

**IN THE HIGH COURT OF MADHYA PRADESH AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE VIVEK RUSIA

ON THE 10th OF MARCH, 2022

WRIT PETITION No. 5205 of 2022

Between:-

SMT. ALKA SHARMA

1.

SHRI SATISH SHARMA

2.

.....PETITIONER

(BY SHRI KIRTI SABOO, LEARNED COUNSEL FOR THE PETITIONER)

AND

1. THE STATE OF MADHYA PRADESH THROUGH SECRETARY 3RD
FLOOR, VALLABH BHAWAN, BHOPAL (MADHYA PRADESH)
JYOTI SHARMA V
2

SHRI SANTOSH SHARMA

3.

.....RESPONDENTS

*This petition coming on for admission on this day, the court
passed the following:*

O R D E R

The petitioners have filed the present writ petition under Article 226 of the Constitution of India seeking a writ of habeas corpus securing the custody of their child from the custody of respondents no.2 and 3.

2. Facts of the case in short are as under:-

i. Petitioner no.1 and 2 are husband and wife. Respondent no.2 and 3 like wise, are also husband and wife. Petitioner no.2 and respondent no.2 are real brothers and sisters. Petitioner no.1 gave birth to first son Naitik on 10.12.2007, second son Govind@

Suryansh Sharma on 20.04.2009 and third son Piyush on 20.03.2010. Since respondents no.2 and 3 were not blessed with a child, therefore, petitioners have decided to give their second son Govind to them till respondent no.3 gives birth to her own child. In the year 2010 respondents no.2 and 3 were blessed with a baby girl and both Govind and baby girl grew together. Petitioners used to visit the house of the respondents to meet Govind. All of a sudden behaviour of respondent no.3 becomes rude with the petitioners and stop permitting them to with their own son Govind @ Suryansh Sharma. Accordingly to the petitioners when they insisted on returning Govind @ Suryansh Sharma, respondents no.2 and 3 have agreed to return the custody by demanding Rs.20,00,000/-. Petitioners sent a legal notice on 14.12.2020, made a complaint to the Collector on 09.02.2021. They tried to lodge a report at police station Dwarkapuri on 19.03.2021 but have failed. They also filed an application under section 97 of Cr.P.C. before the S.D.M. for issuing of a search warrant for their minor child but the same was dismissed.

ii. Meanwhile petitioner no.1 has filed a civil suit against respondent no.3 in respect of the sale of the ancestral house. Vide order dated 18.11.2021 a temporary injunction has been granted in favour of petitioner no.1.

iii. Now petitioners are before this court seeking a writ of habeas corpus that their son Govind @ Suryansh Sharma alleging his illegal custody with respondent no.2 and 3 , the corpus be produced before this court.

3. Learned counsel for the petitioner has argued at length and placed reliance over judgment passed by the Apex Court in the case of *Tejaswini Guad V/s Shekar Jagdish Prasad Tiwari* reported in *(2019) 7 SCC 42* in which it has been held that in exceptional circumstances the High Court can issue a writ of

habeas corpus in order to secure the custody of child hence, prays for issuance of notice to respondents no.2 and 3.

Heard.

4. It is the case of the petitioners that they gave birth to a minor child named Govind @ Suryansh Sharmain the year 2009 and happily handed him to the custody of respondents no.2 and 3 as they were issueless and after almost 10 years they have realized that respondent no.2 and 3 are illegally detaining their child. They have made complaints to each and every authority. They unsuccessful attempt before the magistrate under section 97 of the Cr.P.C. The civil suit is also pending between them in respect of the property.

5. So far, the maintainability of the writ petition is concerned Apex Court in the case of *Tejaswini Guad (supra)* has held that in the child custody matter writ of habeas corpus is maintainable where it is proved that detention of minor child by a parent or others was illegal and without the authority of law. The Apex Court in the aforesaid case in para-20 has also held that in child custody matter the ordinary remedy lies under the Hindu Minority and Guardianship Act 1956 or The Guardians and Wards Act, 1890 as the case may be. There is a significant difference between the enquiry under The Guardians and Wards Act, 1890 and the exercise of power by the writ court which is summary in nature. It is only in an exceptional case the right of the parties to the custody of the minor will be determined in the exercise of extraordinary jurisdiction on a petition for habeas corpus.

6. In this case, Govind @ Suryansh Sharma has attained the age of 12 years. Right after birth, he is residing with respondents no.2 and 3. For ten years the petitioners have never claimed the custody. All of a sudden they have started making allegations against respondents no.2 and 3 that they have no right to keep

their son. The child is aged about 12 years and all of a sudden he cannot be handed over to the petitioners without verifying whether he knows that the petitioners are his biological father and mother. All these enquiries are liable to be conducted by the competent court under the provisions of The Guardians and Wards Act, 1890. The Apex court in the aforesaid judgment has also held that the welfare of the minor child is a paramount consideration in the case of custody. While dealing with the child custody case the paramount consideration should be the welfare of the child and due weightage should be given to the child's ordinary comfort, containment, health, education, intellectual development and favourable surroundings. It is required to be verified whether the child is aware that respondents no.2 and 3 are not his parents. If all of a sudden it is disclosed to him that respondents no.2 and 3 are not his parents then it may affect his psychological State of mind therefore, all these procedures is required to be done gradually with the help of a physiologist or trained mediator, or counsellor which is not possible under the proceeding of the writ petition filed under article 226 of the Constitution of India. The Family Court is fully equipped to deal with such a situation. It is a fit case where the parties must approach the Family Court to claim custody of the child. With the aforesaid, the writ petition is dismissed.

It is made clear that dismissal of the petition shall not come in the way of deciding the rights between the parties before the competent court.

(VIVEK RUSIA)
JUDGE

Ajit/-