(2009) 05 MP CK 0019

Madhya Pradesh High Court

Case No: None

Tabassum Bano (Smt.)		APPELLANT
	Vs	
State of Madhya Pradesh and Others		RESPONDENT

Date of Decision: May 14, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 340, 96, 98
- Evidence Act, 1872 - Section 33
- Registration Act, 1908 - Section 75

Citation: (2009) 4 MPHT 215

Hon'ble Judges: R.K. Gupta, J; Dipak Misra, J

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

Dipak Misra, J.

The expose of the factual matrix has its own unconventional singularity and does manifest special individual characteristics necessitating a keen scrutiny of the nuances of law relating to a writ at habeas corpus on one hand in relation to a claim pertaining to the custody of the female child by the petitioner on the substratum that she is the natural mother and hence, has the absolute right to have the custody and the private respondents have no legal right in the remotest sense to advance a claim and on the other, the negation of the same by the respondent Nos. 3 and 4 on the fulcrum that there is no illegal detention and further on the sub-structure that regaining of custody by the petitioner is not a routine matter bereft of consideration of the welfare of the child which is paramount and is also to be taken note of in a writ of this nature.

2. The facts which are imperative to be stated are that the petitioner had entered into wedlock with one Usman Mansuri who died in the year 2004. After expiration of

four months, she gave birth to a female child on 6-10-2004 at Orai in the clinic of one Dr. Sandhya Gupta. A birth certificate in that regard has been brought on record as Annexure P-1. A further document, namely, '' Jachcha Bachcha Raksha'' card has also been brought on record as Annexure P-2. Due to the death of her husband, the petitioner suffered from depression and in such a situation Dr. Sandhya Gupta, after having dialogue with the elder sister of the petitioner, Zarina Bano, gave the custody of the child to the respondent No. 3 with an understanding that as soon as the petitioner would recover, the female would be returned to the petitioner. It is putforth that the respondent No. 3 is the friend of one Manoj Jain who is the brother of Dr. Sandhya Gupta and that is how he came into the picture. Zarina Bano, as setforth, had handed over the child, Ku. Alia, to the respondent No. 3 with an understanding that she would be given back to her younger sister as soon as she recovered from her illness. After recovering from illness the petitioner demanded her child to be given back to her from the respondent No. 3 who informed that she was living with the respondent No. 4 at Yadgar Chowk, Cantt. Sadar, Jabalpur and asked for the child but the respondent No. 4 refused to part with the child. The aforesaid circumstances led her to file an application u/s 98 of the Code of Criminal Procedure before the Sub Divisional Magistrate, Jabalpur who, after recording certain statements, directed restoration of the child to the petitioner by order dated 29-7-2008. Being dissatisfied with the said order, the petitioner preferred a revision before the learned Sessions Judge, Jabalpur who set aside the order as per Annexure P-10 on 19-10-2008. Reference has been made to the statement made before the Sub Divisional Magistrate, Jabalpur. There is an assertion that an application for review was filed before the learned Sessions Judge wherein the respondent Nos. 3 and 4 filed a false birth certificate of the child, Ku. Alia @ Ku. Vanshika, as per Annexure P-l 1.

3. It is contended that as per the legal advice, the present habeas corpus petition has been filed seeking restoration of the child. It is pleaded that the respondent No. 3 is having his married wife, Sujata Pillai, and as they were issueless, they have adopted one Vanshaj from some Christian Association. The respondent No. 4, Asha Pillai, is not the legally married wife and is living in the servant quarter No. 16 and the respondent No. 3 has illicit relationship with the respondent No. 4. It is urged that Ku. Alia has been named as Vanshika by the respondent No. 3 who is the daughter of the petitioner and she was taken by the respondent No. 3 from Orai when she was one month old. It is putforth that the refusal to return the custody of Ku. Alia tantamounts to illegal detention of the child. It is highlighted that the petitioner is a Post Graduate having Masters Degree in Music from Indrakala Sangeet Vishwavidyalaya, Khairagarh and is a part time teacher imparting education in music at Bundelkhand Kala Sangeet Post Graduate Music College. She is also giving her services in the clinics of Dr. Manoj Diwolia and Dr. Anil Gupta. From all the three sources, she is earning about Rs. 20,000/- per month and has a very good family background and is capable of looking after the child. It is contended that Ku.

Alia was given to the respondent No. 3 without the consent of the petitioner and, therefore, she is illegally detained by the respondent Nos. 3 and 4 and hence, a direction should be issued to handover the child. Ku. Vanshika, to the petitioner.

4. A counter affidavit has been filed by the respondent Nos. 3 and 4 contending, inter alia, that the child was born as a premature one in seven months and there was an effort to terminate the pregnancy by joining hands with the doctor but when the child was born alive, it was handed over to the respondents. Though the doctor helping the petitioner in the entire episode could not be named for want of knowledge yet Dr. Sandhya Gupta who had been examined before the Sub Divisional Magistrate in the proceeding u/s 96 of the Code of Criminal Procedure had stated that she had handed over the child lying on the table with all faith and hope of survival without disclosing the names of the parents, in a way, concealing the same. The respondents who were in need of the child accepted and treated it as a blessing of God. The name of the child was also concealed which shrouds the entire affair in great mystery and the same also relates to the paternity of the child. It is also contended that the maternity of the child claimed by the petitioner is not admitted but there was an unsuccessful attempt to terminate the pregnancy which was followed by wilful desertion from behind the curtain and that is evincible from the material brought before the Sub Divisional Magistrate. It is averred that the respondent had taken pains to keep the child alive at the initial stage and thereafter taken good care to bring her upto the age of four years. The action of the petitioner is not bonafide and the conduct reeks with malafide. It is setforth that it is difficult to conceive that the petitioner who was mentally unsound at the time of birth of the child has become normal without production of proper certificate. Reference has been made to the deposition of the sister of the petitioner and others to show how the entire story seems to be incredible inasmuch as the petitioner is the resident of Orai, District Jalaun (U.P.) and the respondents who are the residents of Jabalpur and unknown to the petitioner could have been given temporary custody of the child. It is also contended that the welfare of the child is the paramount consideration and the respondents are in a position to look after the child and have been looking after and they do not have even the slightest motive to subject the child to human trafficking as alleged by the petitioner. It is alleged that the petitioner is not sure of the maternity and that is why an application for conducting DNA test was filed before the learned Sessions Judge, Jabalpur in criminal revision. It is contended that when the child was handed over to the respondents, there is no illegal or unlawful detention, at any point of time. In fact, the petitioner had deserted and neglected to take care of the child and, therefore, she is disqualified to have the custody of the minor and the respondents are entitled to custody. It is urged that the matter basically pertains to the custody of the child which is to be decided by the proper forum and, therefore, this Court should not interfere in a writ of habeas corpus.

5. A rejoinder affidavit has been filed by the petitioner stating, inter alia, that her husband died on 24-5-2004 in Gajraraja Kshitsha Mahavidyalaya Swashasi Sanstha Evam Jayarogya Shiksitsha Samu, Gwalior as is reflectable from Annexure P-14 and she was suffering from continuous depression for the period 2004-2006. It is contended that she had some prescriptions but they are not available inasmuch as she has never thought that it would be required and, therefore, she did not retain them. It is pleaded that the petitioner had taken the mobile number of the respondent No. 3 from Dr. Sandhya Gupta and she has been asking him to return the child. It was not easy for her to travel all along from Orai to Jabalpur but, since nothing ensued, she had to come to Jabalpur to take proper action. It is contended that Ku. Alia was born in the eighth month and not in the seventh month as stated by the respondents and that she never wanted to terminate the pregnancy. It is also highlighted that she is the natural mother and hence, she has the legal right to have the custody of the child and the respondent Nos. 3 and 4 have no right in law whatsoever to have the custody of the child and, therefore, they are bound in law to restore the child to the petitioner. Emphasis has been laid on the false birth certificate produced by the respondents before the learned Sessions Judge and how the application u/s 340 of the Cr.PC has been filed for proceeding against the same. It is asseverated that the respondent No. 4 is not the legally married wife of the respondent No. 3 and the respondent No. 3 is in the visiting terms with the respondent No. 4. It is averred that the petitioner is not leading a immoral life and never neglected the child. It is asserted that she has sufficient means to look after the child and the welfare of the child can be properly taken care of.

6. An affidavit has been filed by the respondent No. 3 stating that on receiving information from Manoj Gupta that a female child is available at Orai and for getting the same his sister could help him. The third respondent consulted his wife, the respondent No. 4, who agreed to take the female child on adoption. Thereafter, they proceeded to Orai and found that the child was prematurely born and the said fact was also confirmed by Dr. Sandhya Gupta. Despite best efforts, Dr. Sandhya Gupta did not disclose the parentage of the child but the respondent No. 4, who was eager to satisfy herself with motherly emotions accepted the offer and brought the child. It is further contended that in December, 2004, he received a call from Dr. Sandhya Gupta that the mother of the child would be reaching Jabalpur but she would only see the child and go back. Thereafter, the petitioner came to Jabalpur in December, 2004 and after staying in a local hotel for about two days insisted to take the child. The said demand disturbed the entire locality and he was compelled to communicate to Dr. Sandhya Gupta who could only reply that she could not help if the mother had demanded the child. As setforth, the petitioner had taken away the child and with great difficulty, he consoled his wife that they would adopt another child. Towards the end of December, 2004, he received a call to reach Mumbai immediately with his wife and meet the person concerned and brought the child back to Jabalpur. At that juncture, she promised that she would never come in the

way and requested to treat the child as her own. A year back she came to Jabalpur and the respondents gave her good treatment and took her around Jabalpur. On a query being made she said that she was to return to Orai where her mother was lying ill with cancer and she would be required to take her for specialized treatment. As requested, the respondents arranged Rs. 30,000/- and gave her and thereafter she left Jabalpur. It is further averred that the petitioner has been asking money from the respondents and the respondents have been giving money and the said fact has been admitted in her statement recorded before the Sub Divisional Magistrate. In the affidavit, doubts have been cast on the maternity of the mother on the foundation that they had treated her to be the mother on the basis of the statement made by Dr. Sandhya Gupta but they have no knowledge as to whether the child is from Hindu or Muslim family. It is also averred that the child is going to school at present. An allegation has been made that the petitioner may sell the child or engage her in trafficking. It is also asseverated that no certificate of mental illness has been produced and abandonment of the child is writ large. A grave doubt is expressed with regard to the maternity of the child.

7. A reply has been filed to the said affidavit stating, inter alia, that a total imaginary story has been introduced. The facts have been controverted denied by way of affidavit.

8. We have heard Mr. Sanjay Agrawal, learned Counsel for the petitioner, and Mr. Rajendra Tiwari, learned Senior Counsel alongwith Mr. Jayant Nikhra and Mr. R.K. Tripathi, Advocates for the respondent Nos. 3 and 4.

9. At the very outset, it is condign to state that Mr. Sanjay Agrawal, learned Counsel, has very fairly stated that in this petition, he has not challenged the order passed by the Sub Divisional Magistrate or that of the learned Sessions Judge, Jabalpur and it has to be adjudicated strictly within the parameters of law relating to habeas corpus. In support of the petition, the learned Counsel for the petitioner has raised the following contentions:

(a) The petitioner is a Muslim lady and, therefore, personal law has to be made applicable on all fours and, therefore, the question of claim of any adoption by the respondent Nos. 3 and 4 does not arise.

(b) The petitioner, as pleadings would go a long way to show, is the mother of the child and hence, is the natural guardian who alone is entitled to have the custody of the child.

(c) The respondent Nos. 3 and 4 have no semblance of legal right to retain the child and, therefore, it has to be concluded with certitude that the child is to be restored to the custody of the petitioner.

(d) The female child was never given to the respondent No. 3 or to the respondent No. 4 on the consent of the petitioner as she was suffering from depression and,

therefore, from the very beginning, the child has been illegally detained by the respondents. Assuming there is consent, when the petitioner demanded her child, it has to be construed that the consent was withdrawn and it was the legal obligation on the part of the respondent to handover the child to the natural guardian.

(e) In the absence of legal right, the concept of welfare of the child as the paramount consideration does not arise especially in a writ of habeas corpus as the mere proof of illegal detention is a good ground to get the child released from the illegal detention.

(f) The pleadings of the respondents are absolutely inconsistent and an endeavour has been made to retain the child under any circumstance which clearly exhibits the improper conduct of the respondents as a consequence of which they invite the ineligibility to themselves to custody of the child. The denial of motherhood of the petitioner by the respondents shows extreme malice and that is a factor to be taken into consideration for issue of writ of habeas corpus.

(g) The factum of religion is an essential aspect and that cannot be ignored while determining the custody of the child.

(h) The respondent No. 4 is a concubine of the third respondent and the said facet has not been disputed by the respondent Nos. 3 and 4 and, therefore, it can be indubitably held that the respondent No. 4 being a person of loose character cannot be allowed the custody of a minor child.

10. Learned Counsel for the petitioner to bolster the aforesaid submissions has commended us to the decision rendered in Gohar Begam Vs. Suggi alias Nazma Begam and Others, , Mumtaz Begum Vs. Mubarak Hussain, , Mohammad Mehboob Khan v. Rahmit Bi and Ors. 1977 (2) MPWN 79, Wazid Ali Vs. Rehana Anjum, . Learned Counsel has also commended us to Mulla Principles of Mahomedan Law, The Personal Law of Muslims by Faiz Badruddin Tyabji, Outlines of Muhammadan Law and passages from a Handbook of Mahomedan Law by Babu Ram Verma.

11. Mr. Rajendra Tiwari, learned Senior Counsel alongwith Mr. Jayant Nikhra and Mr. R.K. Tripathi, Advocates combatting the aforesaid submissions has raised the following proponements:

(i) Submission that in the absence of any legal right of the respondent Nos. 3 and 4 the petitioner is entitled to custody as a natural mother is unsustainable.

(ii) The stand put forth that the respondents are in illegal custody of the child is wholly unacceptable as the child was handed over to them and there was consent from the very beginning.

(iii) The contention that when the custody of the child was asked for, the consent should be deemed to be withdrawn does not stand to reason as the entire factual matrix is to be appreciated to arrive at the conclusion in that regard.

(iv) The welfare of the child as a paramount consideration has to be taken into consideration while dealing with the petition for corpus and it cannot be said that the said facet has to be kept at bay solely on the ground that the petitioner has some proof to be the natural mother of the child.

(v) The petitioner has disqualified herself to be the custodian of the child since she has shown negligence by her conduct and in fact the material brought on record would go a long way to show that she terminated the pregnancy and abandoned the child after premature delivery.

(vi) The contention that the petitioner was suffering from mental depression has not even established in the remotest sense in the absence of any document which would include the prescription and hence, an adverse inference has to be drawn that she had deliberately abandoned the child and a consent was given by the sisters and doctors to give the child to the respondent and the aforesaid would clearly show that the petitioner was really never interested in the child. The interest in the child, as is appears, developed for some unfathomable reasons after she grew up, may be with a purpose to extract money from the respondents.

(vii) The allegation that the respondent No. 4 is a concubine of the third respondent is a malicious pleading and the submission that there is no denial of the same is totally inconsequential inasmuch as it is not a case for dealing with inter se status between the respondent Nos. 3 and 4 but the custody of the child. In any case, the terms "no comment" used in the counter affidavit would not affect the status of the respondent Nos. 3 and 4.

(viii) The accentuated submission that the personal law would exclusively govern the field, is sans substratum since the personal law is to be read in harmony with the provisions of the Guardian and Wards Act regard being had to the interest of the child.

(ix) The choice of the child cannot be totally brushed aside while deciding the habeas corpus petition and she cannot be allowed to suffer a traumatic experience at this tender age.

(x) The devotion and dedication of the fourth respondent has to be taken into consideration inasmuch as the child is in a mental and physical healthy condition with her and the same gets more significant when the factual backdrop is scrutinised with keener ken that the petitioner had abandoned the child leaving her to her fate to die. The endeavour of the respondents for survival of the child is also to be taken note of for the purpose of custody.

(xi) Various stand and stance put forth by the parties are in the realm of disputed question of facts and an inquiry is the warrant in the case of this nature. It is to be done in an appropriate proceeding before the Competent Court of law where all the relevant factors for the purpose of custody of the child can be gone into.

(xii) The evidence cannot be totally thrown overboard but should be looked into to find out the truth and to arrive prima facie conclusion where the respondents have illegally detained the child to invite the issue of a writ of habeas corpus.

(xiii) The learned Counsel for the respondents have also commended us to the decision rendered in Gohar Begum (supra).

12. Regard being had to the aforesaid submissions raised at the Bar we shall refer to the authorities commended to us. Be it noted, the learned Counsel for both the parties have relied on the decision in Gohar Begum (supra). In the said case, the appellant was an unmarried Sunni Muslim woman who had a female illegitimate child, namely, Anjum. She submitted an application to the High Court for recovery of the child from the respondent and the application met with unsuccess. It was her case before the Apex Court that the child Anjum was taken by the respondent to Pakistan with the consent of the appellant while she had gone to Khandala. After the respondent returned from Pakistan with Anjum the appellant asked the respondent to send the child to her but she declined to do so. Because of the said fact situation, the appellant compelled to approach the High Court u/s 491 of the Cr.PC and the High Court directed the appellant to move the Civil Court under the Guardian and Ward Act for custody of the child. Their Lordships took note of the certain facts in Paragraph 6 which are as follows:

6. ...The child Anjum is the illegitimate daughter of the appellant who is a muslim woman. The child was at the date of the application less than six years old and now she is just over seven years old. The appellant is a singing girl by profession and so is the respondent. The appellant stated in her affidavit that the respondent was in the keeping of a man and this the respondent has not denied. It is not the respondent''s case that she is a married woman leading a respectable life. In fact, she admits that she allowed Trivedi to live in her flat with the appellant as his mistress and took money from him for "Lodging and Boarding Charges". Trivedi has sworn an affidavit acknowledging the paternity of the child and undertaking to bring her up properly as his own child. He is a man of sufficient means and the appellants has been for a considerable time living with him as his mistress.

13. Thereafter Their Lordships proceeded to opine in Paragraphs 7 and 8 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 R. 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, that view is unsustainable in law.

14. Mr. Sanjay Agrawal, learned Counsel has laid immense emphasis on the said paragraphs to bolster the submission that it is a clear cut case of illegal detention by the respondents and the welfare of the child is totally inconsequential. Mr. Tiwari has commended us to Paragraphs 9 and 13 of the said judgment. We think it apposite to reproduced the same:

9. Before making the order the Court is certainly called upon to consider the welfare of the infant concerned. Now there is no reason to think that it is in the interest of the child Anjum to keep her with the respondent. In this connection, it is relevant to state that at some stage of the proceedings in the High Court the parties appeared to have arrived at a settlement whereby it had been agreed that the child Anjum would be in the custody of the appellant and the respondent would have access to the child. The learned Judges of the High Court, however, were not prepared to make an order in terms of this settlement because, as they said, "It did not appear to be in the interest and welfare of the minor". Here again they give no reason for their view, both parties belong to the community of singing girls. The atmosphere in the home of either is the same. The appellant as the mother can be expected to take better care of the child than the respondent. Trivedi has acknowledged the paternity of the child. So in law the child can claim to be maintained by him. She has no such right against the respondent. We have not been able to find a single reason how the interests of the child would be better served if she was left in the custody of the respondent and not with the appellant.
*** *** ***

13. It is further well established in England that in issuing a writ of habeas corpus a Court has power in the case of infants to direct its custody to be placed with a certain person. In R. v. Greenhill (1836) 4 Ad & E1624, at p.640: 111ER 922 at p.927 Lord Denman, CJ. said:

When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that

age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody.

See also (1857) 7 El. & Bl. 186 :119 ER 1217. In Halsbury''s Laws of England, Vol. IX, Article 1201 at page 702 it is said:

Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person.

Section 491 is expressly concerned with directions of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact, the Courts in our country have always exercised the power to direct u/s 491 in a fit case that the custody of an infant be delivered to the applicant: See Rama Iyer v. Naatraja Iyer AIR 1948 Mad. 294, Zara Bibi v. Abdul Razzak 12 Bom LR 891 and Subbaswami Goundan v. Kamakshi Ammal ILR 53 Mad. 72 : AIR 1929 Mad. 834. If the Courts did not have this power, the remedy u/s 491 would in the case infants often become infructuous.

15. In Mohd. Ikram Hussain Vs. State of U.P. and Others, , the Apex Court expressed the view as under:

19. In our opinion the writ nisi in this case for the production of Kaniz Fatima should have been preceded by some more enquiry. It is wrong to think that in habeas corpus proceedings the Court is prohibited from ordering an inquiry into a fact. All procedure is always open to a Court which is not expressly prohibited and no rule of the Court has laid down that evidence shall not be received, if the Court requires it. No such absolute rule was brought to our notice. It may be that further evidence would have borne out what Mahesh stated and then the order could always be passed for the production of Kaniz Fatima; but if the evidence did not bear out what Mahesh alleged then the order which the appellant disobeyed and for which he has to suffer imprisonment would never have been passed. The learned Judges failed to notice that Mahesh''s affidavit was that she was pregnant for 6 months and not as they state that she ran away early in June, 1960 because she became pregnant. It would be difficult to hide such an advanced pregnancy till June 20, 1960 when she left the house.

16. In Bhagwati Bai Vs. Yadav Krishna Awadhiya and Others, , a Division Bench of this Court after referring to the decision in Gohar Begum (supra) has expressed the view as follows:

8. But it must be remembered that this prerogative writ is an extra-ordinary 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 or inadequate. Otherwise, a writ will not be issued : it will be open to the person aggrieved to seek the ordinary remedy. Thus, the power of the High Court in granting the writ is

qualified and has to be used in the exercise of judicious and sound discretion. For restoration of custody of a minor from a person, who according to the personal law, is not his legal or natural guardian, the ordinary remedy lies under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be, and it is only in exceptional cases that the rights of the parties to the custody of the minor will be determined on a petition for, habeas corpus. (See : M. Basavalingam v. M. Swarajyalakshmi AIR 1957 AP 704).

9. It cannot be said that an application u/s 491, Criminal Procedure Code by a guardian for custody of the minor cannot lie just because there is the ordinary remedy provided by the law. The paramount consideration in every such case is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary and it will not be enforced by issuance of the writ when it is in conflict with the former consideration. If that paramount consideration does not call for the writ to be issued, it will be refused and the applicant would be left to resort to the remedy provided under the ordinary law. The underlying principle is that the guardian''s claim to the custody of the child is not a right in the nature of property but, indeed, it is a right in the nature of trust for the benefit of the minor. Where there is imminent danger to the health or safety or morals of the minor, an interim order for production of the minor becomes necessary.

17. In Budhulal Shankarlal Vs. An Infant-Child (not named) and Others, , a Division Bench of this Court was dealing with a petition u/s 491 of the Criminal Procedure Code for release of an infant aged about three months from the custody of the respondent Nos. 2 and 3 therein. It was urged that the petitioner was the father of the child and after delivery of the child his wife expired. He handed over custody of the child to the respondent Nos. 3 and 4 at the Lady Elgin Hospital for temporary care. When a claim for restoration of the child was put forth the respondents filed a return stating, inter alia, the petitioner''s wife had died on the labour table and he took custody of the dead-body but refused to take into his custody the boy from the lady doctor who was on duty in the hospital, saying that there was nobody to look after the child in his house. It was put forth that since the respondents were present there and they were without any issue, they offered to take the child in their custody to bring it up as their own son. Taking various consideration it was also the stand that the petitioner is not in a position to properly take care of the boy and he has been estranged from his parents because of his love marriage with the deceased-wife. On the same circumstances reliance was placed on Gohar Begum (supra) to buttress the contention that the respondents had no legal rights whatever to the custody of the infant and the refusal of the respondents to make over the infant to the petitioner did tantamount to illegal detention of the infant within the meaning of Section 491 of the Code. The Division Bench referred to Paragraph 9 of the decision rendered in Gohar Begum (supra), and expressed the view that from the Supreme Court decision, it is abundantly clear that Their Lordships restated the law that whenever the question of custody of a child arises, irrespective of the

proceedings in which it arises, the predominant consideration is the welfare of the child. The Bench opined that it had been not so, and the observations made by Their Lordships in Paragraphs 9, 10 and 11 in Gohar Begum (supra) would be redundant. Thereafter the Bench proceeded to state as follows:

9. The law is clearly this : (1), a writ of habeas corpus ad subjiciendum (you have the body to submit or answer), shortly called as a 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. (2) However, the writ further extends its influence to restore the custody of a minor to his guardian, when wrongfully deprived of it. (3) The detention of a minor by a person who is not entitled to the legal custody is treated for the purpose of granting a writ as equivalent to imprisonment of the minor. (4) The power of this Court in granting a writ is qualified and has to be used in exercise of judicial and sound discretion. (5) An application u/s 491, Criminal Procedure Code cannot be thrown out merely on the ground that there is an alternative remedy under the Guardians and Wards Act available to the petitioner. (6) The paramount consideration in every such case is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary, so that the latter will not be enforced by issuance of a writ when it is in conflict with the former consideration. (7) If that paramount consideration does not call for a writ to be issued it will be refused and the petitioner would be left to resort to the remedy provided under the ordinary law. (8) The guardian''s claim to the custody of the child is not a right in the nature of property, but it is a right in the nature of trust for the benefit of the minor. This was also the view taken in Bhagwati Bai Vs. Yadav Krishna Awadhiya and Others, .
After so stating the Bench proceeded to lay down the principle as under:

13. The following facts are not without significance, (i) It is stated in the return that the petitioner''s parents did not like the love marriage of the petitioner with his deceased wife. They would, therefore, have hardly any affection for the boy, who owes his birth to that lady, (ii) The respondents have asserted in the return that the petitioner demanded Rs. 500/- from them which creates a suspicion that the petitioner may be entertaining a thought of giving over the child to some other person, who is without an issue, for the sake of money, (iii) The petitioner''s mother or the married sister or the unmarried sister not one of them made any request to us that she wanted to take the custody of the child and bring him up. (iv) The petitioner made two false statements before us: (a) that his mother and unmarried sister reside with him; and (b) that he did not lift the child from the respondent''s house, as alleged by them in the return. The first was controverted by his mother herself. His Counsel, after a while, told us that the second statement was false and that Col. Inderdev actually intervened.

14. It must be remembered that the scope of the present proceedings is very limited. It is not as if we have to choose between two rival claimants for the

guardianship of the minor. That can be done in appropriate proceedings. The only purpose of the above conspectus is to see whether the infant should be taken away from the foster parents and delivered to the natural father. Here, it is not as if the respondents, by force or fraud, removed a minor from lawful guardianship. The initial entrustment of the infant''s custody to the respondents was with the petitioner''s consent.

18. In Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, , the Apex Court held thus:

2. It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal.

After so stating Their Lordships expressed the view that it is difficult in the habeas corpus petition to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be determined and accordingly the District Judge, Chandigarh submitted a report.

19. In Mumtaz Begum (supra), a Division Bench of this Court has expressed the view as under:

10. Having laid out the norms and nuances of the progressive interpretative technology, sanctioned by the Constitution and our judicial mantors, as also noting the judicial exposition in comparable jurisdiction, we propose to re-read the aforequoted sub-para (2). In our view, the mother of the child shall not suffer disqualification to have custody of the child for the mere fact that she is not residing with her husband, the child''s father. If there exist circumstances to show that it was difficult for her to reside with her husband or that she had not forsaken voluntarily her husband''s company, she should not be penalised. That apart, importance must be attached to the main rider, namely, she resides "at a distance from the father''s place of residence". Indeed, we must read the underlying meaning of the rider. Even if the mother must have custody of the child of the tender age, till he attains the age of 7 years, the father must not be denied access to the child. When personal laws are divinely sanctioned, a presumption will naturally arise that such laws have a humanistic content because when great seers, saints and prophets found any faith, they act as benefactors of the mankind as a whole if man is God''s child and if child is the father of the Man, no personal law claiming divine sanction, can afford to deny paramount consideration to the welfare of the child. It is not difficult, therefore, to see why the Declaration was unanimously adopted by the United Nations General Assembly in 1959.

20. In the case of Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Anr. : AIR 1987 SC 3, in a ''habeas corpus'' petition when the question of interest of a minor child

arose Their Lordships have expressed the view as under:

8. Whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and. predominant criterion of what would be best serve the interest and welfare of the minor.

21. In Idrish Mohd. Vs. Memam and Another, , the Apex Court while dealing with the custody of children has held as under:

4. From the documents filed by the appellant before us, the genuineness of which has not been disputed by the State by filing any counter-affidavit, we find that she has attained majority by now. She cannot, therefore, be kept detained against her wishes. The impugned order of the High Court also indicates that she is willing to go only with the appellant. We accordingly, allow this appeal and direct the authorities of Nari Niketan, Karnal to release respondent No. 1 forthwith.

22. In Sangeetha L. v. The Commissioner of Police, Kochi and Ors. AIR 2002 Ker 16 , in Paragraph 21, it has been held as under:

21. It is well settled proposition of law that custody of children by their very nature is not final but are interlocutory in nature subject to modification upon change of circumstances requiring change of custody and such change of custody must be proved to be in the best interest of the children. Reliance may be placed on the decisions, Rosy Jacob Vs. Jacob A. Chakramakkal, , Jai Prakash Khadria V. Srinath Prasad v. Nandamuri Jayakrishna 2001 AIR SCW 1033. Some of the cases are coming under the Guardians and Wards Act. Courts have reiterated that paramount consideration is the welfare of the children and Court has got the power to change their custody in the best interest of the children and taking into consideration of various attendant circumstances.

23. In Rajiv Bhatia Vs. Govt. of Nct of Delhi and Others, , the Apex Court while dealing with an appeal arising from a writ of habeas corpus filed by the natural mother of two young girls, namely, Akansha and Jayanti in Delhi High Court. After adverting to the facts and submissions referred to certain excerpts to which we think apt to reproduce:

6. Before examining the correctness of the rival submissions, we would like to state one fact that in view of the allegations and counter-allegations made, we had called upon the natural mother to produce the child in our Chambers to ascertain the views of the child and pursuant to the said direction, the child was produced in our Chambers. Though the child is quite young and is, therefore, not in a position to express any positive view, on questioning her we have got the impression that the child would like to stay with her natural mother and does not want to be with the alleged adoptive parents. This is borne out from the fact that even in our Chambers when the adoptive parents wanted to talk, the child started crying and did not want

to talk to them even. Though Mr. D.N. Goburdhan vehemently submitted that this is the result of tutoring but we are not persuaded to accept the said submission. We could gather, by putting questions to the child, in the absence of the natural mother, adoptive parents and the lawyers that Akansha''s natural instinct is to continue with the natural mother.

24. We have referred to the said paragraph as Their Lordships had taken pains to study the mind of a young child and record their observations.

25. In Wazid Ali (supra), a learned Single Judge of this Court has dealt with the concept of welfare of a child and in that context expressed the view as follows:

The word "welfare of the child" admits of no strait-jacket yardstick. It has many facets, such as financial, educational, physical, moral and religious welfare. The question, where the welfare of the minor lies should be answered after weighing and balancing all factors germane to the decision-making, such as relationships, claims and wishes of parents, risks, choices and all other relevant circumstances. The answer lies in the balancing of these factors and circumstances and determining what is best for the minor''s total well being. The cardinal principle is that minors cannot take care of themselves so that the State as pater practice has powers to do all acts and things necessary for their protection. It is, therefore, the primary duty of the Court to be satisfied what would be for the welfare of the minor and to make an order appointing or declaring a guardian accordingly. In the present case, the parties are Mahomedan and though paramount consideration in the cases coming under the Act for appointment of guardian should be the welfare of the minor, it must be as far as possible consistent with the personal law relating to the parties looking to the age of the child which is only four years, it would be appropriate to give her in the custody of her mother.
(Quoted from the placitum)

26. In Nil Ratan Kundu and Another Vs. Abhijit Kundu, , the Apex Court has expressed thus:

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 parents 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.

27. In this context, we may refer with profit to the decision rendered in Salamat Ali and Another Vs. Smt. Majjo Begum, , wherein the learned Judge after referring to various decisions in the field came to hold as follows:

7. On a consideration of the authorities, the legal position appears to be that where under the personal law the mother is entitled to the custody of a minor child, she should normally get the custody of the minor but she may be deprived of the custody if the evidence on record shows that it would not be in the interest of the minor to give the minor in the custody of the mother. Thus, the provisions of the personal law are to be applied consistently with the provisions of the Guardians and Wards Act. The welfare of the minor can be determined only on the basis of evidence for which opportunity will have to be afforded to the party seeking it. This opportunity in the present case was not afforded to the applicant who wanted to show that Majjo Begum had abandoned the minor and had, therefore, forfeited the right of custody available to her under the personal law.

28. In this context, we may fruitfully refer to the decision rendered in Rosy Jacob Vs. Jacob A. Chakramakkal, , wherein the Apex Court has expressed the view as follows:

...Merely because the father loves his children and is not shown to he otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because if her profession and financial resources may be in a position to guarantee better health, education and maintenance for them. 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.

(Emphasis supplied)

29. In Syed Saleemuddin Vs. Dr. Rukhsana and Others, , it has been held thus:

...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 the present custody should be changed and the children should be left in the 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 for the Court.

30. Recently, in Mausami Moitra Ganguli Vs. Jayant Ganguli, , a two-Judge Bench of the Apex Court has expressed the view thus:

14. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obligerate the vital factor of the welfare of the minor. The question of welfare of the minor child has again to be considered in the backgrounds of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child, it is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all he relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.
31. In the said case, Their Lordships referred to Halsbury''s Laws of England (Fourth Edition Vol. 13) pertaining to the custody and maintenance of children which reads as follows:

809. Principles as to custody and upbringing of minors.- Where in any proceedings before any Court, the custody or upbringing of minor is in question, the Court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same right and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.

32. Recently, in Gaurav Nagpal Vs. Sumedha Nagpal, , the Apex Court reiterated the principle in the following terms:

The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child the paramount consideration is the ''welfare of the child'' and not rights of the parents under a statute for the time being in force. 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 matter human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise the jurisdiction which is aimed at the welfare of the minor. The word ''welfare'' used in Section 13 of the 1956 Act has to be construed legally 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.

(Quoted from the placitum)

33. From the aforesaid pronouncement of law it is deducible that the welfare of a child as the paramount consideration cannot be ostracized in any proceeding. It is obligation of the Court even in a writ of habeas corpus to see the interest of the child as that is the primary consideration. Certain inquiries are required to be conducted. The choice of the child definitely is of immense significance. True it is, a child cannot form an opinion but as has been held by Their Lordships in Rajiv Bhatia (supra), an effort can be made to decipher the choice. The concept of welfare of a child is not a static or stagnant one and keeps changing. True it is, in a habeas corpus petition it is to be seen whether the child is in illegal custody or has been illegally detained by the respondents. Submission of Mr. Agrawal, learned Counsel for the petitioner is that the child was given by the doctor in consultation with the sister of the petitioner and that cannot tantamount to her consent and further when the child was demanded, the consent must be deemed to have been withdrawn.

34. Be it noted, Mr. Tiwari, learned Senior Counsel has invited our attention to the depositions made before the SDM. Mr. Agrawal has contended that the SDM had no jurisdiction and hence, the said depositions are not to be taken into consideration at all.

35. In this context, we may refer with profit to the decision rendered in Kadiam Paparao Vs. Siddireddy Satyanarayana and Others, , wherein the learned Single Judge after referring to Section 33 of the Evidence Act and Section 75 of the Indian Registration Act eventually came to hold as follows:

A reading of this section makes it clear that it is not only the evidence given in a judicial proceeding but the evidence given before any person authorised by law to take it is admissible in evidence. The expression ''or'' used in Section 33 indicates that not only the evidence given in a judicial proceeding but evidence given before any person who is authorised by law to take it is relevant in a subsequent judicial proceeding or in a later stage of the same judicial proceeding subject of course to the conditions mentioned therein namely, when the witness is dead or cannot be found etc.

36. In Sudhindra Nath Vs. The State, , the Division Bench has ruled thus:

14. The matter seems to us to be beyond all question. If the proceedings had taken place without jurisdiction, it cannot by any means be said that the evidence given in those proceedings was given in a judicial proceeding. Such proceeding, on the authorities which I have cited, can never be a judicial proceeding. The next question is can such evidence of the complainant, given in the two previous proceedings, be admitted on the ground that it was given before a person authorised by law to take it.

15. It seems to me that when it is said that a person must be authorised by law to take it, it means that the person must be authorised to take that particular deposition or the particular case in which the deposition has been given. As I have said the entire trial had been declared by this Court to have been without jurisdiction. If that is so, it cannot be said that the Magistrate who took deposition in such a trial was a Magistrate who was authorised by law to take that deposition. Such a person must be, as I have indicated, a person authorised to take that particular deposition. But the effect of the decision of this Court in those two Revision Cases, is that he was not authorised to take those deposition- the trials having been declared to be without jurisdiction.

37. It is submitted by Mr. Agrawal, learned Counsel for the petitioner that the depositions made before the SDM cannot be pressed into service as he had no jurisdiction to decide the controversy. On a perusal of the decision rendered by the Calcutta High Court there cannot be any doubt that Section 33 of the Evidence Act cannot be pressed into service if the evidence is recorded by a Court having no jurisdiction to try the lis. When the proceeding becomes a proceeding coram non-judice the evidence of the witness cannot be admitted in evidence. But in the case at hand, the SDM had jurisdiction to deal with the application u/s 98 of the Code. Learned Sessions Judge has dislodged the order as ingredients of Section 98 were not satisfied. Thus, the said facts are in the realm of adjudicatory facts and, therefore, the proceeding before the SDM cannot be regarded as a proceeding coram non-judice. Hence, the same can be looked into, may be for the prima facie view.

38. It is significant to note that Dr. Sandhya has been declared hostile before the SDM. Various aspects with regard to handing over the child, presence of the petitioner and other aspects have come in the evidence. In the said proceeding there is no suggestion whatsoever with regard to marital status of the respondent Nos. 3 and 4. Not a single scrap of paper was produced with regard to ailment of the petitioner. It is contended by Mr. Agrawal that in Mohammedan Law that there is no concept of adoption. The learned Counsel has invited our attention to Mulla''s Principles of Mohomedan Law, Nineteenth Edition, wherein it has been stated that the Mohomedan Law does not recognise adoption as a mode of filiation.

39. The said contention does not arise for consideration as Mr. Tiwari, learned Senior Counsel fairly stated that the respondent Nos. 3 and 4 have never claimed to have adopted the child.

40. Mr. Agrawal has submitted that under the Mohammedan Law the mother is best entitled to custody of the child. He has relied on Paragraph 435 Outlines of Mohammedan Law, Forth Edition, by Asaf A.A. Fyzee, wherein it has been stated thus:

The mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband, unless she be an apostate, or wicked, or unworthy to be trusted.

41. The learned Counsel has also commended us to Paragraph 354 of Mulla Principles of Mohomedan Law, Seventeenth Edition. The said paragraph reads as under:

354. Females when disqualified for custody.- A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody:

(1) if she marries a person not related to the child within the prohibited degrees (Sections 260-261), e.g., a stranger (p), but the right revives on the dissolution of the marriage by death or divorce (q); or

(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father''s place of residence; or

(3) if she is leading an immoral life, as where she is a prostitute (r); or

(4) if she neglects to take proper care of the child.

42. We have referred to the aforesaid to show that there are certain instances when a mother can be is disentitled. In the case at hand Dr. Sandhya had deposed that there has been some discussion between Tabassum Bano and Ravi Pille and the child was delivered. Tabassum had deposed that she had been ailing for more than a year after the birth of the child. No material has been produced with regard to her illness. There is material that the child was born prematurely. It is urged by Mr. Agrawal that the consent of the petitioner was not taken. What is asserted is that

the doctor and the sister of the petitioner keeping her illness in view gave the child in the custody of the respondents. It is proponed that when the demand was made, consent should be treated to have been withdrawn. Emphasis has been laid on the decision rendered in Gohar Begum (supra), Mr. Tiwari has submitted that the child was given as the petitioner was not inclined to look after the child because of many a reason apart from the fact she was a prematurely born. It is submitted by Mr. Tiwari that the welfare of the child cannot be given a go by while considering the custody in a habeas corpus petition and that is what Their Lordships have opined in Gohar Begum (supra) and Buddhulal (supra). At this stage, it is apposite to state that this Court to have an idea had directed for production of the child. The child was produced before this Court on 6-5-2009. On that day, this Court recorded the proceeding which is as follows:

In pursuance of the aforesaid order, Vanshika has been produced before this Court. We have taken the proceeding on camera. Initially, we called the child Vanshika. Learned Counsel for the parties along with the petitioner as well as the respondents remained outside. After talking to Vanshika, we found that she was quite articulate, specific and expressive. She has stated that she is studying in St. Joseph Convent School. She has stated that she is happy with her studies and daily life. A suggestion was given to her that she shall be sent with the petitioner immediately. She, in a decided manner, answered in the negative. To assess her mind, when we repeatedly stated that she has no other option but to go with the petitioner, she burst into tears, in a way, in an uncontrollable manner. At this juncture, we called the petitioner, Tabassum Bano and her Counsel Mr. Sanjay Agrawal. She tried to persuade the child Vanshika to come with her but she did not accept the same and kept on crying.

Thereafter, we called Mr. Rajendra Tiwari, Mr. Jayant Nikhra, learned Counsel representing the respondent Nos. 3 and 4.

Mr. Tiwari and Mr. Nikhra came along with Mrs. Asha Pillai, the respondent Nos. 3 and 4 herein. In presence of the learned Counsel for the parties, we again insisted that Vanshika has to go with Tabassum Bano. She again burst into tears. When we told her that she could leave the place where she is sitting. She immediately left the seat and rushed to Asha Pillai.

The aforesaid proceeding has been recorded in presence of learned Counsel for the parties. We have not expressed any opinion but recorded what transpired. It is unnecessary to emphasise, recording of camera proceeding and what transpires herein is without prejudice to the contentions to be canvassed by the learned Counsel for the parties at the time of hearing.

43. Submission of Mr. Agrawal is that the respondent No. 4 is the concubine of the respondent No. 3. To bolster his submission he has invited our attention to the return filed by the respondents, especially to Paragraph 2.1, wherein it has been

mentioned that in reply to Paragraphs 5.13 and 5.15 of the petitioner "need no comment". It is urged by him that in the said paragraphs of the petition the petitioner has pleaded that the respondent No. 4 is not the legally married wife and she is a maid servant and the respondent No. 3 is in visiting terms with the said respondent. Mr. Tiwari has submitted that it cannot be treated to be an admission for conferment or destruction of status and, in any case, Ravi Pille has filed an affidavit stating in categorical and unequivocal terms that Asha Pillai is his wife and he had consulted her to take the female child. In view of the aforesaid, we are of the considered opinion that on the basis of "no comment" and, more so, in view of the affidavit filed, it would be inappropriate for a Writ Court to determine the status of relationship inter se between the respondent Nos. 3 and 4. It is a disputed question of fact and has to be dealt with by the appropriate legal forum.

44. From the foregoing analysis and keeping in view the pronouncements in the field, we are disposed to think that the female child was given to the respondent Nos. 3 and 4. It cannot be said that the child was not given with the consent of the petitioner. The petitioner has pleaded that her consent was not taken. Simultaneously, it is urged that she was suffering from mental ailment but no prescription has been filed. A stand has been taken in the rejoinder that she had not kept the prescriptions thinking that they would never be required. Whether she had availed the treatment or not or suffered from mental illness or not at all, cannot be stated with certitude in a writ petition of this nature. It is difficult to accept the submission of Mr. Agrawal that once the petitioner had demanded the custody of the child, even if the consent was given, it is withdrawn and, therefore, the retention of the child by the respondent Nos. 3 and 4 would tantamount to illegal detention. We are unable to accept the said spacious submission. That apart, as has been held in number of authorities referred to hereinabove the welfare of the child is of paramount consideration. The said aspect cannot be ignored or brushed aside in a writ of habeas corpus. It has also been held that if the mother ignores to look after the child she becomes disentitled to custody.

45. As is evincible from the factual matrix, right from the time of birth the female child has been with the respondent Nos. 3 and 4; that the child has been attending the school; that the child is mentally alert and physically healthy; that there is no material on record to come to the conclusion that the child had been taken by fraud or force; and hence, we conclude and hold that the child is not in unlawful detention of the respondent Nos. 3 and 4. In view of the aforesaid cumulative facets we are unable to entertain the writ of habeas corpus to grant custody of the female child to the petitioner.

46. The present factual matrix, if we are allowed to say so, really raises complex question of facts and there is a serious dispute which really cannot be satisfactorily decided without taking evidence and it is inapposite to decide the same in the writ proceeding. It is not a case where the Court can hold that factual disputes are

projected for the sake of raising factual disputes. Certain things are shrouded in mystery and they are to be uncurtained and unveiled by adducing oral and documentary evidence before the appropriate forum. True it is, a Writ Court can adjudicate the jurisdictional facts but in the case at hand it is not the jurisdictional facts but actually adjudicatory facts which are required to be gone into. In our considered opinion a full scale trial by the appropriate legal forum is necessitous, nay, imperative. Hence, determination by this Court who should be the custodian or guardian of the child need not be decided. We only state that the respondent Nos. 3 and 4 have not unlawfully detained the female child, Vanshika. However, we may hasten to state that the custody or the guardianship of the child has to be decided by the Competent Court of law regard being had to the material brought before it and law in the field and various other aspects which entitle or disentitle the mother or foster parents to have the custody. Our observations are prima facie in nature except the finding that the child is not in unlawful detention of the respondent Nos. 3 and 4. Hence, no relief can be granted to the petitioner in this habeas corpus petition.

46. Ex consequenti, the writ petition, being sans substratum, stands dismissed. There shall be no order as to costs.