Before Jasgurpreet Singh Puri, J.

SUKHJINDER SINGH—*Petitioners*

versus

STATE OF PUNJAB AND OTHERS—*Respondent*

CRWP No. 7881 of 2021 (O&M)

September 14, 2022

The Hindu Minority and Guardianship Act, 1956—S.6—Writ of Habeas Corpus—Release of minor daughter sought by petitioner—Marriage in India—Daughter born in India—Moved to Canada on PR—Matrimonial discord—Wife approached Court in Ontario but before order directing her to hand over custody of minor to parents of petitioner in India passed—Moved to India along with minor and resided with her parents in India since 2019—All parties citizens of India—Petitioner claiming foreign court judgment as binding under S.13 CPC and that paramount welfare of child served if she is granted custody—Maintainability of Habeas Corpus not contested as no longer res integra—Foreign court judgment loses relevant as it is not based on Indian Laws and dominant factor is welfare of child alone—Considering ability of respondent to take care of girl child who is 5 years of age, she having lost recollection of petitioner, her welfare would be best served by staying with mother—However, visitation rights granted to petitioner father at least twice a year—Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and Ors. 2019(7) SCC 42 followed.

Held, that this Court would therefore apply the twin tests i.e. welfare of the child to be paramount consideration and desire of the child and while applying both the aforesaid tests, this Court is of the view that the welfare of the girl child would be with her mother i.e respondent No.5. Apart from the same, it cannot be said that the custody of the child is an illegal custody in view of the judgment of the Hon'ble Supreme Court in Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others [2019 (7) SCC 42].

(Para 18)

Rau P.S. Girwar, Advocate, *for the petitioner*.

Shiva Khurmi, A.A.G., Punjab.

H.S. Dhindsa, Advocate, for respondents No. 5 to 7.

JASGURPREET SINGH PURI, J. (ORAL)

(1) The present is a petition filed under Article 226 of the Constitution of India which is primarily in the nature of a Habeas Corpus seeking release of alleged detenue namely Jasnaaz Kaur who is the daughterof the petitioner and respondent No.5 from the custody of respondent Nos. 6 and 7.

(2) The facts which have arisen for filing of the present petition are summarized as follows:-

The petitioner namely Sukhjinder Singh got married with respondent No.5 namely Avneet Kaur on 29.11.2015 at Ludhiana which was an arranged marriage. The couple was blessed with a girl child on 15.07.2017 at Ludhiana. After the marriage, the couple resided at Ludhiana, Faridkot and some other places in Punjab since respondent No.5 was working as a Probationary Officer in a bank. Thereafter, the petitioner and respondent No.5 decided to move to Canada on the basis of Family Permanent Residency System and in this way, the petitioner, respondent No.5 and the girl child went to Canada on P.R basis on 24.04.2018. At that time, minor girl was even less than 1 year. In Canada the family stayed with one of the relatives of the petitioner from 28.04.2018 to 25.06.2018. However, a matrimonial discord arose between the petitioner and respondent No.5 and there were allegations of beatings by the petitioner towards respondent No.5 and consequently, the respondent No.5 called the police in Canada and respondent No.5 alongwith child were taken to protection home where they stayed for two months.

(3) Thereafter, respondent No.5 who is the mother of the girl child filed custody proceedings before the Courts at Ontario in Canada and vide Annexure P-2 an order was passed on 14.03.2019 by giving various directions. One of the directions was that respondent No.5 shall deliver the girl child to the parents of the petitioner in India on 18.03.2019. In case she fails comply with the aforesaid directions, then immediately she shall return the child to Brantford, Ontario, Canada and deliver the child into the care of the petitioner. Various other directions were also issued pertaining to costs etc. in this regard.

(4) However, prior to the passing of the aforesaid order which was passed on 14.03.2019, respondent No.5 alongwith minor child came back to India on 13.01.2019 and they started living at Ludhiana at the parental house of respondent No.5. After some time the child was admitted in Oquid Pre School, Ludhiana and thereafter, she has now

been admitted in DAV Public School, Ludhiana and is now in Class UKG. At present the age of the girl child is about 5 years.

(5) Both the petitioner and respondent No.5 are citizens of India as of today as per the learned counsel for the parties and they are holding Indian Passports. The same is the position with the girl child. However, the petitioner has been staying in Canada on P.R basis and as per the learned counsel for the petitioner as of now he has not been conferred withcitizenship of Canada.

(6) On 28.02.2020 respondent No.5 went to Australia for pursuingher Master course in Mathematics which was of about 2 years and learned counsel for respondent No.5 has stated that the aforesaid course is now going to be completed within a period of 2 months and thereafter, she will be coming back to India and will reside in India. He further submitted that respondent No.5 is Masters in Professional Accounting, BBA and MBA and during the course of arguments, the learned counsel for respondent No.5 has stated that he has sought specific instructions that respondent No.5 has gota job offer from one international company by which she has an option for working online from India itself through video conferencing and learned counsel also specifically stated that he has instructions to say that respondent No.5 has decided to come back after completion of course in 2 months and to reside in India as per job requirement.

(7) Learned counsel for the petitioner submitted that the petitioner is the father of the girl child and under Section 6 of the Hindu Minority and Guardianship Act, 1956, he is a natural guardian being father of the child. The petitioner is residing in Canada and is a well educated person. He is M.Sc. in Environmental Science from Lovely Professional University, Jalandhar and he is in transport business with good income. He submitted that his wife had taken away the child on her own without the consent of the petitioner and there is no embargo or any other impediment qua the petitioner whereby he can be denied the legal custody of the child especially in view of the fact that he is the natural guardian of the child. He further submitted that future prospects of the girl child are much more brighter in Canada as compared to India not only with regard to her education but also for her overall development. He further submitted that once a judgment has been passed by the Courts at Ontario by which direction was issued to respondent No.5 for the purpose of custody of the child to the parents of the petitioner, respondent No.5 did not comply with the direction and the aforesaid judgment Annexure P-2 has attained finality. He

submitted that the judgment of a Foreign Court is conclusive in terms of Section 13 of the Code of Civil Procedure read with Section 41 of the Indian Evidence Act. He relied upon a judgment of the Madras High Court in ***Dorothy Thomas*** *versus* ***Rex Arul***[1] in this regard. He submitted that since there is no impediment and there is nothing on the record to show that the petitioner will not take care of the child, then by applying the test regarding the welfare of the child i.e. welfare of the child is of paramount consideration, the petitioner is entitled for the custody of the child. He further submitted while referring to the judgment of Hon'ble Supreme Court in ***Yashita Sahu*** *versus* ***State of Rajasthan and others***[2] that in such like circumstances a writ in the nature of Habeas Corpus will be maintainable and has therefore prayed that the custody of the minor childbe handed over to the petitioner.

(8) Mr. Shiva Khurmi, learned Assistant Advocate General, Punjabhas submitted that since it is dispute pertaining to the custody of the child, the State does not have much role in the present case.

(9) On the other hand, Mr. H.S. Dhindsa, learned counsel appearingon behalf of respondents No. 5 to 7 submitted that respondent No.5 who is the mother of the girl child is a highly educated lady and has now done her Master from Australia with a job offer from an international company. He submitted that right from the birth of the child the girl child had been staying with respondent No.5 continuously and respondent No. 5 being the mother of the child has the natural love and affection especially considering the fact that the child is a girl child and for her up bringing and care, there is a requirement of mother and the mere fact that the petitioner is a natural guardian by virtue of Section 6 of the Hindu Minority and Guardianship Act, 1956 will not make any difference. He further submitted that it is not acase that there is any kind of impediment qua the present respondent No.5, whereas on the other hand, the girl child can be taken care of properly by the mother. He further submitted that the conduct of the petitioner whereby he had given beatings to respondent No.5 while in Canada and they were forced to stay at protection home for long period of time itself would disentitle the petitioner for claiming the custody of the girl child. He submitted that although the child was of very tender age at that point of time but she would have certainly experienced the trauma whereby respondent No.5 was forced to live at protection home and

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[1] 2012 (1) RCR (Crl.) 451
[2] 2020 (3) SCC 67

consequently, she decided to come back to India to stay with her parents. He submitted that there is no impediment with regard to any financial constraints of respondents No. 5 to 7. The minor girl child has a fixed deposit of Rs. 7,00,000/- in her name which was got deposited by respondents No.6 and 7 who are the maternal grand-parents. Apart from the same, respondent No.5 has a plot at Ludhiana with a value of approximately Rs. 80,00,000/- and respondents No.6 and 7 are also retired persons and are pensioners.

(10) He further submitted that although there is no litigation pending at any Court in India between the petitioner and respondent No.5 but respondent No.5 contemplates to exercise her statutory rights for moving appropriate petition under Section 125 of the Code of Criminal Procedure apart from any other remedy available to her in accordance with law. He further submitted that the petitioner has now obtained divorce from respondent No.5 from the Courts in Canada. During the course of arguments, a specific query was put to the learned counsel for the petitioner with regard to the verification of the aforesaid aspect. The learned counsel for the petitioner after taking instructions from the parents of the petitioner who are present in the Court stated that it is correct that the petitioner has taken divorce from respondent No.5 from the Courts at Canada in the month of April, 2022.

(11) Mr. H.S. Dhindsa, Advocate has further submitted that in view of the aforesaid position, it will not be in the interest of the girl child to sendher back to Canada to the petitioner.

(12) I have heard the learned counsel for the parties.

(13) The law with regard to grant of custody of a child is no longer res integra. The test to determine the custody of a child has always remainedthe same i.e. the welfare of the child is of paramount consideration. The aforesaid test although being a litmus test is also coupled with another test as acknowledged by the Hon'ble Supreme Court in ***Nil Ratan Kundu and another*** *versus* ***Abhijit Kundu***[3] that the wish of the child is also an important factor which can in certain circumstances supplement the aforesaid test. So far as the maintainability of the present petition for Habeas Corpus is concerned, Mr. H.S. Dhindsa, learned counsel has submitted that he is not objecting to the maintainability of the present petition since now it is a settled law that in such like matters a writ in the nature of Habeas

[3] 2008 (9) SCC 413

Corpus is maintainable. Therefore, considering the aforesaid test, this Court has to consider two things.

1. In whose custody the welfare of child would be best secured?

2. What is the wish of the child?

(14) The Hon'ble Supreme Court in ***Nil Ratan Kundu and another*** *versus* ***Abhijit Kundu*** *(supra)* observed that although it is difficult to answer the complex question with regard to the custody of child but the Court should always keep in mind relevant statutes and the rights flowing therefrom. It is a humane 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 to give due weightage to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. If a 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. The relevant portion is reproduced as under:-

> "56. 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 custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane 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 child's 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."

(15) The arguments which were raised by the learned counsel for the petitioner that vide Annexure P-2 the Courts at Canada have already decided with regard to the custody of the child and by virtue of Section 13 ofthe Code of Civil Procedure, the same is conclusive would not be of much significance in the present case in view of the fact that a perusal of the judgment relied upon by the learned counsel for the petitioner would show that although foreign judgment is conclusive but where it does not recognizelaw in India and it is founded on breach of any law which is in force in India, then the same may not be conclusive in nature. In the present case, the law which is applicable in India which is not only a statutory law but also based upon public policy is that notwithstanding any technicalities or relationship inter se between the parties, the Court has to see the welfare of the child which is the dominant factor whereas all the other factors are subservient to the dominant factor. The norm which has been judicially acknowledged and recognized in India is, in fact, a Grundnorm. The factors which would weigh in the mind of the Court at the time of considering the grant of custody in the present case would be as to (i) whether there is any impediment or embargo qua any of the parties, (ii) whose custody would be in the best interest of the child considering the facts and circumstances of the present case and (iii) what is the wish of the child.

(16) So far as the aforesaid first point is concerned, it has been stated by the learned counsel for the parties during the course of arguments that thepetitioner has already got a divorce from respondent No.5 about a few months ago in Canada and that divorce is already in operation as of today, although it has been stated by the learned counsel for the petitioner that the petitioner has not re-married as of now and therefore, this would be a significant factor to arrive at a conclusion as to with whom the custody of the child should be vested. This Court is of the view that once the petitioner has now obtained divorce from respondent No.5, it will not be in the interest of the child to vest the custody with the petitioner. So far as the comparison with regard to any advantages or disadvantages are concerned, both the parents are well educated. Respondent No.5 has already attained higher education from

Australia and has been offered a job. The maternal grand-parents/respondents No.6 and 7 are also well edcuated and are earning pension. There is a plot worth Rs. 80,00,000/- in the name of respondent No.5. Morevoer, the learned counsel for respondent Nos. 5 to 7 had submitted that mother (Respondent No.5) will come back to India after completion of her course. Therefore, it cannot be said that respondent No.5 will not be able to up bring the child in a proper manner with due care and affection. The mere fact that the petitioner is settled in Canada cannot raise any presumption that in Canada the child can be taken care of in a better form since India also provides good opportunities in this regard. The third factor which is to be considered is the wish of the child.

(17) Respondent Nos. 6 and 7 have brought the girl child with themtoday in the Court and this Court had an occasion to interact with the child in the Chambers alongwith a lady Advocate of the Bar. During interaction, the girl who is now at the age of 5 years although was not of that level of maturity but it could be understood from her expressions and what she expressed was that she has an inclination to stay with respondent No.5. She also could not say anything about her father as probably she does not re- collect. Although a comfortable atmosphere was provided to her so that her desire can be ascertained but whatever could be extracted only indicated her desire to live with her mother.

(18) This Court would therefore apply the twin tests i.e. welfare of the child to be paramount consideration and desire of the child and while applying both the aforesaid tests, this Court is of the view that the welfare of the girl child would be with her mother i.e respondent No.5. Apart from the same, it cannot be said that the custody of the child is an illegal custody in view of the judgment of the Hon'ble Supreme Court in ***Tejaswini Gaud and others*** *versus* ***Shekhar Jagdish Prasad Tewari and others***[4]**.**

(19) In view of the aforesaid position, the present petition is hereby dismissed.

(20) However, since the petitioner is father of the girl child, it will be necessary to provide him with some visitation rights. The petitioner shall always be at liberty to visit and meet the girl child after prior appointment with respondents No. 5 to 7 at least twice a year. In case he wishes to meet the girl child at the place where she is residing,

[4] 2019 (7) SCC 42

then respondents No. 5 to 7 shall be duty bound to permit him to meet her for a period of at least 5 hours in one day in the house of respondents No. 6 and 7 or where the girl child is residing.

(21) This order would also not preclude any of the parties to avail any other statutory remedy available to them under the special law, if any, and in accordance with law.

Viren Jain