

**(2013) 10 AHC CK 0195**  
**In the Allahabad High Court**  
**Case No : Special Appeal No. 476 of 2013**

Atul Sharma

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

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**Date of Decision :** 07-10-2013

**Acts Referred:**

**Citation :** (2013) 9 ADJ 147 : (2013) 6 ALJ 720

**Hon'ble Judges :** Imtiyaz Murtaza, J;Devendra Kumar Upadhyaya, J

**Bench :** Division Bench

**Advocate :** Salil K. Srivastava, for the Appellant; Ashutosh Srivastava, for the Respondent

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## Judgement

Devendra Kumar Upadhyaya, J.—Heard Sri Gajendra Pratap, Senior Advocate assisted by Sri Salil K. Srivastava, Advocate for appellant, Sri Ashutosh Srivastava, Advocate for respondent No. 4 and Ms. Madhulika Yadav, learned Additional Government Advocate for respondent Nos. 1 to 3.

Under challenge in the instant special appeal is the judgment and order dated 22.7.2013 whereby Review Petition No. 498 of 2012 filed by the appellant was dismissed which was filed seeking review of the judgment and order dated 14.6.2012 passed in Writ Petition No. 206 (H/C) of 2012.

To bring home facts of the case, it may be noticed that a writ petition bearing No. 206 (H/C) of 2012 was filed by one Smt. Ganeshwari Sharma for issuance of a writ of habeas corpus commanding the respondents therein namely, Sri Atul Sharma and Smt. Madhuri Sharma to produce the alleged detenus-Master Yadu and Master Udhav, minor twins who were aged about 11 months at the time of filing of writ petition and to release them from their illegal detention.

2. The said writ petition was filed on the allegations inter alia that Smt. Ganeshwari Sharma and Sri Atul Sharma were married on 6.12.2010 and after marriage, the twins, namely, Master Yadu and Master Udhav were born on 10.5.2011 and further that on account of certain alleged compelling

circumstances, Smt. Ganeshwari Sharma was residing at her parental house at Meerut alongwith her two minor children and that she has been doing her best to secure the future of her children. In the said writ petition, it was further averred that Sri Atul Sharma and his family members snatched the custody of Master Yadu and Master Udhav from the mother forcibly in the month of February, 2012 and since then family members of her husband have been illegally detaining her children in their custody. It was also stated that illegally detained children are less than one year of age and further that for their survival guardianship of mother is very necessary. It was further stated that if illegal detention of her children is allowed to be continued, their future may be jeopardized.

3. While entertaining the aforesaid writ petition, this Court passed an order on 18.5.2012 issuing notice to Sri Atul Sharma and Smt. Madhuri Sharma, who is mother of Sri Atul Sharma. Sri Atul Sharma and Smt. Madhuri Sharma were also directed to produce Master Yadu and Master Udhav in Court on 24.5.2012. On 11.6.2012 again an order was passed directing Sri Atul Sharma and Smt. Madhuri Sharma to produce the detenus in Court on 14.6.2012 and it was further directed by the Court that on the next date Smt. Madhuri Sharma shall remain present alongwith children. On 14.6.2012 both the children were present and were in custody of Smt. Madhuri Sharma. The Court on the said date recorded in its order that Smt. Madhuri Sharma is ready to hand over the children to their mother Smt. Ganeshwari Sharma. The order dated 14.6.2012 further records that Smt. Madhuri Sharma, the grand mother of children, did not have any objection if custody of children is given to Smt. Ganeshwari Sharma. The Court directed Smt. Madhuri Sharma to hand over custody of the children to Smt. Ganeshwari Sharma before the Registrar of this Court. The Registrar of this Court submitted a report stating therein that in compliance of the direction issued by this Court on 14.6.2012, custody of the children has been handed over before him by Smt. Madhuri Sharma, who was accompanied by her counsel Sri Manoj Kumar Mishra, to their mother Smt. Ganeshwari Sharma who was also present alongwith her father Sri Jag Roshan Sharma, accompanied by her counsel Sri Ashutosh Srivastava. Handing over of the children took place in presence of learned Additional Government Advocate before the Registrar. An undertaking was also submitted by Smt. Ganeshwari Sharma before the Registrar wherein it was stated by her that she undertakes with her own free will and mutual consent that Sri Atul Sharma, father of the children and Smt. Madhuri Sharma, grand mother of the children will be allowed to meet the children, if they so desire, after making prior intimation of their visit to Smt. Ganeshwari Sharma. It was also undertaken that if Smt. Madhuri Sharma is unable to meet the children due to her illness, Smt. Ganeshwari Sharma will bring the children to Lucknow at a regular interval of four months, if she shows any desire to meet the children. The undertaking was given in presence of counsels of both the parties and learned Additional Government Advocate.

4. This Court took into account the report submitted by the Registrar and also perused the undertaking given by Smt. Ganeshwari Sharma and recorded in

another order dated 14.6.2012 that Master Yadu and Master Udhav have been given in the custody of their mother, Smt. Ganeshwari Sharma. The Court further observed in the order dated 14.6.2012 that since children have been given in the custody of Smt. Ganeshwari Sharma, the cause of action does not survive and accordingly disposed of the writ petition.

5. Against the aforesaid judgment and order dated 14.6.2012, passed in Writ Petition No. 204 (H/S) of 2012, a review petition was preferred by Sri Atul Sharma whereby a prayer was made to review the order dated 14.6.2012 primarily on the ground that judgment and order under review did not deal with natural guardianship of the children and as per provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956, Sri Atul Sharma, being father, is the natural guardian of the children and hence, without recording the finding as to whether custody of children was illegal, the jurisdiction of this Court for issuance of a writ of habeas corpus could not have been exercised.

It was further averred that Sri Atul Sharma, father of children was confined to custody in jail in some criminal case and further that judgment and order dated 14.6.2012 did not deal with the issue relating to entitlement to the custody of minor children and right of the natural guardian being father. On these grounds judgment and order dated 14.6.2012 was sought to be reviewed.

6. Before the review petition come up for hearing, another development had taken place which needs to be noticed at this juncture. Husband, Sri Atul Sharma filed a Writ Petition No. 24 (H/C) of 2013 for issuance of a writ of habeas corpus commanding the official respondents and Sri Jag Roshan Sharma, father of Smt. Ganeshwari Sharma to produce his wife Smt. Ganeshwari Sharma and two children Master Yadu and Master Udhav before this Court and to release the said detenus from the alleged illegal detention. In the said writ petition, an affidavit was filed by Smt. Ganeshwari Sharma stating therein inter alia that the Writ Petition No. 24 (H/C) of 2013 has been filed by Sri Atul Sharma on completely false facts. Smt. Ganeshwari Sharma, denying the allegations made in the writ petition, specifically stated that she is living in Meerut alongwith her twins on her own will and further that Sri Atul Sharma is seeking to create a wrong impression that Smt. Ganeshwari Sharma and both children are in illegal custody of Sri Jag Roshan Sharma. The petition was heard and dismissed by this Court by means of its judgment and order dated 12.2.2013.

7. While dismissing the aforesaid Writ Petition No. 24 (H/C) of 2013, this Court took note of the fact that age of children is only one and half years and, therefore, at that point of time children needed care of her mother and that father's care cannot substitute the care which may be provided by the mother.

8. The Court considered the totality of the facts and circumstances of the case and also took note of the statement made by Smt. Ganeshwari Sharma, the alleged detenu. The professional qualification of Smt. Ganeshwari Sharma was also taken into account while dismissing the writ petition. The Court also took

note of the judgment and order dated 14.6.2012 rendered in Writ Petition No. 206 (H/C) of 2012 and gave its finding that in the totality of the facts and circumstances of the case, particularly, age of the children, at this stage the custody of children cannot be allowed in favour of father, Sri Atul Sharma. The Court further recorded the finding that Smt. Ganeshwari Sharma had clearly stated that she did not want to join her husband in her matrimonial home.

9. In view of the aforesaid findings, the writ petition was dismissed. However while dismissing the writ petition, Sri Atul Shamra was given liberty to file a case for custody of the children in appropriate forum. The Court categorically mentioned in the judgment and order dated 12.2.2013 that if the case for custody of the children is filed by Sri Atul Sharma, the lower Court shall not be influenced by anything said in the order dated 12.2.2013.

10. The review petition was heard and ultimately dismissed by means of judgment and order dated 22.7.2013. It is this judgment and order dated 22.7.2013 that has been appealed against in the instant special appeal.

11. Learned counsel for the appellant has strenuously urged only one point that learned Single Judge while dismissing the review petition completely failed to appreciate the legal issue that in a writ petition filed for issuance of a writ of habeas corpus it is the illegality of detention and not the custody which needs to be examined and further that without recording a finding as regards the illegal detention of children, their custody could not have been ordered to be handed over to Smt. Ganeshwari Sharma. It has been further argued by learned counsel for appellant that Hon''ble Single Judge while deciding the review petition has erred in law in not abiding by the principles enunciated by the Hon''ble Apex Court in a case in Moran Mar Basselios Catholicos and Another Vs. The Most Rev. Mar Poulouse Athanasius and Others, .

12. Sri Gajendra Pratap, Senior Advocate argued that decision of the Court, in absence of finding on the material issue involved, amounts to committing an error on the face of record and on the said premise, such a judgment renders itself liable to be reviewed.

13. The sole argument advanced by learned counsel for appellant is that in a writ petition filed for issuance of a writ in the nature of habeas corpus, it is incumbent upon the Court to record finding regarding illegal detention and by not doing so, Hon''ble Single Judge could not have ordered for handing over the custody of children to Smt. Ganeshwari Sharma. He further stated that since the said finding of illegal custody is material as such in absence thereof the judgment and order dated 14.6.2012 was liable to be reviewed and, thus, review Court refusing to interfere with the said judgment dated 14.6.2012 and dismissing the review petition has not acted in tune with the law laid down by the Hon''ble Apex Court in the case of Moran Mar Basselios Catholicos v. Mar Populse Athanasius (supra). He, thus, summed up his argument and stated that the purpose of issuing a writ of habeas corpus is to determine the illegal detention and thereafter setting the

detenu at liberty. He submitted further that the purpose of such a petition is not to determine the illegality or otherwise of the custody of children. In support of his case, apart from relying on the judgment of Hon''ble Apex Court in the case of Moran Mar Basselios Catholicos v. Mar Populse Athanasius (supra), Sri Gajendra Pratap has laid reliance on the case of Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, and also on the judgment of a Division Bench of this Court in the case of Kamla Palace Vs. State of U.P. and Others .

14. We have considered the argument advanced by the learned Senior Advocate appearing for the appellant and perused the documents available on the file of instant special appeal, review petition No. 498 (H/C) of 2012, Writ Petition No. 206 (H/C) of 2012 and Writ Petition No. 24 (H/C) of 2012.

The Hon''ble Apex Court, while considering the nature and scope of a writ of habeas corpus in detail, has held in the case of Kanu Sanyal v. District Magistrate, Darjeeling and others (Supra) that writ of habeas corpus is essentially a procedural writ and further that it deals with the machinery of justice and not substantive law. In para 4 of the aforesaid case of Kanu Sanyal v. District Magistrate, Darjeeling and others (supra), Hon''ble Apex Court has observed as under:

4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired, or to put it differently, "in order that appropriate judgment be rendered on judicial inquiry into the alleged unlawful restraint". The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice immediately after the receipt of this our writ, the body of A.B. Being taken and detained under your custody together with the day and cause of his being taken and detained to undergo and receive all and singular such matters and things as our Court shall then and there consider of concerning him in this behalf. The italicised words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C. In Cox v. Hakes, the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom" and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end.

Thus, no doubt, the basic purpose of entertaining a petition for writ of habeas

corpus is to enquire the circumstances of detention and to give a person the speedy and effective remedy who is restrained of his liberty and if on enquiry the detention is found to be unlawful, the detenu is to be released.

However, the law relating to habeas corpus concerning transfer of custody of children has travelled a long way since the judgment in the case of Kanu Sanyal v. District Magistrate, Darjeeling and others (supra).

15. Way back in the year 1981, the Hon"ble Apex Court in the case of Capt. Dushyant Somal Vs. Smt. Sushma Somal and Another, , has held that it is beyond question that a writ of habeas corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for custody of a child. The Hon"ble Apex Court went on to observe further that all this does not mean that a writ of habeas corpus cannot or will not be issued against a parent who with impunity snatches away a child from the lawful custody of the other parent, to whom a Court has given such custody. Their Lordships of Hon"ble Apex Court in para 3 of the aforesaid judgment have observed as under:

3. There can be no question that a writ of habeas corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out. Nor is a person to be punished for contempt of Court for disobeying an order of Court except when the disobedience is established beyond reasonable doubt, the standard of proof being similar, even if not the same, as in a criminal proceeding. Where the person alleged to be in contempt is able to place before the Court sufficient material to conclude that it is impossible to obey the order, the Court will not be justified in punishing the alleged contemner. But all this does not mean that a writ of habeas corpus cannot or will not be issued against a parent who with impunity snatches away a child from the lawful custody of the other parent, to whom a Court has given such custody. Nor does it mean that despite the contumacious conduct of such a parent in not producing the child even after a direction to do so has been given to him, he can still plead justification for the disobedience of the order by merely persisting that he has not taken away the child and contending that it is therefore, impossible to obey the order. In the case before us, the evidence of the mother and the grandmother of the child was not subjected to any cross-examination; the appellant-petitioner did not choose to go into the witness-box; he did not choose to examine any witness on his behalf. The evidence of the grandmother, corroborated by the evidence of the mother, stood unchallenged that the appellant-petitioner snatched away Sandeep when he was waiting for a but in the company of his grandmother. The High Court was quite right in coming to the conclusion that the appellant-petitioner had taken away the child unlawfully from the custody of the child's mother. The writ of habeas corpus was, therefore, rightly issued. In the circumstances, on the finding, impossibility of obeying the order was not an excuse which could be properly put forward.

It is noticeable in the aforesaid case that Hon"ble Apex Court justified issuing a writ of habeas corpus and observed that in the facts and circumstances of the

case, the writ of habeas corpus was rightly issued for transferring custody of child to the mother.

16. Yet again in the case of Rajesh K. Gupta Vs. Ram Gopal Agarwala and Others, , Hon''ble Apex Court while affirming the judgment of Delhi High Court dismissing the habeas corpus petition filed by the father seeking custody of child from the mother has observed that in a petition seeking writ of habeas corpus for custody of minor child, the principal consideration for the Court is to ascertain whether the custody of child can be said to be lawful or illegal and whether the welfare of the child requires that the said custody should be changed and the child should be left in the care and custody of someone else. The said judgment reiterated the principles laid down by Hon''ble the Apex Court in the case of Syed Saleemuddin Vs. Dr. Rukhsana and Others, , wherein it was held that in case of dispute between mother and father relating to custody of their child, paramount consideration is welfare of the child and not the legal right of either of the parties. Para 7 of the aforesaid judgment of Hon''ble Apex Court in the case of Rajesh Gupta v. Ram Gopal Agarwala and others (supra) is quoted below:

7. It is well-settled that in an application seeking a writ of habeas corpus for custody of a minor child, the principal consideration for the Court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well-settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties. [See Veena Kapoor (Dr.) v. Varinder Kumar Kapoor and Syed Saleemuddin v. Dr. Rukhsana] It is, therefore, to be examined what is in the best interest of the child Rose Mala and whether her welfare would be better looked after if she is given in the custody of the appellant, who is her father.

Hon''ble Apex Court in the case of Syed Saleemuddin v. Dr. Rukhsana and others (supra) has laid down the principle that in a writ of habeas corpus seeking custody of minor child, the primary consideration is to ascertain if custody of child can be said to be unlawful and further as to whether welfare of the children requires that the present custody should be changed.

Thus, the submission of learned counsel for appellant to the effect that while entertaining and deciding a petition seeking writ of habeas corpus concerning custody of minor children it is only the illegality of detention and no other issue which needs to be examined, appears to be completely misconceived.

From the judgments of Hon''ble Apex Court referred to herein above, it is explicit that there cannot be even an iota of doubt to hold that in a matter where custody of minor children is also an issue, in appropriate cases, the point relating to custody of children, in other words their welfare, can also be taken into account.

17. The judgment under appeal in the instant case takes note of the judgment rendered by Hon''ble Single Judge subsequently, namely, the judgment dated 12.2.2013 in Writ Petition No. 24 (H/C) of 2013 wherein liberty has been granted to the petitioner to file a case for custody of children in proper forum. Merely because the finding regarding detention being illegal or otherwise is missing in the instant case does not make either the judgment dated 14.6.2012 or judgment dated 22.7.2013 vulnerable for the reason that the matter pertains to custody of minor children wherein what needs to be seen as a matter of primary and paramount importance is welfare of children as laid down in the case of *Rajesh Gupta v. Ram Gopal Agarwala and others* (supra).

18. Further, it also needs to be noticed that judgment dated 12.2.2013 rendered by this Court in Writ Petition No. 24 (H/C) of 2013 has granted liberty to the appellant to file case for custody of children in proper forum with further observation that the lower Court shall not be influenced by anything said in the judgment and order dated 12.2.2013.

At the time when the order dated 14.6.2012 was passed by this Court, appellant was in custody in jail. Children were infants of one and half years of age. In such circumstances, we do not find that any illegality was committed by Hon''ble Single Judge while handing over the custody of children to the mother.

19. As regards the scope of review jurisdiction, so far as reliance placed by learned counsel for appellant on the judgment of Hon''ble Apex Court in the case of *Moran Mar Basselios Catholicos v. Mar Populse Athanasius* (supra) is concerned, there cannot be any quarrel on the principles laid down therein. The principles evolved by Hon''ble Apex Court in the case of *Moran Mar Basselios Catholicos v. Mar Populse Athanasius* (supra) have been reiterated in the latest judgment of Hon''ble Apex Court in the case of *Kamlesh Verma Vs. Mayawati and Others*, , wherein Hon''ble Apex Court discussed the scope of review jurisdiction in detail and summarized the principles of review jurisdiction in paras 16 and 16.1 of the said judgment, which run as under:

16. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

(A) When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him.

(ii) Mistake or error apparent on the face of the record.

(iii) Any other sufficient reason.

16.1 The words "any other sufficient reason" has been interpreted in (1922) ILR 3 LAH 127 (Privy Council) and approved by this Court in *Moran Mar Basselios Catholicos and Another Vs. The Most Rev. Mar Poulse Athanasius and Others*, ,

to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India (UOI) Vs. Sandur Manganese and Iron Ores Ltd. and Others, .

(B) When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the record, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate Court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

Thus, if any material error which is manifest on the face of the judgment under review is found, such a judgment needs to be reviewed.

However, examining the judgment under appeal in the instant case on the touch stone of the principles laid down for exercise of review jurisdiction by the Hon"ble Apex Court in the case of Kamlesh Verma v. Mayawati and others (supra), we may observe that merely because there is absence of finding of illegal detention in a case concerning custody of minor children in a petition seeking issuance of a writ of habeas corpus, it cannot be said that said judgment suffers from any error apparent or manifest on the face of the judgment for the reason that it is settled principles of law that in such a situation what is of primary importance is the welfare of minor children to be considered by the Court.

For the reasons aforementioned, we do not find any illegality in the judgment and order under appeal dated 22.7.2013, passed by Hon"ble Single Judge.

The special appeal is, thus, hereby dismissed.

However, before parting with the case, we may observe that in case appellant institutes appropriate proceedings before an appropriate forum for custody of

children, any observation made either in the instant judgment or in the judgment dated 22.7.2013 and judgment dated 14.6.2012 will have no bearing or influence on such proceedings.

There will be no order as to costs.