

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.189 of 2022

Arising Out of PS. Case No.-297 Year-2019 Thana- PIRBAHOR District- Patna

Jyoti Kaur, age about 31 years, Female, Wife of Ravi Saluja, Resident of Khazanchi Road, P.S.- Pirbahore, District- Patna and Wife of Rohan Kumar, Ilaibagh, Bairiya, P.S.- Gopalpur, District- Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through Director General of Police, Patna.
2. The Inspector General of Police, Patna Zone, Patna.
3. The Senior Superintendent of Police, Patna.
4. The Deputy Superintendent of Police, (Town) Gandhi Maidan, Patna.
5. The Officer-in-Charge, Mahila Police Station, Gardanibagh, Patna.
6. The S.H.O., Pirbahore Police Station, Ashok Raj Path, Patna.
7. The S.H.O., Gopalpur Police Station, District- Patna.
8. Ravi Saluja, age about 37 years, Son of Sri Trilochan Saluja, Resident of Mohalla- Khazanchi Road, P.S.- Pirbahore, District- Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Uday Shankar Choudhary, Advocate with Mr. Ritesh Kumar, Advocate
For the Respondent No.8	:	Mr. Ajay, Advocate Mr. Krishna Chandra, Advocate
For the State/R1-R7	:	Mr. Prabhu Narayan Sharma, Adv. [AC to AG]

CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH
and
HONOURABLE MR. JUSTICE PURNENDU SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH)

Date : 01-07-2022

Heard Mr. Uday Shankar Choudhary, learned counsel for the petitioner; Mr. Ajay, learned counsel for respondent no.8, and; Mr. Prabhu Narayan Sharma, learned Assistant Counsel to the learned Advocate General, for the official respondents/State.



2. The petitioner has moved the Court for the following reliefs:

“(i) For the issuance of an appropriate writ/order/direction including a writ in the nature of Habeas Corpus to the Respondent Police authorities for recovery of Victim girl namely Bani Saluja who is in illegal confinement/ custody of Respondent No.-8 namely, Ravi Saluja (Father) since 11.01.2022 till date, and be handed over to the Petitioner.

(ii) For issuance of an appropriate writ/order/direction including a writ in the nature of mandamus commanding the Respondent authorities to especially Respondent No.- 3, 5, 6, 7 and the Respondent authorities to recover the female child Bani Saluja who is in illegal confinement of Respondent No.- 8 (father of the victim) against wishes of the Petitioner, violating the mutual agreement between the Petitioner and the Respondent No.- 8 filed in their mutual Divorce Petition and also Judgement passed by the Principal Judge, Family Court, Patna.

(iii) For issuance of a direction to the Respondent authorities to lodge an FIR for illegal confinement of the minor daughter of the Petitioner by the Respondent No.- 8, till date neither FIR has been lodged nor recovery has been made.

(iv) For issuance of an appropriate writ/order/direction including a writ in the nature of mandamus commanding the Respondent authorities to take appropriate steps to fix the responsibility on the Respondents and for not performing the legal duties, further punishment may be levelled upon them. And to hold the departmental proceedings against the Respondent No.- 5, 6 and 7 who are responsible for the recovery of the Victim baby child namely Bani Saluja.

(v) For the grant of such other relief(s) as the petitioner would be found entitled to, on the facts and in the circumstances of the case.”



3. Having due regard to the nature of the *lis*, the Court deemed it appropriate to interact with the daughter/girl child [Ms. Bani Saluja] in Chambers, stated to have been taken away by the respondent no.8 in violation of the order dated 23.11.2020 of the learned Principal Judge, Family Court, Patna in Matrimonial Case No.107/2020. On 30.06.2022, after spending almost two hours in Court as also a few hours with Ms. Anamika T., learned Registrar (Establishment) of this Court, the girl, her brother [Master Amrit Saluja] and the mother of respondent no.8 [Mrs. Jaswant Kaur] as also the mother-in-law of the petitioner [Mrs. Anita Srivastav] went to the Circuit House, Patna where they spent the night of 30.06.2022, and today/01.07.2022 at 2:15 PM, they have appeared before the Court. The petitioner, the respondent no.8 and the husband of the petitioner [Mr. Rohan Kumar] are also present in person. Today, the Court requested the learned Registrar (Establishment) to interact with the girl child, and such interaction took place over almost two hours. In our interactions, yesterday and today, *in extenso*, with the girl child, the Court finds, apropos her demeanour, that she is much more relaxed today, compared to yesterday. Amidst this backdrop, the learned Registrar (Establishment) has further interacted with her, on our directions.



4. A brief reference to the facts is useful. The petitioner and respondent no.8 solemnised their marriage on 10.11.2008. They were blessed with a boy [Master Amrit Saluja on 19.05.2011] and a girl [Ms. Bani Saluja on 19.05.2015]. For reasons with which we are not presently concerned, they preferred a petition to obtain a decree of divorce with mutual consent under Section 13B of the Hindu Marriage Act, 1955 on 24.01.2020 before the learned Principal Judge, Family Court, Patna [viz. Matrimonial Case No.107/2020]. Judgement therein was delivered on 23.11.2020, leading to the petitioner and respondent no.8 working out an arrangement concerning custody of the two minor children. For completeness, be it noted that Paragraphs No.2 and 5 of the Judgement dated 23.11.2020 are relevant for the same. Thereafter, the petitioner again married Mr. Rohan Kumar on 30.11.2020 and has been blessed with a male child [Master Nishant Kumar] on 07.12.2021. The learned counsel for the petitioner submitted that in pursuance of judgement dated 23.11.2020, decree of divorce was prepared on 05.12.2020.

5. That the extra-ordinary jurisdiction of this Court has had to be invoked in the instant case is rather unfortunate, more so when the warring parties are the biological parents. On one hand, is the biological mother (petitioner), and on the other hand is the



biological father (respondent no.8). While they are now divorced, issues are being raised with regard to the girl child remaining with the petitioner and the boy remaining with respondent no.8. At the outset, we note that such arrangement is in terms of the arrangement finalised *vide* order dated 23.11.2020 of the Court below.

6. The contention urged by the petitioner is that as per the arrangement *supra*, the son, who was in the custody of the respondent no.8 had to be handed over to the petitioner. The boy would reside with the respondent no.8 and the daughter would reside with the petitioner. It is alleged that the arrangement was continuing when respondent no.8 used to bring the son to her house for overnight stay and the very next day, the petitioner would allow respondent no.8 to take the son and the daughter with him for one day. However, it is alleged that the son came to the house of the petitioner on 10.01.2022 and the son was supposed to go, along with the daughter to the house of respondent no.8 on 11.01.2022, which was done, but the daughter, who was supposed to be sent back to the petitioner's house on 12.01.2022, which did not transpire, as claimed by the petitioner. Herein lies the genesis of the dispute which engages our attention. The petitioner then made pleas to the police, and later, the instant petition was filed.



7. Before proceeding, we are mindful of the wisdom of Lord Halsbury, LC in ***Cox v Hakes, (1890) 15 AC 506***, on *habeas corpus*, that *‘the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant’s freedom.’* We bear in mind the guidance in ***Nil Ratan Kundu v Abhijit Kundu, (2008) 9 SCC 413*** to the effect that *‘... 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.'

8. Having considered **Gohar Begum v Suggi**, AIR 1960 SC 93 and **Kanu Sanyal v District Magistrate, Darjeeling**, (1973) 2 SCC 674 in **Syed Saleemuddin v Dr Rukhsana**, (2001) 5 SCC 247, the Hon'ble Supreme Court elucidated thus:

'11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of habeas corpus for custody of minor children the principal consideration for the court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration for the court.

(emphasis supplied via bolding and underlining)

9. In **Nithya Anand Raghavan v State (NCT of Delhi)**, (2017) 8 SCC 454, the Hon'ble Supreme Court restated the law in terms below-noted:

'44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling [Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674 : 1973 SCC (Cri) 980], has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, re-



quiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in *Sayed Saleemuddin v. Rukhsana* [*Sayed Saleemuddin v. Rukhsana*, (2001) 5 SCC 247 : 2001 SCC (Cri) 841], has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In *Elizabeth Dinshaw v. Arvand M. Dinshaw*, (1987) 1 SCC 42 : 1987 SCC (Cri) 13], it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see *Paul Mohinder Gahun v. State (NCT of Delhi)* [*Paul Mohinder Gahun v. State (NCT of Delhi)*, 2004 SCC OnLine Del 699 : (2004) 113 DLT 823] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the de-



cision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

*47. In a habeas corpus petition as aforesaid, **the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition).** For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, **only in exceptional situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.***

(emphasis supplied via bolding and underlining)

10. In *Tejaswini Gaud v Shekhar Jagdish Prasad*

Tewari, (2019) 7 SCC 42, it was held:

‘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.'

(emphasis supplied via bolding and underlining)

11. A coordinate Bench of this Court in ***G S S Sitara v State of Bihar***, (2022) 3 BLJ 274, while upholding the maintainability of the petition seeking a writ of *habeas corpus* by the petitioner/mother therein, rejected her prayer for grant of custody of the minor girl child, who was with the



respondent/father therein. However, that was in the peculiar fact situation of the case, applying the '*test of the best interest of the child and least detrimental alternative*'. Another distinguishing factor in ***G S S Sitara*** (*supra*) was that there was no order of a Court relating to custody, which exists in the case at hand.

12. After extensive and detailed interactions with the petitioner, the respondent no.8, the mother of the respondent no.8, mother-in-law of the respondent no.8 as also the son and daughter of the petitioner and respondent no.8, present in Court, conscious of the paramount requirement of taking the best interests and welfare of the child into consideration, as delineated in the afore-quoted judgements, we proposed the following interim arrangement, which was put to the parties and their respective counsel:

12.1 The parties shall file appropriate application/petition before the Competent Court with regard to any variation they may desire relating to custody/visitation rights of the petitioner and the respondent no.8 with regard to their son and daughter in accordance with the relevant provisions under The Hindu Minority and Guardianship Act, 1956, within a period of ten days from today.



12.2 On such application/petition being filed, the Competent Court shall take up and decide the same within two weeks from the date of filing and if so required, by hearing on daily basis. The parties undertake to cooperate in the such proceedings. To ensure that the other side has notice of the application/petition filed, counsel appearing in this Court shall be at liberty to serve a copy thereof on the counterpart counsel in this Court in the current proceedings.

12.3 The Competent Court shall ensure that the application/petition is decided taking into consideration the law, best interests of the child, medical opinion (if any) to fashion out a workable arrangement, such that it bestows finality, as far as possible, to the dispute. It shall be open to the Competent Court to take the help of expert(s), if it so deems fit. However, care would be taken, to the extent possible, to account for the free will of the girl, before any final order is passed. Needless to state, ultimately the Competent Court will take an independent view, having regard to all particulars, depending on the material before it, in accordance with law.

12.4 Insofar as visitation rights are concerned, the Competent Court shall bear in mind the *dicta* of the Hon'ble Supreme Court in ***Yashita Sahu v State of Rajasthan, (2020) 3***



SCC 67 and *Amyra Dwivedi v Abhinav Dwivedi*, (2021) 4 SCC 698.

12.5 The Competent Court will be uninfluenced by the arrangement noted hereinabove.

13. We are happy to note that the parties, after some discussions, have agreed to the above. The petitioner and the respondent no.8 further agree that during the interregnum i.e., the period till the matter is decided by the Competent Court as proposed *supra*, the girl child can reside with the petitioner. This arrangement is in the factum of the petitioner and her husband consenting to *infra*:

13.1 That the petitioner's husband [namely, Mr. Rohan Kumar (Resident of Flat No.111, Geetanjali Apartment, Mohalla-Ilahibagh, PS Bairiya, District- Patna)] will not reside in the house in which the petitioner is residing, till the time the matter is decided by the Competent Court;

13.2 That Mr. Rohan Kumar would reside in the accommodation provided by the company which employs him, and;

13.3 That Mr. Rohan Kumar will not, in any manner whatsoever, interact with the girl child during the said period.



14. We direct the petitioner to permit the respondent no.8 to interact with the daughter and the petitioner with the son, every day. We deem it apposite to counsel the petitioner that the emotional well-being of the girl child should be her priority. The girl child is at a tender age, and we are confident that henceforth, the petitioner and respondent no.8 will co-parent her fostering in a spirit of cooperation and respect.

15. It has been brought to our notice that mid-term school examination of the girl child is slated to commence from 13.07.2022. The petitioner volunteers that she would take all measures to ensure that the girl is fully prepared for the examination.

16. In order to obviate any misgiving with regard to the treatment meted out to the girl or her comfort at the petitioner's place, this Court directs the petitioner and respondent no.8 to give their mobile numbers to the learned Registrar (Establishment). It shall be the petitioner's duty to let the girl child speak to the learned Registrar (Establishment) at 8:00 AM and 7:00 PM. It is made clear that if at any other point of time, the learned Registrar (Establishment) feels that she may be required to personally verify the status of the girl child, she would communicate this to the petitioner and respondent no.8, who shall forthwith bring her to a



place as instructed by the learned Registrar (Establishment). Depending on her assessment, liberty is granted to the learned Registrar (Establishment), if she feels the intervention of the Court is required, to bring the same to the notice of this Court.

17. The respondent no.8 shall hand over the books, clothes as also the school ID card of the girl child to the petitioner today itself. The petitioner has undertaken to ensure that the daughter's schooling is not impeded in any manner. The petitioner and respondent no.8 are free to make any mutual arrangement with regard to conveyance of the girl to the school and back therefrom on the dates of examination.

18. On the basis of our preceding analysis, we hold that this writ petition for *habeas corpus* is maintainable in law, in view of ***Nithya Anand Raghavan*** (*supra*) and ***Tejaswini Gaud*** (*supra*). The jurisprudence on this score is well-settled now. Although, as recorded hereinabove, we have examined the law on the subject, in view of the instant judgement, particularly the arrangement being consented to by the petitioner and the respondent no.8, we refrain from expressing any opinion *qua* the rival factual contentions on merits.

19. However, a hint of caution is necessitated. The parties should be careful not to create any hurdles in the smooth



operationalisation of the above exercise. We expect no unnecessary objections/complaints to be raised by either side.

20. Liberty is granted to the parties to approach this Court, if any urgent modification of the terms agreed *supra* is warranted, which shall otherwise operate till the Competent Court renders a decision.

21. With the directions and observations afore-noted, this criminal writ petition is disposed of.

(Per: Hon'ble Mr. Justice Purnendu Singh)

22. I had the benefit of going through the erudite judgment of my learned brother Ahsanuddin Amanullah, J. and I am in agreement with the observation and operational part of the order. However, I thought fit to supplement the judgment according to my view also. I wish to add a few words as the present writ petition has been filed in the background of the strained relationship between the husband (respondent no.8) and the wife (petitioner) which resulted into the divorce by mutual consent. The petitioner has raised the issue of custody of her female child aged about 7 years to be handed over to her, who is said to be in illegal custody of respondent no.8 in violation of the terms of divorce by mutual consent. She has not made any allegation that if the child continues to remain in the custody of



father the same will afflict her mental, moral, educational and general welfare. The role of the High Court in such cases in examining the cases of custody of a minor is on the touchstone of principle of *parens patriae* jurisdiction, as the minor is within the jurisdiction of the Court.

23. The law relating to custody of minors has been exhaustively considered by the Hon'ble Supreme Court in catena of decisions and it would be useful to briefly refer to law applicable in custody of child while dealing with this kind of sensitive and delicate issue.

24. The Hon'ble Supreme Court in **Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Anr.**, AIR 1987 SC 3, it was held that whenever a question arises before a Court pertaining to the custody of a minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criteria of what would best serve the interest and welfare of the minor.

25. In **Syed Saleemuddin v. Dr. Rukhsana**, 2001 (5) SCC 247 affirming the principle held that in an application for seeking 'habeas corpus' for custody of minor child, the court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires



that present custody should be changed and the children should be left in care and custody of somebody else. The Apex Court reiterated the principle that in a matter of custody of a child, the welfare of child is of paramount consideration of the Court.

26. In **Howarth v. Northcott, 152 Conn 460**, following observations were made:-

"In habeas corpus proceedings to determine child custody, the jurisdiction exercise by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patrie*, for the protection of its infant ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity." (emphasis supplied)

It was further observed;

“The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate. It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a



child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.”

27. In this regard, it would be important to reproduce the observation made by the Apex Court in **Mausami Moita Ganguli V. Jayant Ganguli, (2008)7 SCC 673** in paragraph nos. 19 to 21 and 23 to 26:

“19. The principle of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of the law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890(Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.”

“20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents in so far as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in



each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstance, bearing in mind the welfare of the child as the paramount consideration.”

21. In *Rosy Jacob v. Jacob A. Chakramakkal* reported in (1973) 1 SCC 840, a three-Judge Bench of this Court in a rather curt language had observed that the controlling factor governing the custody of the child would be its welfare and not the rights of the parent:

“15. ... The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of the parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human being so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.”

“23. Having bestowed our anxious consideration to the material on record and the observation made by the courts below, we are of the view that in the present case there is no ground to upset the judgment and order of the High Court. There is nothing on record to suggest that the welfare of the child is in any way in peril in the hands of the father. In our opinion, the stability and security of the child is also essential ingredient for a full development of child’s talent and personality. As noted above, the appellant is a teacher, now employed in a school at Panipat, where she had



shifted from Chandigarh some time back. Earlier, she was teaching in some school at Calcutta. Admittedly, she is living alone. Except for a very short duration when he was with the appellant, Master Satyajeet has been living and studying in Allahabad in a good school and is stated to have his small group of friends there. At Panipat, it would be an entirely new environment for him as compared to Allahabad.”

“25. It is also significant to note that during the course of hearing on one of the dates, when we had not yet interviewed Satyajeet, we had suggested that it would be better if the child could stay with his mother for some more time. However, upon hearing us, he started crying and whining and, showed reluctance to go with the mother.”

Watching his reaction, we dropped the proposal.

“26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child’s interest and welfare will be best served if he continues to be in the custody of the father, In our opinion, for the present, it is not desirable to disturb the custody of master Satyajeet and , therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained. We feel that the visitation rights to the appellant by the High Court, as noted above, also do not require any modification.”

We, therefore, affirm the order and the afore-extracted direction given by the High Court. It will, however, be open to the parties to move this Court for modification of this order or for seeking any direction regarding the custody and well-



being of the child, if there is any change in the circumstances.”

28. In the case of **Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42**, where the matter had gone in respect of a decision of the District Judge passed in favour of wife-respondent for custody of the child under Hindu Minority and Guardianship Act, 1956, read with Section 25 of the Guardian and Wards Act, 1890.

The conclusions in paragraph 50, 51 and 52 are reproduced as under:-

"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 in Mausami Moitra Ganguli case, 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 parents patriae jurisdiction arising in such cases."

The following observations by the Hon'ble Supreme Court in para 52 of the judgment are quite relevant:-

"52. The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be beneficiary of his own wrongs. The High Court has referred to these aspects in details in the impugned judgments. "

29. Recently the Hon'ble Supreme Court while considering the custodial controversies in **Yahita Sahu v. State of Rajasthan** and Others, (2020) 3 SCC 67, has carefully taken the psychological impact of divorce on the child and the child is taken from one parent and given custody to the other and denied visitation rights or contact with the child. The welfare of the minor to be of paramount consideration, the parent should reach to an agreement so that the child can live in an environment reasonably conducive to child's development. In this regard



observations made in Paragraph nos. 20, 21, 24 and 25 are as under:

“20. 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.”

“21. 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 wary of what is said by each of the spouses.”

“24. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays. In cases like the present one where the parents are in two different continents effort should be made to give maximum visitation rights to the parent who is denied custody.”

“25. In addition to ‘Visitation Rights’, ‘Contact rights’ are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, email or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless



there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 510 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.”

30. A co-ordinate Bench of this Court in **Smt. G.S.S. Sitara Vs. State of Bihar & Ors., 2022 (3) BLJ 274** has also after exhaustively dealing with the peculiar facts of the said case has held that it is not the statutory provision which would bind the court under all circumstances to hand over the custody of the minor child. The Court is required to settle the right giving way to the background consideration of the welfare of the child on the touchstone of principle of *parens patriae* jurisdiction as the minor is within the jurisdiction of the Court.

31. In the present case as per the mutually consented divorce filed on 24.01.2020 vide Matrimonial Case no. 107 of 2020 in which order was passed on 23rd November, 2020, as per the mutually agreed terms, the court allowed the petitioner to have the custody of the minor girl child and Respondent No.8 was to have the Custody of the minor boy and both the children would be allowed to meet each other by an arrangement between the



parties. Under the divorce order, the Respondent No. 8 was ordered to pay an alimony of Rupees 11 Lakhs for the maintenance and welfare of the petitioner and the minor girl child. He was also ordered to make an FD of Rs. 5 Lakhs in the name of his minor daughter, Bani Saluja to the Petitioner, which was duly complied by the Respondent No.8, a reference has been with regard to same in Para 8 of the divorce order.

32. On careful consideration of the facts of the case, it would appear that as per the terms of the agreement order, the son visited the house of the petitioner on 10.01.2022 and the very next day i.e on 11.01.2022, both the son and the daughter returned back to the house of Respondent No.8. The Petitioner has alleged that the Respondent No.8 by not returning her daughter has deliberately violated the terms and conditions of the order dated 23.11.2020 and had allegedly threatened her.

33. It is the case of the petitioner that, upon being aggrieved by the unwarranted action of Respondent No.8, Petitioner tried to lodge case in Pirbahore police station for illegal confinement of her daughter but Respondent No.6 refused to lodge the case and instead threatened her and her present husband, Rohan Kumar of filing a false case under POCSO Act for harassing their minor girl child.



34. Dismayed, the Petitioner went to Mahila PS Gardanibagh, Patna and submitted hand written application on 16.01.2022. Thereafter, a legal notice was sent to respondent No.8 on 17.01.2022, on behalf of the petitioner, wherein the Respondent No.8 was asked to hand over the custody of the child within seven days of the notice. Petitioner filed application of same fact to (1) DGP , Bihar, (2) IG Patna Zone, (3) Sr. SP, Patna, (4) Dy. SP Town, Patna (5) SHO, Mahila P.S. Patna, (6) SHO, Pirbahore, Patna, (7) SHO, Gopalpur PS Patna by speed post dated 23.01.2022 and 29.01.2022. But when no action was taken, the Petitioner filed the writ of Habeas Corpus to get the custody of her minor girl child, Bani Saluja from Respondent No.8.

35. While deciding the matter of interest of a child as observed by the Apex Court, 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 parent which has to be taken into consideration. The issue has to be decided only on the basis of what is in the best interest of the child. **In the present case, I have found that the petitioner and Respondent No.8 had filed a joint petition of mutual divorce on 24.01.2020 and the petitioner just after**



seven days of passing of judgment dated 23.11.2020 and before preparation of decree dated 02.12.2020 married to one Mr. Rohan Kumar on 30.11.2020. (emphasis supplied).

Thereafter, out of her second husband on 07.12.2021, she was blessed with a male child and during this period i.e till 07.12.2021, for almost a year, she never claimed the custody of the child and terms and conditions of mutually consented divorce order ever violated. The conduct of the petitioner shows that she was not concerned in any manner with her daughter or son whose biological father is Respondent No.8 or she had ever complained or has pleaded in the writ petition that the child was not taken care by him.

36. The eldest son of the petitioner had visited her house on 10.11.2022 and he had returned along with her sister back to his home along with their father, the respondent no.8 in terms of the agreement. The allegation is that the respondent no.8 did not return back girl child in terms of the agreement on the very next day i.e. 12.01.2022 and as such violated the terms and conditions of divorce with mutual consent.

37. From the pleadings made in the present writ petition, the question of custody of child is being claimed for violation of terms of agreement of mutual divorce. The petitioner



nowhere has alleged that due care of child is not taken care of by her father i.e. Respondent No.8 and the same to be prejudicial to the welfare of the child. In course of hearing, respondent no. 8 stated that he earns sufficient income and is also ready to bear the cost of the two child, even if, they are admitted in boarding school. The child was produced before the Court and she was found hale and hearty. Respondent No.8 informed that she is studying in Saint Xavier's, Patna which is a school of good repute.

38. It is also significant to note that during the course of hearing on one of the dates, the child was found in a fit mental and physical condition. She made no complaints whatsoever against Respondent No.8 or his family members and seems rather happy in the company of her brother and her demeanour did not show any signs of fear, compulsion, threat or ill treatment.

39. However, the child did raise her concerns with the conduct of Rohan Kumar and recounts being slapped by him. This raises apprehensions with regard to conduct of the husband of the petitioner and the effect it may cast on the tender and susceptible mind of the girl child if they are to live together under the same roof.



40. The petitioner has an infant who requires the mothers undivided care and attention almost throughout the day has now shown her affection for the daughter and wants her custody. It is informed by the respondent no.8 that his daughter is to take her examination from 13.07.2022. In such circumstances, interviewing child would not be wise, especially when circumstance of case may not be able to give positive point of view from above matrix of facts and situations.

41. However, now the petitioner has also shown her affection towards the child and seeks her custody and has voluntarily desired that she will keep her second husband Rohan Kumar away from the child for any period fixed by this Court and ensures her second husband will not remain in the house.

42. In terms of Section 6 of The Hindu Minority and Guardianship Act, 1956, after the child attains age of 5 years, the father becomes natural guardian of the child as well as minor property and do not include step-father and step-mother. **Section 6** is reproduced as under:

“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 step-father and a step-mother."

This would be required to be read with Section 13 of the Act of 1956 which reads as under:-

"13. Welfare of minor to be paramount consideration-(1) in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minors shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of the opinion that his or her guardianship will not be for the welfare of the minor."

43. It is important for better appreciation to see the provision laid down under Section 17 of the Guardians and Wards Act, 1890 and the same is extracted hereunder:



“17. Matters to be considered by the Court in appointing guardian.--(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
(3) If minor is old enough to form an intelligent preference, the Court may consider that preference.
(4) [***]
(5) The Court shall not appoint or declare any person to be a guardian against his will.

According to the said provision, the welfare of the minor should be considered as paramount consideration.

44. In section 13, the word ‘welfare’ has to be construed literally and taken in its widest sense as per the mandate of laws laid down by the Apex Court in **Gaurav Nagpal Vs. Sumedha Nagpal, (2009) 1 SCC 42**, the moral and ethical welfare of child must also weigh along with physical well being.

45. Without going into the merits of the case and conscious of the paramount requirement of taking the best interest and welfare of the child into consideration, as delineated in the afore-quoted judgments, and also bearing in mind the dicta of the Hon’ble Supreme Court in **Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673**, wherein it was held that it is the welfare and interest of the child and not the rights of the



parents which is the determining factor for deciding the question of custody. **The question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents.** (emphasis supplied).

46. In view of the above discussions made, I am of the view that the best interest of the child is to have the parental care of both the parents, but in the present case, the parents are separated with each other and the innocent child is being dragged into the midst of the custody battles. The child has to bear the burnt of parental disharmony affecting the overall development of the child. It seems to be not possible to provide complete peaceful environment to the child. In such cases, the role of the Court becomes *parens patriae* and it has to decide what is the best interest for the welfare of the child after judging pros and cons of both the respective parents who claims custody of the child.

47. With aforesaid consideration and view of mine, I am in agreement with my brother Ahsanuddin Amanullah, J., with the arrangements made during the interregnum period i.e till the matter is decided by the competent Court.



48. While parting with this judgment, I would record that the observations made in this judgment are only for the purpose of this case and no part of it shall be taken as a finding of this Court in a proceeding of guardianship before a competent court of law.

(Ahsanuddin Amanullah, J)

(Purnendu Singh, J)

Anand Kr.

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