

person selected with a legal right to allotment.”

9. The Hon'ble Supreme Court in **Sunita Sharma's case (supra)** has passed an order for the reason that the concerned authorities were condoning the delay in large number of cases, which was of few days in some cases, whereas in some other cases, few years and in one case, more than 20 years. It was the said fact, which led the Hon'ble Supreme Court to pass the order referred to by the learned counsel for the petitioner.

10. In the present case, the letter of cancellation of allotment was issued on 9.1.1990. But, it was on 8.2.2010, almost 20 years later, the petitioner made a representation to deposit the 15% amount. Later, the petitioner filed revisions on 24.1.2011 and on 27.7.2011 before the State Government, which have been dismissed by an order impugned in the present writ petition. Though, the period of condonation of delay, the Authority who can condone the delay and also the amount of surcharge has also been specified in terms of the Policy framed, but such policy is almost after 20 years of the cancellation of allotment. The petitioner cannot claim any right on the basis of such policy in respect of concluded actions. The petitioner cannot be permitted to raise any dispute after such long delay. The arbitrariness, which writ large in the matter before the Hon'ble Supreme Court, cannot be claimed by the petitioner, he having lost any right due to his non action for many years. Therefore, reliance by petitioner on the said order does not help the petitioner in any manner.

11. Having failed to send the acceptance within 30 days and to pay the amount and to seek extension of time for payment of 15% of the amount, no concluded contract has come into existence.

12. Consequently, the present writ petition stands dismissed.

Petition dismissed.

PUNJAB AND HARYANA HIGH COURT

Before: Paramjeet Singh, J.

CRWP-1256-2014

Decided on: 23.09.2014

Amita Chhabra

Petitioner

Versus

State of Haryana and others

Respondents

Argued by:

Mr. Anurag Chopra, Advocate, for the petitioner.

Mr. Sandeep S. Mann, Sr. DAG, Haryana.

Mr. Karan Vir Nanda, Advocate, for respondents no.2 to 4.

A. Constitution of India, Article 226 -- Custody of minor child -- Habeas Corpus writ against father -- Maintainability of -- Whether habeas corpus petition is maintainable when custody of minors/infants is claimed by the mother from their father? -- Held, it is the welfare of the child which is of paramount consideration -- Jurisprudence cannot slumber -- A writ court can always issue writs to meet the new challenges -- High Court has power to issue habeas corpus writ at least to

temporarily decide the custody of the minors in the interest of justice till the issue is determined by a Guardian Court in accordance with law.

(Para 31)

B. Constitution of India, Article 226 -- Custody of minor child – Habeas Corpus writ against father – Hindu Minority and Guardianship Act, 1956 (32 of 1956), Section 6 -- Custody of minor children -- Courts of law are expected to strike a just and proper balance between the requirements for welfare of minor children and the rights of their respective parents over them – Court has to exercise a jurisdiction which is aimed at the welfare of the minors -- Court has to take into consideration 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 -- Male child under five years of age and female child under thirteen years of age, need most tender affection, the caring hand and company of his natural mother -- Minor-son, aged 2½ years, will remain with the mother and minor-daughter, aged 6½ years as she is studying in Nahan, will remain with father at least till the academic session is over -- Minor-daughter's studies cannot be disturbed in the mid of the academic session, however both he parents were given visitation rights -- Either of the parties shall approach, within reasonable time preferably three months from today for the custody of minors, the competent court i.e. Family Court or Guardian court under the provisions of the Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956 – Any order regarding the interim custody or visitation right passed by the competent court will be binding on the parties as per law -- Till then, interim arrangement as ordered by High Court will continue.

(Para 32, 33)

Cases referred:

1. Gaurav Nagpal vs Sumedha Nagpal 2008 (4) R.C.R.(Civil) 928.
2. Syed Saleemuddin vs. Dr. Rukhsana 2001(2) R.C.R.(Criminal) 591.
3. Gurmeet Kaur Batth vs. State of Punjab and others 2009(1) R.C.R. (Criminal) 974.
4. Gohar Begum vs. Suggi alias Nazma Begum and others AIR 1960 AIR SC 93.
5. Ajay Bansal vs. State of Punjab and another 2013 (3) R.C.R. (Civil) 340.
6. Jaswinder Kaur vs. State of Punjab and others 2010 (2) R.C.R. (Criminal) 891.
7. Kalpeshkumar Bhikhalal Vohara vs. Dalpatbhai Manilal Shah, Banaskantha & Ors. 2000(1) GCD 227.
8. Baljit Kaur vs. State of Punjab and others, Crl. W. P. No.667-2011, decided on 12.07.2011.
9. Smali Bagga vs. State of Punjab and others 1996(2) R.R.R.202.
10. Venugopal vs. Krishnankutty 2004(2) HLR 274.

11. Deepak Agnihotri vs. The Commissioner of Police and others 2009(2) R.C.R. (Criminal) 30.
12. S. Parthasarathi vs. State of Karnataka & Ors. 2010 (2) Air Kar R 132.
13. Sakina vs. State of Punjab and others 2012 (8) R.C.R.(Civil) 64.
14. Sangeetha vs. The Commissioner of Police, Kochi and others AIR 2002 Kerala 16.
15. Gaurav Nagpal vs. Sumedha Nagpal 2008(4) R.C.R. (Civil) 928.
16. Davinder Singh vs. State of Punjab, Crl. W.P. No.1132-2014, decided on 21.08.2014.
17. Nil Ratan Kundu vs. Abhijit Kundu 2008 (3) R.C.R. (Civil) 936.
18. Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw and another, AIR 1987 SC 3.
19. S.P.Chengalvarjna Naidu (dead) by Lrs vs. Jagannath, 1994(1) R.R.R. 253.
20. Smali Bagga (Smt.) vs. State of Punjab and another, 1996(2) R.R.R. 202.
21. Mrs. Kuldeep Sidhu vs. Chanan Singh and others 1988 (1) R.C.R.(Criminal) 534.
22. Manjula Jha vs. Ravindra Nath Jha, 1998(1) All India Hindu Law Reporter 273.
23. Manju Tiwari vs. Rajendra Tiwari, AIR 1990 SC 1156.
24. Saihba Ali vs. State of Maharashtra and others, 2003 (4) R.C.R. (Civil) 273.
25. Surabhai Ravikumar Minawala vs. State of Gujarat 2005(2) RCR (Civil) 822.
26. Manjit Kaur vs. State of Punjab, Crl. W.P. No.608 of 2008, decided on August 14, 2008.
27. Mausami Moitra Ganguli vs. Jayanti Ganguli JT 2008 (6) SC 634.
28. Gippy Arora vs. State of Punjab and others, 2012 (4) R.C.R.(Civil) 397.

JUDGMENT

PARAMJEET SINGH, J. –

1. The genesis of factual matrix lies in spectre of love between the petitioner and respondent No.4, who solemnized their love cum arranged marriage according to their own sweet will. Now, writ petition has originated on the complaint of petitioner-wife complaining the illegal custody of minor children aged 2½ years and 6½ years in the hand of respondent-husband and in-laws.

“Happy marriages begin when we marry the ones we love, and they blossom when we love the one we marry.”

... Tom Mullen

2. Alfred Lord Tennyson penned down that marriages are made in heaven and Andre Maurois said, "A successful marriage is an edifice that must be rebuilt every day." Marriage between two Hindus is considered a sacred relationship, because their *karmas* are intertwined. The relationship between the couple is essentially a relationship of two souls. It is both an obligatory and a sacrament. When two individuals are in love they are at their best to impress each other. They behave, talk and wear what the other likes. Though marriage is after many years of courtship, but it is after the marriage that they come to know of the real person, after sometime partners start realizing and ultimately say that other partner is not suitable and are up in breakup. Early stages of marriage are 'make or break' situation in many cases. Love and arranged marriages are still a debatable topic in Indian society and the issue as to which one is better, is still confused. In love and an arranged marriage common factor is physical attraction. Success of marriage is not spending time together but result of understanding and respecting each other's feelings. There should be a mental compatibility and understanding among partners. In reality successful married life is based on commitment, concern, empathy, love and responsibility. It is not just an initial love and physical attraction; it needs a lot of dedication and effort to sustain a marriage. Love is a dream and marriage is a reality. When dream and reality come together it is the best thing to happen. Long-term successful relationship calls for efforts and hard work. When after marriage couple decide to spend the rest of their life together than only actual love starts. Love is more like a wonderful feeling, marriage calls for understanding, daily efforts and constant needs to nurture feelings. Every relationship, if it is to thrive and endure, has certain demands and needs to be met with. Love is a magical experience which ignites passion in human hearts and leaves an impact not possible to calculate. Success of marriage depends upon two things- finding the right person and being the right person. Main ingredients of a successful marriage are, like a good recipe- love, commitment, concern, understanding and togetherness. Married life is not a bed of roses. Marriage is the most beautiful relationship that happens at some point of time, but because of immature attitude and impatience fails to keep the spark of married life. Blessed are those who have happy married life.

3. It would be apposite to refer a paragraph from judgment of the Hon'ble Supreme Court in the case of **Gaurav Nagpal vs Sumedha Nagpal 2008 (4) R.C.R.(Civil) 928:**

"2. Matrimonial discords are on the rise at an alarming rate. The sanctity of marriages is under cloud, which in a great way affects the society at large. Individuals can in no way be segregated from the society to which they belong. The cultural heritage of a country is greatly influenced by a pattern of behaviour of individuals and more so in matters of matrimony. Home can be a wonderful place to live. But continuous fights between the partners of a marriage disturb the atmosphere at home and create havoc on the members of a family. One does not need a mansion to lead a happy marital home. The foundation of a happy home is love, sharing of joys and sorrows, and not in that sense bricks and concrete. There should be cementing of hearts and not cementing of floors and walls. Life is a series of awakening. The happiness which brings enduring worth to life is not the superficial happiness that is dependent on circumstances. Ultimately, in the fight between the partners,

the victims more often than not are the children. It is unfortunate that in their fight more often on account of egoism the children suffer, more particularly when the child is a girl. It is not uncommon to see that at the time of negotiation of marriage, the boy's parents shy away because the girl is from a broken family and/or the parents are divorced. The child has practically no role in breaking of the marriage, but he or she suffers. The marital discord sometimes reaches a stage where the parties are unmindful of what psychological, mental and physical impact it has on children. It is worse when there is a single child, be it a boy or a girl. The case at hand is a classic example where the child has become the focus of controversy. Bitter legal fights have been fought and the corridors of several courts including the Supreme Court have been travelled by the parties. Efforts have been made unsuccessfully to bring about conciliation between the parties. The best way to make children good said a learned author is to make them happy."

4. The facts in short compass which have triggered this judicial action are as follow:

5. Petitioner-wife and respondent no.4-husband met in Panipat and solemnized love-cum-arranged marriage on 23.01.2007. Daughter-Nandni Gupta, aged 6½ years and son-Aarav Gupta, aged 2½ years, were born from the loins of respondent no.4-Vikrant Gupta. Initially, the couple started residing in Dream Homes, Kishanpura, Dhakauli, Zirakpur.

6. The averments in the petition reveal that there was some temperamental imbalance between the petitioner and respondent no.4. The allegations made in the petition are to the effect that after the marriage, respondent no.4 continued to harass and torture the petitioner and children as a result of which marriage between the couple had turned sour and their matrimonial differences had turned bitter. The case of petitioner is that her temperament towards respondents no.2 to 4 had always been cordial and for the sake of children she allegedly continued to bear the brunt of torture which was subjected at the hands of her husband. Reference to various E-mail communications and short message service has been made which were exchanged between the petitioner and respondent no.4.

7. It is the case set up by the petitioner that respondents no.2 to 4, in-laws and husband of the petitioner, hatched a conspiracy and illegally took the custody of minors from the matrimonial home at Zirakpur and shifted to Nahan. The minors were taken by them on 18.03.2014. The petitioner and respondent no.4 were in service and remained pre-occupied in their job. The petitioner was working at Ludhiana and used to undertake long journey to reach the children every weekend. Allegedly, on 08.04.2014, the petitioner was shocked and surprised, when she received various letters which were sent at the address of her parents in Yamuna Nagar which carried horrible contents not even worth reading. Further averments are to the effect that in a deceitful manner, respondents no.2 to 4 hatched a conspiracy and tried to shift the children from one place to the other, therefore, the petitioner could not have any access to the children. The petitioner allegedly tried her best to get in touch with her children, but on one pretext or the other, respondents no.2 to 4 did not provide any chance for communication and meeting between the petitioner and children. Whereabouts of the children were not known to the petitioner and she

apprehended threat to their life and liberty. When the couple was residing at Zirakpur, daughter-Nandni Gupta, aged 6½ years, was studying at Gurukul School, Sector-20, Panchkula. With these averments, instant *habeas corpus* petition has been filed for custody of minors-Nandni Gupta (daughter) and Aarav Gupta(son).

8. In pursuance of the notice of motion, respondent no.4 filed short reply and admitted that their marriage was a love marriage and their relationship was cordial. The stand taken by respondent no.4 is to the effect that in the year 2013, there were some disturbances in petitioner's maternal home due to which she started residing at her maternal home in Yamuna Nagar to take care of her ailing father and jobless brother. This became a matter of concern for respondent no.4 as their daughter was missing school regularly. It is further averred that minor children are not detenues as claimed by the petitioner. The petitioner voluntarily dropped both the children at the house of respondents no.2 to 4 at Nahan on two occasions i.e. 01.11.2013 and 02.03.2014 as she wanted to stay at her parental home in Yamuna Nagar. It is further averred that the petitioner was never interested in taking care of the children and daughter-Nandni Gupta, aged 6½ years, is studying in second class at Carmel Convent School, Nahan. The petitioner herself got her daughter admitted in the school at Nahan and admission form bears the signatures of the petitioner.

9. It is further averred in reply that the petitioner visited her kids only twice in a span of four months and a complaint was also lodged against her at Nahan for threatening and blackmailing respondents no.2 to 4. It is also averred that the petitioner had been continuously talking to the children on telephone. The claim for handing over the custody of minors to the petitioner is false. The petitioner had been shirking her responsibility of taking care of her kids. The petitioner has always exhibited a violent behaviour. It is further averred that father of the petitioner has belligerent temper. It is further averred that the matter was compromised between the parties at Police Station, Yamuna Nagar. The car of respondent no.4 was allegedly damaged by the brothers of petitioner and other relatives. Opting a job in Ludhiana was prerogative of the petitioner. She allegedly wanted to palm off her responsibility of taking care of her kids and she deliberately dropped them at Nahan. It is further averred that minor-Nandini Gupta is regularly attending her school at Nahan and doing good in study as well as sports. She has obtained good marks and also brought laurels to the *alma mater* as is evident from Annexures R-3 to R-6. Other averments in petition have been denied.

10. Additional affidavit of petitioner along with some documents rebutting the contents of reply has also been filed.

11. This Court instead of appointing warrant officer issued notice to the respondents and directed respondent no.4 to be present in Court along with the children on 02.09.2014. In pursuance thereof, both the children were produced in this Court. Vide order dated 02.09.2014, both the children were allowed to meet their mother(petitioner) and keeping in view the age of Aarav Gupta, being 2½ years, his interim custody was handed over to the petitioner, however, custody of Nandani Gupta, aged 6½ years, who is studying at Nahan was ordered to remain with respondent no.4. Thereafter, attempts were made for reconciliation between the couple and the case was adjourned on various dates for exploring amicable settlement between them. On 16.09.2014, this

Court heard the petitioner and respondent no.4 including their children jointly and separately in Chamber to explore further possibility of reconciliation, but the parties remained adamant. The interim custody of minors continued to remain as ordered by this Court.

12. I have heard learned counsel for the parties and perused the record.

13. Learned counsel for the petitioner has vehemently contended that *habeas corpus* petition is maintainable in the present form. The petitioner-mother of minors-Nandni Gupta and Aarav Gupta has expressed her grief over deprivation of her children. The welfare of a child is always better when the child is with the mother specifically when he/she is an infant. Learned counsel further contended that petitioner and respondent no.4 were residing at Zirakpur, District Mohali, near Chandigarh where better education facilities are available, but under a conspiracy and to deprive the petitioner of custody of children, they were taken to Nahan and thereafter daughter-Nandani Gupta has been taken out from Gurukul School, Panchkula on 22.03.2014 and her school leaving certificate was obtained on the ground of transfer of respondent no.4. In fact, the petitioner has been taking care of study of minor-Nandani Gupta without which it could not have been possible for the child to have achieved the position in study which she has obtained. Therefore, the contention of respondent no.4 that Nandani has achieved this position only as a result of efforts made during three months, cannot be believed. In support of his contentions, learned counsel for the petitioner has relied upon **Syed Saleemuddin vs. Dr. Rukhsana 2001(2) R.C.R.(Criminal) 591, Gurmeet Kaur Batth vs. State of Punjab and others 2009(1) R.C.R. (Criminal) 974, Gohar Begum vs. Suggi alias Nazma Begum and others AIR 1960 AIR SC 93, Ajay Bansal vs. State of Punjab and another 2013 (3) R.C.R. (Civil) 340 and Jaswinder Kaur vs. State of Punjab and others 2010 (2) R.C.R. (Criminal) 891.**

14. Per contra, learned counsel for respondents no.2 to 4 has vehemently contended that this Court does not have any jurisdiction to determine the welfare of the children and give direction for handing over the custody of the minors to the petitioner-mother. The parties can approach the competent court according to the provisions of Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956 and also avail other remedies available to them. Learned counsel further contended that *habeas corpus* petition is not maintainable. The custody of minors with their father is legal and valid and in accordance with law and it cannot be termed in any manner as illegal custody. Learned counsel further contended that it will be in the interest of minors, if they are allowed to remain with respondents no.2 to 4. In support of his contentions, learned counsel has relied upon **Kalpeshkumar Bhikhalal Vohara vs. Dalpatbhai Manilal Shah, Banaskantha & Ors. 2000(1) GCD 227, Baljit Kaur vs. State of Punjab and others, Crl. W. P. No.667-2011, decided by this Court on 12.07.2011, Smali Bagga vs. State of Punjab and others 1996(2) R.R.R.202, Venugopal vs. Krishnankutty 2004(2) HLR 274, Deepak Agnihotri vs. The Commissioner of Police and others 2009(2) R.C.R. (Criminal) 30, S. Parthasarathi vs. State of Karnataka & Ors. 2010 (2) Air Kar R 132, Sakina vs. State of Punjab and others 2012 (8) R.C.R.(Civil) 64, Sangeetha vs. The Commissioner of Police, Kochi and others AIR 2002 Kerala 16, Gaurav Nagpal vs. Sumedha Nagpal 2008(4)**

R.C.R. (Civil) 928 and Davinder Singh vs. State of Punjab, Crl. W.P. No.1132-2014, decided by this Court on 21.08.2014.

15. From the arguments raised by learned counsel for the parties, following points arise for consideration by this Court:

- (i) *Whether habeas corpus petition is maintainable when custody of minors/infants is claimed by the mother from their father?*
- (ii) *Whether the petitioner is entitled to the custody of minors?*

16. Before I answer the points framed for consideration, it would be appropriate to deal with the law relating to the custody of minors in various countries as has been considered by the Hon'ble Supreme Court in **Gaurav Nagpal (supra)** and **Nil Ratan Kundu vs. Abhijit Kundu 2008 (3) R.C.R. (Civil) 936** and by this Court and other High Courts. The relevant paragraphs of the judgment **Gaurav Nagpal (supra)** are reproduced as under:

"19. We shall first deal with law relating to custody in various countries. English Law

20. In Halsbury's Laws of England, Fourth Edition, Vol. 24, para 511 at page 217 it has been stated :

"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 supplied)

It has also been stated that if the minor is of any age to exercise a choice, the court will take his wishes into consideration. (para 534; page 229).

21. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is 'welfare of the child'.

22. In Habeas Corpus, Vol. I, page 581, Bailey states :

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly

stimulate."

23. It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for the best interests of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

24. In **Mc Grath, Re, (1893) 1 Ch 143 : 62 LJ Ch 208**, Lindley, L.J. observed :

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded. (emphasis supplied)

American Law

25. Law in the United States is also not different. In American Jurisprudence, Second Edition, Vol. 39; para 31; page 34, it is stated :

"As a rule, in the selection of a guardian of a minor, the best interest of the child is the paramount consideration, to which even the rights of parents must sometimes yield".

(emphasis supplied)

In para 148; pp. 280-81; it is stated :

"Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child

would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment".

(emphasis supplied)

26. In **Howarth v. Northcott**, 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758; it was stated :

"In habeas corpus proceedings to determine child custody, 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 infant 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".

It was further observed :

"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". (emphasis supplied)

27. 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.

28. The legal position in India follows the above doctrine. There are various statutes which give legislative recognition to these well-established principles. It would be appropriate if we examine some of the statutes dealing with the situation. Guardians Act, consolidates and amends the law relating to guardians and wards. Section 4 of the said Act defines "minor" as a person who has not attained the age of majority. "Guardian" means a person having the care of the person of a minor or of his property, or of both his person and property. "Ward" is defined as a minor for whose person or property or both, there is a guardian. Chapter II (Sections 5 to 19 of Guardians Act) relates to appointment and declaration of guardians. Section 7 thereof deals with 'power of the Court to make order as to guardianship' and reads as under :

7. Power of the Court to make order as to guardianship. - (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made –

- (a) appointing a guardian of his person or property, or both, or
- (b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any

guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

29. Section 8 of the Guardians Act enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of Court. Section 17 is another material provision and may be reproduced :

"17. Matters to be considered by the Court in appointing guardian. - (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

*** **

(5) The Court shall not appoint or declare any person to be a guardian against his will.

(emphasis supplied)

30. Section 19 prohibits the Court from appointing guardians in certain cases.

Chapter III (Sections 20 to 42) prescribes duties, rights and liabilities of guardians.

31. The Act is another equally important statute relating to minority and guardianship among Hindus. Section 4 defines "minor" as a person who has not completed the age of eighteen years. "Guardian" means a person having the care of the person of a minor or of his property or of both his persons and property, and *inter alia* includes a natural guardian. Section 2 of the Act declares that the provisions of the Act shall be in addition to, and not in derogation of 1890 Act.

32. Section 6 enacts as to who can be said to be a natural guardian. It reads thus :

6. 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 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.

33. Section 8 enumerates powers of natural guardian. Section 13 is extremely important provision and deals with welfare of a minor. The same may be quoted in extenso;

13. Welfare of minor to be paramount consideration.

(1) *In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.*

(2) *No, person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.*

(emphasis supplied)

34. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

35. 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.

36. The aforesaid statutory provisions came up for consideration before Courts in India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.

37. In **Saraswathibai Shripad v. Shripad Vasanji, ILR 1941 Bombay 455 : AIR 1941 Bombay 103**; the High Court of Bombay stated :

"It is not the welfare of the father, nor the welfare of the mother

that is the paramount consideration for the Court. It is the welfare of the minor and the minor alone which is the paramount consideration."

(emphasis supplied)

38. In **Rosy Jacob v. Jacob A. Chakramakkal, (1973)1 SCC 840**, this Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

39. Again, in **Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544**, this Court reiterated that the only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

40. Merely because there is no defect in his personal care and his attachment for his children - which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield 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.

41. In **Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu, (1984) 3 SCC 698**, this Court held that Section 6 of the Act constitutes father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. [See also **Elizabeth Dinshaw (Mrs.) v. Arvand M. Dinshaw, (1987)1 SCC 42**; **Chandrakala Menon (Mrs.) v. Vipin Menon (Capt), 1993(2) RCR(Criminal) 5 : (1993)2 SCC 6**].

42. 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 Mousami Moitra Ganguli's case (*supra*), the Court has to 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.

43. 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 *parens patriae* jurisdiction arising in such cases.

44. The trump card in appellants' argument is that the child is living since long with the father. 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 can not be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.

45. The conclusions arrived at and reasons indicated by the High Court to grant custody to the mother does not in our view suffer from any infirmity. It is true that taking the child out of the father's custody may cause some problems, but that is bound to be neutralized."

Re Point No.(i):

17. In addition to **Gaurav Nagpal (supra)** and **Nil Ratan Kundu (supra)**, I also deem it appropriate to refer to the following judgments:

18. In **Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw and another**, AIR 1987 SC 3, the Hon'ble Supreme Court has considered a dispute pertaining to custody of minor child in a criminal writ petition and held that mother was full of genuine love and affection for the child and she could be safely trusted to look after him, educate him and attend in every possible way to his proper up-bringing. The child's presence in India was held to be a result of an illegal act of abduction and father guilty of said act was held not entitled to claim any advantage.

19. In **S.P.Chengalvarjna Naidu (dead) by Lrs vs. Jagannath**, 1994(1) R.R.R. 253, the Hon'ble Supreme Court has held as under:

"Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is settled proposition of law that a judgment or decree obtained by fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed by the first court or the highest Court has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings."

20. In **Smali Bagga (Smt.) vs. State of Punjab and another**, 1996(2) R.R.R. 202, during pendency of proceeding for custody before the Guardian Judge, habeas corpus petition filed by the mother was dismissed, however, a direction was given to the Guardian Judge to decide the case within a period of three months.

21. In **Mrs. Kuldeep Sidhu vs. Chanan Singh and others** 1988 (1) R.C.R.(Criminal) 534, mother had interim order of custody from foreign court

and father unauthorizedly removed the children from Canada to India. Habeas corpus petition filed by mother was allowed and custody of the children was directed to be handed over to the mother.

22. In **Manjula Jha vs. Ravindra Nath Jha, 1998(1) All India Hindu Law Reporter 273**, the Hon'ble Allahabad High Court dismissed the writ petition filed by mother seeking production and delivery of the child to her, however, a direction was given to produce the child before the Court of Guardian Judge on a fixed date and to determine the writ of interim custody.

23. In **Syed Saleemuddin (supra)**, the Hon'ble Supreme Court has considered the scope of habeas corpus petition regarding the custody of minor children and held that the habeas corpus petition is maintainable. While granting the custody of the children to their mother till the family court disposed of the petition for the custody of the children, it was observed as follows:

"From the principles laid down in the aforementioned cases it is clear that 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 present custody should be changed and the children should be left in 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 of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

24. In **Manju Tiwari vs. Rajendra Tiwari, AIR 1990 SC 1156**, the Hon'ble Supreme Court has held that High Court can exercise jurisdiction vested in it under Article 226 of the Constitution of India with respect to the issuance of a writ of habeas corpus when there is illegal detention or wrongful custody.

25. In **Saihba Ali vs. State of Maharashtra and others, 2003 (4) R.C.R. (Civil) 273**, the Hon'ble Supreme Court held that writ petition was not maintainable but observed that to do complete justice, the Court could pass an order in the interest and welfare of the minor that mother be given the visiting rights, but it was never laid down that no relief could be granted in a writ petition to do complete justice even in writ petition. In that case, the minor child was in custody of grand-parents under orders of competent Family Court.

26. In **Surabhai Ravikumar Minawala vs. State of Gujarat 2005(2) RCR (Civil) 822**, the Hon'ble Gujarat High Court allowed habeas corpus petition of the mother regarding custody of nine months' old child and it was held that no amount of wealth can take the place of mother's care and love.

27. In **Manjit Kaur vs. State of Punjab, Crl. W.P. No.608 of 2008, decided on August 14, 2008**, this Court has held that habeas corpus petition was maintainable as the child was illegally snatched away from the mother and custody of child was handed over to the mother leaving the parties to avail other remedies in accordance with law.

28. In **Mausami Moitra Ganguli vs. Jayanti Ganguli JT 2008 (6) SC 634**, the Hon'ble Supreme Court has held that the first and the paramount consideration is the welfare of the child and not the right of the parent.

29. In **Nil Ratan Kundu (supra)**, the Hon'ble Supreme Court has held that paramount consideration is the welfare of the minor and not the legal right of a particular party.

30. In **Gippy Arora vs. State of Punjab and others, 2012 (4) R.C.R.(Civil) 397**, it has been held by this Court as under:

"Before passing any order regarding the custody of the child, the material question regarding the maintainability of habeas corpus petition in the matters of custody of minor child has to be determined. It is a settled principle of law that in all the disputes pertaining to the custody of minor child, the interest and welfare of the minor is the predominant criterion. The Hon'ble Supreme Court in Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and another, AIR 1987 SC 3 was considering a dispute pertaining to custody of minor child in a criminal writ petition where one minor child was born of Indian father and American mother was an American citizen. On divorce of the parents his custody and guardianship had been entrusted to the mother by the competent Court of USA. The father was given visitation rights. He abducted the minor illegally in India. On a writ petition filed by mother for custody of the minor, it was held that mother was full of genuine love and affection for the child and she could be safely trusted to look after him, educate him and attend in every possible way to his proper up-bringing. The child's presence in India was held to be a result of an illegal act of abduction and father guilty of said act was held not entitled to claim any advantage. Relying upon 1996 (1) All England Reporter 886, it was observed that it is the duty of Courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrong doing. A similar question has cropped up before this Court in a case of Marilyn Ainaat Dhillon Gilmore @ Anita Dhillon Vs. Margret Nijjar and others, 1984 (1) I.L.R.(Punjab) 1, where the parents were citizens of United States but had come to India, the wife had filed a petition for custody of her minor child by filing a habeas corpus petition. It was held that High Court could go into the question of custody of the children in habeas corpus proceedings. In para 17 of the said judgment it was observed as follows:-

"17. Children need the love and care of both parents. If they cannot get it from both then at least they must get it from one. The course which would deprive them of both must be avoided and adopted as the last resort. Children are required to be in the custody of someone until they attain their majority. The Court in passing an order in writ jurisdiction in the matter has to deal it in equitable manner. It has also to give due weight to the claim of the respective

parents founded on human nature and generally what is equitable and just. And irrespective of the rights and wrongs of the contending parents, the welfare of the children is the supreme consideration when employing the remedy of habeas corpus. It has rightly been observed by legal commentators that the proceedings of this kind partakes of the incidence of a suit in equity and is considered to be one in rem, the child being the res."

31. After perusing the catena of judgments (supra) and having given anxious and conscious thoughtful consideration to the facts of the case and applying well settled principles referred to hereinbefore, I have come to the conclusion that no absolute rule of law has been laid down regarding the non-maintainability of writ petition. It is often said that children are national asset. It is the welfare of the child which is of paramount consideration. Since issue is with regard to the custody of minors/ infants, the observations of Justice V.R.Krishna Iyer are relevant that the finest hour of justice comes when court and counsel constructively collaborate to fashion a relief in an individual case and fathom deeper to cure the injustice which breeds wrong. When trauma prevails justice must invigilate, hence, broaden habeas corpus jurisdiction. Jurisprudence cannot slumber. The Court is not a distant abstraction omnipotent in the books but an activist institution which is the cynosure of hope. A writ court can always issue writs to meet the new challenges. Rule of law meets with its Waterloo when parents in a matrimonial discord are at loggerheads and the ultimate sufferers and victims are the minor children. Therefore, in the peculiar circumstances of the case, it is held that this Court has power to issue habeas corpus writ at least to temporarily decide the custody of the minors in the interest of justice till the issue is determined by a Guardian Court in accordance with law. Point no.(i) is answered accordingly.

Re: Point No.(ii)

32. Turning to the facts of the case in hand, admitted facts are to the effect that immediately before moving the children to Nahan, parties were residing in Zirakpur (Mohali). It is also an admitted fact that the age of Aarav Gupta is 2½ years and Nandni Gupta is 6½ years. The Hon'ble Supreme Court and various High Courts have categorically held that minor children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changing social conditions, must yield to the considerations of their welfare as human being so that they may grow up in a normal balanced manner to be useful members of the society. The Courts of law are expected to strike a just and proper balance between the requirements for welfare of minor children and the rights of their respective parents over them. When the Court is confronted with conflicting demands made by the parents, the Court has not only to look at the issues in accordance with law but human angles too are relevant for deciding these issues. It has to exercise a jurisdiction which is aimed at the welfare of the minors. The Court has to take into consideration 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. The male child under five years of age and female child under thirteen years of age, in my opinion, need most tender affection, the caring hand and company of his natural mother. Neither the

father nor his female relations, howsoever close, well meaning and affectionate may be towards the minor, can appropriately serve as a substitute for the minor's natural mother. When a female child grows she needs special care, many things she can only share with natural mother and not even with father or any other female relations.

33. Considering the settled principles of law regarding custody of minor and the peculiar circumstances of this case and the fact that proverbial universally accepted superiority of the natural mother's instinctive selfless love and affection for her children, particularly infants. I am of the view that the motherly care and affection is indispensable for the healthy growth of the minors. The selfless interest of mother in welfare of her children is by and large found to be part of her nature. This instinct is not confined to human race alone. No one else can provide love and affection to children as mother can, as lap of mother is God's own cradle for children. From the facts on record specifically tender age, this Court has come to the conclusion that in the interest of welfare of the minor Aarav, it is ordered that minor-Aarav Gupta, aged 2½ years, will remain with the petitioner-mother and minor-Nandni Gupta, aged 6½ years as she is studying in Nahan, will remain with respondent no.4-father at least till the academic session is over. Minor-Nandni Gupta's studies cannot be disturbed in the mid of the academic session. Hence, interim order dated 02.09.2014 is made absolute. Point No.(ii) is answered accordingly.

34. However, it cannot be overlooked that both the parents should have visitation rights of the minors. The visitation rights shall be in the following terms:

- (i) *During long holidays/vacations (especially seven days or more), respondent no.4 shall arrange to send daughter-Nandni Gupta to remain with petitioner.*
- (ii) *Petitioner and respondent no.4 shall have visiting rights to meet the minors, respectively, twice in a month preferably on Saturdays or Sundays or a festival day with prior notice. Respondent no.4- father will arrange for the movement of the children.*

35. It is also directed that either of the parties shall approach, within reasonable time preferably three months from today for the custody of minors, the competent court i.e. Family Court or Guardian court under the provisions of the Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956. Any order regarding the interim custody or visitation right passed by the competent court will be binding on the parties as per law. Till then, interim arrangement as ordered by this Court will continue. To make the visitation rights purposeful and convenient for both parents and children, the parties have exchanged their mobile numbers. They may also exchange their emails. It is made clear that they shall contact each other through these contact numbers only for the purpose of fixing time, place etc. to meet the children as per visitation rights. It is directed that they shall keep the contact numbers functional till the decision with regard to custody of children is given by the competent court as aforesaid and the interim arrangement made by this Court continues.

36. Nothing observed hereinabove by this Court will, in any manner, affect

the rights of the petitioner or respondent no.4 and will have no bearing upon the decision to be taken by the competent court i.e. Family Court or Guardian Court. If custody suit is filed in the competent court that shall be decided by concerned court preferably within six months.

37. Before parting with this judgment, I consider it proper to emphasize and impress upon the couple the desirability of making serious efforts to sort out their mutual differences and misunderstandings, if for no other reason, at least for the sake of their offsprings, in whose welfare they both must be equally interested. The normal wear and tear of married life can be made smooth by adopting the policy of give and take. A home should not be an arena of ego clashes and misunderstandings.

38. Disposed of in the above mentioned terms.

Order accordingly.

PUNJAB AND HARYANA HIGH COURT

Before: Paramjeet Singh, J.

RSA No.256 of 2013 (O&M)

Decided on: 03.03.2014

Subhash Chander and others

Appellants

Versus

M/s Active Promoters Pvt. Ltd.

Respondents

Present: Mr. Arun Jain, Sr. Advocate, with Mr. Amit K. Jain, Advocate, for the appellants.

Mr. Ashok Aggarwal, Sr. Advocate, with Mr. Mukul Aggarwal, Advocate, for the respondent.

A. Execution of agreement to sell – Proof of -- Suspicious circumstances -- If the document would have been executed in the presence of the executants and witnesses then it should have been typed in a uniform continuous manner and blank spaces would not have been left out -- Though in the blank columns name and father's name of defendant has been mentioned but no address and name of village etc. has been written or typed -- Further even on the last page word 'baeya' (vendor) has been mentioned but no details have been mentioned along with it i.e. name, father's name and address -- It only bears signatures on a revenue stamp in Urdu, which has been shown as mark 'B'. Where the word 'kharidar' (purchaser) has been written no details of the 'kharidar' have been mentioned -- Even no details of the witnesses i.e. name, address etc. have been typed -- These have been written in hand -- It means, document was already in existence and subsequently witnesses have been added according to choice and blank spaces have been filled up -- If the agreement to sell would have been written in the presence of the seller then there was no question of leaving the blank spaces and thereafter filling with ink -- This clearly indicates that agreement to sell/Ex.P5 is clouded with suspicious circumstances.

(Para 20)