HIGH COURT OF MADHYA PRADESH BENCH AT GWALIOR

SB : HON'BLE MR. JUSTICE S.A. DHARMADHIKARI

W.P. No. 10370 of 2020

Smt. Madhavi Rathore

Vs.

State of M.P. & Ors.

Whether reportable :- Yes /No

For Petitioner	: Shri Prashant Sharma, Advocate.
For Respondents No. 1 to 5/State	: Shri Rohit Mishra, Additional Advocate General.
For Respondents No. 6 to 8	: Shri K. N. Gupta, learned Senior counsel with Shri Praveen Newaskar, Advocate.

O R D E R

(**Delivered on this Day of 5th September, 2020**)

In pursuance of the directions issued by the Apex Court and guidelines issued by the High Court of Madhya Pradesh in the wake of COVID-19 outbreak, the matter was taken up through video conferencing while adhering to the norms of social distancing prescribed by the Government.

2. With the consent of parties, this petition is disposed of finally.

3. This petition under Article 226 of Constitution of India has been filed by the petitioner seeking issuance of writ in the nature of habeas corpus directing the respondents No. 1 to 5 to produce the corpus Yatharth before this Court, who is alleged to be in illegal detention of

the respondents No. 6 to 8.

4. The brief facts leading to filing of this case are that the petitioner/Madhavi and respondents No. 6 got married on 03/12/2017. The child namely Yatharth was born out of their wedlock on 02/02/2019. The matrimonial dispute between the petitioner(wife) and respondent No. 6 (husband) was going on. The respondent No. 6 was employed at Indore. After his services were terminated, he came back to Gwalior, He was harassing and used to beat the petitioner. He demanded dowry of Rs. 5 Lakhs from the petitioner. Some altercation took place now and then to the extent that respondent No. 6 had locked the petitioner in a room and took away the minor child Yatharth along with him.

5. The corpus Yatharth is 15 months old child and has been illegally snatched by the respondent No. 6/husband and her inlaws from the possession of the petitioner, who is living in her parental house. On 30/06/2020, when the petitioner requested her husband to hand over the corpus to her, the respondent No. 6/husband beat the petitioner along with her brother and mother and had tied them with rope. In these circumstances, the petitioner was left with no other option, but to file an FIR bearing crime No. 84/2020 at police station Sirol, District Gwalior,

6. Learned counsel for the petitioner submits that child is a minor

aged about 15 months and respondents No. 7 to 8 are grandparents and are senior citizens. They are not in a position to look after the child properly, therefore, the petitioner has made repeated request to hand over the child to her, but the respondents No. 6 to 8 did not hand over the child to her. In these compelling circumstances, the petitioner has filed the instant petition.

7. In the light of order passed by this Court on 13/08/2020, the petitioner along with corpus and respondents No. 6 to 8 were present in person before this Court through Video Conferencing. Respondents No. 1 to 5 have filed the status report. A detailed and exhaustive return has also been filed on behalf of the respondents No. 6 to 8. This Court had also interacted with the petitioner and respondent No. 6.

8. Shri K. N. Gupta, learned senior counsel appearing on behalf of respondents No. 6 to 8 submits that present petition has been filed claiming right of guardianship of a minor son and the petition under Article 226 of Constitution of India is only procedural and it does not bestow any right between the parties. The issue is required to be adjudicated by the competent civil court as per the provision contained in Hindu Minority and Guardianship Act, 1956 r/w Guardians and Wards Act, 1890. In support of his contentions, learned Senior Counsel has placed reliance on the judgments delivered by the Apex Court in the case of **Kanu Sanyal vs. District Magistrate, Darjeeling**

reported in (1973) 2 SCC 674 and in the case of **Syed Saleemuddin vs. Doctor Rukhsana reported in (2000) 5 SCC 247** to contend that the dispute arose between the husband and wife in relation to custody of guardianship of a minor child, therefore, the petitioner cannot claim guardianship as per provision contained in section 6 of Hindu Minority and Guardianship Act. In view of above, it is contended that this Court cannot exercise the powers of issuance of writ in the nature of habeas corpus under Article 226 of Constitution of India. He further contended that unless the custody of the child with respondent No. 6 is declared illegal by the competent civil court in appropriate proceedings, the mother / petitioner cannot claim custody of the child. He further pointed out that from the date of marriage i.e. 03/12/2017, the petitioner was of unsound mind. After delivery of the child, the petitioner became more furious and did not take care of the child. She was taken to various psychiatrists serving in the mental hospital at Gwalior. When the petitioner was examined by the Doctor, she became more furious. Her mental disorder rose to a level that she started refusing to feed the child and also did not take care of the child including cleanliness and maintaining hygiene. The husband / respondent No. 6 used to ask her to take care of the child, but she used to beat him as well as her father-in-law and mother-in-law. The respondents No. 6 to 8 have also lodged a complaint on 10/07/2020 to

this effect. Her abnormal behaviour was also recorded in the mobile as well as in C.D. All these facts goes to show that the petitioner is not in a position to maintain the child. The basic and primary requirement is the welfare of the child which is to be seen before granting custody of the child.

9. In reply, learned counsel for the petitioner has taken this Court to the various photographs annexed with the petition to show that the child is interacting with the mother and is comfortable with the mother. On seeing the said photographs, no one can make out that the petitioner is of unsound mind. Moreover, she is highly qualified and has obtained the degree of Bachelor of Engineering. It is further submitted that proper care and upbringing of the child can be done by the mother only. The husband is free to invoke the provision of Guardians and Wards Act and after getting decree from the civil court either of the parent is entitled to get the custody of the child. It is further submitted that competent civil court or the doctor has not declared the petitioner to be insane or lunatic.

10. Heard learned counsel for the parties at length and perused the material available on record.

11. The first issue before this Court is whether a *Habeas Corpus* petition is maintainable or not in respect of custody of a minor child, who is in the custody of the father and grandparents at Gwalior.

12. The apex Court in the case of **Capt. Dushyant Somal Vs. Sushma Somal** and another **reported in (1981) 2 SCC 277** has dealt with the jurisdictional aspect with regard to issuance of *Habeas Corpus* writ in respect of illegal custody of Child. Paragraphs 3, 5 and 7 of the aforesaid judgment reads as under :-

> **"**3. There can be no question that a Writ of Habeas Corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out. Nor is a person to be punished for contempt of Court for disobeying an order of Court except when the disobedience is established beyond reasonable doubt, the standard of proof being similar, even if not the same, as in a criminal proceeding. Where the person alleged to be in contempt is able to place before the Court sufficient material to conclude that it is impossible to obey the order, the Court will not be justified in punishing the alleged contemner. But all this does not mean that a Writ of Habeas Corpus cannot or will not be issued against a parent who with impunity snatches away a child from the lawful custody of the other parent, to whom a Court has given such custody. Nor does it mean that despite the contumacious conduct of such a parent in not producing the child even after a direction to do so has been given to him, he can still plead justification for the disobedience of the order by merely persisting that he

has not taken away the child and contending that it is therefore, impossible to obey the order. In the case before us, the evidence of the mother and the grand-mother of the child was not subjected to any cross-examination; the appellant-petitioner did not choose to go into the witness box; he did not choose to examine any witness on his behalf. The evidence of the grand-mother, corroborated by the evidence of the mother, stood unchallenged that the appellant-petitioner snatched away Sandeep when he was waiting for a bus in the company of his grand-mother. The High Court was quite right in coming to the conclusion that he appellant-petitioner had taken away the child unlawfully from the custody of the child's mother. The Writ, of Habeas Corpus was, therefore, rightly issued. In the circumstances, on the finding, impossibility of obeying the order was not an excuse which could be properly put forward.

5. It was submitted that the appellant-petitioner did not give evidence, he did not examine any witness on his behalf and he did not cross-examine his wife and mother-in-law because, he would be disclosing his defence in the criminal case, if he so did. He could not be compelled to disclose his defence in the criminal case in that manner as that would offend against the fundamental right guaranteed by Article 20(3) of the Constitution. It was suggested that the entire question whether the appellant-petitioner had unlawfully removed the child from the custody of the mother could be exhaustively enquired into in the criminal case

where he was facing the charge of kidnapping. It was argued that on that ground alone the writ petition should have been dismissed, the submission is entirely misconceived. In answer to the rule nisi, all that he was required to do was to produce the child in Courts if the child was in his custody. If after producing the child, he wanted to retain the custody of the child, he would have to satisfy the Court that the child was lawfully in his custody. There was no question at all of compelling the appellant-petitioner to be a witness against himself. He was free to examine himself as a witness or not. If he examined himself he could still refuse to answer questions, answers to which might incriminate him in pending prosecutions. He was also free to examine or not other witnesses on his behalf and to cross examine or not, witnesses examined by the opposite party. Protection against testimonial compulsion" did not convert the position of a person accused of an offence into a position of privilege, with, immunity from any other action contemplated by law. A. criminal prosecution was not a fortress against all other actions in law. To accept the position that the pendency of a prosecution was a valid answer to a rule for Habeas Corpus would be to subvert the judicial process and to mock at the Criminal Justice system. All that Article 20(3) guaranteed was that a person accused of an offence Shall not be compelled to be a witness against himself, nothing less and, certain nothing more. Immunity against testimonial compulsion did not extend to refusal to examine and cross-examine

witnesses and it was not open to a party proceeding to refuse to examine himself or anyone else as a witness on his side and to cross examine the witnesses for the opposite party on the ground of testimonial compulsion and then to contend that no relief should be given to. the opposite party on the basis of the evidence adduced by the other party. We are unable to see how Article 20(3) comes into the picture at all.

7. It was argued that the wife had alternate remedies under the Guardian and Wards Act and the CrPC and so a Writ should not have been issued. True, alternate remedy ordinarily inhibits a prerogative writ. But it is not an impassable hurdle. Where what is complained of is an impudent disregard of an order of a Court, the fact certainly cries out that a prerogative writ shall issue,. In regard to the sentence, instead of the sentence imposed by the High Court, we substitute a sentence of three months, simple imprisonment and a fine of Rupees Five hundred. The sentence of imprisonment or such part of it as may not have been served will stand remitted on the appellant-petitioner producing the child in the High Court. With this modification in the matter of sentence, the appeal and the Special Leave Petition are dismissed. Criminal Miscellaneous Petition No. 677/81 is dismissed as we are not satisfied that it is a fit case for laying a complaint.**"**

13. In light of the aforesaid judgment, this court is of the opinion that a writ petition for issuance of a writ in nature of *Habeas Corpus* under article 226 of the Constitution of India in the peculiar facts and

circumstances of the case is certainly maintainable. Otherwise also, keeping in view the welfare of the child and other factors, this court is of the opinion that the child has to be in the custody of mother.

14. In the case of **Veena Agrawal Vs. Shri Prahlad Das Agarwal** reported in **AIR (MP) 1976 92**, the Division Bench of this Court in paragraphs No.5 and 6 has held as under:-

> **"**5. Having heard learned counsel of the parties, we are of opinion that this petition must be allowed. At the outset we would like to mention that in the nature of the present case it is not at all necessary for us to go into the details of allegations and counter-allegations of the parties. We are required to decide this, petition on the sole consideration in whose custody the welfare of the minor lies. Under Section 6(a) of the Hindu Minority and Guardianship Act, 1956, it is provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. The clause gives legislative sanction to the principle which is now well established that although the father is the natural guardian of the minor child and entitled as such to his custody, the prime and paramount consideration is the welfare of the minor and the custody of a child of tender years should, therefore, remain with the mother unless there

are grave and weighty considerations which require that the mother should not be permitted to have the minor with her. For applying the aforesaid rule we will have to look to the facts emerging from the petition and the return filed before us. The fact that the petitioner belongs to a respectable family is not in dispute and also her father is drawing a handsome salary. The petitioner has besides her father, her mother, four sisters but no brother. Out of these four sisters, first two are already married and the 4th and 5th studying in a college. The petitioner is the third daughter of her parents. The petitioner is staying with her parents. She herself is a highly educated lady. Therefore, it cannot be denied that if the custody of the male child is given to her she will not be able to look after him and the welfare of the child would in any manner be in jeopardy. As regards the contention advanced on behalf of the respondent that even he can look after the child cannot be a ground for depriving the mother of the custody of the child in view of the provisions of Section 6(a) of the Hindu Minority and Guardianship Act, Even the basis stated by the respondent that he would be in a position to look after the child is not convincing. The petitioner is a lecturer and he will have to discharge his official duties by remaining away from his house. He cannot,

therefore, feed the child in a manner which is expected of a mother. The contention advanced on his behalf is that he would keep his aged mother with him and also an Ayah who would be able to look after the child properly cannot be equated with the looking after of the child by his own mother. Besides that, looking to the salary a lecturer draws it does not appear feasible that the respondent would be able to keep an Aya. The mother of the respondent is of an old age, as stated before us, and she would not be able to properly look after the child. We are, therefore, not convinced that the respondent-father is in a position to look after his newly born male child in preference to that of the mother.

6.In Bhagwati Bai v. Yadav Krishna Awadhiya, AIR 1969 Madh Pra 23, a Division Bench of this Court has held as under :

"The writ of habeas corpus ad subjic-iendum, i.e., you have the body to submit or answer, is commonly known as the writ of habeas corpus. It 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, for the purpose of granting the writ, as equivalent to imprisonment of the minor. It is, therefore, not necessary to show that any force or restraint is "being used against the minor by the respondent. In Gohar Begum v. Suggi Begum, (1960) 1 SCR 597 = (AIR 1960 SC 93) where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued.**”**

15. In the case of **Kamla Devi Vs. State** reported in **AIR (HP) 1987 34**, the High Court of Himachal Pradesh in paragraph No.25 has held as under:-

“25. The law, which generally lags behind social advances, has haltingly stepped in by enacting Section 6 of the Hindu Minority and Guardianship Act, 1956 and taken a small step in the direction of treating the mother as better suited for custody till the minor attains the age of 5. The relevant portion of Section 6 of the said Act reads as follows : "The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are- (a) in the case of a boy or an unmarried girl - the father, and after him, the mother: - Provided that the custody of a minor who has not

> completed the age of five years shall ordinarily be with the mother."
>
> (Emphasis supplied)
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> The "tender years rule" has thus found statutory recognition and the legislative policy underlying thereto is based not only on the social philosophy but also in realities and points in the direction that the custody of minor children who have not completed the age of 5 years should ordinarily be with the mother irrespective of the fact that the father is the natural guardian of such minors. When moved for a writ of Habeas Corpus and in exercising the general and inherent jurisdiction in a child custody case, the Court is required to bear this legislative prescription in mind while judging the issue as to the welfare of the child.
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> Findings Against The Factual Backdrop :"

16. In similar circumstances, the co-ordinate Bench of this Court at Indore has passed a judgment dated 08/06/2020 in W.P. No. 7739/2020 (Anushree Goyal vs. State of M.P. & Ors.), wherein, the co-ordinate Bench of this Court has held that the custody of the minor child is to be given to the mother i.e. petitioner and has allowed the said writ petition.

17. Undisputedly, the facts also reveal that there are matrimonial dispute between the parties. The child in question is hardly 15 months of age. The mother and father are well educated. There is nothing

adverse brought before this Court that the parents of the petitioner with whom she is living are not capable of maintaining the petitioner as well as the child.

18. In the present case the child is aged about 15 months and this Court keeping in view Section 6 of Hindu Minority and Guardianship Act, 1956 is of the opinion that the child has to be given in the custody of the mother.

19. This Court is not dealing with the application preferred under Section 4 of Guardians and Wards Act, 1890. This Court is dealing with the *Habeas Corpus* writ petition. In the case of **Sheoli Hati Vs. Somnath Das** reported in **(2019) 7 SCC 490** the Hon'ble Supreme while deciding the issue relating to custody of a child has held that the welfare of a child is of paramount importance. While dealing with this *Habeas Corpus* petition again this Court is of the opinion that the welfare of a child is of paramount importance and the mother/petitioner, who has nurtured the child for nine months in the womb, is certainly entitled for custody of the child keeping in view the statutory provisions governing the field. In these circumstances, this Court is left with no other alternative except to direct the respondents No. 6 to 8 to handover the custody of the child to the present petitioner.

20. In view of above, the respondents No. 6 to 8 are directed to

handover the custody of the child Yatharth to the present petitioner/mother on **8th September, 2020 at 11 Am** in her present residential address under the supervision of Assistant Sub Inspector of concerned police station, who escorted the petitioner as well as corpus and was present before this Court on 20/08/2020 so that the transition of the child shall take place peacefully and without any untoward incident. Both parents as well as the in-laws shall co-operate with each other. In pursuance to the direction of this Court, the SHO of the police station concerned is directed to file report with regard to peacefully handing over the corpus/child in the custody of the petitioner by **10th September, 2020** before the Registry of this Court.

21. However, the respondents No. 6 to 8 would be at liberty to proceed in accordance with law for seeking custody of child, if so advised.

22. Accordingly, the instant petition stands allowed to the extent indicated herein above. There shall be no order as to costs.

(S.A. Dharmadhikari)
JUDGE
(05/09/2020)

Durgekar*