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In addition to it I award another sum of Rs. 1,000 as damages for putting the building out of repairs and for damaging the woodwork, etc. In all, the claimant is, therefore, awarded a sum of Rs. 6,544 and to this extent the arbitrator's award is varied. In view of the fact that the claimant made a somewhat exaggerated claim for compensation, I allow him only half the costs in this Court.

R.S.

CRIMINAL MISCELLANEOUS

Before Tek Chand, J.

BHOLA NATH,—*Petitioner*

versus

THE DISTRICT MAGISTRATE, JULLUNDUR AND OTHERS,—*Respondents*

Criminal Miscellaneous No. 341 of 1958.

1958

Sept. 23rd

Code of Criminal Procedure (V of 1898)—Section 491—Writ of Habeas Corpus—*When can issue in the case of a minor or wife—"Imprisonment"—Import of—Minor girls lodged in a Rescue Home—Whether under physical restraint—Issuance of writ of* habeas corpus—*Whether discretionary with the Court—Right of parent to obtain custody of minor children—Whether absolute—Welfare of the minor —Whether to be considered.*

Held, that ordinarily the basis of the issuance of the writ of *habeas corpus* is an illegal detention, but in the case of the writ issued in respect of the wife or the child the law is not so much concerned about the illegality of the detention as the welfare of the person detained. The writ of *habeas corpus* is frequently resorted to by the courts at the instance of a guardian—be he a father or husband—for the custody of his ward. The term 'imprisonment' usually imports a restraint contrary to the wishes of the prisoner, and the writ of *habeas corpus* was designed as a remedy

for him, to be invoked at his instance, to set him at liberty; not to change his keeper. But in the case of infants, an "unauthorised absence from the legal custody has been treated, at least for the purpose of allowing the writ to issue as equivalent to imprisonment, and the duty of returning to such custody is equivalent to a wish to be free; and proceedings in *habeas corpus* have so frequently been resorted to, to determine the right to possession of a minor, that the question of physical restraint need be given little or no consideration where a lawful right is asserted to retain possession of the child. The writ may not only issue without the privity of the child, but even against its express wishes; and it may issue although the person in whose custody a child is, denies, that he is restraining or preventing the child from returning to his parents, if it appears that he harbours the child and refuses to permit the parents to exercise parental authority to enforce a return,— The writ of *habeas corpus* lies where the subject is a child notwithstanding the fact that the child is not held in actual physical restraint. The scope of the writ of *habeas corpus* is wide.

Held, that the keeping of the minor girls in a Rescue Home amounts to imposition of a physical restraint, and that would be so, even if the minors were agreeable to remain in the Rescue Home through their own inclination. The unauthorised absence from the legal custody of the father at least for purposes of allowing the issuance of the writ is equivalent to imprisonment, and the right to have a minor returned to legal custody, is equivalent to being set at liberty. Where a person is legally entitled to the custody of a minor, the detention of the minor, by any other, against the will of the guardian, is illegal. In the case of a minor, in order to determine, whether the detention is legal or illegal, should depend not upon the consent of the minor but on that of the lawful guardian.

Held, that powers of the High Court in granting writs is not unqualified, but is to be used in the exercise of a sound discretion. The writ of *habeas corpus* is, no doubt, a writ of right but not a writ of course. It is a constitutional right of a person to demand the writ, but that does not necessarily imply that the writ must issue in all cases. The issuance of the writ of *habeas corpus* is within the judicial discretion of the High Court, which may grant a writ "whenever it thinks fit". The Courts have a discretion to

refuse to restore the minor to the custody of its parent, where such a recourse would be to the detriment of the interests of the child, and in all such cases, the welfare of the minor is the first and paramount consideration. The Courts will supersede the natural rights of the parent and will not restore the custody of the child to him, where on account of his misconduct or ineptitude, the moral welfare of the child is endangered. The parent's legal claim to dominion over the child is not a right in the nature of property, but of trust, for the benefit of the child. Where the parent fails to perform the obligations which such a trust imposes, the legal dominion stands forfeited. The legal right of the parent is secondary to the best interest of the child and the former will not be enforced where it is in conflict with the latter consideration.

Petition under section 491 of the Code of Criminal Procedure, praying that a writ in the nature of habeas corpus *be issued and the respondents be directed to produce Shrimati Mangati and Shrimati Nirmala, in the Court and they be set at liberty.*

V. K. RANADE, for Petitioner.

CHETAN DASS, Assistant Advocate-General, for Respondents.

ORDER

TEK CHAND, J.—This is a petition under section 491 of the Code of Criminal Procedure, praying that this court may issue a writ of *habeas corpus* against the respondents and for the production in this Court of Smt. Mangti *alias* Veena and Smt. Nirmala *alias* Vinod, minor daughters of the petitioner, now alleged to be under illegal detention in the Rescue Home at Jullundur. The petitioner has alleged that his two daughters are minors and they were abducted from his place at Amritsar by Surjit Kaur, Devki Rani, her mother, and Deva in the month of October, 1956. After the abduction they were taken to various places and subjected to sexual

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intercourse against their will. They were recovered by the police from the house of Surjit Kaur in Adarsh Nagar, Jullundur. Prosecutions were registered against several accused persons as the alleged abductors under sections 363/366, 368/376/109, Indian Penal Code. After the recovery of the girls from the house of Surjit Kaur on 3rd of November, 1956, they were sent to the Rescue Home at Jullundur and they are still there. It is stated that the girls have been writing letters to their father to obtain their release from the Rescue Home as the police was putting pressure on them presumbly as to the nature of their evidence in the cases mentioned above. It was further alleged that in order to stop the girls from asking for their release from the Rescue Home a false case under section 309, Indian Penal Code, was instituted by the police in July, 1957, and under the threat of this prosecution the petitioner and his daughters made statements on 4th of July, 1957, that the girls might be kept in the Rescue Home. These girls were discharged towards the end of 1957, in the case under section 309, Indian Penal Code. The petitioner also alleged that after the order of their discharge he applied to the police for restoration of the girls to him, but the police refused to do so. He then applied to respondent No. 4, Mr. Isa Dass, Magistrate, for their restoration who sent the application to the Assistant Sessions Judge for disposal, as in the latter Court the cases were committed for trial. The Assistant Sessions Judge sent the application back to respondent No. 4 for disposal who dismissed it. The appeal from this order was dismissed by the Sessions Judge on 28th of April, 1958.

The petitioner states that there is no order, executive or judicial, under which his daughters were sent to the Rescue Home and are being detained there from 3rd of November, 1956. The

girls did not want to be kept in the Rescue Home and desired to live with their father. Mangti *alias* Veena, the elder daughter, made a statement to that effect in the Court of the Sessions Judge, Jullundur, on 23rd of April, 1958. The petitioner in this application has prayed that the detention of his daughters in the Rescue Home is illegal, *mala fide* and beyond the jurisdiction of the Courts, and has prayed for the issuance of a writ in the nature of *habeas corpus* for their being produced in this Court and then being set at liberty. This petition is being opposed by the counsel for the respondents on two grounds. Firstly, it is contended before me that the petition under section 491 is not competent as the girls are not being detained in public or private custody and are not deprived of their liberty. In the affidavit of the respondent No. 2 who is the Superintendent of Police at Jullundur, it is stated that, after the rescue of the girls by the Police, they were sent to the Rescue Home, Jullundur, since their guardian could not be known at the time they were recovered'. This Rescue Home is being maintained by the Central Social Welfare Board in co-operation with the Central and the State Governments. They are receiving education there and "their movements are not restricted except to the extent it may be necessary in their own interest, so that they do not fall into evil habits or in the hands of the undesirable persons. Thus, there is no physical restraint on the movements of Shrimtai Mangti and Nirmala and the restraint on their movements is essentially of a moral character." The learned counsel for the respondents admitted that there is no provision of law under which the girls are being detained there and also conceded that the provisions of the Punjab Suppression of Immoral Traffic Act, 1956, have no applicability. What is argued before me is that in order that such an application under

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section 491 should lie, there must be actual physical confinement of a total character. I have been referred to an American case *Philip S. Wales* v. *William C. Whitney* (1), where it was stated that something more than moral restraint is necessary to make a case for *habeas corpus* and that there must be an actual confinement. In that case the person said to be detained had received an order to the effect that a general Court martial had been ordered to be convened, and that he should appear and report himself to the Presiding Officer of the Court for trial and he was ordered to confine himself to the limits of the City of Washington. It was held on the facts of that case that that did not amount to actual confinement. The point arising in the American case is of no assistance in determining the question before me. My attention was also drawn to a decision of a Single Bench in *Hazur Ara Begum* v. *Deputy Commissioner, Gonda* (2), for the proposition that the words "detained" and "custody" in section 491, Criminal Procedure Code, imply some sort of confinement or physical restraint on the liberty of movement of the detenu and that the use of the words "be set at liberty" also support this construction. There is no quarrel with the above proposition. The girls are, to my mind, under a physical restraint and they have not the liberty to leave the Rescue Home, if they so desire or if the petitioner, who is their legal and natural guardian, wishes to take them from that institution. It is well known that the writ of *habeas corpus* is frequently resorted to by Courts at the instance of a guardian—be he a father or a husband—for the custody of his ward. Ordinarily, no doubt, the basis of the issuance of the writ of *habeas corpus* is an illegal detention, but in the case of the writ issued in respect of the

(1) 114 U.S. 277
(2) A.I.R. 1934 Oudh. 301

wife or the child the law is not so much concerned about the illegality of the detention as the welfare of the person detained.

The term 'imprisonment' usually imports a restraint contrary to the wishes of the prisoner, and the writ of *habeas corpus* was designed as a remedy for him, to be invoked at his instance, to set him at liberty; not to change his keeper. But in the case of infants, an "unauthorised absence from the legal custody has been treated, at least for the purpose of allowing the writ to issue, as equivalent to imprisonment, and the duty of returning, to such custody, is equivalent to a wish to be free; and proceedings in *habeas corpus* have so frequently been resorted to, to determine the right to possession of a minor, that the question of physical restraint need be given little or no consideration where a lawful right is asserted to retain possession of the child. The writ may not only issue without the privity of the child, but even against its express wishes; and it may issue although the person in whose custody a child is, denies, that he is restraining or preventing the child from returning to his parents, if it appears that he harbours the child and refuses to permit the parents to exercise parental authority to enforce a return",—*vide* 12 R.C.L., page 1214. The writ of *habeas corpus* lies where the subject is a child notwithstanding the fact that the child is not held in actual physical restraint. The scope of the writ of *habeas corpus is* wide. In the language of Wharton—

> "Besides the efficiency of the writ of *habeas corpus* in liberating the subject from illegal confinement from a public prison, it also extends its influence to remove every unlawful restraint of personal freedom in private life, availing for

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instance, to restore children to the lawful custody of their father, unless he is leading a vicious life",—*vide* Wharton's Law Lexicon, 14th Edition, page 462.

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The keeping of the minor girls in a home in this case amounts to imposition of a physical restraint, and that would be so, even if the minors were agreeable to remain in the Rescue Home through their own inclination. The unauthorised absence from the legal custody of the father at least for purposes of allowing the issuance of the writ is equivalent to imprisonment, and the right to have a minor returned to legal custody is equivalent to being set at liberty. "The unlawful detention of a child, from the person who is legally entitled to its custody, is for the purpose of the issue of writ, regarded as equivalent to an unlawful imprisonment of the child",—*vide* Halsbury, 3rd Edition, Volume XI, page 34. Where a person is legally entitled to the custody of a minor, the detention of the minor by any other against the will of the guardian is illegal. In the case of a minor, in order to determine whether the detention is legal or illegal, should depend not upon the consent of the minor but on that of the lawful guardian.

The next question is whether this Court has a discretion in issuing the writ. Mr. Ved Kumar Ranade maintained that the Court is bound to issue the writ at all events, without exercising its discretion, once it is established that the petitioner is the father and his daughters, who are kept in the Rescue Home, are minors. The power of this Court in granting writs is not unqualified, but is to be used in the exercise of a sound discretion. The writ of *habeas corpus* is, no doubt, a writ of right but not a writ of course. It is a constitutional right of a person to demand the writ, but that does not necessarily imply that the writ

must issue in all cases. The issuance of the writ of *habeas corpus* is within the judicial discretion of this Court. This Court may grant a writ "whenever it thinks fit." The provisions of section 491 make it abundantly clear, that the power is discretionary. The paramount consideration in all such cases must be the welfare of the minor. Courts will be justified in refusing to give the custody of the child to the father—although the father is ordinarily entitled to the custody of his minor children—if he is otherwise an unsuitable person and if the interests of the child would suffer by the change of the custody. The rule is thus stated by Story:—

> "For, although, in general, parents are entrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education and literature, and morals, and religion, and that they will be treated with kindness and affection. But, whenever this presumption is removed, whenever, for example, it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness or blasphemy or low or gross debauchery or that he professes atheistical or irreligious principles, or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children—never in such case the Court of Chancery will interfere and deprive him of the

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custody of his children, and appoint a suitable person to act as guardian and to take care of them and to superintend their education",—*vide* Story on Equity, 3rd Edition, page 563, paragraph 1341.

I am, therefore, of the view that the question whether this petition under section 491, Criminal Procedure Code, should be granted or refused depends upon the judicial discretion of this Court.

The next question to be seen in this case is whether on the facts and in the circumstances of this case, the petitioner should have the custody of his minor daughters, who, according to the affidavit of respondent No. 2, are 15 and 13 years, respectively.

Parental right to the custody of the children is interfered with only in cases of gross misconduct. In the words of J. L. Knight Bruce in *Re Fynn* (1).

> "Before this jurisdiction can be called into action between them, it must be satisfied, * * * * that the father has so conducted himself, or has shown himself to be a person of such a description or is placed in such a position as to render it not merely better for the children, but essential to their safety or to their welfare in some very serious and important respect, that his rights should be treated as lost or suspended, should be superseded or interfered with" (*Vide Re Goldsworthy* (2)."

(1) 64 E.R. 205
(2) (1876) 2 Q.B.D. 75 at pp. 82-83

The Courts have a discretion to refuse to restore the minor to the custody of its parent where such a recourse would be to the detriment of the interests of the child and in all such cases the welfare of the minor is the first and paramount consideration. The Courts will supersede the natural rights of the parent and will not restore the custody of the child to him, where on account of his misconduct or ineptitude, the moral welfare of the child is endangered. The parent's legal claim to dominion over the child is not a right in the nature of property but of trust for the benefit of the child. Where the parent fails to perform the obligations which such a trust imposes, the legal dominion stands forfeited. The legal right of the parent is secondary to the best interests of the child and the former will not be enforced where it is in conflict with the latter consideration.

The learned counsel for the State has pressed before me that the petitioner by his conduct had made it clear that he had forfeited his right to have the custody of his minor daughters. My attention has been drawn to the statement of the petitioner dated the 4th of July, 1957, to the effect that he desired to send both his daughters to the Rescue Home as he was in indigent circumstances and could not look after them, that both the girls were witnesses in cases in which influential people were the accused persons who wanted the girls to suborn themselves. He said that he felt that the lives of his daughters were in danger and he being alone could not protect them. On these grounds he had prayed that the girls should be kept in the Rescue Home.

The petitioner had also made a statement dated 16th October, 1957, in the Court of Special Magistrate in the case *State* v. *Rajpal Singh, etc.*, in

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which the accused were being prosecuted under section 376 and 376/109, Indian Penal Code. He had admitted in that statement that he had told the police that his daughters were of bad character and were vagrant, and that he tried his best to persuade them to give up their bad way of living, but they did not desist. He had stated that the girls were not within his control. He admitted that his daughters had left his house of their own accord. He deposed that two or two and a half years ago he came to know, that Mangti had become a vagrant and of loose character, and that for a brief interval, she was persuaded by him to behave herself, but on the asking of other people she reverted to bad ways. He admitted that Mangti had become of loose character on account of her associations with Gurbakhsh Kaur. He also said that for one month he did not know where she had gone and made no report to the police, nor took any other step to find her. She was once brought home by him when she was seen in a street with Gurbakhsh Kaur, and after a few days, she again left the house on the pretext of seeing a procession and did not return home and had also taken the other girl Nirmala with her. He went to Delhi after about two months of Mangti's departure and brought both the girls home. They again went astray, left the house and did not return for several days. It appears from his lengthy statement that he had failed to exercise any control over his errant daughters, and had neglected them completely, despite having become aware of the fact, that they had fallen into evil ways and were associating themselves with undesirable persons.

The case for the State is that the girls during the course of their several escapades had been carnally known by over a hundred persons. The petitioner said in this Court that he thought that

40 or 50 persons had violated them. From the facts on the record, I feel satisfied that the petitioner has completely failed to keep his daughters under control, and has not been able to exercise any parental supervision worth the name. As a father he has failed to protect his daughters, and after they had erred to his knowledge, he did not take any serious or effective steps to rescue them and then to keep them away from the course of moral depravity that the girls appear to have chosen for themselves under the influence of undesirable associates. It seems that the petitioner had abandoned his daughters, who had become prone to bad influences, to drift without anchor or rudder wherever their fancy or inclination led them.

It has been suggested on behalf of the State that there are as many as 37 challans which have not yet been put in Court against several accused persons and the result of the appeals filed in the High Court in some cases in which these girls were involved was being awaited. It has been suggested that the accused in those cases wanted the girls to make statements favourable to them. It was strenuously urged that if these girls are restored to an inpecunious father like the petitioner, the accused in a large number of cases would succeed by lure of money or by other presure in inducing the girls to make statements favourable to them. It was strenuously argued that a father like the petitioner is likely to succumb to the temptation. It was also suggested that the new change in the attitude of the petitioner as manifested in this petition, was not motivated by any new desire on his part to exercise his parental control with a view to reform them. The prosecution felt that this was really an attempt on the part of the seducers and other guilty associates of the girls to get them out

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of the Rescue Home, as that would facilitate their subordination. This suggestion is not fanciful and the likelihood of influence, being brought to bear on the girls, cannot be ruled out. After carefully taking into consideration all the circumstances of this case and the past conduct of the petitioner, the safety and the welfare of the girls require that they should stay in the Rescue Home where they are living at present. Ordinarily, the Courts are reluctant to supersede or interfere with the rights of a parent over his minor children, but in the extraordinary and unusual circumstances of this case the petitioner cannot be trusted for the safety and the well-being of his daughters. He has given ample proof of his incompetence and unfitness to take care of them. This is a case in which the petitioner has shown his unsuitability to remain a guardian of his refractory and way-ward daughters, whose own interests require that they should continue to stay in the Rescue Home. This petition ought not to succeed and it is, therefore, dismissed.

R.S.

APPELLATE CIVIL

Before Mehar Singh, J.

DES RAJ AND OTHERS,—*Appellants*

versus

HARGURDIAL SINGH AND OTHERS,—*Respondents*

Regular Second Appeal No. 237 of 1954.

1958

Sept. 23rd

Limitation Act (IX of 1908)—Article 132—Mortgage deed prescribing no time for redemption and stating that the interest will be payable for a whole year and year by year—Starting point of limitation for a suit by the mortgagee to recover the mortgage amount—Whether the date