

2025:PHHC:051547



**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRWP-1086-2025 (O&M)
Reserved on: April 7th, 2025
Pronounced on: April 22nd, 2025



.....Petitioner

Versus

Union of India and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Argued by: Mr. Abhinav Sood, Advocate
with Mr. Sayyam Garg, Ms. Anmol Gupta
and Ms. Mehndi Singhal, Advocates
for the petitioner.

Mr. Lalit K. Gupta, Advocate
for respondents No.1 and 2.

Mr. Amit Rana, Senior Deputy Advocate General, Punjab.

Mr. Rahul Mohan, Sr. Deputy Advocate General, Haryana
and Mr. Yuvraj Shandilya, Assistant Advocate General,
Haryana.

Mr. S.S. Saron, Advocate
with Mr. M.B. Rajwade, Mr. Anuj Arya
and Mr. Naveen, Advocates
for respondent No.8.

MANJARI NEHRU KAUL, J.

The present petition has been filed under Article 226 of the Constitution of India in the nature of *habeas corpus* by the petitioner, the biological mother of the minor child XXX (hereinafter referred to as 'alleged detenué'), seeking a direction to respondent No.8, her former husband, to produce the alleged detenué before this Court and hand over his custody to her. The petitioner has invoked the extraordinary writ jurisdiction of this Court, asserting that the alleged detenué is being

unlawfully retained in India by respondent No.8 in deliberate and continuing violation of a binding custody order dated 13.11.2024 passed by the Superior Court of Justice (Family Court), Ontario, Canada.

2. The relevant factual backdrop, as emerges from the pleadings, is as follows;

- (i) The petitioner and respondent No.8 were married on 20.12.2018 at Durham, Ontario, Canada. The alleged detinue, was born in February, 2021 in Canada and holds Canadian nationality.
- (ii) Owing to marital discord and alleged acts of domestic violence, the petitioner separated from respondent No.8 in January 2024. It is not disputed that Canadian police authorities issued show cause notices to respondent No.8 in connection with complaints of sexual assault and other offences.
- (iii) On 02.07.2024, by a consent order, the family Court in Ontario permitted respondent No.8 to travel to India with the alleged detinue for a short visit of 2 to 3 weeks, subject to the condition that he would furnish a full travel itinerary to the petitioner and return to Canada thereafter.
- (iv) It is an admitted position that respondent No.8 did not inform the petitioner of the date and details of travel and, further, did not return to Canada with the alleged detinue after the agreed time. This led the petitioner to approach the Ontario Family Court, which passed a final order dated 13.11.2024, granting sole custody of the child (alleged detinue) to the petitioner, directing respondent

No.8 to return the alleged detinue within seven days and to facilitate daily virtual communication between the alleged detinue and the petitioner. A monetary penalty of 1,000 Canadian dollars per day was imposed for non-compliance.

- (v) Despite the categorical and binding directions of the Canadian Court, respondent No.8 neither returned the alleged detinue to Canada nor facilitated any interaction between the alleged detinue and the petitioner.
- (vi) The petitioner thereafter approached this Court by way of the present petition, asserting that the continued retention of her child i.e. alleged detinue by respondent No.8 amounts to illegal detention and parental abduction.

3. **SUBMISSIONS ON BEHALF OF THE PETITIONER:**

Learned counsel for the petitioner submitted as follows:

- (i) That the petitioner is the biological and natural guardian of the alleged detinue and has been granted his sole custody by a competent Court in Canada through a final and enforceable decree.
- (ii) That the conduct of respondent No.8 in violating Canadian Court orders and retaining the child in India is illegal and contrary to settled principles of comity of courts and international child custody jurisprudence.
- (iii) That the alleged detinue is of tender age, emotionally dependent on the petitioner, and has been abruptly severed from her due to the unilateral and wrongful actions of respondent No.8.

4. The petitioner has placed on record certified documents confirming that she has no criminal antecedents either in Canada or Bolivia, refuting the allegations raised by respondent No.8.

5. That the petitioner is an independent financially-abled woman and has the financial resources to take care of the needs of her child (alleged detinue), whereas respondent No.8 does not even have the financial capacity to take care of the alleged detinue as he had been declared bankrupt in 2018; respondent No.8 has a tendency of being an abuser, which is discernible from a perusal of Annexure P-4.

6. That vide Annexure P-15, a Red Notice has been issued against respondent No.8 by the Interpol and an Orange Notice has been issued for the alleged detinue.

7. That there is a genuine and reasonable apprehension that respondent No.8, who is a Canadian national, and has fled away from his country along with the alleged detinue, may still flee away with the alleged detinue to an unknown location in order to obstruct/hinder the custodial rights of the petitioner, more so, since it is evident that he is deliberately evading the legal proceedings in Canada.

8. Reliance is placed on *CRWP No.60 of 1988* titled as *Mrs. Kuldeep Sidhu Versus Chanan Singh and another* and *CRWP No.8319 of 2020* titled as *Mandeep Kaur Versus State of Punjab* in support of the proposition that in cases of wrongful retention of children in defiance of foreign custody orders, Indian Courts must ordinarily direct repatriation, unless compelling reasons to the contrary exist.

9. **SUBMISSIONS ON BEHALF OF RESPONDENT NO.8:**

Learned counsel for respondent No.8, on the other hand, has contended as follows:

- (i) That the alleged detenu was brought to India pursuant to the permission granted by the Canadian Court and remains in the legal custody of his father i.e. respondent No.8, who is a natural guardian under Section 6 of The Hindu Minority and Guardianship Act, 1956 and has filed a petition for appointment of guardian and permanent custody of minor child (alleged detenu) in the Court of Principal Judge, Family Courts, Kharar, District Mohali.
- (ii) That the Canadian custody order was an *ex parte* order, which was obtained by the petitioner by suppression of material facts, particularly her alleged conviction in Bolivia and instances of mental instability.
- (iii) That the child is currently enrolled in a pre-school in India and is well settled; a direction to repatriate him would disrupt his routine and may cause psychological trauma.
- (iv) That respondent No.8 has had to extend his stay in India due to health issues, and the petitioner has made no sincere attempt to resolve the custody issue amicably.
- (v) That the parties before this Court i.e. the petitioner is a Brazilian with permanent residency of Canada, respondent No.8 is a Canadian citizen with the child (alleged detenu) being a Canadian citizen, the custody of child cannot be gone into by this Court and, therefore, the present writ petition would not be maintainable.

10. SUBMISSIONS ON BEHALF OF RESPONDENT NO.1- UNION OF INDIA:

Learned counsel for respondent No.1-UOI submitted as

follows:

- (i) That while the Government of India has no direct stake in the custody dispute between parties, the Ministry of External Affairs and the Foreigners Regional Registration Office (FRRO) have an obligation to ensure compliance with VISA and immigration norms and uphold the rule of law.
- (ii) It is pointed out that respondent No.8, a Canadian national, is residing in India on a converted VISA, and that the terms of VISA conversion and extension require truthful disclosure of purpose and compliance with Indian laws. If it is found that material facts were suppressed, or that the stay in India is being misused to evade foreign judicial orders, the authorities are empowered to initiate appropriate action under The Foreigners Act, 1946 and related regulations.

11. On a pointed query put to the learned standing counsel for UOI as to whether respondent No.8 at the time of applying for extension/conversion of his VISA had disclosed about the order dated 13.11.2024 passed by the Canadian Court granting sole and final custody of the child (alleged detinue) to the petitioner and designating her as the exclusive decision-making authority, to the authorities, he has categorically replied in the negative and submitted that while applying for VISA conversion, respondent No.8 had only uploaded the copy of the order of the Canadian Court dated 28.09.2021 and had made no mention at all about the subsequent orders dated 02.07.2024 and 13.11.2024 passed by the Canadian Court.

12. On a further query, it was not disputed by UOI that the Indian VISA of the alleged detinue has expired, however, it was submitted that on an application given for VISA conversion of the child (alleged detinue) by respondent No.8, the same was under process at FRRO.

13. **REBUTTAL BY LEARNED COUNSEL FOR THE PETITIONER:**

Learned counsel for the petitioner, while rebutting the submissions made by the counsel for respondent No.8, however, submitted that the entire case of respondent No.8 dwells upon the alleged criminal record of petitioner, particularly to her being charged with drug trafficking in Bolivia. However, as per a report issued by the Departmental Court of Justice of Bolivia annexed as Annexure P-1 in CRM No.266 of 2025, it was categorically stated that the petitioner has no criminal antecedents. Attention was also drawn to Annexure P-2 in CRM No.266 of 2025 issued by the Royal Canadian Mounted Police, which as per the learned counsel, further corroborated the clean antecedents of the present petitioner.

FINDINGS OF THE COURT:

14. I have heard learned counsel for the parties and perused the relevant material on record.

15. By way of the present writ petition, the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India has been invoked by way of a writ of *habeas corpus*, seeking the release and repatriation of a minor child, who is alleged to be illegally and wrongfully retained in India by respondent No.8, the biological father of the child (alleged detinue). The petitioner is the biological mother of the

child (alleged detenué). Notably, both the petitioner and respondent No.8 are foreign nationals, and the child (alleged detenué), a Canadian national. In this backdrop, the following issues arise for consideration:

- (i) Whether the writ of *habeas corpus* is maintainable in the peculiar facts and circumstances of the case;
- (ii) Whether the custody order passed by a competent Canadian Court merits enforcement by an Indian Court;
- (iii) Whether the conduct of respondent No.8, who *prima facie* appears to be defying the authority of Canadian Courts, warrants judicial intervention in India;
- (iv) Whether the petitioner should be relegated to seek redress before Courts in Canada, the country of origin and habitual residence of the child (alleged detenué).

16. A writ of *habeas corpus* is a prerogative writ. It is a well settled principle of law that the writ of *habeas corpus* is an efficacious remedy available to secure the release of a person, who is unlawfully or illegally detained. In the context of child custody, however, the Hon'ble Supreme Court has time and again emphasised that the determinative factor is not the mere legal entitlement of one parent over the other but rather the paramount consideration is of the welfare and best interest of the child. This position has been reaffirmed by Hon'ble the Supreme Court in *Nithya Anand Raghavan Versus State of NCT of Delhi 2017 (7) SCR 281*, wherein the Hon'ble Apex Court cautioned against the mechanical enforcement of foreign custody orders in India without first

evaluating whether compliance with such an order would truly serve the welfare of the child.

17. In the present case, it is undisputed that respondent No.8 was permitted by a Canadian Court to travel to India for a brief period of 2 to 3 weeks, along with the alleged detainee, subject to an undertaking and specific conditions. However, the subsequent sequence of events reveals that respondent No.8 failed to return to Canada as required and appears to have deliberately overstayed in India in breach of the undertaking given to the Canadian Court. He not only disobeyed the said directions of the Canadian Court but also obtained extension of his VISA from the Indian Government, while suppressing material facts, particularly the subsequent order dated 13.11.2024, passed by the competent Canadian Court, granting sole and final custody of the alleged detainee to the petitioner and designating her as the exclusive decision-making authority. The factum of withholding this crucial order of the Canadian Court has been admitted by the Union of India before this Court and even in the reply filed by the Union of India, a mention is only given of the first order dated 28.09.2021, whereby the alleged detainee was ordered to remain in custody of respondent No.8. However, order dated 02.07.2024, whereby respondent No.8 along with his minor son (alleged detainee) were granted permission to travel to India for 2 to 3 weeks has been withheld.

18. It also emerges from the record, and as has also been conceded by the learned counsel appearing for Union of India that while respondent No.8 has been granted VISA extension by the Government of India till 15.01.2026, the Indian VISA of the alleged detainee, who is a Canadian national, has admittedly expired. Therefore, the continued

stay of the alleged detinue in India is unauthorized. In this backdrop, permitting respondent No.8 to retain the custody of the child (alleged detinue), despite an unequivocal foreign custody order to the contrary, would be antithetical not only to the legal rights of the petitioner but also to the rule of law, international comity, and, above all, the welfare of the child.

19. The Hon'ble Supreme Court in *Shilpa Aggarwal Versus Aviral Mittal 2010 (1) SCC 591* held that where a child is wrongfully removed from the country of habitual residence in defiance of a Court order, Indian Courts should ordinarily facilitate the return of the child to that jurisdiction. Similarly, in *V. Ravi Chandran (Dr.) Versus Union of India and others 2010 (1) SCC 174*, Hon'ble the Supreme Court underscored the importance of respecting the jurisdiction of foreign Courts and not allowing India to become a haven for litigants attempting to escape lawful orders passed abroad.

20. The *prima facie* conduct of respondent No.8 in suppressing critical facts while seeking to prolong his stay in India, retaining the child (alleged detinue) in defiance of the directives issued by the Canadian Court, and now facing allegations of parental abduction in Canada, clearly points to an attempt to evade legal accountability. The approach of respondent No.8 is not only lacking in *bona fides* but also indicative of an effort to manipulate jurisdiction by creating fortuitous circumstances, which cannot be permitted or condoned by Indian Courts. It needs to be stated with emphasis that the jurisdiction of Indian Courts cannot be attracted by the deliberate creation of artificial facts or flouting foreign judicial orders. It also needs to be pointed out that respondent No.8 has instituted proceedings before the Principal Judge,

Family Court, Kharar, District Mohali, seeking permanent custody of the child (alleged detinue), clearly reflecting his unwillingness to return to Canada. Such conduct unmistakably suggests an attempt at forum shopping on the part of respondent No.8.

21. Although it has been vehemently argued by the learned counsel for respondent No.8 that the present dispute is essentially a custody battle of alleged detinue and does not give rise to a cause of illegal detention, this Court is unable to accept such a proposition in the present context. The retention of the alleged detinue in India, in violation of lawful orders passed by the Court of competent jurisdiction in the alleged detinue's country of habitual residence, coupled with the expiry of his Indian VISA, renders such custody *prima facie* illegal. It is not open to a parent to disobey Court orders, refuse to return the child as per undertaking, and then seek to characterize the resultant custody as lawful under Indian law.

22. In *habeas corpus* proceedings involving custody of a minor, it is imperative to strike a balance between the principle of comity of nations and the paramount consideration of the welfare of the child. While international comity must be respected, the decisive factor must always be the best interest of the child. In the present case, it is undisputed that the alleged detinue is a Canadian national, and therefore, his welfare must be assessed in that context.

23. This Court had the occasion to observe the alleged detinue during the course of proceedings on a number of dates. The alleged detinue appeared to be comfortable in the presence of his biological mother i.e. the petitioner, and their interaction, as per the observations of this Court, came across as being natural, affectionate and reassuring.

There were no visible signs of distress, alienation or apprehension that could have warranted this Court to doubt the safety of the child or his emotional well-being in the custody of the petitioner. Further, pertinently the Canadian Court has not only vested the petitioner with final custody but has also declared the primary place of residence of the child (alleged detainee) to be in Toronto, Canada.

24. It cannot be overemphasized that even if the father is of impeccable character and fully capable of caring for the child, and even if the mother has been separated from him without justification, the welfare of the child may still demand that custody remain with the mother. Especially in cases where the child is of tender age or in fragile health, a mother's care-driven by instinct and deep emotional bonds- cannot be equaled by any substitute, however well intentioned or well compensated.

25. In view of the totality of the circumstances, this Court is of the considered view that the continued retention of the minor child (alleged detainee) by respondent No.8 is unjustified, contrary to the orders of a competent foreign Court, violative of the principles of comity of Courts, and not conducive to the welfare of the child. Indian Courts, while exercising the jurisdiction of *parens patriae*, must be guided by considerations of fairness, equity, and international legal harmony, and must not allow their forum to be used to frustrate valid foreign judicial orders.

26. Before parting, it must be unequivocally observed that Indian Courts cannot be reduced to instruments of convenience for litigating foreign nationals seeking to sidestep judicial proceedings in their own jurisdictions. The constitutional writ jurisdiction of the Indian

Courts is neither designed nor intended to be misused in this manner.

27. Accordingly, and for all the reasons stated above, this Court holds that the continued custody of the child (alleged detinue) by respondent No.8 is unsustainable in law. The alleged detinue, being a Canadian national, whose Indian VISA has expired, and whose lawful and final custody rests with the petitioner pursuant to the order passed by the Canadian Court dated 13.11.2024, ought to be repatriated to Canada in the custody of the petitioner.

28. Ordered accordingly.

29. Since the petition has been decided, pending applications stand disposed of.

April 22nd, 2025
Puneet

(MANJARI NEHRU KAUL)
JUDGE

Whether speaking/reasoned : Yes

Whether reportable : Yes