

(2020) 08 P&H CK 0039

In the Punjab And Haryana At Chandigarh

Case No : Letter Patent Appeal No. 476 Of 2020 (O&M)

Manohar Lal And Another

APPELLANT

Vs

State Of Punjab And Others

RESPONDENT

Date of Decision : 05-08-2020

Acts Referred:

Juvenile Justice (Care And Protection Of Children) Act, 2015 — Section 2(22), 2(14) (v), 27, 28, 44
Hindu Minority And Guardianship Act, 1956 — Section 6
Code Of Criminal Procedure, 1973 — Section 491
Juvenile Justice (Child And Protection Of Children) Model Rules, 2016 — Rule 23(15)

Citation : (2020) 08 P&H CK 0039

Hon'ble Judges : Ravi Shanker Jha, CJ;Arun Palli, J

Bench : Division Bench

Advocate : R.S. Rai, Anurag Arora, Anu Pal, Munish Gupta

Final Decision : Dismissed

Judgement

Arun Palli, J

The matter is being taken up and heard by video conferencing owing to the prevailing Pandemic (COVID-19).

This is an intra-court appeal under Clause X of the Letters Patent against an order and judgment dated 24.07.2020, rendered by the learned Single Judge, vide which custody of Avneet Kaur (minor) has since been restored to her father Gurpreet Singh (respondent No.6).

In brief the case set out by Gurpreet Singh (respondent No.6), the petitioner before the learned Single Judge, was that he was employed in the Indian Army as Gunner. He married Rajwinder Kaur in the year 2010. A girl child, namely, Avneet Kaur was born to them on 30th July, 2011. However, owing to incompatibility, the marriage between the two was dissolved vide a decree for mutual divorce dated 19.11.2012. Subsequently, Gurpreet Singh married Jasmeet Kaur on 14.02.2014, but she barely resided with him for a month and

left for Australia on study visa, litigation even qua the second marriage is pending. As agreed between the parties, Avneet Kaur (minor) remained in custody of her father Gurpreet Singh. But as Gurpreet Singh being in the Army was posted away from home, Avneet Kaur (minor) resided with her grandfather (Jagwinder Singh), paternal uncle (Jatinder Singh), and post 2015, when Jatinder Singh got married, even Manjit Kaur (paternal aunt) joined the family. Though Gurpreet Singh would often visit his daughter at Sunam. Avneet Kaur (minor) was admitted to one of the best school in the region, namely, Lady Fatima, Patiala. The appellants i.e. Smt. Raj Kaur and Manohar Lal, happened to be the real 'Massi' and 'Massad' of Avneet Kaur. And for Gurpreet Singh and his family were residents of Sunam, situated at some distance from Patiala and the school of Avneet Kaur (minor), for convenience and safety of the child, Avneet Kaur (minor) would reside with the appellants during the week. However, owing to COVID 19 induced lockdown Avneet Kaur was brought home at Sunam, and since then was happily residing with her grandfather, paternal uncle and paternal aunt. Eventually, the family decided that Avneet Kaur (minor) would not stay with the appellants and accordingly the arrangement made in this regard was put to an end. The appellants were informed accordingly. The appellants wields lot of influence in the region as son of real uncle (Taya) of Manohar Lal, namely, Madan Lal Jalalpur (respondent No.7) happens to be the sitting MLA from ruling party (Congress). And for they wanted complete control and custody of Avneet Kaur (minor), Gurpreet Singh and his family members were repeatedly threatened to handover the child to them. On 30.05.2020 Manohar Lal (appellant No.1) along with Gagandeep son of MLA Madan Lal Jalalpur and certain other persons in police uniform picked up Jagwinder Singh (father of Gurpreet Singh) from his house and took him to Police Station, Sunam, where he was made to sit on the floor and tortured for over 4 hours. Later he was released but with instructions to handover Avneet Kaur (minor) to the appellants. On being apprised of this incident, Gurpreet Singh, who is currently posted at Jalandhar Cantt., obtained leave and reached home in the evening of 2nd June, 2020. Complaints narrating the incidence and the treatment meted out to Jagwinder Singh were submitted to S.S.P. Sangrur for necessary action, but to no avail. In the meanwhile, Gurpreet Singh received a phone call on 03.06.2020 from the office of Child Welfare Committee, Patiala (respondent No.5), and was asked to produce Avneet Kaur (minor) before the Committee on 04.06.2020. Certain officials from the office of Child Welfare Committee, Sangrur (respondent No.4) also visited his house on 04.06.2020 for recording the statement of Avneet Kaur (minor). Those officials interacted with Avneet Kaur and even recorded her statement, upon which they told Gurpreet Singh that they were satisfied about her well being and a report in this regard would be submitted to the authorities. However, in the evening on 04.06.2020 itself, Gupreet Singh received another call from the office of Child Welfare Committee, Patiala (respondent No.5), and was instructed to appear with Avneet Kaur (minor) before the Committee the next day. Accordingly, he along with his younger brother (Jatinder Singh) and Avneet Kaur (minor) reached the office of respondent No.5 on 05.06.2020. They both were asked to wait outside.

Whereas Avneet Kaur (minor) was made to sit in a separate room. Surprisingly, after a while the appellants along with the son of respondent No.7 and certain other persons also arrived at the spot. At about 12:00 pm, Gurpreet Singh (respondent No.6) was asked by the official of respondent No.5 to leave and inquire about the proceedings after about 2 hours as only thereafter the child could be handover to him. Later when Gurpreet Singh called at the office of respondent No.5, he was told that the child was handed over to the appellants. Shocked with the turn of events, he rushed to the office of respondent No.5, but only to find that appellants had already left with Avneet Kaur (minor). And when Gurpreet Singh called appellant Manohar Lal, he was informed that custody of Avneet Kaur (minor) was entrusted to them by the Committee (respondent No.5) and, therefore, he at best could only meet the child. Just because respondent No.7 happened to be the sitting MLA and closely related to the appellants, his minor daughter was illegally removed from his custody with the assistance of the officers of respondent No.5. It was in this background, Gurpreet Singh approached this Court seeking a writ in the nature of habeas corpus requiring the appellants to produce and release the detainee Avneet Kaur (minor) from their illegal custody.

In response the stand set out in the written statement filed by respondent No.5 was that upon a complaint received from the appellants alleging that Avneet Kaur (minor) was being maltreated by her grandfather and uncle, and was being forcibly kept at Sunam, a copy of the complaint was sent to District Programme Officer-cum-Public Information Officer, Sangrur (DCPO) for necessary action. The report from the DCPO, Sangrur was received on 04.06.2020, whereafter Gurpreet Singh (respondent No.6) was required to produce the child before the Child Welfare Committee, Patiala on 05.06.2020. Upon interacting with Gurpreet Singh (respondent No.6), the Committee found that he was earlier married with Rajwinder Kaur in the year 2010 and Avneet Kaur (minor) was born in July, 2011. The marriage between Rajwinder Kaur and respondent No.6 was dissolved in 2012. And Rajwinder Kaur left the minor with respondent No.6 while she was barely 10 months old, and respondent No.6 gave her custody to the appellant No.2 (Raj Kaur) i.e. her real Massi. Resultantly, Avneet Kaur (minor) remained with the appellants for about 9 years. The Committee (respondent No.5) after recording the statement of Avneet Kaur (minor), and having found that she needed care and protection of a family, vide order dated 05.06.2020 (Annexure R5/1) gave her in foster care of the appellants.

In a separate response submitted by the appellants, it was denied if Avneet Kaur (minor) was in illegal custody, for, she was in foster care pursuant to the orders passed by the Child Welfare Committee, Patiala. Even otherwise, for Avneet Kaur (minor) was given in adoption to the appellants, they were entitled to retain her custody.

Learned Single Judge, upon consideration of the matter and material on record, found that the order dated 05.06.2020 (Annexure R5/1) was passed by the Child

Welfare Committee, Patiala on Form 32. And in reference to the provisions and scheme of Section 44 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short '2015 Act'), concluded that same would assume relevance and apply to children who on evaluation of various factors are actually found to be in need of care and protection. Likewise, Section 2(14)(v) of the 2015 Act postulates that child in need of care and protection would mean 'a child who has parent or guardian but such parent or guardian is found to be unfit or incapacitated by the Committee or Board to care for and protect the safety and well-being of the child'. The expression 'Committee' was also defined in Section 2(22) of the 2015 Act, which means 'Child Welfare Committee' constituted

under Section 27. Section 27 enjoins upon the State Government to constitute for every district, one or more Child Welfare Committees. And, the said Committee shall consist of a Chairman and four other members as the State Government may think fit to appoint. In reference to the Juvenile Justice (Child and Protection of Children) Model Rules, 2016 (for short 'Model Rules 2016'), it was observed that in terms of sub-rule 15 of Rule 23, the Committee is required to pass the final order in Form 32 for placing the child in foster care. Further, in terms of the proviso of Section 28, at least three members of the Committee are required to be present at the time of final disposal of the case. However, an analysis of the final order dated 05.06.2020 (Annexure R5/1), passed by the Child Welfare Committee, Patiala would reveal that the same was passed by only two members of the Committee. The order in Form 32 is passed in respect of foster care placement with a family or group foster care, and in terms of Section 44 the concept and expression 'Foster Care' holds relevance only in respect of children who actually need care and protection. Meaning thereby, a child who has parent or guardian but such parent or guardian is found to be unfit or incapacitated by the Committee or the Board to care for and protect his or her safety and well being. Whereas the order dated 05.06.2020, passed by the Child Welfare Committee, Patiala, was completely silent if Gurpreet Singh (respondent No.6) and his family was unfit or incapacitated in taking care and for protection and well being of the child. Not just that, the said order was passed on 05.06.2020, which was a gazetted holiday on account of Sant Guru Kabir Jayanti. Nothing was placed on record to justify as to how such an order could be passed without requisite number of members being present while passing the final order and that too on a gazetted holiday.

Further, even the counselling report submitted by District Programme Officer, Sangrur on 04.06.2020 would show that the Counsellor had interacted with Avneet Kaur (minor) and found that she was living happily with her father and wanted to reside with him. Therefore, in the wake of the said report what still prompted respondent No.5 to adopt a different approach was beyond the comprehension of the Court. Undoubtedly, statement of Avneet Kaur (minor) was allegedly recorded even on 05.06.2020 (Annexure R5/2), but nothing was brought on record to justify as to why Gurpreet Singh despite being present in the office of the Committee was kept out of the proceedings. Accordingly, the

order dated 05.06.2020, passed by the Child Welfare Committee, Patiala was declared to be the result of colourable exercise of powers, and custody of Avneet Kaur (minor) was restored to her father Gurpreet Singh (respondent No.6) with liberty to the appellants to seek her custody in regular proceedings under the relevant statute. Thus, this appeal.

Mr. R.S. Rai, learned senior counsel for the appellants, submits that petition for habeas corpus, filed by respondent No.6, claiming custody of the child was not even maintainable, for, the only course open to him was to avail the remedies under the Hindu Minority and Guardianship Act, 1956 or Guardian and Wards Act, 1890. Thus, he asserts that learned Single Judge seriously erred in granting the custody of the child to respondent No.6 in the present proceedings. And, at any rate, he submits in the given facts and circumstances, custody of Avneet Kaur (minor) with the appellants could not be termed as illegal or unlawful. Further, in the matter concerning custody of the child, his/her welfare and interest is paramount, however, the learned Single Judge apparently failed to examine this aspect particularly, when Avneet Kaur (minor) was living with the appellants for the past 9 years and her welfare and interest was fully secured being with them. He has also placed reliance upon the decisions of the Supreme Court as also this Court in *Amritpal Singh v. State of Punjab and others*, dated 03.12.2018 (LPA No.1875 of 2018); *Reetu Verma v. State of Haryana and others*, dated 23.05.2019 (LPA No.3716 of 2018); *Suman Lata v. State of Haryana and others*, dated 21.08.2019 (LPA No.1046 of 2017); and *Adishwar Jain v. Union of India and another*, 2006 SCC OnLine P&H 456.

We have heard learned Senior counsel and perused the records. Concededly, Gurpreet Singh (respondent No.6) and Rajwinder Kaur happened to be the biological parents of Avneet Kaur (minor). Marriage between the two was dissolved on 19.04.2012. It is not disputed either for, post divorce, Rajwinder Kaur was unwilling to keep Avneet Kaur (minor), she remained in custody of her father Gurpreet Singh. However, Gurpreet Singh being employed in the Indian Army, and currently posted at Jalandhar Cantt., Avneet Kaur (minor) resided with her grandfather (Jagwinder Singh), paternal uncle (Jatinder Singh) and Manjit Kaur (paternal aunt) at Sunam. Avneet Kaur (minor) was admitted to one of the best schools: Lady Fatima, Patiala and was studying in the 3rd standard. Raj Kaur (appellant No.2) is the real sister of Rajwinder Kaur i.e. mother of Avneet Kaur (minor) and Manohar Lal (appellant No.1) is her husband. For school of Avneet Kaur (minor) was at a little distance from Sunam, rather than having the child to commute everyday and to avert any inconvenience to her, she would stay with the appellants during the week, and return home on the week ends. Nothing was brought on record to substantiate if the appellants were either the adopted parents of Avneet Kaur (minor) or entitled to her custody under any authority/lawful right. Indisputably, Gurpreet Singh (respondent No.6), as instructed, had brought Avneet Kaur (minor) to the office of Child Welfare Committee, Patiala (respondent No.5), when pursuant to the order dated 05.06.2020 (Annexure R5/1) she was removed from his custody and given in

foster care to the appellants. As demonstrated above, the validity of the order dated 05.06.2020 (Annexure R5/1) was examined at length by the learned Single Judge in the wake of the relevant provisions of 2015 Act as also the Model Rules 2016, whereupon it was concluded:

"[18.] Perusal of final order dated 05.06.2020 (Annexure R-5/1) passed by the Child Welfare Committee, Patiala would show that the order has been passed by only two Members of the Committee. The order on Form 32 is in respect of foster care placement with a family or group foster care. A foster care is defined under Section 44 of the Act is applicable only in respect of children in need of care and protection, which means a child, who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child.

[19]. The order dated 05.06.2020, passed by the Child Welfare Committee, Patiala is totally silent about the factum of petitioner and his family being unfit or incapacitated for taking care and for protection and well being of the child. The aforesaid order has been passed by Chairperson and one Member of the Committee as against the requirement in terms of proviso to Section 28 of the Act which prescribes that there shall be at least three members present at the time of final disposal of the case.

[20]. With the assistance of learned counsel for the petitioner I have verified the list of public holidays in Punjab for the year 2020. It is found that 5th June was Friday and was a gazetted holiday on account of Sant Guru Kabir Jayanti. The order has been passed on a gazetted holiday, without there being any disclosure and justification for incomplete composition of the members of the Committee to work on a gazetted holiday.

....

[21]. In reply, filed by respondent No.5, a reference has been made to the report from DCPO, Sangrur which was received on 04.06.2020. Learned counsel for the petitioner while filing replication has produced on record Annexure P- 7 i.e. Counselling Report dated 04.06.2020 prepared by the District Programme Officer, Sangrur. The same reads as under:-

"Counselling Report

On dated 04.06.2020, in the morning at 10.00 AM, upon the counseling of child Avneet Kaur daughter of Gurpreet Singh, resident of Guga Mari Road, Sant Atar Singh Nagar, Sunam, District Sangrur, it has been informed by the child, that 'I am studying in Third Class in Lady Fatima Convent School, Patiala and my father is employed in Army'. Thereafter, the child was conversed with, regarding her hobbies and then the child told that 'I am fond of studying and alongwith the studies, I am also fond of driving'. Thereafter, it was told by the child that 'I have been residing with my Daadi (Masi Maa) in Jalalpur and I am pursuing my studies there and during school holidays, I come to my home at Sunam. Now, since

lockdown, I have been residing in my house at Sunam and I am very happy with my father and want to reside with him. The family of child (Chacha Ji & Dada Ji) was also talked with and they told that 'we are ready to look after our child'.

Sd/- Counsellor 04.06.2020

Sd/- District Programme Officer Sangrur"

[22]. Perusal of the aforesaid counselling report would show that the Counsellor interacted with the minor and found that the minor was living happily with her father and also wanted to reside with him. In the presence of such report, what prompted respondent No.5 to adopt different approach is beyond comprehension of this Court..."

In our opinion, in the wake of the conclusion reached by the learned Single Judge, we are not required to dwell any further on this aspect. And suffice it to say that intent, approach as also the order dated 05.06.2020, passed by the Child Welfare Committee, Patiala, whereby Avneet Kaur (minor) was removed from the custody of her father (Gurpreet Singh) and given in foster care to the appellants, lacked bonafides.

Ex facie, Gurpreet Singh (respondent No.6) being biological father of Avneet Kaur (minor), in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956 is her natural and legal guardian. On the contrary, appellants failed to show if they had any authority or lawful right to detain Avneet Kaur (minor). In the given circumstances, the only and the inevitable conclusion we could reach is: she was in illegal detention of the appellants. It would be apposite, at this juncture, to refer to the decision of the Supreme Court in *Tejaswini Gaud and others v. Shekhar Jagdish Prasad Tewari and others*, 2019 (7) SCC 42, which has a decisive bearing on the matter in issue and wherein in the similar circumstances it was concluded:

"13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

14. In *Gohar Begum* where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued. In *Gohar Begum*, the Supreme Court dealt with a petition for habeas corpus for recovery of an illegitimate female child. Gohar alleged that Kaniz Begum, Gohar's mother's sister was allegedly detaining Gohar's infant female child illegally. The Supreme Court took note of the position under the Mohammedan Law that the mother of

an illegitimate female child is entitled to its custody and refusal to restore the custody of the child to the mother would result in illegal custody of the child. The Supreme Court held that Kaniz having no legal right to the custody of the child and her refusal to make over the child to the mother resulted in an illegal detention of the child within the meaning of Section 491 Cr.P.C. of the old Code. The Supreme Court held that the fact that Gohar had a right under the Guardians and Wards Act is no justification for denying her right under Section 491 Cr.P.C. The Supreme Court observed that Gohar Begum, being the natural guardian, is entitled to maintain the writ petition and held as under:-

"7. On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants.

In *Queen v. Clarke* (1857) 7 EL & BL 186: 119, ER 1217 Lord Campbell, C.J., said at p. 193:

"But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty."

The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of Section 491 would clearly be applicable to the case and the appellant entitled to the order she asked.

8. We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have not given any reason in support of their view and we are clear in our mind that view is unsustainable in law.

.....

10. We further see no reason why the appellant should have been asked to proceed under the Guardian and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under Section 491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right under Section 491. That is well established as will appear from the cases hereinafter cited." (Underlining added)

In conspectus of the above enunciation of law, the argument advanced by learned Senior counsel that remedy, if any, available to Gurpreet Singh (respondent No.6) to seek custody of Avneet Kaur (minor) was only under the

substantive law in appropriate proceedings, lacks conviction and cannot be countenanced. Thus, the petition for habeas corpus filed by Gurpreet Singh (respondent No.6) praying for release of his minor daughter (detenue), who was in unlawful detention, was fully maintainable. We may also hasten to add that in the present proceedings, Gurpreet Singh never claimed custody but restoration of custody of his minor daughter (Avneet Kaur). Of course, the position would be viewed from a different perspective, where there are competing claims between the biological parents of the child or where parties to the lis purport to have an authority or lawful right to retain/claim custody of the child. Something that requires evidence and full scale inquiry. However, such is not the position here. We have also examined the orders/judgments that have been cited and relied upon by the learned counsel for the appellants. But, in the given circumstances, none has any bearing on the matter.

Welfare and interest of the child in matters concerning custody is paramount: there cannot be any quarrel with such a proposition either. What is the position in the matter at hand? Gurpreet Singh (respondent No.6) being father of Avneet Kaur (minor) is her natural guardian. Nothing was brought on record to show if he had abandoned or neglected the child or was incapacitated in any manner to look after Avneet Kaur (minor). The argument that Gurpreet Singh (respondent No.6) being member of the Armed Forces and posted away from home would hardly be positioned to care about Avneet Kaur (minor), would also not advance the cause of the appellants. For Avneet Kaur (minor) was residing with her grandfather, paternal uncle and paternal aunt at Sunam. Her father (Gurpreet Singh) being posted at Jalandhar Cantonment would visit her often. What further transpires from the record is that even Gurpreet Singh is slated to superannuate from service in January, 2021. Having said that we do not wish to delve any further into this aspect lest it prejudice the interest of the appellants. Thus, suffice it to say that interest and welfare of Avneet Kaur (minor) is well-protected and secured being in the custody of her father (Gurpreet Singh).

Before we part we consider it necessary to observe that observations and/or the conclusion recorded above are germane and confined to the present proceedings only. In the event, the appellants initiate any proceedings for custody of Avneet Kaur (minor) in terms of the liberty granted by the learned Single Judge, under the relevant statutes, the Court in seisin of the matter shall decide their claim on merits and strictly in accordance with law.

In view of the above, we are dissuaded to interfere with the impugned order and judgment rendered by the learned Single Judge. The appeal being bereft of merit is accordingly dismissed.