

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CRIMINAL APPLICATION NO. 6708 of 2021****With****CRIMINAL MISC.APPLICATION (FOR JOINING PARTY) NO. 1 of 2021****In****R/SPECIAL CRIMINAL APPLICATION NO. 6708 of 2021****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS. JUSTICE SONIA GOKANI****and****HONOURABLE MRS. JUSTICE MAUNA M. BHATT**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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**SWAMINATHAN KUNCHU ACHARYA**

**Versus****STATE OF GUJARAT**

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**Appearance:**

**MR. KULDEEP D VAIDYA(7045) for the Applicant(s) No. 1****for the Respondent(s) No. 2,5,6,7****MR ZUBIN BHARDA****for MR K I KAZI(5030) for the Respondent(s) No. 3,4****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 : 02/05/2022

CAV JUDGMENT

(PER : HONOURABLE MRS. JUSTICE MAUNA M. BHATT)

1. Rule returnable forthwith, Learned APP waives service of rule on behalf of Respondent-State and Learned Advocate Mr. K.I. Kazi waives service of rule on behalf of private Respondent Nos. 4 and 6.

2. This petition under Article 226 of Constitution of India is filed seeking writ of habeas Corpus or writ in the nature of habeas Corpus for production of Corpus-Pranav Rajesh Acharya, aged 5 years (Date of Birth: 14.06.2016).

3. **Factual Aspect:**

3.1. Petitioner herein is the parental grandfather of the Corpus, Respondent No. 3 is the maternal uncle, Respondent No. 4 is the maternal aunt, Respondent No. 5 is the Corpus and Respondent No. 6 is the maternal grandfather.

3.2 Mother of Corpus, Rakhi Suryavanshi and father of Corpus, Rajesh Acharya got married in the year 2011. We have been given to understand that it was a love marriage. After marriage, both were working and residing in Ahmedabad. The certificate of marriage dated 28.01.2011 is on record. Out of

the wedlock, Corpus-Pranav Acharya was born on 14.06.2016. The Corpus and his parents were staying happily. Unfortunately, during the 2<sup>nd</sup> wave of COVID-19 in Gujarat, both father and mother of the Corpus contacted COVID-19 infection and succumbed to the same. Father of the Corpus namely, Rajesh Archarya expired on 13.05.2021 and mother of the Corpus namely, Rakhi Archarya expired on 12.06.2021. While the parents of the Corpus were infected with COVID-19, the custody of minor Corpus was with Respondent No. 4, who is the maternal aunt.

3.3 It is alleged in the petition that ever since then, Respondent No. 4 is not allowing the Petitioner to enter the house of his son and daughter in law and to take belongings of Corpus as also his deceased son and daughter in law.

3.4 On the above factual background, the present petition is filed by the Petitioner (paternal grandfather) seeking custody of minor Corpus Pranav Archarya. Upon notice being issued, the Respondents Nos. 4 and 6 appeared through their advocates and filed their respective affidavits.

3.5 We have heard Learned Advocate Mr. Kuldeep Vaidya for the Petitioner, Learned Advocate Mr. Zubin Bharda with Learned Advocate Mr. K.I. Kazi for the Respondent Nos. 4 and 6 and Learned APP Ms. Jirga Jhaveri for Respondent-State.

#### **4. Submissions on behalf of the Petitioner:**

4.1 It is the case of the Petitioner that he is a retired Central Government employee and stays in Ahmedabad with his wife at the address given in the petition. It is his case that though his son and daughter-in-law were staying separately in Ahmedabad, since they both were working, the Corpus was looked after by the Petitioner and his wife. This is the reason why the Corpus is very attached to the Petitioner and his wife. It is contended that as he and his wife had also contacted with COVID-19 infection at the same time as contacted by the parents of the Corpus, and both the Petitioner and wife being aged people, they had kept themselves under isolation and that is the reason they could not meet their son and daughter-in-law during their treatment for combating COVID-19. It is further contended that the Corpus is accustomed to stay in Ahmedabad and more comfortable with grandparents and, therefore, Dahod where Corpus's maternal aunt (Respondent No. 4) resides would not be a suitable place for him. It is strenuously contended on behalf of the Petitioner that even the Corpus is not willing and ready to reside in Dahod. In relation to the welfare of child, Learned Advocate submitted that Petitioner and his wife are in good health, they have their own house in Ghodasar and the Petitioner gets pension for their livelihood. In relation to studies of the Corpus, the Petitioner has assured that the Corpus shall be imparted with

the best possible education. It is further submitted that the younger son of the Petitioner, who stays in Coimbatore with wife and children, is well settled and has his own restaurant business. The Petitioner has submitted that the younger son can also be called upon as and when required to take care of his parents as also Corpus. The daughter of the Petitioner is settled in Chennai and can also take care of parents and Corpus, if need arises. In support of his submissions, family details with their economic condition is filed through additional affidavit dated 27.09.2021.

4.2 Thus, Learned Advocate appearing for the Petitioner submitted that the best interest and welfare of Corpus is with the Petitioner and his wife who are paternal grandparents of Corpus and, therefore, he may be given the custody of Corpus till he attains the age of majority. Learned Advocate further contended that the Petitioner does not have any objection if on weekends, the Respondent Nos. 4 and 6 wish to take the Corpus with them or have regular video calling, without hampering the studies of the Corpus.

## **5. Submissions on behalf of the Respondents:**

5.1 Mr. Zubin Bharda, Learned Advocate with Learned advocate Mr. K.I. Kazi appearing for Respondent Nos. 4 and 6 disputing the facts stated by the Petitioner, submitted that the Petitioner and his family were not happy with the marriage as

their son with Rakhi Suryavanshi (daughter-in-law) since she did not belong to the same caste. It is for this very reason that the Petitioner and his family did not even attend the wedding and photographs of marriage ceremony support the same. It is further contended that the Petitioner and his family never accepted the relationship and therefore, the parents of Corpus had to struggle a lot to get settled in Ahmedabad. As father of Corpus was not supported by his family, to minimize their difficulties, sister of deceased Rakhi (maternal aunt of Corpus-Respondent No. 4) offered a house of her ownership to the parents of Corpus. In support of same, the leave and license agreement entered into between the parties is also placed on record. He further contended that all necessities of the mother of Corpus was taken care of by the Respondents, which is the maternal family of Corpus. Even the expenses of hospitalization during COVID-19 treatment and post death rituals of parents of Corpus were borne by the Respondents. To counter the allegations made in the petition, particularly for not allowing the Petitioner to enter the residence of his deceased son to take belongings of Corpus, a detailed affidavit dated 07.09.2021 is filed by Respondent No. 4 and an affidavit dated 20.11.2021 is filed by Respondent No. 6. In the said affidavits, it is explained that under what circumstances the lease agreement was entered into between the parents of Corpus and Respondent No. 4. It is stated in the affidavit that as father and mother of Corpus were searching for a house and having

no support from the Petitioner's family, she entered into a lease agreement with the parents of Corpus for the flat she owns in Ahmedabad so that they could stay peacefully and work for their livelihood. Several other submissions indicating distressed relationship between the two families were made.

5.2 Learned Advocate Mr. Bharda further submitted that entire maternal family of the Corpus lives jointly and is economically sound. The maternal grandfather is a retired employee of Central Government, Respondent No. 4- maternal aunt of Corpus is unmarried, 46 years old with good health and is also an employee of Central Government. The maternal uncle of Corpus is also doing job having good salary, his wife is a teacher in school and they have children of nearly same age as the Corpus, basis which it is submitted that the Corpus would be more comfortable in the house of Respondent Nos. 4 and 6. The details of other family members are also placed on record to support the submission that good care of Corpus would be taken if the custody of minor is given to Respondent No. 4. In respect of studies of Corpus, it is assured that the Corpus shall be imparted with the best education. He thus submitted that the welfare and best interest of Corpus is with the maternal aunt, considering that she is well educated, aged 46 years, a central government employee, a spinster and lives in a joint family.

## **6. Consideration of submissions:**

6.1 We have considered the submissions advanced by both the parties. In respect to the allegations and counter allegations made by both the parties on their internal relationship, we deem it appropriate not to enter into the same, since that would lead to digressing from the main issue. Be that as it may be, this Court at this juncture is primarily required to look into the best interest and welfare of Corpus.

### **6.2 Efforts made for Settlement:**

6.2.1 Though not mandated, considering the tender age of the Corpus, we thought it fit to settle the issue between the parties right from the very beginning. In this respect, vide order dated 04.08.2021, as an interim arrangement, custody of minor Pranav was given to the Petitioner and his wife, while the maternal family of Corpus was permitted to meet the Corpus through video calling along with visitation rights. The intention behind this was that Corpus who had lost his parents at this young age gets love and affection from both the families. We also felt that the same was necessitated since both the grandparents of Corpus had seen the worst situation in their life, in as much as the loss of their son and daughter-in-law had caused tremendous trauma, grief and agony and providing interim custody of the Corpus would have helped them get



back to life in some way.

6.2.2 Thereafter, with the intervention of the Learned Advocates appearing for both the parties, efforts were made to amicably resolve the issue. Both the sides were directed to submit their suggestions for the same. Efforts were also made by this Court to mediate the matter.

6.2.3 Thereafter, the matter was also referred to the High Court Mediation Centre with a view to see that by amicable settlement, Corpus would get love and affection of both the grandparents, which he is entitled for. In spite of best efforts employed by this Court, the Learned Advocates as well as the Mediation Centre, an amicable settlement could not be arrived at. In our opinion, this was because neither of the parties wanted to leave their past emotional baggages, resulting in a direct detrimental effect being caused on the Corpus. It is in this context, that we have decided the matter on merits. We observe this since in our considered opinion, though we did feel that both the parties would have understood the importance of life after having lost respective family members at a young age, neither side was ready to let go and hence, we have adjudicated the matter keeping in mind the best interest of the Corpus.

### 6.3 Law on the subject:

6.3.1 As Respondents have not raised the issue in relation to the maintainability of writ of habeas Corpus, we deem it appropriate not to go into the same at this stage. Further, in the decision of the Hon'ble Supreme Court in the case of ***Yashita Sahu v. State of Rajasthan*** reported in **(2020) 3 SCC 67**, the Hon'ble Supreme Court in relation to the maintainability of a writ of habeas corpus has held:

*“10. It is too late in the day to urge that a writ of habeas 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 v. Lahari Sakhamuri v. Sobhan Kodali among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.”*

6.3.2 In relation to welfare of minor child, in the decision of ***Yashita Sahu (supra)***, the Hon'ble Supreme Court has held that:

*“while deciding the matter of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands, technical objections can not 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 Court should decide the issue of custody only on the basis of what is in the best interest of the child.”*

6.3.3 We also would like to refer to one more decision in the case of ***Vasudha Sethi v. Kiran V Bhaskar*** reported in **2022 SCC Online SC 43**. In the said decision, while deciding the issue for custody of child between father and mother of Corpus, the Hon’ble Court held that,

*“28. Each case has to be decided on its own facts and circumstances. Though no hard and fast rule can be laid down, in the cases of Kanika (supra) and Nithya (supra), this Court has laid down the parameters for exercise of the power to issue a writ of habeas corpus under Article 226 of the Constitution of India dealing with cases of minors brought to India from the ocountry of their native. This Court has reiterated that the paramount consideration is the welfare of the minor child and*

*the rights of the parties litigating over the custody issue are irrelevant. After laying down the principles, in the case of Nithya (supra), this Court has clarified that the decision of the Court in each case must depend on the totality of facts and circumstances of the case brought before it. The factual aspects are required to be tested on the touchstone of the principle of welfare of the minor child. In the cases of Lahiri (supra) and Yashita (supra), the Benches of this Court consisting of two Judges have not made a departure from the law laid down in the decisions of larger Benches of this court in the cases of Nithya (supra) and Kanika (supra). The Benches have applied the law laid down by the larger Bench to the facts of the cases before them. It is not necessary for us to discuss in detail the facts of the aforesaid cases. By its very nature, in a custody case, the facts cannot be similar. What is in the welfare of the child depends on several factors. A custody dispute involves human issues which are always complex and complicated. There can never be a straight jacket formula to decide the issue of custody of a minor child as what is in the paramount interest of a minor is always a question of fact. But the parameters for exercise of jurisdiction as laid down*

*in the cases of Nithya (supra) and Kanika (supra) will have to be followed.”*

6.3.4 Moreover, in the decision of Hon'ble Supreme Court in the case of ***Tejaswini Gaud & Ors. v. Shekhar Jagdish Prasad Tewari & Ors.*** reported in (2019) 7 SCC 42, the Court held that:

*“26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statues govern the rights of the parents or guardians, but the wlefare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.*

*27. After referring to number of judgements and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings.”*

#### 6.4 Interaction with the Corpus:

6.4.1 Keeping in mind the ratio laid down in the above referred case laws, we thought it fit to independently meet the Corpus in order to ascertain his comfort. We noticed that he is comfortable with the Petitioner and his wife, however he was not in a position to give an independent preference between the Petitioner and the maternal aunt.

6.4.2 We also noticed that the Corpus stayed with Respondent No. 4 during the hospitalization of his parents and also post their death, till the custody was given to the Petitioner vide order dated 04.08.2021, as interim arrangement.

#### 7. Decision:

7.1 We are not ignorant of the fact that for the Petitioner and his wife, having seen their children dying in front of them, Corpus is their ray of life and hope. However, welfare of the Corpus being the paramount consideration as of now, sentiments expressed by both the sides alone may not act as guiding factor. We are also mindful of the fact that for the Corpus, both are grandparents who are equally important and hence, custody being handed over to either one of them would not impact the Corpus to a larger extent. However, in the same breath, we take notice that the present petition is a

battle for custody not only between the paternal and maternal grandparents but also additionally with the maternal aunt. In such a situation, we deem it fit to hand over the custody of the Corpus in favor of Respondent No. 4 (maternal aunt) for the following reasons:

- (a) **Age:** The Petitioner and his wife are senior citizens and living alone in Ahmedabad. Though reliance is placed on the paternal uncle who works in Coimbatore to state that he can come down in times of need to help to the Petitioner and also take care of the Corpus, however we feel that practically the same may not be possible. During the course of proceedings, we could notice that for running his business, his presence is required at Coimbatore and therefore, it would not be feasible for him to travel to Ahmedabad at short notice if required. As against this, from the documents on record, we could notice that Respondent No. 4 is at present aged 46 years. She is not married therefore she does not have any other family responsibility as of now. In such circumstances, we feel that Respondent No. 4 would be well suited to attend the needs of the Corpus at present and in the near future. Moreover, the maternal grandfather is enjoying good health to take care of the Corpus along with maternal aunt.

- (b) **Income**: The Petitioner is a retired Central Government employee and is surviving on pension money. As against this, Respondent No. 4 has studied upto M.Com and is currently working as a Central Government employee. Looking at her age, there is still time left for her retirement. Additionally, there is a scope for her progress in future. Considering future progress, we feel that the Corpus's needs would be suitably fulfilled in the event Respondent No. 4 is handed over his custody.
- (c) **Family**: As noted above, the Petitioner is staying in Ahmedabad, however only with his wife. As against this, though Respondent No. 4 is staying in Dahod, she is staying in a joint family. We do feel that considering the tender age of the Corpus, his upbringing in a joint family would make substantial positive difference as compared to him staying in a nuclear family at this juncture. Ascertaining the current mental state of the Corpus, the two cousins who are stated to be around the same age as the Corpus might act as an added factor to help him come out of the tragic incident of loss of his parents a little quicker.
- (d) **Studies**: Though both the parties have assured that they would be affording the best education to the Corpus, considering that Respondent No. 4 is unmarried, well-educated and also has the benefit of having two younger



children around in the house as on date, we feel that Respondent No. 4 would be well suited to cater to the Corpus's educational needs. Education in today's age does not only end at sending the child to school but includes constant follow up, regular monitoring and interaction with teachers, instilling the need of co-curricular activities, all of which the Respondent No. 4 would be in a better position to manage factoring in her age.

7.2 In view of above facts and taking note of overall circumstances, in our opinion the welfare and best interest of Corpus is with Respondent No. 4 (maternal aunt) namely Hemangini @ Mintu Madanmohan Shuryanvanshi. Therefore, let custody of Minor Corpus- Pranav Rajesh Acharya be given to maternal aunt i.e. Respondent No. 4. The Petitioner is directed to give custody of Corpus on 31<sup>st</sup> May, 2022 between 11:00 a.m. to 5:00 p.m. The Respondent No. 4 is directed to ensure the education of Corpus in the school at Dahod from new academic year. The procedural formalities for the admission is expected to be completed as early as possible.

7.3 Further, in order to balance the equities and considering the age of the Petitioner and his wife, we expect Respondent No. 4 to provide paternal grandparents a right to meet the corpus on regular basis, preferably twice in a month, whenever convenient to both the families. It is desirable that Respondent

No. 4 during vacation and holidays may permit the Corpus to visit and stay with his grandparents, subject to the wishes of the Corpus. It is also expected to have video calling between the Corpus and the Petitioner on regular basis. Needless to say that Respondents are expected to act as a bridge between the Corpus and his paternal grandparents so that emotional bonding remains intact.

7.4 It is however made clear that this order shall not in any way prejudice the right of Petitioner for any application to be filed before competent court of law.

8. Accordingly, the petition is disposed of. Rule is discharged. No costs.

9. In view of the above, Criminal Misc. Application (FOR JOINING PARTY) is disposed of accordingly.

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(SONIA GOKANI, J)

(MAUNA M. BHATT, J)

NAIR SMITA V.