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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
GUARDIANSHIP PETITION NO.9 OF 2023

Mrs. Rita D'Souza

...Petitioner

Versus

Christopher Diago Zuzarte and Anr.

...Respondents

Mr. Filji Frederick with Mr. Archit Chaturvedi and Ms. Alisha Mohite
i/b FF and Associates for the Petitioner.

Mr. Rajiv Basant Chaudhary for the Respondents.

CORAM : R.I. CHAGLA J.
DATE : 5TH OCTOBER, 2023.

ORDER :

1. By this Guardianship Petition, the Petitioner is seeking direction that the Petitioner is true and lawful guardian of minor child Gabriel. The Petitioner has referred to certain events which have transpired on the birth of the minor child Gabriel and has relied upon the report of the Doctor of Wadia Hospital who according to the Petitioner deemed it fit to handover the minor child Gabriel to the Petitioner with the consent of his biological parents and upon the Petitioner taking responsibility for the child. Annexed at Exhibit A is the report of the Dr. Wadia Hospital along with discharge card.

2. The Petitioner has submitted that she is in a better position to take care of the welfare of the minor child Gabriel and has been doing so ever since the birth of the minor Gabriel who was brought to the house of the Petitioner from the hospital upon his discharge. The Petitioner has referred to the medical condition of Respondent No.2 coupled with the fact that the Respondents are not in a financial condition to take care of the minor child Gabriel. The Petitioner has further stated that the Respondents had for a short while after the birth of Gabriel stayed at the house of the Petitioner. However, due to the inconvenience caused to the Respondents in travelling from Mira Road to Parel for the treatment and constant follow-up of Respondent No.2, the Respondents left the house of the Petitioner, leaving Gabriel with the Petitioner for being looked after. All expenses incidental to Gabriel's upbringing in the last two years were at all times borne by the Petitioner.

3. The Petitioner has referred to a certain police complaint made by the Respondent No.1 on 11th March, 2021 against the Petitioner filed at the Bhoiwada Police Station, Parel alleging that the Petitioner had forcefully abducted Gabriel from his biological parents i.e. the Respondents without their consent and was illegally retaining

the custody of Gabriel and the Respondent No.1 wanted the custody of his son back. Annexed at Exhibit D to the Petition is a copy of the statement of Respondent No.1 filed with the Bhoiwada Police Station, Parel.

4. The Petitioner has further stated that the concerned Police Officer from the Bhoiwada PS called upon the Petitioner to hand over custody of the minor child Gabriel to the Respondents based on the complaint made by the Respondents. However, after having interacted with both the Petitioner and the Respondents, the police officer realized that Gabriel was being taken care of in a very efficient manner with the best of amenities and that the Petitioner had not taken custody of Gabriel by force but he was given to the Petitioner by consent of the Respondents for taking proper care of him.

5. The Petitioner in less than two months after handing over custody of Gabriel was called upon by the Respondent No.2 to take Gabriel back since his health had deteriorated to a massive extent due to malnutrition at the house of the Respondents. In view of the said complaint filed by the Respondents with the Bhoiwada PS,

Parel, the Petitioner visited the concerned Police Station and was advised by the Assistant Police Inspector Mr. Rahul Lokhande to take Gabriel to her own house with the consent of the Respondents. The Respondents mutually agreed to this decision and willingly handed over Gabriel to the Petitioner.

6. The Petitioner has undertaken to take care of the minor child Gabriel and provide him the best amenities out of pure love and affection towards the child and respect for the family, with a view to ensure that he has a bright future and gets every opportunity to excel in life. The Petitioner states that she has been living alone after death of her husband Mr. Colin D'Souza. The Petitioner does not have any children from her marriage. The Petitioner's husband was a businessman, while she herself has worked in good positions in the corporate sector. Hence, she has sufficient means to take care of herself and also the minor child Gabriel. The Petitioner is also financially capable of taking care of the future well being and education of the child. Further, from interaction with the minor child Gabriel it is noticed that the child is emotionally attached to the Petitioner, owing to the fact that he has been under the love and care of the Petitioner since his birth.

7. There is an Affidavit filed by the Respondent No.1 wherein the Respondent No.1 has denied the contentions of the Petitioner. The Respondent No.1 is the brother of the Petitioner and biological father of Gabriel. He has in the said Affidavit stated that the Petitioner forcibly with dishonest intention took Gabriel from the Respondents' custody to her home after Gabriel's discharge from the hospital upon his birth. It is further stated in the said Affidavit in Reply that the Respondents had requested the Petitioner to give them back their minor child Gabriel. However, the Petitioner had refused to do so. In view thereof, the Respondents had approached the Bhoiwada police station seeking help to get Gabriel from the custody of the Petitioner. The Respondents were given custody of the child by the Petitioner after the police officers at Bhoiwada Police Station called upon the Petitioner to do so.

8. It is the contention of the Respondent No.1 in the said Affidavit that, after getting two months custody of Gabriel from the Petitioner, the Petitioner came to the Respondents home and forcibly took Gabriel from the Respondents by threatening them and went home with the child. The Respondent No.1 has stated that the Respondents are poor and not well qualified and hence there was no

follow up with the Bhoiwada Police Station. The Respondent No.1 in the said Affidavit dated 10th August, 2023 has sought for custody of the minor child Gabriel to be given to the biological parents.

9. There are further Affidavits filed by the Petitioner as well as by the Respondents making counter allegations, particularly with regard to the events that transpired during the discharge of the minor child Gabriel from hospital upon his birth and to whom should the custody of the minor child be given.

10. It is necessary to note that there are Whatsapp communication which has been relied upon by the Petitioner in Affidavit in Rejoinder, wherein the Respondent No.1 has stated that the minor child Gabriel is safe with the Petitioner and the future of the child is in her hands. Further, the Respondent No.1 has stated that Gabriel is the Petitioner's son and not the son of the Respondents. There are photographs which have been annexed to the Affidavit in Rejoinder of the Petitioner which shows that the Respondents had visited the minor child Gabriel at the residence of the Petitioner for celebrating his birthday.

11. This Court having considered the submissions on behalf of the Petitioner and Respondents had attempted to bring a settlement in the matter. However, it is noted in the Order dated 7th September, 2023 that there was animosity between the parties. This Court had suggested that the parties may share the custody of Gabriel. This was vehemently opposed by the Respondent No.1. The Respondent No.1 stated that just two to three days back he was permanently employed and undertook to produce a letter of permanent employment on the next date. This Court also considered it fit to appoint a Commissioner who would visit the respective residences of the Petitioner and Respondents to ascertain their living condition and which of the residences may be more conducive for the welfare of the minor child. In the subsequent order dated 29th September, 2023 it was recorded that the Commissioner had visited the respective residences of the Petitioner and Respondents. The Commissioner's Report dated 20th September, 2023 was tendered to this Court and taken on record. It is noted in the said order that though an undertaking was given by the Respondent No.1 to produce the letter of his permanent employment, the Respondent No.1 stated that his employer is reluctant to issue the employment letter.

12. I have perused the Commissioner's Report dated 20th September, 2023 and taken note of the observations in the report with regard to the respective residences of the Petitioner and Respondents. The conclusion in the report is reproduced as under:-

Conclusion :- By observing both residences it can be seen and it is a fact that the residence of the Petitioner is in best condition, any child would like to stay in the residence of the Petitioner. Therefore, I am of the view of that the residence of the Petitioner is well equipped and is in very good condition for living of child Gabriel.

13. It is well settled by the Supreme Court that the welfare of the child is of paramount consideration whilst determining the issues arising under the Guardianship Act. The Court in considering these issues is exercising its *parens patriae* jurisdiction. One such decision of the Supreme Court is in ***Gaurav Nagpal Vs. Sumedha Nagpal***¹ where the provisions of the Hindu Minority and Guardianship Act, 1956 were considered. Whilst construing the word 'welfare' used in Section 13 of the Act, the Supreme Court held that it 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 his / her physical well being. Though the provisions

¹ (2009) 1 Supreme Court Cases 42.

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 a Court exercising its *parens patriae* jurisdiction.

14. In *Mausami Moitra Ganguli Vs. Jayant Ganguli*², the Supreme Court considered the provisions of the Guardians and Wards Act, 1890 and in particular Section 17 thereof which relates to the custody of the minor child. The Supreme Court in paragraphs 19 and 20 held as under:-

“19. The principles 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 law pertaining to the custody of a child contained in either the Guardianship 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

² (2008) 7 Supreme Court Cases 673.

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 insofar 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 of the 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 circumstances, bearing in mind the welfare of the child as the paramount consideration.”

15. The Supreme Court in *Nil Ratan Kundu and Anr. Vs Abhijit Kundu*³ in the context of the principles governing custody of minor child held in paragraph 52 as under:-

“52. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind 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

³ (2008) 9 Supreme Court Cases 413

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..."

16. Although the above decisions of the Supreme Court are in the context of disputes between the parents as to custody of their minor child, in the peculiar circumstances of the present case, the principles governing the custody of the minor child laid down by the Supreme Court and the role of the Court in exercising its parens patriae jurisdiction will apply inspite of the Petitioner not being a parent but Aunt of the minor child.

17. I have considered the facts of the present case as well as taken note of the documents on record which have been adverted to above including the discharge certificate from the Wadia Hospital after birth of Gabriel, which gave discharge to the Petitioner after considering the psychological issues of the Respondent No.2 – his biological mother. Further, the Petitioner has been taking good

care of the minor child Gabriel since his birth and though there are police complaints of the Respondent No.1 which have been relied upon, the fact is that the minor child Gabriel still remains with the Petitioner and the Respondents have consented to the same by visiting Gabriel at the residence of the Petitioner on his birthdays as can be seen from the photographs annexed to the Affidavit in Rejoinder filed by the Petitioner.

18. I have interacted with the minor child Gabriel in my Chambers and have found that he is extremely attached to the Petitioner. Further, the biological mother, Respondent No.2 has deep psychological issues and this was noticed whilst passing of this Order in Court as there was a huge commotion caused by the Respondent No.2 which disturbed Court proceedings. The Respondent No.1 is very aggressive and has acted in defiance of orders of this Court by stating that he will forcefully take Gabriel from the custody of the Petitioner.

19. Having taken into consideration the welfare of the minor child Gabriel whilst exercising parens patriae jurisdiction, in my view, the welfare of the minor child Gabriel will be best served by

the Petitioner and that the Petitioner is required to be declared the true and lawful guardian of the minor child Gabriel. Hence, in these circumstances, the following order is passed:-

(i) The Petitioner is declared as true and lawful guardian of the minor child Gabriel.

(ii) The Petitioner shall allow the Respondents access to the minor child Gabriel at the residence of the Petitioner by allowing the Respondents to make frequent visits and also permit the Respondents to take Gabriel for outings, subject to him being returned to the residence of the Petitioner on the same day. Liberty is granted to parties to apply in the event there is any difficulty in implementing this Order.

(iii) The Petition is accordingly disposed of in the above terms. There shall be no order as to costs.

[R.I. CHAGLA J.]