

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Habeas Corpus Petition No. 23 of 2018

Akanksha Budhiraja

....Petitioner

Versus

State of Uttarakhand and others

....Respondents

Present: Mr. Vipul Sharma, Advocate for the petitioner.
Ms. Mamta Joshi, Brief Holder for the State/respondent nos. 1, 2, 3
& 6.

Hon'ble Sudhanshu Dhulia, J. (Oral)

This writ petition has been filed by the petitioner seeking a writ of habeas corpus to produce her son, namely, Master Gaurav who is not yet 5 years of age and who, according to the petitioner, is presently with his father at Moradabad. The petitioner is mother of Mst. Gaurav, who resides at Rudrapur, District Udham Singh Nagar.

2. The case of the petitioner is that she and Sachin Budhiraja/respondent no. 4 were married on 06.12.2012 as per Hindu rites and ceremonies. Thereafter on 15.10.2013, out of the wedlock, they had a son, namely, Master Gaurav. There is an allegation of demand of dowry, torture, etc. at the hands of respondent no. 4 and thereafter the petitioner left her matrimonial house along with her son on 25.03.2018 and since then she is residing with her parents at Rudrapur, District Udham Singh Nagar, Uttarakhand. The petitioner states that on 23.05.2018, respondent no. 4, who is her husband and respondent no. 5, who is her mother-in-law came to her maternal house at Rudrapur and requested that Gaurav be sent with them for only ten days

to Moradabad. The petitioner though initially hesitant but finally accepted this request, but thereafter respondent no. 4 has not returned with their son. Moreover, it is also alleged that she is not being allowed to talk to her son. She further alleges that respondent no. 4 is a businessman and remains outside the house and there is no one to take care of the son, etc.

3. Petitioner's counsel Sri Vipul Sharma was asked as to how a son can be said to be in unlawful custody of his father and more important whether a writ of habeas corpus would lie under these circumstances.

4. The petitioner relies upon a decision of Punjab & Haryana High Court, where, according to the petitioner, the custody was given to the mother on a writ of habeas corpus. The judgment referred is **Gurmeet Kaur Batth v. State of Punjab and others (Criminal Writ Petition No. 1165 of 2018)** dated 20.01.2009.

5. Indeed in the said case, learned Single Judge of Punjab and Haryana High Court did order of the custody of the child to her mother, but the facts of that case are entirely different from the facts of the present case. In the said case, the mother Gurmeet Kaur Batth who was a citizen of Canada married one Ajay Pal Singh, who at the relevant time was a citizen of India residing in Amritsar. They were married in November, 2002 and thereafter out of the wedlock, they had a son, namely, Shahbaz Singh. Matrimonial difference arose in Canada between the couple and thereafter though there were matrimonial differences, but the son was handed over by the petitioner to her mother-in-law. The mother-in-law of the petitioner brought

the son (Shahbaz Singh) to India. After few months, the petitioner Gurmeet Kaur Batth moved a writ of habeas corpus in Punjab and Haryana High Court and the Punjab and Haryana High Court came to the conclusion that the son was in custody of the mother-in-law, and the custody was sought by the mother, who is the natural guardian of the son. Hence, under these circumstances, the custody of the child was given to the petitioner in the said case.

6. In the present case, the facts are entirely different. Admittedly, Gaurav who is four years & eight months of age is as of now with his father at Moradabad. The parties admittedly Hindu by religion, therefore, respondent no. 4 who is the father of Gaurav is his natural guardian (as is his mother). The petitioner has not been able to show as to how the child, namely, Gaurav can be said to be in an illegal detention or illegal custody of his natural father.

7. The first and foremost aspect which has to be examined by this Court is whether Mst. Gaurav is in unlawful or illegal custody of respondent no. 4. Considering, however, that Gaurav is 5 years of age, his welfare is also of paramount importance, but that is not the subject matter of this Court, as that would fall under the jurisdiction of the Family Court, particularly when this Court finds that the custody of a child with his natural father cannot be said to be an illegal or unlawful custody.

8. The Constitution Bench of Hon'ble Apex Court in the case of **Kanu Sanyal v. District Magistrate, Darjeeling** reported in **(1973) 2 SCC 674** had considered entire history and development of a writ of habeas corpus and had come

to the conclusion that the writ of habeas corpus is “essentially a procedural writ”. Hon’ble Apex Court in the case of **Kanu Sanyal (supra)**, in para 4, observed as under:

“4. It will be seen from this brief history 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 into, 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 italicized 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 the Lord Halsbury, L.C. in *Cox v. Hakes* (1890) 15 AC 506, ‘the essential and leading theory of the whole procedure is the immediate determination of the right to 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.”

9. Technically there may be a situation where it would still may possible to make out a case for a writ of habeas corpus by the mother where the child is in custody of the father, but first and foremost it has to be shown that the custody is unlawful or illegal. Moreover, in case any relief is granted to the petitioner, considering her fervent

prayer before this Court, this would amount to court's seal of approval that the child is in unlawful custody of his father. Such an order would preempt any proceedings which primarily and essentially lie in the domain of a Family Court. Moreover, the petitioner has not been able to show even prima facie that the child is in illegal custody of his father.

10. Under these circumstances, the writ as sought by the petitioner cannot be granted. Writ petition fails and is hereby dismissed.

(Sudhanshu Dhulia, J.)

25.06.2018

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