

**Court No. - 66**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 385 of 2020

**Petitioner :-** Rishik Lavania And Another

**Respondent :-** State Of U.P. And 4 Others

**Counsel for Petitioner :-** Prashant Shukla

**Counsel for Respondent :-** G.A.

**Hon'ble J.J. Munir,J.**

In compliance with the *rule nisi* issued by this Court vide order dated 16.09.2020, the minor Rishik Lavania has been produced before this Court by Sub Inspector Amit Prasad, posted at P.S. Hariparvat, District Agra. Along with the minor, the mother Dr. Smt. Akanksha Vashishth has also appeared. The minor has been identified before this Court by the Sub Inspector who has brought him here. Smt. Akanksha Vashishth, has appeared in compliance with the order dated 31.08.2020 where it was left elective for her. She has been identified before this Court by Sri Vinit Kumar Singh, learned counsel appearing on behalf of respondent nos. 3, 4 and 5. He has also filed a short counter affidavit. It is taken on record. A supplementary affidavit has been filed on behalf of the petitioner which is also taken on record. Now, that master Rishik Lavania is present in Court along with his mother, Smt. Dr. Akanksha Vashishth, both of them being identified, this Court considers it appropriate for a just disposal of this *rule nisi* to record the mother's stand in the matter. The Court, accordingly, proceeds to record the statement of Dr. Smt.Akanksha Vashishth, *verbatim*:

Q. Your name?

A. Dr. Akanksha Vashishth.

Q. Your husband's name?

A. Dr. Sumit Lavania.

Q. What is your occupation?

A. I am BDS, Dentist.

Q. Do you practice your profession?

A. I used to, but presently I am not practicing.

Q. What is your source of livelihood and support in life?

A. Currently my parents are there and before coming to Agra I lived at Mumbai. I was working there.

Q. The son stays in the custody of your parents or your custody?

A. He stays with my parents since I left him at my home town, due to Covid-19. Now, I have left my job at Mumbai and come back to my home town, Agra.

Q. You want the child to stay with you?

A. Yes sir.

This Court has considered the statement of the minor's mother Dr. Smt. Akanksha Vashishth, who has categorically stated that the child stays with her and in her care and custody. It is her case that for a brief spell of time due to outbreak of the Covid-19 pandemic, she sent the child from Mumbai where she was in a job, to her parents. During that period of time the child was with the grand parents. It is also her stand that she has given up her job and is back to her home town, Agra. She has indicated her inclination to take care of the child. Now, the father and the mother are both natural guardians under Section 6(a) of the Hindu Minority and Guardianship Act.

Sri Vinit Kumar Singh, learned counsel for the respondents has raised an objection that this petition for habeas corpus cannot be utilized as a substitute for settling a custody dispute between two natural guardians. In the event, the father feels that he has a better claim to the minor's custody he can suit his case before the competent forum. It is Mr. Singh's submission that a writ of habeas corpus can issue to restore a minor's custody, where the minor is in unlawful custody; not where he/she is in custody that is pre-eminently lawful.

This Court has considered the rival submissions. In the opinion of this Court, there is no cavil that the mother and the father are both natural guardians under Section 6(a) of the Hindu Minority and Guardianship Act, 1956. It cannot be said that a mother, if for some reason like the welfare of the minor is not best suited to hold his custody, her custody is unlawful. If the mother's custody cannot be held unlawful, there is no scope for this Court to issue a writ of habeas corpus.

Learned counsel for the petitioner at this stage has placed reliance upon the decision of the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42**. He has called attention to paragraphs 36 and 37 that are extracted below:

"36. The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only 1½ years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the Court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. 1½ years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the

appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.

37. Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralised with the passage of time. However, till the child is settled down in the atmosphere of the first respondent father's house, Appellants 2 and 3 shall have access to the child initially for a period of three months for the entire day i.e. 8.00 a.m. to 6.00 p.m. at the residence of the first respondent. The first respondent shall ensure the comfort of Appellants 2 and 3 during such time of their stay in his house. After three months, Appellants 2 and 3 shall visit the child at the first respondent's house from 10.00 a.m. to 4.00 p.m. on Saturdays and Sundays. After the child completes four years, Appellants 2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11.00 a.m. to 5.00 p.m. and shall hand over the custody of the child back to the first respondent father before 5.00 p.m. For any further modification of the visitation rights, either parties are at liberty to approach the High Court."

The decision of their Lordships in **Tejaswini Gaud** (*supra*) does not rule out the remedy of a habeas corpus in custody matters but makes it clear that it can issue in a situation where the custody is in unlawful hands. In **Tejaswini Gaud** (*Supra*), it has been held about maintainability of a petition for a writ of habeas corpus in custody matters, in paragraphs 19 and 20 of the report, 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.

It is thus evident that the present proceedings would be open to the parties if the minor were in the custody of an utter stranger or a kindred who had no right whatsoever under the law, or the custody held by a person with no right, or is otherwise illegal. In the present case, this Court finds that the mother is a dentist and a well educated woman. She is capable of earning her livelihood, even if for the present, she does not have a job in her home town of Agra. There is no justification for this Court, therefore, to issue a writ of habeas corpus ordering the custody of the minor to be hands-changed from the mother to the father. This does not mean that the father is remediless. If the father thinks that he has a better right to the minor's custody, it is open to him to bring a duly constituted application under Section 25 of the Guardians and Wards Act, or some other provision of the said statute, as may be advised.

So far as the present writ petition is concerned, this habeas corpus petition fails and is **dismissed** subject to liberty given to the father as indicated above.

The minor who has been brought by the police, is left free to go with his mother. The Sub Inspector who has brought the minor here is discharged of his assignment.

The amount deposited with the Registrar General of this Court shall be remitted by the Registrar General forthwith in the account of Dr. Smt. Akanksha Vashishth, through a bank instrument payable at Agra.

**Order Date :- 18.9.2020**

BKM/-