

A.F.R.

Neutral Citation No. - 2024:AHC:97133

Court No. - 80

Case :- HABEAS CORPUS WRIT PETITION No. - 797 of 2023

Petitioner :- Ayra Khan And Another

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Akhilesh Kumar Tiwari

Counsel for Respondent :- G.A.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri Akhilesh Kumar Tiwari, learned counsel for the petitioners, Ms. Harshita Rani, learned A.G.A. appearing for the State-respondents and Sri Faizan Siddiqui, learned counsel appearing for the respondent nos. 4 and 5.

2. The present petition has been filed with the assertion that the petitioner no. 2, mother of the petitioner no. 1 (corpus), was ousted from her matrimonial home, on 08.09.2023, by her husband, respondent no. 4, and the petitioner no. 1 (corpus), minor daughter, who at that point of time was less than two years, was detained.

3. It has been further asserted that the respondent no. 4 had thereafter gone out of the country and the petitioner no. 1 (corpus) was being illegally detained by the respondent No. 5, mother-in-law of the petitioner no. 2.

4. Pursuant to the *rule nisi* issued earlier, the petitioner no. 1 (corpus), was produced before the Court, on the previous date i.e. 16.04.2024, by the State authorities, along with the respondent no. 5.

5. Taking into consideration the age of the petitioner-corpus and that the petitioner no. 2 being her biological mother would

be legally entitled to have her custody, by way of an interim arrangement, and as agreed by counsel for the parties, the petitioner no. 1 (corpus) was permitted to go along with the petitioner no. 2.

6. Today, upon the case case being taken up, it has been pointed out that the petitioner no. 2 is present in Court, along with the petitioner no. 1 (corpus).

7. The petitioner no. 1 (corpus), and the petitioner no. 2 have been identified Sri Akhilesh Kumar Tiwari, learned counsel.

8. Sri Faizan Siddiqui, learned counsel appearing for the respondent nos. 4 and 5 has stated that the respondent no. 4 is out of the country, and that there are no instructions as to when he would return.

9. Learned A.G.A., on the basis of an enquiry made from the petitioner no. 2, in Court, submits that she has stated that the petitioner no. 1 (corpus) is being taken care of by her, since the previous date, when the corpus was permitted to go along with her in terms of the order passed by the Court by way of an interim arrangement. She has further stated that she has sufficient means to take good care of her minor child, petitioner no. 1 (corpus).

10. 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.

11. The law relating to guardians and wards is governed in terms of the Guardians and Wards Act, 1890¹. 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.

12. 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.

13. 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.

14. 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

1 GWA

2 Mulla, Principles of Mahomedan Law, 22nd Edition

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).”

15. 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.

16. 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 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.

17. 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.

18. 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.

19. The facts regarding which there is no dispute, and which were noticed in the previous order, are that the petitioner no. 1 (corpus) is a minor girl of age about 2-1/2 years. The respondent no. 4, father of the petitioner no. 1 (corpus) is presently living abroad, where he is stated to be having a job, and there is no indication of the time frame within which he is to return.

20. The petitioner no. 2 is stated to have left her matrimonial home due to some differences with her husband and her in-laws, and the petitioner-corporis was stated to be with the respondent no. 5, her grand mother, an elderly lady.

21. Counsel for the parties agree that looking to the age of the petitioner-corporis, it may be difficult to ascertain her wishes, and the questions with regard to her custodial rights would have to be examined on the principles of *parens patriae* jurisdiction by seeking to ascertain what would be in the best interest of the corpus.

22. Counsel for the parties have not disputed the legal position that in the case of a female child of 2-1/2 years, her biological mother would be legally entitled to her custody as per the personal law. The detention of the petitioner no. 1 (corpus) by the respondent no. 5, in the said circumstances, cannot, *prima facie*, be legally supported.

23. It has, also, not been disputed by counsel for the parties that in the entirety of the facts and circumstances of the case, it would be in the paramount interest of the petitioner no. 1 (corpus) that the interim arrangement, as per terms of the

previous order dated 16.04.2024, permitting the petitioner-corporate to go along with the petitioner no. 2, her biological mother, be continued.

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

25. The arrangement, in terms of which the petitioner no. 1 (corporate) was permitted to go along with the petitioner no. 2, her mother, would continue.

26. Counsel for the parties have stated that the parties would continue to explore the possibilities of reconciliation.

27. It is made clear that in case of any dispute with regard to guardianship or custody, or any claim with regard to visitation rights, it would be open to the parties concerned to take recourse to appropriate statutory remedy.

28. The petition stands **disposed of**.

Order Date :- 28.5.2024

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