

**THE HIGH COURT OF MADHYA PRADESH**  
**WP-14187-2019**  
*(Smt. Roshni @ Roshan Vs. State of M.P.)*

**Gwalior, Dated : 20-08-2019**

Shri Ayub Khan, counsel for the petitioner.

Shri S.N. Seth, Government Advocate for the respondents No. 1 to 5/State.

Shri S.S. Kushwaha, counsel for the respondent No. 6.

Shri Deepak Khot, counsel for the intervenor.

Corpus Mohsin aged about 1 ½ years is produced by her grand mother Shajadi Begum.

This petition under Article 226 of the Constitution of India has been filed in the nature of habeas corpus for the custody of the minor child Mohsin aged about 1 year and 6 months and the petitioner is the mother of this child.

It is mentioned in the writ petition that since the husband of the petitioner namely Moinuddin was harassing the petitioner, therefore, on 13.03.2019 she left her matrimonial house along with Vishal Kannojiya and on 18.03.2019 when she came to know that her husband has consumed poison, accordingly, she came back on 18.03.2019 to see her husband at SSIMS Hospital and on 19.03.2019 her husband expired. Thereafter, the petitioner went to her matrimonial house to attend the last ceremony and while she was about to come back along with her minor son Mohsin aged about 1 ½

years, respondent No. 6 forcibly kept her son with him and forced the petitioner to go back. It is further mentioned that the petitioner had made an application to the Police Station Madhauganj for the custody of her child but the respondent No. 6 is working on the post of Constable and also posted in the Police Station Madhauganj, therefore, the application of the petitioner was not taken and in spite of her repeated efforts, custody of her child was not given back. On 03.06.2019 the petitioner had given an application to the Superintendent of Police, Gwalior for the custody of her child but no action was taken. On 27.06.2019 respondent No. 6 met the petitioner and offered that in case, if she wants the custody of her child, then she should spend a night with him in a hotel and when she refused then he openly threatened that he would not give back her child and, accordingly, on 28.06.2019 the petitioner moved an application before the Inspector General of Police, Gwalior Range, Gwalior for the custody of the child. It is further mentioned that one social organization namely *Rashtriya Alpsankhyak Muslim Kalyan Sanghathan* had also given a memorandum for the custody of the child but no action was taken. On 12.07.2019 also the petitioner went to the office of Additional Superintendent of Police, Gwalior who instructed the petitioner to take the custody of her child from Police Station Madhauganj and when the petitioner went to the Police Station Madhauganj, then the respondent No. 6 called 20-25 persons in the Police Station and she was abused and custody of the child was

not given. Accordingly, this petition in the nature of habeas corpus has been filed for the custody of minor child Mohsin aged about 1 ½ years.

Though the respondent No. 6 is served and represented but he has not filed any return.

One Shajadi Begum, who is claiming to be grand mother of the child Mohsin aged about 1 ½ years has filed an application for intervention, which has been registered as I.A. No. 3911/2019. It is mentioned in the application that the minor child Mohsin is in her custody. Her Son Moinuddin had committed suicide by consuming poison because of harassment by the relatives including the parents and siblings of the petitioner. Accordingly, Crime No. 243/2019 has been registered at Police Station Kampoo District Gwalior against the parents and siblings of the petitioner for offence under Section 306/34 of IPC. It is further submitted that the petitioner had left her matrimonial house on 13.03.2019 at 10:30 AM and, accordingly, Late Moinuddin had lodged a Guminsan report on 13.03.2019 at 17:32 hours. It is further submitted that on 18.03.2019 the petitioner came back and accordingly, her recovery memo was prepared and she was given to the custody of her mother. The statement of the petitioner under Section 164 of Cr.P.C. was also recorded in which she had stated that on 13.03.2019 she had gone with Vishal Kannojiya after leaving her child in the custody of sister of Vishal Kannojiya. She went to Morena from where she went to Agra. On 18.03.2019 sister

of Vishal Kannojiya informed that her husband has consumed some substance, therefore, she came back to Gwalior along with Vishal Kannojiya. It is further submitted that on the statement of the petitioner, the offence under Sections 376, 506, 366 of IPC has been registered against Vishal Kannojiya in Crime No. 131/2019 at Police Station Kampoo District Gwalior and, accordingly, on 25.03.2019 the ornaments belonging to the petitioner were recovered from the possession of Vishal Kannojiya (Rajak).

It is submitted by the counsel for the petitioner that since the petitioner herself had abandoned her child by leaving him in the custody of sister of her friend, therefore, it would not be in the interest and welfare of the child to handover his custody to the petitioner.

As the intervenor had not stated anything about her family background, therefore, certain questions with regard to the family background of the intervenor were asked to Shri Deepak Khot, who submitted that the intervenor herself is present in the Court. Accordingly, in the presence of the counsel, this Court has inquired from the intervenor about her family background. It is submitted by the intervenor that her husband has expired. She has three sons. Out of which, Moinuddin (husband of the petitioner) has already committed suicide. Respondent No. 6 Nasiruddin, who is working as a Constable in the Police Department is residing separately along with his family and third son Tajuddin is a labourer by profession and

with great difficulty, he can earn his livelihood and her third son is having three children and is residing with his wife and children separately. It was further stated by the intervenor that she is residing all alone along with the minor child Mohsin aged about 1 ½ years and submitted that she is getting the family pension to the tune of Rs.20,000/- per month.

Refuting the information given by the intervenor, counsel for the petitioner has drawn attention of this Court towards the return filed by the State Government. By referring to the proceedings which had taken place before *Parivar Parmarsh Kendra* on 04.06.2019, it is submitted by the counsel for the petitioner that it is incorrect to say that the minor child Mohsin aged about 1 ½ years is in the company/custody of the intervenor, but in fact respondent No. 6 is keeping the said boy with him which is apparent from the proceedings. By referring to the last paragraph of the proceedings of *Parivar Parmarsh Kendra* held on 04.06.2019, it is submitted that the custody of the child was given to the respondent No. 6 Nasiruddin, therefore, it is clear that the intervenor has not come before this Court with clean hands and incorrect facts have been narrated in the application.

It is submitted by the counsel for the State that since an offence under Section 376 of IPC has been registered against Vishal Kannojiya, therefore, the Court may consider the welfare of the child. However, it is submitted that since the petitioner is a natural guardian

of the child, therefore, the custody should be given to her.

Heard the learned counsel for the parties.

Several personal allegations have been made in the petition against respondent No. 6, whereas several personal allegations have been made by the intervenor against the counsel for the petitioner.

Counsel for the respondent No. 6 had sought time to file return to the writ petition.

Since the child was already produced before the Court and it was incumbent upon the Court to decide the question of custody, therefore, the Court has decided not to dwell upon any personal allegations made by the petitioner against respondent No. 6. Similarly, the personal allegations made against the petitioner are also not being taken into consideration because they are beyond the scope of the habeas corpus writ petition.

It is submitted by the counsel for the petitioner that while entertaining the petition under Article 226 of the Constitution of India in the nature of habeas corpus, this Court can consider the question of welfare of the child. To buttress his contentions, counsel for the petitioner has relied upon the judgment passed by the Supreme Court in the case of **Nithya Anand Raghavan Vs. State (NCT of Delhi) and another** reported in (2017) 8 SCC 454, **Prateek Gupta Vs. Shilpi Gupta and others** reported in (2018) 2 SCC 309 and **Kanika Goel Vs. State of Delhi through Station House Officer and another** reported in (2018) 9 SCC 578. It is submitted that this Court has

jurisdiction to decline the relief of return of the child if it is found that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. It is submitted that the petitioner herself has abandoned the child and went along with her friend Vishal Kannojiya and did not file the petition for the custody of the child at the earliest available opportunity, therefore, it is clear that welfare of the child is not in the hands of the petitioner although she is the natural guardian of the minor child.

The Supreme Court by judgment dated 06.05.2019 passed in the case of **Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others in Criminal Appeal No. 838/2019** has held as under:-

“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.

18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where

in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

25. Welfare of the minor child is the paramount consideration:- The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.”

In the present case, the State has filed a detailed return and along with that return, certain documents including statement of the

petitioner have been placed on record. The petitioner had alleged that she was being maltreated by her husband and according to her statement recorded under Section 164 of Cr.P.C., she had gone to the hospital, where she met with Vishal Kannojiya and after leaving the child in the custody/company of his sister, she went to Morena, where she stayed for two days and from thereafter she went to Agra and on 18.03.2019 she was informed by sister of Vishal that her husband has consumed some substance, therefore, on the same day, she came back to Gwalior along with Vishal. From her recovery memo Ex. IA-3 filed along with intervention application, it is clear that the recovery memo of the petitioner was prepared on 18.03.2019 at 18:10 hours and it is mentioned as under:-

“उपरोक्त पंचानों के समक्ष गुमशुदा रोशनी को उसकी मां रहीसा उपस्थित थाना आए। दस्तयाब किया कथन लिए कोई जुर्म दस्तयाबी अपराध घटित होना नहीं बताया। बाद उक्त गुमशुदा से पूछने पर उसकी इच्छा माता के घर जाने का कहने से उसकी मां रहीसा के सुपुर्द किया। दस्तयाबी सुपुर्दगी पंचनामा तैयार किया गया।”

Thus, it is clear that on 18.03.2019 no allegation of rape was made by the petitioner against Vishal Kannojiya. Thereafter, it appears that on 25.03.2019 the police registered an offence under Sections 376, 366 and 506 of IPC against Vishal Kannojiya on the statement made by the petitioner. Thereafter, her statement under Section 164 of Cr.P.C. was recorded on 28.03.2019, in which she did not make any allegation of physical harassment by Vishal Kannojiya.

When a question was put to the counsel for the petitioner as to

whether the petitioner has made any allegation of sexual harassment against Vishal Kannojiya or not, then he fairly conceded that the petitioner is present in the Court and he can answer this query after taking instructions from her. Accordingly, the petitioner personally stated that although she has made allegation of sexual harassment against Vishal Kannojiya, but it was under the pressure of respondent No. 6, who is posted as a Constable in the Police Station Madhauganj. Thus, it is clear that both the parties are making serious allegations against each other, therefore, in order to verify the fact that whether the petitioner had abandoned the child or not, it would be essential to consider her conduct.

In her statement recorded under Section 164 of Cr.P.C., she has fairly stated that after leaving her child in the company/custody of sister of Vishal Kannojiya, she went to Morena and from thereafter, she went to Agra and came back on 18.03.2019 after getting an information that her husband has consumed some substance. In a statement filed by the State in its return, she has alleged that she was being harassed by her husband, however, she did not lodge any complaint against her husband. Although it is clear that the petitioner left her child in the company/custody of sister of Vishal Kannojiya, but whether it was under compulsion because of harassment/maltreatment of her husband or whether it was voluntary, is a question which has to be *prima facie* assessed and, therefore, the conduct of the petitioner assumes importance. In the statement

recorded under Section 164 of Cr.P.C., it is stated by the petitioner that after receiving an information that her husband has consumed something then she immediately came back to Gwalior on 18.03.2019 itself and went to the Police Station, where recovery memo on 18.03.2019 was prepared. Thus, it is clear that the petitioner had not disassociated herself completely from her husband or matrimonial house, but the moment, she got the information that her husband has consumed something, she immediately came back to Gwalior.

It is not out of place to mention here that by that time, she was not aware that whether her husband is alive or he has expired, therefore, attachment of the petitioner with her in-laws or husband or the child was still subsisting and it cannot be said that the petitioner had completely abandoned her child and it can be held that because of certain reasons, she left her matrimonial house by leaving the child in the company of sister of Vishal Kannojiya, which does not amount to abandoning the child. The petitioner before leaving her matrimonial house or going to Morena along with Vishal had taken care of the fact that her child shall remain in the company of a lady so that he can be taken care of.

At this stage, it is submitted by the counsel for the respondent No. 6 that the State has filed a copy of the statement of the sister of Vishal Kannojiya, which was recorded under Section 161 of Cr.P.C., according to which the petitioner had handed over her child on a false pretext and thereafter she did not come back.

It is sufficient to mention that since the allegations and counter allegations are being made by each of the parties and since two criminal cases have also been registered, i.e., Crime No. 243/2019 at Police Station Kampoo for offence under Sections 306/34 of IPC and another Crime No. 131/2019 at Police Station Kampoo District Gwalior for offence under Sections 376, 366 and 506 of IPC, therefore, it would not be appropriate for this Court to consider the allegations in detail. Since the petitioner had returned back immediately to Gwalior after receiving the information about the consumption of some substance by her husband clearly indicates that she had not abandoned the child for the purposes of this petition under Article 226 of the Constitution of India.

So far as the intervenor is concerned, it is her statement that she is living in the house all alone along with the minor child aged about 1 ½ years. The intervenor is aged about 60 years, therefore, she can be said to be an old person. When according to the intervenor herself, her one son Nasiruddin respondent No. 6 and another son Tajuddin are residing separately with their respective families, then it is clear that it is not possible for an old lady aged about 60 years to look after the welfare of the minor child aged about 1 ½ years. Further from the proceedings of *Parivar Parmarsh Kendra* dated 04.06.2019, it appears that the custody of the child was given to respondent No. 6 Nasiruddin. Thus, it is clear that intervenor has not placed correct facts before this Court.

Under these circumstances, this Court is left with no other option but to hold that the petitioner being the natural guardian of the minor child aged about 1 ½ years, is a best person to look after the child and, accordingly, the custody of the child is handed over to the petitioner in the Court itself. The petitioner is free to keep the child with her, but she is advised to ensure that the welfare of the child is not hampered in any manner.

With aforesaid observations, the petition is finally disposed of.

**(G.S. Ahluwalia)**  
**Judge**

Abhi