

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CRIMINAL APPLICATION NO. 12669 of 2021**

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PANCHAL ZALAKBEN HARDIKBHAI D/O SANJAYBHAI BHAGUBHAI  
PANCHAL  
Versus  
STATE OF GUJARAT

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## Appearance:

MR GAJENDRA P BAGHEL(2968) for the Applicant(s) No. 1  
for the Respondent(s) No. 2,3

MR VASANT R BAROT(5746) for the Respondent(s) No. 4

MS JIRGA JHAVERI, ADDL.PUBLIC PROSECUTOR for the Respondent(s)  
No. 1

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**CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI**  
and  
**HONOURABLE MRS. JUSTICE MAUNA M. BHATT**

Date : 06/05/2022

**ORAL ORDER**  
**(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)**

1. This petition is preferred under Article 226 of the Constitution of India seeking custody of the son of the petitioner born out of the wedlock, which had been tied with the respondent No.26.12.2015 at Nadiad in a group marriage. The child was born on 07.07.2017 and is presently aged 04 years. The marriage ran into the rough weather firstly because according to the petitioner, she was not made aware of the first marriage of respondent No.4-husband and thereafter,

certain allegations are made with regard to the physical and mental cruelty. This Court would choose not to go into the same, the fact remains that this had led to the wife separating from the husband and on 15.04.2021, she left her matrimonial home and started residing with her parents at Ahmedabad with her son.

1.1 It is alleged that on 03.11.2021 the respondent No.4 approached at her parental home and under the pretext of buying the crackers to the corpus, he had taken him away. She was never permitted to meet him and her repeated requests have fallen on deaf-ears. She, therefore, approached this Court with the following prayers:

"7...

(A) *YOUR LORDSHIPS be pleased to issue appropriate writ of habeas corpus or any other appropriate writ, order or directions against the respondent nos.2 to 3 for producing the son of the petitioner forthwith before this Hon'ble Court and hand over the custody of petitioner to the petitioner or be pleased to pass any other appropriate order, in the interest of justice;*

(B) *YOUR LORDSHIPS be pleased to direct the respondent no.2 to 3 to produce the corpus viz. Petitioner's son before this Hon'ble Court, pending the admission, hearing and final disposal of this petition, in the interest of justice;*

(C) *YOUR LORDSHIPS be pleased to grant such other and further relief(s), as are deemed fit, in the interest of justice."*

2. The petitioner approached the Nikol Police Station by way of a complaint giving all these details and lastly ventilating her grievance of non-return of her son. She has also urged that there was an abrupt dealing with her request of returning her son.

3. On 23.12.2021, this Court issued the notice, making it returnable on 13.01.2022. On the returnable date, the corpus remained present with the father through the video conference from the office of the learned advocate, Mr.Vasant Barot. Noticing the young age of the child and also the young age of the couple, we had requested the learned advocate on both the

sides to meet at the office of one of the advocates and workout amicable settlement.

4. On 31.01.2022, this Court had received the report from the Full Time Secretary, DLSA, Ahmedabad Rural that the process of mediation was on. However, on 17.02.2022, the Court recorded that the mediation could not become successful.

5. This Court also spoke to both the spouses and also met the child in presence of the parents and without their presence as well. We directed the mother to meet the child on Saturday and Sunday till the Court decides on the aspect of custody. She was also permitted to stay with her husband and in-laws as they were welcoming her as conveyed to this Court. Eventually, the arrangement was made for the mother to meet at Bayad Taluka Legal Services Authority and lastly before this Court decides the custody of child it was found appropriate to appoint learned advocate,

Mr.Ekant Ahuja as an *amicus curiae*.

5.1 He was requested also to meet the spouses and also explore the possibility of amicable settlement, we appreciate that within a short time he not only has undertaken that task, but also has assisted the Court where he prepared the details of the respective stands of the parties and the legal provisions concerning the custody.

6. Learned advocate, Mr.Gajendra Baghel appearing for the petitioner and the learned advocate, Mr.Vasant Barot appearing for the private respondents have also been heard at length.

7. We could notice that the petitioner has studied upto the 10<sup>th</sup> standard and the husband has done BBA. He is an agriculturist with 12 wighas of land. He has mother and sisters, both the sisters are married and one of them is a teacher. The father of the petitioner is carpenter and mother is housewife. She has other

siblings and she herself has some sundry work.

8. According to the *amicus curiae*, the disputes between the parties also are not such which cannot be mandated, however, the wife is very clear that she does not want to start the matrimonial life once again. Initial issue was of the place as she wanted to move to Ahmedabad whereas the husband is staying in a small town and she is made it extremely clear that reunion is not feasible.

9. There appears to be a clear dispute between the spouses on account of their personal belief systems, their mind sets and the past baggages which are not allowing them to look forward to their future. In this circumstance, the question arises of entertaining this petition under Article 226 of the Constitution of India.

9.1 We would like to quote at this stage the findings and observations in case of ***Yashita Sahu vs. State of Rajasthan***, reported in **2020 AIJEL-SC 65636**.

*“17. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then*

*technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.*

*18. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.*

*19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every*

*separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.*

*20. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts*



*must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.”*

10. We have also noticed Section 6 of Hindu Minorities and Guardians Act, 1956 which speaks of the custody to be ordinarily with the mother till the child is below 05 years. For ready reference, Section 6 (a) of the Hindu Minorities and Guardians Act, 1956 provides thus:

*“6(a). In the case of a boy or an unmarried girl-the father, and after him, the mother:provided that the custody of a mior who has not completed the age of five years shall ordinarily be with the mother.”*

This provision since speaks of the custody of a minor not having completed the age of five years to be ordinarily with the mother. Here, the minor is of four years whose physical custody should ordinarily remain with her. As rightly pointed out by the learned *amicus curiae* that the father and mother are both the natural

guardians and in case of ***Githa Hariharan (Ms) and another vs. Reserve Bank of India and another***, reported in **1999 2 SCC 228** while considering the aspect of custody between the two natural guardians, the Apex Court had preferred the mother by virtue of the proviso to Section 6(a) of the Hindu Minorities and Guardians Act, 1956 in case of a child below five years.

11. The paramount consideration over the period of time which has emerged before the Court of law is of welfare and the best interest of the child. In case of ***Tejaswini Gaud and others vs.***

***Shekhar Jagdish Prasad Tweari and other***, reported in **(2019) 7 SCC 42** the Apex Court has held that owing to the facts and circumstances of each case, the welfare of the child needs to be determined and the Court is not expected to take a pedantic approach.

*“50. 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 10 Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42 on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mausami Moitra Ganguli case (2008) 7 SCC 673, the court has to give 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.*

*51. 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."*

12. Reference is made of Section 7 of the Guardianship Act where the Court has power to make order as to guardianship and Section 17 are the consideration to be weighed with the Court in appointing the guardians. Reference is also made made of Section 26 of the Hindu Marriage Act, 1955 which authorizes the Court to pass interim orders in any of the proceedings under the Act with respect to custody, maintenance and education of minor children.

12.1 This Court presently is not concerned with these provisions. Suffice to note that, it is largely concerned with interim custody and the paramount consideration shall be the interest of the child even the Hindu Minorities and Guardians Act, 1956, the personal laws of the spouses will require the custody of the minor, who has not completed the age of five years to be

ordinarily with the mother unless of course there is something drastic which is pointed out which would not be necessitating giving of the custody to the mother.

12.2 Again, as held in various decisions by the Apex Court including in case of **Yashita Sahu (supra)** this arrangement which is made by this Court under Article 226 of the Constitution of the India shall be subject to the proceedings that may be initiated by either side for the custody of the child exercising their statutory rights.

13. Accordingly, we allow this petition giving the custody of child to the mother. Let the same be handed-over peacefully to the mother in presence of the learned *amicus curiae*, if need be so learned APP shall ensure the presence of the Woman Constable so that there is no unnecessary dispute in this relation. As the father would have visitation right, as was happening in case of the mother he would have the right accordingly, on 01<sup>st</sup> and the 03<sup>rd</sup> Saturday the child shall be taken to the office of Office of District Legal Services Authority for visitation from 11:00a.m. to 03:00p.m on Sunday and 02<sup>nd</sup> and 04<sup>th</sup> Saturday he will be permitted to visit residence of the petitioner. He will be also permitted to take the child out with him for having exclusive custody of his for few hours, however, any breach on his part of returning of the child will enter serious consequences till the competent court changes this order.

14. We appreciate the role played by learned advocate, Mr.Ekant Ahuja as *amicus curiae*.

15. After the judgement was pronounced, respondent-father of the child tried to create unruly atmosphere in the Court premise leading to unmanageable situation for Campus Administration. His intimidating behaviour make us suspend the visitation rights for six months from today. Let welfare officer also visit on continuous basis.

(SONIA GOKANI, J)

(MAUNA M. BHATT,J)

M.M.MIRZA

