

HIGH COURT FOR THE STATE OF TELANGANA

WRIT PETITION No.12622 of 2024

WRIT PETITION No. 12622 of 2024

Between:

Maria Sultana, W/o. Mohammed Abdul Muqthadeer Khan

..Petitioner

AND

The State of Telanagana, rep by its Principal Secretary, Home Department, Secretariat Buildings, Hyderabad, Telangana State and others

... Respondents

DATE OF ORDER PRONOUNCED: **02.05.2024**

SUBMITTED FOR APPROVAL

THE HON'BLE SRI JUSTICE P.SAM KOSHY

AND

THE HON'BLE SRI JUSTICE SAMBASIVA RAO NAIDU

- | | | |
|----|---|--------|
| 1) | Whether Reporters of Local newspapers may be allowed to see the Judgment? | Yes/No |
| 2) | Whether the copy of judgment may be marked to Law Reporters/Journals | Yes/No |
| 3) | Whether His Lordship wishes to see the fair copy of the Judgment? | Yes/No |

P.SAM KOSHY, J

SAMBASIVA RAO NAIDU, J

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! Counsel for the Petitioner : Mr. P. Krishna Prakash

^ Counsel for Respondent Nos.1 to 6 : The Advocate General

^ Counsel for the Respondent Nos.7 to 11 : --

> HEAD NOTE:

? Cases referred

¹ (2019) 7 Supreme Court Cases 42

¹ 1981 LawSuit(All)375

¹ AIR 1988 Kerala 30

THE HONOURABLE SRI JUSTICE P.SAM KOSHY
AND
THE HON'BLE JUSTICE SAMBASIVA RAO NAIDU
WRIT PETITION No.12622 OF 2024

ORDER: *(per Hon'ble Sri Justice P.SAM KOSHY)*

Heard Mr.P.Krishna Prakash, learned counsel for the petitioner and Mr.Swaroop Oorilla, learned Special Government Pleader appearing for the respondent Nos.1 to 6. Perused the material available on record.

2. The instant is a writ petition which has been filed seeking for issuance of writ in the nature of Habeas Corpus directing the respondent/police authorities ensuring the production of the minor daughter of the petitioner viz., Musfira Amal, aged around 3 years and 10 months before this Court and thereafter restore the custody of the said minor child to the petitioner who is the natural guardian/biological mother of the minor child.

3. From the pleadings that are available on record what clearly culls out is that the marriage between the petitioner and 7th respondent took place on 15.08.2019 at Hyderabad. At the time of marriage, the 7th respondent, the husband of the petitioner was working in Dubai.

Subsequent to the marriage, the petitioner went along with respondent No.7 and were residing in Dubai. While they were staying in Dubai as husband and wife, the minor child viz., Musfira Alam was born on 03.06.2020. However, since the child developed certain medical complications, for better treatment the petitioner and the minor child came to India on 12.06.2023.

4. It is said that on 16.06.2023, the 11th respondent who is the brother of the 7th respondent, on the pretext of taking the child for a ride took the child from her custody and since then the child was not returned back to the petitioner. In spite of all efforts, negotiations and persuasions, the child continued to remain with the custody of the close relatives of the 7th respondent i.e., in the custody of respondent Nos.8 to 11. In between the petitioner herein has also lodged a complaint with the police authorities so far as the 11th respondent having illegally taken away the child from the mother's custody. It is said that there has been no progress on the said complaint. Subsequently, the petitioner also has filed a complaint under the Domestic Violence Act, before the

Metropolitan Magistrate, Hyderabad in the month of October 2023. The same has been registered and after taking cognizance, the summons also has been issued to the respondent therein. The said complaint case has been registered as D.V.C.No.40 of 2024. The petitioner continued her persuasion with the respondents in getting the custody of the child back, but without any success. It was in between that the 7th respondent has filed a petition under Section 7, 10 and 25 of the Guardian and Wards Act 1890, before the Principal Family Court at Hyderabad, where the said case G.W.O.P.No.572 of 2024, seeking for the declaration and appointment of the respondent No.7 as the guardian of his minor daughter viz., Musfira Alam and to retain the physical custody of the daughter till she attains the age of majority. The petition under the Guardian and Wards Act was filed on 15.04.2024.

5. It is subsequent to all this that the present writ petition now has been filed on 01.05.2024 by the petitioner/mother seeking for issuance of writ in the nature of Habeas Corpus, for firstly production of the minor child

before the court and secondly for granting the custody of the minor child to the petitioner/mother.

6. On a query being put to the learned counsel for the petitioner as regards the maintainability of the petition for Habeas Corpus in the aforementioned factual backdrop, particularly, where the petition under the Guardian and Wards Act, has already been filed and is in the process of consideration by the concerned competent court. The learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in the case of **Tejaswinin Gaud v. Shekhar Jagdish Prasad Tewari**¹. In addition, the learned counsel for the petitioner also relied upon the decision of the Division Bench of the Allahabad High Court in the case of **Vinayak Goyal v. Prem Prakash Goyal**² and yet another decision of the Division Bench of the Kerala High Court in the case of **Suharabi v. D.Muhammed**³.

¹ (2019) 7 Supreme Court Cases 42

² 1981 LawSuit(All)375

³ AIR 1988 Kerala 30

7. *Per contra*, the learned Special Government Pleader appearing for the respondent Nos.1 to 6 contended that, from the pleadings it appears to be a *inter se* dispute between the husband and wife claiming for the custody of the child aged around 3 years and 10 months. He further contended that since the G.W.O.P. has already been filed and is being pursued before the concerned competent court, the petitioner has a statutory legal remedy available to seek for the custody of the child. It was also contended that the petitioner also has an application for interim relief so far the interim custody of the child is concerned. Therefore, according to the learned Special Government Pleader it was not a case where the extra ordinary writ jurisdiction of this court in so far as issuance of writ in the nature of Habeas Corpus to be issued.

8. Having heard the contentions put forth on either side some of the admitted factual matrix which in terms of the pleadings are undisputed. They are as follows;

1. The marriage between the petitioner and respondent No.7 to be held on 15.08.2019.

2. The baby girl viz., Musfira Alam being born on 03.06.2023.
3. The petitioner and the minor child having come to India on 12.06.2023 for better treatment of the child.
4. As per the petitioner, the 11th respondent took away the minor child with an element of cheating on 16.06.2023.
5. Since then, the minor child is in the custody of the respondent Nos.8 to 11, none of them being natural guardian.
6. In between the 7th respondent had also come to India for the purpose of filing the G.W.O.P. After filing the same he left back to Dubai.
7. The minor child still is in the custody of the respondent Nos.8 to 11.
8. The petitioner herein have already filed a complaint case under the Domestic Violence Act before the Metropolitan Magistrate, Hyderabad in October,

2023, which subjudice before the concerned competent court.

9. The 7th respondent meanwhile also filed a petition under Guardian and Wards Act on 15.04.2024 wherein also notices have been issued.

9. In the aforesaid undisputed factual backdrop, it would be relevant at this juncture to refer to the judgment relied upon by the learned counsel for the petitioner himself.

10. The decision of the Supreme Court in the Case of **Tejaswini Gaud V. Shkhar Jagdish Prasad Tewari** supra, in paragraph No.14 dealing with the maintainability of the petition under Habeas Corpus has held as under:

Writ of habeas corpus 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 as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a

person who according to the personalis not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

11. Likewise in paragraph Nos. 19 and 20 the Hon'ble Supreme Court has held as under:

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the [Hindu Minority and Guardianship Act](#) or the Guardians and [Wards Act](#) as the case may be. In cases arising out of the proceedings under the [Guardians and Wards Act](#),

the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the [Guardians and Wards Act](#) and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

12. The fact which further needs appreciation at this juncture is that the aforesaid judgment in the case of ***Tesjaswini Gaud*** supra, the dispute was not between the two natural guardians of the minor child it was between the father the natural guardian and the siblings of the mother of the child. On the other side, the dispute arose after the natural guardian the mother had expired on account of the some illness, therefore the decision rendered in the said judgment has to be appreciated in the given factual backdrop which has been narrated in the preceding

paragraphs and also considering the fact that the dispute was not between the natural guardians.

13. As regards the decision of the Allahabad High Court in the case of **Vinayak Goyal V. Prem Prakash Goyal** supra, the reading of the paragraph No.5 of the said judgment itself again would clearly indicate that the said litigation also was not between the two natural guardians. The said petition also was the mother as the natural guardian the one side and paternal grand father and grand mother on the other side. For that reason also, the judgment of the Allahabad High Court becomes too distinguishable of facts.

14. Coming to the decision of the Division Bench of the Kerala High Court in the case of **Suharabi V. D.Muhammed** supra, what needs to be considered is that the fact that the said decision was rendered where the original proceedings were one which was instituted under the provisions of the Guardian and Wards Act. It was not decided in the course of the petition for Habeas Corpus and thus, the said decision of the Kerala High Court rather goes

against the petitioner so far as the maintainability of the writ for Habeas Corpus is concerned.

15. In the light of the observations made by the Hon'ble Supreme Court in the paragraph which have been quoted earlier in this judgment, we are also of the considered opinion that under the factual backdrop narrated and which are undisputed which stands reflected in the preceding paragraphs, we do not find it to be a case where the extra ordinary writ remedy in the nature of Habeas Corpus has to be issued. We are more not inclined to entertain the writ petition for yet another reason that the admitted factual matrix from the petition itself where the petitioner admits that the private respondents had illegally taken the custody of the child on 16.06.2023, whereas the instant petition seeking for the custody of the child by invoking the remedy of Habeas Corpus has been filed after a about more than 11 months i.e., on 01.05.2024. Except for the oral submissions and the filing of the case under the Domestic Violence Act, which again is only in October 2023, where the custody of the child has been sought for as one of the relieves against the series of relieves that has

been sought for. There does not seem to be any other legal remedies resorted to by the petitioner and no plausible explanation has been provided as to why the petitioner did not think of of filing the petition for Habeas Corpus, immediately upon losing the custody of the child about 11 months back. Moreover we are also of the considered opinion that now that the husband himself has moved a petition seeking for the relief of retention of the custody of the child and for declaring him as the natural guardian and where the court has already seized the matter and have issued notices to the petitioner. The petitioner have all the right to enter appearance and move an appropriate application and seek for interim custody of the child also. Particularly taking note of the fact that the child today is not with either of the natural guardian, but is in the custody of the private respondent Nos.8 to 11, who are close relatives of the father of the minor child i.e., 7th respondent.

16. Since the petitioner has all these legal remedies available, we are not inclined to entertain the instant writ petition at this juncture.

17. Accordingly, the instant writ petition stands rejected reserving the right of the petitioner to avail such other legal remedies available to her under law.

Consequently, miscellaneous petitions pending, if any, shall stand closed. No order as to costs.

P.SAM KOSHY, J

SAMBASIVA RAO NAIDU, J

Date: 02.05.2024

Note: LR Copy to be marked: Yes
B/o.AQS