

RESERVED

AFR

Court No. - 66

Case :- HABEAS CORPUS WRIT PETITION No. - 140 of 2020

Petitioner :- Shaurya Gautam (Minor) And Another

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

Counsel for Petitioner :- Digvijay Singh

Counsel for Respondent :- G.A.,Anurag Kumar,Pankaj Kumar Tyagi

Hon'ble J.J. Munir,J.

1. Awadhesh Gautam has instituted this petition for a writ of habeas corpus, on behalf of his two minor children - Shaurya Gautam and Km. Dishu Gautam. He prays that a writ, order or direction in the nature of habeas corpus may be issued by this Court, ordering Smt. Brahma Devi Tiwari, respondent no. 4 and Sri Braddhanand Bal Ashram, Arya Samaj Jama Wala, Tilak Road, Dehradun, Uttarakhand, respondent no. 5, to produce the two minor children-detenues before this Court and upon production, they be ordered to be set a liberty in the manner that the minors be given into the father's custody.

2. A *rule nisi* was initially granted on 13.02.2020, but remained uncomplied with, on account of disruption of judicial work in the wake of CoViD-19 pandemic. Nevertheless, Mr. Pankaj Kumar Tyagi, Advocate, put in appearance on 08.10.2020 and sought time to comply with the *rule nisi*. Time was granted, fixing a date for return on 15.10.2020. On 15.10.2020, the *rule nisi* was again not complied with. In the circumstances, the petition was formally admitted to hearing, with Mr. Anurag Dubey waiving service on behalf of the fourth respondent. The Superintendent of Police, Hathras, was ordered to cause the two detenues to be produced before the Court on 03.11.2020 at 02:00 p.m. The Superintendent of Police, Hathras, was directed to seek cooperation from his counterpart in District Dehradun, Uttarakhand, in order to enforce the *rule*.

3. In compliance with the *rule*, the minors were produced before the Court on 03.11.2020. This Court has interacted with the elder of the two minors, Shauya Gautam, besides the minors' grandmother (maternal) Smt. Brahma Devi Tiwari. The Court also spoke to the minors' aunt (*mausi*) Smt. Uma Rawat, as also Awadhesh Gautam, the father, who has brought this petition. This Court has perused the writ petition and the counter affidavit filed on behalf of the fourth respondent.

4. Heard Mr. Digvijay Singh, learned counsel for the petitioners and Mr. Pankaj Kumar Tyagi, learned counsel appearing on behalf of respondent no. 4 and Sri Jhamman Ram, learned Additional Government Advocate appearing on behalf of the State.

5. It appears that this issue about the minors' custody has arisen in the context of Awadhesh Gautam's wife and the minors' mother, Poonam Gautam, dying an unnatural death, regarding which, Awadhesh Gautam and four others of his family were reported to the police by the fourth respondent, charging them with murder and destruction of evidence. A First Information Report dated 20.09.2017, giving rise to Case Crime No. 238 of 2017, under Sections 147, 302, 201 of the Indian Penal Code, 1860¹, Police Station - Sahpau, District - Hathras, was registered. It is alleged in the writ petition that Shaurya Gautam and Km. Dishu Gautam were forcibly taken away by respondent no. 4, when Awadhesh Gautam was sent to jail, in connection with the crime last mentioned. It is also mentioned that he was admitted to bail by an order of this Court dated 15.11.2019 passed in *Criminal Misc. Bail Application No. 5179 of 2019*. Upon his release from jail, he approached the fourth respondent. A request was made to permit him to meet the children. He discovered there that his children have been lodged in Sri Braddhanand Bal Ashram, Uttarakhand. He claims to have met his children there. The children, it is claimed by Awadhesh Gautam, asked him to take them away with him. They stated

1 hereinafter referred to as "I.P.C."

that their grandmother (mother's mother) was not likeable and she had left them alone with the *ashram*, wherefrom they wished emancipation. It is also asserted that he produced documents before the *ashram* authorities to show that he was the minors' father, and requested them to hand him over custody of the minor children. It is asserted that the *ashram*, respondent no. 5, refused to release the children.

6. These facts have been strongly controverted in the counter affidavit filed by respondent no. 4. It is denied that Shaurya Gautam and Km. Dishu Gautam were forcibly removed from Awadhesh's custody. Rather, the two minors had been placed in the care of Awadhesh's brother, Neeraj Gautam. It must be remarked that Neeraj Gautam does not appear to be a brother of Awadhesh's, but a cousin or relative. It was Neeraj Gautam who handed over custody of the two minors to the fourth respondent, their maternal grandmother, in the presence of the Station House Officer, Police Station - Sahpau, District - Hathras. A photocopy of the aforesaid memo, albeit undated, is annexed to the counter affidavit as C.A.-3. It is asserted that the grandmother's custody cannot, therefore, be termed as unlawful. The fourth respondent has said in paragraph 12 of the counter affidavit that Awadhesh Gautam has murdered her daughter and she fears for the minors' life, if they were placed in his custody.

7. Apart from the said stand, it is submitted that the fourth respondent's custody, being not outrightly unlawful, the father's remedy lies in instituting proceedings to seek the minor's custody before the court of competent jurisdiction, under the Guardians and Wards Act, 1890². It is pointed out that Dinesh Gautam, Awadhesh's brother, has moved the Principal Judge, Family Court, Hathras, under Section 9/10 of Act, 1890, with a prayer that he be appointed the minors' guardian and their custody ordered to be handed over to him. This application has been instituted on 25.07.2019, where summonses were issued on 21.10.2019, returnable on

2 hereinafter referred to as "Act, 1890"

26.11.2019. The said application is still pending. It is urged that this petition, therefore, for a writ of habeas corpus, is not maintainable.

8. This Court has keenly considered the matter in all its various facets. So far as the question regarding maintainability of a habeas corpus writ petition to decide issues regarding custody of children or guardianship between a parent and some other kindred, or between two parents, both of whom are natural guardians is concerned, is, by now, fairly well-settled. This question came up for consideration before the Supreme Court in **Syed Saleemuddin v. Dr. Rukhsana and Others**³. It was held in **Syed Saleemuddin (supra)** held 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 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."

9. The same question came up before the Supreme Court in **Nithya Anand Raghavan v. State (NCT of Delhi) and Another**⁴. In **Nithya Anand Raghavan (supra)**, it was held :

³ (2001) 5 SCC 247

⁴ (2017) 8 SCC 454

"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 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.

10. More recently, the issue engaged the attention of their Lordships of the Supreme Court in **Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others**⁵. In *Tejaswini Gaud (supra)*, it was held 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

5 (2019) 7 SCC 42

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."

11. The Supreme Court, still later, considered the question in *Yashita Sahu v. State of Rajasthan and Others*⁶, where it was held :

"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in *Elizabeth Dinshaw v. Arvand M. Dinshaw*, *Nithya Anand Raghavan v. State (NCT of Delhi)* and *Lahari Sakhamuri v. Sobhan Kodali* among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable."

12. Here, the custody of the minors in the hands of the fourth respondent cannot be termed unlawful. The fourth respondent is the minors' grandmother. She has been given custody of the minors by Neeraj Gautam, the cousin or relative of Awadhesh's, in the presence of the Station House Officer, Police Station - Sahpau, District - Hathras, who

had custody of the children after Awadhesh's arrest. Still, Awadhesh could say that being the natural guardian of the two minors, he has a right to seek their custody from the grandmother. It is precisely this right which Awadhesh asserts, by virtue of Section 6 (a) of the Hindu Minority and Guardianship Act, 1956⁷. He says he is the sole natural surviving guardian, and therefore, entitled to the minors' custody. It is, no doubt, true that Awadhesh is the minors' natural guardian under Section 6 (a) of Act, 1956, but the issue about the minors' custody is not so much about the right of one who claims it, as it is about the minors' welfare. It is universally accepted for a principle in all matters, where questions relating to appointment or declaration of a guardian arise, or a claim is made to the minor's custody that it is the minor's welfare that is of paramount importance. This principle is engrafted in Section 13 (2) of Act, 1956 and also under Section 17 of Act, 1890. If it could be shown, therefore, *ex-facie*, that the minors' welfare is best secured in Awadhesh's hands, this Court would grant immediate custody to the father. Here, however, that does not appear to be the case. The father is an accused. The issue of welfare of the child cannot be mechanically determined. It is to be sensitively approached, taking into consideration both broad and subtle factors that would ensure it best. The principle governing custody of minor children, apart from other issues, fell for consideration of the Supreme Court in **Nil Ratan Kundu and Another v. Abhijit Kundu**⁸. In **Nil Ratan Kundu** (*supra*), it was held by their Lordships thus :

Principles governing custody of minor children

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict

⁷ hereinafter referred to as "Act, 1956"

⁸ (2008) 9 SCC 413

rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

13. In **Nil Ratan Kundu**, facts also disclose that the father, who claimed the minor's custody from his maternal grandfather and grandmother, was, like here, an accused in a case relating to his wife's dowry death. The father's involvement in a case relating to his wife's dowry death was regarded by their Lordships as an important factor to be carefully addressed by the Court in reference to its facts and evidence. It must be noted here that **Nil Ratan Kundu** was a case that arose out of the proceedings under the Act, 1890, and therefore, there were detailed findings with reference to evidence, which is not the case here. Nevertheless, the fact about the involvement of a natural guardian, in a criminal case relating to the death of a spouse, was held to be an important consideration while determining the question of welfare of the minor. In this regard, it was held in **Nil Ratan Kundu** thus :

62. Now, it has come in evidence that after the death of Mithu (mother of Antariksh) and lodging of first information report by her father against Abhijit (father of Antariksh) and his mother (paternal grandmother of Antariksh), Abhijit was arrested by the police. It was also stated by Nil Ratan Kundu (father of Mithu) that mother of accused Abhijit (paternal grandmother of Antariksh) *absconded* and Antariksh was found sick from the house of Abhijit.

63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent

herein and pendency of the criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the "character" of the proposed guardian. In *Kirtikumar*[(1992) 3 SCC 573 : 1992 SCC (Cri) 778] , this Court, almost in similar circumstances, where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of the mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person. To us, it is no answer to state that in case the father is convicted, it is open to the maternal grandparents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and an appropriate order ought to have been passed.

14. It was also emphasized in **Nil Ratan Kundu** that wishes of the minor ought to be taken into consideration, where the minor is of an age that he can express his/her intelligent choice. This is a principle embodied in Section 17 (3) of Act, 1890. Bearing in mind these facts, this Court carefully interacted with the elder of the two minors, that is to say, Shaurya Gautam. He is a 10-year old boy and fairly intelligent. He informed the Court that he and his sister stay at Sri Braddhanand Bal Ashram, but he is not at all disturbed about the fact that his maternal grandmother has placed him and his sister there. He also told the Court that there is a school, which he and his sister attend. The grandmother (*nani*) comes over to meet Shaurya and his sister. He is emphatic that he does not wish to go back to his father or stay with him. On being asked the reason, he says that he fears for his life. He also said that he wishes to stay at the hostel. During the course of conversation, the child emotionally brokedown and wept. He insisted upon staying with the hostel and refused to go back to his father. Smt. Brahma Devi Tiwari, the minors' grandmother, told the Court that she stayed alone. Her daughter and son-in-law live close by. On being asked why she does not house the children

in her home, she said that she is fearful of their father. He would kidnap both of them and get her framed in a false case. It is for the said reason that she has housed the two children in the *ashram*. The minors' aunt, Smt. Uma Rawat, told the Court that she is a housewife. Her husband is an engineer in a US-based firm, domiciled in Dehradun. She also reiterated that they do not keep the children with them, because the father would get them implicated in some false case. The father, on being asked, denied these allegations and said that he never threatened his in-laws.

15. This Court has looked into the allegations in the First Information Report, which shows that the father is facing trial on a charge of murder of his wife. The First Information Report indicates that his wife had called her mother on 17.09.2017 that there was a conspiracy afoot, where she could be crushed to death under the wheels of a tractor. Later on, she was found dead near Jalesar Road, portraying it as an accident. At least, that is the case in the First Information Report. The postmortem report shows crush injuries, from the skull to the upper abdomen. Awadhesh Gautam has said in the petition that his wife met an unnatural death, due to accidental burn injuries. This does appear to be the case.

16. This Court does not consider it appropriate to say anything more about the issue. Whatever has been remarked hereinabove, is only to fathom the nature of the allegations against Awadhesh Gautam. It is, in no way, an expression of opinion about the criminal charges against him. The totality of the circumstances on record show that unless acquitted, it would not be appropriate to place the two minor children in their father's custody. It is all the more so as the elder of the two minors, who can express an intelligent preference about the guardian he would like to be with, has ruled out the father. He is also fearful of the father. It is also true that the minors have been placed in the care of an *ashram*, but they do not appear to be neglected in the matter of their education. It is not, indeed, an ideal situation about the minors' welfare to be placed in institutional care,

where the grandmother and the aunt are around in the same town. But the fears expressed by the grandmother, who is an old woman and the aunt, do not appear to be entirely unfounded. Also, the grandmother is in touch with the minors, as Shaurya Gautam informed us. She pays them regular visit and her caring hand is always there.

17. In the overall circumstances of the case, this Court does not think that Awadhesh Gautam is entitled to the minor's custody, at least at this stage, when he is facing criminal charges. If and when he is acquitted and the children, still minors, it would be open to him to make an appropriate application, seeking their custody to the court of competent jurisdiction, under the Act, 1890, which shall be decided in accordance with law, according to the circumstances then obtaining, without being influenced by anything said here.

18. In the result, this petition fails and stands **dismissed**.

19. In totality of the circumstances obtaining for the present, this Court does not find it appropriate to grant any visitation rights to Awadhesh Gautam.

Order Date :- 10.11.2020
Deepak/I. Batabyal