

RESERVED

AFR

Court No. - 74

Case :- HABEAS CORPUS WRIT PETITION No. - 450 of 2020

Petitioner :- Master Advait Sharma

Respondent :- State Of U.P. And 5 Others

Counsel for Petitioner :- Vibhu Rai

Counsel for Respondent :- G.A.,Arvind Prabodh Dubey,Dr. Rajeev Nanda,Manish Kumar Vikki

Hon'ble J.J. Munir,J.

1. Master Advait Sharma, a child of three years and a half, occupies the centre stage of controversy, that is the subject matter of this Habeas Corpus Writ Petition. It about the child's custody that his parents are entangled in a bitter battle. The child's misfortune, circumstanced as he is, is the fallout of an estrangement of his parents, who do not seem to have got along in matrimony. This has all happened in circumstances hereinafter detailed.

2. Advait's parents, Preeti Rai and Prashant Sharma, were married on November the 28th, 2013. Preeti Rai is an I.T. Engineer, employed with a Multinational Corporation. Prashant Sharma is a Sales Manager with a business house. He is currently serving as an Area Manager with Tropicana Juices, a company based at Ghaziabad. Advait was born of the wedlock of Preeti Rai and Prashant Sharma on 05.07.2017. Smt. Sharda Sharma and Chandra Kishore Sharma, who figure in the array of parties to this Habeas Corpus Writ Petition, are Prashant's mother and father, and Advait's grandparents. There is trading of allegations by the spouses, that carry varying versions to suit each about their case, why they fell apart. But, that does not matter, so far as the present proceedings are concerned. This petition has been brought by Preeti Rai, on behalf of Advait, saying that her minor son is in the unlawful custody of his father and grandparents, wherefrom he ought to be relieved and

delivered to her.

3. Preeti Rai was earlier posted in the N.C.R., but she says that she was thrown out of her matrimonial home on 20.04.2019, over issues relating to dowry. She then sought a transfer to Bengaluru, with the intention to stay close to her son, because Advait's grandparents would often take him away to their daughter's place in Bengaluru. However, within a few days of Preeti's arrival in Bengaluru, Advait was relocated to Delhi.

4. The pleadings of parties are replete with virtues claimed for themselves and demonizing the other party, including the in-laws on both sides. That again, ought not to be looked into or considered by this Court much, except to the extent that it is relevant to the issue of the minor's welfare.

5. This petition was admitted to hearing on 09.09.2020, requiring Advait to be produced before the Court on 16.09.2020, bearing all caution in terms of the CoViD-19 protocol. On 16.09.2020, the minor was produced and the parents also appeared. Bearing in mind the age of the couple and the minor's welfare, that would be best secured with his parents' reunited, this Court referred the parties to the Allahabad High Court Mediation and Conciliation Center to attempt a reconciliation. On 17.09.2020, an interim settlement was arrived at between parties, carrying the terms recorded in this Court's order of September the 18th, 2020. This Court had wished best for the minor and his parents. But, that was not to be. On 22.10.2020, when the matter came up again, the Court was informed by Dr. Rajiv Nanda, learned Counsel appearing on behalf of respondent nos. 4 and 5, that the interim settlement recorded before the Mediation and Conciliation Centre had fallen through. This Court, accordingly, ordered on 22.10.2020 that Smt. Preeti Rai and Prashant Sharma shall appear on 05.11.2020 along with Advait. It was at that stage that hearing commenced on 05.11.2020. Hearing

concluded on 08.12.2020 and judgment was reserved.

6. Heard Mr. Vibhu Rai along with Mr. Abhinav Gaud, learned Counsel for the petitioner, Dr. Rajiv Nanda along with Mr. Manish Kumar Vikki, learned Counsel appearing on behalf of respondent nos. 4 & 5 and Mr. S.S. Tiwari, learned A.G.A. appearing for the State.

7. Dr. Rajiv Nanda, learned Counsel for the respondents has raised an objection about the maintainability of this Habeas Corpus Writ Petition. He has submitted that a habeas corpus writ petition is not maintainable at the instance of one parent seeking the custody of a child from the other, because the custody cannot be termed unlawful. He submits that the father is the natural guardian under Section 6(a) of the Hindu Minority and Guardianship Act, 1956¹, and unless it be shown that the minor's welfare is in jeopardy in the father's hands, the father's custody cannot be termed illegal or unlawful. Dr. Nanda submits that in a situation like the one in hand, the mother's remedy is to institute proceedings seeking custody, under Section 25 of the Guardians and Wards Act, 1890², before the Court of competent jurisdiction. This objection by the learned Counsel for the respondents is sought to be sustained on the following authorities : **Sumedha Nagpal vs. State of Delhi & ors., (2000) 9 SCC 745; Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42; Rishik Lavania and another vs. State of U.P. and others, 2020 SCC OnLine All 1035; Reetu and another vs. State of U.P. and others, 2020 SCC OnLine 1136; and Aisha (Minor) and another vs. State of U.P. and othes, 2020 SCC OnLine 1129.**

8. Apart from these decisions, Dr. Nanda has urged the broad principle of alternative remedy, which, if available, bars a writ petition. To the above end, he has placed reliance on a decision of

1 for short "the Act of 1956"

2 for short "the Act of 1890"

the Supreme Court in **Punjab National Bank and others vs. Atmanand Singh and others, (2020) 6 SCC 256**, wherein it has been held thus :

"24. In *Hyderabad Commercials* [*Hyderabad Commercials v. Indian Bank*, 1991 Supp (2) SCC 340], on which reliance has been placed, it is clear from para 4 of the said decision that the Bank had admitted its mistake and liability, but took a specious plea about the manner in which the transfer was effected. On that stand, the Court proceeded to grant relief to the appellant therein, the account-holder. In the present case, however, the officials concerned of the Bank have denied of being party to the stated agreement and have expressly asserted that the said document is forged and fabricated. It is neither a case of admitted liability nor to proceed against the appellant Bank on the basis of indisputable facts.

25. Even the decision in *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*, (2004) 3 SCC 553] will be of no avail to Respondent 1. This decision has referred to all the earlier decisions and in para 28, the Court observed as follows: (SCC p. 572)

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. *The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition.* The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn. v. Registrar of Trade Marks* [*Whirlpool Corpn. v. Registrar of Trade Marks*, (1998) 8 SCC 1].) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

(emphasis supplied)

9. Dr. Nanda submits that the authority of their Lordships of the Supreme Court in **Atmanand Singh** (*supra*) would squarely be attracted to the facts here, because this petition also involves extremely complex questions of fact, from which alone, inference

about the minor's welfare can be drawn. Therefore, the course indicated in **Atmanand Singh** requiring parties to pursue their alternative remedy ought to be the fate of this habeas corpus writ petition. It must be remarked here that the principle in **Atmanand Singh** is stated on high authority and binds this Court, but that decision was rendered in the context of a writ petition, other than habeas corpus. The principle about alternative remedy, in the opinion of this Court, would not be attracted to a writ of habeas corpus. Habeas corpus is about liberty and in its application to a custody dispute, though brought on a cause of action about custody of the child, it is issued on the parameters of welfare. **Atmanand Singh** was a case relating to a writ, other than habeas corpus. It arose out of a dispute between a customer and the Bank about a money claim. The general principle of alternative remedy applicable to all other kinds of writs, would never apply to a writ of habeas corpus. It is quite another matter that in some cases, the question about the minor's welfare, which a Court seized of a habeas corpus matter may examine, is enmeshed in so much of factual disputations, that it is incapable of resolution in proceedings, decided on affidavits. It is there that parties may be asked to resort to their remedy under the statute.

10. In **Rishik Lavania** (*supra*), I had occasion to consider this question and the remarks there about a habeas corpus writ petition being not maintainable, were in the context of a capable mother, who held custody with an *ex facie* strong indication about the minor's welfare being secure. Here, there is much cavil on both sides, where the minor's welfare would be better secured; there is also a clear case here to be examined, whether the father with his two aged parents can take care of the minor, who is a young child of three and a half years.

11. The decision in **Reetu** (*supra*) is clearly distinguishable on facts, because it was a case not between two parents. In **Reetu**, I

held a habeas corpus writ petition to be maintainable, because it was the case of a mother, who had petitioned for her minor child's custody held by the grandmother and the father's brother. There is nothing in the decision in **Reetu**, which may bar the petitioner's right to maintain a petition for a writ of habeas corpus.

12. **Aisha** (*supra*) was a case where the remarks in paragraph 11 do not exclude the remedy of a habeas corpus, so far as a custody dispute between parents about their child is concerned. It only says that where very intricate questions are involved, the parties may be left free, in the first instance, to go to the Civil Court. This is a question, which is to be seen on the facts of the case, but cannot be utilized to throw out a petition for a writ of habeas corpus in a custody matter between parents at the threshold. In **Aisha**, I held:

"11. The objection raised by the learned counsel for the respondent that this petition is not maintainable as it relates to a custody dispute between two parents, where custody of either cannot be said to be unlawful, in the sense that it is understood in the jurisdiction for a writ of habeas corpus, cannot be accepted. The validity of a minor's custody with a parent can be examined in a petition for a writ of habeas corpus with reference to the law governing the right to that custody. The question of welfare of minor too, can be examined within the scope of these proceedings. The only limitation appears to be that the inquiry should not involve fine and intricate details, the assessment of which may require such a detailed inquiry which is not traditionally associated with the exercise of the Court's writ jurisdiction. Where a very detailed inquiry is required to be made, the parties ought to be left free in the first instance to go to the Civil Court.

12. Now, in the facts of the present case it has to be seen whether the custody of the mother is apparently unlawful, so as to entitle the father to ask for a writ of habeas corpus."

13. In this context, reference may be made to the decision of the Supreme Court in **Tejaswini Gaud** (*supra*), to which Dr. Nanda has alluded. It has been held in **Tejaswini Gaud**, thus :

"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus

proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

14. In a later decision, the Supreme Court considered the question in **Yashita Sahu vs. State of Rajasthan and others, (2020) 3 SCC 67**, where it was held:

"10. It is too late in the day to urge that a writ of habeas corpus 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. Arvand M. Dinshaw* [*Elizabeth Dinshaw v. Arvand M. Dinshaw*, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , *Nithya Anand Raghavan v. State (NCT of Delhi)* [*Nithya Anand Raghavan v. State (NCT of Delhi)*, (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] and *Lahari Sakhamuri v. Sobhan Kodali* [*Lahari*

Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] 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.”

(emphasis by Court)

15. This Court is, therefore, not minded to accept the submission of Dr. Nanda that the present habeas corpus writ petition ought to be thrown out on the ground of maintainability, because the minor is in his father's custody, which, *per se*, is not unlawful. There is no quarrel between parties about the legal proposition that this Court, in considering the claim of parties to the minor's custody, is bound by the principle that welfare of the child is of paramount consideration. Both parties say that Advait's welfare would be best secured with the one claiming it. There is a very different version about adherence to the norms of a responsible spouse or parent coming from each side. It is something that is commonplace and expected.

16. It is asserted on behalf of Preeti that at the time the parties got married, she was working with the British Telecom company at Gurgaon and Prashant was employed with PepsiCo, Lays Division, Delhi. It is her case that Prashant resigned from the PepsiCo and remained jobless from January 2015 to April, 2015. During this period of time, Preeti was taking care of the entire family, comprising Prashant, her mother-in-law and father-in-law, catering to all their financial requirements. Prashant joined another company in November, 2015. It is claimed by Preeti that she was pestered with the demand for a car in dowry. She says that she bought a car on loan, the EMIs whereof she is still repaying. In January, 2017, Prashant left his job, and the entire financial responsibility to run the household fell again on Preeti's shoulders.

17. It is Preeti's further case that for that reason, she could not afford to take leave and stay home, though she was in the family way. It is asserted that on 3rd May, 2017, Prashant virtually forced

Preeti to pay a sum of Rs.1 lakh towards his tuition fee at the Indian Institute of Foreign Trade, New Delhi. She made good that demand from her savings in order to salvage her marriage. In the end of June, 2017, Prashant joined the Ultratech Cement, Delhi. On 5th July, 2017, as already said, Advait was born. He was born in the Fortis Hospital, Noida, Gautam Budh Nagar. In the month of September, 2017, Prashant once again left his job with Ultratech Cement. He remained unemployed upto January, 2018. During this period of time, the entire financial liabilities of the household were borne by Preeti. It is asserted by Preeti that Advait was in her custody and care since his birth. He was in good health. It is said that Advait was forcefully taken away to Bengaluru by Smt. Sharda Sharma and Chandra Kishore Sharma, her mother-in-law and father-in-law, respectively. They went to see their daughter, who was then in the family way. They stayed there till the end of October, 2018.

18. It is asserted for a fact that Prashant's sister stays in Bengaluru. It then said that Advait was brought back to Delhi by his grandparents in the month of October and reunited with Preeti for a couple of days. After a short stay of two days in Delhi, the grandparents again took Advait to Gorakhpur without informing Preeti. She says that she kept quiet out of fear. Chandra Kishore fell ill in the month of November, 2018 due to affliction of the prostate, whereupon both the grandparents, along with Advait, came back to Delhi for treatment.

19. It is said that on 14th June, 2019, Sharda Sharma abruptly left for Bengaluru, taking along Advait without informing Preeti. It is asserted that on 20.04.2019, Prashant ousted Preeti from their matrimonial home. She attempted to pacify the matter, and, failing in that endeavour, sought a transfer to Bengaluru in order to stay near Advait. Her employers approved the transfer and she moved to Bengaluru. It is alleged that Preeti went to the house of her sister-in-

law in Bengaluru to meet Advait. She was allowed to meet her minor son once a week. On 1st June, 2019, when Preeti went to her sister-in-law's home, she was not permitted to enter. She was informed that Advait had been taken to Delhi by Sharda Sharma, again without information. On 27.07.2019, Advait was brought back to Bengaluru by Sharda.

20. The salient, amongst these facts, are asserted in paragraph nos. 6, 7, 8 and 13 of the habeas corpus writ petition and paragraph nos.29(a) and 42 of the rejoinder affidavit. The fact about Advait being brought back to Bengaluru on 27.07.2019 is sought to be established by a reference to Annexure no. CA-6 to the counter affidavit dated 19.10.2020 at page 135 of the paper-book, which carries a photostat copy of an airways ticket purchased for Advait by SpiceJet Flight no. SC8719 from Delhi to Bengaluru.

21. It is asserted in paragraph no. 15 of the petition that Advait was admitted to the Fortis Hospital, Noida, Gautam Budh Nagar, while in the custody of respondent nos.4, 5 and 6, on 3rd September, 2019. Preeti, upon learning of Advait's hospitalization, travelled to Delhi on 05.09.2019. She stayed there until Advait was discharged and settled properly at home. She left for Bengaluru on 11.09.2020. It is further said that Advait was again admitted to the Fortis Hospital, Noida, Gautam Budh Nagar, but information about this fact was a secret kept from Preeti. She learnt about Advait's hospitalization late in September, 2019. It is then said that Preeti learnt in the month of December, 2019 that Advait is alone with Smt. Sharda Sharma, as Prashant had left for Bangkok on a trip. She rushed to Delhi and brought Advait to her sister's place in NOIDA. Advait was in good health and stayed with his mother. Prashant, upon his return, took away Advait on 22.12.2019.

22. On 17.03.2020, Preeti returned to Gorakhpur on account of the closure of her office at Bengaluru in consequence of the CoViD-

19 outbreak. Shortly thereafter, a nation-wide lock down followed. It is said that during this period of time, Preeti attempted to speak to her child through video call, but the contact was rare. In the month of July, 2020, Preeti and her father called Prashant and expressed their desire to bring Advait to Gorakhpur. They assured Prashant that all necessary precaution would be observed, but Prashant declined the request.

23. On 1st August, 2020, Preeti came over to Delhi and beseeched Prashant to let her take Advait to her sister's place in NOIDA for two days. On the following day, Prashant offered to take Preeti to his house. It is asserted that Preeti agreed, thinking that it may prove a turning point for the parties. There is an assertion on her behalf to this effect in paragraph no. 20 of the writ petition. There are then some assertions to the effect that on 3rd August, 2020, Preeti went over to Prashant's place, where she was taunted and not permitted to go near Advait by Prashant and his parents. Preeti had to call the Police, who listened to her ordeal and suggested Prashant and his parents to let Advait be with his mother for sometime, until his health was restored. It is claimed that later on, she was thrown out of the house and not permitted inside any more. Preeti was taken by her sister to her home in NOIDA.

24. It is then asserted that Preeti tried to contact Prashant and his parents on 6th August, 2020, but to no avail. On the 9th of August, 2020, Preeti asserts in paragraph no.28 of the writ petition that she visited her husband and in-laws' place in Ghaziabad, where she learnt that they had left on 07.08.2020. On 10th of August, 2020, she returned to her native place in Gorakhpur, when she could not locate the whereabouts of her child (Advait). She thought that Advait might be at Prashant's Sahara Estate House in Gorakhpur, but found the flat there locked too. Instead, on the 12th of August, 2020, Chandra Kishore Sharma, Preeti's father-in-law visited her house in Kauriram, Gorakhpur and threatened her. On the following day i.e. 13th of

August, 2020, Preeti was compelled to lodge an FIR against Prashant, Smt. Sharda Sharma, Chandra Kishore Sharma and Ankita Sharma, her husband, mother-in-law, father-in-law and sister-in-law, in that order, giving rise to Case Crime no.935 of 2020, under Sections 498A, 323, 504, 506 IPC and Section 3/4 of the Dowry Prohibition Act, Police Station Shahpur, District Gorakhpur. These facts are asserted in paragraph nos.28 and 29 of the writ petition. A xerox copy of the FIR is on record as Annexure no.5 to the writ petition. It was after the aforesaid event that the present habeas corpus writ petition was instituted on 3rd September, 2020. The proceedings before this Court, and the reference to the Allahabad High Court Mediation and Conciliation Centre, with no fruitful result, are matters that have been referred to in the earlier part of this judgment.

25. There are assertions in the rejoinder affidavit about Preeti being harassed, abused and ill-treated during the period of time that the parties were together, by virtue of the interim-settlement made before the Mediation Centre. There are also allegations about threats extended to Preeti, asking her to withdraw her case with the Police. She also claims to have been threatened over the decision to move this Court. These facts have been asserted largely in the rejoinder affidavit filed on behalf of Preeti.

26. To emphasize once again, this Court is not much concerned about the truth or otherwise of these allegations that have been largely denied in the counter affidavit filed on behalf of Prashant. The counter affidavit alleges largely that Preeti was a cruel wife and a callous mother. It is asserted that she was cruel also to Prashant's mother, father and sister. She spread a canard about Prashant being a womanizer, drunkard and a gambler. She threatened Prashant and his parents with death, imprisonment in a false case, leaving their house or committing suicide. It is made out in the counter affidavit that Preeti's father Chandra Bhan Rai, sister Udita Rai and mother

Saroj Rai would quarrel with Prashant, asking him to part ways with his parents.

27. There is a specific allegation that soon after marriage, Preeti got Prashant assaulted by a friend, one Nishith Kumar Sahu, after she invited him over on the pretext of dining together. An FIR dated 23.01.2014 about the incident dated 22.01.2014 has been registered as FIR no. 44/2014, under Sections 323, 341 IPC, Police Station Mayur Vihar Phase-1, East Delhi. It is also asserted that Preeti, during the period of time that she was in the family way, called over Prashant's mother, who extended all support to her, but Preeti attended office regularly, despite a clear advice from doctors to avoid travel, unless extremely necessary.

28. It is made out that on account of exertions indulged in by Preeti, contrary to medical advice, the foetus suffered some kind of deterioration and the still born child was found to be in grave danger during a medical check-up done on 5th July, 2020. Preeti was admitted to the Fortis Hospital, NOIDA on that day and she delivered Advait as a premature baby through a caesarean. There are assertions that Advait has a seriously compromised health. He suffers from the Respiratory Distress Syndrome. There are much allegations made out on behalf of Prashant that Preeti would not feed Advait and weaned him away from herself within six months. It is asserted that Prashant had to call his mother over, because Preeti was not looking after the child.

29. There is also an allegation that Preeti would go to office at 11.30 a.m. and come back at 11.30 in the night. She would ignore Advait and lock herself inside the room. Advait would sleep with his grandmother, Sharda Sharma and Prashant. It is also asserted that Preeti frequently stayed away from home over night. Sometimes, she would go for "office outings" as these have been described, leaving back Advait with Prashant and Smt. Sharda Sharma. It is

also asserted that on 18.09.2018, Preeti came back home drunk. When she was confronted about her intoxicated state with Advait around, she lost her temper and abused Prashant and his mother, cursing them and Advait.

30. It is asserted that on 10.10.2018, Preeti misbehaved with her mother-in-law and asked her to leave the house along with Advait. It is asserted that since Preeti declined to take care of Advait and humiliated Prashant's parents, they left Prashant's house on 10.10.2018 for Gorakhpur along with Advait. It is then said that in November, 2018 on the occasion of *Chhath Puja*, the couple went to Gorakhpur. There, Preeti's father, mother and sister came over to Prashant's home and abused Prashant's parents, causing them immense shock. It is claimed that this led to health complications for Chandra Kishore Sharma, who was hospitalized in the Northern Railway Central Hospital, Paharganj, New Delhi and the Max Hospital, Saket, Delhi for approximately 48 days. It is made out on an emotional note that Prashant took care of his father day and night, performing the pious obligations of a son to take care of his ailing father. It is also asserted that Smt. Sharda Sharma took care of Advait at home, while Preeti did not take leave from the office, to share the travails of the family.

31. About Smt. Sharda Sharma's Bengaluru visit in June, 2019, it is asserted that, that was to take care of Prashant's sister (Sharda Sharma's daughter), Ankita Sharma, who was then expecting a child. Advait was taken along to Bengaluru, because Preeti was not interested to take care of Advait. It is then said that sometime in the month of February/ March, 2019, Preeti resigned her job with the British Telecom company and joined another concern at Bengaluru. She did not discuss this change with anyone in the family. She told Prashant around 15th April, 2019 that she would be leaving in 2 - 3 days' time. It is claimed that in Bengaluru, Preeti would come over on the weekends to her sister-in-law's place,

but did not show any interest in taking Advait along with her. It is also asserted that Preeti did not reveal her whereabouts in Bengaluru to Prashant or her in-laws.

32. It is also asserted that on June the 25th, 2019, Preeti went to Gorakhpur straight from Bengaluru, but did not bother to come over to Ghaziabad and meet her son, who was there with Prashant and Smt. Sharda. About Advait's hospitalization, it is said that in September, 2019, he fell ill and was admitted in the Paediatric Intensive Care Unit of the Fortis Hospital, Sector 62, NOIDA, from September the 3rd to September the 7th, 2019. Preeti was informed about it. She came over to NOIDA for 3 – 4 days and then went back to Bengaluru to keep her employer's commitments. Advait was looked after by Prashant and Sharda Sharma. Advait again fell ill, requiring admission to the Paediatric Intensive Care Unit at the Fortis Hospital on 16th September, 2019. He was discharged around 19th September, 2019. It is said that despite information about Advait's re-hospitalization, Preeti did not bother to come and visit her son. Instead, she fought Prashant, blaming him about Advait's illness.

33. In the month of December, 2019, Preeti took Advait to her cousin Pratibha Rai's house around December the 18th, 2019 for a period of about three days. She did not take proper care of Advait, because of which he fell ill again. Advait had to be regularly attended to by Dr. Ankit Parakh for almost two months. Advait was administered steroids inhalers and oral steroids. Details of these medicines have been set out in the counter affidavit.

34. In the month of February, 2020, it is claimed by Prashant that Preeti went from Bengaluru to her father's house at Kauriram near Gorakhpur, but did not bother to meet her son, who was in Delhi – N.C.R. In the month of May, 2020, Preeti and her father, Chandrabhan Rai are claimed to have pressurized Prashant to send

Advait to Kauriram, Gorakhpur. Prashant asserts that he very politely told them that the prevailing CoViD-19 Pandemic did not make it safe for Advait to travel outside Delhi - N.C.R. There are then assertions in the counter affidavit about the availability of doctors and hospitals, where Advait was required to be attended to during this period of time.

35. The next event that Prashant claims to have happened was on June the 27th, 2020. It is said that in order to harass Prashant and his parents, Preeti and her father conspired and came with a plan to remove Advait from NOIDA and send him away. It is not mentioned in this part of the affidavit, where Advait would be sent; elsewhere it has been mentioned. It has been stated that during this period of time, Advait was not well and was under the management of various doctors from Delhi, NOIDA, Jaipur and Mathura, and, therefore, he could not be sent to Gorakhpur. It is asserted that in furtherance of the conspiracy between Preeti and her father, she called Prashant on 31st July, 2020 and told him that she is in NOIDA at her sister's place, to wit, M-804, Grand Ajnara Heritage, Clock Tower, Sector 74, NOIDA, for 10 days. She asked Prashant to bring over Advait to her sister's place for a period of 5 - 7 days. Prashant sent Advait to Preeti in order to avoid "escalation of conflict", to borrow the precise expression employed by Prashant in his counter affidavit. After Advait had been at his aunt's place for sometime and Prashant was about to leave, Advait got upset and agitated. He is said to have inconsolably wept being in unfamiliar company. Preeti, thereupon, said that she would come over to the parties' matrimonial home and spend 3 - 4 days with Advait there. It is asserted that once back at the parties' matrimonial home, Preeti got furious on seeing Prashant's parents there. She is said to have been annoyed about the issue why Advait was not acting familiar and playing with her.

36. On 5th August, 2020 after Prashant left for his office, Preeti is claimed to have been instigated by her father and younger sister.

Preeti, on instigation by her father and younger sister, is claimed to have abused, fought and threatened Prashant's parents. She threatened with getting them jailed in false dowry and cruelty cases. It is also asserted that Preeti beat up Advait, when he went over to his grandmother's lap. According to Prashant, this disturbed the grandparents and they asked him to report the matter to the Police at the earliest. At this stage, Prashant claims to have called Preeti's father and requested him to make his daughter see good sense and pacify the matter in Advait's interest. In response, Preeti's father also threatened Prashant with a jail term for him and his entire family. It is claimed that there is a call recording about this conversation.

37. It must be remarked that the Court was not inclined to hear it and never called upon the parties to produce it, inasmuch as in the Court's opinion, it would be quite unnecessary. At this stage, it is averred that both sides called the police facility at number 100/ 112. It is claimed that the Police warned Preeti in both instances and asked her to take care of Advait as well as the family. They advised her also that she could pursue her case before a Court of law.

38. It is then asserted that Prashant and his parents were terrified and frightened about Preeti's aggression. They apprehended danger to their life and property. Prashant approached the local police station with a written complaint on 6th August, 2020, but the S.H.O. there refused to acknowledge the complaint. The complaint was then sent to the police station through speed post on 13.08.2020. This complaint was also sent to the Senior Police Officers, the Mahila Thana, as well as the Women's Commission, through email on 7th August, 2020, seeking appropriate action against Preeti. Copies of those complaints, the delivery report and the track report have been annexed as Annexure no. CA-3 to the counter affidavit. It is then averred that the Police did not take any action on Prashant's complaint, nor was any inquiry initiated.

39. It is asserted that during the two months from October - September, 2020, the Police visited Prashant's house as many as five times, all at the instance of Preeti. These frequent visits by the Police followed a sudden fight, initiated by Preeti. These events, which involved escalated aggression, are pleaded to be against the interest and welfare of Advait. It is asserted that after this complaint, on 13th August, 2020, the FIR bearing no. 935 of 2020 was lodged by Preeti at Police Station Shahpur, District Gorakhpur, under Sections 498A IPC and Section 3/4 of the Dowry Prohibition Act. This was followed by institution of the present petition for a writ of habeas corpus. There is a flood of information and detail about the medical treatment of Advait and Prashant's father. It has been made out on behalf of Prashant that Preeti is a bad wife and a bad mother, and that Advait's welfare would not be ensured in her hands, let alone best served.

40. A supplementary affidavit on behalf of respondent nos. 4, 5 and 6, which is in fact a supplementary counter affidavit has also been filed. It details the entire medical history of Advait. There are details of hospitals and doctors, who have been consulted, the diseases diagnosed and the treatments administered. There is a flood of medical information carried in this affidavit. It has also been made out that apart from respiratory problems, Advait also suffers from behavioural problems. It is asserted that he has signs of autism and speech regression, requiring behavioural therapy. There is substantial correspondence from doctors made by email to support a case about these medical problems with Advait. All that is sought to be made out is that Advait is very sick, physically as well as psychologically, and he can be salvaged from that predicament by Prashant and his parents alone. Preeti, who is a careless mother, cannot take care of a sick child.

41. In order to buttress Preeti's projected callous behaviour towards her duties to the family, it has been averred in paragraph

no.7 that Preeti is fond of socializing and drinking, and on account of her office parties, socializing, staying out of her matrimonial home, Advait has suffered a lot. A screen shot of a chat dated 10th August, 2017 and the photograph of a hand written note, tucked outside Preeti's room, that she would not come back for the night, has been annexed to the supplementary counter affidavit as Annexure no. SA-2.

42. This Court has gone through all the relevant material on record and interacted with Preeti, Prashant, Prashant's parents, that is to say, Chandra Kishore Sharma and Smt. Sharda Sharma. So far as Advait is concerned, he is still too young to express an intelligent preference about the parent he would like to be with for the most part of the time. During hearing, whatever the Court could observe about Advait was that he appeared to be, in no way, much concerned about the Court proceedings. He moved about the Court with less than typical hesitation. He moved upto the dais, came over to me as the hearing proceeded and fiddled around with papers and other things, that were placed there. The Court is no expert about child behaviour, but would be content to assume that there might be some issues with the child that the experts have diagnosed; but that does not *ipso facto* better qualify Prashant and his parents to take care of Advait or disqualify the mother, Preeti in the matter of ensuring Advait's welfare.

43. The parties all along have been disputatious about every word or fact that the other has said or stated. But, there is one principle of the law, which both sides have very fairly been *ad idem*, to wit, the only consideration, on which custody ought to be entrusted to one or the other parent, is the paramountcy of the child's welfare. This Court can't help but notice the fact that Prashant and his parents have attempted to prove that Preeti has been an uncaring mother since the day she conceived. If they are to be believed, a case of prenatal neglect and prenatal welfare would have to be examined.

This Court is not minded to do that. Statutes are no panacea to answer a complicated human problem, like the welfare of a minor child, but they do serve as guiding principles around which, on the facts of a given case, the perplexed question of a child's welfare between estranged parents has to be determined. Section 6(a) of the Act of 1956 is one such provision of the law. It reads:

"6. Natural guardians of a Hindu minor.- The natural guardians of a Hindu, minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;

(c) in the case of a married girl-the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.- In this section, the expressions 'father' and 'mother' do not include a stepfather and a step-mother."

44. The provision lays down the Rule that notwithstanding the father being the natural guardian, the custody of a minor, who has not completed the age of five years, ought ordinarily be with the mother. This rule echoes experience of mankind that mothers are best suited to take care of very young children. Since, however, welfare of a child is of paramount consideration, the proviso to Section 6(a) of the Act of 1956, makes a remarkable prescription by employing the word 'ordinarily' to qualify the rule. The word 'ordinarily' gives full play to the Court's assessment in a given case

to find out where the welfare of the minor would be best secured. It must be remarked here before moving ahead that even the natural guardianship of a minor under Section 6(a) of the Act of 1956 is now no longer preferentially held by the father. The mother and the father are at par as natural guardians of the minor, in view of the holding of the Supreme Court in **Githa Hariharan (Ms) and another vs. Reserve Bank of India and another, (1999) 2 SCC 228**. The dispute here is about custody and not about guardianship, which is hardly disputed for both parents.

45. During the hearing, an effort with equal force was made on both sides to show, with reference to specific issues, why welfare of the minor would be best subserved in the hands of one party or the other. Largely, the specific issues, on which the parties have addressed the Court, have come upon a formulation done by Dr. Nanda. These have been answered by Mr. Vibhu Rai on behalf of Preeti. In the opinion of this Court, it may not be necessary to examine under each of the compartments of allied heads, the germane issue about Advait's welfare. In the opinion of this Court, a more holistic view ought to be taken with reference to all that has been demonstrated by parties. To this Court's understanding, all that has been placed on record about Preeti's engagements in connection with her employment, as evidence about her being an uncaring mother, does not go well with contemporary times. In case, whatever lapses evident, if they can be called that, on Preeti's part while discharging her role as Advait's mother, are to be accepted as indicia of maternal neglect, every working mother, who parts ways with her spouse, would have to be condemned as neglectful. Office engagement, professional commitments, meetings and some socializing connected to work, come with any meaningful career or pursuit, except a limit of avocations. This is the case, both with a man and a woman. What Prashant tries to dub as uncaring behaviour of a mother for Preeti, proceeds on a juxtaposition with

the model of a mother, who is a home maker.

46. Decidedly, Preeti is a professional in corporate employment, but that does not make her any less a mother. Contemporary life, with an aspiration for equal participation of men and women, does bring onerous responsibility, both for the man and the woman, and changes too, about the established and accepted patterns of their role in the family, that has hitherto been in vogue for centuries. The man can no longer arrogate to himself the exclusive role of the bread winner and to the woman of the home maker. Now, it is a sharing of both roles by the spouses - both being working individuals, earning their livelihood. Of course, it would be a different case, if it were demonstrated that Preeti is indeed a drunkard or alcoholic or a pathogenic socialite. In this case, this Court does not find any such evidence placed on record on behalf of Prashant.

47. It has not been disputed before this Court that for certain spells of time, Prashant was unemployed and Preeti bore the financial responsibilities of the home. This fact does not show Prashant in poor light, or does it eulogize Preeti. It only demonstrates that so long as the spouses were together, they were sharing their common burden of running the household and the family, according to the emergent circumstances.

48. This Court had the advantage of watching the parties' interact during the hearing. The Court noticed that Advait's father, that is to say, Prashant and his grandparents, Smt. Sharda Sharma and Chandra Kishore Sharma, are a doting father and grandparents to the extent that their affection may become a bane for the child. It hardly needs be gainsaid that the welfare of a child consists not only in the care that he is given while young, but the manner he is groomed to become a responsible citizen. The Court found the over-indulgence by Advait's father and his grandparents, a possible source of hampering his development and grooming him into a

young adult. To the contrary, this Court did not notice anything about Preeti's disposition towards her son, which may not auger well for the child's development and overall welfare. It is the precipitate wisdom of generations that a young child's welfare is better ensured in the hands of the mother than the father, or for that matter, anyone else. It is in keeping with this transcendent experience of mankind that the proviso to Section 6(a) of the Act of 1956 reserves to the mother the right to the child's custody until the age of five years. The word 'ordinarily' predicates a rule about custody of a young child to be entrusted to the mother, but making allowance in exceptional circumstances for the Court to order otherwise. These circumstances could be demonstrable delinquency, drug addiction, conviction in connection with offences involving moral turpitude, coupled with behaviour, that renders the mother unfit.

49. In the opinion of this Court, there is a strong presumption about a child's welfare to be better secured in the mother's hand, which can be dispelled only by cogent and glaring evidence about the mother's lack of fitness to discharge her maternal obligations, as already remarked. There is no such circumstance or evidence brought to this Court's notice that may render Preeti unfit to take care of her minor son. This Court is fortified in the view that we take by the decision of the Supreme Court in **Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318**, where it has been held:

"13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter

any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

50. This Court took note of this very special role of the mother in **Habeas Corpus Writ Petition No.3921 of 2018, Aharya Baranwal and 3 others vs. State of U.P. and 2 others** decided on 22.05.2019. In **Ahrya Baranwal (supra)**, it was held:

"21. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is 'welfare of the child'.

22. In *Habeas Corpus*, Vol. I, page 581, Bailey states;

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. **The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate.**"

23. It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for the best interests of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment."

(emphasis supplied)

51. I had occasion to consider the question about the right of a mother to the custody of her young child, particularly, in the context of Section 6(a) of the Act of 1956 in **Master Atharva (Minor) and another vs. State of Uttar Pradesh and 7 others, 2020 (143) ALR 332**, where it was held:

"9. A reading of the terms of the proviso to Section 6 shows that quite apart from the question of natural guardianship, the custody of a minor, who has not completed the age of five years, is to be ordinarily with the mother. The only niche, therefore, so far as the statute goes, is the word "ordinary". The word "ordinary" signifies that as a matter of rule, children up to the age of five years are to be left with their mothers, but there could be exceptions as well. Those exceptions could be where the mother is demonstrably leading an immoral life or may have remarried, where in her new home, the child from her earlier alliance has no place, or where the mother is convicted of a heinous offence etc. In the present case, no such circumstance has been indicated, much less pleaded and proved so as to place the mother in that exceptional category where she may be deprived of the custody of her young child, who is still well below the age of five years.

10. It must also be remarked that even after the child turns five, it is not that the mother becomes disentitled. She still would be the best person to tender a child and groom him into an adult. In this connection, reference may be made to the decision of the Supreme Court in *Roxann Sharma v. Arun Sharma*, (2015) 8 SCC 318, where it has been held:

"13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

52. This Court takes note of the fact that Preeti is an IT Engineer, employed with a Multinational Corporation. She is currently posted at Bengaluru. She is, thus, evidently an educated woman and has the necessary maturity and judgment to raise the minor. She also has the necessary means. The minor is not yet school going, but this

Court has no doubt that as soon as he turns old enough to go to school, Preeti would do the needful at Bengaluru or wherever she is posted. Also, going by the fact that Preeti is an educated person, there is no reason to doubt that she would secure for Advait necessary medical attention that he needs. Preeti's current posting at Bengaluru is a suitable station for the minor's medical and educational needs, as and when these arise. Also, since Prashant's sister appears to be living in Bengaluru, there ought to be no difficulty for Prashant or his parents, if they wish to visit Advait, by calling him over to the home of Prashant's sister.

53. It has been urged by Dr. Nanda that Preeti has got a permanent Australian Visa (Class SN – Skilled Nominated Sub-Clause 90) for two years and two months, granted on 16th April, 2019. It has been averred to that effect in paragraph no.3 of the supplementary affidavit. It is also said there that Preeti went to Australia in accordance with one of the conditions of the Visa, without telling Prashant about it. She did so in the months of June – July, 2019. An apprehension was expressed by Dr. Nanda, during the hearing, that Preeti would take away Advait beyond the Indian shores and away to Australia, if she were granted custody. To this, a response has been filed in the form of an affidavit, in support of an Application u/s 340 Cr.P.C., seeking to prosecute Prashant, for making a perjured statement in the supplementary affidavit. It is said in the affidavit dated 07.12.2020 that the copy of the Visa, annexed as SA-1 to the supplementary affidavit, is a forged document and that Preeti never left India, though she holds an Indian Passport. The Visa has been condemned as the copy of a forged document.

54. This Court does not wish to go much into the question, whether the document is forged or not, but it would be in the interest of both parties that Advait, so long as he is in the custody of one of the parties while they stay estranged, ought not to leave the country with one parent alone without the consent of the other. It is also

necessary that in the circumstances, apart from visitation rights to meet the minor at Bengaluru, Prashant should also have unsupervised visitation rights of one week at a time, thrice a year, when the child would stay with Prashant alone and the child's grandparents, if they are staying with Prashant.

55. To the above end, Preeti shall ensure that Advait is taken to Prashant for one week at a stretch, thrice a year, and permitted to stay with Prashant, uninterfered with by Preeti. It will be Prashant's responsibility to deliver Advait back to Preeti's custody at the end of each period of one week's stay. It is also made clear that the schedule of these three visits, in one calendar year, shall be mutually agreed upon by parties, subject to the conditions that the week long stay for Advait with his father, shall be not less than thrice a year. So far as the father's visitation to Advait at Bengaluru or wherever Preeti is living is concerned, he would have the right, once a month at Bengaluru, by calling over Advait to his sister's place for seven hours on any Sunday of the Month, between 10:00 a.m. to 5:00 p.m. This arrangement would apply even if Preeti's posting is at a different station, with the modification that the parties would then choose the venue of this monthly visitation mutually.

56. In the circumstances, this Habeas Corpus Writ Petition succeeds and is **allowed**. The *rule nisi* dated 09.09.2020 is made **absolute**. It is ordered that Advait, the minor shall be delivered by his father, Prashant Sharma into the custody of his mother, Smt. Preeti Rai at Ghaziabad, within a week of the date of pronouncement of this judgment, failing which, the Chief Judicial Magistrate, Ghaziabad shall cause the minor to be delivered into the custody of his mother, Smt. Preeti Rai at Ghaziabad through agency of the Police. Smt. Preeti Rai will remain available at Ghaziabad to receive the minor in her care and custody, in accordance with these directions. The father, Prashant Sharma shall have visitation rights in terms directed hereinabove with corresponding obligations upon

Smt. Preeti Rai to facilitate the visitation.

57. Let this order be communicated to the Chief Judicial Magistrate, Ghaziabad, by the Joint Registrar (Compliance), **within next 24 hours.**

Order Date :- 19.2.2021
Anoop / BKM / I. Batabyal