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**(2025) 04 P&H CK 0146**

**Punjab And Haryana At Chandigarh**

**Case No:** Criminal Writ Petition No. 4205 Of 2025 (O&M)

Raja Rekhi

APPELLANT

Vs

State Of Haryana And Others

RESPONDENT

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**Date of Decision:** April 29, 2025

**Acts Referred:**

- Constitution Of India, 1950-Article 226, 227, 511
- Indian Penal Code, 1860-Section 361
- Hindu Minority And Guardianship Act, 1956-Section 6
- Code Of Criminal Procedure, 1973-Section 361

**Hon'ble Judges:** Harpreet Singh Brar, J

**Bench:** Single Bench

**Advocate:** Arundhati Katju, Anand V. Khanna, Harmanbir S. Sandha, Manjinder Singh Saini, Ramesh Kumar Ambavta

**Final Decision:** Dismissed

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**Judgement**

Harpreet Singh Brar, J

1. The present criminal writ petition has been filed under Articles 226, 227 of the Constitution of India seeking issuance of a writ in the nature of Habeas Corpus, directing the official respondents to ensure release of Kabir Rekhi, minor son of the brother of the petitioner, from the illegal custody of respondent No.4.

2. Learned Senior counsel for the petitioner, inter alia, contends that the petitioner is uncle of the alleged detenu, who is aged about 12 years. On 24.04.2025, the father of the detenu namely Amit Rekhi was attending a business conference in Belgium when respondent No.4, mother of the detenu, broke into his office and stole the passport of the detenu. She woke the detenu in the wee hours of the day and took him away from his habitual residence. The petitioner called the police immediately but was met with a nonchalant response. Respondent No.4 had falsely told the

police that she has merely taken the child for an hour to meet her parents in Delhi. However, her mother does not reside in Delhi. Further, she has not provided any details qua the whereabouts of the detenu to Amit Rekhi or the petitioner. Considering the fact that she took the detenu's passport with her, she intends to take him to Australia, where she is currently residing. The parents of the detenu are already in litigation qua custody of the detenu as a guardianship petition is pending adjudication before the learned Family Court, Gurugram.

3. Per contra, learned counsel for respondent No.4 contends that it was the detenu who called respondent No.4 requesting her to take him as his father had gone to Belgium, leaving him with the house help. Respondent No.4, being a mother, flew back from Australia, for the comfort of her child. Further, the screenshots of the call details as well as messages exchanged between the detenu and respondent No.4 would reflect the detenu himself had asked her to book tickets. Finally, respondent No.4 is also a guardian of the minor child and till the guardianship petition is decided, she is entitled to hold his custody.

4. Notice of motion.

5. Mr. Ramesh Kumar Ambavta who is present in the Court today, accepts notice on behalf of official respondents No.1 to 3-State.

6. Having heard learned counsel for the parties and after perusing the record, it transpires that the detenu is the son of the Amit Rekhi, brother of the petitioner and respondent No.4. He is currently 12 years of age and was residing with his father. For proper adjudication of the case, a perusal of Section 361 of the IPC and Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter 'HMGA') is necessary, which are reproduced as under:

### **Section 361 of the Cr.P.C.**

#### **Kidnapping from lawful guardianship.**

**Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.**

**Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.**

**Exception.--This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.**

### **Section 6 of the HMGA**

## **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.**

7. A perusal of the above provisions indicates that for an incident to be considered as kidnapping, it is necessary that the minor child is taken away from the custody of a 'lawful guardian.' However, a mother falls well within its ambit, especially in absence of an order passed by a competent Court, divesting her of the same. This Court is of the view that a parent cannot be implicated for kidnapping their own child as both the parents are his equal natural guardians.

8. Further, this Court has noticed an increasing tendency amongst disgruntled parents to move a writ petition in the nature of habeas corpus, in order to settle custody of their children. A two Judge bench of the Hon'ble Supreme Court in Tejaswini Gaud and others vs. Shekhar Jagdisg Prasad Tewari 2019 AIR SC 2318, speaking through Justice R. Banumathi, has opined as follows:

**"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."(emphasis added)

9. It is trite law that welfare of the minor would reign supreme while deciding upon the matter of his custody. The Hon'ble Supreme Court in Rosy Jacob vs. Jacob A. Chakramakkal (1973) 1 SCC 840 and Mausami Moitra Ganguli vs. Jayant Ganguli 2008 (4) R.C.R. (Civil) 551 and this Court in Saurabh Sharma vs. Nishi 2023(4) R.C.R. (Civil) 586 has consistently held that the welfare and interest of the child are of paramount consideration with respect to custody of a child. Section 6 of HMGA categorically states that the custody of minor child upto the age of 5 years shall ordinarily be with the mother. In doing so, the legislature has recognised the indispensable and inimitable role of a mother in the upbringing of a child. A mother's love for her children is selfless and the lap of the mother is God's own cradle for them.

Therefore, children of tender years ought not to be deprived of said love and affection. A two Judge bench of the Hon'ble Supreme Court in Rajeshwari Chandrasekar Ganesh vs. State of Tamil Nadu and others 2022 SCC OnLine SC 885, speaking through Justice J.B. Pardiwala, the following was observed:

**91. Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute.** The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its minor ward, and the very nature and scope of the

inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as parens patriae, has in promoting the best interests of the child.

92. The general principle governing the award of custody of a minor is succinctly stated in the following words in Halsbury's Laws of England, Fourth Edition, Vol. 24, Article 511 at page 217:

**"... Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father." (emphasis added)**

10. Adverting to the facts of the case, it appears that respondent No.4, mother of the detenu, ordinarily resides in Australia. The detenu was left with the house help by his father Amit Rekhi, while he was on a business trip to Belgium. Perturbed by the same, the detenu called his mother-respondent No.4, in distress and she flew all the way from Australia to be with him. Even though the matrimonial relationship between the parents has soured, the relationship between a parent and child subsists and it is only natural for a mother to give in to her maternal instincts and respond to the calls of her distressed child. It would also be rather unfair to expect her to leave her minor child in a place where he is uncomfortable, more so in absence of a judicial order prohibiting her from intervening.

11. Further still, since the guardianship petition is pending adjudication before the learned Family Court, Amit Rekhi, father of the detenu, cannot claim sole custody over him either. As discussed above, while deciding the matter of custody of a child, the paramount consideration shall always remain his welfare. Thus, it would be just and prudent for this Court to take into account the wishes and well being of the detenu, who is 12 years old, and capable of forming a rational opinion about his living situation.

12. As such, at this stage, any interference by this Court would be unwarranted. Accordingly, the present petition is dismissed.

13. Pending miscellaneous application(s), if any, shall also stand disposed of.