2023:PHHC:112659

CRWP-8930-2022

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRWP-8930-2022

Date of decision: 28.08.2023

Dr. Honey Chahal and another

....Petitioners

V/s

State of Punjab and others ....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present : Mr. R.S. Rai, Senior Advocate and
Mr. Amit Jhanji, Senior Advocate
With Mr. Rahul Bhargava, Advocate and Ms. Arti Kaur, Advocate and Ms. Eliza Gupta, Advocate for the petitioners.

Dr. Anmol Rattan Sidhu, Senior Advocate with
Mr. Pratham Sethi, Advocate for respondent No.3.

Mr. Vishal Sharma, Advocate and
Mr. S.S. Aviraj, Advocate for respondent No.4.

Mr. Kunal Dawar, Advocate for respondent No.5.

Ms. Guramrit Kaur, Deputy Advocate General, Punjab with
Mr. Mohit Thakur, AAG Punjab.

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ARUN MONGA, J.

Master Agam Pratap Singh (born- 01.11.2019) is alleged to be under unlawful custody. Hence the instant writ petition for issuance of a Habeas Corpus. Relief sought is two-fold; firstly to produce the minor before the Court and secondly to restore his custody to the petitioners (his biologicalparents). Circumstances of Agam of not being in custody of his parents are rather unanticipated viz. his non-custodial biological mother is pitted against her *Bhabhi*- respondent No.3 (wife of brother of biological mother), who is allegedly the captor of her 3 years old minor son Agam and thus keeping him with her as a captive. While,respondent no.3 claims herself to be his custodial adoptive mother since February- 2020, when he was merely 3 months old and asserts that the minor is emotionally bonded with her as son and treats and considers her as the real mother (otherwise she is *Maami* of the minor).

2. Biological mother's case is that in a bid to salvage disintegrating fabric of her own marriage, as well as that of her brother, she took the painful decision to entrust her son Agam's care to her brother and sister in law (respondent No. 5 and respondent No. 3, respectively)in the larger interest of the whole family. She comforted herself with the belief that her own parents (*Naana-Naani of the child)*were since residing with her brother(respondent No.5), they would provide the additional care to her young offspring. She states that she could not even remotely perceive at that juncture that an intricate scheme was then being orchestrated by her husband in collusion with her sister-in-law (*Bhabhi*)-respondent no.3, though later they fell out with each other and respondent no.3 even lodged an FIR against him *inter alia* under Section 307 IPC (alleging that he fired gunshot at her with intent to kill), in which he is currently on bail. At the relevant time, however, they had conspired to deprive the biological mother of her son by creating an adoption deed,which she was made to sign under coercion. The adoptive father-her brother, though had better sense, and he did not sign the deed, and thus there is no legal adoption. Consent of adoptive father is a must and, lack thereof renders the so-called adoption deed as *non est* and nullity, is the stand of the parents/petitioners.

2.1. While on the other hand, respondent no.3-the adoptive mother i.e. sister-in-law of biological mother, whose own marriage is now on the rocks, claims that there is a valid adoption of Agam. Regardless of the deed not having been signed by adoptive father, the adoption attained finality upon delivery of the minor to the adoptive parents, before they got separated. Handing over of the child waswith the consent of biological parents.Both the adoptive parents also consented to it and therefore, she (respondent No. 3) is the legal custodian/guardian of Agam. Writ petition is liable to be dismissed.

2.2. Pertinently, adoptive father (respondent no.5) of the minor out rightly denies the stand taken by his wife-adoptive mother. He rather supports the

version of his sister/biological mother. He asserts that he never consented to the adoption and minor is thus in illegal custody of his estranged wife.

3. Having succinctly summed up the case in hand, as above, let us now adumbrate the facts in greater detail, first as pleaded in the petition and then as per the counter affidavits.

3.1 Marriage between petitioners, both practicing as physicians being General Surgeon and Radiologist respectively, was solemnized on 19.08.2017. They are blessed with two children out of their wedlock, elder daughter namely Mehreen born on 18.06.2018 and a son named Agam Pratap Singh born on 01.11.2019. Respondent No.5-Gursagar Singh, an Executive Engineer with government, is real brother of petitioner No.1. He gotmarried to respondent no.3 on 17.11.2013 who is currently serving as Superintendent of Police.They have no child from their own wedlock. They have been living separately sinceNovember-2021 owing to matrimonial differences, though respondent No.3 claims to be living separately from respondent No.5 since June- 2022.

3.2 Petitioner No.1 completed her Masters in General Surgery from DMC, Ludhiana in the year 2016. After her marriage,she joined at GGSMC, Faridkot as a Senior Resident in 2017. Her son Master Agam Pratap Singh remained under her own care and custody from the time of his birth on 01.11.2019 till 13.02.2020. Thereafter, since biological mother, petitioner No. 1 herein, had to proceed for her six months fellowship/course at Galaxy Care Multispecialty Hospital, Pune, her minor son was left under the care of his grand maternal parents (*naana-naani*) in Mansa.

3.3 In the absence of biological mother, on 15.02.2020, respondent No.3,then posted as S.P. Faridkot, forcibly took the custody of the minor from his maternal grand-parents,notwithstanding, that her husband/respondent No.5was averse to it. While natural mother was in Pune, there was a global pandemic due to Covid-19. Nation-wide lockdown was declared and travelling restrictions were

imposed in the entire country. Respondent No.3 then took a stand that she would return the minor child when both the natural parents, pursuing their respective professional career/course, would return. Petitioners, in the larger interest of maintaining family relations and in the pandemic scenario, permitted custody of minor child with respondent no.3. After relaxation of lockdown and completion of her fellowship course, petitioner No.1 tried to contact respondent No.3 and her brother respondent No.5, to meet her son but all her efforts were frustrated on one pretext or the other.

3.4. On 26.10.2020, when petitioner No.1 went to take the custody of her son, she was assured that on his first birthday i.e. on 01.11.2020, she would be given the custody. However, on the occasion of first birthday of child, respondent No.3 did not keep her word and flatly refused to hand-over the child. On the assurance of respondent No.5, natural mother left the premises hoping that better sense would soon prevail. The child remained with respondentNo.3 despite various attempts by the petitioner to get the child back. The behavior of respondent No.3 was also rude towards petitioners. She also turned hostile towards her husband when he tried to persuade her to return the child. She misused her official position and threatened the petitioners with dire consequences, in case they insist to take the custody of the minor child.

3.5. Feeling helpless and in order to end the stalemate, petitioner requested respondent No.4 (real brother of respondent no.3)to intervene. He then arranged a meeting of petitioners with respondent No.3 at her official residence on 26.04.2022. When they went there, petitioners were surprised that respondent No.3 had already prepared an adoption deed. They were asked to come to Sub Registrar Office, Samrala Chowk, Ludhiana to sign it otherwise, they would be implicated in a false case. When petitioners refused to sign, respondent No.3 publicly abused and threatened them.

3.6. Petitionersalso filed a complaint against respondent No.3 on 26.04.2022, in the office of Commissioner of Police, Ludhiana about the aforesaid incident. Same was also captured in CCTV cameras installed in the Sub Registrar office, Ludhiana. Later, petitioners were called in the office of Commissioner of Police, Crime. When petitioner No.1 along with her brother were coming out of the office of Commissioner of Police, she received a message that her husband i.e. petitioner No.2 was detained by a gunman of respondent No.3 and would be released only after the withdrawal of complaint against her. Petitioners were further threatened by respondent No.3 to sign the Adoption deed and on refusal, she would kill the child and deprive them of his custody. Petitioners were terrified by the conduct of respondent No.3 and left the office of Commissioner of Police.Later on, under coercion, petitioners withdrew their complaint against her by way of a written application on 27.04.2022. Respondent No.3, even thereafter continued to threaten petitioners for having not signed adoption deed.

3.7. In the atmosphere of fear created by respondent No.3, a meeting was again arranged by respondent No.4-Parandeep Singh, nephew of respondent No.3, at Mini Secretariat, Ludhiana where petitioners were forced to sign the Adoption deed without permitting them to read the same in the presence of two self created witnesses. However, respondent No.5, who was adoptive father of the minor child did not come to sign, as he was against the said adoption. Feeling offended, respondent No.3 rebuked her husband respondent No.5-Gursagar Singh and threatened him to divorce him. Though respondent No.5 refused to sign the Adoption deed, but petitioners were forced to sign their individual affidavits dated 25.05.2022 in order to create documentary evidence that they have no objection to adoption.

3.8 On 29.05.2022, petitioner No.1 received a call from SHO Police Station Model Town, Hoshiarpur that a complaint had been filed against her by respondent No.3 for harassment and issuing threats. On 31.05.2022 petitioner

No.1 went to the said police station and denied the allegations made in the complaint.

3.9. Under these circumstances and seeing the conduct of respondent No.3, her husband Gursagar Singh-respondent No.5 later filed petition under Section 13 of the Hindu Marriage Act, 1955 for divorce in the Family Court at Talwandi Sabo, District Bathinda on the ground of mental and physical cruelty. It is pleaded in the said petition that respondent No.3 has made his married life a hell. Various specific acts of her mental and physical cruelty, including illegal unilateral adoption of his sister's minor son,have been narrated therein.

4. On the other hand, Respondent No.3, the adoptive mother, deposes that the petition lacks merit as it has been filed with vital facts deliberately suppressed. Respondent No.3 states that a person approaching the court with unclean hands should not be heard or granted any relief. She states that an agreement was reached between the two families that the child of the petitioners would be adopted by her and her husband, as they were unable to have children of their own. Respondent No.3 asserts that the custody of the petitioners' second child was handed over to her and her husband according to mutual understanding and after adoption ceremonies, supported by a certificate from Gurudwara Sahib Tilla Baba Farid, Faridkot. They celebrated the child's birthdays and even executed an adoption deed in year 2022. The child was enrolled in school and affidavits of biological parents, confirming the adoption were exchanged. However, the matrimonial relationship between respondent No.3 and her husband respondent no.5 deteriorated over time, and that is when petitioners began attempting to regain custody of the child. Respondent No.3 claims that the petitioners resorted to aggressive tactics, even resorting to violence, to forcibly take custody of the child. An FIR under Sections 307, 323, 342, 336 and 506 of IPC read with Sections 25,27 and 30of Arms Act was registered at the instance of respondent No.3

regarding an incident where the petitioners allegedly assaulted her and attempted to take the child's custody. Petition is thus liable to be out rightly dismissed.

5. Whereas, respondent No.5-husband of adoptive mother, has taken a contradictory stand vis-à-vis his wife. He not only contradicts his wife but he has in fact taken astand completely supportive of the biological mother. He states in his affidavit dated 17.04.2023 (Annexure R-5/1) that his wife-respondent No.3 has illegally kept the custody of child Agam Pratap Singh and he has never consented to adopt the child and the claims made by respondent No.3 are totally false. He further asserts that his photographs produced by respondent no.3 showing an adoption ceremony are also false as on alleged date i.e., 12.02.2020, no such ceremony took place in the Gurudwara.

5.1. Respondent No.5 has appended RTI information (Annexure R-5/3) and asserts that he did not avail any leave from his work during the month of February-2020 and his attendance for the month of February-2020 vouches for this fact. He thus deposes that, the fact that he had not availed any leave in the month of February- 2020 falsifies his presence in any the purported adoption ceremony as projected by respondent No.3.

5.2. Respondent No.5 avers that there is a serious matrimonial discord between him and respondent No.3 and there are no chances of any amicable settlement between them.

6. In the back-round of the aforesaid pleadings, I have heard rival contentions of learned counsels for the parties and perused the case file.

7. Initiating arguments, Mr. Amit Jhanji, learned senior counsel for the petitioners urges that, being the biological parents of the minor/detenu, petitioners are the natural guardians in view of Section 6 of the Hindu Adoptions and Maintenance Act, 1956 (“for short ‘the Act’).

7.1 Referring to the proviso of Section 8 of the Act, learned senior urged that the same clearly envisages that any female Hindu,if she has a husband living,

she shall not adopt a son or daughter except with the consent of her husband, unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. In the instant case, husband of respondent No.3 does not fall in any of the disqualifications *ibid*and it is a clear case of non-consent by the husband, thus contends the learned senior counsel.

7.2 He further submits that respondent Nos.3 and 5 are estranged couple and there is a conceptual and contextual difference between a divorced woman and one who, without divorce,is leading life like a divorced woman. Both cannot be equated. In support of his argument, he relies on the Apex Court in *Brajendra Singh vs. State of Madhya Pradesh*[1].

7.3 Learned senior counsel for the petitioners asserts further that the factual position which is not disputed goes to show that petitioners, who are the biological parents and natural guardian of the detenu, are deprived of the custody of their minor child. Respondent No.3 is exploiting her position as a serving S.P. and putting pressure on petitioners not to claim custody of the child. She was even instrumental in registration of an FIR, *inter alia* under Section 307 IPC, against the petitioners, for which they had to seek bail. Respondent No.3 mischievously invoked stringent Section under IPC, in her endeavor, to merely put petitioners in custody/jail.

7.4. On merits, learned senior counsel submits that valid adoption never took place. The adoption deed does not have the consent or bear the signature of the respondent No.5 (husband of respondent No. 3). In the absence of the consent of the adoptive father, the adoption cannot be taken cognizance of, and the custody of the minor child with respondent no.3 is thus illegal. Resultantly, a writ petition seekinghabeas corpus would be maintainable.Mere retention of temporary custody of the child with respondent no.3 does not give a license to her to retain the custody forever, is the argument.

[1] (2008) 13 Supreme Court Cases 161

7.4 To fortify his case, learned senior counsel relies upon Supreme Court judgment in*Tejaswini Guard and others vs. ShekharJagdish Prasad Tewari and others*[2]wherein, in somewhat similar circumstances issuance of a writ of habeas corpus was sought and it was held in the following terms:

> *"32. In the case at hand, the father is the only natural guardian alive and has neither abandoned nor neglected the child. Only due to the peculiar circumstances of the case, the child was taken care of by the appellants. Therefore, the cases cited by the appellants are distinguishable on facts and cannot be applied to deny the custody of the child to the father.*
>
> *33. The child Shikha went into the custody of the appellants in strange and unfortunate situation. Appellants No.1 and 2 are the sisters of deceased Zelam. Appellant No.4 is the husband of appellant No.1. All three of them reside at Mahim, Mumbai. Appellant No.3 is the married brother of Zelam who resides in Pune. During the fifth month of her pregnancy, Zelam was diagnosed with stage 3/4 breast cancer. Zelam gave birth to child Shikha on 14-08-2017. On 29-11-2017, respondent No.1 collapsed with convulsions due to illness. Upon his collapse, he was rushed to hospital where he was diagnosed with Tuberculosis Meningitis and Pulmonary Tuberculosis. He was kept on ventilator for nearly eight days, during which period, appellants took care of Zelam and the child. The first respondent had to undergo treatment in different hospitals for a prolonged period. From 29-11-2017 to June 2018, Zelam and Shikha stayed at the residence of appellant's in Mumbai. During this period, Zelam underwent mastectomy surgery. Zelam later relapsed into cancer and decided to get treatment from a doctor in Pune and therefore, shifted to appellant No.3's house at Pune with Shikha and Zelam passed away on 17-10-2018. After recovering from his illness, the respondent visited Pune to seek custody of the child. But when they refused to hand over the custody, the father was constrained to file the writ petition seeking custody of the child. The child Shikha thus went to the custody of the appellants in unavoidable conditions. Only the circumstances involving his health prevented the father from taking care of the child. Under Section 6 of the Act, the father is the natural guardian and he is entitled to the custody of the child and the appellants have no legal right to the custody of the child. In determining the question as to who should be given custody of a minor child, the paramount consideration is the `welfare of the child' and not rights of the parents under a statute for the time being in force.*

[2] (2019) 7 Supreme Court Cases 42

34. As observed in Rosy Jacob[3] earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian, child's ordinary comfort, contentment, health, education etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.

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 neutralized with the passage of time. However, till the child is settled down in the atmosphere of the first respondent-father's house, the appellants No.2 and 3

[3]*Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840*

> *shall have access to the child initially for a period of three months for the entire day i.e. 08.00 AM to 06.00 PM at the residence of the first respondent. The first respondent shall ensure the comfort of appellants No.2 and 3 during such time of their stay in his house. After three months, the appellants No.2 and 3 shall visit the child at the first respondent's house from 10.00 AM to 04.00 PM on Saturdays and Sundays. After the child completes four years, the appellants No.2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11.00 AM to 05.00 PM and shall hand over the custody of the child back to the first respondent-father before 05.00 PM. For any further modification of the visitation rights, eitherparties are at liberty to approach the High Court.*

In view of the ratio of aforesaid judgment,custody of the child with the respondent no.3 in this case is illegal, is the contention.

7.5 On a court query, learned senior counsel concedes that though Adoption deed is not mandatory, butcontends that the ceremonies of Adoption are a *sine qua non.* Samemust be proved to have taken place.In the instant case, respondent No.3 has miserably failed to establish/prove that any ceremony of adoption indeed took place.

7.6. In the course of hearing, Mr. R.S. Rai, learned senior counsel, under instructions of briefing counsel and petitioner No.1-Dr. Honey Chahal present in court in person, in the passing reference also pointed out toWhatsApp exchange between petitioner No.2and respondent No.3. Aforesaid WhatsApp exchange was placed on record in course of hearing and marked Annexure-"A". He would arguethat a bare look at thesame is reflective of the fact that at that time relationshipbetween two of them wasinappropriate and it is in these circumstances that they had then colluded to deprive the biological mother -petitioner No.1, of the custody of her son by projecting that it was in the welfare of the minor to leave him with respondent No. 3 since at that time, she was busy. He would argue that the petitioner no.1 was in absolute dark as to what was going on stealthily behind her back between respondent no.3 and her husband. She was rather made to feel guilty and marginalized by petitioner no.2 that he, out of his love and affection for

her brother, was going out of his way to provide him (herbrother) and the latter's wife the bliss of being parents since they could not have child of their own. Whereas, petitioner no.1 was made to feel she was blocking the same, against the interest of her own brother. It was thus that petitioner No.1 took a call in the galling, though eventually the adoption never materialized legally. Had she known the truth, she would have never allowed even the parting of her son from her care. Be that as it may, given the limited scope of controversy in hand, it is not for me to look into and comment upon the veracity of any such allegations and/or validity of the WhatsApp exchange. The same is left open to be adjudicated by competent Court below, if and when any such stand or objection is so taken.

8. Mr. Kunal Dawar, learned counsel for respondent No.5, husband of respondent No.3, supports the stand taken by the petitioners. He submits that prior to the enactment of Hindu Adoption and Maintenance Act, 1956, female had no right to adopt a child. Even after its enactment in 1956 and till 2010, the female could not adopt the child without the consent of her husband. Further, even after the amendment of the Act, in 2010, the right of female to adopt is subject to fulfillment of conditions specified in the proviso of Section 8 of the Act and is not her absolute right. Consent of the adoptive father is *sine qua non*as per section 8 *supra* just like the consent of wife in envisaged under Section 7 of the Act. He *inter alia* relies on Supreme Court judgment rendered in *Ghisalal vs Dhapubai*[4]. Relevant paras thereof are as below :-

> *"26. The term `consent' used in the proviso to* Section 7 *and the explanation appended thereto has not been defined in the Act. Therefore, while interpreting these provisions, the Court shall have to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to* Section 7 *should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject matter of challenge before the Court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by*

[4] SC 2011 (2) SCC 298

leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the Court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption.

x-x-x-x-x

45. In view of the above discussion, we hold that the concurrent finding recorded by the trial Court and the lower appellate Court, which was approved by the learned Single Judge of the High Court that Gopalji had adopted Ghisalal with the consent of Dhapubai is perverse inasmuch as the same is based on unfounded assumptions and pure conjectures. We further hold that Dhapubai had succeeded in proving that the adoption of Ghisalal by Gopalji was not valid because her consent had not been obtained as per the mandate of the proviso to Section 7 of the 1956 Act. As a corollary, it is held that the suit filed by Ghisalal for grant of a decree that he is entitled to one half share in the properties of Gopalji was not maintainable and the findings recorded by the trial Court, the lower appellate Court and/or the High Court on the validity of Gift Deeds dated 29.11.1944 and 22.10.1966, Will dated 27.10.1975 executed by Gopalji in favour of Dhapubai and Sale Deed dated 19.1.1973 executed by her in favour of Sunderbai are liable to be set aside.

46. In the result, Civil Appeal Nos.6375-6376 of 2002 are allowed. The judgments and decrees passed by the trial Court, the lower appellate Court and the High Court are set aside and the suit filed by Ghisalal is dismissed. As a sequel to this, Civil Appeal Nos.6373-6374 of 2002 are dismissed. The parties are left to bear their own costs."

Pertinently, I may like to observe here that, the judgment *ibid* is in a case where after trial, first appeal and second appeal, Supreme Court was seized of and dealt with the judgments rendered by courts below.

9. Per contra, Dr. Anmol Rattan Sidhu, learned senior counsel for respondent No.3 vehemently opposes the prayer made and submits that it is for the Guardian/Civil court to decide the rival contention of both the parties for and against factum and the validity of adoption and this Court cannot delve deep into the contentious claim which would require extensive trial. He further submits that thechild was validly given in adoption. Petitioners cannot now turn around and plead that the child is in illegal custody. The child was validly adopted and after

adoption the biological parents have severed ties with the child. He further submits that once a valid adoption has been made it cannot be revoked. He relies on Supreme Court judgments in case titled *Param Pal Singh vs. National Insurance Company and another*[5] and *Lakshman Singh Kothari vs. Rup Kanwar (Smt.) @ Rup KanwarBai*[6].

10. Mr. Vishal Sharma, learned counsel for respondent No.4 submits that petitioners and respondent No.5 have joined hands to frustrate the rights of respondent No.3 who had validly adopted the child. In any case, there are disputed facts involved in the case, which this Court cannot adjudicate in the limited scope of a habeas corpus petition. He relies upon para Nos. 110 to 112 in particular, of a Division Bench judgment of this Court in *Richa Gupta vs. Union of India and others*[7], which for ready reference are reproduced herein below:

> *(110). In the instant case, the documents in support of claim and counter claim by both the parties relied upon are not trustworthy. The photographs Annexure R-7/1 only depicts handing over the child by the biological motherpetitioner to the sister of respondent No.7 and no one else is present there. The affidavit alleged to be given by the petitioner is on a stamp paper purchased on 05.09.2019 but was got signed and notarized on 06.01.2020 i.e. much later to the adoption deed. Once the adoption deed dated 03.12.2019 stands executed where there was no occasion to have an affidavit executed subsequent to that date on 06.01.2020 showing the purchase of stamp paper from Happy, Stamp Vendor despite the fact that the alleged adoption deed stands registered on 03.01.2019 though it was also on a stamp paper purchased on 05.09.2019 itself but from a different stamp vendor namely Sartaj Singh Sodhi.. Even further the date of birth certificate produced by both the parties are totally distinct and contrary as one date of birth certificate relied upon by the petitioner shows place of birth as Government Medical College and Hospital, Chandigarh with date of birth 31.05.2019 showing permanent address as 52, Bharpur Garden, Patiala, Punjab, issued on 01.06.2019 by the Sub Registrar (Birth and Death), GMCH, Sector 32, Chandigarh whereas, respondent No.7 puts reliance upon a date of birth certificate issued by Government of NCT, Delhi, India, North Delhi Municipal Corporation dated 21.01.2020 and date of issue as 25.03.2021 with place of birth A-2/145, Sector 18, Rohini, Delhi, which seems to be actually used misleading the passport authority with the sole purpose of taking the child abroad by wrongful means having got a passport issued on 22.01.2020 with the expiry date to be 21.01.2025 (Annexure R-7/8). Once the afore-said circumstances are raising serious doubts and*

[5] 2013(3) SCC 409
[6] 1962 (1) SCR 477
[7] CRWP-820-2020, decided on 29.05.2023

suspicion before this Court, the execution of alleged deed by no stretch of imagination could be termed to be without any pressure fear or coercion, meaning thereby, the issue involved disputed facts which cannot be adjudicated by this Court while exercising writ jurisdiction that too, for a limited purpose for issuing writ of habeas corpus, wherein, the utmost and essential element needs to be proven by either of the parties demonstrating that the custody of the child is illegal or legal.

x-x-x-x-x-x

(112). However, the petitioner is at liberty to dispute the validity of alleged adoption deed before the appropriate forum of law and in case any such petition is preferred by the petitioner or through the authorized person of the petitioner, the concerned court shall decide the same expeditiously, preferably within six months from the date of filing of the said petition. This view of ours also derive strength from the Apex Court judgment while exercising criminal appellate jurisdiction in Criminal Appeal No. 838 of 2019 "Tejaswini Gaud and others vs. ShekharJagdishParsadTiwari and others" wherein, it was held that 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 Guardian 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 inquiry under the Guardian 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 inquiry is required the Court may decline to exercise the extra ordinary jurisdiction and direct the parties to approach the Civil Court."

11. Before proceeding further, it is also apt to refer to Articles 485, 486 and 487 of 21st Edition of Mulla Hindu Law under the Chapter IV titled 'Act of Adoption and Ceremonies Incidental to it'. The same are extracted herein below:

485. Ceremonies relating to adoption-(1) *The ceremonies relating to an adoption are:*

(a) the physical act of giving and receiving, with intent to transfer the boy from one family into another;

(b) the dattahomam, i.e., oblations of clarified butter to fire; and

(c) other minor ceremonies, such as putresti jag (sacrifice for male issue).

(2) The physical act of giving and receiving is essential to the validity of an adoption.

As to data homam, it is not settled whether its performance is essential to the validity of an adoption in every case.

As to the other ceremonies, their performance is not necessary to the validity of an adoption.

(3) No religious ceremonies, not even dattahomam, are necessary in the case of Sudras, nor are religious ceremonies necessary amongst Jains or in the Punjab.

> ***486. Giving and receiving:-****(1) The physical act of giving and receiving is absolutely necessary to the validity of an adoption. This is not only in the case of the twice-born classes, but also in the case of Sudras. This ceremony is of the essence of adoption, and the law does not accept any substitute for it. Mere expression of consent, or the execution of a deed of adoption though registered, but not accompanied by an actual delivery of the boy, does not operate as a valid adoption. To constitute giving and taking in adoption all that is necessary is that there should be some overt act to signify the delivery of the boy from one family to another.*
>
> *No particular form is prescribed for the ceremony, but the law requires that the natural parent should hand over the adoptive boy and the adoptive parent should receive him. The nature of the ceremony may vary depending upon the circumstances of the case. However, the ceremony of giving and taking should necessarily be there. In case of an old adoption, strict proof of the performance of the ceremonies may not be available. An adoption acquiesced in and recognized for an number of years by the person making the adoption and a long course of recognition on the part of persons who would be expected to know of the fact and who were best acquainted with the circumstances, can give rise to the inference that the conditions relating to the adoption were fulfilled.*
>
> *(2) Diverse circumstances may necessitate that the act of actual giving or taking should be delegated to a third person and therefore, the parents after exercising their volition to give and take the boy in adoption, can both or either of them delegate the physical act of handing over the boy or receiving him by way of adoption to a third party.*
>
> *However, the power (or right) to give a son in adoption cannot be delegated to any person. The delegation can only be of the physical act mentioned above. Accordingly, the father or mother may authorize another person to perform the physical act of giving a son in adoption to a named person and can delegate someone to accept the child in adoption on his or on her behalf.*
>
> ***487. Dattahomam,-(1).*** *Dattahomam is not essential in the case of an adoption in the twice-born classes when the adopted son belongs to the same gotra as the adoptive father. There is a conflict of opinion whether the same is necessary in other cases."*

12. There is no quibble about the proposition that no particular form is prescribed for the adoption ceremony. *Prima facie* all that is required is that natural parents should handover the adoptive child and the adoptive parent should receive him. In the instant case, the adoptive child was concededly handedover physically to respondent No.3 and 5 by biological parents, though biological mother's case is that she was tricked into it.Another major dispute, however, also remains as to whether the consent of adoptive father was there and if not, whether the adoptive mother had the capacity to adopt the minor child in the absence of consent of her husband.

13. Be that as it may, writ of habeas corpus is issued with the primary purpose of protecting an individual's freedom. It is an efficacious remedy to promptly release individuals from illegal or inappropriate confinement. Legal mechanism of habeas corpus is also resorted in situations where a minor is wrongfully/forcefully removed from the custody of his lawful guardian. In such instances, the writ can be employed to mandate the return of the minor to the person who holds the legal right to guardianship. To that extent, this court possesses the limited jurisdiction to step in and reinstate the custody of minor in such a case.

14. In the case in hand, dispute *inter se* petitioners and respondent No.3 is with regard to custody of minor Master Agam Pratap Singh. Respondent No.3, who is sister-in-law of petitioner No.1, was issueless, she was entrusted the custody of minor Agam. Her case is that all the necessary ceremonies for adoption of the minor were performed. As the relations between respondent No.3 and her husband-respondent No.5 subsequently turned sour, it resulted into a collateral custody dispute of the minor Agam as well.

15. Petitioner No.1 claims that shemade various attempts to contact her minor son Agam, but all her efforts were frustrated by respondent No.3 on one pretext or the other. As respondent No.3 holds a grudge against the petitioners, she in utter abuseof her influence and power, registered false case against the petitioners and issued a number of threats for not signing the adoption deed. It is the assertion of petitioner No.1 that since adoption has never taken place as the so-called adoption deed does not bear the signature of respondent No.5, she should be given the custody of her minor son Agam. She, thus, prays for issuance of a writ in the nature of habeas corpus for the release of her son Master Agam Pratap Singh, who is stated to be in illegal and unlawful custody of respondent No.3. Respondent No.3, on the other hand, claims that the adoption had been completed by following the due process of law and that it cannot be cancelled by

anybody not even by the biological parents, in view of Section 15 of the Act.Once it has been established that petitioners had given the custody of the minor child out of her free will and by executing the deed of adoption in the presence of witnesses duly signed by them, the present petition for habeas corpus itself is not maintainable as the minor child is not in illegal custody. In any case, the petitionershave got alternate efficacious remedy to approach the Guardian Court/Civil Court to get the custody of the minor child.

16. From the rival facts, what thus appears is that dispute is related more qua the adoption of a minor child, rather than determination of legality of his current custody, which can be termed temporary, in view of the cloud on the veracity of adoption. There are conflicting claims and evidencerelated to the adoption of a minor child. Outcome of adjudication on the adoption by the competent Court would ultimately govern the rights to permanent custody.

17. Question is whether in writ jurisdiction this court would give a declaration *qua* trustworthiness/veracity of documents presented. I am of the view that, the credibility of documents submitted by both parties to support their claims and counterclaims regarding the adoption are a matter of trial. Issues raised include the legality, context and admissibility of execution of affidavits and discrepancy thereof with the adoption deed and validity thereof, in the absence of signatures of adoptive father.

18. This Court has got its own Jurisdictional constraints to give any findings qua these issues. The writ jurisdiction is summary in nature and very limited on disputed factual aspects. Issues of child custody and adoption would typically fall under the purview of specific family laws viz. the Hindu Minority and Guardianship Act, 1956 and the Guardians and Wards Act, 1890. No doubt, child's welfare is of paramount importance. But it is nobody's case herein that child is currently suffering from lack of proper care and upbringing. The welfare of the child has to be determined in the facts and circumstances of each case.

Court cannot and ought not to take a pedantic approach. In the present case, the adoptive mother has neither abandoned the child nor has deprived the child of a right to her motherly love and affection for him. It is not even the case of the petitioners that the adoptive mother is physically, financially or mentally unfit to take care of the child.

19. The parents assert that they have not relinquished their rights over their minor son and it was merely due to their preoccupation that the respondent No.3, by their consent, took care of the child for a certain period. Such temporary arrangement should not automatically translate into her permanent custody rights. However, their individual affidavits and other documents including deed signed by them is not suggestive of such assertions. Rival claims require careful consideration of evidence by a trial court which cannot possibly be done within the limited jurisdictional boundaries of this Court.Only once the accuracy of documents presented as evidence is established, that the same would play significant role. It is, therefore, all the more imperative to ensure a fair trial for both parties to arrive at a just resolution. Till the same is done, it is necessary to prioritize the welfare of the child in question. Courts prioritize the best interests of the child above all else, which entails not only his immediate circumstances, but also the child's long-term well-being, emotional development and stability. No doubt, biological parent's fitness to seek restoration of their minor to them is not under cloud in any manner. Their right of recovery and ability to care for the child is to be equally protected. Same is in line with the general principle that it has to be the biological parents, who should be provided the opportunity to raise their child, unless there are serious reasons to believe otherwise.

20. This Court's role in such a case is limited to examining the affidavits and determining whether a trial is required. If answer is in affirmative, the parties have to then approach a civil court, as opposed to making a determination based

solely on affidavits in writ jurisdiction.No doubt till adjudication and crystallization of the final *inter se* rights welfare of the child must be ensured.

21. In the premise, since the case involves determination of highly disputed questions of facts raised by the petitioners and respondent No. 3 against and for the validity of adoption of the minor child,for their determination, it is necessary that the parties get adequate opportunity of leading elaborate oral and documentary evidence and the same is tested on the anvil of cross-examination. In the writ court, rights are determined only on the basis of affidavits. I am of the opinion thatin the peculiar facts and circumstances of the case,it would be appropriate to direct the petitioners to approach the Civil Court for adjudication of their claim to the custody of the child.

22. Accordingly, partiesare relegated to seek their remedy by filing appropriatepetition/proceedings in the competent Court to seek adjudication on the claim of respondent No. 3 about adoption of the minor child. Both or either of petitioners and/or even respondent No. 3 may, therefore, avail the remedy for adjudication of their respective rights to keep the custody of the minor child by filing appropriate petition/proceedings in the competent Court.

23. In case any such petition/proceedings are initiated by respondent No. 3 separately, the same shall be transferred, if necessary, to the competent Court,whose jurisdiction is invoked by the petitioners. The Court shall club and try the cases together. The pleadings therein shall be completed within a period of one month of their filing. Thereafter the trial shall proceed in accordance with law. All endeavors shall be made by the Court for hearing on day-to-day basis if possible, and in case the same is not possible and adjournment is inevitable, such adjournment shall not be granted beyond three days and the entire trial shall be concluded and final order shall be passed expeditiously but in any case not later than within a period of four months. If requested by either of parties claiming

rights for the minor's custody, the proceedings of the Court, including the recording of evidence, shall be held through video conferencing.

24. The Court is informed that till date, no steps have been taken by either side by filing any petition to establish their rival claims for the minor's custody. In the course of hearing, this Court made an endeavor for an amicable way-out till the rights of parties for the minor child's custody are crystallized in accordance with law by the competent Court. This Court had suggested that biological parents be given the visitation rights to meet her son on every weekend. While the said suggestion was acceptable to the adoptive mother but the biological mother could not persuade to agree to the same. She wanted full custodial rights of her son and rather suggested that she would allow adoptive mother be given the visitation rights.

25. Court is also informed that petitioner No. 2, the biological father of the minor child, is presently out of India on one year fellowship in USA for a super specialized course in Radiology. Be that as it may, in the larger interest of welfare of the child and in fairness to thecontesting parties herein, taking guidance from the Apex Court judgment rendered in **Tejaswani Gaud**s *ibid,* it is directed that, as an interim measure, the adoptive mother shall allow the biological parents to have the visitation rights *qua* the minor child, Master Agam Pratap Singh on every weekend. For this, respondent No.3 will ensure that the minor is dropped on every Saturday by 11:00 a.m. at the residence of petitioner No. 1-Dr. Honey Chahal. Likewise Dr. Honey Chahal shall ensure that on every next Sunday the minor is dropped back at the residence of respondent No.3 by 06:00 p.m.The child is stated to be enrolled in a school/play school. It is not clear if school is five or six days in week. Assuming, it is six days, given that child is at nursery/kindergarten level, no harm would be caused if for few months he does not attend the school on Saturdays on the weekends. Parties are directed to comply with the direction of this court in mutual spirit of give and take by keeping their differences aside and

in the larger interest of welfare of the child. They all must make earnest collective endeavour to ensure that the minor is not subjected to any distress or anguish on their account, which may lead to him being inconsolable, given his tender age. State and concerned SSP are since arrayed as respondents herein, they are also directed to ensure the compliance. Should the unlikely situation arise,parties are at liberty to seek police assistance for enforcement of the interim arrangement. But it shall be ensured that only lady officials, that too in plainclothes and not in the police uniform are deputed for the purpose.

26. The petitioners shall initiate appropriate proceedings before the competent Court within two months from today for adjudication of their claim to the custody of the child. The aforesaid interim arrangement shall continue until adjudication of the rights of the parties by the competent Court before whom the proceedings are initiated by petitioners. If petitionersdo not initiate the appropriate proceedings before the competent Court within twomonthsfrom today for adjudication of their claim to the custody of the child, the aforesaid interim direction affordingweekly visitation rights in respect of the minor child shall stand vacated.

27. In the parting, I may hasten to add here that, as to which of the claimants would finallyget the permanent custody would naturally depend on the adjudication of their rival claims by the competent court. As of now, the interim arrangement,as above, is being directed keeping in mindthe paramount consideration of welfare of the child and, to obviate a situation in future where the child should not be made to feel as if he is being forcibly taken from one to the other, leaving him wailing and crying just to enforce decree of the court. It is thus imperative that the child develops an emotional bond and a *bonhomie* with both sets of families by forging a genuine camaraderie, for which all the parties shall render mutual co-operation.

27. Any observations made and/or submissions noted hereinabove shall not have any effect on merits of the case as the same are only for the purpose of interim arrangement made herein above and welfare of the child. The Court trying the claims below shall proceed without being influenced with this order.

28. Pending application, if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

August 28, 2023
Ajay

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No

As I just pronounced the above judgment in open court, learned counsel representing the petitioners and the respondent no.3 to 5, are all present in Court, and after consulting their respective clients, they are all *ad idem* that proposed case/s, as stated in the judgment *supra*, shall be filed in Chandigarh, a neutral place for all, and none of the parties shall raise any objection qua the territorial jurisdiction thereof. Accordingly, on joint request, liberty is granted to file the case/s in Chandigarh and right to raise any objection *qua* the same by any of the parties shall stand waived off. Considering that respondent no. 3 holds a senior position as a police officer in Punjab, this decision on joint consent will help alleviate any concerns the petitioners might have about her being an influential individual. This Court appreciates the fair and considerate outlook shown by all the learned counsel.

(ARUN MONGA)
JUDGE

August28, 2023
Ajay