

Court No. - 80

Case :- HABEAS CORPUS WRIT PETITION No. - 83 of 2024

Petitioner :- Javeriya Fatma and another

Respondent :- State of UP and 4 others

Counsel for Petitioner :- Farhan Alam, Yash Raj Verma

Counsel for Respondent :- G.A.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri Yash Raj Verma, learned counsel for the petitioners and Sri Pankaj Saxena, learned AGA-I appearing for the State-respondents.

2. The petitioner no.2, asserting himself to be the father of the petitioner no.1 (*corpus*), a minor girl child of age about seven months, has filed the present petition seeking a writ of habeas corpus by asserting that the petitioner no.1 (*corpus*), is in illegal custody of the respondent nos.4, 5 and 6.

3. Pleadings in the petition indicate that the petitioner no.1 (*corpus*), was born on 05.06.2023, and soon thereafter her mother passed away on 14.06.2023. The petitioner no.2, father of the petitioner no.1, permitted his in-laws to retain the custody of the newly born infant.

4. It is contended that some time in the month of September, 2023 when the petitioner no.2 requested his in-laws to return the minor child, they refused to do so. It is sought to be asserted that the respondent nos.4, 5 and 6 are illegally detaining the petitioner no.1 (*corpus*), a girl child, stated to be presently of age about eleven months.

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5. The present petition has been filed seeking a writ of habeas corpus for release of the petitioner no.1 (*corpus*) from the alleged illegal custody of the respondent nos.4, 5 and 6.

6. A writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording 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 would have to be treated as equivalent to illegal detention for the purpose of granting a writ directing custody of the minor child.

7. The law relating to guardians and wards is governed in terms of the Guardians and Wards Act, 1890¹, and an order with regard to guardianship may be passed under the aforesaid enactment, upon an application filed by a person claiming entitlement.

8. The provision with regard to making of an application regarding claims based on entitlement of guardianship is under the GWA and under Section 12 thereof the court is empowered to make interlocutory orders for protection of a minor including an order for temporary custody and protection of the person or property of the minor.

9. Section 17 of the GWA relates to matters to be considered by the court in appointing a guardian, and in

¹ the GWA

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terms thereof it is provided that the court while deciding the question of guardianship of a minor, shall, as far as possible, do so consistently with the law to which the minor is subject, keeping in view the welfare of a minor. Thus, the provisions of the personal law are to be applied consistently with the provisions of the GWA, and insofar as the question of custody is concerned, the rights of parties in the present case, are to be governed by the personal law.

10. The matters relating to "Guardianship of Person and Property" are provided under Chapter XVIII of **Mulla Principles of Mahomedan Law**² and Part-A thereof pertains to "Appointment of Guardians". In terms of Section 349, all applications for the appointment of a guardian of the person or property or both of a minor, are to be made under the GWA. Section 349, as aforesaid, is being extracted below:-

"349. Application for appointment of guardian.—All applications for the appointment of a guardian of the person or property or both of a minor are to be made under the Guardians and Wards Act, 1890."

11. Further, Section 351 of Principles of Mahomedan Law, which is in terms of Section 17 of the GWA, imposes a duty upon the court in appointing guardian to make the appointment consistently with the law to which the minor is subject, keeping in view the welfare of the minor.

12. The subject matter relating to "Guardianship of a Person of a Minor" is dealt with under Part-B of Chapter XVIII of Principles of Mahomedan Law, and Sections 352

² Mulla, Principles of Mahomedan Law, 23rd Edition

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thereof, which relates to the right of mother to custody of infant children, is set out hereinbelow:-

"352. Right of mother to custody of infant children.
—The mother is entitled to the custody (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (e), unless she marries a second husband in which case the custody belongs to the father (f)."

13. It would be seen that in terms of Section 352, above mentioned, the mother is entitled to custody (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty.

14. In terms of Section 353, it is provided that in default of the mother, the right of custody of a boy under the age of seven years, and of a girl who has not attained puberty, would belong to the female relatives in a specified order, under which the mother's mother, is shown first in the list. Section 353 is being reproduced herein below:-

"353. Right to female relations in default of mother.
—Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:—

- (1) mother's mother, how highsoever;
- (2) father's mother, how highsoever;
- (3) full sister;
- (4) uterine sister;
- (5) consanguine sister;
- (6) full sister's daughter;
- (7) uterine sister's daughter;
- (8) consanguine sister's daughter;
- (9) maternal aunt, in like order as sisters; and
- (10) paternal aunt, also in like order as sisters."

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15. In the instant case, the mother of the petitioner no.1 (*corpus*), is stated to have passed away on 14.06.2023, and in September 2023, the custody of the corpus was handed over by the father, petitioner no.2, to his in-laws. The corpus, since then, is stated to have been in the custody of the respondent no.6, her maternal grandmother.

16. It is not the case of the petitioner no.2 that the custody of the corpus was altered or forcibly taken away from him by the respondent no.6; rather it is the own case of petitioner no.2 that he himself had handed over the custody of the corpus an infant of three months at that point of time, to his mother-in-law i.e. the maternal grandmother of the corpus.

17. As noticed in the earlier part of the judgment, Section 17 of the GWA which relates to matters to be considered in appointing a guardian, provides that the court while considering the question of guardianship, shall, as far as possible, do so consistently with the law to which the minor is subject, keeping in view the welfare of the minor. The provisions of the personal law are thus to be applied consistently with the provisions of the GWA, and the rights of parties in the present case, insofar as the question of the custody is concerned, are to be governed by the personal law.

18. A conjoint reading of Sections 352 and 353 under Part-B of Chapter XVIII of **Mulla Principles of Mahomedan Law**, is clearly indicative that it is the mother who would be entitled to the custody (*hizanat*) of a

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male child until he has completed the age of seven years and of her female child until she has attained puberty, and failing the mother, the custody of a boy under the age of seven years and of a girl who has not attained puberty, would belong to the female relatives in a specified order under which the mother's mother is shown first.

19. In the case at hand, the petitioner no.1 (*corpus*) is a girl child, presently of age about eleven months, and she is stated to be under the custody of respondent no.6 i.e. her mother's mother.

20. The mother of the petitioner no.1 (*corpus*) is stated to have passed away on 14.06.2023, and the corpus is with her maternal grandmother, respondent no.6, since September 2023, when her custody was handed over to the said respondent by the petitioner no.2 (father of the *corpus*) himself.

21. The custody of petitioner no.1 (a minor girl child), with her maternal grandmother, after her mother's death, would *prima facie* not be illegal in view of the provisions of the GWA and the applicable personal law.

22. In a petition seeking issuance of a writ of habeas corpus relating to the custody of a minor child, the principle duty of the Court would be to ascertain whether the custody of the child is unlawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child be handed over to the care and custody of some other person. In doing so, the paramount consideration would undoubtedly be the

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welfare of the child and the role of the High Court in examining such cases would have to be on the touchstone of principles of *parens patriae* jurisdiction.

23. Habeas corpus proceedings would not ordinarily lie to justify or examine the legality of the custody of the minor child, and the question in this regard would have to be addressed by the Court in exercise of its discretionary jurisdiction. The prerogative writ of habeas corpus, is in the nature of an extraordinary remedy, and is to be issued taking into consideration, the circumstances of a particular case.

24. In child custody matters, the remedy ordinarily lies under the statutory law, or the personal law, as applicable in the facts of the case; and only in cases which justify the exercise of the extraordinary discretionary jurisdiction under Article 226, a writ of habeas corpus would be issued where it is demonstrated that the detention of minor child, is illegal or without any authority of law.

25. The facts of the present case do not in any manner suggest that it is a case of illegal custody and in view thereof, the present petition seeking a writ of habeas corpus would not be entertainable.

26. As regards the claim for custodial rights, it is always open to the parties to avail the appropriate remedy for the purpose before the proper forum.

27. The observations made herein above are *prima facie* in nature and the same would be without prejudice to the

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rights and contentions of the parties which may be agitated in appropriate proceedings.

28. The petition fails and is accordingly **dismissed**.

Order Date :- 30.4.2024

Sachdeva

(Dr. Y.K. Srivastava,J.)