

Custody of Minor with Mother is Not Unlawful

In a recent case, The Allahabad High Court gave a judgement quashing a writ petition that custody of minor with mother is not unlawful. The judgement delivered was in the case of **Master Tarun & Akchhat Kumar and Another vs. State of U.P. and 3 others**, where a writ petition was filed under the writ of Habeas Corpus by the father, of the two children, who has asserted that the kids are in illegal custody with their mother.

The principle grievances in this case are that the custody of the children with the mother is illegal and the petitioner wants grant for visitation rights.

It is also submitted that proceedings is initiated, under Section 12 of the Domestic Violence Act and Section 125 Cr.P.C., by the mother of the children against the father of the children are also stated to be pending. And an FIR under Sections 498A, 323, 504, 506, 392 IPC and Dowry Prohibition Act is stated to have been lodged by the mother of the children, which was registered as criminal case is said to be pending. Section 498(a) of The Indian Penal Code talks about cruelty with wife by the husband or relative of husband, Section 323 talks about the punishment for voluntarily causing hurt, Section 392 talks about the punishment of robbery.

It is further stated that the wife of the petitioner left her matrimonial home in the year 2013 on account of a matrimonial discord and a petition under Section 9 of the Hindu Marriage Act 1955, (Manoj Kumar Pandey vs. Priya Pandey) was filed before the Family Court which is still pending before the court. Section 9 of Hindu Marriage Act 1955 talks about restitution of conjugal rights between the two parties.

In this petition seeking a writ of habeas corpus in a matter relating to a claim for custody of a child, the most important issue which is to be taken into consideration is whether from the facts of the case, it can be stated that the custody of the child is illegal. The writ of habeas corpus is an extraordinary remedy which can't be used until other ways are not available. Habeas Corpus is the writ of right and not a writ of course and it may be granted only on reasonable ground or probable cause of that particular caseⁱ.

The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would in a matter of child custody will, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detention is unlawful.

The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in *Nithya Anand Raghvan v State (NCT of Delhi)*, where it was held that the principal duty of the any court in such matters is to confirm whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.ⁱⁱ

The maintainability of a habeas corpus petition under Article 226 of the Constitution of India in custody of a minor was examined in *Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and 5 others*ⁱⁱⁱ. It was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed only in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective to be applied.

So the court had to decide on the base that whether this current custody is illegal and unlawful or whether there welfare requires another custody. The writ of Habeas Corpus for custody of child is not used in ordinary way this writ is used for custody of child when no other alternatives are present. For an Instance the power of the High Court, in granting a writ, in matters related to child custody, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

So in a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court.^{iv}

In the present case it is undisputed that the respondent mother of the children along with her minor children is living separately from the petitioner father of the children since the year 2013.

In a petition for a writ of habeas corpus, the Court requires to examine, at the threshold, whether the minor is in lawful or unlawful custody of the private respondent named in the petition.

Conclusion: In a case, as the present one, once it is confirmed that the respondent of this case is none other than the mother of the minor children, the custody of the children with their mother cannot, be stated to be illegal.

As aforesaid, it is only in exceptional situation when the custody of the minor children may be directed to be taken away from the mother to any other person, including the father of the children, in exercise of writ jurisdiction.

The court later also said that the proceedings for restitution of conjugal rights under Section 9 of the Hindu Marriage Act 1955 initiated on a petition stated to have been filed by the husband, being pending, any claim with regard to ancillary reliefs pertaining to custody or visitation rights may be agitated in the said proceedings and the present petition seeking a writ of habeas corpus is not liable to be entertained in the facts of the case.

ⁱ Mohammad Ikram Hussain vs. State of U.P.

ⁱⁱ Nithya Anand Raghvan v State (NCT of Delhi) and 3 others.

ⁱⁱⁱ Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and 5 others

^{iv} Rachhit Pandey (Minor) vs. State of U.P. and 3 others.