

**(2012) 11 P&H CK 0060**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Amended Criminal WP No. 978 of 2012

Preet Ranjan Kaur

APPELLANT

Vs

Harjit Singh and Another

RESPONDENT

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**Date of Decision:** Nov. 16, 2012

**Acts Referred:**

- Constitution of India, 1950 - Article 32
- Guardians and Wards Act, 1890 - Section 25
- Hindu Marriage Act, 1955 - Section 13, 13B
- Hindu Minority and Guardianship Act, 1956 - Section 6

**Citation:** (2013) 1 DMC 123

**Hon'ble Judges:** Surya Kant, J; R.P. Nagrath, J

**Bench:** Division Bench

**Advocate:** Harbhagwan Singh with Mr. Dinesh Sharma, for the Appellant; Kanwaljit Singh, with Mr. Tarundeep S. Khaira, Advocate for the Respondent No. 1 and Rajiv Sharma, Advocate for the U.T. Chandigarh, for the Respondent

**Final Decision:** Allowed

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**Judgement**

R.P. Nagrath, J.

Prayer in this petition is made by the wife, seeking writ in the nature of "habeas corpus" for a direction to respondent No. 1 (her husband) to produce the minor daughter Iknor Kaur, who was about 5 1/2 years old at the time of filing this petition. Marriage between the parties was solemnized on 7.5.2005 and the couple stayed together as husband and wife in Sector 45, Chandigarh. Iknor Kaur was born to the petitioner out of the wedlock on 22.10.2006. The petitioner was allegedly turned out of matrimonial home on 6.12.2008 along with the minor child. She then filed a petition under the Protection of Women from Domestic Violence Act, 2005 (for short "the Act of 2005"). However, on persuasion of the Lok Adalat the petition under the Act of 2005 was withdrawn on 19.12.2009. Thereafter, they filed petition

for divorce by mutual consent, based on a written compromise dated 24.9.2010 (Annexure R-1) but keeping in view the future of the child and the hostile attitude of the respondent, the petitioner withdrew her consent on the second motion and divorce petition was dismissed on 16.5.2011. It may be noted here that the respondent filed FAO No. 116-M of 2012 against that judgment after delay of 206 days, but that FAO has since been withdrawn on 1.11.2012.

2. The facts leading to the filing of this petition briefly are, that the respondent came to the house of the petitioner's father on 13.9.2011 at about 1.30 p.m. and forcibly snatched the child from the lap of the petitioner. The child started crying. While going the respondent remarked that he would return the child by evening but did not do so. He started sending messages that the child would be returned safe only if the petitioner agrees for a divorce. Iknoor Kaur was studying in K.G. Class of Sherwood Convent School, Sector 59, Phase IV, SAS Nagar, Mohali but it was learnt that the child had been shifted to DAV Public Senior Secondary School, Phase X, Mohali. It is contended that health of the child is in a bad shape. Despite gaining height from 110 cms to 114 cms, the child has reduced weight from 17.5 kgs. to 15.6 kgs. within a span of 5 months as appears from the record of health check up, produced by the respondent.

3. The petitioner also relies upon a document dated 17.12.2009 prepared by the respondent in his own handwriting, admitting his misdemeanours committed against the petitioner.

4. Regarding welfare of the child, it is stated that the respondent does not live with his parents and there is no female member to look after the child, who has been kept virtually in solitary confinement. The condition under which the child is living is not conducive for her mental development.

5. The respondent has opposed this petition. It is admitted that the respondent did write a document dated 17.12.2009 in the nature of apology but that was under pressure exerted by the petitioner's family members in lieu of the respondent's desire and demand to meet his daughter Iknoor Kaur.

6. The respondent claims that the petitioner in a most inhumane and atrocious manner abandoned the girl child in a park of Phase IV, Mohali on 13.9.2011 at about 7.00 p.m. The respondent received telephonic information from mother of the petitioner that the girl has been left in the park. The respondent went there, picked up his daughter and brought her home. Fearing some conspiracy in this episode, the respondent reported the entire matter to Senior Superintendent of Police, Chandigarh on 14.9.2011 at 3.54 p.m. vide application Annexure R-2. The petitioner had also poisoned the adolescent mind of the child against her own father. She has always used the child as a tool to blackmail the respondent. The respondent is also getting periodic vaccination and routine health check up of the child for which the prescription of the doctor are Annexure R-6 (Colly). After enormous endeavour, the

respondent has been able to get the child out of the poison and the distressful state of mind which was deeply rooted in the sensitive mind of the child. The child is brilliant and doing well in her studies and has since been promoted to class I. The petitioner also filed rejoinder.

7. We have heard Counsel for the parties and thoughtfully considered the submissions made by them.

8. The petitioner's Counsel has vehemently contended that in the fact situation of the matter, it is a fit case to restore the minor child to the petitioner. This contention is broadly based on the following points:

(i) The custody of the child was obtained by the respondent by deceitful manner;

(ii) the respondent in no uncertain terms gave a writing (Annexure P-1) agreeing that child would remain in the custody of petitioner;

(iii) the matter pertains to a girl child, who was less than five years in age when departed company of her mother; and

(iv) it is in the best interest and welfare of the child that her custody be immediately handed over to the petitioner.

9. On the other hand, the prayer of the petitioner is opposed on the following grounds:

(i) that custody of the child with the father is neither illegal nor unlawful nor he has any interest adverse to that of the minor;

(ii) the child is studying in a reputed and good school and staying with the family of the respondent who has his parents, brother, sister-in-law and nephew as members of the family;

(iii) the appropriate remedy for the petitioner is to apply for the custody of the child under Hindu Minority and Guardianship Act, 1956 and Guardian and Wards Act and present petition is misuse of process of law;

(iv) the petitioner did not initiate criminal proceedings against the respondent for a period of 8 months, despite stating that the child was kidnapped;

(v) the petition is counter blast to the FAO filed by the respondent against the judgment of the Matrimonial Court vide which the petition for divorce by mutual consent was dismissed; and

(vi) that the child is staying with the respondent for the last over one year now and being looked after by the respondent. The welfare of the child is by not shifting her custody to the petitioner in these summary proceedings.

10. It would be quite useful to briefly refer to the principle of law applicable in such cases while dealing with this kind of sensitive and delicate issue. In [Sarita Sharma](#)

Vs. Sushil Sharma, the Hon"ble Supreme Court held that ordinarily a female child should be allowed to remain with the mother, so that, she can be properly looked after. The girl child in that case was 5 years old.

11. Hon"ble Supreme Court held in Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Another, that whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on consideration of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. In that case the child of 8 years was interviewed in chambers, and found to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with.

12. It is not at all the respondent's version that petitioner was incapable of looking after the welfare of the child, as she had been doing all-through, since birth of the child. It is only the matrimonial discord and the issues relating thereto that the matter with regard to the custody of the child has arisen.

13. Even on an earlier occasion the respondent made an attempt to get custody of the child by filing a "habeas corpus" petition in 2009. That Criminal Writ Petition No. 787 of 2009 was disposed of vide an order dated 10.8.2009 (Annexure R-7). The order (Annexure R-7) shows that the respondent expressed his apprehension with regard to well being of his daughter and her due care having not been taken by the mother. When the child was produced in the Court it was found hale hearty.

14. The respondent admittedly gave a writing in his own hand on 17.12.2009, expressing apology for his past conduct. It would also be appropriate to reproduce paragraphs 3 and 5 of this writing:

xx xx xx xx xx (3) A false case of Habeas Corpus was registered against my wife Preet and her father, mother, Chamkaur Singh, Mehtab Singh and Amreek Singh i.e. six person, because of which, my wife Preet registered false cases against me which includes false cases of Domestic Violence Act and 125, Cr.P.C. which was registered against me by my wife Preet.

xx xx xx xx xx (5) I am withdrawing the case of custody from Chandigarh District Court on 18, Dec. 2009 and I am compromising with my wife Preet on 19, Dec. 2009 and she is withdrawing the cases of Mohali which includes Domestic Violence, 125, Cr.P.C. If we both go wrong with each other then each of us can take action against each other, but this can take place, only after giving 4-5 warnings.

Dated: 17.12.2009

xx xx xx xx xx Sd/-

Harjit Singh, S/o Baldev S. Bajwa  
2096/45-C, Chd.

15. The respondent has relied upon compromise dated 24.9.2010 (Annexure R-1) signed by both the parties, on the basis of which a petition for divorce by mutual consent was filed. Clause 8 of this compromise also says that the petitioner would retain the custody of the girl child, which term was acceptable to the respondent. It is further stated that future responsibility of taking care, education and to solemnize marriage of the child is of the petitioner and the respondent would not interfere in the same.

16. The respondent relied upon report (Annexure R-2) which he made to the Senior Superintendent of Police, Chandigarh on the next date i.e. 14.9.2011 stating that on 13.9.2011, he received a phone call that the petitioner was coming to the park and the respondent should reach there to collect the child. It is mentioned in the report (Annexure R-2) that the call was made from the phone of his wife or in-laws. The respondent went in the park and picked up the child. It was stated in Annexure R-2 that at that time mother-in-law of the respondent was standing at some distance from the child.

17. It is contended that the above incident was reported to the Police as the respondent apprehended that the petitioner and her parents may not falsely implicate him on a criminal charge.

18. We find it difficult to accept the version that a mother would abandon her girl child of 5 years in a park and permit the respondent to take her away and that too many months after the dismissal of petition u/s 13B of Hindu Marriage Act for mutual divorce. This cannot be particularly accepted when the child had been living with the mother since birth during the past 5 years. The respondent apparently took the child with an assurance to return it in the evening or soon thereafter and obviously there was no scope of the petitioner lodging complaint of kidnapping unless the offence was clearly attracted. When the child is in custody of a parent, the police may also be helpless in taking criminal action.

19. From the facts discussed above, it is prima facie shown that the respondent took the child from the house of the petitioner's father on 13.9.2011 with an express assurance of returning back the child. We are, otherwise, not persuaded to accept the petitioner's allegation that the respondent forcibly snatched the child from the lap of the petitioner.

20. The respondent placed on record certain photographs of the school function, in which his daughter participated, to suggest that the child is looking happy and cheerful. According to the petitioner these are the photographs of the same function.

21. We find that a child of this age would always feel comfortable in the company of the classmates while participating in such like functions and her face would not reflect the agony, that the child may be undergoing. The contention that the loss of weight of the child despite gaining height from 110 cms to 114 cms can occur in the

normal circumstances, is far from convincing. It may be noticed that the respondent in fact produced the record (Annexure R-6) to show that the child is being properly looked after for its health, for vaccination and routine health check up. This record, however, shows the grim health condition of the child, who despite gaining 4 cms. of height in 5 months lost about 2 kgs. of weight.

22. The respondent's Counsel relied upon the judgment in [Syed Saleemuddin Vs. Dr. Rukhsana and Others](#), affirming the principle that in an application for seeking "habeas corpus" for custody of minor child, 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 in a matter of custody of a child that the welfare of child is of paramount consideration of the Court. For this principle [Rajesh K. Gupta Vs. Ram Gopal Agarwala and Others](#), can also be referred.

23. It is forcefully contended for the respondent that the child is in his custody for about 8 months before this petition was filed, and now it is for over 1 year, hence, in these summary proceedings, the custody of the child may not be transferred as it would be not in tune with the welfare of the child, who is being looked after properly by the father and having good education in a school of repute. It is submitted that the remedy in such a situation lies by filing petition for custody of the child by establishing legal right and other ingredients u/s 6 of Hindu Minority and Guardianship Act, 1956 and Section 25 of Guardian and Wards Act, 1890.

24. To support this argument, reliance has been placed upon [Sumedha Nagpal Vs. State of Delhi and Others](#), . Hon"ble Supreme Court held that there were serious disputed facts and unless the pleadings raised by the parties were examined with reference to evidence by an appropriate forum, a proper decision in the matter cannot be taken and such a course is impossible in a summary proceedings such as writ petition under Article 32 of the Constitution of India. It was also observed that during infancy and impressionable age, the care and warmth of both the parents is required for the welfare of the child. On the basis of pleadings and material placed before Hon"ble Supreme Court, it could not be said that there was any much less clinching material to show that the welfare of the minor child was at peril and called for an interference. The trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a Court of competent jurisdiction, would have to be borne in mind.

25. We may, however, refer to a subsequent decision of the Apex Court in the [Gaurav Nagpal Vs. Sumedha Nagpal](#), , where the matter had gone in respect of a decision of the District Judge passed in favour of wife-respondent for custody of the child under Hindu Minority and Guardianship Act, 1956, read with Section 25 of the Guardian and Wards Act, 1890.

26. The conclusions in paragraphs 50 and 51 are reproduced as under:

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, the Court has to give due weightage to the child's 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 parents patriae jurisdiction arising in such cases.

The following observations by the Hon"ble Supreme Court in para 52 of the judgment are quite relevant:

52. The trump card in the appellant's argument is that the child is living since long with the fattier. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be beneficiary of his own wrongs. The High Court has referred to these aspects in details in the impugned judgments.

Hon"ble Supreme Court in that case also referred to Howarth v. Northcott, 152 Conn 460, on the following observations:

The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the Court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate,

It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.

27. The Apex Court in [Mausami Moitra Ganguli Vs. Jayant Ganguli](#), held that, it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. The question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents.

28. We have found that the child remained with the mother till her company was separated on 13.9.2011 while the girl child was below 5 years of age. Before that there was a candid admission of the respondent in the written compromise dated 24.9.2010 that child would remain in the custody of mother. That was the voluntary decision of the respondent, on the basis of which the petition for divorce by mutual consent was filed though later on that petition was dismissed.

29. We have also observed earlier that allegations of respondent that the petitioner abandoned the child in the park late in the evening at about 7.00 p.m. and that message sent to the respondent to collect it are not acceptable. The contention that the wife did not initiate criminal proceedings on the allegation of snatching away the child by the respondent-husband, would not weaken her stand as in case the child was taken by the respondent with the promise to return it in the evening or by the next day, may be a circumstance, to suggest that a clear case of kidnapping was not made out. Shifting of the child from a reputed school is also not appreciated and we have already found that in a span of few months the child has lost 2 kgs. of weight despite having gained height of 4 cms.

30. During arguments, the respondent's Counsel contended that the child has been brought and can be interviewed for adjudging the desire of the child to ascertain with which parent it wants to stay. The minor girl is staying away from the mother for the past over 1 year but before that the child was continuously in the custody of the mother for 5 years. Interviewing the child would not be appropriate exercise, especially when the child of this age in the circumstances of the case, may not be able to give her positive view points.

31. From the above matrix of the fact situation, it is found expedient and appropriate that the custody of the child is restored to the mother, as an interim measure, leaving thereafter for the respondent-husband to get his legal rights established for seeking custody of the child to the exclusion of the mother by instituting proceedings under Hindu Minority and Guardianship Act, 1956 and Guardian and Wards Act, 1890.

32. The petition, therefore, is allowed. Respondent No. 1 is directed to hand over the custody of the child to the petitioner within a period of two weeks from today. Respondent No. 2-Home Secretary, U.T. Chandigarh would ensure compliance. The petitioner would be well within her rights to admit the child in any other reputed school. The respondent is, however, permitted to have the visitation rights in the following terms:

- (a) During long holidays/vacations covering more than four weeks the child will be allowed to be in the company of the father for a period of seven days,
- (b) The period shall be fixed by the father after due intimation to the mother who shall permit the child to go with the father for the aforesaid period.
- (c) For twice every month preferably on Saturday or Sunday or a festival day, mother shall allow the child to visit the father from morning 10.00 a.m. to evening 5.00 p.m. Father shall take the child and leave her back at the mother's place, on such days.

The aforesaid arrangement would remain as an interim measure till the matter is ultimately decided by the Guardian/Competent Court on a petition that the respondent-husband may choose to file. Allowed in the aforesaid terms.