

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 22ND DAY OF DECEMBER, 2020

PRESENT

THE HON'BLE Mr. JUSTICE ARAVIND KUMAR

AND

THE HON'BLE Mr. JUSTICE SHIVASHANKAR AMARANNAVAR

WPHC No.25 OF 2019

BETWEEN :

Vijaya Mahantesh Mulemane,
S/o late Mallikarajuna Gouda,
Aged about 41 years,
Presently R/o Hatcholli Post,
Siruguppa Taluk, Bellary District,
Karnataka-583 114.

Currently R/at: 10
Carabob CRT. APT 908,
Toronto Ontario-M1T3N5
Canada.

... PETITIONER

(By Shri Mahesh S., Advocate)

AND :

1. Government of Karnataka
Through Secretary,
Home Department,
Karnataka, Vidhana Soudha,
Bengaluru-560 001.

2. Commissioner of Police,
Bengaluru City Police,
Infantry Road,
Bengaluru-560 001.
3. R-3 is deleted V/o dated 23.04.2019
4. Mrs. Anupama Nadagouda,
(last known address)
W/o Vijaya Mahantesh Mulemane,
D/o Venkatrao Nagadouda,
Aged about 37 years,
R/o No.R-B5,
Jayamahal Extn.,
Bengaluru-560 046.

... RESPONDENTS

(By Shri Ashok Haranahalli, Senior Counsel for
Shri Kiran V Rcn, Advocate for R-4;
Shri V S Hegde, SPP-II for R-1 & R-2)

This WPHC is filed under Article 226 and 227 of the Constitution of India, praying to issue a Writ of Habeas Corpus ordering and directing the respondents to produce the minor child namely Anvita Mulemane aged about 6 years and 11 months before this Hon'ble Court and direct the return of the minor child back to Canada as per the order dated 27.11.2018 passed by the Superior Court of Justice, Canada and etc.

This WPHC coming on for Orders, this day, ARAVIND KUMAR, J, passed the following;

ORDER

This petition under Article 226 and 227 of the Constitution of India has been presented by 4th respondent seeking for a writ of habeas corpus by directing the respondents to produce the minor child "xxx" who is aged about 9 years and to direct return of the minor child back to Canada as per order dated 27.11.2018 passed by Superior Court of Justice Canada.

2. Having heard Sri.S.Mahesh, learned counsel appearing for petitioner and Sri.Ashok Haranahalli, learned Senior Counsel assisted by Sri.Kiran V.Ron for respondent No.4 as well as learned Government Advocate appearing for respondents No.1 and 2, we have noticed from the records that the minor child "xxx" is born out of the marriage solemnized on 30.11.2008 between petitioner and 4th respondent. Minor child was born on 11.02.2012 at Toronto, Canada. On account of certain disputes having arisen between them it resulted in petitioner and 4th respondent getting separated and several litigations have been initiated

by both parties. During, August, 2018 4th respondent accompanied by the minor child has returned from Canada to India and has since been residing in India.

3. It is the grievance of petitioner that 4th respondent strategically conspired to flee away from Canada with minor daughter and thereby depriving the company of the minor child to which he was entitled and all efforts made by the petitioner as well as by the police to Toronto, Canada to contact 4th respondent has been in vain. It is also pleaded by the petitioner that he has last seen minor daughter was during October, 2018 and all efforts to arrange a meeting with minor daughter has been in vain. Thus, having deprived of the company of the minor daughter present petition has been filed and a writ of Habeas Corpus has been sought for as noticed herein above.

4. The 4th respondent who has appeared and filed statement of objections has not only denied the petition averments except to the extent expressly admitted thereunder

but has also contended that minor daughter is in her company and she is not in illegal detention as claimed by the petitioner. The 4th respondent has also contended that she has already filed a petition in G & WC No.337/2018 before the Family Court, Bengaluru for declaring her to be appointed as guardian of the minor child in which proceedings petitioner has appeared and has not only filed statement of objections but has also filed an application for rejection of the petition on the ground of Family Court not having jurisdiction but also made a counter claim seeking interim custody of the minor child to him. Hence, she has contended that the issue regarding interest of the child is now ceased by jurisdictional Family Court and as such, present petition is not maintainable.

5. The Courts, while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Courts cannot take a pedantic approach. Though provisions of the special

statutes govern the rights of the parents or guardians, but the welfare 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 only.

6. The Hon'ble Apex Court in cantena of decisions held that Courts while dealing with child custody cases has to take into consideration the paramount interest and welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. This preposition receives the support from the law laid down in the case of ***Nil Ratan Kundu & Another V/s Abhijit Kundu*** reported in ***2008 (9) SCC 413***.

7. At the juncture of deciding custody cases same cannot be decided on documents, oral evidence or precedents without reference to human touch. We are of the considered view that custody of the child is fairly well settled and it is

this paramount interest of the child which should be taken into consideration while deciding a complex question as to custody of a minor, however, it cannot be decided solely interpreting legal provisions. It is a human problem and is required to be solved with a pragmatic approach and human touch.

8. In the matter of **Kamla Devi v/s State of H.P** reported in **AIR 1987 HP 34**. The Court observed at paragraph 52 as under:

“In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. 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.”

The approach to be adopted by the Courts when confronted with conflicting claims made by the parents the contours laid down in the matter of **Gaurav Nagpal vs Sumedha Nagpal** reported in **(2009) 1 SCC 42** can be noted with benefit and it reads:

“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 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."

Keeping aforesaid authoritative principles in mind when facts on hand are examined, we notice in the instant case that dispute between the parties namely petitioner and 4th respondent is with regard to the custody of the minor child "xxx." Undisputedly, child has been in the company of the mother from August 2018 till date. In other words, father seems to have not seen the child from 2018. The overall development of the child would depend on the parental love. Such parental love ought to come from both the parents namely father and mother. As such, neither of the parties would get any undefined right to prevent either of them from

interacting the child or being in their company or spending valuable time with the child, which would shape the over all development of the child. It is this paramount consideration which not only the parents of the child will have to take into consideration but the Court also has to decide the issue in the interest of the child. Thus, expression "Welfare" occurring in Section 17 of the Act has to be taken note of and it has to be construed literally and must be taken in its widest sense. Though the provisions of the special statutes which governs the rights of the parents or guardians may be taken into consideration. The Hon'ble Apex Court in the case of *Gaurav Nagpal* referred to herein supra has held there is nothing which can stand in the way of the Court exercising ***parens patriae*** jurisdiction arising in such cases. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being.

9. As observed hereinabove, the minor child in the instant case not being in the company of the father for the past two years and the girl child being aged about 9 years,

and the fact that she is on the age of attaining puberty, it would be apt appropriate that custody has to continued with the mother for the present and subject to orders that may be passed by Family Court. At the same time, parental love which the father has to shower on the child also cannot lost sight of. Hence, we direct that parents of minor child should create ambience or atmosphere conducive for the petitioner-father interacting with the minor child through video conferencing initially once in fifteen (15) days i.e. every second and fourth Sunday of every month between 11.00 A.M to 1.00 P.M and we also make it expressly clear that neither of the parties namely petitioner or 4th respondent shall make the child feel uncomfortable at the time it participates in the video conferencing and all endeavors shall be made by them to create conducive atmosphere so that it may not impact on the child. This arrangement shall continue till orders are passed in the Guardian and Wards Act proceedings that has been initiated by the respondent and G & WC No.337/2018 which is now pending on the file of Family Court, Bengaluru.

The Family Court, Bengaluru, shall without being influenced by any observation made in this order shall independently consider the claim as well as the counter claim for guardianship in the event of application I.A No.5 filed by the petitioner under Order 7 Rule 11 CPC being dismissed.

It is needless to state that if the petitioner has any right to invoke jurisdiction of this Court in any manner at a later point of time, he would be liberty to do so subject to just exception and all contention of both parties are kept open.

With these observations, writ petition stands disposed of.

All pending applications stands consigned to records.

**SD/-
JUDGE**

**SD/-
JUDGE**

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