

**JOSE ANTONIO ZALBA DIEZ DEL CORRAL  
ALIAS JOSE ANTONIO ZALBA**

**v.**

**THE STATE OF WEST BENGAL & ORS.**

(Writ Petition (Criminal) No. 318 of 2020)

JULY 28, 2021

**[VINEET SARAN AND DINESH MAHESHWARI, JJ.]**

*Constitution of India – Art. 32 – Habeas Corpus Petition – For custody of minor children – Maintainability – Petitioner had married respondent no.6 and they have two minor children – Disputes between petitioner and respondent no.6 – Habeas Corpus Petition filed u/Art.32 by petitioner, a citizen of Spain, for custody of the two minor children who were living with respondent no.6 in India – Preliminary objection raised by respondent no.6 with regard to maintainability of the Habeas Corpus petition, particularly when a petition filed by the petitioner under the Guardians and Wards Act for custody of the children was pending before the trial court – Held: In the present case, the admitted facts being that respondent no.6 (mother) had the custody of the two minor children, for which the petitioner (father) had already filed a petition u/s.12 of the Guardians and Wards Act, which is pending consideration; and the custody of the children with the mother, who is a natural guardian, cannot be said to be illegal and, thus, the petition for habeas corpus would not be maintainable and that too directly u/ Art.32 of the Constitution – The statutory remedy available under the Guardians and Wards Act is the appropriate remedy, which has already been availed by the petitioner – There are no extra ordinary or exceptional circumstances in the present case requiring the Supreme Court to exercise its jurisdiction u/Art. 32 of the Constitution – The remedy already availed by the petitioner is an appropriate and effective remedy, where all the questions raised herein regarding the welfare and well-being of the children can be considered in accordance with law – Guardians and Wards Act, 1890 – s.12 – Family Law – Child custody.*

*Yashita Sahu v. State of Rajasthan, (2020) 3 SCC 67 : [2020] 1 SCR 417 – distinguished.*

*Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari (2019) 7 SCC 42 : [2019] 7 SCR 335 and Soumitra*

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*Kumar Nahar v. Parul Nahar (2020) 7 SCC 599 – referred to.*

CRIMINAL ORIGINAL JURISDICTION: Writ Petition (Criminal) No. 318 of 2020

(Under Article 32 of the Constitution of India)

P. S. Narasimha, Sr. Adv. (AC)

Petitioner-in-person.

Sidharth Luthra, Sr. Adv., Soumitra G. Chaudhuri, Ms. Puja Kumari Shaw, Chanchal Kumar Ganguli, Kumar Mihir, Advs. for the Respondents.

The following Order of the Court was passed :

**ORDER**

1. This Habeas Corpus Petition has been filed under Article 32 of the Constitution of India by the petitioner (father) for the custody of his two minor children. ‘
2. The brief facts of the case are that the petitioner had married the respondent No. 6 and they have a son aged about 15 years and a daughter aged about 10 years. The petitioner is a citizen of Spain. There being some disputes between the petitioner (husband) and respondent No. 6/wife, the respondent No. 6/wife left the petitioner along with the two minor children. The petitioner thereafter filed a case under Section 12 of the Guardians and Wards Act, 1890 (hereinafter referred to as “the Act”) for the custody of two minor children, before the 10<sup>th</sup> Additional District Judge, Alipore, Kolkata, which is numbered as Case No. 88 of 2017. The said case for custody is still pending before the said Court. Further a case under the Protection of Women from Domestic Violence Act,2005 has also been filed by respondent No. 6/wife against the petitioner, which is also pending. In the said case, some maintenance amount was granted in favour of respondent No. 6/wife, which was challenged before the High Court and the same has been reduced. The same is not an issue in this petition.

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3. In the background of the aforesaid facts and circumstances, the petitioner has filed this writ petition with the following prayers:
  - (i) Issue an appropriate writ/order/direction in the nature of Habeas Corpus to issue directing and commanding the Respondent Nos.2, 3, 4 and 5 to produce Siddhartha Aupa Zalba Mahapatra and Ikantika Margarita Zalba Mahapatra before this Hon'ble Court ensuring protection of their rights and their best interest from the custody of the respondent no.6.
  - (ii) Issue an appropriate writ/order/direction in the nature of Mandamus directing the Respondents No.2, 3, 4 and 5 to hand over the custody of the said Siddhartha Aupa Zalba Mahapatra and Ikantika Margarita Zalba Mahapatra subject to the outcome of Act VIII Case No.88 of 2017 pending before the Learned 10<sup>th</sup> Additional District Judge, Alipore for ensuring proper protection of their rights by shifting the children from Kolkata, India to Spain, the safest option available to the children;
  - (iii) Issue an appropriate writ/order/direction in the nature of Certiorari directing the respondents to produce the records of the case in connection with Act VIII Case No.88 of 2017 presently pending before the Learned 10<sup>th</sup> Additional District Judge, Alipore before this Hon'ble Court so that conscientiable justice may be administered after scrutinizing the same.
  - (iv) Interim order directing the Respondents concerned and to render police assistance for protecting the life and property of the children of the petitioner and the respondent no.6, namely, Siddhartha Aupa Zalba Mahapatra and Ikantika Margarita Zalba Mahapatra.
  - (v) Interim order directing the children to be taken from Kolkata, India to Spain and live under the care and protection of their paternal family including the petitioner and be housed at their paternal family home in Spain."
4. We have heard the petitioner, who has appeared in-person, as well as Mr. Sidharth Luthra, learned senior counsel appearing on behalf of respondents no. 1 to 5 along with Mr. Chanchal Kumar Ganguli and Mr. Anuj Prakash, learned counsel for respondent no. 6 /wife and perused the record. We have also heard Mr. P.S. Narasimha, learned senior counsel who was appointed as Amicus Curiae to assist the court.

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5. The fact that the petition for custody of the children under Section 12 of the Act is pending, has not been disputed. The pendency of the said case would also be clear from the perusal of the prayers made in this petition, which have been extracted above. A preliminary objection has been raised by Shri Anuj Prakash, learned counsel for the Respondent no.6 with regard to the maintainability of this petition, particularly when the petition filed by the petitioner under the Guardians and Wards Act for custody of the children is pending before the Trial Court.
6. The petitioner has submitted that this petition has been filed to ensure the safety of, and in the best interest of the minor children. It is contended that respondent No. 6/wife along with two minor children is staying in Kolkata, which is a red zone for COVID-19, whereas the petitioner being a resident of Spain can take the children to Spain, which is a much safer place and has better medical facilities. It is also contended that at present the petitioner is staying in Shantiniketan, which is a green zone for COVID-19 and, thus, the children would be safer with the petitioner in Shantineketan. It is also submitted that the children have been illegally taken away by respondent No. 6/wife and the petitioner is wrongly deprived of their custody. The petitioner has submitted that the children have the right to live with their father, as both the parents have right for the custody of their children. In support thereof, he relied upon the decisions of this Court in “Soumitra Kumar Nahar Vs. Parul Nahar” (2020) 7 SCC 599 and “Yashita Sahu Vs. State of Rajasthan” (2020) 3 SCC 67. It is further contended by the petitioner that though the petition for custody of the children under the Guardians and Wards Act is pending before the Trial Court but in the given circumstances, the respondent no. 6/ wife be directed by this Court to handover the custody of the children to the petitioner.
7. Per contra, Mr. Sidharth Luthra, learned senior counsel appearing for the State/respondents has submitted that in view of the fact that the petition for custody of the children is pending before the Trial Court, this writ petition under Article 32 of the Constitution of India would not be maintainable. In support thereof, he placed reliance upon the two decisions of this Court in “Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tewari” (2019) 7 SCC 42 and “Yashita Sahu Vs. State of Rajasthan” (2020) 3 SCC 67. It is further contended that in the counter affidavit filed by the State, it has categorically been

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stated that the position of pandemic in the State of West Bengal is well under control and it cannot be said that the children will not be safe with the mother in Kolkata.

8. Mr. P.S. Narasimha, learned Amicus has very fairly placed the position of law relating to the present matter.
9. Mr. Anuj Prakash, learned counsel for respondent No. 6/wife has supported the submissions of Mr. Luthra with regard to the non-maintainability of this Habeas Corpus Petition, especially when the custody of the children is with the mother, who is a natural guardian. It is contended that the maintenance amount awarded by the Trial Court under the provisions of the Protection of Women from Domestic Violence Act,2005 has not been paid by the petitioner to respondent No. 6/wife which would, according to the learned counsel, clearly demonstrate that the petitioner has no concern for the wellbeing of respondent No. 6/wife or the children. It is lastly contended that in case the petitioner is given custody of the children and he takes the children to Spain, they would be outside the territorial jurisdiction of the Trial Court, where the petition for custody of the children under the provisions of the Act is pending. With regard to the safety of the children, it has been contended that respondent No.6/wife, along with children are staying in Kolkata, and since March 2020, two waves of pandemic (COVID-19) have already passed, and respondent no. 6/wife as well as two minor children are completely safe.
10. Having heard the petitioner as well as the learned counsel for the parties and on perusal of the record, before going into the merits of the claim of the petitioner, the preliminary question to be decided by this Court would be with regard to the maintainability of this petition.
11. It cannot be disputed that both the parents may have a right for custody of their children but the said question of custody is to be considered and decided after evidence is adduced by the parties, and after following the due procedure, which would be under the provisions of the Guardians and Wards Act; and the petitioner has already filed a petition under the said Act, which matter is pending consideration before the Trial Court in Kolkata.
12. The decision in Yashita Sahu(supra) is distinguishable on facts. The said case related to a matter in which both the parents, along with the children, were residing in United States and since there were disputes between the husband and wife, and the wife had taken

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away the children and started living separately, the father filed a petition for custody of the children before the court in the United States, which directed the wife to produce the children and instead the wife took the children from United States to India. It was in such circumstances that in a Habeas Corpus Petition before the Rajasthan High Court, the High Court directed the wife to return to the United States along with the minor daughter within six weeks to enable the territorial jurisdictional court in United States to pass further orders in the proceedings already pending there. It was in the aforesaid facts that the writ petition for Habeas Corpus was held to be maintainable. This Court in the case of Tejaswini Gaud (supra) has categorically laid down the law with regard to the maintainability of Habeas Corpus Petition in Paragraphs No. 19 & 20, which are extracted below:

“19. 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.

20. 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

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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."

Emphasis supplied

13. In the present case, the admitted facts being that the mother has the custody of two minor children, for which the petitioner(father) has already filed a petition under Section 12 of the Act, which is pending consideration; and the custody of the children with the mother, who is a natural guardian, cannot be said to be illegal and, thus, the petition for habeas corpus would not be maintainable and that too directly under Article 32 of the Constitution of India. While saying so, we are not going into the question whether the maintenance amount directed by the Trial Court in the proceedings under the Protection of Women from Domestic Violence Act,2005 has been paid or not. The statutory remedy available under the Guardians and Wards Act is the appropriate remedy, which has already been availed by the petitioner. There are no extra ordinary or exceptional circumstances in the present case requiring this Court to exercise its jurisdiction under Article 32 of the Constitution of India. The remedy already availed by the petitioner is an appropriate and effective remedy, where all the questions raised herein regarding the welfare and wellbeing of the children can be considered in accordance with law, after appreciation of the evidence, which may be led by the parties.
14. Accordingly, we dismiss this writ petition on the ground of maintainability. However, we request the 10<sup>th</sup> Additional District Judge, Alipore, Kolkata to hear and decide the pending case No. 88 of 2017 as expeditiously as possible, and in accordance with law, preferably within six months from the filing of a certified copy of this order, along with an application for expeditious disposal of the pending case.
15. Before parting, we express our gratitude for the able assistance rendered by Mr. P.S. Narsimha learned senior counsel, who was appointed as Amicus Curiae by this Court.