

RESERVED

AFR

Court No. - 66

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Case :- HABEAS CORPUS WRIT PETITION No. - 61 of 2020

Petitioner :- Anmol Shivhare (Minor)

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- R.K. Mishra

Counsel for Respondent :- G.A.

Hon'ble J.J. Munir,J.

1. This is a habeas corpus writ petition effectively brought by Ram Kumar Gupta in the name of his son Anmol Shivhare, complaining that his minor son aforesaid is in the unlawful custody of Smt. Sanyogita @ Gunja, the minor's mother. He prays that the minor be ordered to be produced before this Court and emancipated in the manner that his custody be entrusted to Ram Kumar Gupta, relieving the minor from the mother's custody.

2. This petition was admitted to hearing on 04.11.2020 and a *rule nisi* was issued, ordering the minor to be produced before this Court on 17.11.2020. The minor was produced before this Court as ordered. On the date of return, the minor's father, Ram Kumar Gupta and the minor's mother, Smt. Sanyogita @ Gunja also appeared in compliance with the Court's direction to that effect, carried in the order dated 04.11.2020. The Court has interacted with the minor Anmol Shivhare,

4. Smt. Sanyogita, on being specifically asked, if she has instructed a counsel to represent her, declined and addressed the Court herself.

5. In answer to the *rule nisi*, no return in the form of a counter affidavit has been filed by or on behalf of Sanyogita @ Gunja, respondent no. 5. Thus, the facts before the Court are those that figure in the writ petition and the others the Court has gathered from the parties while interacting with them during hearing.

6. The facts are that Ram Kumar Gupta and Sanyogita were married according to Hindu rites on 8th December, 2009 at Kanpur Nagar. After marriage, Sanyogita came over to her matrimonial home and the two parties cohabited as man and wife. In time, a son was born to the parties. He was born on 07.08.2015. His name is Anmol Shivhare. Ram Kumar Gupta left his native place for Gurgaon, Haryana in search of better prospects to earn his livelihood. He landed in a private job there. He set up residence at Mohammadpur, Sector 37, Gurugram (earlier called Gurgaon), Haryana. Once established there, Gupta invited his wife along with his young son to stay there. The family moved together and settled at Gurugram. The minor, Anmol was admitted to a certain Divya Niketan Public School, Mohammadpur Jharsa, Gurugram, Haryana. He was enrolled in Class-1. The family were living a peaceful life or so it was thought by Gupta.

7. It is said in the writ petition by Gupta that all of a sudden, on 03.10.2019, Sanyogita went away somewhere taking along the parties' minor son, Anmol. Gupta lodged a first information report on 04.10.2019 at Police Station Sector 37, Gurugram. It was registered as Case Crime No. 295 of 2019, under Section 346 I.P.C. The Police investigated the matter. They found that Sanyogita along with the minor son of parties was staying with

Cr.P.C. could be recorded. She said in both her statements that she had married Balram and also produced a marriage certificate dated 22.05.2018 from the Arya Samaj, Block Khera, Firozabad. A copy of that certificate is available on the record of this petition. The police on the basis of Sanyogita's statements under Section 161 and 164 Cr.P.C. submitted a final report to the Magistrate concerned, proposing closure of the investigation. Gupta, however, says that Sanyogita's marriage to Balram is a nullity because it is a second marriage in the lifetime of her husband. Apparently, she has not secured any kind of dissolution of her marriage with Gupta. She has not secured a decree of divorce or annulment. Gupta says further that upon coming to know of this claim of Sanyogita about a second marriage, he went over to Balram's house and attempted to meet his wife. He particularly tried to meet his son, the minor detenu Anmol. He moved an application to the Station House Officer, Police Station Baldeo, District Mathura asking the police to recover his son and deliver him the child's custody, but to no avail. Gupta says that Sanyogita has married a second time, and therefore, she has lost her right to Anmol's custody. The minor's custody with Sanyogita, in the home of a stranger, has been dubbed as unlawful. Gupta says that the minor's life in the stranger's home is at risk. The minor has a bleak future. It is the minor's welfare that he may be placed in his father's custody, who is his natural guardian, in preference to the mother, who has walked out on her lawfully wedded husband without a divorce, and staying in a live-in relationship with a stranger. This Court must remark here that these facts stare in the face beckoning an answer as to where the minor Anmol's welfare would be best secured.

8. Mr. R.K. Mishra, learned counsel appearing for Gupta, submits that notwithstanding the preference about custody indicated by the proviso to

divorce or an annulment of marriage in accordance with law and honourably left her husband's home to marry another man. It is a case where the mother has acted in an immoral way to walk out on her husband, without telling anyone where she intends to go. She has not secured an end to her marriage with Gupta and has gone over to live with another man, Balram under the colour of a marriage solemnized with him. The mother's marriage to Balram is void under the law as her husband is alive and her marriage to Gupta subsists. She is, therefore, virtually in a live-in relationship with a stranger. The minor's welfare in a stranger's home is not at all secure. Rather, the minor's life is in peril, if Balram were to think that Anmol is an unwelcome presence and an unwanted burden on his resources. He submits that even if Balram has no criminal propensities so as to imperil the minor's life, the lack of affection from the bread winner of the home, where the minor is living, would certainly cast a dark shadow on the minor's future. The minor requires not only food, shelter and clothing but also an intent attention to his education – both literary and moral. Sanyogita, apart from the fact that she has no resources of her own to provide for the minor, would be under the perpetual influence of Balram, with whom she stays. Balram and the minor, being utter strangers, the very sensitive and concerned grooming that a young child requires would be a causality. It is, therefore, submitted that in all these circumstances, the minor ought to be relieved from his mother's custody and entrusted to his father.

9. In reply, the mother has said that she dissociated herself with her first husband, Gupta because he would torture her over triflings. He was unkind to the child also. She says that the child is young and requires her care. She has all the motherly affection for the child. She submits that she can raise him well, taking care of all his needs. She has emphasised that the minor's

discharge somewhat of an inquisitorial role. The submissions from the mother came through mostly during interaction with parties. During the course of interaction with the minor's mother, she described Balram Chaudhary as her husband and Gupta as her former husband. She candidly acknowledged that Anmol was Gupta's son. She also told the Court that she has begotten another son of her wedlock to Balram, as she has chosen to describe her relationship. The other son is an infant of five to six months. About Gupta, she said that he would torture her everyday over triflings. On being asked how Gupta treated his son, Anmol, she said: 'very badly'. She told the Court to Gupta's face, that Anmol once had a burn injury to his hand, but because of Gupta's unkind attitude, the child had to be taken for necessary medical aid and treatment by subterfuge. The Court put specific questions to Sanyogita about Gupta's outlook towards his son, which were answered by her in the terms indicated hereinabove.

10. She told the Court that her present husband earns his living by driving a Taxi. She also said that he wholeheartedly agrees to bear the minor's financial and other responsibilities. The Court further inquired whether the child was attending school. In answer, Sanyogita said, 'Yes, but presently he is not attending school on account of the Covid-19 pandemic'. The Court inquired of her about her educational qualifications, to which she said that she had left her B.A. Course incomplete.

11. The Court interacted with Gupta in considerable detail. He told the Court that he does service for an occupation with the Kanpur Plastic Factory, which is located at Dada Nagar, Kanpur. It is near Panki. He earns a salary of Rs. 9,500/- *per mensem*, overtime wages, apart. Upon the Court asking him if he had remarried, he answered in the negative. Upon the Court further asking Gupta if he intended to remarry, he said that for the present, he has

Gupta informs the Court that he has done his graduation. It would be apposite to extract *verbatim*, the relevant questions put to Gupta and their answers during interaction. These read:

Q. Aapka naam?

A. Ram Kumar Gupta.

Q. Aap kya karte hain?

A. Naukari Kanpur Plastic Factory me. Kanpur, Dada Nagar me. Ye Panki ke paas hai.

Q. Aapki kitni salary hai?

A. Rs. 9,500/-, over time alag se.

Q. Aapne doosri shadi ki hai?

A. Nahi.

Q. Aap dusari shadi karenge?

A. Abhi vichar nahi kiya.

Q. Aap bachche ko kaise palenge, bachcha bahut chhota hai?

A. Paal lenge.

Q. Aap kitna padhe hai?

A. Graduation complete hai.

12. The Court interacted with the minor, Anmol. He is a young child aged a little over five years. The child on being asked his name kept quite. He appears to be lost deep in some thoughts. He did not appear to be very attentive. Bearing in mind the child's tender age, the Court interacted with the child at close quarters with a view to ascertain whether he was comfortable in his mother's custody. This Court attempted to elicit from the child in a subtle manner, if there is any truth to the mother's allegation about

his mother. The Court then drew the child's attention to his father, who was present in Court. The father attempted to touch the child, to which he sharply reacted, shunning the father's touch. At this juncture, the Court again called the child over and asked him, if he would like to go back to his father. Again, he did not speak anything. Instead, he nodded his head vigorously in refusal. The father asked the child to tell him who he was. The child said: 'Koi Nahi'. This was the first word spoken by him since he appeared in Court. He spoke this word of refusal, when beckoned by his father.

13. This Court may re-emphasise that the child is young and it was certainly not the endeavour of the Court to know his intelligent preference about the choice of his guardian. The Court wished to know, again, as already said, if there was any truth to Sanyogita's allegations about Gupta being an unkind father. Again, whatever the Court says is no condemnation of the father or a perennial certification to the mother to hold the minor's custody, till he turns an adult. It is the Court's endeavour for the present to find out where the minors welfare would be best subserved.

14. It is by now well nigh settled that though the Act of 1956 and the Guardian and Wards Act, 1890 speak about the rights of the natural guardian, their appointment and declaration and also their rights to the minor's custody, the decision about the guardianship of a minor or his/her custody, which could be distinct from guardianship, is not so much about the guardian's right, as about the minor's welfare. If there is one principle that has become almost immutable in guardianship and custody disputes, it is this: the welfare of the minor is of paramount importance. *A fortiori* everything else is subordinated to that consideration. The various injunctions about guardianship and custody, carried in different statutes and texts, embodying personal laws of parties, have all to take a back-seat and what

years, ordinarily a minor's interest would be better secured by the mother. This trust expressed in the mother is something that emanates from human nature. Five years is not a statutory cut off date after which the right, as it were, gets divested from one and vested in the other. The age mentioned in the proviso to Section 6(a) is no calibrated formula. It indicates a thought that young children are presumed to be better cared for by the mother, unless something is shown in the circumstances to outweigh that precipitate experience of mankind spread across eons.

16. In this connection, reference may be made with great profit to the decision of the Supreme Court in **Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318**. It has been held there:

"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."

17. There is a very illuminating reference about the mother's priceless role in securing the minor's welfare to be found in a decision rendered by Rajul Bhargava, J. in **Habeas Corpus Writ Petition No. 3921 of 2018, Aharya Baranwal and 3 others vs. State of U.P. and 2 others, in the order dated 22.05.2019**. His Lordship's reference to a passage from *Bailey*

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)

18. It must be remarked that the rather very vexed question about a child's custody torn between parents, who have chosen to part ways, has no answer to fit all situations. Provisions of different statutes and guidance in various authorities are but guides to reach a just conclusion in a particular case. What cannot be lost sight of, as said earlier, is that the principle about the welfare of the child being of paramount consideration cannot be given a go by. In this connection, reference may be made to the remarks of their Lordships of the Supreme Court in **Nil Ratan Kundu vs. Abhijit Kundu, (2008) 9 SCC 413**. It has been held in **Nil Ratan Kundu (supra)**:

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."

19. Considering the overall behaviour of the minor towards his parents, this Court feels that at this age, depriving the minor of his mother's company, might have an adverse impact on his overall development. This, in turn would derogate from the minor's welfare.

20. Here, this Court, on a careful consideration of the matter, finds that the minor, though above the age of five years, is still a child of tender years. He may not be an infant, who needs to be weaned away from his mother, but he still needs the tender care that the mother alone can provide. The fact that the mother has walked away from her husband's home without securing a divorce and entered into a new relationship with Balram Chaudhary, which she represents and ostensibly believes to be a second marriage, may be something that the law and the society frown upon, but, in itself, is something not so depraved or immoral as to deprive the mother of her special place in the minor's life. The mother indicated that she was treated

Chaudhary's home, this Court feels that the minor, for the present, is well adapted into his mother's new family. In that family there is a new member, who is a consanguine brother to the minor. Sanyogita's younger son is begotten of Balram Chaudhary. In the opinion of this Court, Balram Chaudhary, Sanyogita and the two children, who are half brothers, are a family with reasonably good bonds, that can be trusted to secure the minor's welfare. On the other hand, Gupta is engaged in earning his livelihood and back home there may not be anyone, even half as able to take care of the minor at this young age as his natural mother. Sanyogita has also indicated that she is all inclined to raise the minor and ensure good education to him. By contrast, Gupta's reaction to the proposal of raising a young child was rather reluctant. He also said that for the present he has not considered a second marriage. If he does in future, of course, subject to a divorce, the minor might have a step mother. That might be more detrimental to the minor's welfare than a stepfather, who goes away to work. It is a prospect which has not yet come by. Nonetheless, it is a prospect that has to be borne in mind. Thus, so far as the dominant and substantial part of the minor's custody and care are concerned, this Court is of opinion that these would be better secured in the mother's hands, in comparison to the father. At the same time, the minor cannot be deprived of the company of his father.

21. The circumstances in which Gupta and Sanyogita are placed are not very conventional. Therefore, ensuring visitation rights to the father has to be ensured bearing in mind the subtler aspects of human behaviour. The rights of the minor to his father's company have to be ensured at all costs.

22. This Court is, therefore, of opinion that Sanyogita @ Gunja would be obliged to take the minor to his father's home at Kanpur once in two months, on any Sunday of the month. The child will stay with his father from 10:00

period of stay, the minor needs his mother, Gupta will be free to inform her over cellphone and the mother shall take care of the minor's requirements. Reasonable expenses for the onward and return journey by Sanyogita and the minor shall be borne by Gupta, payable at the time of each scheduled visit.

23. It is in these terms that the *rule nisi* issued in this case is **disposed of**. There shall be no order as to costs.

Order Date : 09.12.2020

BKM/-