

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7TH DAY OF JUNE 2023

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

W.P.H.C. NO.30 OF 2023

BETWEEN:

... PETITIONER

(BY MR. S. SREEVATSA, SR. COUNSEL FOR
MR. N. GOWTHAM RAGHUNATH, ADV.,)

AND:

- 1 . STATE OF KARNATAKA
DEPARTMENT OF HOME
BY ITS SECRETARY
VIKASA SOUDHA
BENGALURU 560001.
- 2 . THE STATION HOUSE OFFICER
HAL POLICE STATION
HAL OLD AIRPORT ROAD
SECTOR 3, MARATHAHALLI
BENGALURU 560037.

... RESPONDENTS

(BY MR. V.S. HEGDE, SPP-II FOR R1 & R2
MR. M.T. NANAI AH, SR. COUNSEL FOR
MR. M.C. KUMARASWAMY, ADV., FOR R3)

THIS WPHC IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, PRAYING TO ISSUE A WRIT OF HABEAS CORPUS BY DIRECTING THE 2ND RESPONDENT POLICE TO TRACE AND PRODUCE THE PETITIONERS MINOR DAUGHTER, MAYRA GIRI AGED ABOUT 8 YEARS BEFORE THIS HONBLE COURT.

THIS W.P.H.C. HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 06.06.2023, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, **ALOK ARADHE J.**, MADE THE FOLLOWING:

ORDER

This writ petition seeking a writ of habeas corpus has been filed by the petitioner, in which following reliefs are sought:

(a) Issue a writ of Habeas Corpus by directing the 2nd respondent police to trace and produce the petitioner's minor daughter, Mayra Giri aged about 8 years before this Hon'ble Court; and

(b) Pass such other order/s as this Hon'ble Court may deem fit, proper, necessary and expedient in the circumstances of the case.

2. Facts giving rise to filing of this petition briefly stated are that the petitioner and respondent No.3 (hereinafter referred to as 'the wife' for short) got married on 23.10.2011. Out of the wedlock, a daughter viz., (hereinafter referred to as 'the daughter' for short) was born to them. The petitioner who is the father of the daughter filed a petition under Section 25 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act' for short), which was allowed by the Family Court vide judgment and decree dated 03.03.2022. The operative portion of the judgment reads as under:

"Petition filed by the petitioner under Section 25 of Guardian and Wards Act is allowed.

Respondent / mother is directed to handover the custody of the minor child Mayra Giri aged about 7 years to the custody of the petitioner within one month from the date of this order.

Further the respondent is permanent restrained by an order of injunction from removing the child from the jurisdiction of this court till the child is handed over to the custody of petitioner.

No order as to costs."

3. It is not in dispute that the aforesaid order passed by the family court was challenged by the wife in an appeal under Section 47(c) of the Act viz., M.F.A.No.2786/22. The aforesaid appeal was decided vide judgment dated 31.01.2023 and the judgment of the family court has been upheld. The operative portion of the aforesaid judgment passed in the M.F.A. reads as under:

68. *The appeal is dismissed. We feel that the interest of the minor child will be best served if the custody of the child is handed over to the respondent but with sufficient access to the appellant to visit the minor at frequent intervals, and therefore,*

while confirming the judgment and decree dated 03.03.2022 passed by the Family Court in G & WC No.128/2018 filed by the respondent under Section 25 of the Act, and directing appellant to grant custody of the minor child to the respondent, we are inclined to grant visitation rights to the appellant though she has not prayed for the same, on the following terms:

(i) The appellant is directed to hand over the minor child to the custody of the respondent after completion of the child's annual final examinations for the present academic year i.e., 2022-23.

(ii) The respondent shall make arrangements for the child to continue her studies in her present school and shall shift his residence to a place which is within the

radius of 5 Kms. From the child's school.

(iii) The respondent shall provide the school calendar of the child with list of holidays along with dates of examination to the appellant.

(iv) The respondent shall meet all the expenses of the minor child towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the upbringing of the child, the respondent shall not create any obstruction to and / or prevent the appellant from also making such contribution.

(v) The appellant will be at liberty to visit the minor child either in the respondent's

house or in the premises of a mutual friend or any other place as may be agreed upon on every Sunday. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend or in a public place agreed upon at 10.00 a.m. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 p.m. in the evening.

(vi) On all important festival days for which holiday is declared to the School, the appellant shall be entitled to take custody of the child between 10.00 a.m. and 1.00 p.m.

(vii) *The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.*

(viii) *The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.*

(ix) *During long holidays / vacations covering more than ten days, the child will be allowed to be in the company of the mother for half of the said long holidays / vacations.*

(x) *The mother is entitled to communicate with the child through phone / video*

call / skype etc. between 7.00 p.m. to 8.00 p.m. everyday.

(xi) The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court, Bengaluru, for fresh directions should the same become necessary on account of changed circumstances.

4. It is also not in dispute that against the aforesaid judgment and decree passed by a division bench of this court, the wife filed a Special Leave petition before the Hon'ble Supreme Court in SLP No.4869/2023. However, another S.L.P.No.19469/2023 was filed on behalf of the daughter. The Special Leave Petition viz., SLP No.4869/2023 filed on by the wife was dismissed vide

order dated 29.03.2003. The relevant extract of the order reads as under:

5. We have gone through the impugned order of the High Court and see no infirmity in the findings. The High Court has upheld the order which was passed by the trial Judge.

5. It is also not in dispute that the Special Leave Petition filed separately by the daughter against the judgment dated 31.01.2023 passed by a division bench of this court was also dismissed by an order dated 16.05.2023.

6. In other words, the order appointing the husband as guardian of the minor daughter and a direction to the wife to hand over the custody to the husband has attained finality.

7. However, despite the fact that the order of the family court directing handing over of the custody

had attained finality, the custody of the daughter has not been handed over to the petitioner. Thereupon, the petitioner filed this writ petition on or about 11.04.2023 seeking the reliefs as stated supra in this writ petition. A Division Bench of this court passed an interim order directing issuance of Non Bailable Warrant to secure the presence of wife. The said order was challenged by the wife in SLP No.19469/2023. The aforesaid Special Leave Petition has been dismissed on 16.05.2023. In the light of the directions contained in the order dated 16.05.2023 passed by Hon'ble Supreme Court, the wife appeared before this court along with the daughter.

8. Learned Senior Counsel for the petitioner submitted that the judgment and decree dated 03.03.2022 passed by the family court attained finality as the aforesaid judgment and decree has been upheld in an appeal not only by a division bench

of this court but by Hon'ble Supreme Court as well. It is submitted that despite dismissal of the Special Leave Petition, the custody of the child has not been handed over to the petitioner who is legally entitled to the custody of the daughter. It is further submitted that the child is in illegal custody of the wife as the wife is retaining the custody of the child in contravention of the judgments of the courts. It is further submitted that in the fact situation of the case, a writ of habeas corpus is maintainable. In support of aforesaid submission, reliance has been on decision in **'TEJASWINI GAUD AND OTHRES VS. SHEKHAR JAGDISH PRASAD TIWARI AND OTHERS'**, (2019) 7 SCC 42, **'YASHITA SAHU VS. STATE OF RAJASTHAN AND OTHERS'**, (2020) 3 SCC 67 and **'RAJESHWARI CHANDRASEKAR GANESH VS. STATE OF TAMIL NADU AND OTHERS'**, 2022 SCC ONLINE SC 885.

9. On the other hand, learned counsel for the wife at the outset fairly submitted that the parties are bound to comply with the orders of the courts. It is however, pointed out that against the judgment dated 29.03.2023 passed in SLP No.4869/2023, a review petition has been filed before Hon'ble Supreme Court. It is further submitted that the daughter is not in illegal custody. It is contended that the wife had left the petitioner when the daughter was 3 years of age and now after a period of 5 years, the petitioner is claiming the custody of the daughter. It is urged that the proceedings have been initiated with a view to harass the wife and her father. It is also pointed out that the amount of maintenance is not paid to the wife and for execution of the judgment passed by the family court, the execution proceedings have been initiated. Therefore, no interference is called for in this proceeding.

10. We have considered the rival submission made on both sides and have perused the record. At the outset, we may deal with the issue pertaining to maintainability of the writ petition. In **TEJASWINI GAUD AND OTHERS** supra, the Hon'ble Supreme Court has held as under:

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.

11. In **YASHITA SAHU** supra, the Hon'ble Supreme Court has held as under:

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 vs. Arvand M. Dinshaw & Ors.¹, Nithya Anand Raghavan vs. State (NCT of Delhi) & Anr. ² and Lahari Sakhamuri vs. Sobhan Kodali³ 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. In **RAJESWARI CHANDRASEKAR**

GANESH supra, the Hon'ble Supreme Court has held as under:

91. *Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its minor ward, and the very nature and scope of the*

inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as parens patriae, has in promoting the best interests of the child.

13. In view of the aforesaid enunciation of law by Hon'ble Supreme Court, it is evident that in child custody matters, when the child is in custody of one of the parents, a writ of habeas corpus is maintainable. Therefore, the contention urged on behalf of the wife that the writ of habeas corpus is not

maintainable does not deserve acceptance. Accordingly, it is repelled.

14. A division bench of this court vide judgment dated 31.01.2023 passed in M.F.A.No.2786/2022 while upholding the judgment dated 03.03.2022 passed by the family court, by which petitioner was appointed as guardian, has directed the wife to hand over the custody of the minor after completion of annual final examination for academic year 2022-23. The final examination of the daughter as per version of the wife, has concluded on 13.03.2023. However, notwithstanding the fact that judgment of this court has upheld by Hon'ble Supreme Court vide order dated 29.03.2023 passed in SLP No.4869/2023, the wife is continuing with the custody of the daughter, which is not permissible on account of judgment dated 31.01.2023 passed in MFA No.2786/2022, which has been upheld by Hon'ble Supreme Court

vide order dated 29.03.2023 passed in SLP No.4869/2023.

15. It is pertinent to note that on 19.04.2023, a division bench in this writ petition had directed issuance of Non Bailable Warrant, which was challenged in SLP No.19469/2023. The Hon'ble Supreme Court by an order dated 16.05.2023, recorded undertaking furnished on behalf of the wife that she will remain present before this court along with the daughter. Thereafter, Hon'ble Supreme Court directed that no coercive steps shall be taken against the wife. Thereafter, another division bench of this court by an order dated 27.04.2023 inter alia held that the wife is trying to evade the process of the court and she does not intend to appear until coercive steps are taken. It was further held that her action amounts to abuse of judicial process.

16. Thereafter, by an order dated 09.05.2023, a bench of this court inter alia held that wife has not handed over the custody of the minor child to the petitioner and is also avoiding service of Non Bailable Warrant. It was further held that despite best effort made by the police authorities including the police authorities at Delhi, the wife is not traceable. A bench of this court therefore, issued several directions to secure the presence of the minor child. The court also directed initiation of civil and criminal contempt proceeding against the wife. The aforesaid conduct of the wife amounts to abuse of process of law and cannot be countenanced.

17. In the circumstances aforesaid, the wife cannot be permitted to continue with the custody of the daughter as the same is in contravention of judgments of the court, which have attained finality

and is binding on the parties. We therefore, issue following directions:

(i) The Commissioner of Police, Bangalore shall ensure that concerned Station House Officer hands over the custody of the daughter to the petitioner within 24 hours from the date of receipt of a copy of this order.

(ii) The police is also directed to contact employer of the wife viz., Manipal Health Enterprise Pvt. Ltd. Annexe, Old Airport Road, Bengaluru to hold back all the benefits payable to her till custody of the daughter is handed over.

(iii) The directions contained in the order dated 09.05.2023 relating to initiation of suo motu criminal and civil contempt proceeding shall also be given effect to.

With the aforesaid directions, the petition is disposed of.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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