

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CRIMINAL APPLICATION NO. 4518 of 2022**

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TEJAL PARESHBHAI PATHAK W/O CHIRAG PRABHASHANKAR TRIVEDI

Versus

STATE OF GUJARAT

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Appearance:

MR.DARSHAN A. DAVE(7921) for the Applicant(s) No. 1

MR SANDIP M PATEL for the Respondent(s) No. 4,5,6

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 : 05/05/2022

ORAL ORDER

(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. This petition is preferred under Article 226 of the Constitution of India where the petitioner is before this Court seeking the custody of her minor child "Shivanshi". It is the case of the petitioner that the marriage with the respondent No.4 was solemnized on 19.1.2019 and child "Shivanshi" was borne on 5.8.2020. Marriage dispute resulted into petitioner having left her marital home. Parties arrived at the settlement on 4.1.2022, due to intervention for both of them to have the custody turn by turn for 10 days each. Respondent No.4 was to have the custody of child from 1st date of the English calendar month till 10th, whereas from 11th to 20th date petitioner - mother would have her custody and this rotation will go on.

2. The petitioner filed an application under Section 97 of the Code of Criminal Procedure, 1973 where the respondent No.4 averredly gave an assurance to hand over the custody of the minor child to the petitioner and therefore on 15.12.2021, she had withdrawn the application. It is the grievance of the petitioner that respondent No.4 had taken the custody on 13.1.2022 and he thereafter sent a legal notice making it quite clear that he was not ready to return the child and many allegations were altered at her.

2.1. According to the petitioner, the paramount interest of the child if kept in view, the child is only 20 months old and she being the mother, the child's custody should be handed over to her.

3. Prayers sought for are as follows:

“10(A) Your Lordships may kindly be pleased to admit and allow the present petition;

(B) Your Lordships be pleased to issue a writ of Habeas Corpus directing the respondent No.2 to bring and produce the corpus- namely “Shivanshi” (aged 1.5 years) before this Hon'ble Court from the illegal custody of respondent No.4 to 6 at the earliest;

(C) Your Lordships may be pleased to grant such other and further relief(s) as may deem just and proper in the facts and circumstances of the case.”

4. Today, the child is brought before this Court by respondent No.4. We had a detailed talk with both the

parents and attempts have been made to make them understand individually and collectively as also in presence of their respective learned advocates that the child would need warmth and love of mother and father both. Proposal was also moved as to whether there is a feasibility of their staying together. We noticed that the excessive mental past baggages are not allowing the spouses to respond positively. However, that avenue appears to be open considering the respective versions as they appear to be regular wear and tear of the married life which are being reflected from their talks. Both the spouses also need to off load themselves from the past and that will be feasible through extensive and continues counseling at the ends of the wiser persons as also by the professional marriage counselors trained in this field.

5. While this process continues, according to us the child is too young to be deprived of mother's love.

6. We have chosen to hear the learned advocate Mr. Darshan Dave for the petitioner and learned advocate Mr. Sandip Patel for Respondents. They have extensively argued in defense of their respective versions. It is not being disputed that the child has been taken away by the father under the pretext of the agreement for 10 days and thereafter he has never been returned. It is a matter of record that neither side has gone to any Court seeking the custody of the minor child under the Guardians and Wards Act or under any other

statutory remedy.

7. Thus having heard both the sides, at the outset, we need to profitably reproduce the findings and observations of the Apex Court in the case of ***Yashita Sahu v. State of Rajasthan & Ors.*** reported in **2020 AIJEL-SC 65636**

“17. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot 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 courts should decide the issue of custody only on the basis of what is in the best interest of the child.

18. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.

19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the

care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

20. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents. ”

8. The Court cannot be oblivious to the personal loss of the

litigants while insisting on the child's custody, till the age of 5 years with the mother and here she is barely 20 months old. The arrangement made on the 4.1.2022, as was given to understand was at the intervention of the police personnel so as to bring about amicable settlement. However, that has not worked well with the parties and that arrangement according to us, is not conducive or beneficial to the child also. But the father must have the visitation rights and therefore, it will be desirable for us to make substantial provision for the same. Let the father meet the child for two days in a week. He can visit Rajkot for this purpose. On 1st and 3rd Saturdays, he can go to the Legal Services Authority, Rajkot. Ordinarily, the timings will be 11 a.m. to 2 p.m. and can be extended to the convenience of both the sides. On special events like birthdays and anniversaries, he will be permitted to visit the child. Let that be in cordial atmosphere where neither side will attempt to create any kind of unpleasant atmosphere. They both shall need to focus on child's well being all along.

9. We would also request the Chairperson, Rajkot District Legal Service Authority to also attempt to bring about the permanent solution between the parties, as according to us, such solution will be quite beneficial. After once the Chairperson undertakes this exercise and if he finds the need for continuity of the process, he will be at liberty to relegate the parties to professional counselors or anyone he deems appropriate. The 1st session will be with physical presence of

the parties where both shall remain present as per scheduled direction and thereafter, if the request is made by respondent No.4, he can be permitted to remain present virtually.

10. The custody of the child to be handed over in presence of learned advocates appearing for the parties and learned APP today in the Court.

11. This is without prejudice to the rights of the parties to approach the appropriate statutory contemplated forum eventually if the permanent settlement does not sail through while exercising their rights under the personal laws. None of the observations here would prejudice the rights of the parties nor would giving of custody to mother of minor child also take away the need of establishing the respective rights under the custody litigation.

12. Accordingly, this petition is *disposed of*. Notice is discharged.

(SONIA GOKANI, J)

(MAUNA M. BHATT, J)

After the order was passed, learned advocate for respondent No.4 to 6 has made a request for stay of this order to enable the parties to approach the Apex Court, considering the age of the child coupled with the fact that the right of

both the sides are kept open to be agitated before the appropriate Court, such a request is rejected.

(SONIA GOKANI, J)

NAIR SMITA V.

(MAUNA M. BHATT,J)

