HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

S.B. Civil Writ Petition No. 1430/2024

Smt. Sanju Tak W/o Dr.kailash Prajapat D/o Shri Shankar Lal Tak, aged about 33 years, R/o 28, Sainik Basti, Nagaur (Raj.) Presently, R/o Gali No. 3, Near Mataji Mandir, Rampura Basti, Bikaner Tehsil, District Bikaner (Raj.).

----Petitioner

Versus

1. Dr. Kailash Prajapat S/o Shri Hariram, R/o 28, Sainik Basti, Nagaur Tehsil, District Nagaur (Raj.).
2. L.k. Singhania Education Centre, Gotan, District Nagaur (Raj.) through its Principal, L.K. Singhania Education Centre, Gotan, District Nagaur(Raj.).

----Respondents

For Petitioner(s)	:	Mr. Jitendra Choudhary Mr. CS Kotwani
For Respondent(s)	:	Mr. Banshi Lal

HON'BLE DR. JUSTICE NUPUR BHATI

Order

12/02/2024

1. Though the matter was listed in 'Fresh' category, the matter was heard finally today itself.

2. This writ petition has been filed under Section 226 and 227 of the Constitution of India claiming the following reliefs:-

> "that this writ petition of the petitioner may kindly be allowed and by an appropriate writ, order or direction in the nature thereof thereby:-
> A. the impugned order dated 19.01.2024 (Ann.3) may kindly be quashed and set aside.
> B. The applications of the petitioner (Ann.2) may kindly be ordered to be allowed.
> C. The whole proceedings pursuant to the application (Ann.1) filed by the respondent No.1, in the facts and circumstances of the case may kindly be declared as void ab initio.

> D. The respondent No.1 and his family members or any other associates, may kindly be restrained from taking any action against the petitioner so as to take back the custody of minor Pranay Khatod from the petitioner in any manner whatsoever.
> E. The Principal of the respondent No.2 School may kindly be restrained from taking any steps in regard custody of the minor child Pranay Khatod from the petitioner, in pursuance of the impugned order dated 19.01.2024 (Ann.3).
> F. Any other appropriate writ, order or direction which this Hon'ble Court may deem just and proper in the facts and circumstances of the case may also kindly be passed in favour of the petitioner.
> G. Writ petition filed by the petitioner may kindly be allowed with costs."

3. Brief facts of the case are that the marriage between the petitioner and respondent no. 1 was solemnized as per Hindu rituals at Bikaner on 16.02.2010 and two children, namely Pranay Khatod, aged 11 years and Mahi Khatod, aged 3 years, have been born out of the wedlock. Due to the ill-treatment of the petitioner and her children by the respondent no. 1 and his family, the petitioner along with Mahi Khatod, left the place and went to her parents' house and after sometime, managed to take Pranay Khatod to her parents' house and, both the children have been continuing their studies in Bikaner.

4. Thereafter, respondent no. 1 filed an application under Section 25 of the Guardians and Wards Act, 1890 (hereinafter referred to as the 'Act of 1890') on 08.01.2024 (Annexure-1) before the Additional District Judge No. 1, Nagaur (Rajasthan) seeking directions to grant custody of the child, Pranay to the Principal of respondent school, L.K. Singhania Education Centre, Gotan, since the child had been studying. In response to this, the petitioner filed separate applications on 19.01.2024 (Annexure-2) under Section 9 and 12 of the Act of 1890. The learned Trial court

vide order dated 19.01.2024 (Annexure-3) allowed the application of the respondent no. 1 and directed that the custody of the minor child, Pranay Khatod, be given to the Principal of the respondent school, as an interim measure. Thus, aggrieved of the order dated 19.01.2024 (Annexure-3), the petitioners have preferred this writ petition.

5. Learned counsel for the petitioner submits that the learned Trial court has committed an error in hearing the application filed by the respondent No.1 as the learned Trial court lacks the jurisdiction as per Section 9 of the Act of 1890. He further submits that only the court which is situated where the minor ordinarily resides i.e. at Bikaner and has jurisdiction and not Nagaur. Thus the filing of the application by respondent No.1 deserves to be dismissed.

6. Learned counsel for the petitioner also submits that the application is filed by the respondent No.1 to harass the petitioner and her son and that, respondent No. 1 has stated wrong facts in the application filed by him that he is worried for the safety and welfare of his son Pranay however the respondent No 1 wishes to take back the custody of the minor son and harass him. He also submits that Pranay does not wish to reside with respondent No.1 his father as respondent No.1 beats him and harasses him which has a negative impact on the health of the minor son Pranay. He further submits that looking to the wishes and happiness of the son, his health, education and welfare the application of the respondent No. 1 under Section 25 of the Act of 1890 deserves to be dismissed. He also submits that the petitioner-mother has

already got the admission of Pranay in a good school and she is taking proper care of her child Pranay which is in the best interest of him.

7. Per contra, learned counsel for the respondents submits that the petitioners have concealed the fact that while the minor child, Pranay Khatod was in school, the petitioner took him away on 31.12.2023 by hiding him in the rear seat of the car and the same was not informed to the respondents. He also submits that the petitioner assured the school administration that she would hand over the custody of child back, but the same was not done, and thus, the respondents filed application under Section 25 of the Act of 1890 which was decided in favour of respondent no. 1 but still, the petitioner did not comply with the same.

8. Learned counsel for the respondents further submits that in the event of non-compliance of order dated 19.01.2024 (Annexure-3), the respondents filed another application under Section 25 of the Act of 1890, wherein the learned Trial court, vide the order dated 31.01.2024 (Annexure-R5), directed the police authorities to take custody of the minor child, Pranay Khatod and give to the respondent school administration, Gotan, however when the authorities reached the residence of the petitioner, they did not find the petitioner there and thus, he submits that the order dated 31.01.2024 (Annexure-R5) has not been complied with. He further submits that the minor child, Pranay Khatod has been studying in the respondent school for nine months and changing the school in between the academic session would cause loss to his studies and it would be against the

interest of the minor child, to continue the last three months of his academic session in a different school.

Heard learned counsel for the parties, perused material available on record as well as the judgment cited at Bar.

9. This court observes that while passing an order for custody of child, the interest and welfare of the child has to be of paramount importance. It is not the better right of the father or mother which is required to be ascertained, rather the desire of the child coupled with availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child, which was reiterated in the case of ***Gaytri Bajaj v. Jiten Bhalla***, reported in ***(2012) 12 SCC 471***. The relevant para is reproduced as under:-

> "14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court."

10. Moreover, the court observes in the case of ***Nil Ratan Kundu v. Abhijit Kundu***, reported in ***(2008) 9 SCC 413***, that it is not the "negative test" i.e. whether a parent is unfit to maintain the custody of child, rather a "positive test" i.e. whether such

custody would be in the welfare of the child, which is to be ascertained while deciding the custody of the child. Thus, in the present circumstances, taking into account the welfare of child, the custody remains with the mother. The relevant para has been reproduced as under:-

> "62. In our opinion, in such cases, it is not the `negative test' that the father is not `unfit' or disqualified to have custody of his son/daughter is relevant but the `positive test' that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of minor in favour of father, mother or any other guardian."

11. This court, while taking into account, all the crucial factors for determining the custody of child as observed in the case of ***Lahari Sakhamuri v. Sobhan Kodali***, reported in ***(2019) 7 SCC 311***, finds that in all circumstances, in the present case, that irrespective of the characteristics of the father as an individual, the child is not willing to stay with him, it is observed that the mother has sufficient means to provide the child with proper education and access to school and the child has also stated that he wishes to remain with his mother. The relevant para has been reproduced as under:-

> "49. The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual."

12. This court further that in the case of ***Vasudha Sethi & Ors. vs. Kiran V. Bhaskar & Anr.*** reported in ***2022 AIR (SC) 476***, the Hon'ble Apex Court has held that each case has to be decided

on its own facts and circumstances. Factual aspects are required to be tested on the touchstone of principle of welfare of minor child. What is in welfare of the child depends on several factors. A custody dispute involves human issues which are always complex and complicated and what is in paramount interest of a minor is always a question of fact. The relevant para is reproduced as under:-

> "Each case has to be decided on its own facts and circumstances. Though no hard and fast rule can be laid down, in the cases of Kanika (supra) and Nithya (supra), this Court has laid down the parameters for exercise of the power to issue a writ of habeas corpus under Article 226 of the Constitution of India dealing with cases of minors brought to India from the country of their native. This Court has reiterated that the paramount consideration is the welfare of the minor child and the rights of the parties litigating over the custody issue are irrelevant. After laying down the principles, in the case of Nithya (supra), this Court has clarified that the decision of the Court in each case must depend on the totality of facts and circumstances of the case brought before it. The factual aspects are required to be tested on the touchstone of the principle of welfare of the minor child. In the cases of Lahiri (supra) and Yashita (supra), the Benches of this Court consisting of two Judges have not made a departure from the law laid down in the decisions of larger Benches of this Court in the cases of Nithya (supra) and Kanika (supra). The Benches have applied the law laid down by the larger Bench to the facts of the cases before them. It is not necessary for us to discuss in detail the facts of the aforesaid cases. By its very nature, in a custody case, the facts cannot be similar. What is in the welfare of the child depends on several factors. A custody dispute involves human issues which are always complex and complicated. There can never be a straight jacket formula to decide the issue of custody of a minor child as what is in the paramount interest of a minor is always a question of fact. But the parameters for exercise of jurisdiction as laid down in the cases of Nithya (supra) and Kanika (supra) will have to be followed."

13. In the present case, upon interaction with the child in the Chamber, it is seen that the child firmly said that he wishes to

remain with his mother and also does not want to continue his studies with the respondent No.2 School at Gotan, Nagaur.

14. It appears that the mother has tried to over reach the process of law by taking away her minor child from the respondent No.2 school but this Court cannot be ignorant to the natural instincts of a mother, who indeed would never try to cause any harm/damage to her child, be it physical/mental or her child's future prospects. The minor child who is 11 years old and is studying in 6th standard cannot be compelled to study at respondent No.2 school against his wishes. The very fact that the father tried to shirk away from the responsibility of giving love, care to the child in such a tender age by putting the child in a hostel. The mother is trying to keep the child in her company with care and education which reflects upon the prospect of welfare of child at the tender age of 11 years.

15. Upon interaction with the minor child in the chamber, it is found that the mother i.e. petitioner lives with her father and mother and the second child born out of the wedlock of the parties is also with the mother. Thus, the minor child will be in company of his mother, grandfather, grandmother and his younger brother if the mother is given the custody of the minor, whereas presently the father has admitted the minor in the hostel of the respondent No.2. At the time of interaction in the chamber with the mother, she stated that minor child has been admitted in the school at Bikaner in 6th standard and, therefore, the child will not suffer any loss in his studies.

16. In the peculiar facts and circumstances of the case, the welfare of the child lies with the mother, thus this Court deems it appropriate to quash and set aside the order dated 19.01.2024 (Annexure-3) passed by the learned Additional District Judge No.1 Nagaur, and the respondent No.2 is directed to give the custody of minor child to his mother.

17. The writ petition is allowed in the aforesaid terms. Stay application as well as all other pending applications, if any, also stand disposed of.

(DR. NUPUR BHATI),J

224-Surabhi-DJ/-