

(2019) 12 GUJ CK 0024

In the Gujarat High Court

Case No : R/Special Criminal Application No. 5659 Of 2019

Manish S/O Natvarlal Vaghela

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 23-12-2019

Acts Referred:

Juvenile Justice Act(Care And Protection Of Children) Rules, 2007 — Rule 6, 6(5), 7
Code Of Criminal Procedure, 1973 — Section 97
Juvenile Justice (Care And Protection Of Children) Act, 2015 — Section 15, 30(7), 35,
41, 42(2), 101, 102,

Citation : (2019) 12 GUJ CK 0024

Hon'ble Judges : S.R.Brahmbhatt, J;Dr. A. P. Thaker, J

Bench : Division Bench

**Advocate : Rajan J Patel, N J Mevada, Chirag J Brahmbhatt, Bhunesh C Rupera,
Devang Vyas, Ronak Raval**

Final Decision : Dismissed

Judgement

Dr. A. P. Thaker, J

1. By filing this petition, the petitioner has prayed as under:-

"A. Be pleased to issue a writ in the nature of Habeas Corpus and/or any other appropriate writ, commanding the respondents for the production of the body of The Corpus-Minor Vaidehi in this court and be set at liberty.

B. Be further pleased to pass an appropriate order to take the DNA sample of The Corpus-Minor Vaidehi and The petitioner herein to identify The Corpus-Minor Vaidehi in its true manner in the larger interest of justice and to bring the actual facts on the notice of this Hon'ble court.

C. Be further please to pass an appropriate order to take the Res. No.4 to 7 under observation and to take The Corpus-Minor Vaidehi away from the Res. No.4 to 7, looking to the safety of The Corpus-Minor Vaidehi with immediate effect until the Final order is passed in the larger interest of justice.

D. Any other order or orders and/or directions as your lordships may deem fit and proper may pleased be passed."

2. The short facts leading to the filing of the present petition are that the petitioner and respondent no.4 herein got married as per Hindu rites on 14.10.2015. Since the petitioner and respondent no.4 had married against the will of their family members, they were living away from their family members. Out of the wedlock, they were blessed with a baby girl viz. Vaidehi on 13.12.2016. Thereafter, some disputes started between them and, ultimately, marriage of the petitioner and respondent no.4 was dissolved by executing an agreement for dissolution of marriage on 15.6.2017. At that time, though Minor-Vaidehi was just six months old and was on breast feeding, she was in need to be kept with the mother, however, respondent no.4 was not ready to take care of her and, therefore, custody of minor-Vaidehi was given to the petitioner herein. It is also stated that unwillingly, on 12.7.2017, the petitioner was compelled to sign Memorandum of Understanding dated 12.7.2017, under which the custody of the minor child was given to respondent no.4. However, the petitioner challenged such Memorandum of Understanding by filing CMA No.18 of 2018 before the Family Court, Ahmedabad. After execution of Memorandum of Understanding, respondent no.4 and Minor-Vaidehi disappeared and though the petitioner tried to find them out, they could not be traced. Therefore, the petitioner filed a complaint with police on 8.11.2017. In spite of this, since they could not be searched, the petitioner filed an application under Section 97 of Code of Criminal Procedure before learned Additional Metropolitan Magistrate, Ahmedabad, being Criminal Misc. Application No.10549 of 2017. In the said proceedings, respondent no.4 filed her affidavit, however, facts regarding handing over the minor-Vaidehi to Orphanage were suppressed. Said application was rejected by the learned Magistrate on 18.1.2018.

3. On 23.1.2018, the petitioner filed an application being CMA No.18 of 2018 before Family Court, Ahmedabad under the provisions of the Guardian and Wards Act, 1890 for the custody of minor-Vaidehi, with an application for interim relief at Exh.5. However, application Exh.5 came to be rejected by the Family Court on 21.2.2019, therefore, the petitioner filed Special Civil Application No.6045 of 2019 before this Court. In the said petition, respondent no.4 herein, mother of minor-Vaidehi, filed an affidavit and declared that the custody of Vaidehi is handed over to respondent nos.6 and 7 herein without consent of the petitioner herein. Therefore, the petitioner has filed present petition.

4. Mr.Rajan Patel, learned advocate for the petitioner submitted that admittedly minor-Vaidehi is the daughter of the petitioner and respondent no.4. On 12.7.2017, by Memorandum of Understanding custody of minor was given to respondent no.4. He further submitted that there were various proceedings and ultimately, respondent no.4 disclosed for the first time before this Honourable Court that custody of the child is already handed over to the Children Welfare Committee by her, without consent of the petitioner. He submitted that even the

respondent nos.6 to 9 have not taken any lawful action to find out the father of minor-Vaidehi. He submitted that it is the duty of the Committee to restore the child with father when the respondent no.4 has fraudulently deprived the petitioner of the parenthood right of the petitioner.

4.1 He submitted that the corpus is under illegal custody of third party-respondents inspite of the fact that her father is ready and willing to take her custody. He also submitted that it is in the interest of minor child to hand over her custody to the petitioner, as he is the father of the minor-Vaidehi. He submitted that the petitioner has filed different proceedings before different Courts for getting custody of his minor daughter, however, till today he did not get the custody of minor. He also submitted that when the mother has declared herself as an incapable person to take care of the corpus, petitioner is the only person, being father of minor, to take care of the corpus.

4.2 He submitted that the petitioner herein being biological father and one of the parents of the child, corpus cannot be said to be orphan child as per Section 2, Sub-section 42 of the Juvenile Justice (Care and Protection of Children) Act, 2015. He submitted that as per Section 35 of the Act read with Rule 7, sub-rule 5, 6 and Rule 6 of the Rules, respondent no.4 cannot surrender the child without the consent of the petitioner and, if it is done, necessary steps under Rule 6 of the Rules are required to be taken to trace out the biological father, which is not done in the present case. He submitted that only when the child is abandoned; when it is not possible to trace out the parents or the parents are not willing to take the custody of the child, then only the alternative of finding adoptive parents for the child is available. He submitted that the proceedings filed before the Family Court and Special Civil Application filed before this Court are not efficacious remedies and, therefore, the petitioner has filed present petition praying for a writ of habeas corpus. He also invited the attention of the Court to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, and submitted that this Court has power to issue writ of habeas corpus.

4.3 He further submitted that respondent no.4 herein has surrendered the child by execution of Deed of Surrender, without consent of the petitioner, to respondent no.8 and without conducting any inquiry, respondent no.8 has filed its report, which is illegal as per the provisions of the Adoption Regulation, 2017. He has relied upon various provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 and the Rules framed thereunder to submit that act of handing over custody of child to the respondent authorities is illegal and the respondent authorities have also not followed the procedure prescribed under the law in the present case.

4.4 In support of his submissions, he relied upon following decisions.

(i) Lakshmi Kant Pandey v. Union of India, reported in Laws (SC) 1984 2 8.

(ii) Kamla Devi v. State, reported in Laws (HPH) 1986 7 3.

(iii) Deepak Mohanty v. Superintendent of Police, Cuttak and Others, reported in Laws (Ori) 2016 8 32.

5. On the other hand, Mr. Bhunesh Rupera, learned advocate appearing for respondent nos. 4 and 5 has denied all the allegations made against his client. He submitted that this petition is not maintainable as the corpus is not under illegal detention of anyone. He also submitted that even if the allegations made by the petitioner are considered to be true, this is a case of child custody and, for that purpose, the petitioner is having alternative remedy and this petition for seeking writ of habeas corpus may not be entertained. He submitted that the petitioner can ask the custody of minor Vaidehi by way of adaptation, after completing necessary formalities. He submitted that the petitioner had married with respondent no. 4 by saying that he is unmarried though he was already married. He submitted that therefore, since the beginning the petitioner had cheated respondent no. 4. He has denied all the allegations levelled against respondent no. 4. He also submitted that respondent no. 4 was deserted by the petitioner and since the respondent-wife is not highly qualified, she could not earn anything and ultimately she decided to donate her daughter Vaidehi to Orphan House. In view of all these and, particularly, in view of the fact that alternative remedy is available, he prayed to dismiss present petition.

6. Learned APP appearing for the Respondent-State has also raised objection with regard to the maintainability of the petition. He submitted that the corpus is not under any illegal confinement, therefore, this petition with a prayer for issuance of writ of habeas corpus is not maintainable. He also submitted that Juvenile Justice (Care and Protection of Children) Act, 2015 provides complete mechanism for custody, care and protection of a child and the Child Welfare committee is competent to pass order in this regard and if there is any grievance against such order, remedy of appeal is also available. He, therefore, submitted that alternative remedy is available to the petitioner and, present petition may not be entertained. In support of his submissions, he has relied upon following decisions.

(i) Saihbha Ali v. State of Maharashtra, reported in 2003 (7) SCC 250

(ii) Prabhasing v. State of Jharkhand reported in 2005 (3) SCC 551.

(iii) Veena Kapoor v. Varindra Kumar Kapoor reported in 1981 (3) SCC 92.

(iv) Nil Ratan Kunda v. Abhit Kuddy reported in 2008 (9) SCC 413.

7. Mr. Chirag Brahmabhatt, learned advocate appearing for respondent nos. 6 and 7 has submitted that present petition seeking writ of habeas corpus is not maintainable as the corpus is not under any illegal confinement. He submitted that Matruchaya Orphanage Home is a registered child care institution as per Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and they are not taking any grant from the State or Central Government and it is run on charity. He also submitted that as per Section 30 (7) of the Act, Child Welfare

Committed has power to hand over the custody of a child. He also submitted that the Act provides complete mechanism for custody, care and protection of a child and the Child Welfare committee is competent to pass order in this regard and if there is any grievance against such order, remedy of appeal is also available. He also submitted that his clients have also got an order from the concerned District Court before giving the custody of the child to adoptive parents and, therefore, it cannot be said that there is any illegality committed by the respondents. He, therefore, submitted that alternative remedy is available to the petitioner and, present petition may not be entertained.

8. Mr.Devang Vyas, learned advocate appearing for respondent no.9 submits that the present petition is not maintainable as an alternative efficacious remedy is available to the petitioner. He submitted that the Act provides complete mechanism for custody, care and protection of a child and the Child Welfare committee is competent to pass order in this regard and the committee has followed rules and regulations in the present case and after getting order from the concerned District Court, child is given to its adoptive parents. Therefore, the procedure prescribed under the law is followed in present case and it cannot be said that there is any illegality or the child is under illegal detention. He, therefore, prays to dismiss present petition.

9. We have heard learned counsel appearing for the parties and perused the material available on record. In this petition, the petitioner has prayed for a writ of habeas corpus in respect of minor-Vaidehi. As per Section 30, sub-section (7) of the Juvenile Justice (Care and Protection of Children) Act, 2015, Child Welfare Committee has power to give or hand over the custody of a child and the Act provides the procedure to be followed for such adoption or custody. In the present case, the petitioner and respondent no.4 herein got married as per Hindu rites on 14.10.2015. They were blessed with a baby girl viz. Vaidehi on 13.12.2016. Thereafter, some disputes started between them and, ultimately, marriage of the petitioner and respondent no.4 was dissolved by executing an agreement for dissolution of marriage on 15.6.2017. Thereafter, a Memorandum of Understanding dated 12.7.2017 was executed whereby the custody of the minor-Vaidehi was handed over to her mother-respondent no.4. Thereafter, it seems that the respondent no.4 has voluntarily abandoned her child Vaidehi and as per Schedule 5 and Section 35 of the Act had executed "Deed of Surrender" of the child. Along with it, she had also placed consent agreement executed on 17.12.2017 and since the petitioner had separated from her, she was having the responsibility of minor-Vaidehi. In view of the documents placed on record, necessary procedure was followed and lastly an order for adoption of the child was passed by the District and Sessions Court.

10. At this juncture, it is relevant to refer to the provisions of Section 101 and Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015, which provides for appeal and revision, which reads as under:-

"101. (1) Subject to the provisions of this Act, any person aggrieved by an order

made by the Committee or the Board under this Act may, within thirty days from the date of such order, prefer an appeal to the Children's Court, except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate:

Provided that the Court of Sessions, or the District Magistrate, as the case may be, may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time and such appeal shall be decided within a period of thirty days.

(2) An appeal shall lie against an order of the Board passed after making the preliminary assessment into a heinous offence under section 15 of the Act, before the Court of Sessions and the Court may, while deciding the appeal, take the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board in passing the order under the said section.

(3) No appeal shall lie from,-

(a) any order of acquittal made by the Board in respect of a child alleged to have committed an offence other than the heinous offence by a child who has completed or is above the age of sixteen years; or

(b) any order made by a Committee in respect of finding that a person is not a child in need of care and protection.

(4) No second appeal shall lie from any order of the Court of Session, passed in appeal under this section.

(5) Any person aggrieved by an order of the Children's Court may file an appeal before the High Court in accordance with the procedure specified in the Code of Criminal Procedure, 1973.

102. The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

11. It is pertinent to note that the allegations of the petitioner are regarding non-compliance of various provisions of the Act and Rules. Against this, the Child Welfare Committed has come with a case that after following procedure and getting order from the Court, it has given the child to adoptive father.

Therefore, when the child has been given in adoption by the order of the Court to adoptive parents, then that act cannot be treated as an illegal act of granting custody of minor. Even if there is lack of following due procedure under the Act

and Rules by the Child Welfare Committee that can be agitated by the petitioner under the provisions of appeal/revision, as referred to above by taking out separate proceedings. When there is an efficacious alternative remedy available, writ of habeas corpus cannot be issued especially when the Child Welfare Committee has got necessary orders from the Court before handing over the custody of minor to adoptive parents.

12. On perusal of the reliefs sought for by the petitioner, it appears that he has prayed for relief of DNA test of minor. This Court fails to understand as to why the petitioner wants DNA test of the minor child and it reflects that the petitioner has some suspicion regarding the paternity of the child.

13. Having considered the aforesaid judgments of the Supreme Court and the principles laid down in various cases for grant of writ of habeas corpus, it appears that the condition precedent for instituting a petition seeking writ of habeas corpus is the person for whose release, the writ of habeas corpus is sought, must be in detention and he must be under detention by the authorities or by any private individual. It is his detention which gives the cause of action for maintaining the writ of habeas corpus. If the allegations in the writ of habeas corpus read as a whole do not disclose the detention, in other words, if there is no allegation of illegal detention, the writ petition seeking writ of habeas corpus is liable to be rejected. In view of the principles of law laid down by various Courts, if facts of the present case are seen, it is apparent that the petitioner has failed to demonstrate that minor-Vaidehi is illegally detained by anyone. The judgments relied upon by counsel for the petitioner are of no help to him.

14. Considering the facts on record, the corpus is not under any illegal confinement, therefore, this petition with a prayer for issuance of writ of habeas corpus is not maintainable. Not only that Juvenile Justice (Care and Protection of Children) Act, 2015 provides complete mechanism for custody, care and protection of a child and the Child Welfare committee is competent to pass order in this regard and if there is any grievance against such order, remedy of appeal is also available. In view of this, the petitioner is having alternative remedy and this petition with a prayer to issue writ of habeas corpus is not maintainable. Therefore, present petition is dismissed.

15. It is clarified that this Court has not gone into the merits of the case and whatever observations herein above are made is only for the purpose of deciding the maintainability of the petition and the observations made herein above will not be construed as opinion of this Court on merits. The petitioners can avail legal remedy as may be available under the law. If the petitioner pursue such remedy, the observation of this Court made herein above will not come in his way before any other forum.