

Kalpataru Towers, Off Akurli Road,
Kandivali (E), Mumbai – 400 101.
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.... Respondent No.2

Ms.Swapana P. Kode i/b Ms. Tripti R. Shetty for
petitioner/applicant.

Mr. J.P. Yagnik, APP for respondent No.1-State.

Mr. Hrishikesh Mundargi i/b Mr. Subir Sarkar for respondent No.2.

CORAM : S. S. SHINDE &

N.J. JAMADAR, JJ.

Reserved for Judgment on : 26th August 2021.

Judgment Pronounced on : 30th September 2021.

JUDGMENT : (PER N.J. JAMADAR, J.)

1. Rule. Rule made returnable forthwith and, with the consent of the learned counsels for the parties, heard finally.

2. This petition under Article 226 of the Constitution of India is filed for a writ of habeas corpus to produce Master R, son of the petitioner, who has been allegedly illegally kept away from the petitioner by respondent No.2-the wife of the petitioner; and immediate transfer of the custody of Master R to the petitioner.

3. The petition arises in the backdrop of the following facts :

(a) The petitioner is an actor. Respondent No.2 is also an actress. The marriage between the petitioner

and respondent No.2 was solemnized on 13th July 2013. Respondent No.2 has a daughter by her quondam husband. Master R was born to respondent No.2 by the petitioner on 27th November 2016. Respondent No.2 resides at 211, 'A' Wing, Kalpataru Towers, Kandivali (East), Mumbai, which the petitioner claimed to have shared with respondent No.2 as a matrimonial home. The petitioner's mother has a flat in 'B' Wing of the same complex. The petitioner now resides in the said flat of his mother.

(b) The petitioner alleges that the respondent No.2 designedly separated Master R from the petitioner by forcing him out of the respondent No.2's house for three months over a matrimonial dispute. Respondent No.2 allegedly made an effort to take Master R out of the country clandestinely by forging travel documents.

(c) Since respondent No.2, according to the petitioner, is extremely busy with her professional commitments, respondent No.2 has not been able to devote any time for the parenting and development of

Master R. In contrast, the petitioner decided, in the year 2019, not to accept any professional commitment and devote his entire time, effort and attention to bring-up Master R. With the escalation of marital discord, respondent No.2 allegedly prevented the petitioner from meeting Master R, jeopardizing the willingness and happiness of Master R. When the petitioner made efforts to meet Master R, respondent No.2 retaliated by lodging false and motivated reports against the petitioner with the police.

(d) Respondent No.2 has been guilty of persistent neglect of the parental and developmental needs of Master R. Often Master R was left with the maids, to be taken care of by them.

(e) In the wake of the Pandemic, respondent No.2 and Master R got infected with Covid-19 virus. The respondent No.2 sent Master R to the house of the petitioner. The petitioner and his mother took care of Master R and nursed him to good health. Master R developed an extremely thick bond with the petitioner. Master R refused to leave the house of the

petitioner and accompany respondent No.2. After making disingenuous efforts, respondent No.2 took away Master R surreptitiously.

(f) The petitioner alleges that since 25th October 2020, respondent No.2 absconded with Master R. The petitioner made frantic efforts to locate respondent No.2 and Master R. Since 12th November 2020, Master R has been missing from the house of respondent No.2. He had no knowledge of the whereabouts of Master R. The petitioner made several attempts to contact respondent No.2. The petitioner also made several complaints to police and other authorities. Those attempts did not yield any result. Hence, the petitioner was constrained to invoke the writ jurisdiction of this Court.

(g) The petitioner has also sought immediate transfer of the custody of Master R to him from respondent No.2. In the circumstances of the case, according to the petitioner, the welfare of the child would be better served by immediate transfer of the custody of the child.

4. Pursuant to the notice issued by this Court, respondent No.2 appeared before the Court on 5th January 2021. She volunteered to allow the access of the child to the petitioner through video conferencing for minimum 30 minutes from 6:00 p.m. to 6:30 p.m. everyday.

5. An affidavit in reply is filed by respondent No.2. At the outset, the tenability of the petition for writ of habeas corpus is assailed. The petitioner has allegedly made several blatantly false, obnoxious and defamatory statements against respondent No.2. Referring to her credentials as a professional actress, the respondent No.2 asserts that she continues to perform her professional duties in order to support herself and her children and parents. The allegations of making deliberate attempts to separate the child from the petitioner are denied. Myriad counter allegations have been made against the petitioner, ranging from misbehaviour with the daughter of respondent No.2 to substance abuse. Reference is made to various reports lodged against the petitioner. Those complaints and reports, according to respondent No.2, indicate that the petitioner has proven himself to be a threat to her, her family members and Master R, in particular.

6. Respondent No.2 contends that Master R is perfectly safe and

happy with her. Any contact with the petitioner is likely to be detrimental to the growth and well-being of Master R. The writ petition thus being devoid of any merit and the prayers made therein being not sustainable in law, respondent No.2 has prayed for dismissal of the petition.

7. An affidavit in rejoinder is filed by the petitioner.

8. During the pendency of the petition, the petitioner took out an application, being Interim Application No.1474 of 2021 to hand over the custody of Master R as the respondent No.2 had gone abroad purportedly for a professional commitment.

9. In the backdrop of the aforesaid pleadings, we have heard Ms. Swapana Kode, the learned counsel for the petitioner and Mr.Hrishikesh Mundargi, the learned counsel for respondent No.2, at length. With the assistance of the learned counsels of the parties, we have perused the material on record, including the documents and notes of arguments tendered on behalf of the petitioner and respondent No.2.

10. At the threshold, Mr. Mundargi, the learned counsel for respondent No.2 took exception to the tenability of the petition once Master R was produced before this Court, albeit through video conference.

11. Mr. Mundargi would urge that writ of habeas corpus is maintainable only when it is established that the detention of a minor child by a parent was illegal and sans any authority in law. In the case at hand, indisputably, Master R is in the custody of respondent No.2, who is entitled to have the custody of Master R, a child below five years of age, under governing statutory regime. There is no material to demonstrate that the custody of Master R with respondent No.2 is illegal or unlawful in any manner whatsoever. Thus, the petition does not deserve to be entertained any more, canvassed Mr. Mundargi.

12. In order to buttress the aforesaid submission, Mr. Mundargi placed a very strong reliance on the judgment of the Supreme Court in the case of *Tejaswini Gaud and Others Vs. Shekhar Jagdish Prasad Tewari and Others*¹, wherein in the backdrop of the order passed by this Court to transfer the custody of the minor child from the relations of the mother of the child to the father, the Supreme Court considered the justifiability of the exercise of writ jurisdiction by the High Court to transfer the custody of a minor child and, in the process, expounded the legal position as under :

“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

1 (2019) 7 SCC 42

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.*

(emphasis supplied)

13. Ms. Swapana Kode, the learned counsel for the petitioner joined the issue by forcefully submitting that the legal position has now crystallized to the effect that the High Court, while considering

the petition for writ of habeas corpus concerning a minor child, is empowered to direct return of the child or decline to change the custody of the child, as the case may be.

14. To bolster up this submission, Ms.Kode, invited the attention of the Court to the judgments of the Supreme Court in the cases of *Gohar Begam Vs. Suggi alias Nazma Begam & Ors.* ², *Dr.(Mrs.) Veena Kapoor Vs. Varinder Kumar Kapoor* ³ and *Yashita Sahu Vs. State of Rajasthan & Ors.*⁴

15. In the case of *Dr.(Mrs.) Veena Kapoor* (Supra), where the High Court had dismissed the petition of the petitioner therein for a writ of habeas corpus concerning a child, who was alleged to be in the illegal custody of respondent-her estranged husband, the Supreme Court observed as under :

“2 It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal.”

16. In the case of *Yashita Sahu* (Supra), the Supreme Court considered the previous pronouncements on the maintainability of writ of habeas corpus and ruled in favour of maintainability in

2 1960 AIR 93

3 (1981) 3 SCC 92

4 (2020) 3 SCC 67

emphatic terms, as under :

“10 It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw vs. Arvand M. Dinshaw & Ors.¹, Nithya Anand Raghavan vs. State (NCT of Delhi) & Anr. ² and Lahari Sakhamuri vs. Sobhan Kodali³ among others. In all these cases the writ petitions were entertained. Therefore, we reject the contention of the appellantwife that the writ petition before the High Court of Rajasthan was not maintainable.”

(emphasis supplied)

17. A useful reference, in this context, can also be made to the judgment of the Supreme Court in the case of **Sayed Saleemuddin Vs. Dr. Rukhsana and Others** ⁵. After referring to the pronouncement in the case of **Gohar Begam** (Supra), the Supreme Court enunciated the legal position as under :

“10 This Court in the case of Gohar Begam v. Suggi Alias Nazma Begam and others (1960(1) SCR 597) dealt with a petition for writ of Habeas Corpus for recovery of a illegitimate female infant of an unmarried Sunni Muslim mother, took note of the position under the Mohammedan Law that the mother of an illegitimate female infant is entitled to its custody and the refusal to restore such a child to the custody of its mother would result in an illegal detention of the child within the meaning of Section 491 of the Criminal Procedure Code. This Court held that the dispute as to the paternity of the child is irrelevant for the purpose of the application and the Supreme Court will interfere with the discretionary powers of the High Court if the discretion was not judicially exercised. This Court further held that in issuing writs of Habeas Corpus the Court have power

5 (2001) 5 SCC 247

in the case of an infant to direct its custody to be placed with a certain person.

11 From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children.

(emphasis supplied)

18. In the backdrop of the aforesaid enunciation of the legal position, in our view, the remit of the writ of habeas corpus, in a matter where the custody of a child is sought from one parent by another, cannot be constricted to the question of legality of the custody alone. It is not an immutable rule of law that writ of habeas corpus, at the instance of one parent, is not maintainable if the child is in the custody of another parent, unless the custody is

strictly illegal or unlawful.

19. Undoubtedly, the Court has to ascertain whether the custody of the child, in the circumstances of the given case, can be said to be unlawful or illegal. However, the matter does not rest at that point. The writ of habeas corpus can very well be pressed into service for granting the custody of a child to a spouse if the welfare of the child so dictates. We are, thus, not persuaded to accede to the submission on behalf of the respondent No.2 that the moment, Master R was produced before this Court, through video conference, the instant petition served its purpose.

20. This propels us to the pivotal question as to whether, in the facts of the instant case, this Court would be justified in delving into the aspect of the proper custody of the child keeping in view the welfare of the child. It is well neigh settled that in determining the question as to who should be given custody of a minor child, the paramount consideration is the welfare of the minor and not the legal rights of the parents, statutory or customary.

21. Ms. Kode made an earnest endeavour to draw home the point that various acts of commission and omission, attributed to respondent No.2, as evidenced by the material on record, unmistakably indicate that respondent No.2 is not in a position to

attend to the parental and developmental needs of Master R. Inviting the attention of the Court to the alleged transcripts of the conversation exchanged between the petitioner and respondent No.2 and the contemporaneous material, Ms. Kode would submit that respondent No.2 has neither the time nor the will to genuinely ensure the welfare of Master R. In contrast, the petitioner has forsaken all the professional commitments and is willing to devote his entire time and resources for the upbringing of Master R. In the circumstances, according to Ms. Kode, the welfare of Master R can only be sub-served by the change in custody. To lend support to this submission, Ms. Kode placed a strong reliance on the judgment of the Supreme Court in the case of *Gaurav Nagpal Vs. Sumedha Nagpal*⁶.

22. Per contra, Mr. Mundargi, the learned counsel for respondent No.2 stoutly submitted that the issues sought to be raised by the petitioner, in the instant petition, and allegedly reflecting upon the suitability of respondent No.2 to continue to have the custody of Master R, are all rooted in facts. In exercise of writ jurisdiction, this Court would not be justified in adjudicating disputed questions of facts. According to Mr. Mundargi, there is not a shred of material to show that respondent No.2 had not properly attended to the needs

⁶ (2008)

and requirements of Master R. On the contrary, at this tender age, only the custody of the mother can be said to be the proper custody. In any event, on the basis of mere allegations and counter-allegations, and sans any evidence/material in support thereof, the question as to whether the welfare of Master R can be met by transfer of the custody, cannot be legitimately determined, submitted Mr. Mundargi.

23. Mr. Mundargi would further urge that apart from the instant petition, no other proceeding is subjudice between the petitioner and respondent No.2. Thus, this Court ought not entertain the petition as a Court of first instance would do. The proper remedy for the petitioner is to agitate the grievances before the jurisdictional family/civil court, canvassed Mr. Mundargi.

24. We have given our anxious consideration to the rival submissions canvassed across the bar. To start with, from the material on record it appears that, on account marital discord, the petitioner and respondent No.2 have developed strong animosity towards each other. Indisputably, the petitioner and respondent No.2 are residing in the same residential complex, *albeit* in different buildings. This proximity, it seems, has on the one hand, provided opportunities to the parties to keep a tab on the activities

of the other, and, on the other hand, it had led to many acrimonious episodes leading to police reports. It is incontrovertible that Master R has been residing with respondent No.2, barring the period in which he was suffering from Covid-19. Moreover, Master R has yet not completed five years of age.

25. In the light of aforesaid facts, two factors assume significance. One, is there material which warrants the exercise of extraordinary writ jurisdiction to order change in custody on the touchstone of the paramountcy of the welfare of Master R. Two, are there exceptional circumstances to depart from “tender years rules”. We propose to consider these issues broadly, without delving deep into the thickets of facts.

26. The parameters for determination of the proper custody for a minor, when the parents are at loggerheads, are well recognized. The legal rights of the parents yield to the paramountcy of the welfare of the child. “Welfare”, in turn, is a term of wide connotation. It is not restricted to physical comfort and well being. It comprises emotional, intellectual and overall holistic development of the child.

27. A profitable reference in this context can be made to the judgment in the case of *Gaurav Nagpal* (Supra) wherein, after

adverting to the relevant statutory provisions and governing precedents, the Supreme Court articulated the factors, which weigh in, in determining the question of custody of a minor child. The observations of the Supreme Court in paragraphs 40, 42 and 43 are instructive and thus extracted below :

“40. Merely because there is no defect in his personal care and his attachment for his children--which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

.....

42 When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

43. The word `welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest

sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.”

28. A useful reference, can also be made to the judgment of the Supreme Court in the case of *Nil Ratan Kundu & Anr, vs Abhijit Kundu*⁷, wherein the consideration for determination of the proper custody of a minor child were succinctly postulated, by the Supreme Court, as under :

“.....In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.”

29. The aforesaid pronouncements thus exposit that the welfare of the minor is a broad and elastic term. The approach of the Court in ascertaining and determining the welfare of the minor ought to be well informed and pragmatic. The Court is called upon to exercise *parens patriae* jurisdiction. Every factor which bears upon the development of the child, must enter into the decision of the

⁷ AIR 2009 (Supplementary) 732

Court. The Court is called upon to deal with a human problem with a humane touch.

30. As regards the “tender years rule”, it is necessary to note that it finds statutory recognition under section 6 of the Hindu Minority and Guardianship Act, 1956, which provides that in the case of a boy or an unmarried girl, the father, and after him, the mother shall be the natural guardian; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

31. The aforesaid statutory prescription is based on societal wisdom and hard realities of life. At such tender age, a child needs the company of mother. Ordinarily, the amount of love, affection, care and protection which a mother can provide to a child of such tender age, cannot be expected to be provided by the father or any other person. This does not necessarily reflect upon the unsuitability of the father and other relations. However, in the circumstances, which are usually associated with a child of a tender age, the custody of the mother appears more natural and conducive for the development of the child.

32. Reverting to the facts of the instant case, in the backdrop of the aforesaid principle of paramountcy of welfare and “tender years

rule”, it is imperative to note that having regard to the age of Master R, the tender years rules, which has statutory recognition, gets attracted and, thus, cannot be brushed aside lightly in evaluating the “welfare principle”.

33. At this juncture, the allegations of neglect and lack of care, attributed to respondent No.2, are in the realm of the disputed questions of facts. There is an equal body of counter-allegations, at the instance of respondent No.2, against the petitioner. It is trite that in the wake of marital discord, the allegations and counter-allegations fly thick and fast. In our view, the allegations against respondent No.2, which reflect upon the justifiability of the continued custody of Master R with respondent No.2, are essentially rooted in facts, and thus, warrant adjudication.

34. It is imperative to note that the edifice of these allegations is sought to be built upon the premise that respondent No.2, being an extremely busy actress, is not in a position to devote time and efforts for sound upbringing of Master R. Conversely, the petitioner has decided not to undertake any professional commitment. In our view, the issue of welfare of the minor cannot be determined on the sole parameter of the work commitment of one parent and availability of ample time with another.

35. The fact that respondent No.2 is a busy actress, cannot be construed to unfavourably judge her suitability to have the custody of Master R. In our view, the issue of work commitments of respondent No.2 putting hindrances in overall development of Master R, being again a question of fact, warrants adjudication. We are, therefore, not persuaded to accede to the submission on behalf of the petitioner on the said count.

36. In the light of the material on record, we are of the view that there are no exceptional circumstances which would warrant a departure from “tender years rule”. Nor there is such material which *prima-facie* indicates that the custody with respondent No.2 is detrimental to the welfare and development of Master R. We are, therefore, not inclined to direct the change in custody, in exercise of extraordinary writ jurisdiction.

37. The petitioner is, however, at liberty to institute appropriate proceedings before the jurisdictional forum for grant of custody of Master R, including interim custody or custody for specified period.

38. Undoubtedly, Master R needs love, affection, care and protection of both, the petitioner and respondent No.2. Love and affection of both the parents is considered to be the basic human right of a child. Thus, the element of the access of the child to a

non-custodial parent assumes critical salience. The Courts often ensure that even if custody is given to one parent, non-custodial parent has adequate visitation rights. In the case at hand, both the parents reside in the same residential complex. Thus, in addition to contact rights, through video conferencing, pursuant to the order of this Court, dated 5th January 2021, in our view, for the development of Master R, it would be necessary to allow the physical access to the petitioner to Master R, at least twice a week.

39. We are, thus, inclined to dispose of the petition with the direction for daily access, through video conference for half an hour and physical access twice a week of Master R to the petitioner.

40. We propose to make the arrangements for physical and virtual access to the petitioner till appropriate orders are passed by the competent courts in the proceedings, which may be instituted by the parties, in the event the marital discord is not amicably resolved sooner.

41. We clarify that the aforesaid observations have been made for the purpose of determining the justifiability of the exercise of writ jurisdiction and this Court may not be construed to have expressed an opinion and/or determined the issue of custody of Master R, finally. In the event, either of the party institutes a proceedings and

the question of custody of Master R arises in those proceedings, the competent court shall decide the same in accordance with law, without being influenced by any of the observations made hereinabove.

42. Before parting, we hope and trust that the petitioner and respondent No.2, who claim to be adept at playing characters, in reel life, act in the best interest of Master R, in real life.

43. Hence, the following order :

O R D E R

The petition stands dismissed, subject to the following directions :

(i) The petitioner is entitled to have access to Master R, through video conferencing for minimum 30 minutes from 6:00 p.m. to 6:30 p.m. on weekdays, subject to convenience and comfort of Master R.

(ii) The petitioner shall have physical access to Master R every week, on Saturday and Sunday, for two hours, ordinarily in the precincts of the residential complex, Kalpataru Towers, Kandivali (East).

(iii) The petitioner and respondent No.2 are at liberty to work out the modalities of physical access as regards the

day, time and place in such a way that the petitioner has physical access for two hours twice a week.

(iv) The aforesaid directions shall continue to operate till appropriate orders are passed by the jurisdictional courts.

Rule stands discharged, subject to aforesaid directions.

In view of disposal of writ petition, Interim Application No. 1474 of 2021 also stands disposed of.

[N.J. JAMADAR, J.]

[S.S. SHINDE, J.]