

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CRIMINAL APPLICATION NO. 6345 of 2020

DIVYAKUMARI KEVALKUMAR BHATT
Versus
STATE OF GUJARAT

Appearance:

MR APURVA A DAVE(3777) for the Applicant(s) No. 1
for the Respondent(s) No. 2,3,4
MS JIRGA JHAVERI, APP for the Respondent(s) No. 1

CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI
and
HONOURABLE MR. JUSTICE NIRZAR S. DESAI

Date : 03/11/2020

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

1. The petitioner by way of the present petition under Article 226 of the Constitution of India has approached this Court for issuance of writ of habeas corpus or any other appropriate writ, order or direction for production and the custody of the corpus child who is 8 months old.
2. The petitioner's marriage was solemnized with respondent no.3 on 10.12.2018. The child was born on 29.02.2020. According to her, respondent no.3 in a purchase of residential house had needed the monetary help which the grandfather of the petitioner had made twice. After lapse of some time, when her grandfather needed money back, disputes had started. She has also alleged of absence of healthy and cordial relationship between the spouses as also with the in-laws and as she was not allowed to go out anywhere or take with her son, who was only 5 months old when she was ill treated and she gave a complaint on 06.08.2020 with Mahila Police Station, Lunavada, Dist. Mahisagar. However, the police had not acted upon the same.
3. The application under Section 97 of the Code of Criminal Procedure, 1973 ['Cr.P.C.' for short] was moved before the Court of learned Additional Chief Judicial Magistrate being Criminal Miscellaneous Application No.47 of 2020 which, on some technical ground, not entertained stating that for getting the custody of the child, alternative remedy is available.
4. The applicant is before this Court presently for the reason that due to pandemic due to Covid-19 virus, the Family Court is not taking up the matters of custody and it is almost impossible for the petitioner to reach to her child who is 7 months old. She has also further urged that the child is without her for the past more than three months and he is not also getting the mother's milk which otherwise in his age, he is supposed to have. It is, therefore, urged that on this ground alone, let the respondent be

directed to handover the custody of the child which is taken away against her will and wish and for the best interest and welfare of the child, court's indulgence would be needed.

5. This Court, on 28.10.2020, had issued notice noticing the age of the child.

6. Today, the respondents have joined through Video Conferencing this Court where in-laws of the petitioner i.e. grand parents of the corpus presented Avyansh from home in presence of lady PI and respondent no.3 – husband of the petitioner has presented himself, who is an Advocate through Nadiad Court in presence of Learned Additional Sessions Judge Mr.S.D.Suthar. They are represented by Ms.Medha Pandya, learned advocate.

7. We could notice the corpus- child(Avyansh) with the grandparents in healthy condition. We also could notice that petitioner mother joined from the Lunavada Court through Video Conferencing with her paternal grandfather.

Extensively both the learned advocates are heard and the litigating parties are also availed an opportunity on the very issue of custody of the child to present their rival contentions. Without entering into allegations of either sides, it is quite apparent that child continued to be with the respondent No.3 – husband who resisted handing over of the custody on the ground of he being a premature baby and again, due to pandemic because of Covid-19 viruses, the respondents are not desirous of sending the child to mother who is at Lunavada, ostensibly because of their concern of the child in the event of any health issue. At the same time, we could notice that mother is thoroughly agitated and fervently urges that medical facilities are also available at Lunavada and in surrounding area.

It is alleged that she left home on her own, leaving the child behind, according to respondent No.3 whereas, as per the say of the petitioner herself, she was driven out when the child was only five months of age. And, almost three months have passed she is running from pillar to post to get the custody of child who is only 7 months old. Noticing extremely young age of child who simply could not be kept away from his mother, we deem it necessary to exercise writ jurisdiction to accede to the request of the Petitioner without at this stage granting the request of learned advocate Ms.Pandya to file the affidavit in reply formally as this surely is a nature of litigation where parties can be permitted luxury of long drawn pleadings and litigation only once the custody of the child is handed over to the mother. Let this happen at the earliest. It is a birth right of the child to be embraced in the warmth and protection of motherhood. His foundation of health and key nutritive diet is mother's milk. He cannot be deprived of these valuable requirements. For the better and the fullest health, growth and development of the child, ordinarily mother's custody is a must. The child has no voice of his nor means nor capability to knock the doors of justice for establishing his right of welfare. It is an axiomatic truth that both the parents, father and mother are required to look after the welfare of the minor and are treated as natural guardians and yet, rigid insistence of statutory interpretation would not be welcomed for the welfare of such a young child. It is trite law that the custody of child at least till the age of five needs to be with mother.

In re Mc Grath(1893, 1 Ch.143) Lindsey, L.J. Observed,” The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded. “

8. Considering the fact that the petitioner – mother is residing with the grandparents and also noticing the concern of Respondent No.3 for the child, let him carry the child to the Petitioner mother and he can also ensure generating a conducive atmosphere, keeping aside all other contentious issues which make their relationship sore. Bearing in mind the disputes between the spouses, we are of the opinion that this matter requires presence of some authority which can monitor process of smooth handing over and, therefore, it is directed that the child shall be handed over to the petitioner – mother, at the earliest, at the District Court, Lunawada in presence of Learned Principal District Judge. Let the same be done on or before 06.11.2020.

This Petition is scheduled on 06.11.2020 for reporting the compliance of the direction of handing over of custody of the child. Other and further directions with regard to right of visitation of father and grand parents, mediation to explore possibilities of reunion of spouses etc. will be passed on 06.11.2020. The respondent No.3 – husband shall ensure due care and responsibility in taking the child to the mother – petitioner.

Matter to appear on 06.11.2020.

Office to reflect the name of Ms.Medha Pandya, learned advocate for the respondents. Ms.Pandya, learned advocate is permitted to file her Vakalatnama, on or before 06.11.2020.

(SONIA GOKANI, J)

(NIRZAR S. DESAI,J)

MISHRA AMIT V. / Amit