

IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH.

227

CWP-24956-2023 (O&M).
Date of Decision: 16.02.2024.

RAVIT CHOWDHRY

... Petitioner(s)

Versus

STATE OF HARYANA AND OTHERS

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. Chetan Bansal, Advocate, and
Mr. Kunal Muthreja, Advocate, with
Mr. Ravit Chowdhry-petitioner-in-person.

Mr. Vivek Saini, Addl. A.G. Haryana.

Mr. S.S. Sahu, Advocate, with
Ms. Sulekha-respondents No.3-in-person.

VINOD S. BHARDWAJ, J. (ORAL)

Challenge in the present writ petition is to the proceedings initiated before the respondent No.2-Sub Divisional Magistrate, Tehsil Ratia, District Fatehabad, under Section 97 of the Code of Criminal Procedure wherein, a warrant of Search dated 25.10.2023 (Annexure P-1) has been issued authorizing Station House Officer (SHO), Police Station, Sadar Ratia, to enter the house of the petitioner and to produce Ekat i.e. son of the petitioner before the Sub Divisional Magistrate, Ratia.

PLEADINGS AND SUBMISSIONS OF PETITIONER

Learned counsel for the petitioner argues that marriage between the petitioner and respondent No.3 was solemnized as per Hindu rites and ceremonies on 01.11.2021 and out of the said wedlock, a son namely, Ekat was born on 17.10.2022. Respondent No.3 is working as a Senior Manager with a real estate group namely ELAA in Gurguram while the petitioner is working as an Assistant Vice President with another real estate group namely Tulip Infratech, Gurugram. The parties were residing together at Gurugram. It is alleged that respondent No.3 left the matrimonial house on 22.09.2023 without any intimation and she also took away her belongings and jewellery. She deserted her son Ekat, who was then about one year old, at the house with the petitioner and left him there while leaving. It is further alleged that respondent No.3 treated the petitioner with cruelty even before leaving the matrimonial house and that she did not make any enquiry or showed any concern about the well being of the minor child. Thereafter, on 27.09.2023, respondent No.3 entered the house with certain unknown persons and started shouting at the petitioner and creating a public unruly scene in the building and in the surroundings. It was with great persuasion that family members of respondent No.3 and the parents of petitioner were able to sit across on 28.09.2023, in an attempt to resolve the issue. The respondent No.3, however, again came with police personnel and asked for her clothes and other belongings and all her belongings were taken to the police post. As respondent No.3 continued to create a scene and harassed the petitioner, a complaint dated 28.09.2023 was submitted by the petitioner at Police Station, Sushant Lok, District Gurugram against

respondent No.3, giving a narration of the entire incident that had taken place.

Learned counsel for the petitioner contends that notwithstanding that respondent No.3 had herself deserted the child and left him at the matrimonial house, a proceeding was instituted by respondent No.3 under Section 97 of the Code of Criminal Procedure at Ratia, District Fatehabad and a search warrant dated 25.10.2023 was issued by the Court of Sub Divisional Magistrate, Ratia, District Fatehabad. It had been alleged in the said complaint that the petitioner illegally confined the infant. The police officials tried to enter the house of the petitioner and threatened the brother of the petitioner with dire consequences if the child is not produced. A complaint regarding the above said incident was submitted by the petitioner to the SHO, Police Station Sushant Lok, Gurugram on 02.11.2023. The present writ petition has now been filed challenging the proceedings initiated before the Sub Divisional Magistrate, Ratia, District Fatehabad for production of the minor child along with the orders passed therein.

PLEADINGS AND SUBMISSIONS BY RESPONDENTS.

No response has been filed on behalf of the respondent-State of Haryana, however, a written statement has been filed on behalf of respondent No.3 Sulekha wherein, she has narrated her version of the incident admitting that the marriage between the petitioner and respondent No.3 had been solemnized on 01.11.2021 at New Delhi. Allegations of demand of dowry, harassment and cruelty meted out to her by the petitioner and members of his family have also been leveled in the said response. It is

further averred that her in-laws used to torture her and were cruel in their behavior towards respondent No.3 especially after the marriage of her younger brother-in-law (Devar) since huge dowry and other valuables had been given by the in-laws' of her brother-in-law. She has alleged that the petitioner and his parents abused and manhandled her on 22.09.2023 and she was forcibly thrown out of the matrimonial house. The minor child was forcibly snatched away by the petitioner and refused to be handed over notwithstanding that the child is still on mother feed. Under the compulsive circumstance, the respondent No.3 had to take shelter at the house of her friend Nancy, who is living as a Paying Guest and the entire incident was also narrated by her to her mother and as well as her brother Deepak. Subsequently, on 27.09.2023, they came to the matrimonial house of respondent No.3 and requested the petitioner and his parents to allow respondent No.3 to meet the child but the above said request was not accepted. On account of above said conduct of the petitioner, respondent No.3 moved an application to the Superintendent of Police, Fatehabad on 18.10.2023 requesting action against the petitioner and members of his family and also approached the Sub Divisional Officer (Civil) Ratia, District Fatehabad, for redressal of the issue as regards the forcible detention of the minor child. It is alleged that the order was rightly passed.

A rejoinder was also filed by the petitioner controverting the factual aspects raised in the reply.

ARGUMENTS OF PETITIONER

Learned counsel for the petitioner has raised an argument that the proceedings under Section 97 Cr.P.C. could not have been

instituted/entertained by the SDM since, the petitioner being the father is the natural guardian of his minor son and that it was not a case of forcible detention of the minor child and instead respondent No.3 had herself abandoned the child. It is also argued that the order of search warrant was issued by the Sub Divisional Magistrate without affording any opportunity of hearing to the petitioner and as such, the same violates the principles of natural justice.

In support of his contention, learned counsel for the petitioner has placed reliance on the judgment in the matter of **Lalit Parkash Sharma Vs. State of Haryana and another in CWP No.739 of 2015 decided on 22.12.2012** by this Court. The relevant extract of the said order reads thus:-

“20. The child was below 5 years old. The couple were living together in a tenanted premises. A dispute arose and the wife called up her father who brought the police to their doorstep. The wife alleges that the husband did not allow her to take the child away. She also urges that the husband had played fraud and had taken child from the hospital to another doctor. The basic ingredient to attract Section 97 Cr.P.C. is that the child is confined under such circumstances, that confinement amounts to an offence. By no stretch of imagination, custody of the child with the real father by itself would amount to an offence. Something more has to be alleged and established to support that position. The revisional Court could not have exercised the revisional powers. Even hard cases cannot persuade a Court to ignore the legal principles and it is in these circumstances, it is held that the wife can not seek relief from criminal Court by invoking the powers under Section 97 Cr.P.C., therefore, the order passed by the Additional Sessions Judge cannot be sustained. There was no need to even remit

the matter back to the Magistrate or give directions. The impugned order is set aside. It is clarified that nothing said herein before this Court shall be construed as an expression of opinion on the merits of the controversy regarding the custody of the child which is now pending adjudication before the competent Court having jurisdiction. That 10 of 11 case would be decided on its own merits uninfluenced by the order made here.”

Reference is also made to the judgment in the matter of **Ramesh Vs. Smt. Laxmi Bai, reported as 1998 (9) SCC 266**, wherein it was held that proceedings under Section 97 Cr.P.C., would not be attracted when a child is living with his father. The relevant extract of the same reads as under:-

“4. From a perusal of the impugned order of the High Court, it appears to us that though the points which should weigh with a court while determining the question of grant of custody of a minor child have been correctly detailed, the opinion of the High Court that the revisional court could have passed an order of custody in a petition seeking search warrants under Section 97 CrPC in the established facts of the case is untenable. Section 97 CrPC prima facie is not attracted to the facts and circumstances of the case when the child was living with his own father. Under the circumstances, we are of the opinion that the orders of the High Court dated 17-7-1996 and that of the learned Additional Sessions Judge dated 9-7-1996 cannot be sustained and we accordingly set aside the orders and the directions given therein.”

Similarly, reliance was also placed on the case of Anjali Rangari Vs. Anil Kripasagar Rangari and others, reported as 1997 (10) SCC 342. The relevant part of the said order is extracted as under:-

“3. The only question that needs to be considered in the context of the facts and circumstances of the present case is as to whether provisions of Section 97 Criminal Procedure Code, 1973 could be invoked. It cannot be disputed that the mother is also a natural guardian under Section 6 of the Hindu Minority and Guardianship Act, 1956, If it is so, could it be said that the custody of the two minor children with the mother was illegal and they were under her wrongful confinement? In the facts and circumstances of the case, we are unable to hold that the custody of the children with the mother was either unlawful or they were wrongfully confined by the mother at Delhi. If this be so the very basis of the impugned order cannot be sustained and consequently the impugned order is required to be set aside. We accordingly do so.”

ARGUMENTS BY RESPONDENT

Rebutting the above said argument, learned counsel for respondent No.3 has relied on the judgment in the matter of Dr. (Mrs.) Veena Kapoor Vs. Varinder Kumar Kapoor, reported as 1981 (3) SCC 92, to the effect that writ of habeas corpus is maintainable in the matters relating to custody of minor children. The relevant extract of the said judgment reads as under:-

“It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that

the custody of child with the respondent cannot be said to be illegal.”

Reliance is also placed on the judgment in the matter of **Zahirul Hassan Vs. State of U.P., reported as 1988 (2) HLR 471**, as per which the proceedings under Section 97 Cr.P.C. can be held maintainable, where father forcibly removes the child from custody of the mother as well as on the judgment of **Prakash Singh Vs. State of Jharkhand and another, reported as 2012 (23) RCR (Crl.) 152**, in relation to the maintainability of proceedings under Section 97 Cr.P.C. He contends that the proceedings would be maintainable since it was a case of child being deliberately taken away from the mother.

Learned counsel for the respondent contends that the averments contained in the application were similar in nature. As per the allegations leveled in the above said application submitted with the Superintendent of Police as well as the averments that have been raised in the reply filed by respondent No.3, it is at best a case where the father of the child did not allow the mother of the child respondent No.3 to take child with her at the time when she left the matrimonial house (without commenting on the circumstances under which she left the matrimonial house).

It is also not in dispute that a petition for dissolution of marriage by way of a decree of divorce has already been filed before the Principal Judge, Family Court, Gurugram, by the petitioner herein.

No other argument has been raised.

CONSIDERATION AND DECISION

I have heard the learned counsel appearing for the respective parties and have also gone through the documents appended along with the present petition with their able assistance.

Before proceeding further in the matter, it would be relevant to make a reference to certain important provisions of law that are attracted in the facts of the present case:-

The Code of Criminal Procedure, 1973***“97. Search for persons wrongfully confined.***

- If any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amount to an offence, he may issue a search-warrant, and the persons to whom such warrant is directed may search for the person so confined; and search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.”

THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

4. Definitions.—In this Act,—

(a) “minor” means a person who has not completed the age of eighteen years;

(b) “guardian” means a person having the care of the person of a minor or of his property or of both his person and property, and includes—

xxx xxx xxx

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.

xxx xxx xxx

13. Welfare of minor to be paramount consideration.—

(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor 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 opinion that his or her guardianship will not be for the welfare of the minor.”

(Emphasis supplied)

It is evident from a bare perusal of the provisions of Section 97

Cr.P.C. that the District Magistrate, Sub-Divisional Magistrate or

Magistrate of the first class can initiate proceedings under Section 97

Cr.P.C. when he has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence. A search Warrant is accordingly required to be issued for production of the person who has been so confined and that an appropriate order is required to be thereafter, passed by the Magistrate in the circumstances of the case, as is deemed appropriate.

In order to ascertain as to whether the necessary grounds existed for formation of a satisfaction by the Magistrate that there was a confinement in the nature of an offence by the petitioner, however, the application submitted before the Magistrate is not on record. Counsel for respondent No.3, however, submits that the averments and allegations reflected in the complaint submitted before the Superintendent of Police are similar to the ones leveled in the application under Section 97 Cr.P.C.

The said complaint has been perused and as per the same, the respondent No.3 has alleged being maltreated in relation to demands and of being forced out of the matrimonial house by forcibly taking away the child. The petitioner-father did not allow her to take the infant child with her. She thus moved the application before the Sub Divisional Magistrate for seeking custody of the infant.

The necessary ingredients for invoking jurisdiction under Section 97 Cr.P.C. can be summarized as under:-

- (i) An application/information has to be brought to the knowledge of the District Magistrate/Sub Divisional Magistrate/Magistrate of First Class;

- (ii) Magistrate must have reasons to believe that a person is confined;
- (iii) The circumstances under which a person is confined amount to an offence;
- (iv) The Magistrate may then direct a person to search for the person confined and to be brought before him; and
- (v) The Magistrate may thereafter pass such orders as seem proper in the circumstances of the case.

Before invoking the powers under Section 97 Cr.P.C. the ingredients ought to be satisfied and it needs to be determined as to whether the child has been illegally confined and as to whether such a confinement would amount to commission of an offence. In the absence of any such satisfaction, the exercise of jurisdiction under Section 97 Cr.P.C. would not be proper.

The search warrant issued by the Sub Divisional Magistrate, Fatehabad reads as under:-

“In the Court of Sub-Division Magistrate, Ratia Distt. Fatehabad

Warrant to Search u/s 97Cr.P.C.

To,

Station House Officer,

Police Station Sadar Ratia.

Whereas complaint has been made by Sulekha W/O Ravit chaudhary Son of Rakesh chaudhary D/O Om Prakash Resident of Ward NO 16 Nahar Colony Ratia Tehsil Ratia

Distt. Fatehabad before me and has been made to believe that my Son Ekat Age 1 & 2 Months S/o Ravit chaudhary have been wrongfully confined by Respondent No. 1 To 5 Ravit chaudhary S/O Rakesh chaudhary 2. Rakesh chaudhary S/O Atam Prakesh 3. Shobita W/O Rakesh chaudhary 4. Pulkit Chaudhary S/O Rakesh Chaudhary 5. Aahat chaudhary W/O Pulkit chaudhary all R/o C-128, 4TH Floor Sushant Lock 1, C Block Sector 43 Gurugram Tehsil & Distt Gurugram.

This to authorize and require you to enter the said house of Ravit Chaudhary & Rakesh Chaudhary, with such assistance as shall be required and to reasonable force if necessary for that purpose to search every part of that house and to bring the above said Ekat before this court on or before 03 Day of 11.....2023.

*Given under my hand and Seal of the court t this?
2.9.10/202 10/2022023.*

Sub-Divisional Magistrate Ratia.”

It is apparent from a perusal of the above said order that the Magistrate has merely referred to the complaint made by respondent No.3 alleging that child has been confined without satisfying himself as to whether the said allegation is substantiated in particulars or not.

So much so, the Magistrate does not even refer as to whether he has reason to believe that a person has been confined under such circumstances as would amount to an offence.

In the absence of satisfying the ingredients and requirements stipulated under Section 97 Cr.P.C., the issuance of a search warrant shall be lacking the minimal statutory requirements and is liable to be set aside.

Further, there is no discussion as to whether the custody of the child with the father would amount to commission of any offence in law or not. Hence, even on the said account, the order that was passed by the Magistrate was non-responsive and has seemingly been passed in a ministerial manner. As per the provisions of the Hindu Guardian and Wards Act, 1956, a father is a natural guardian of the child and that merely because the child is with the father may not always make an offence.

The above said factual aspects have neither been referred to nor considered or mentioned by the Sub Divisional Magistrate while passing the said order. Merely because the parents of a child are in dispute and litigation with each other, does not mean that any such custody would become an offence empowering the Sub Divisional Magistrate to initiate the proceedings under the Code of Criminal Procedure.

Support in this regard is also drawn from the precedent judgment of this Court in the matter of *Lalit Parkash Sharma (supra)*. Therefore, the issuance of search warrants and the order of the Sub Divisional Magistrate impugned herein is set aside.

The same next leads to the second question as to whether in the given circumstances, the temporary or interim custody of the child should be left with the petitioner or should be handed over to the respondent No.3.

While the contention of the petitioner is that the mother abandoned the child and left the matrimonial house without taking the child with her, the contention of respondent No.3 is to the contrary. It is the specific case of the respondent No.3 that child was forcibly taken away from her when she was turned out of the matrimonial house after torturing

her and being manhandled by the petitioner and his family members on 22.12.2023. Her attempt to take back the child with her have been thwarted by force. It was under said circumstances that the proceedings had been instituted. A further emphatic reliance has been placed on Section 6 of the Hindu Minority and Guardianship Act, 1956 that custody of a child below the age of 05 years should ordinarily be with the mother.

It is not in dispute that the child is about 18 months old. The father as well as mother are both claiming custody of the child and that no proceedings are pending before a Family Court for custody of the child.

Before proceeding further into the said matter, it is essential to examine the legal position on the said aspect. In relation to 'Hindus', guardians can be divided into three classes namely:-

- (1) Natural guardians;
- (2) Testamentary guardians (appointed by will of the father);
- and
- (3) Guardians appointed by competent Court as per law.

The rights of a natural guardian have been extended widest amplitude but can be restricted or extinguished only by the Court. The paramount factor under the Guardians and Wards Act, 1890 is the satisfaction of the Court as to what is for the welfare of the minor and protects his best interest while promoting his welfare and protection.

The mandate of Guardians and Wards Act, 1890, is further supplemented in the Hindu Minority and Guardianship Act, 1956 and again re-emphasizes 'welfare' of the minor being 'paramount.' Welfare has been

perceived and applied in a broad sense and not just material and physical well-being. The concept of 'welfare' needs to factor in the physical; psychological; personal and external aspects considering all aspects such as age, gender, physical and mental capacities as well as needs of a child.

Section 6 of the Hindu Minority and Guardianship Act, 1956, recognizes father as the natural guardian and 'after' him, the mother. The use of the expression "**after**" in Section 6 (a) does not presume demise of the father before a mother is deemed natural guardian but has been interpreted to "in the absence" or where the father may not be in actual charge or affairs of the minor – may be on account of any or multiple intervening circumstances, which are required to be ascertained on case to case basis. However, this Court is not delving into above area since the same is not germane to the dispute under adjudication and it is open to the parties to seek such determination by means of approaching the competent Court through an appropriate petition. The significance of the bare reference is that even though law saddles father as the natural guardian but has left ample scope whether mother can be the natural guardian – despite father. Such aspect is again required to be guided by paramount consideration of welfare of a child.

The proviso to Section 6 (a), even while recognizing the status of father as a natural guardian, carves out, the ordinary entitlement to custody of child below 5 years. The said proviso gives a legislative sanctity to what would ordinarily be in best interest of child below 5 years in matter of custody. Hence, unless there are grave, weighty or over-whelming circumstances which require that mother should not be given custody, the

legislative intent is otherwise. The right in favour of the mother, as per the proviso, is only to the 'custody' notwithstanding that 'father' continues to be the guardian. The law also does not suggest that on completion of 5 years or where a child/minor is above 5 years, the 'custody' should be transferred/vested automatically with the father. The same is again an aspect to be determined upon assessment and evaluation of all the relevant considerations coupled with satisfaction of judicial conscience.

The Hon'ble Supreme Court approved the principle of *parens-patriae* as regards the welfare of child being absolutely paramount in the matter of **Dr. V Ravi Vs. Union of India, reported as AIR 2010 SC (Supp.) 257**, and that the above principle concerning welfare of child has to weigh paramount and not just even the Comity of Court in the case of **Nithya Anand Raghavan Vs. State of NCT of Delhi reported as AIR 2017 SC 3137**. The above judgments emphasize the importance and the status which Courts behold on the welfare of the minor. The above aspect finds its place in Section 13 of the Hindu Minority and Guardianship Act of 1956 as well.

Law is thus well settled that even though father is the natural guardian of a child but at the same time custody does not essentially travel with guardianship. Court has been held to be the best guardian of the interests of a minor and its every decision is required to be guided by the paramount welfare of the child. Section 13 of the Hindu Minority and Guardianship Act, 1956, empowers that a Court may declare or appoint a guardian, other than the natural guardian, in the best interest of child. The said provision gives over-riding power to the Court above the rights of the natural guardian in the best interest of child.

As per the Scheme of the Act of 1956, 'guardian' and 'custodian' are two different contractual and conceptual expressions. Section 6 of the Act of 1956 uses both the expressions and declares father to be the natural guardian of the child and at the same time the proviso deals with custody under a special circumstance where the minor is less than 05 years of age. The aforesaid proviso, in the matter of custody of a child below 05 years, again gives an over-riding preference to the mother. The said Section uses a mandatory expression "shall ordinarily." The above expression rather gives rise to a binding obligation on the Court and the same is to be declined only in exceptional circumstances.

A proviso is in the nature of an exception to what has been generally prescribed earlier. Hence, law gives a precedence to a mother's right to custody over the rights of a natural guardian. The above clause was interpreted by the Hon'ble Supreme Court in the matter of **Roxann Sharma Vs. Arun Sharma, reported as (2015) 8 SCC 318**. The relevant part of the said judgment reads thus:-

"10. Section 6 of the HMG Act is of seminal importance. It reiterates Section 4(b) and again clarifies that guardianship covers both the person as well as the property of the minor; and then controversially states that the father and after him the mother shall be the natural guardian of a Hindu. Having said so, it immediately provides that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. The significance and amplitude of the proviso has been fully clarified by decisions of this Court and very briefly stated, a proviso is in the nature of an exception to what has earlier been generally prescribed. The use of the word "ordinarily" cannot be over-emphasised. It ordains a presumption, albeit a

rebuttable one, in favour of the mother. The learned Single Judge appears to have lost sight of the significance of the use of word "ordinarily" inasmuch as he has observed in paragraph 13 of the Impugned Order that the Mother has not established her suitability to be granted interim custody of Thalbir who at that point in time was an infant. The proviso places the onus on the father to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of the Parliament or the Legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

11. We shall now consider the relevance of the precedents cited before us by the learned Senior Counsel for the Father. In Sarita Sharma vs. Sushil Sharma (2000) 3 SCC 14, in defiance of the orders passed by the Jurisdictional Court in the U.S., the mother, Sarita, had returned to India with two children from their matrimonial relationship. The High Court viewed that the divorce decree and custodial directions having emanated from a competent Court deserve to be honoured, and accordingly allowed the Habeas Corpus Petition and directed the mother to return the custody of the children to the father, Sushil. This Court was not persuaded that further consideration by Courts in India as to whether the interests of the children, which were paramount, stood foreclosed and could not be cogitated upon again. As regards Section 6 of the HMG Act, it opined that although it constitutes the Father as a natural guardian of a minor son it could not be considered as superseding its paramount consideration as to what is conducive to the welfare of the minor. These observations were reiterated and this Court reversed the decision of the High Court holding that the interests and welfare of the children dictated that the custody should be with their mother. This case, therefore, militates

against the legal and factual position which the Father seeks to essay before us. It is also important to underscore the fact that both the children were over the age of five, a fortiori, the custody should not have been reversed in the case in hand by the High Court from the Mother to the Father since Thalbir was then around one year old and is presently still less than three years old.

12. Learned Senior Counsel has next drawn our attention to Mausami Moitra Ganguli vs. Jayant Ganguli, (2008) 7 SCC 673. In this case also, this Court was confronted with the custody conflict over 10 year male child. We must be quick to point out that the Court did not consider Section 6 of the HMG Act after detailing the factors which were indicative of the position that the welfare of the child lies with continuing the custody with the father, this Court dismissed the mother's appeal. The facts are totally distinguishable. The ratio continues to be that it is the welfare of a minor which has paramount importance.

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 livelihood of the welfare and interest of the child being undermined or jeopardised if the custody retained by the mother. Section 6 (a) of 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&W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.

14. We must not lose sight of the fact that our reflections must be restricted to aspects that are relevant for the granting of interim custody of an infant. The Trial is still pending. The learned Single Judge in the Impugned Order has rightly taken note of the fact that the Mother was holding a Tenured College Professorship, was a post-graduate from the renowned Haward University, receiving a regular salary. Whether she had a Bi-polar personality which made her unsuitable for interim custody of her infant son Thalbir had not been sufficiently proved. In the course of present proceedings it has been disclosed that the Father has only passed High School and is not even a graduate. It has also not been denied or disputed before us that he had undergone drug rehabilitation and that he was the member of Narcotics Anonymous. This is compounded by the fact that he is not in regular employment or has independent income. As on date he is not an Income tax assessee although he has claimed to have earned Rupees 40,000 to 50,000 per month in the past three years. We must again clarify that the father's suitability to custody is not relevant where the child whose custody is in dispute is below five years since the mother is per se best suited to care for the infant during his tender age. It is for the Father to plead and prove the Mother's unsuitability since Thalbir is below five years of age. In these considerations the father's character and background will also become relevant but only once the Court strongly and firmly doubts the mother's suitability; only then and even then would the comparative characteristic of the parents come into play. This approach has not been adopted by

the learned Single Judge, whereas it has been properly pursued by the learned Civil Judge.

15. In the course of the hearings before us temporary visitation rights were granted to the Mother under the provision of a social worker who had been appointed by the Maharashtra State Legal Service Authority. We have had the advantage of perusing her very diligent and detailed Reports which vividly recount the initial reluctance and antipathy of Thalbir to his Mother, which very quickly came to be naturalised because of the maternal affection of the Mother. The Reports of the Social Worker lucidly indicate that at present Thalbir is extremely comfortable and happy in the company of his Mother but becomes agitated at the sight of his Father when he has to return to him. The Social Worker has also fervently pleaded that her Reports should be kept sealed for fear of the Father. This is extremely disturbing to us just as we expect it should be to the Father also.”

Hence, the suitability, if determined, the proviso derives the force of binding and mandatory law.

The said issue was also considered by this Court in the matter of **Neha Vs. State of Haryana and others, decided on 01.06.2020 in CRWP-3013-2020.** The relevant extract thereof reads thus:-

“13. Another aspect that is particularly noteworthy herein is, the tender age of the minor daughter. She is merely four years and ordinarily, per Section 6 of 1890 Act, custody of a minor who is less than five years has to be with her mother. For ready reference, said section is reproduced as under:-

6. Natural guardians of a Hindu minor- The natural guardian 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.

No doubt, the above provision postulates that the custody shall "ordinarily" be with the mother. But the word "ordinarily" is to be construed to mean that unless, prima facie, it is shown otherwise by the father that child would be better taken care of by deprivation of motherhood. Father must then give some cogent reasons, indicative of the welfare and interest of the child being jeopardized or the exclusive motherhood being imminently non-conducive to the upbringing of child. In the family scenario and circumstances herein, there is no such cogent reasoning forthcoming so as to deny statutory right of a mother. Said motherhood right, in fact, is essentially more for the benefit and welfare of the minor child. Spirit of section 6 hypothesizes that, given the tender age of a minor, suitability of custody is not the predominant factor, what is more relevant or should weigh, is the requisite biological and natural environment, which gives rise to a general presumption that mother is first and best suitable for child care of a minor that age.

14. In the aforesaid background, while there is no dissention with the proposition that respondent No.4 being father of the minor daughter herein, cannot be stated to be in her illegal or unlawful custody, however, since the minor daughter is less

than five years, the mother is, therefore, entitled to the benefit of Section 6, ibid. That apart, prima facie, this Court is of the opinion that until the prayer of the parties qua custody of the minor child is decided by Guardian court, the welfare and interest of the minor child would be better in the hands of mother-petitioner.

15. Having given my careful thought to the entire family set up vis a vis the welfare of the child involved herein and the relevant statutory provisions, I am of the opinion that it may not be desirable to continue the custody of the minor child with respondent No.4. Especially, when the minor daughter since her childhood was with both the parents until in the surreptitious manner she was taken away by the father-respondent No.4 to have her exclusive custody.”

The Courts have thus recognized the preferential right of the mother in relation to child below 05 years, if she is otherwise suitable and capable of taking care of the child.

The facts circumstances of the case nowhere bring any compelling evidence against the mother and rather show that mother does not suffer from any mental; physical; psychological or financial restraint or impediment. She is educated, qualified, working and is financially independent.

Reference is hence required to be made to the judgment relied upon by the petitioner for seeking protection of custody of the minor.

Referring to the judgment in the matter of **Ramesh Vs. Smt. Laxmi Bai (supra)** relied upon by the petitioner. In the said case, the Hon'ble Supreme Court observed that Section 97 Cr.P.C. would not be

attracted where the custody of the child is with the father. What is evident from a perusal of the said judgment is that the child namely Amit in the above said case was aged 09 years at the time when the dispute was brought before the Court, hence, the proviso was neither applicable nor considered and adjudicated by the Hon'ble Supreme Court of India. The same largely dealt with scope of Section 97 Cr.P.C.

Similarly, in the matter of **Anjali Rangari (supra)**, the father therein, had alleged that mother had left the matrimonial house along with two minor children. The Chief Judicial Magistrate ordered the custody of the minor children to be given to the father. It was held by the Hon'ble Supreme Court that in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, the mother is also a natural guardian of the said children and custody of the child was handed over to the mother. The above judgment does not, in my opinion, further the case of the petitioner and rather supports the cause of the mother.

The judgment relied upon by the counsel for respondent No.3, on the other hand, is with respect to the maintainability of the proceedings under Section 97 Cr.P.C., in the matter of **Dr. (Mrs.) Veena Kapoor (supra)** relates to a writ of habeas corpus and would not be applicable to the facts of the present case. The same is thus not applicable to the dispute involved in the present case, either on facts or on law.

Before proceeding to decide the issue as to who should be given interim custody of the minor till such time that the parties obtain appropriate orders from the Family Court for custody, even though said issue may not be primary, but since it emanates from proceedings for

seeking custody under Section 97 Cr.P.C., it is definitely involved and is required to be determined. This Court afforded opportunity to the parties to resolve their differences amicably. The parties failed to settle the same.

The parents are required and expected by law and the Society to keep their egos and differences below the welfare of the child they brought in the World, under a belief, consensus and obligation to rear the child as good person and citizen – with a satisfaction of completeness rather than repentance of lacking. The responsibility then falls upon the Court to not allow the ‘child’ to be used as a ‘bait’ or an “object” to be used to exert pressure or dominance in their own turf war.

In exercise of powers under Article 226 of the Constitution of India, High Court is in the role as *parens patriae* and in its such capacity it is required to examine as to what is in the best interest of the child.

Reliance in this regard is also placed on the case of **Ashish Ranjan Vs. Anupama Tandon and others, reported as 2011 (1) RCR (civil) 291**. The relevant extract thereof is reproduced as under:-

“18 It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of stare decisis remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the

"moral and ethical welfare of the child must also weigh with the court as well as his physical well-being". The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution with love, affection and sentiments applying human touch to the problem. 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 parens patriae jurisdiction arising in such cases."

The said principles have further been reiterated by the Hon'ble Supreme Court in the matter of **Syed Salamuddin Vs. Dr. Rukhsana and others, reported as (2001) 5 SCC 247** as well as in **Tejaswani Gaud and others Vs. Shekhar Jagdish Irasad Tewari and others reported as (2019) 7 SCC 42**. It has been held that the Court, while deciding the child custody cases, is not bound by mere legal right of parent or guardian, but welfare of minor is the supreme consideration in custody cases.

It is undisputed from the facts that the husband and wife are working in a real estate on good positions and are independently capable of maintaining themselves as well as the minor. Besides the child was 14 months on the date when the cause of action arose and now is nearly 18 months old, hence, he is less than 02 years of age. The mother does not suffer from any such exceptional circumstances as would render her incapable of being given custody of the minor or where it may be said that it would not be for the welfare of the child if temporary custody, pending orders by Family Court, is given to the mother.

Under such circumstances, the law recognizes the ordinary right of the mother to be handed over the interim custody of the child. The parties would, however, be at liberty to approach the Family Court for seeking custody of the said minor, which shall determine the issue as per law and unfazed by the instant order, which is passed solely as an interim measure.

Hence, considering the totality of the circumstances noticed above, the age of the child who is less than 02 years; best interest of the child; the legal position and legislative intent; the absence of any incapacity and the physical and psychological needs of the child less than 5 years, the petitioner is directed to hand over the interim custody of the child to respondent No.3-mother within a period of one week from receipt of certified copy of the order. The father shall, however, be entitled to visitation right, twice a month, on Sunday or Holidays from 10:00 A.M. till 5:00 P.M. He may also take the child for outing, if so required or felt but shall return the custody of the child by 5:00 P.M. to the mother.

In the event of the parties approaching the Family Court for seeking custody of the child, an expeditious decision shall be taken thereupon by the Family Court, on all the matters including the question of interim custody, as per evidence adduced in support of their respective claim.

The present petition is disposed of accordingly in the terms as aforesaid.

Pending, misc. application(s), if any shall also stand(s)
disposed of accordingly.

February 16, 2024
raj arora

(VINOD S. BHARDWAJ
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No