

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 3RD DAY OF MARCH 2022

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE S. VISHWAJITH SHETTY

W.P.H.C. NO.48 OF 2021

BETWEEN:

MR. VIJAYA MAHANTESH MULEMANE
S/O LATE MALLIKARJUNA GOUDA
AGED ABOUT 41 YEARS
PRESENTLY R/O. HATCHOLLI POST
SIRUGUPPA TALUK
BELLARY DISTRICT
KARNATAKA 583 114
ALSO AT.10, CARABOB CRT APT 908
TORONTO, ONTARIO M1T 3N5
CANADA.

... PETITIONER

(BY MR. MAHESH S, ADV.,)

AND:

1. STATE OF KARNATAKA
DEPARTMENT OF HOME
BY ITS PRINCIPAL SECRETARY
VIDHANA SOUDAH
BANGALORE 560001.
2. THE DIRECTOR GENERAL AND
INSPECTOR GENERAL OF POLICE
POLICE HEAD QUARTERS
NURPATHUNGA ROAD
BENGALURU 560001.

3. COMMISSIONER OF POLICE
BANGALORE CITY
INFANTRY ROAD
BANGALORE 560001.

4. MRS. ANUPAMA NADAGOUDA
W/O VIJAYA MAHANTESH MULEMANE
D/O VENKATRAO NADAGOUDA
AGED ABOUT 37 YEARS
R/O NO. R-B5, JAYAMAHAL EXTN
BENGALURU 560046
(LAST KNOWN ADDRESS)
ALSO AT HOUSE NO.29/30
KHB COLONY
PWD CAMP RAICHUR ROAD
SINDHANUR, RAICHUR DISTRICT 584 128.

... RESPONDENTS

(BY MR. THEJESH P, HCGP FOR R1 TO R3
MR. KIRAN V. RON, ADV., FOR R4)

- - -

THIS WPHC IS FILED UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO ISSUE AN ORDER OR DIRECTION OR WRIT IN THE NATURE OF HABEAS CORPUS DIRECTING THE 4TH RESPONDENT TO PRODUCE THE DETENUE I.E., THE DAUGHTER OF THE PETITIONER KUM.ANVITA FORTHWITH BEFORE THIS HON'BLE HIGH COURT. ISSUE AN ORDER EPRMITTING PETITIONER TO TAKE THE CUSTODY OF HIS MINOR DAUGHTER ANVITA ALONG WITH HIM TO CANADA AS THE DETENUE ANVITA IS A CITIZEN OF CANADA HOLDING PASSPORT OF CANADA.

THIS WPHC COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.**, MADE THE FOLLOWING:

ORDER

This writ petition has been filed seeking a writ of habeas corpus for production of Kum.Anvita (hereinafter

referred to as 'the daughter' for short) aged about 10 years and to permit the petitioner to take the daughter with him to Canada. In order to appreciate the petitioner's grievance, relevant facts need mention, which are stated infra.

2. Admittedly, the petitioner is the natural father of the daughter. The marriage between the petitioner and respondent No.4 (hereinafter referred to as 'the respondent' for short) was solemnized as per Hindu rights and customs on 30.11.2010. On 30.08.2010, civil marriage was performed between the petitioner and respondent at Toronto in Canada. The petitioner and the respondent were blessed with a daughter on 11.02.2012 in Canada. The birth certificate of the daughter as well as the passport has been issued by Canadian Authorities.

3. The respondent filed a petition seeking divorce on 26.05.2017 in superior court of justice at Toronto,

Canada. By an order dated 01.11.2017, the court in Canada directed that respondent shall have temporary access to the child. Thereafter, on the basis of consent furnished by the petitioner, the respondent and the daughter traveled to India on 25.08.2018 and were scheduled to depart on 16.10.2018. However, the respondent made attempts to stop the petitioner from leaving India with the child and lodged a complaint against the petitioner for offences under Section 498A, 341, 504, 506 of Indian Penal Code as well as under Section 3 and 4 of the Dowry Prohibition Act, 1961.

4. The petitioner however, returned to Canada for professional commitments and moved the court in Canada apprising the subsequent events which took place in India. The court in Canada passed an order on 22.11.2018 directing the respondent to return to Canada with the child and further directing the respondent to return the custody of the child to the petitioner. Thereafter, the superior court of Canada passed an

order on 27.11.2018 granted the sole custody of the child to the petitioner and also directed the respondent to deliver the daughter forthwith to the petitioner along with her passport and other documents.

5. The petitioner returned to India on 07.02.2019. However, the respondent did not permit the petitioner to interact with the child and refused to hand over the custody of the child. Thereupon, the petitioner on 14.02.2019, filed a writ of habeas corpus viz., WPHC No.25/2019, which was disposed of by an order dated 22.12.2020 and it was held that the daughter is not in the custody and not in the company of the petitioner for past three years and it would be appropriate that the daughter continues to be with the mother for the present. The said arrangement was directed to continue till further orders are passed in the proceeding under Guardians and Wards Act, 1890 and the Family Court, Bengaluru was directed to deal with the proceeding for

appointment of Guardian without being influenced by any of the observations made in the order.

6. Thereafter, respondent filed a petition under the Guardians and Wards Act, 1890 before Family Court, Bengaluru. The Family court by an order dated 04.02.2021 inter alia held that it had neither territorial jurisdiction nor any cause of action within its jurisdiction to maintain the petition. Accordingly, the same was dismissed. The petitioner thereafter filed this petition seeking a writ of habeas corpus on 20.04.2021. Being aggrieved by order dated 04.02.2021, the respondent filed an appeal viz., M.F.A.No.2863/2021, which has been dismissed with costs by a bench of this court by judgment dated 14.12.2021.

7. Learned counsel for the petitioner submitted that orders have been passed against the respondent by the Superior Court of Justice in Canada regarding custody of the daughter and she was granted only

temporary access to the child. It is also urged that the Superior Court of Justice in Canada has passed an order directing sole custody of the child in favour of the petitioner. It is also urged that the proceeding under Guardian and Wards Act initiated by the respondent has been dismissed by the Family Court and the aforesaid order has been affirmed by this Court in MFA No.2863/2021 vide order dated 24.12.2021. It is submitted that petitioner has taken care of the daughter in Canada and respondent is in live in relationship with her partner.

8. It is also submitted that petitioner is employed and shall take care of the daughter. It is also submitted that Canada would provide conducive atmosphere as well as a bright future to the girl child. It is further submitted that there is infrastructure available in Canada to enable the petitioner to look after the daughter. However, it is fairly admitted by the learned counsel for the petitioner that since 5.8.2018 the child is

in India and the petitioner has only met her once on 05.07.2021 in Bengaluru. In support of aforesaid submission, reliance has been placed on the decision of the Supreme Court in **'YASHITA SAHU Vs. STATE OF RAJASTHAN AND ORS.'** AIR 2020 SC 577, **'LAHARI SAKHAMURI Vs. SOBHAN KODALI'** AIR 2019 SC 2881, **'V.RAVICHANDRAN Vs. UNION OF INDIA & ORS.'** (2010) 1 ACR 231 (SC), **'NILANJAN BHATTACHARYA Vs. THE STATE OF KARNATAKA AND ORS.'** IN WP(HC) NO.93/2019 DISPOSED ON 07.04.2020.

9. On the other hand, learned counsel for Respondent has submitted that the affidavit filed by the petitioner discloses that the petitioner is not in employment for the past two years and is in India. It is also submitted that the mother-in-law of Respondent is aged about 80 years and the petitioner lacks female support system in Canada to support the minor daughter, it is also urged that against the order dated

14.12.2021 passed in MFA No.2863/2021, the Respondent has filed SLP before the Supreme Court which is pending. It is further submitted that minor daughter is aged about 10 years and is a student of Vishwavidyapeeth, Yelahanka, Bangalore. It is also urged that the daughter is residing in India for the past about 3 years i.e., since, 25.08.2018 and has developed roots. It is contended that the principle of comity of courts has to yield to interest and welfare of the child.

10. It is submitted out that the Respondent is presently not employed and is a house wife and is residing with her parents and devotes time and attention to the welfare of the child. It is pointed out that the Respondent has an annual rental income of Rs.8,00,000/-. It is also contended that the academic session in Canada begins from Attention of this court has also been invited to the undertaking contained in the affidavit filed on behalf of the respondent and it has been stated that respondent would live with her parents

and would not be in touch with her partner viz., Mr.Sanjeev Marathe and shall also not expose the daughter to any interaction with the aforesaid Mr.Sanjeev Marathe. It is also pointed out that the petitioner had met the daughter only on two occasions during the pendency of this proceeding. It is also urged that in the facts and circumstances of the case, and taking into account the age of the daughter, the daughter should be allowed to remain in the custody of the respondent. In support of aforesaid submissions, reliance has been placed on decision of the Supreme Court in **'NITHYA ANAND RAGHAVAN VS. STATE AND ANOTHER', (2017) 8 SCC 454, 'KANIKA GOEL VS. STATE OF DELHI AND ANOTHER', (2018) 9 SCC 578, 'LAHARI SAKHAMURI VS. SOBHAN KODALI', (2019) 7 SCC 311, 'SARITA SHARMA VS. SUSHIL SHARMA', (2000) 3 SCC 14.**

11. We have considered the submissions made on both sides and have perused the record. A Three

Judge Bench of Supreme Court in **NITHYA ANAND RAGHAVAN** supra inter alia has held that principle of comity of courts cannot be given primacy of more weightage for declining the matter of custody or return of the child to the native state. Similar view was taken in **LAHARI SAKHAMURI** supra and it was held that Doctrine of Comity of Courts cannot override the best interest and welfare of the child. Similar view was taken in '**TEJASWINI GAUR VS. SHEKAR JAGDISH PRASAD**', (2019) 7 SCC 42I and **YASHITA SAHU VS. STATE OF RAJASTHAN**', (2020) 3 SCC 67. The supreme court in **SARITA SHARMA** supra has held that ordinarily a female child should be allowed to remain with the mother so that she can be properly looked after. Similarly, in **NITHYA ANAND RAGHAVAN** supra, the Supreme Court has held that custody of the girl child may be ordered to be taken away from her mother for being given to any other person including the father of the child only in exceptional situation.

12. However, the issue pertaining to the best interest and welfare of the child has to be answered in the facts and circumstances of each case. Admittedly, the daughter was born on 11.02.2012 in Toronto in Canada. It is also not in dispute that the daughter is residing with respondent in India since, 25.08.2018 i.e., for nearly three and half years and has developed roots here. The daughter is student of Vishwavidyapeeth, Yelahanka, Bangalore and is student of 4th Grade.

13. The petitioner claims to have been employed in Canada. He lives alone in Canada. In case, the custody of the daughter is given to the petitioner, she will have to live alone with the petitioner in Canada. The daughter is residing with her mother for past more than three and half years along with her grand parents which is conducive to her overall growth. The mother is a house wife and is in a position to devote time to take care of the daughter. She has also an annual rental income of Rs.8 Lakhs. If the custody of the daughter is

given to the petitioner, at this point of time it will suddenly and abruptly disturb the child's daily routine and the education as the academic session in Canada starts in September.

14. So far as submission made by learned counsel for the petitioner that in view of the orders passed in the superior court in Canada, the custody has to be given to the petitioner, suffice it to say that principles of comity of courts must yield to best interest and welfare of the minor. Needless to state that the parties shall be at liberty to prosecute their remedies in the facts and circumstances of the case. In our opinion, it is in the best interest of the child that she should be allowed to stay with the respondent in India, in view of undertaking given by respondent before this court that she will stay with her parents, till the issue pertaining to her custody is finally adjudicated.

15. The parent who is denied the custody of the child should have access to the child especially when both the parents live in different countries. The parents are under an obligation to provide for an environment which is reasonably conducive to the development of the child. It is in the best interest of the child to have parental care of both parents if not joint atleast separate. Therefore, bearing in mind the best interest of the child and in the obtaining factual matrix, following directions are issued:

(i) The petitioner is entitled to communicate with the child through phone / video call / skype at any time.

(ii) The respondent shall provide the school calendar of the child with the list of holidays along with dates of examination to the petitioner.

(iii) The respondent shall keep the petitioner informed about the day to day developments of the daughter on weekly basis and the aforesaid

communication will be sent to the petitioner on a Sunday every week.

(iv) The petitioner shall be at liberty to meet the child after intimation to the respondent. During the period of stay of petitioner in India, he shall be at liberty to meet the daughter on 1st and 3rd Sunday of every month and shall be entitled to take custody of the daughter from the respondent at 11.00 a.m. and shall hand over the custody of the daughter to respondent at 5.00 p.m.

(v) The respondent shall not require the child to have any interaction with aforesaid Mr.Sanjeev Marathe.

It is clarified that observations / findings in this judgment have been made for the purposes of deciding the controversy in this petition and would have no bearing on any other proceeding, which has to be dealt with on its own merit.

With the aforesaid directions, the petition is disposed of.

Sd/-
JUDGE

Sd/-
JUDGE

SS