IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRWP No.8319 of 2020
DATE OF DECISION**:- 10.05.2021**

Mandeep Kaur ... Petitioner

Versus

State of Punjab and others ... Respondents

CORAM: HON'BLE MR.JUSTICE ANUPINDER SINGH GREWAL

Argued by: Mr. Divjyot Singh Sandhu, Advocate
for the petitioner.

Mr. Dhruv Dayal, Senior DAG, Punjab,
for respondents No.1 to 3.

Mr. Inderpal S. Parmar, Advocate for respondents No.4 to 6.

ANUPINDER SINGH GREWAL, J.

The petitioner has sought issuance of a writ in the nature of habeas corpus for the release of her minor daughter who is alleged to be in the custody of respondent No.4 and to handover the custody to her.

It is stated in the petition that the marriage of the petitioner and respondent No.4 was solemnized on 20.11.2013. The respondent No.4 was an Australian citizen and the petitioner later joined him in Australia. Out of the wedlock, a girl child Jasreen Kaur Garcha was born on 27.06.2017. The petitioner and respondent No.4 developed matrimonial differences which led to their separation. The petitioner is stated to have filed a petition for divorce on 14.10.2019 in the Federal Circuit Court wherein respondent No.4 is alleged to have been served. However, before the divorce could be finalized, respondent No.4 promised that he will improve his behavior in future and thus, they, started living together. The petitioner withdrew the divorce proceedings on 09.12.2019. The parties

while they were living together arrived in India on 24.01.2020. The respondent No.4 kept the passport of the child and in a deep rooted conspiracy, the child was taken away by respondent No.4 on 02.02.2020 when the petitioner had gone to her parental village Naulakha, District Fatehgarh Sahib. It is stated in the petition that respondent No.4 instead of acceding to the request of the petitioner to handover the child, started threatening her and the petitioner fearing her safety, fled back to Australia on 05.02.2020. She filed a petition for the custody of the minor child in the Federal Circuit Court, Australia and the court passed an interim order on 01.04.2020 (Annexure P-3) directing the respondent No.4 to return the minor child to Australia. It is also stated that the Family Court of Australia issued warrant of arrest against respondent No.4 on 13.10.2020 (Annexure P-9).

Learned counsel for the petitioner submitted that the child is, at present, 4 ½ year of age and the mother is the natural guardian of the child. He referred to Section 6 of the Hindus Minority and Guardianship Act, 1956, wherein the custody of a child under 5 years would be with the mother. The mother has a permanent residency in Australia. She is getting a salary of 70,000/- Australian dollars per annum. She has bought a double storey house in Melbourne for 6,00,000/- Australian dollars. It is also stated that she has studied Bachelor degree of Physiotherapy and, therefore, is having a sound economic status for the proper upbringing of the child. The Australian government, as a measure of social security, provides 1100/- Australian dollars per month for the upkeep of a child. He also submitted that respondent No.4 is an Australian citizen and was well settled in Australia as he had even obtained a diploma in Hospitality

management in Australia but he is unemployed in India. Being a small landowner, he does not have the financial status for the proper maintenance of the child. He further submitted that the federal court passed an interim order, directing the respondent No.4 to bring the child to Australia. The principle of comity of court entails that as a foreign court had passed an order, this Court should direct respondent No.4 to handover the custody of the minor child to the petitioner. He further contended that in response to the preliminary objection raised by the counsel for the respondent No.4 about the maintainability of the petition, it has been held by the Supreme Court of India in the case of Yashita Sahu vs. State of Rajasthan, AIR 2020 (SC) 577 that a petition for writ of habeas corpus for the custody of the child would be maintainable. In support of his submissions, he has also cited judgment of the Supreme Court in the case of Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw and another, reported as 1987(1) SCC 42 and judgments of this Court in the case of Amita Chhabra vs. State of Haryana and others, 2015 (1) RCR (Civil) 43, Gippy Arora vs. State of Punjab and others, 2012 (4) RCR (Civil) 397, Neha vs. State of Haryana and others, 2020 (4) RCR (Civil) 643 and Mandeep Kaur vs. State of Punjab and others, 2021 (1) RCR (Civil) 152.

Per contra, learned counsel for respondent No.4 submitted that the petitioner was involved in a relationship with the brother-in-law of respondent No.4. This relationship led to a marital discord between the parties. The respondent No.4 was not aware of this relationship earlier and had called the petitioner to Australia initially on a tourist visa for 3 months and, thereafter, on permanent residency documents. Respondent No.4 did not want the matrimonial life of his sister to be destroyed and,

therefore, persuaded the petitioner to withdraw her divorce petition as he wanted to sort out the matter. Thereafter, the parties landed in India with the minor child on 24.01.2020. The petitioner, on her return, straightaway went to her parental house along with the minor. Respondent No.4 even at that time wanted to settle the differences to protect his as well as the matrimonial life of his sister. The Panchayat was convened on 04.02.2020 and it was agreed that as the petitioner has permanent residency in Australia, the custody of the child would be handed over to respondent No.4. The petitioner did not have any grouse otherwise instead of leaving for Australia she would have filed proceedings for the custody of the child in India. The petitioner, thereafter, returned to Australia and filed a case for divorce which was granted by the Australian court. He also contends that while the order of divorce was passed, the court had also recorded that proper arrangements have been made for the care, welfare and development of the child/children. The respondent No.4 had filed a petition under Section 5 and 25 of the Guardians and Wards Act, 1890 read with Section 6 of the Hindu Minority and Guardianship Act, 1956 before the Family Court at Ludhiana on 19.03.2020 which is pending adjudication. He has placed reliance on the judgment of the Supreme Court in the case of Sumedha Nagpal Vs. State of Delhi, 2000 (9) SCC 745 to submit that as disputed questions of fact are involved, the same cannot be decided under its jurisdiction and the family court would be an appropriate forum to adjudicate the matter.

He further contended that the minor child is residing with the father and grandparents in a cordial family environment for almost a year and the change of the custody at this stage would not be in the interest of

the child especially when the petitioner is living alone and thus, would not be in a position to take care of the child. He also submits that respondent No.4 had obtained diploma in Hospitality Management in 2009 from Holmes Institute of Australia. The respondent No.4 owns about 2½ acres of agricultural land and besides income from the agricultural land, he has 6 flats and is getting rental income of Rs.24,000/- per month. The gross income of respondent No.4 is about Rs.47,000/- per month. The father of respondent No.4 also has agricultural land and is drawing pension as he is a retired employee of the Electricity Board. The mother of respondent No.4 owns 155 square yards plot in village Kohara, District Ludhiana.

Learned counsel further submitted that the petitioner has not completed the Bachelor degree of Physiotherapy and has studied up to 10+2 class. The averment in the petition that she had completed Bachelor degree of Physiotherapy is incorrect. He further submitted that after her return to Australia, the petitioner had preferred an application for the custody of the child and in the application, the Australian address of respondent No.4 had been mentioned although she knew that respondent No.4 along with their child was in India. He has cited the judgment of this Court in the case of Ranbir Singh vs. Satinder Kaur Mann and others, 2006(3) RCR (Civil) 628 to submit that a decree, which has been obtained from a foreign court on the basis of a fraud, would not be enforceable in India. He has also submitted that the interest and welfare of the minor child would be of paramount consideration and merely an order of a foreign court would not be determinative. The interest and the welfare of the child would be question of fact and should be adjudicated in a family court on the basis of evidence led before it. He has cited the judgment of

the Supreme Court of India in the case of Ruchi Majoo vs. Sanjeev Majoo, 2011 (3) RCR (Civil) 122.

In response to the averment of the counsel for respondent No.4 that she has not obtained a degree of Bachelor in Physiotherapy but she is only 10+2, it has been clarified by counsel for the petitioner that she had cleared the Part I examination of Bachelor of Physiotherapy and a copy of the mark-sheet had also been filed.

Heard through video conferencing.

The issue with regard to the maintainability of a petition in issuance of a writ of habeas corpus for the custody of a child to a parent has been dealt with by the Supreme Court in the case of Yashita Sahu vs. State of Rajasthan (supra) wherein it was held that it is well settled that the writ jurisdiction could be invoked in the best interest of the child. Paragraph 9 of the judgment is reproduced hereunder:-

> "It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw and Ors., (1987) 1 SCC 42, Nithya Anand Raghavan v. State (NCT of Delhi) & Anr., (2017) 8 SCC 454 and Lahari Sakhamuri v. SobhanKodali, (2019) 7 SCC 311 among others. In all these cases the writ petitions were entertained. Therefore, we reject the contention of the appellant - wife that the writ petition before the High Court of Rajasthan was not maintainable."

Therefore, I do not find any merit in the contention of the learned counsel for respondent No.4 to assail the maintainability of the petition.

The petitioner, who is the mother, is seeking the custody of four year old girl child. The child would require love, care and affection of the mother for her development in the formative years. The support and guidance of the mother would also be imperative during adolescence. The mother is the natural guardian of the child till the age of five years in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, which is reproduced hereunder:-

> "Natural guardians of a Hindu minor. — The natural guardian 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;
> (b) in case of an illegitimate boy or an illegitimate unmarried girl — the mother, and after her, the father;
> (c) in the case of a married girl—the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section —
> (a) if he has ceased to be a Hindu, or
> (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation. — In this section, the expression "father" and "mother" do not include a step-father and a step-mother."

I also draw support from the judgment of this Court in the case of Mandeep Kaur vs. State of Punjab and others (supra) wherein the

custody of 3½ year old daughter was granted to the mother; Neha vs. State of Haryana and others (supra) wherein custody of four year old girl child was also handed over to the mother. A Division Bench of this Court in the case of Rajat Agarwal vs. Sonal Agarwal, FAO No.4545 of 2017, decided on 25.02.2021, had upheld the order of the Family Court granting custody of 13 year old child to the mother. The relevant extract of the judgment is reproduced hereunder:-

> "17. Keeping in view the totality of facts and circumstances of the present case, we are of the considered opinion that respondent-mother is the best person to educate and bring up her minor daughter and to effectively take care of her interest and welfare. The role of the mother in the development of a child's personality can never be doubted. Mother shapes child's world from the cradle by rocking, nurturing and instructing her child. Particularly, the company of a mother is more valuable to a growing up female child unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother.
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> 18. Apart from that, Mother is a priceless gift, a real treasure and an earnest heartfelt power for a child, especially for a growing girl of the age of 13 years which is her crucial phase of life being the major shift in thinking biologically which may help her to understand more effectively with the help of her mother and at this crucial teen age, her custody with the mother is necessary for her growth. At this growing age, daughter looks for mother/a female companion with whom she can share and discuss certain issues comfortably. There would be so many things which a daughter could not discuss with her father and as such mother shall be the best person to take care of her daughter at this growing age."

Furthermore, the petitioner has permanent residency in Australia. She is earning 70,000/- Australian dollars per annum and a

handsome sum would be payable to her for the maintenance of child as well by the Australian authorities. She has bought a house in Australia. Although the petitioner should have been more forthcoming and categoric in disclosing her educational qualification, yet the lapse is not significant enough to oust her from writ jurisdiction for issuance of a writ of habeas corpus for the custody of a child as what is of paramount consideration for this Court is the interest and welfare of the child. The petitioner can avail opportunities for further studies in Australia and enhance her qualification. She is nonetheless employed in Australia and is commanding a financial status which would enable her to bring up the child by imparting her good education. The father is an Australian citizen. He has also obtained a diploma in Hospitality Management and is employed in Australia and only recently had come to India. He owns a small piece of agricultural land and is stated to have some rental income as well.

It is apt to notice that the parties had gone to Australia in furtherance of their career prospects. They were working in Australia. The child was born in Australia and in initial years was brought up there. Ideally it would in the best interest and welfare of the child if she would have the love, affection and company of both the parents especially in the formative years. This court had mooted the idea of reconciliation but there was no headway as petitioner wants to live in Australia while respondent No.4 wants to settle in India although he has a professional degree in Australia and his prospects there appear to be bright. This, however, is not

to suggest that the child raised by the single parent would be at a disadvantage. Modern times are replete with the instances of children raised by the single parent having grown as responsible adults contributing to nation building in various fields.

The principle of comity of courts has been followed by the courts in India to honour and to show due respect to the judgments obtained by the courts abroad. It is equally true that the judgment of a foreign court would not be the only factor while considering the issue of custody of a child to a parent. It would only be one of the factors for consideration and would be subservient to the paramount consideration of the interest and welfare of the child. Reference may be made to the judgments of the Supreme Court in the cases of Yashita Sahu vs. State of Rajasthan and others (supra) and Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw and another (supra). The relevant extract of the judgment in the case of Yashita Sahu vs. State of Rajasthan and others (supra) is reproduced hereunder:-

> "13. In the fast shrinking world where adults marry and shift from one jurisdiction to another there are increasing issues of jurisdiction as to which country's courts will have jurisdiction. In many cases the jurisdiction may vest in two countries. The issue is important and needs to be dealt with care and sensitivity. Though the interest of the child is extremely important and is, in fact, of paramount importance, the courts of one jurisdiction should respect the orders of a court of competent jurisdiction even if it is beyond its territories. When a child is removed by one parent from one country to another, especially in violation of the orders passed by a court, the country to which the child is removed must consider the question of custody and decide whether the court should conduct an elaborate enquiry on the question of

> child's custody or deal with the matter summarily, ordering the parent to return the custody of the child to the jurisdiction from which the child was removed, and all aspects relating to the child's welfare be investigated in a court in his/her own country."

The order had been passed by the Federal court in Australia, directing the respondent No.4 to return the child to Australia. The Family court at Australia has also issued warrant of arrest against respondent No.4 on 13.10.2020 (Annexure P-9). He has not returned to Australia ever since February last year and the learned counsel for respondent No.4 has submitted that he does not wish to go back to Australia and would stay in India permanently.

The respondent No.4 has levelled allegations pertaining to the character of the petitioner that she was in an extra-marital relationship with a relative of the petitioner. Aside of the bald assertion in the petition, no supporting material has been brought before this Court. It would be worthwhile to note that in a patriarchal society, it is fairly common to cast aspersions on the moral character of a woman. More often than not these allegations are made without any basis or foundation. Even assuming a woman is or has been in an extramarital relationship, the same by itself cannot lead to the conclusion that she would not be a good mother to deny her the custody of her child. The petitioner and respondent No.4 have divorced and a decree in this regard has been passed by a court in Australia.

However, in the instant case, these allegations against the petitioner being wholly unsubstantiated are not considered relevant to adjudicate the issue of custody of the minor child.

The judgments relied upon by the learned counsel for the respondent No.4 are distinguishable on facts and would not be applicable to the instant case. In the case of Ranbir Singh vs. Satinder Kaur Mann (supra), the parents were in Malaysia and the father knew that the mother had left Malaysia for India but he had intentionally mentioned her Malaysian address in the divorce proceedings initiated by him in Malaysia. The mother who was not aware of the proceedings did not appear and the father obtained an ex parte decree for the custody of the child. In the instant case, although the Australian address of the respondent No.4 had been mentioned but a perusal of the record indicates that respondent No.4 had not only engaged a counsel to defend himself but he had also himself put in appearance. The order of the Australian Court does indicate his presence. The petitioner has also placed on record a copy of the correspondence between respondent No.4 and his lawyer at Annexure P-18. The respondent No.4 was, thus, aware of the proceedings. He had participated therein and only at a later stage, he chose not to participate. Thus, it cannot be said that the order was passed by the Australian court behind the back of respondent No.4 or was not in conformity with the principles of natural justice.

The judgment in Sumedha Nagpal vs. State of Delhi (supra), pertained to the custody of a 2 year child. The mother had sought custody while the father had pleaded that the mother had left the matrimonial house and abandoned the child to live with her parents. The child in that case was brought up in the house of the father or the matrimonial home in India. There were allegations and counter allegations involving disputed questions of fact and it was under such circumstances that the Supreme

Court held that such disputed questions of fact would be best decided by the family court. In the instant case the child was born in Australia and is an Australian citizen. He was also brought up in Australia and only at the age of about 4 years, he was brought to India by both the parents.

In the case of Ruchi Majoo vs. Sanjeev Majoo (supra), the mother had brought the child to Delhi, while the father who was in America had preferred a petition there and the American court had ruled in favour of the father. The child had been living with her mother for 3 years and the custody of the child was directed to be handed over to the mother and one of the factors which weighed with court was that the father had contracted second marriage. The interest of the child was held to be paramount and it was also observed that nothing prevents the High Court from embarking a detailed enquiry if the cause of action is within its jurisdiction.

In the aforenoted facts and circumstances, especially when there is an order of the Australian Court, the child is under five years of age, she is an Australian citizen and the petitioner is fairly well settled in Australia, I am of the considered view that it would be in the best interest and welfare of the child if her custody is handed to the petitioner-mother.

Consequently, the petition is allowed. The custody of the girl child would be handed over to the petitioner. The petitioner is stated to be residing in Australia. Till the petitioner arrives in India to take the custody of the child, respondent No. 4 shall ensure that the child interacts with the petitioner through video conferencing on every Tuesday, Friday and Sunday at 01:00 p.m. (IST) or as mutually agreed by them. In the event of the petitioner facing any difficulty with regard to the interaction,

she would be at liberty to approach the Member Secretary, District Legal Services Authority, Ludhiana, who shall arrange the video conferencing of the child with the petitioner. On the arrival of the petitioner in India and after observing Covid-19 protocol, the custody of the child shall be handed over to her by respondent No.4. The petitioner would be at liberty to approach the Station House Officer of the area, who would ensure that the custody of the child is handed over to her. After the custody of the child is handed over to the petitioner, she shall arrange interaction of the child with respondent No.4 through video conferencing on every Sunday at 11:00 a.m. (IST) or as mutually agreed by them. The parties shall henceforth abide by the orders (interim/final) of the Federal/Family Court in Australia.

I would also like to place on record the valuable assistance rendered by the counsel for the parties, especially by Mr. Divjyot Singh Sandhu, Advocate, who unfortunately expired due to Covid-19 pandemic after the judgment was reserved.

(ANUPINDER SINGH GREWAL)
JUDGE

10.05.2021
SwarnjitS/Ramesh

Whether speaking/reasoned : Yes / No
Whether reportable : Yes / No