

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

WPA No. 1098 of 2020

IA No: CAN 1 of 2020 (Old No: CAN 3091 of 2020)

CAN 2 of 2020 (Old No: CAN 3093 of 2020)

CAN 3 of 2020 (Old No: CAN 3094 of 2020)

CAN 4 of 2024

Dr. Gaurav Gupta

Vs.

State of West Bengal & Ors.

For the Petitioner : Mr. Partha Sarathi Sengupta, Sr. Adv.
Mr. Ratnesh Kr. Rai, Adv.
Ms. Devanshi Deora, Adv.

For the Respondent : Mr. Sabyasachi Banerjee, Adv.
No. 4 Ms. Diksha Ghosh, Adv.

Hearing Concluded on : August 22, 2024
Judgement on : September 02, 2024

DEBANGSU BASAK, J.:-

1. Writ petitioner as father of two minor children has sought a writ of habeas corpus against the respondent No. 4, who is the wife and the mother of the two minor children.

2. Learned Senior Advocate appearing for the writ petitioner has contended that, the minors were in the custody and control of the respondent No. 4 till they were illegally and wrongfully removed by the respondent No. 4 from Kolkata to presently at Bhopal. He has contended that, the present

custody of the children with the respondent No. 4 is wrongful and illegal.

3. Referring to the facts of the case, learned Senior Advocate appearing for the writ petitioner has submitted that, marriage between the writ petitioner and the respondent No. 4 took place on December 10, 2006 and solemnized under the Hindu Marriage Act, 1955. The first child was born on September 15, 2012 at England. Parents had thereafter relocated and settled in Kolkata. The first child had been admitted at a school in Kolkata and continues to be a student of such school. Second child was born on October 18, 2017 at Kolkata.

4. Learned Senior Advocate appearing for the writ petitioner has contended that, disputes and differences arose between the writ petitioner and the respondent No. 4. Respondent No. 4 had taken the children from Kolkata to Mumbai without any intimation. Writ petitioner had travelled to Mumbai to meet his children and respondent No. 4 on October 27, 2019 when he was manhandled and not allowed to meet his children. The respondent No. 4 had subsequently shifted to Bhopal where she is presently residing. Respondent No. 4 has denied the writ petitioner all access to his children.

Even access through virtual platform has either been denied altogether or monitored.

5. Learned Senior Advocate appearing for the writ petitioner has submitted that, the writ petitioner travelled to Bhopal to attend family counselling when he was threatened by the then Director General of Police, Madhya Pradesh. Writ petitioner had filed Misc. Case No. 3021 of 2019 under Section 9 of the Hindu Marriage Act, 1955 seeking restitution of conjugal rights in the District Court at Alipur, South 24 Parganas. Respondent No. 4 had filed a criminal complaint at Bhopal on December 11, 2019. Writ petitioner had filed Misc. Case No. 181 of 2019 under Section 25 of the Guardians and Wards Act, 1890 read with Section 6 (a) of the Hindu Minority and Guardianship Act, 1956 before the District Judge, Alipore, South 24 Parganas on December 13, 2019. Thereafter, writ petitioner has filed the present writ petition.

6. Learned Senior Advocate appearing for the writ petitioner has submitted that, the respondent No. 4 filed an application under Section 12 read with Sections 18 to 23 of the Protection of Women from Domestic Violence Act, 2005 against the writ petitioner and his family members on June 24, 2020. The respondent No. 4 had filed a Transfer Petition

being 361-362/2020 seeking transfer of applications under Section 9 of the Hindu Marriage Act, 1955 and Section 25 of the Guardianship and Ward Act, 1890 from Kolkata to Bhopal.

7. Learned Senior Advocate appearing for the writ petitioner has pointed out that, in this writ petition, an interim order was passed on February 3, 2020 directing the respondent No. 4 to deposit the passports of the children with the District Judge, Bhopal until further orders. Such order was challenged by a Special Leave Petition by the respondent No. 4 which was dismissed by an order dated June 19, 2020. He has pointed out that by an order dated March 4, 2020 Hon'ble Supreme Court directed the parties to mediate the disputes before the mediator in the Transfer Petition filed by the respondent No. 4. Such mediation however had failed and by an order dated February 8, 2020 Hon'ble Supreme Court disposed of Transfer Petition No. 361-362/2020 by transferring the proceedings under the Hindu Marriage Act, 1955 and the proceedings under the Guardians and Wards Act, 1890 to the Principal Judge, Nagpur, Maharashtra.

8. Learned Senior Advocate appearing for the writ petitioner has submitted that, on June 30, 2020 respondent

No. 4 filed Transfer Petition No. 683 of 2020 praying for transfer of the present writ petition to the Madhya Pradesh High Court at Jabbalpur. Respondent No. 4 had also filed for divorce in Bhopal, Madhya Pradesh which was also transferred to Nagpur by virtue of the order dated March 1, 2024.

9. Learned Senior Advocate appearing for the writ petitioner has contended that, several orders were passed by this Court in the best interest of the children. The respondent No. 4 had acted in violation thereof. He has drawn the attention of the Court to the various acts of misdeeds of the respondent No. 4 vis-à-vis children as also the orders passed by the High Court.

10. Learned Senior Advocate appearing for the writ petitioner has contended that, the present writ petition is maintainable since, the respondent No. 4 removed the children born out of the wedlock by deceit and is illegally and unlawfully detaining them at Bhopal. He has relied upon ***2019 Volume 7 Supreme Court Cases 42 (Tejaswani Gaud & Anr vs. Shekhar Jagdish Prasad Tewari & Ors.)*** and ***2020 Volume 3 Supreme Court Cases 67 (Yashita Sahu vs. State of Rajasthan And Others)*** in the regard.

11. Learned Senior Advocate appearing for the writ petitioner has contended that, welfare of the children is of paramount importance and that, the children are at the risk of Paternal Alienation Syndrome owing to the malicious act of the respondent No. 4. He has submitted that Supreme Court recognized Paternal Alienation Syndrome to be a serious form of child psychological abuse. In support of such contention, he has relied upon **2017 Volume 3 Supreme Court Cases 231 (Vivek Singh vs. Romani Singh)**, **1999 Volume 2 Supreme Court Cases 228 (Githa Hariharan & Anr. Vs. Reserve Bank of India)**.

12. Learned Senior Advocate appearing for the writ petitioner has relied upon **2019 Volume 7 Supreme Court Cases 311 (Lahiri Sakhamuri vs. Sobhan Kodali)** and submitted that, best interest of the children is the paramount consideration in deciding custody of the children. He has pointed out that, the children would be better placed in the custody of the writ petitioner since the writ petitioner has evidently better maturity and judgement. He has contended that, writ petitioner is way better placed in respect of financial sufficiency, mental stability, and providing access to better school to the children. Moreover, children will develop better

having a permanent residence as opposed to temporary residence. He has pointed out that the respondent No. 4 is living in a rented accommodation and forced to shift residence due to her financial condition and in fact shifted her residence. Consequently, he has submitted that, appropriate order be passed with regard to the custody of the two children involved.

13. Learned Advocate appearing for the respondent No. 4 has submitted that, the respondent No. 4 was being tortured both physically and mentally and therefore, was constrained to remove the children to Bhopal as also remove herself from the writ petitioner and his family members. He has contended that, the writ petitioner is violent and abusive in nature. He has referred to the proceedings that the respondent No. 4 was constrained to initiate as against the writ petitioner. He has contended that, respondent No. 4 is sufficiently qualified and with sufficient financial capability to meet the needs of the children. He has pointed out that, both the children are now studying at Bhopal in one of the best schools there.

14. Learned advocate appearing for the respondent No. 4 has relied upon **1981 Volume 3 Supreme Court Cases 92 (Dr. (Mrs.) Veena Kapoor vs. Varinder Kumar), 1999**

Volume 2 Supreme Court Cases 228 (Githa Hariharan & Anr. Vs. Reserve Bank of India), 2001 Volume 5 Supreme Court Cases 247 (Syed Saleemuddin vs. Dr. Rukhasana & Ors.), 2008 Volume 9 Supreme Court Cases 413 (Nil Ratan Kundu & Anr. Vs. Abhijit Kundu), 2011 Volume 6 Supreme Court Cases 479 (Ruchi Majoo vs. Sanjeev Majoo), 2017 Volume 8 Supreme Court Cases 454 (Nithya Anand Raghavan vs. State (NCT Delhi) & Anr.), 2019 Volume 7 Supreme Court Cases 42 (Tejaswani Gaud & Anr. Shekhar Jagdish Prasad Tewari & Ors.), 2021 SCC OnLine All 882 (Sushil Kumar Tiwari Vs. State of UP & Ors.), 2022 SCC OnLine SC 937 (Rohit Thammana Gowda vs. State of Karnataka & Ors.), 2022 SCC OnLine SC 885 (Rajeshwari Chandrashekar Ganesh Vs. State of Tamil Nadu & Ors.), 2022 SCC OnLine ALL 955 (Shradha Kannujia (Minor) & Anr. Vs. State of UP & Ors.) and 2022 SCC OnLine Ori 2008 (Koushalya Das vs. State of Odisha & Ors.) with regard to nature and extent of order that may be passed in a writ petition relating to custody of children.

15. As has been noted above, father has filed the present writ petition seeking a writ of habeas corpus in respect of the

children born out of the wedlock between the writ petitioner and the respondent No. 4.

16. Writ petitioner and the respondent No. 4 had filed a number of proceedings against each other. The following proceedings apparently have been filed by the parties against each other apart from the present writ petition :-

- i. Misc. Case No. 302 of 2019 under Section 9 of the Hindu Marriage Act, 1955 seeking restitution of conjugal rights with the respondent No. 4 before the learned Judge, District Court at Alipore, South 24 Parganas by the writ petitioner.
- ii. Respondent No. 4 lodged first information report bearing No. 2000 of 2019 at the police station, Mahila Thana, Bhopal inter alia under Sections 498A/34/506 of the Indian Penal Code, 1860
- iii. Misc. Case No. 181 of 2019 under Section 25 of the Guardian and Wards Act, 1890 read with Section 6(a) of the Hindu Minority and Guardianship Act, 1956 before the learned

District Judge, Alipore, South 24 Parganas filed by the writ petitioner.

- iv. Proceedings under Section 12 read with Section 18 to 23 of the Protection of Women from Domestic Violence Act, 2005 filed by the respondent No. 4.
- v. Respondent No. 4 filed Transfer Petition (Civil) No. 361-362/2020 seeking transfer of proceedings under Hindu Marriage Act, and the Guardians and Wards Act.
- vi. Respondent No. 4 filed Special Leave Petition being SLP No. 7486/2020 challenging the order dated February 3, 2020 passed by the High Court in this writ petition.
- vii. Respondent No. 4 filed Transfer Petition being TP No. 683 of 2020 seeking transfer of the present writ petition.
- viii. Respondent No. 4 filed proceedings for divorce.

17. By an order dated February 8, 2022, the Hon'ble Supreme Court transferred the proceedings under the Hindu Marriage Act, as also the Guardian and Wards Act to the

Principal Judge, Nagpur, Maharashtra. Such proceedings are pending.

18. Maintainability of the present writ petition has been questioned on behalf of the respondent No. 4. Respondent No. 4 has also questioned the need for passing further orders in this writ petition in view of the pendency of custody proceeding before the District Court.

19. In ***Dr. (Mrs.) Veena Kapoor (supra)*** Supreme Court has noted that it was difficult to take evidence with regard to the issue as to whether the custody of the child with the father was illegal or not. It has noted that, the paramount consideration is the welfare of the minor and not the legal right of any particular party, when it comes to the issue of deciding custody of a minor.

20. In ***Githa Hariharan & Anr. (supra)*** the issue was not with regard to custody of a minor but, whether mother can act as the guardian of a minor particularly when, the father was agreeing on such issue, in relation of banking documents.

21. In a habeas corpus writ petition of seeking transfer of custody of children from father to mother, Supreme Court in ***Syed Saleemuddin (supra)*** has observed that, the principle 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 the present custody to be changed and to be left in the care and custody of somebody else.

22. *Nil Ratan Kundu & Anr. (supra)* has dealt with the issue of custody of minor in a proceeding under the Guardians and Wards Act, 1890. So also in ***Ruchi Majoo (supra)*** an order passed by the jurisdictional Court under the Guardians and Wards Act, 1870 had been challenged under Article 227 of the Constitution which order was in turn challenged before the Supreme Court.

23. *Nithya Anand Raghavan (supra)* has deal with a habeas corpus writ petition filed under Article 226 of the Constitution of India. It has noted ***Syed Saleemuddin (supra)***. It has noted that, the High Court while dealing with a writ petition for habeas corpus concerning a minor may direct return of the child or decline to change the custody of the child keeping in mind all facts and circumstances including the settled legal position. It has also noted that the remedy of writ of Habeas Corpus cannot be used for mere enforcement of directions given by the Foreign Court against a person within its jurisdiction and convert that jurisdiction into one of

executing Court and that, the order of the Foreign Court must yield to the welfare of the child. It has observed in paragraph 47 as follows :-

“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 exceptional 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.”

24. *Tejaswani Gaud & Anr. (supra)* has dealt with a writ of habeas corpus and observed that, habeas corpus proceedings are not to justify or examine the legality of custody. It has observed that, in child custody matters, the power of the High Court in granting a writ of habeas corpus is qualified only in cases where the detention of the minor is by a person who is not entitled to his legal custody. A 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. Such writ also extends its influence to restore the custody of a minor to its guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to its legal custody is treated as equivalent to illegal detention for the purpose of granting writ directing custody of a child. It has noted that there are significant differences between enquiry under the Guardians and Wards Act, 1890 and the exercises of powers by a Writ Court which is summary in nature. It has held that, where Writ Court is of the view that a detailed enquiry is required, the Court may decline to exercise writ 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 in a petition for habeas corpus.

25. *Sushil Kumar Tiwari (supra)*, *Shradha Kannujia (Minor) & Anr. (supra)* and *Koushalya Das (supra)* have been rendered by other High Courts in Habeas corpus writ petitions.

26. In *Rohit Thammana Gowda (supra)* a proceeding before the United States Court governing the minor was

pending. The minor was also a naturalized US citizen with the parents holding permanent US resident cards. In such context direction was issued for return of the child to the United States of America.

27. Rajeshwari Chandrashekar Ganesh (supra) has decided an Article 32 Writ petition. There, the minors were directed to stay with their mother in the United States of America as the minors were accustomed with the social and cultural milieu of that country. Supreme Court has noted that, the US Court issued directions with regard to the minors.

28. While dealing with power to be exercised in a writ of habeas corpus, the Supreme Court in **Rajeshwari Chandrasekhar Ganesh (supra)** has held as follows :-

“79. The exercise of the extraordinary jurisdiction for issuance of a writ of Habeas Corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detentions unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.

80. The object and scope of a writ of Habeas Corpus in the context of a claim relating to the custody of a minor child fell for the consideration of this Court in Nithya Ananda Raghavan (supra) and it was held that the principal duty of the court in such matters should be to

ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over the care and custody of any other person.”

29. Rajeshwari Chandrasekhar Ganesh (supra) has also dealt with the issue of maintainability of a habeas corpus writ petition under Article 226 of the Constitution for custody of a minor, as follows :-

“82. The question of maintainability of a Habeas Corpus petition under Article 226 of the Constitution of India for the custody of a minor was examined by this Court in Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42, and it was held that the petition would be maintainable where the detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of Habeas Corpus can be availed in exceptional cases where the ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:

“14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an 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 is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal

law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

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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 of 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.”

30. In the context of proceedings under the Guardians and Wards Act, 1890, Supreme Court in ***Vivek Singh (supra)*** has recognised a child might suffer from Paternal Alienation Syndrome should such child be denied access to one of the parents.

31. In ***Yashita Sahu (supra)*** Supreme Court in a habeas corpus writ petition has held that, welfare of the child is the paramount consideration for the Court. Child has human right to have love and affection of both parents. Therefore, Court must clearly define the nature, and the specifics of visitation and contact rights of the parents. It has noted that, a child separated from one parent in custodial controversies faces adverse psychological impact and that, in order to minimise such impact, court should afford sufficient visitation rights to parent not given child custody so that the child may not lose social, physical and psychosocial contact with the other parent.

32. In the facts of ***Yashita Sahu (supra)*** the mother of the child, the minor daughter had shifted from United States of

America, where she was living with her husband and the child, to India, in violation of order of the US Court.

33. *Lahari Sakhamuri (Supra)* has dealt with proceeding initiated under the Guardians and Wards Act, 1890 as well as habeas corpus writ petition seeking relief. In the facts of that case, the minor children were United States of America citizen and the parents had been residing in the United States of America since prior to solemnisation of marriage in India. Mother of the children had filed a proceeding for divorce before the US Court. An application for custody of the minor children before the US Court had been made by the mother. Thereafter, mother travelled with the minor children to India and filed proceedings under the Guardians and Wards Act, 1890 for custody of such children. In such context, Supreme Court had held that, the proceeding under the Guardians and Wards Act, 1890 in India was not maintainable as the children were ordinarily residents within the jurisdiction of the Court trying such proceedings. It has also upheld the order of the High Court directing return of the children to the United States of America.

34. A writ petition seeking relief of issuance of a writ of habeas corpus for the custody of a minor is maintainable,

subject to certain jurisdictional facts being established. Jurisdictional facts making such writ petition maintainable must exist for a Writ Court to assume jurisdiction in a writ petition of habeas corpus. The jurisdictional facts are, whether there exists any special circumstance which a Court exercising jurisdiction under the provisions of the Guardians and Wards Act, 1890 or under the Hindu Minority and Guardianship Act, 1956 cannot attend to and grant requisite relief in respect of the child concerned.

35. It is only in exceptional cases that the rights of the parties to the custody of the minor should be determined in exercise of extraordinary jurisdiction on a writ petition for habeas corpus. In other words, when a Constitutional Court seeks to intervene in a writ of habeas corpus in respect of the custody of a child, such Constitutional Court needs to arrive at a finding that, the alleged detention is illegal and without any authority of law and that, the ordinary remedy provided by the law is either unavailable or ineffective. Once such findings are arrived at, does the Constitutional Court clothe itself with the jurisdiction to entertain and try a writ petition seeking relief of writ of habeas corpus in respect of the custody of a child. Even if such jurisdictional facts are

established, a Constitutional Court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court, if the Constitutional Court is of the view that a detailed enquiry is required which is not possible on affidavit evidence or the summary procedure it usually adopts. See paragraphs 19 and 20 of ***Tejaswani Gaud (supra)***.

36. Once a Constitutional Court assumes jurisdiction in a writ petition seeking relief of writ of habeas corpus in respect of custody of a child, then, the Court is guided by the paramount consideration of the welfare of the child. While granting reliefs to the parties, the power of the Constitutional Court is not pursuant to but independent of any statute.

37. In the facts and circumstances of the present case, the parties between themselves have filed various proceedings seeking diverse reliefs. Writ petitioner has filed a proceeding under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 with regard to the custody of the children. No special circumstances has been established and in fact none exists which prompts a Constitutional Court to hold that, relief sought for by the writ petitioner in such proceeding is incapable of being granted by the Court deciding such proceeding or that, it would not be in

the best interest of the children to have such proceeding decided by such court. Significantly, such proceedings have been transferred by the Hon'ble Supreme Court to the transferee Court where it is presently pending.

38. In the facts and circumstances of the present case, a proceeding under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 is pending. Affidavits disclosed in the present proceedings show that, there are a number of allegations and counter allegations between the writ petitioner and the respondent No. 4. Such allegations should ideally be adjudicated upon after affording the parties an opportunity of hearing as envisaged in the procedure governing the proceeding under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956.

39. In such circumstances, we relegate the private parties to the proceeding for custody already pending. We clarify that, we have not decided upon any of the points raised with regard to the custody of the child and that, all observations made by us in this judgement and order are restricted towards determining our course of action in view of the pendency of the number of proceedings between the private parties. All

points raised by the parties with regard to the custody of the children are kept open. The transferee court is at liberty to decide on the custody and visitation rights of the parents, in accordance with law.

40. In view of the fact that we are not deciding on the visitation or the custody of the children, and relegating the parties to the civil court with regard thereto, we deem it appropriate not to deal with the authorities cited at the bar requiring the welfare of the children to be kept in mind in deciding custody proceedings.

41. WPA No. 1098 of 2020 along with all connected applications are disposed of accordingly without any orders to costs. Interim orders stand vacated.

[DEBANGSU BASAK, J.]

42. I agree.

[MD. SHABBAR RASHIDI, J.]