants relied upon a decision of this Court in the case of ***Nirmala v. Kulwant Singh and Others***⁴.

CONSIDERATION OF SUBMISSIONS

6. After having perused various decisions of this Court, the broad propositions of settled law on the point can be summarised as follows:

- a. Writ of Habeas corpus is a prerogative writ. It is an extraordinary remedy. It is a discretionary remedy;

¹ (2019) 7 SCC 45

² (2022) 8 SCC 804

³ (2024) INSC 610

⁴ (2024) SCC OnLine SC 758

- b.** The High Court always has the discretion not to exercise the writ jurisdiction depending upon the facts of the case. It all depends on the facts of individual cases;
 - c.** Even if the High Court, in a petition of Habeas Corpus, finds that custody of the child by the respondents was illegal, in a given case, the High Court can decline to exercise jurisdiction under Article 226 of the Constitution of India if the High Court is of the view that at the stage at which the Habeas Corpus was sought, it will not be in the welfare and interests of the minor to disturb his/her custody; and
 - d.** As far as the decision regarding custody of the minor children is concerned, the only paramount consideration is the welfare of the minor. The parties' rights cannot be allowed to override the child's welfare. This principle also applies to a petition seeking Habeas Corpus concerning a minor.
- 7.** Now, we come to the impugned judgment. The reasons given by the Division Bench are found only in two paragraphs, namely, paragraphs nos. 10 and 11, which read thus:

“10. From perusal of the Tejaswini Gaud & Ors.(supra), the Habeas Corpus proceeding is not to justify or examine the legality of the custody. In the present case, the only thing which is required to be considered is whether the detention of the minor child by the parents or others was illegal and without any authority of law. It is the

settled proposition of law that the Writ of Habeas Corpus is maintainable only if the person is able to prove that the Corpus is in illegal custody or is kept in illegal confinement. **In the present case, admittedly the petitioners would have precedence over the respondent Nos.3 and 4 who are the relatives from the maternal side whereas the petitioner No.3 is the biological father of the Corpus, therefore, the writ of Habeas Corpus is maintainable as well as the petitioners would have precedence for custody of the minor child qua the respondent Nos.3 and 4.**

11. The writ of the Habeas Corpus for seeking custody of minor child is maintainable only if the Corpus is in illegal custody. **In the present case, the custody/detention of a minor child by the respondent Nos.3 and 4 who are not the natural guardian of the Corpus, are not entitled to her legal custody.** Accordingly, the respondent Nos.3 and 4 are directed to hand over the custody of the minor child namely XXXX to the petitioners within 15 days from the date of receipt of certified copy of the order.”

(emphasis added)

8. It is apparent that the High Court has not dealt with and considered the issue of the welfare of the child. The High Court has disturbed the child's custody based only on the father's right as a natural guardian.

9. The High Court was dealing with the custody of the child, whose age at that time was one year and five months. The

child had been in the custody of the appellants from the tender age of 11 months after her mother died. The child, at present, has been in the custody of the appellants for more than one and a half years. When the Court deals with the issue of Habeas Corpus regarding a minor, the Court cannot treat the child as a movable property and transfer custody without even considering the impact of the disturbance of the custody on the child. Such issues cannot be decided mechanically. The Court has to act based on humanitarian considerations. After all, the Court cannot ignore the doctrine of *parens patriae*. Learned senior counsel appearing for the 2nd to 5th respondents submitted that if the Court is of the view that there is no proper consideration by the High Court, the order of remand may be passed to the High Court.

10. We believe that considering the peculiar facts of the case and the child's tender age, this is not a case where custody of the child can be disturbed in a petition under Article 226 of the Constitution of India. Only in substantive proceedings under the GW Act can the appropriate Court decide the issue of the child custody and guardianship. Regular Civil/Family Court dealing with child custody cases is in an advantageous position. The Court can frequently interact with the child. Practically, all Family Courts have a child centre/play area. A child can be brought to the play centre, where the judicial officer can interact with the child. Access can be given to the parties to meet the child at the same place. Moreover, the Court dealing with custody matters can record evidence. The

Court can appoint experts to make the psychological assessment of the child. If an access is required to be given to one of the parties to meet the child, the Civil Court or Family Court is in a better position to monitor the same.

11. Coming to the facts of the case, at this stage, it will be very difficult to decide whether the welfare of the minor child requires custody of the maternal aunts to be disturbed. The child has not seen the father and grandparents for over a year. At the tender age of two years and seven months, if custody of the child is immediately transferred to the father and grandparents, the child will become miserable as the child has not met them for a considerably long time. Moreover, even the contesting respondents have not alleged that the child is not being looked after properly by the appellants. Whether the father is entitled to custody or not is a matter to be decided by a competent court, but surely, even assuming that the father is not entitled to custody, at this stage, he is entitled to have access to meet the child. It is in the child's best interest that she knows her father and grandparents and remains with them for some time to begin with.

12. We repeatedly asked the learned senior counsel representing the husband whether the husband was willing to apply for custody. However, he has shown unwillingness to apply for custody. The husband is a member of the Bar practising at the Indore Bench of the Madhya Pradesh High Court. Even he was personally present during the hearing. However, the learned senior counsel appearing for the

appellants stated that the appellants or any of them would apply for claiming declaration as a guardian and retaining the custody. The earlier application filed by the appellants has been withdrawn. However, orders of the Court regarding custody are never final. Therefore, we propose to permit the appellants or any of them to apply for custody to the Regular Court under the GW Act. Even in the petition filed by the appellants, the competent Court can permit the father to take over the custody if it is satisfied that the welfare of the minor requires custody to be granted to the father.

13. We propose to direct the appellants to give access to the father and paternal grandparents of the child to meet the child once a fortnight. To begin with, access can be provided in the office of the secretary of the District Legal Service Authority so that the secretary can supervise the access. We propose to direct the secretary of the District Legal Service Authority to take assistance from a child psychologist or a psychiatrist (preferably female) attached to a local public hospital. If no such expert is available with the local public hospital, such an expert can be appointed at the appellants' cost. The expert will ensure that the child responds to the father and grandparents and interacts with them. The order of access shall continue for four months. After that, it will be open for the concerned Trial Court to modify this order of access in all respects. When the child becomes comfortable with his father and grandparents, the Court can also consider granting overnight access to the father and the grandparents.

14. Hence, we pass the following order:

a. Impugned judgment and order dated 23rd June, 2023 is set aside, and Writ Petition No. 11004 of 2023 is hereby dismissed. We make it clear that the Writ Petition is dismissed not on merits but on the ground that on facts, the discretion could not have been exercised under Article 226 of the Constitution of India to disturb the custody of the appellants at this stage;

b. On every 1st, 3rd and 5th Saturdays starting from 21st September 2024, the appellants shall take the child to the office of the secretary of the District Legal Service Authority at district Panna in the State of Madhya Pradesh at 03.00 p.m. Under the supervision of the secretary of the District Legal Service Authority, the father and grandparents of the child shall be permitted to meet the child till 05.00 p.m.;

c. The secretary of the District Legal Service Authority shall take the assistance of a child psychologist or a psychiatrist (preferably female) working in any local public hospital. If such experts are unavailable, the secretary shall privately engage one such expert at the appellants' cost. The appellants will pay necessary charges as and when called upon by the secretary. The payment will be subject to the outcome of the proceedings for grant of custody;

d. The expert so appointed shall remain present at the time of access. The expert's duty will be to persuade the child to interact with her father and grandparents. As regards the mode and manner of allowing the father and grandparents to meet the child, the parties and the secretary of the District Legal Service Authority shall be guided by the opinion of the expert;

e. As assured to the Court, the appellants or some of them shall file a petition seeking a declaration of guardianship and permanent custody of the child under the provisions of the GW Act before the competent Court within a maximum period of two months from today;

f. The concerned Court in which the application will be filed shall pass further orders regarding the grant of access and/or overnight custody to the husband and the grandparents. Further interim directions regarding access, overnight access, etc., shall be issued by the competent Court in which the appellants apply for custody. To enable the said court to pass an appropriate interim order, we direct that the interim arrangement made as above for the grant of access to the father and the grandparents will continue to operate for four months from today. Thereafter, the competent Court will deal with the prayer for interim relief on its own merits. Needless to add, in the event the husband and/or grandparents apply for custody, the application

filed by them and the application filed by the appellants shall be heard together, and

g. In the event of failure of both parties to apply to the competent Court, the parties will be free to apply to this Court for appropriate directions.

15. The appeal is, accordingly, partly allowed on the above terms.

16. We direct the registry to immediately forward a copy of this judgment to the secretary of the District Legal Service Authority at District Panna, State of Madhya Pradesh, who shall act upon the copy of the judgment provided by the registry of this Court. If the secretary of the District Legal Service Authority needs any further directions from this Court, it will be open for him to submit a report to the Registrar (Judicial) of this Court, who shall immediately place the same before this Bench and/or the appropriate Bench.

17. There will be no orders as to costs.

.....J.
(Abhay S Oka)

.....J.
(Augustine George Masih)

**New Delhi;
September 6, 2024.**