Before Jasjit Singh Bedi, J.

RASHNEET KAUR—*Petitioner*

versus

STATE OF HARYANA AND OTHERS—*Respondent*

CRWP No.3251 of 2022

June 13, 2022

A) Constitution of India, 1950—Art.226—Hindu Minority and Guardianship Act, 1956—S.6—Writ of Habeas Corpus—Direction to father and grandparents to produce minor girl child and custody of minor child to mother and natural guardian of child—Sought for— Held, no amount of wealth or mother like love can substitute for mother's love and care, therefore, maternal care and affection is indispensable for healthy growth of child—Even if statement of father is taken as truth that child refused to go with mother, that by itself does not have any significance as child of such tender age does not know what is in her best interest—In long term for benefit and welfare of child, by no stretch of imagination can it be said that welfare of child would be better taken care of by grandparents viz-a-viz mother—In case of child who is less than 05 years old, custody should ordinarily be with mother—In fact nothing significant pointed out by grandparents as to why custody of child ought not to be with mother—Hence, custody of minor to mother.

Held, that the girl child, namely, Avneet Turka was born on 01.08.2017 and is, therefore, less than five years old. She was brought back to India by respondent no. 7 and 8 on 23.1.2020 after which due to COVID-19 the petitioner-mother was unable to see her till March 2022. Therefore, it is apparent that when the child left the company of the petitioner she was approximately 2½ years old and spent her growing years in the company of her grandparents i.e. respondent No.7 and 8. As per the father, the child had refused to go with the petitioner at the time when the petitioner left for her parental home on 28.03.2022. I may point out here that even if the statement of the father is taken as the truth that the child had refused to go with the mother, that by itself does not have any significance as a child of such tender age does not know what is in her best interest. It may be reiterated that the child had not met her mother in two years between January 2020 to March 2022. Apparently, for the reasons beyond her control the petitioner was unable to come back to India. The minor girl child may have developed

a bond with the respondent nos.7 & 8 with whom she is residing for the last more than two years because of which she might have stated that she does not wish to go with her mother. However, in the long term for the benefit and welfare of the child, by no stretch of imagination can it be said that the welfare of the child would be better taken care of by the grandparents viz-a-viz the mother. Even otherwise, in the case of child who is less than 05 years old (which is the case here) the custody should ordinarily be with the mother. In fact nothing significant has been pointed out by the respondent nos.7 & 8 as to why the custody of the child ought not to be with the mother.

(Para 18)

B) Constitution of India, 1950—Art.226—Hindu Minority and Guardianship Act, 1956—S.6—Writ of Habeas Corpus for custody of minor—Maintainability—Held, where in circumstances of particular case ordinary remedy of Civil Courts is either not available or is ineffective, writ of Habeas Corpus is certainly maintainable, more so, where it is shown that detention of minor child by parent or others was illegal, without any authority of law and was also to detriment of child.

Held, that a perusal of section 6 of The Hindu Minority and Guardianship Act, 1956 along with various judgments (supra) would show that in child custody matters, the ordinary remedy lies under the Hindu Minority and Guardianship Act, 1956 and The Guardianship and Wards Act, 1890 as the case may be. There are significant differences between an inquiry by the Civil Courts and the exercise of powers by a Writ Court which is of summary nature where rights are determined on the basis of affidavits. Therefore, where the court is of the view that a detailed inquiry is required the Court may decline to exercise the extraordinary jurisdiction of a Writ Court and direct the parties to approach the Civil Court. Therefore, it is only in exceptional cases, where the rights of the parties to the custody of the minor will be determined in the exercise of extraordinary jurisdiction in a petition for Habeas Corpus. Thus, where in the circumstances of a particular case the ordinary remedy of the Civil Courts is either not available or is ineffective a writ of Habeas Corpus is certainly maintainable, moreso, where it is shown that the detention of the minor child by a parent or others was illegal, without any authority of law and was also to the detriment of the child.

(Para 16)

Himanshu Sharma, Advocate, *for the Petitioner.*

Parveen Kumar Aggarwal, Deputy Advocate General, Haryana.

Kanwaljeet Singh, Advocate, for respondent nos.7 & 8.

JASJIT SINGH BEDI, J.

(1) The present criminal writ petition under Article 226 of the Constitution of India has been filed for the issuance of a Writ in the nature of Habeas Corpus directing the respondents to produce the minor girl child of the petitioner i.e. Avneet Turka (aged 4-1/2 years) daughter of Sh. Avikash Turka resident of H.No.174, Sector D, Defence Colony, Ambala Cantonment and handover the custody of the minor child to the petitioner, who is the mother and natural guardian of the child.

(2) The brief facts as emanating from the petition are that the petitioner who was born in Shahbad, District Kurukshetra got married to Avikash Turka son of respondent nos.7 & 8, resident of 174, Sector D, Defence Colony, Ambala Cantonment on 15.12.20213 at Gambhir Farms, Shahbad, District Kurukshetra. Immediately after the marriage the petitioner and Avikash Turka immigrated to Australia and after three years of the wedlock a female child i.e. Avneet Turka was born on 01.08.2017 at Mater Hospital, South Brisbane, Queensland, Australia. The details of the passport of the minor child are attached as Annexure P-3.

Meanwhile, the petitioner qualified as a nurse with a Bachelor Degree in Nursing from Griffith University, Brisbane, Queensland, Australia and has been working at RSL Remembrance Village, Mount Austin, New South Wales, Australia drawing an annual salary of Australian Dollar 67,000/-.

(3) Though there was marital discord between the couple from time to time, however, the petitioner who was residing in Australia along with her husband travelled to India to meet her family and relatives between 29.04.2019 to 13.05.2019. Her parents-in-laws i.e. Respondent nos.7 & 8 would also travel to Australia for visiting the petitioner, her husband and their child Avneet Turka.

(4) As per the petitioner, on 23.01.2020 her in-laws brought the minor child Avneet Turka along with them to India and petitioner was to visit India soon thereafter. However, due to the outbreak of COVID-19 in 2020 followed by the unforeseen and unavoidable circumstances of overseas travel restrictions and suspension of international flights the petitioner got stranded in Australia and could not visit India in 2020 and 2021. Thereafter the petitioner came to India on 21.03.2022 to visit

family and relatives after a gap of 02 years and went to the matrimonial home situated at #174, Sector D, Defence Colony, Ambala Cantonment. The petitioner resided there for about a week and suffered domestic violence and maltreatment at the hands of her in-laws respondent nos.7 & 8. Due to the same, the petitioner decided to visit her parental home situated at Shahbad, District Kurukshetra and after packing their bags and dressing up her daughter Avneet Turka to visit her parental home, the respondent nos.7 & 8 did not allow the petitioner to take along her daughter with her.

(5) Due to the aforementioned incident and domestic violence, the petitioner approached Police Station Panjokhra, and filed a complaint dated 28.03.2022 (Annexure P-1) against respondent nos.7 & 8 seeking the release of her minor daughter from the forcible custody of respondent nos.7 & 8 and to hand over the custody to her. On 30.03.2022 the respondent nos.7 alone appeared before the police at Police Station Panjokhra and did not produce the minor child. The police again called respondent nos.7 & 8 and the petitioner at P.S. Panjokhra on 6.4.2022 and directed them to produce the minor child. However, while the respondents nos.7 & 8 did appear on 6.4.2022 but they did not produce the minor child and kept the matter pending on one pretext or the other.

(6) The petitioner thereafter visited the matrimonial home again. However, the said house was locked and on an inquiry the neighbor informed her that the respondents nos.7 & 8 had left the house and their current location was not known. Thus it was apparent that the intention of the respondent nos.7 & 8 was to harass the petitioner and keep her away from her minor daughter. Due to the aforementioned facts, the present petition came to be filed before this Court.

(7) The matter came up for hearing on 08.04.2022 before this Court when notice of motion was issued for 5.5.2022. On the said date, counsel appeared for respondent nos.7 & 8 and this Court directed the parties to appear before the Mediation and Conciliation Centre of this Court with a further direction to the respondent nos.7 & 8 to pay a sum of Rs.25,000/- to the petitioner. The matter thereafter was adjourned to 16.5.2022. On that day time was sought by respondent nos.7 & 8 and the matter stood adjourned to 23.05.2022. Meanwhile in the mediation proceedings a sum of Rs.25,000/- was paid in cash to the petitioner but an amicable settlement could not be arrived at and, therefore, the matter was sent back to this Court. On 26.5.2022 the counsel for respondent nos.7 & 8 was asked to bring the minor child to the court on the next

date i.e. 27.05.2022. However, the child was not brought to the Court.

(8) Meanwhile, reply dated 28.04.2022 was submitted by way of an affidavit of Mr. Raj Singh, HPS, DSP, Ambala on behalf of respondent nos.1 to 3 and 6. As per the said reply the petitioner on 08.04.2022 stated that she did not wish to take action against her in laws and would file a appropriate complaint separately at Kurukshetra. The statement of her husband Avikash Turka was recorded on the same day and he stated that he and his parents were willing to give the child to his wife as his daughter needed both parents and they could share custody for a period of six months each. This was because the child was being taken care of by his parents and even otherwise did not want to go with the petitioner on 28.03.2022. However, they would let the child go with the mother if the child so wanted.

(9) The respondent nos.7 & 8 did not file any reply during the course of proceedings before this Court. However, counsel for the respondent nos.7 & 8 stated that they were willing to share custody of the minor child with the petitioner. On a query as to how that would be possible as the petitioner and her husband Avikash Turka are residing in Australia and respondent nos.7 & 8 were ordinarily residents of Ambala, Haryana, India, no response whatsoever was provided by their Counsel.

(10) I have heard the counsel for the parties at length.

(11) The Counsel for the petitioner submits that the child had been brought by respondent nos.7 & 8 to India in January 2020 with the clear understanding that the petitioner would follow the suit and thereafter bring the child back to Australia where she is ordinarily residing with the petitioner. However, due to COVID-19 restrictions she was unable to travel back to the country up till March 2022. When she came back and attempted to take her child to her own parental home the same was objected to by respondent nos.7 & 8. This unlawful, illegal and forcible retention of the child itself entitles the petitioner to the relief as prayed for in this petition, more so when the female child is less than 05 years old and needs the care, love and attention of the petitioner-mother. In fact the custody of the minor child has always been with the petitioner except for a few occasions in the past when the child resided with the respondent nos.7 & 8 but such an incident of respondent nos.7 & 8 refusing to part with the child had never taken place. In fact the welfare of the child was of paramount importance and, therefore, the custody ought to be handed over to the petitioner. Reference is made to Section 6 of The Hindu Minority and

Guardianship Act, 1956 to contend that the custody of a girl child less than 05 years of age should ordinarily be with the mother.

(12) The Counsel for respondent nos.7 & 8 has only reiterated the version of Avikash Turka, as per his statement Annexure R-1 recorded by the investigating agency. He has not been able to point out anything significant as to why the custody of the minor child should be retained by respondent nos.7 & 8 except to say that the child is attached to the grandparents and that they were willing to share the custody with the petitioner. As has already been mentioned above, he has been unable to explain as to how the child's custody could be shared with the grandparents i.e. respondent nos.7 & 8 who are residents of India and the petitioner, the mother who was a resident of Australia.

(13) The learned State Counsel has only reiterated the version in the State's reply dated 28.04.2022.

(14) Before proceeding further it would be necessary to examine the relevant provisions of The Hindu Minority and Guardianship Act, 1956 which are as under:-

> " **6. Natural guardians of a Hindu minor.**—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;**
>
> (b) in the 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 expressions "father" and

"mother" do not include a step-father and a step-mother.

13. **Welfare of minor to be paramount consideration**.—

(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

(15) The Hon'ble Supreme Court and this Court has on various occasions dealt with the issue in hand and some of the relevant judgments in this regard are as under:-

In ***Tejaswini Gaud & Ors.*** *versus* ***Shekhar Jagdish Prasad Tewari & Ors.***[1] the maternal aunt and uncles had custody of the child who's mother was ailing and had subsequently died. The father sought the custody and the Hon'ble Supreme Court while granting custody of the child held as under:-

"11. **Maintainability of the writ of habeas corpus**:- The learned counsel for the appellants submitted that the law is well- settled that in deciding the question of custody of minor, the welfare of the minor is of paramount importance and that the custody of the minor child by the appellants cannot be said to be illegal or improper detention so as to entertain the habeas corpus which is an extraordinary remedy and the High Court erred in ordering the custody of the minor child be handed over to the first respondent-father. Placing reliance on **Dr. Veena Kapoor v. Varinder Kumar Kapoor (1981) 3 SCC 92** and **Sarita Sharma Vs. Sushil Sharma 2000(2) RCR (Civil) 367: (2000) 3 SCC 14** and few other cases, the learned counsel for the appellants contended that the welfare of children requires a full and thorough inquiry and therefore, the High Court should instead of allowing the habeas corpus petition, should have directed the respondent to initiate appropriate proceedings in the civil court. The learned counsel further contended that though the father being a natural guardian has a preferential

[1] 2019(3) RCR (Civil) 104

right to the custody of the minor child, keeping in view the welfare of the child and the facts and circumstances of the case, custody of the child by the appellants cannot be said to be illegal or improper detention so as to justify invoking extra-ordinary remedy by filing of the habeas corpus petition.

12. Countering this contention, the learned counsel for respondent No.1 submitted that in the given facts of the case, the High Court has the extraordinary power to exercise the jurisdiction under Article 226 of the Constitution of India and the High Court was right in allowing the habeas corpus petition. The learned counsel has placed reliance on **Gohar Begum v. Suggi @ Nazma Begam and others AIR 1960 SC 93 and Smt. Manju Malini Sheshachalam D/o Mr. R. Sheshachalam v. Vijay Thirugnanam S/o Thivugnanam & Others 2018 SCC Online Kar 621**. Contention of respondent No.1 is that as per Section 6 of the Hindu Minority and Guardianship Act, respondent No.1, being the father, is the natural guardian and the appellants have no authority to retain the custody of the child and the refusal to hand over the custody amounts to illegal detention of the child and therefore, the writ of habeas corpus was the proper remedy available to him to seek redressal.

13. 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 personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

14. In Gohar Begum where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued. In Gohar Begum, the Supreme Court dealt with a petition for habeas corpus for recovery of an illegitimate female child. Gohar

alleged that Kaniz Begum, Gohars mothers sister was allegedly detaining Gohars infant female child illegally. The Supreme Court took note of the position under the Mohammedan Law that the mother of an illegitimate female child is entitled to its custody and refusal to restore the custody of the child to the mother would result in illegal custody of the child. The Supreme Court held that Kaniz having no legal right to the custody of the child and her refusal to make over the child to the mother resulted in an illegal detention of the child within the meaning of Section 491 Cr.P.C. of the old Code. The Supreme Court held that the fact that Gohar had a right under the Guardians and Wards Act is no justification for denying her right under Section 491 Cr.P.C. The Supreme Court observed that Gohar Begum, being the natural guardian, is entitled to maintain the writ petition and held as under:-

"7. On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants.

In **Queen v. Clarke (1857) 7 EL & BL 186: 119, ER 1217** Lord Campbell, C.J., said at p. 193:

"But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty.

The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of Section 491 would clearly be applicable to the case and the appellant entitled to the order she asked.

8. We therefore think that the learned Judges of the High

Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have not given any reason in support of their view and we are clear in our mind that view is unsustainable in law.

....

10. We further see no reason why the appellant should have been asked to proceed under the Guardian and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under Section 491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right under Section 491. That is well established as will appear from the cases hereinafter cited. **(Underlining added)**

15. In Veena Kapoor, the issue of custody of child was between the natural guardians who were not living together. Veena, the mother of the child, filed the habeas corpus petition seeking custody of the child from her husband alleging that her husband was having illegal custody of the one and a half year old child. The Supreme Court directed the District Judge concerned to take down evidence, adduced by the parties, and send a report to the Supreme Court on the question whether considering the interest of the minor child, its mother should be given its custody.

16. In **Rajiv Bhatia v. Govt. of NCT of Delhi and others (1999) 8 SCC 525**, the habeas corpus petition was filed by Priyanka, mother of the girl, alleging that her daughter was in illegal custody of Rajiv, her husbands elder brother. Rajiv relied on an adoption deed. Priyanka took the plea that it was a fraudulent document. The Supreme Court held that the High Court was not entitled to examine the legality of the deed of adoption and then come to the conclusion one way or the other with regard to the custody of the child.

17. In Manju Malini where the mother filed a habeas corpus petition seeking custody of her minor child Tanishka from her sister and brother-in-law who refused to hand over the child to the mother, the Karnataka High Court held as under:-

"24. The moment respondents 1 and 2 refused to handover the custody of minor Tanishka to the petitioner the natural and legal guardian, the continuation of her custody with them becomes illegal detention. Such intentional act on the part of respondent Nos.1 and 2 even amounts to the offence of kidnapping punishable under S.361 of IPC. Therefore there is no merit in the contention that the writ petition is not maintainable and respondent Nos.1 and 2 are in legal custody of baby Tanishka.

18. 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.

19. 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.

20. In the present case, the appellants are the sisters and brother *of* the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent- father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India.

21. **Custody of the child removed from foreign countries and brought to India**:- In a number of judgments, the Supreme Court considered the conduct of a summary or elaborate enquiry on the question of custody by the court in the country to which the child has been removed. In number of decisions, the Supreme Court dealt with habeas corpus petition filed either before it under Article 32 of the Constitution of India or the correctness of the order passed by the High Court in exercise of jurisdiction under Article 226 of the Constitution of India on the question of custody of the child who had been removed from the foreign countries and brought to India and the question of repatriation of the minor children to the country from where he/she may have been removed by a parent or other person. In number of cases, the Supreme Court has taken the view that the High Court may invoke the extraordinary jurisdiction to determine the validity of the detention. However, the Court has taken view that the order of the foreign court must yield to the welfare of the child. After referring to various judgments, in **Ruchi Majoo v. Sanjeev Majoo (2011) 6 SCC 479**, it was held as under:-

"58. Proceedings in the nature of habeas corpus are

summary in nature, where the legality of the detention of the alleged detenu is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views the rival claims, if any, to such custody.

59.The Court may also direct repatriation of the minor child to the country from where he/she may have been removed by a parent or other person; as was directed by this Court in **Ravi Chandran 2009(4) RCR (Civil) 961: (2010) 1 SCC 174** and **Shilpa Aggarwal, 2010(1) RCR (Civil) 231: (2010)1 SCC 591** cases or refuse to do so as was the position in **Sarita Sharma case 2000 (2) RCR (Civil) 367: (2000)3 SCC 14.** What is important is that so long as the alleged detenu is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ courts jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenu is within its territorial jurisdiction."

22. After referring to various judgments and considering the principles for issuance of writ of habeas corpus concerning the minor child brought to India in violation of the order of the foreign court, in **Nithya Anand Raghavan v. State (NCT of Delhi) (2017) 8 SCC 454** it was held as under:-

"46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of

the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

23. In Sarita Sharma, the tussle over the custody of two minor children was between their separated mother and father. The Family Court of USA while passing the decree of divorce gave custody rights to the father. When the mother flew to India with the children, the father approached the High Court by filing a habeas corpus petition. The High Court directed the mother to handover the custody to the father. The Supreme Court in appeal observed that the High Court should instead of allowing the habeas corpus petition should have directed the parties to initiate appropriate proceedings wherein a thorough enquiry into the interest of children could be made.

24. In the recent decision in **Lahari Sakhamuri v. Sobhan Kodali 2019 (5) SCALE 97**, this court referred to all the judgments regarding the custody of the minor children when the parents are non-residents (NRI). We have referred to the above judgments relating to custody of the child removed from foreign country and brought to India for the sake of completion and to point out that there is a significant difference in so far the children removed from foreign countries and brought into India.

25. Welfare of the minor child is the paramount consideration:- **The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought**

to be child interest and welfare of the child.

26. **After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to childs ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, in Nil Ratan Kundu v. Abhijit Kunu, 2008(3) RCR (Civil) 936: (2008) 9 SCC 413, it was held as under**:-

"49. In **Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148** the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, in **M.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Madras 315** the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to human touch. The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51. In **Kamla Devi v. State of H.P. AIR 1987 Himachal Pradesh 34** the Court observed:

"13.... the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a childs ordinary comfort, contentment, intellectual, moral and physical

development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Courts view of the best interests of the child whose welfare requires that he be in custody of one parent or the other."

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a childs ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

27. Reliance was placed upon **Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42**, where the Supreme Court held as under:-

32. In McGrath, (1893) 1 Ch 143, Lindley, L.J. observed: (Ch p. 148) The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded.

(emphasis supplied)

....

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in **Mausami Moitra Ganguli case 2008(4) RCR (Civil) 551:(2008) 7 SCC 673**, the court has to give due weightage to the childs ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word welfare used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.

28. Contending that however legitimate the claims of the parties are, they are subject to the interest and welfare of the child, in **Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840**, this Court has observed that:-

“7 the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the fathers fitness or otherwise to be the guardian, and (ii) the interests of the minors.

“15. .... The children are not mere chattels : nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a

dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to 11 have erred in reversing him on grounds which we are unable to appreciate.

29. The learned counsel for the appellants has placed reliance upon **G. Eva Mary Elezabath v. Jayaraj and Others 2005 SCC Online Mad 472** where the custody of the minor child aged one month who had been abandoned by father in church premises immediately on death of his wife was in question. The custody of the child was accordingly handed over to the petitioner thereon who took care of the child for two and half years by the Pastor of the Church. The father snatched the child after two and a half years from the custody of the petitioner. The father of the child who has abandoned the child though a natural guardian therefore was declined the custody.

30. In **Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi 1993(1) RCR (Criminal) 529: (1992) 3 SCC 573, the father of the children was facing charge under Section 498-A IPC and the children expressed their willingness to remain with their maternal uncle who was looking after them very well and the children expressed their desire not to go with their father. The Supreme Court found the children intelligent enough to understand their well-being and in the circumstances of the case, handed over the custody to the maternal uncle instead of their father.**

31. In the case at hand, the father is the only natural guardian 12 13 alive and has neither abandoned nor neglected the child. Only due to the peculiar circumstances of the case, the child was taken care of by the appellants. Therefore, the cases cited by the appellants are distinguishable on facts and cannot be applied to deny the custody of the child to the father.

33. As observed in Rosy Jacob earlier, the father's fitness has to be considered, determined and weighed

predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian, child's ordinary comfort, contentment, health, education etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

34. The welfare of the child has to be determined owing to the facts and circumstances of each case and the court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.

In ***Mandeep Kaur*** *versus* ***State of Punjab & Ors.***[2] where the mother had filed a Habeas Corpus petition against the father for the custody of the minor child this Court held as under:-

11. **The question which first arises as to whether the present habeas corpus petition is liable to be dismissed on the grounds of custody of the minor daughter with respondent No.4 father, who is her natural guardian under Section 6 of the HMG Act, not being illegal and availability to the petitioner of alternative remedy of filing of petition for custody of the minor daughter under the HMG Act/the GW Act before the Guardian/Family Court.**

12. **Now, it is well settled that writ of habeas corpus can**

[2] 2021(1) RCR (Civil) 152

be issued for restoration of custody of a minor to the guardian wrongfully deprived of it.

13. **In Criminal Appeal No. 127 of 2020 SLP (crl.) No. 7390 of 2019 titled Yashita Sahu Vs. State of Rajasthan and others decided on 20.01.2020 Hon'ble Supreme Court observed as under:-**

"9. 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 vs. Arvand M. Dinshaw & Ors. (1987) 1 SCC 42, Nithya Anand Raghavan vs. State (NCT of Delhi) & Anr. (2017) 8 SCC 454 and Lahari Sakhamuri vs. Sobhan Kodali (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."

14. **The exercise of extra ordinary writ jurisdiction to issue writ of habeas corpus in such cases is not solely dependent on and does not necessarily follow merely determination of illegality of detention and is based on the paramount consideration of welfare of the minor child irrespective of legal rights of the parents.**

20. It follows from the above discussion that a petition for issuance of a writ of habeas corpus to recover the custody of minor child if the minor child is in illegal custody or being detained in custody which would be detrimental to the interest of the minor child is maintainable. (See **Gohar Begam Vs. Suggi alias Nazma Begam (1960) 1 SCC 597; Manju Tiwari Vs. Rajendra Tiwari : AIR 1990 SC 1156; Syed Saleemuddin Vs. Dr. Rukhsana : 2001(2) R.C.R.(Criminal) 591 and Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others (SC) : 2019(3) R.C.R.(Civil) 104.**) The Supreme Court/High Court can in exercise of its writ jurisdiction under Article 32/226 of the Constitution direct by issuance of a writ of habeas corpus that custody of a minor be given to any other person

till decision of the question of its custody by the Guardian/Family Court in accordance with law.(See Manju Tiwari v. Dr. Rajendra Tiwari, (SC) :AIR 1990 SC 1156; Syed Saleemuddin Vs. Dr. Rukhsana 2001(2) R.C.R.(Criminal) 591; Roxann Sharma v. Arun Sharma (SC) : 2015 (2) R.C.R. (Civil) 93; Gippy Arora Vs. State of Punjab and others : 2012(4) R.C.R.(Civil) 397 (PHHC); CRWP No.68 of 2017 titled as 'Kirandeep Kaur Vs. State of Punjab and others' decided on 07.03.2017 and CRWP-3013 of 2020 titled as 'Neha Vs. State of Hayrana and others' decided on 01.06.2020.) Mere availability of an alternate remedy of filing custody petition under the HMG Act/the GW Act is no bar to exercise of extra ordinary writ jurisdiction for issuance of a writ of Habeas Corpus. (See Gohar Begam Vs. Suggi alias Nazma Begam (1960) 1 SCC 597; Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others (SC) : 2019(3) R.C.R.(Civil) 104; Smt. Nandita Virmani Vs. Raman Virmani : 1983 Cri. L. J. 794 and Durgesh Kumar Ahuja Vs. Vineet Khurana and another : 1985 Cri. L.J. 1195.)

21. So far as the judgments relied upon by learned counsel for respondents No.4 and 5 are concerned, in **Amit Vs. Nirmal Sahu (Allahabad HC) : 2009(5) R.C.R.(Civil) 258** a false averment had been made by the applicant mother that she was thrown out of the house of her husband on 10-7-2007. The record indicated that the applicant left the house of her husband on 20-11-2005, almost after one month of the child being born. The opposite party had filed an application under Section 9 of the Hindu Marriage Act, 1955 for the restitution of the conjugal rights in which the applicant had filed an application under Section 24 of the Hindu Marriage Act,1955 for grant of maintenance prior to the filing of the writ petition. In view of these circumstances the Court held that the alleged detention of the child by the father and natural guardian of the male child was neither illegal nor without any authority of law and that the mother, should have moved an application under Section 6 of the HMG Act since the matter was pending before the Family Court. In **Manjula Jha Vs. Ravindra Nath Jha (Allahabad HC) : 1988(1) HLR 273** the petitioner had filed an application under Section 10 of the Guardians And

Wards Act, 1890 in the court of the District Judge, Aligarh before filing of the habeas corpus writ petition for custody of son aged six years. Since the petitioner was actually availing the alternative remedy the Court held that the matter in relation to the welfare of the minor could appropriately and effectively be investigated and adjudicated upon by the District Judge before whom the application of the petitioner under the provision of the Guardians and Wards Act, 1890 was pending. In **Muthian Sivathanu Vs. Home Secretary, Government of Tamil Nadu and others (Madras HC): 2014(38) R.C.R.(Criminal) 219** where GWOP No. 2177 of 2011, seeking custody of the child, was filed and the same was pending before the Family Court, Chennai, habeas corpus petition filed by the father for custody of child with mother was dismissed on the ground of availability of alternative remedy. In all these cases litigation- matrimonial or custody petition was already pending before the Family/Guardian Court which was taken into consideration by the High Court in declining exercise of writ jurisdiction. Facts of the present case are different from those of the above-referred cases as the petitioner was not pursuing any such remedy before filing the present habeas corpus petition. Further, in view of the observations made by Hon'ble Supreme Court in **Syed Saleemuddin Vs. Dr. Rukhsana 2001(2) R.C.R.(Criminal) 591 and Veena Kapoor Vs. Varinder Kumar Kapoor : AIR 1982 Supreme Court 792**, the question of custody of detenue-Alizeh Dhalla has to be decided on the paramount consideration of her welfare. Therefore, observations in **Amit Vs. Nirmal Sahu (Lucknow Bench) : 2009(5) R.C.R.(Civil) 258; Manjula Jha Vs. Ravindra Nath Jha (Allahabad HC) : 1988(1) HLR 273** and **Muthian Sivathanu Vs. Home Secretary, Government of Tamil Nadu and others (Madras HC) : 2014(38) R.C.R.(Criminal) 219** relied upon by learned counsel for respondents No.4 and 5 are not of any help to respondents No.4 and 5.

22. **It follows from the above discussion that the present habeas corpus petition is not liable to be dismissed on the grounds of custody of the minor daughter with respondent No.4-father not being illegal and availability**

to the petitioner of alternative remedy of filing custody petition under the HMG Act/the GW Act.

23. The question which next arises is whether the petitioner is entitled to take custody of the minor daughter from respondent No.4.

24. As between the parties who are Hindus, the HMG Act lays down the principles on which custody disputes are to be decided. As per Section 6 (a) of the HMG Act, 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) is the father, in the case of a boy or an unmarried girl and after him, the mother. However, proviso to Section 6(a) of the HMG Act provides that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

25. In **Roxann Sharma v. Arun Sharma (SC) : 2015 (2) R.C.R. (Civil) 93** Hon'ble Supreme Court observed as under:-

"12. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardized if the custody retained by the mother. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this Section or for that matter any other provision including those contained in the G&W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

26. In **CRWP-3013 of 2020 titled as 'Neha Vs. State of Hayrana and others' decided on 01.06.2020** while interpreting Section 6(a) of the HMG Act, a Coordinate

Bench of this Court observed as under:-

"13. ....No doubt, the above provision postulates that the custody shall "ordinarily" be with the mother. But the word "ordinarily" is to be construed to mean that unless, prima facie, it is shown otherwise by the father that child would be better taken care of by deprivation of motherhood. Father must then give some cogent reasons, indicative of the welfare and interest of the child being jeopardized or the exclusive motherhood being imminently non-conducive to the upbringing of child Spirit

of section 6 hypothesizes that, given the tender age of a minor, suitability of custody is not the predominant factor, what is more relevant or should weigh, is the requisite biological and natural environment, which gives rise to a general presumption that mother is first and best suitable for child care of a minor that age."

27. **In the present case the question of welfare and interest of the minor daughter has to be judged on the consideration of universally acknowledged superiority of the mother's instinctive selfless love and affection of her children, particularly the infants. The lap of the mother is the natural cradle where the safety and welfare of the infant can be assured and there is no substitute for the same. Mother's protection for the infant is indispensable and no other protection will be equal in measure and substance to the same. No amount of wealth or mother like love can take place of mother's love and care. Motherly care and affection is indispensable for the healthy growth of the infants.**

29. In view of Section 6(a) of the HMG Act, the custody of minor daughter who is now aged about three and half years has to be "ordinarily" with the petitioner being its mother. The custody of the minor daughter was with the petitioner till her arrest in the theft case registered against her and her parents and other family members at the instance of respondent No.4. The question of guilt or innocence of the petitioner in the above said theft case has to be decided on the basis of evidence to be produced before the trial Court and is not required to be gone into by this Court in the present case. The petitioner has nothing to do with the

criminal case registered against her father. Matrimonial dispute of her brother with his wife will also be a personal matter. Suffices it to observe here that the petitioner cannot be said to be disabled by these matters from properly looking after and taking motherly care of the minor daughter. Respondent No.4 being businessman has to go out of the house to attend to the business and respondents No.4 and 5 cannot be said to be in a better position to take care of the minor child as compared to its mother-the petitioner. Respondents No.4 and 5 have not given any cogent reasons indicative of the welfare and interest of the minor daughter being jeopardized by entrusting its interim custody to its mother or custody of the mother being non-conducive to the proper upbringing, development and growth of the minor daughter. Therefore, there is no valid ground to deny interim custody of the minor daughter who is aged less than five years to its mother-the petitioner which is in fact essential to the welfare and in the best of the interest of the minor daughter. No doubt, custody of the minor daughter with respondent No.4, who being father is her natural guardian, cannot be said to be illegal but due to the minor daughter being less than five years, the mother is entitled to its custody not only as per the statutory right conferred by Section 6(a) of the HMG Act but also due to the same being essential to the welfare and in best of the interest of the minor daughter. In view of these facts and circumstances of the case, I am of the considered view that till the question of custody of the minor daughter is decided by Guardian/Family Court, the welfare and interest of the minor child would be better served by entrustment of its interim custody to its mother-the petitioner.

In the case of ***Neha** versus **State of Haryana & Ors.***[3] where the mother had filed a Habeas Corpus petition before the High Court for custody of her minor daughter who had been taken away by the father, this Court held as under:-

"1. This criminal writ petition has been filed by one Ms. Neha for custody of her minor daughter, namely, Trisha aged about 4 years, who was allegedly taken away by her

[3] 2020(4) RCR (Civil) 643

father in a clandestine manner.

5.Respondent No.4-husband in his return has controverted the averments of the petition. He admitted that minor child is in his custody since 16.11.2019, but urged that the scope of interference by way of writ of habeas corpus is confined to the matters of illegal custody. Being father, contended respondent no.4, in no way, can be termed to be in unlawful custody of his minor daughter. According to him, the child is in his custody as petitioner has abandoned both of them. Ever since the said abandonment, he is taking proper care of the child and her welfare, which is of paramount consideration and has also filed a petition under 1890, Act.

8. At the threshold, learned counsel for respondent No.4 argued that the writ petition is not maintainable, as custody of the child with her biological father cannot be construed as illegal by any stretch of imagination. This Court, therefore, ought not to exercise its jurisdiction to issue a writ in the nature of habeas corpus. The maintainability of the writ petition has also been objected on the ground that alternative remedies are available to both the parties. In as much as, Guardian/Civil Judge, Dera Bassi is already seized of the custody dispute of the minor daughter. The father has already instituted a petition under Section 25 of 1890 Act, seeking permanent custody. Learned counsel for the respondent No.4 points out that petitioner has caused appearance in the custody case and has preferred not to file any application for interim custody of the minor daughter. Therefore, by her acquiescence, she seems to have agreed to the interim custody of the child being with the father till the final decision with regard to permanent custody is given by the concerned Court.

9. While on the other hand, learned counsel appearing for the petitioner submitted that custody of the minor child with father is most certainly unlawful, given the tender age of the minor daughter, who is barely four years old. Minor has throughout been with her mother/father ever since birth till 16.11.2019, when the father exclusively took her away to his paternal house stating that he would return in few days. He also argued that the petitioner did not take any immediate action against her husband as she was under a

bonafide impression that he would soon return along with the daughter. Furthermore, argued the learned counsel for the petitioner, that even though the petitioner had also been aggrieved on the matrimonial front, but in order to maintain cordiality and peace she chose not to precipitate the issues by rushing to institute any civil and/ or criminal proceedings. Learned counsel for the petitioner also argued that the misconduct and the conspiring mind set of the husband is reflected from a bare look at the events, and in the manner, he instituted custody petition, after having repeatedly misled the petitioner that he would soon return to the matrimonial home along with the daughter.

10. Before proceeding further in the matter, this Court would like to observe that even though there are allegations and counter allegations between petitioner and respondent No.4 with regard to their inter se matrimonial conduct, but the same are best left undealt at this stage. Paramount herein is, as to what serves best in the interest and welfare of the minor daughter so as to continue her exclusive interim custody either with father or the mother? It is for the appropriate Court to deal with those interse spousal allegations in appropriate proceedings.

11. Adverting now to the interest and welfare of the child and consequent result thereof, as to which of the spouse should have the custody of the minor daughter, during their separation, this Court would like to observe that merely because other remedies are available to the parties, would not render the present petition not maintainable. It is settled position in law that a writ of habeas corpus is maintainable to ensure the safety / security, welfare and happiness of a minor child. In such matters, what has to be decided is not merely the legal rights of the spouses involved but more predominantly, the criteria to be adopted by Court is as to what is more in the interest and welfare of the minor child rather than the interest of the parents. After all, every child is a national asset. It is the bounden duty of court also to watch and ensure the welfare and interest of a child in trouble, that best suits for his/her upbringing. Not to say, that parental love and affection, their rights and duties

vis a vis their child are to be undermined, in any manner. Court is only to supplement, after weighing all the *pros and cons.*

13. Another aspect that is particularly noteworthy herein is, the tender age of the minor daughter. She is merely four years and ordinarily, per Section 6 of 1890 Act, custody of a minor who is less than five years has to be with her mother. For ready reference, said section is reproduced as under:-

"6. 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."

No doubt, the above provision postulates that the custody shall "ordinarily" be with the mother. But the word "ordinarily" is to be construed to mean that unless, prima facie, it is shown otherwise by the father that child would be better taken care of by deprivation of motherhood. Father must then give some cogent reasons, indicative of the welfare and interest of the child being jeopardized or the exclusive motherhood being imminently non-conducive to the upbringing of child. In the family scenario and circumstances herein, there is no such cogent reasoning forthcoming so as to deny statutory right of a mother. Said motherhood right, in fact, is essentially more for the benefit and welfare of the minor child. Spirit of section 6 hypothesizes that, given the tender age of a minor, suitability of custody is not the predominant factor, what is more relevant or should weigh, is the requisite biological and natural environment, which gives rise to a general presumption that mother is first and best suitable for child care of a minor that age.

14. In the aforesaid background, while there is no

> **dissention with the proposition that respondent No.4 being father of the minor daughter herein, cannot be stated to be in her illegal or unlawful custody, however, since the minor daughter is less than five years, the mother is, therefore, entitled to the benefit of Section 6, ibid. That apart, prima facie, this Court is of the opinion that until the prayer of the parties qua custody of the minor child is decided by Guardian court, the welfare and interest of the minor child would be better in the hands of mother-petitioner.**
>
> **15.** Having given my careful thought to the entire family set up vis a vis the welfare of the child involved herein and the relevant statutory provisions, I am of the opinion that it may not be desirable to continue the custody of the minor child with respondent No.4. Especially, when the minor daughter since her childhood was with both the parents until in the surreptitious manner she was taken away by the father-respondent No.4 to have her exclusive custody.
>
> 17. It is also made clear that respondent No.4 shall be at liberty to file an appropriate fresh application for temporary/ interim custody keeping in view the paramount interest and welfare of the child. My aforesaid observations are merely preliminary and the Guardian Judge, without being influenced therefrom shall deal with the pending petition under section 25 and proceed to pass appropriate orders in accordance with law. Since, liberty has already been given to respondent no.4 to file appropriate application seeking custody, it would, therefore, be appropriate at this stage to grant temporary custody of the minor to the petitioner till any further appropriate orders are passed by the Guardian/ Civil Judge.

In the case of ***Mandeep Kaur*** *versus* ***State of Punjab*** **CRWP-8319-2020** Decided on **10.05.2021** where the wife had filed a Habeas Corpus petition against the husband-father and there was a interim order of the Australian Courts directing the husband to return the minor child to her mother, this Court while granting custody to the mother held as under:-

> "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 stepmother."

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.

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.

In ***Jaswinder Kaur*** *versus* ***State of Punjab & Ors*.**[4] where the mother had filed a Habeas Corpus petition against the grandparents in a case where the father had passed away, this Court held as under**:-**

"**15. The first controversy raised in the present writ petition is whether the writ of habeas corpus is maintainable to hand over the custody of the minor children. The answer to that question is in positive. Where the custody of the children has been taken by the other party by force or not in an legal manner in that case, writ of habeas corpus is maintainable and the custody should be resorted to the guardian, keeping in view the welfare of the minors**.

20. While awarding the custody of the minor welfare of the donors is paramount consideration. The custody can even be handed over to the relatives who is not natural guardian, according to the Hindu Minority and Guardianship Act.

22. Anil Kumar, now deceased husband of the petitioner and the minor children namely Ekta and Mohit were admittedly living at Jalandhar. Copy of Ration Card to that effect has

[4] 2010(2) RCR (Crl.) 891

been placed on the file. It is also no disputed that Anil Kumar died in the hospital after his illness and thereafter the dispute regarding the custody of the minor has arisen. Under Hindu Law, prior to coming into operation, Hindu Minority and Guardianship Act, 1956, the father was the natural guardian of the person and separate property of his minor children and next to him came the mother.

23. Section 6 of the Guardian Act, lays down that 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 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. The mother; provided that custody of the minor son completed the age of five years shall ordinarily be with the mother.

24. The age of minors in the present case is 7 years and 9 years i.e. date birth of Ekta daughter of the petitioner is 20.8.2000 whereas date of birth of Mohit son of the petitioner is 25.8.2002. It is the case of both the parties that at the time of death of Anil Kumar petitioner came to village Chamiari and thereafter children remained at village Chamiari. The case of the petitioner is that she was beaten and was not allowed to take the children, whereas the case of the respondents is that the petitioner voluntarily left the children at village Chamiari. However, this fact is not disputed that prior to death of Anil Kumar the children were residing at Jalandhar along with petitioner and Anil Kumar deceased. Anil Kumar deceased was in job with the Police Department at Jalandhar. Respondent Nos. 4 and 5 have three sons and grandchildren. The present petition, as per record, has been submitted on 14.7.2009 whereas death of Anil Kumar has taken place on 2.3.2009. Chaman Lal-respondent has filed petition under Section 7 and 25 of the Act read with Section 6 of the Guardian Act, for his appointment as guardian of Ekta and Mohit in respect of their person and property. No doubt, the rights of the parties, regarding custody, shall be determined in that petition but considering the whole of the circumstances and keeping in

view the fact that minors were in the custody of petitioner and Anil Kumar till 2.3.2009. I am of the considered view that for welfare of the minors, the custody should be handed over to the mother till the decision of application under Section 25 of the Act.

25. In fact respondent Nos. 4 and 5 had deprived of a mother from the custody of minors Ekta and Mohit. So the writ of habeas corpus is maintainable for restoring the custody of the minors to the lawful guardian. Who happened to be the mother of both the monors. However the very the fact that respondents No. 4 and 5 are contesting regarding the custody of the minors. So in my view the grandparents cannot be deprived off to meet the minors. So till the decision of application under Section 25 and 7 of the Act, it is ordered that respondent Nos. 4 and 5 shall have the right to meet the minors at Jalandhar, the place of residence of the petitioner or at a place agreeable to both the parties on 2nd and 4th Sunday of every month.

In ***Gurmeet Kaur Batth*** *versus* ***State of Punjab & Ors*. CRWP-1165-2008** Decided on 20.01.2009 where the mother had filed a Habeas Corpus petition against the grandmother and the Canadian Court had given interim custody of the child to the mother, this court while granting custody to the mother held as under:-

"19. Whether this writ petition was maintainable or not, was a subject matter in another case 'Gippy Arora v. State of Punjab and others' Criminal Writ Petition No.543 of 2008, decided by this Court on November 25, 2008. The entire case law was dealt with by Hon'ble Mr. Justice M.M.S. Bedi. In erudite judgment, after going into the entire conspectus of case law, had held as under:

"Before passing any order regarding the custody of the child, the material question regarding the maintainability of habeas corpus petition in the matters of custody of minor child has to be determined. It is a settled principle of law that in all the disputes pertaining to the custody of minor child, the interest and welfare of the minor is the predominant criteria. The Hon'ble Supreme Court in **Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and another, AIR 1987 SC 3** was considering a dispute pertaining to custody of minor child in a criminal writ petition where one

minor child was born of Indian father and American mother was an American citizen. On divorce of the parents his custody and guardianship had been entrusted to the mother by the competent Court of USA. The father was given visitation rights. He abducted the minor illegally in India. On a writ petition filed by mother for custody of the minor, it was held that mother was full of genuine love and affection for the child and she could be safely trusted to look after him, educate him and attend in every possible way to his proper up-bringing. The child's presence in India was held to be a result of an illegal act of abduction and father guilty of said act was held not entitled to claim any advantage. Relying upon 1996 (1) All England Reporter 886, it was observed that it is the duty of Courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrong doing. A similar question has cropped up before this Court in a case of **Marilynn Ainat Dhillon Gilmore @ Anita Dhillon Vs. Margret Nijjar and others, 1984 (1) I.L.R.(Punjab) 1**, where the parents were citizens of United States but had come to India, the wife had filed a petition for custody of her minor child by filing a habeas corpus petition. It was held that High Court could go into the question of custody of the children in habeas corpus proceedings. In para 17 of the said judgment it was observed as follows:-

"17. Children need the love and care of both parents. If they cannot get it from both then at least they must get it from one. The course which would deprive them of both must be avoided and adopted as the last resort. Children are required to be in the custody of someone until they attain their majority. The Court in passing an order in writ jurisdiction in the matter has to deal it in equitable manner. It has also to give due weight to the claim of the respective parents founded on human nature and generally what is equitable and just. And irrespective of the rights and wrongs of the contending parents, the welfare of the children is the supreme consideration when employing the remedy of habeas corpus. It has rightly been observed by legal commentators that the proceedings of this kind partakes of the incidence of a suit in equity and is considered to by one

in rem, the child being the res."

The custody of the child was handed over to the mother subject to her producing undertaking to execute bond before the High Court to produce the children whenever ordered by the High Court. In **Syed Saleemuddin Vs. Dr. Rukhsana, AIR 2001 SC 2172**, the Hon'ble Supreme Court considering the scope of habeas corpus petition regarding custody of minor children had held that the habeas corpus petition is maintainable. While granting the custody of the children to their mother till the family Court disposed of the petition for the custody of the children. It was observed as follows:-

"From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

Similarly in the case of **Mrs. Kuldeep Sidhu Vs. Chanan Singh and others, AIR 1989 P&H 103**, where the mother had an order of interim custody in her favour from a foreign Court and the father had in an unauthorized manner

removed the children from Canada to India, the habeas corpus petition was allowed and custody of the children was directed to be handed over to the mother. In **Eugenia Archetti Abdullah Vs. State of Kerala, 2005 (1) RCR (Crl.) 259**, a Division of Kerala High Court observed that for custody of children of less than 3 years lap of the mother is a natural cradle where the safety and welfare of children can be assured and there is no substitute for the same. In the said case custody of the minor children below 3 years was with father. The wife had claimed custody by filing habeas corpus petition. It was held following the judgment of the Supreme Court in **Manju Tiwari Vs. Rajendra Tiwari, AIR 1990 SC 1156**, that High Court can exercise jurisdiction vested in it under Article 226 of the Constitution of India with respect to the issuance of a writ of habeas corpus when there is illegal detention or wrongful custody. Similarly a division Bench of Gujarat High Court in **Surabhai Ravikumar Minawala Vs. State of Gujarat, 2005 (2) RCR (Civil) 822** also the habeas corpus petition of the mother regarding custody of 9 months' old child was allowed holding that no amount of wealth can take the place of mother's care and love. Similar question had arisen before this Court in **Manjit Kaur Vs. State of Punjab, and Crl. W.P. No. 608 of 2008, decided on August 14, 2008** where a minor child of 9 months was taken away by his grand-parents when their daughter-in-law, an NRI, had come from abroad for a short period. This Court had held relying upon Manju Tiwari's case (supra) that habeas corpus petition was maintainable as the child has been illegally snatched away from the mother. Custody of the child was handed over to the mother leaving the parties to avail other remedies in accordance with law.

On the other hand, Mr. Jauhar, counsel for the respondents has vehemently contended that habeas corpus petition for custody of the child is not maintainable. The only remedy available to the petitioner is to approach the Family Court where the matrimonial dispute is pending and it should be left to the discretion of said Court to determine the welfare of the minor child. He places strong reliance on the judgment of **Sheela Vs. State of NCT of Delhi and another, 149 (2008) Delhi Law Times 476 (DB)**.

I have carefully gone through the said judgment. In the said case in a writ petition custody of the child was given to the wife subject to certain conditions on the basis of undertaking given by wife but on her failure to comply with the interim directions the custody was again handed over to the father. The conduct of wife was unfair. The writ petition was dismissed leaving the parties to battle out the custody of the child in appropriate forum. No absolute rule or law was laid down regarding non-maintainability of the writ petition.

Counsel for the respondents places reliance on a judgment of the Supreme Court in **Saihba Ali Vs. State of Maharashtra and others, 2003 (4) RCR (Civil) 273:(2003) 7 SCC 250**. In the said case, custody of the minor child was with the grand-parents under the orders of competent Family Court. Wife had field a petition under Article 32 of the Constitution of India seeking a writ in the nature of habeas corpus directing the respondents to produce the minor child and handover the custody of the same to her. The Supreme Court held that the writ was not maintainable but observed in para 5 of the judgment that to do complete justice, the Court could pass an order in the interest and welfare of the minor children that mother be given the visiting rights, but it was never laid down that no relief could be granted in a writ petition to do complete justice even in writ petition. He also placed reliance on a judgment of Allahabad High Court in **Manjula Jha Vs. Ravindra Nath Jha, 1998 (1) All India Hindu Law Reporter 273**. In the said case, mother had sought production of the child and delivery of the child to her in a writ petition. The petition was dismissed, however, a direction was given to produce the child before the Court of Guardian Judge on a fixed date and to determine the writ of interim custody. Counsel for the respondents also placed reliance on **Vaidehi Vs. I. Gopinath, 1993 (2) All India Hindu Law Reporter, 647**, where a mother had filed a writ petition against her husband to produce two minor children aged 9 years and 6 years and to set them at liberty by handing over them over to the mother. The habeas corpus petition was dismissed but the main consideration while dismissing the petition was that both the children produced in the Court had made statements which were recorded. In the said statements they had

expressed desire not to stay with mother and preferred to stay with their father. Reliance has been placed on another judgment of Punjab and Haryana High Court in **Smali Bagga (Smt.) Vs. State of Punjab and another, 1996(2) RRR 202: 1996 (1) All India Hindu Law Reporter 683**. In the said case, the proceedings regarding the custody of the child were pending before the Guardian Judge but the mother had filed a habeas corpus petition in the High Court seeking the custody of the child. The petition was dismissed, however, a direction was given to the Guardian Judge to decide the case within a period of three months. In the said case, the habeas corpus petition was not entertained. Another judgment relied upon by counsel for the respondent is **Sumanlata Vs. Omparaksh Saini and others, 1990 (1) All India Hindu Law Reporter, 286**, where it was not held that the habeas corpus petition is not maintainable but after tracing the history and scope of habeas corpus petition, it was held that where the paramount interest of the minor does not demand any action, the Court will be slow in issuing the writ of habeas corpus. After discussing the ambit scope and object of Article 226 (3) of the Constitution in relation to the issuance of writ of habeas corpus for custody of minor and the law laid down by various judgments of the Apex Court and High Court, the writ petition of the mother was dismissed.

After careful perusal of the judgments cited by counsel for the respondents, I am of the considered opinion that in none of the said judgments it has been laid down as a rule of law that in all cases of production and custody of the child by a natural guardian should be dismissed merely because it is for another Court i.e. Court of Guardian Judge to determine the question of welfare of the minor child in custody of another person. In view of the ratio of the judgments i.e. Manju Tiwari's case (supra) and a Division Bench of Kerala High Court in Eugenia Archetti Abdullah's case (supra), this Court is of the opinion that High Court can exercise jurisdiction vested in it under Article 226 of the Constitution of India with respect to the issuance of a writ of habeas corpus when the custody of the child has been taken away by one of the natural guardian by playing a fraud upon the another."

(1) Mr. Navkiran Singh has also relied upon '**Sumedha Nagpal v. State of Delhi and others' 2000 (9) Supreme Court Cases 745** to say that till the issue of guardianship of the child is decided, custody of the child cannot be given to the mother.

(2) I am of the view that this judgment is not of any help to the counsel for the respondent grandmother. In the present case, custody of the child was entrusted by the mother to the grandmother. Therefore, on the demand made by the mother for return of the child, she is bound to comply and return the child as she is not a natural guardian. Respondent grandmother has failed before the Guardian Judge and before this Court in Civil Revision No. 757 of 2008. Furthermore, the Court of competent jurisdiction in Canada has held that mother is entitled to the custody of the child. Even otherwise, mother's lap is the natural cradle. Therefore, respondent is bound to produce the child in this Court and hand over to mother, who is a natural guardian. Petitioner mother will be permitted to take the child, along with travel documents, to Canada.

(16) A perusal of Section 6 of The Hindu Minority and Guardianship Act, 1956 along with various judgments (supra) would show that in child custody matters, the ordinary remedy lies under the Hindu Minority and Guardianship Act, 1956 and The Guardianship and Wards Act, 1890 as the case may be. There are significant differences between an inquiry by the Civil Courts and the exercise of powers by a Writ Court which is of summary nature where rights are determined on the basis of affidavits. Therefore, where the court is of the view that a detailed inquiry is required the Court may decline to exercise the extraordinary jurisdiction of a Writ Court and direct the parties to approach the Civil Court. Therefore, it is only in exceptional cases, where the rights of the parties to the custody of the minor will be determined in the exercise of extraordinary jurisdiction in a petition for Habeas Corpus. Thus, where in the circumstances of a particular case the ordinary remedy of the Civil Courts is either not available or is ineffective a writ of Habeas Corpus is certainly maintainable, moreso, where it is shown that the detention of the minor child by a parent or others was illegal, without any authority of law and was also to the detriment of the child.

(17) Thus it is apparent that the paramount consideration ought to

be the welfare of the child and due weight should be given to the child's comfort, contentment, health, education, intellectual development, familiar surroundings etc. The question of the welfare and interest of a minor child has to be judged on the consideration of the acknowledged superiority of the mother's love and affection for her children. The lap of the mother is a natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same. No amount of wealth or mother like love can substitute for a mother's love and care and, therefore, maternal care and affection is indispensable for the healthy growth of a child.

(18) In the present case, the girl child, namely, Avneet Turka was born on 01.08.2017 and is, therefore, less than five years old. She was brought back to India by respondent no. 7 and 8 on 23.1.2020 after which due to COVID-19 the petitioner-mother was unable to see her till March 2022. Therefore, it is apparent that when the child left the company of the petitioner she was approximately 2½ years old and spent her growing years in the company of her grandparents i.e. respondent no. 7 and 8. As per the father, the child had refused to go with the petitioner at the time when the petitioner left for her parental home on 28.03.2022. I may point out here that even if the statement of the father is taken as the truth that the child had refused to go with the mother, that by itself does not have any significance as a child of such tender age does not know what is in her best interest. It may be reiterated that the child had not met her mother in two years between January 2020 to March 2022. Apparently, for the reasons beyond her control the petitioner was unable to come back to India. The minor girl child may have developed a bond with the respondent nos.7 & 8 with whom she is residing for the last more than two years because of which she might have stated that she does not wish to go with her mother. However, in the long term for the benefit and welfare of the child, by no stretch of imagination can it be said that the welfare of the child would be better taken care of by the grandparents viz-a-viz the mother. Even otherwise, in the case of child who is less than 05 years old (which is the case here) the custody should ordinarily be with the mother. In fact nothing significant has been pointed out by the respondent nos.7 & 8 as to why the custody of the child ought not to be with the mother.

(19) So far as the question of sharing the custody of the child is concerned, the mother is a resident of Australia and so is the father. The respondent no. 7 and 8 (grandparents of the child) are residents of

India, and, therefore, the statement of the father that the petitioner and respondent nos.7 & 8 could share custody is illogical and unreasonable and cannot be accepted. Issues of the education of the child, her health, etc., would arise and these are best dealt with by the mother unless it is shown that the mother is completely incapable of maintaining the minor child.

(20) In view of the above discussion, the present petition is allowed. Respondent no. 3 & 4 are directed to ensure that the custody of the minor child, namely Avneet Turka is handed over by respondent no. 7 and 8 (grandparents) to the petitioner (mother) immediately. Pursuant thereto, an affidavit regarding compliance of this order shall be furnished by respondent no. 3 and 4 to this Court within one week of the handing over of the custody of minor child to the petitioner.

(21) Disposed of in the above terms.

Ritambhra Rishi