Court No. - 66 Reserved
A.F.R.

Case :- HABEAS CORPUS WRIT PETITION No. - 861 of 2019

Petitioner :- Smt. Meenakshi And Another
Respondent :- State Of U.P. And 8 Others
Counsel for Petitioner :- Sushil Kumar Sharma,Mohit Kumar
Counsel for Respondent :- G.A.,Amar Nath,Shravana Kumar Yadav

Hon'ble J.J. Munir,J.

1. A young child ought to be and has a right to be in the care and company of his parents. The parents together are a young child's world. It is together that they groom him into his youth. It is together that they ensure the over all development of his personality in its myriad facets. But marriage, like life, some time takes an unpleasant turn, where the spouses could turn into an estranged couple. It is here that a young child faces one of the biggest tragedies of his life. His/ her world comprising the two parents comes apart. It is in this situation that the Court, in the exercise of its *parens patriae* jurisdiction, called upon to perform the onerous task of keeping the young child's world, as much together as can be. The better the Court can bring this about, it could be some recompense to a child's devastated world. This petition for a writ of habeas corpus, instituted by Master Anav's mother, the first petitioner, asking the Court to liberate the minor from his father's custody by entrusting the minor into hers, is about a young child's devastated world.

2. The facts giving rise to this cause are these: Smt. Meenakshi, the first petitioner and Ram Narayan, the ninth respondent married according to Hindu rites on 20.04.2014. The couple lived together as man and wife for a period of about four years. Meenakshi says that she had a tumultuous marriage. In her husband's home, she stayed along with her in-laws. During her stay with her husband, she was tortured, both physically and mentally, in connection with dowry that was demanded. Meenakshi had lost her father some fifteen years ago. It was her mother, who had settled this marriage for her. Her mother had given in dowry all necessaries for a household apart

from Rs.5 lakhs in cash, besides ornaments. During her stay at her husband's, Meenakshi came to know, as she alleges, that her husband had an amorous relationship with his sister-in-law (*bhabhi*) and another girl from the village, to which she objected in vain. She claims that this further accentuated her torture by her husband and in-laws, forcing her to abandon her marriage and go back to her mother's home. She went back to her mother on 04.06.2018. A son, named Anav, was born of this rather short lived wedlock of parties. He was born on 20.09.2016. For the present, Anav is aged about 4 hours.

3. It is also claimed by Meenakshi that after her initial exit from the matrimonial home on 04.06.2018, she attempted reproachment a number of times. She went back to her husband's home, but on each occasion found herself unwelcome. There was a concerted effort to jettison the from her matrimonial home by her husband and the in-laws. The discord between parties was mediated by kinsmen, which resulted in what Meenakshi claims to be a mutual divorce. It is a private settlement, engrossed on a stamp paper, worth Rs.100/- and notarized. It is a document dated 04.12.2018, executed at Panipat, Haryana. Apart from parties, it is attested by witnesses, who appear to be the mediators or *panchas* of some kind.

4. This Court does not wish to comment about the obvious effect in law of this settlement dated 04.12.2018, which Meenakshi believes to be a divorce by mutual consent. In terms of this settlement, the parties convenated to withdraw pending cases and Meenakshi agreed to stay with her mother.

5. It is claimed by Meenakshi that she went back to her mother's home along with her young son, Anav. After lapse of sometime, matters took an unpleasant turn for Meenakshi and her young son, Anav. It is claimed that there was an unholy alliance between Meenakshi's brother, Sunny and her estranged husband, Ram Narayan with the two making it common cause to oust her minor son

from her mother's home. This came about between Sunny and Ram Narayan for very different reasons of their own. While Ram Narayan wanted his son to stay with him, Sunny who is arrayed as the sixth respondent to this petition, wanted the child out of his mother's home, where Meenakshi stays, because he thought Meenakshi may claim a share for her son in her ancestral property. It is claimed that Ram Narayan, in connivance with Meenakshi's brother, Sunny, besides Vinod and Robin, both natives of Village Toli, threatened Meenakshi that they would not permit her son to live with her. It is asserted that Sunny, Vinod and Robin, respondent nos. 6, 7 and 8, in that order, beat up Meenakshi and her mother, telling her that she would not be given a penny of the inheritance. In furtherance of this common interest between Ram Narayan and Sunny, in the evening of 06.04.2019, respondent nos. 6, 7 and 8, beat up Meenakshi. It is also claimed that they opened fire, but Meenakshi's mother came to her rescue. Respondent nos. 6, 7 and 8 beat up Meenakshi's mother also and snatched away her son, locking up Meenakshi and her mother inside a room. Respondent nos.6 to 8, in this manner, kidnapped the minor, Anav and handed him over to Meenakshi's husband, Ram Narayan.

6. The fact that the child had been handed over to his father, was disclosed to Meenakshi by respondent nos.6 to 8. It is also asserted that Meenakshi approached the Police Station Nakud, but the police did not register an FIR. Meenakshi lodged her complaint regarding the kidnapping of her son and also about the incident of being beaten up and subjected to a life threat, to the Inspector General of Police, the Deputy Inspector General of Police, the District Magistrates of Saharanpur and Shamli, the Senior Superintendent of Police, Saharanpur and Station House Officer, Police Station Nakud, District Saharanpur. On 13.04.2019, Meenakshi sent her complaint as aforesaid by registered post. A copy of her complaint along with postal receipts of dispatch to two of the Authorities above detailed, are on record.

7. It is Meenakshi's further case that respondent nos. 6 to 9 promised that Anav, the minor, would be returned to her care and custody by 1st June, 2019, if she relinquishes her claim to her family property and undertakes to leave her native village, along with her mother. It was also put as a condition that she withdraws her pending case in the Court of A.C.J.M.-II, Saharanpur. Surprisingly, there is a written settlement dated 30.05.2019 made before the Station House Officer, Police Station Nakud, Saharanpur, indicating that there was some issue concerning her minor son, Anav between Smt. Meenakshi on the one hand and respondent no.6, her brother, Sunny, Robin and Vinod on the other, regarding which she had lodged a complaint. It is said in the settlement that some respectable persons of the Village and relatives had brought about an amicable settlement between parties, in terms whereof, Meenakshi would be handed back the custody of her minor son on 01.06.2019. It is said that the settlement between parties may be accepted. It is made out that this settlement was never honoured and Meenakshi was not given back the custody of her minor son, who was allegedly kidnapped. Meenakshi then pressed the police to lodge her FIR, regarding which she also approached higher police officers, but to no avail.

8. In the circumstances, an application under Section 156(3) Cr.P.C. was instituted by Meenakshi before the Additional Chief Judicial Magistrate-II, Saharanpur, requesting that a case be ordered to be registered against respondent nos. 6 to 9 for offences punishable under Sections 364, 307, 343, 323 & 120-B IPC. This Application has been numbered on the file of the Magistrate concerned as Case no.123 of 2019 initially, and re-numbered as Case no.1325 of 2019. The Magistrate by his order dated 13.05.2019 has treated the said application, under Section 156(3) Cr.P.C. as a complaint and order it to proceed. A copy of the Magistrates's order dated 13.05.2019 is on record.

9. It is further made out on behalf of the first petitioner that the minor has risk to his life at the hands of respondent nos. 6, 7 and 8 on the one hand because the three of them are after the ancestral property, whereas the safety and welfare of the child is in jeopardy with the father, because he is into an amorous relationship with his sister-in-law, and at the same time, with another woman from the village. It was also pointed out that the fact that the father got his own son kidnapped, in connivance with the first petitioner's brother and the other two respondents, tells much on his conduct, *vis-a-vis* the child's welfare.

10. It is to be noticed here that on behalf of the husband, Ram Narayan, an affidavit dated 02.01.2020 has been filed, styled as a supplementary affidavit. It speaks about the same compromise dated 04.12.2018, upon which the petitioner has relied as proof of a divorce by mutual consent between parties. A closer perusal of this settlement/ compromise shows that it embodies terms about withdrawal of pending litigation between parties and records the fact that the wife has received from the husband, in settlement of all her claims, a lump sum of Rs.15,30,000/-. It is also a term of this settlement that the parties' minor son, Anav would live with his mother. It is shown in the supplementary affidavit filed on behalf of the husband that a petition for divorce, under Section 13(1) of the Hindu Marriage Act, 1955 filed on behalf of the wife before the Additional District Judge, Panipat has been dismissed as withdrawn, and a copy of the order of the learned Additional District Judge, dated 04.12.2018 is on record, annexed to the supplementary affidavit under reference. Along with the affidavit also, annexed is a copy of the order of the Judicial Magistrate at Panipat, dismissing the wife's application for maintenance, under Section 125 Cr.P.C., on the basis of her statement recorded by the Magistrate. The Magistrate's order is also dated 04.12.2018.

11. A joint counter affidavit has been filed on behalf of respondent nos.6, 7 and 8, where all allegations about kidnapping of Meekashi's

son have been denied. It has been made out that Meekashi's son is not in the custody of respondent nos.6, 7 and 8, and further that they were not parties to the settlement recorded between the husband and wife. There is an averment that these respondents never told the first petitioner (incorrectly mentioned as deponent) that her child would be returned to her by 01.06.2019, if she forsakes her claim in the ancestral property of respondent no.6 and herself. It has also been asserted in paragraph 16 that the minor is in his father's custody and, therefore, this petition for a writ of habeas corpus is not maintainable. The first petitioner ought to proceed under the Guardians and Wards Act, 1890 (for short, 'the Act of 1890').

12. This Court has given a thoughtful consideration to the rival submissions and perused the record. In addition, the Court has interacted with the minor's mother, Smt. Meenakshi. The endeavour, to ascertain the minor's wish in this case, does not appear to be very relevant because the minor is a boy of four years, and in the assessment of this Court, too young to express his intelligent preference about his choice for a guardian.

13. Before the Court determines the cause on merits, it is necessary to dispose of the plea, taken in the affidavit filed on behalf of respondent nos.6, 7 and 8, to the effect that the mother ought to ask for the minor's custody, by moving the Court of competent jurisdiction, under the Act of 1890, and not through a writ of habeas corpus. This plea, though figures in the affidavit filed on behalf of respondent nos.6, 7 and 8, has been pressed before the Court on behalf of respondent no.9, Ram Narayan, the minor's father.

14. It is argued by Mr. P.N. Tiwari that the first petitioner and respondent no.9, being both natural guardians under the Hindu Minority and Guardianship Act, 1956 (for short, 'the Act of 1956'), the minor's custody with the father cannot be termed unlawful. It is then urged that the minor's custody with father, being not unlawful, it is not a case, where a writ in the nature of habeas corpus ought to

issue. It is a dispute between the parents for the child's custody, pure and simple, that ought to be determined, under the Act of 1890 by the Court of competent jurisdiction. This question, whether a custody dispute between a parent and some other kindred or between the two parents, is by now fairly well settled. This question came up for consideration before the Supreme Court in **Syed Saleemuddin vs. Dr. Rukhsana and Others, (2001) 5 SCC 247**. It was held in **Syed Saleemuddin** (supra):

> "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 present custody should be changed and the children should be left in 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 of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

15. The question again came up before the Supreme Court in **Nithya Anand Raghavan vs. State (NCT of Delhi) and Another, (2017) 8 SCC 454**. In **Nithya Anand Raghavan** (*supra*), it was held:

> “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, requiring 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 [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 decision 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.
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> 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 exceptionable 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."

16. A milestone decision, on the issue, is the relatively recent pronouncement of their Lordships of the Supreme Court in **Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others, (2019) 7 SCC 42**. In **Tejaswini Gaud**, 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.
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> 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."

17. The Supreme Court, still later, considered the question in **Yashita Sahu vs. State of Rajasthan and Others, (2020) 3 SCC 67**, where it was held :

> "10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary wirt jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw, Nithya Anand Raghavan v. State (NCT

> of Delhi) and Lahari Sakhamuri v. Sobhan Kodali among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable."

18. There is little doubt about the issue that though both the mother and the father are natural guardians, a writ of habeas corpus may issue, because the Court can still determine the legality of the custody with reference to the question of the minor's welfare. As it is said, it is not so much about the rights of the parents to an exclusive custody of the child, as it is about the child's welfare. It is, therefore, lawful for the Court to exercise its jurisdiction and issue a writ of habeas corpus to place the child in a custody, where his/ her welfare appears to the Court to have the best prospects. This petition is, therefore, held to be maintainable.

19. It must be remarked here that the mother has come up with serious allegations about her son being kidnapped by force, by none else than her brother and being delivered into her husband's custody. In their counter affidavit, filed by respondent nos. 6 to 8, that allegation has been vociferously denied. Meenakshi's attempts to put the process of criminal law in motion with regard to her allegations about the minor's kidnapping have failed with the police, and the Judicial Magistrate too, has declined to order the police to register and investigate the case; the Magistrate has directed the matter to proceed as a complaint case. Meenakshi's brother and husband have both denied allegations about the minor being kidnapped. So far as this Court is concerned, there is no tangible evidence about the minor's alleged forcible removable from the mother's custody. This Court is not inclined to probe the matter further, bearing in mind the relationship between parties, and the minor's welfare.

20. Now, the minor is a young child of tender years. He is just four years old. The Court did not find him capable of expressing an

intelligent preference between his parents, in whose custody, he would mostly like to be.

21. The Court has spoken to the minor's father, Ram Narayan. He says that he is a farmer. His annual income is Rs.1.50 lakhs. He also says that he does not pay income tax. He has informed the Court that he has passed his Class-XII examination. Ram Narayan is part of a family where he has his father and mother, besides his elder brother. His elder brother is married and has a son. The minor, Anav is reported to be receiving his education at a certain Adarsh Vidya Public School, Village Sahpat, Tehsil Kairana, District Shamli. The School is located in the village, where Ram Narayan lives. The village does have a hospital. The village has a population of about 2000 – 2200 residents.

22. The mother, on the other hand, says that she is a Post Graduate in Education. She has earned her M.A. Degree in Education from the Chaudhary Charan Singh University, Meerut. She stays in her native village with her mother. Her village is called Toli, located within Tehsil Nakud in the district of Saharanpur. She informed the Court that there are number of schools in the vicinity, mostly in town Fandpuri. The mother says that she does not work, but has sufficient agricultural income. She told the Court that their family own 40 *bighas* of land. She has asserted that she is competent to raise her son well.

23. Amongst many things that this Court noticed is the fact that the father is not, particularly, interested in raising the minor. Rather, the supplementary affidavit dated 2nd January, 2020, that he has filed, annexes a photostat copy of the settlement between parties, dated 04.12.2018, already spoken of. A perusal of the settlement shows that apart from a covenant there, that parties have emancipated themselves mutually of the marital bond and are free to marry elsewhere, there is a specific term in the settlement that the minor, Anav, then aged two and a half years, would stay in his

mother's custody. This discloses the disinclination of the father to bear a whole-time responsibility for the minor's custody and the complementary inclination of the mother to take that responsibility. This settlement between parties, sworn before a Notary Public and arrived at with the mediation of some kind of a *Panchayat*, may carry some terms that the law does not acknowledge, but the settlement about the minor's custody is certainly an enforceable term. The father does not deny that the settlement was recorded and the mother also acknowledges it.

24. This Court also notices that a divorce petition, brought by the mother and proceeding under the Protection of Women from Domestic Violence Act, 2005, besides those for maintenance, under Section 125 Cr.P.C., were all withdrawn by the mother, acting on this compromise. It is not so much about the legal effect of this compromise on the minor's custody that this Court has to take it into consideration. It is to judge the inclination of the two parents, *vis-a-vis* the minor's custody that this Court has looked into the settlement.

25. No doubt, the father and the mother, are both natural guardians, if one goes by Section 6(a) of the Act of 1956. The mother's right and that of the father, under Section 6(a) as to guardianship has been considered at par by the Supreme Court in **Githa Hariharan (Ms) and another vs. Reserve Bank of India and another, (1999) 2 SCC 228**. So far as custody goes, as distinct from guardianship, between the two natural guardians, the mother is to be preferred by virtue of the proviso to Section 6(a) of the Act of 1956, in the case of a child below five years of age.

26. What is important while deciding the issue of custody between two natural guardians, is where the minor's welfare would be best secured. The statute indicates a preference for the mother, so far as a child below five years is concerned. But, that legislative edict though a strong indicator, is not to be construed as an inflexible rule

to be mechanically applied. The question of a child's welfare is always a matter for the Court's decision, based on varied factors.

27. The statutes, like Section 17 of the Act of 1890 or Section 13 of the Act of 1956, only indicates some of the relevant parameters that the Court must be mindful of while deciding the question of the minor's welfare. Every case has individual features of its own, where the Court has to think for itself, at a human level with all experiences at its command, where the minor's welfare would be best secured. No straitjacket formula, as it is proverbially said, can be devised or applied to decide the human problem of a child's welfare. In this connection, reference may be made to the decision of the Supreme Court in **Nil Ratan Kundu and another vs. Abhijit Kundu, (2008) 9 SCC 413**. It is held in **Nil Ratan Kundu**:

> "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 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."

28. In the same vain are the remarks of the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and**

others, (2019) 7 SCC 42. In **Tejaswini Gaud**, it has been held by their Lordships of the Supreme Court:

> **"35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach.** In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child."
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> (Emphasis by Court)

29. Generally speaking, however, the custody of a minor child of tender years, below the age of five years, ought to be with the mother. There could be exceptions to the Rule as the Court has indicated above. Human affairs can never be disposed of by a rubber stamp approach or the application, virtually of mathematical formulae. But, the general rule about custody of a child, below the age of five years, is not to be given a go-by. If the mother is to be denied custody of a child, below five years, something exceptional derogating from the child's welfare is to be shown.

30. I had occasion to consider the legal position in this regard in **Master Atharva (Minor) and another vs. State of U.P. And 7 others, decided on 19.10.2020**. In **Master Atharva (Minor)**, it was held:

> "9. A reading of the terms of the proviso to Section 6 shows that quite apart from the question of natural guardianship, the custody of a minor, who has not completed the age of five years, is to be ordinarily with the mother. The only niche, therefore, so far as the statue goes, is the word "ordinary". The word "ordinary" signifies that as a matter of rule, children up

> to the age of five years are to be left with their mothers, but there could be exceptions as well. Those exceptions could be where the mother is demonstrably leading an immoral life or may have remarried, where in her new home, the child from her earlier alliance has no place, or where the mother is convicted of a heinous offence etc. In the present case, no such circumstance has been indicated, much less pleaded and proved so as to place the mother in that exceptional category where she may be deprived of the custody of her young child, who is still well below the age of five years.
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> 10. It must also be remarked that even after the child turns five, it is not that the mother becomes disentitled. She still would be the best person to tender a child and groom him into an adult. In this connection, reference may be made to the decision of the Supreme Court in Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318, where it has been held:
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> > “13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.”

31. In the present case also, Ram Narayan, the father has not come up with any such case, where the mother may be judged unsuitable to raise the minor. There is nothing on record to show that her case falls into that kind of an exceptional category, where she may be deprived of the minor's care and custody. To the contrary, this Court finds that the mother is an educated woman and a Post

Graduate in Education. She is far better educated than the father. The welfare of the young child is not dependent on material resources alone. It requires a lot more. Literal and then intellectual guidance, besides moral training are important facets of a child's grooming. This Court finds that all these would be better secured with the mother than the father. So far as the financial support is concerned, that in any case, would be the father's responsibility and the law would take care of it.

32. Quite apart, it must be assumed that the parties have settled their monetary issues in terms of the settlement agreement dated 04.12.2018. The mother has indicated that she has the necessary wherewithal to raise the minor. The mother, being found fit to have the minor's custody, it cannot be the best arrangement to secure the child's welfare, or so to speak, repair his devastated world. He must have his father’s company too, as much as can be, under the circumstances. This Court must, therefore, devise a suitable arrangement, where the minor can meet his father in an atmosphere, that is reassuring and palliative. The father must, therefore, have sufficient visitation while the minor stays with his mother.

33. In the result, this habeas corpus writ petition succeeds and is **allowed**. It is ordered that the minor, Anav, who is presently in the custody of his father, Ram Narayan, shall be delivered into the custody of his mother, Smt. Meenakshi within three days of receipt of a copy of this judgment. In case, the minor's custody is not made over to his mother within that time, the learned Chief Judicial Magistrate, Shamli and the Superintendent of Police, Shamli, acting in aid of the learned Chief Judicial Magistrate, Shamli, shall cause the minor to be delivered into the custody of his mother, Smt. Meenakshi, after taking him out of his father, Ram Narayan's custody. And for the purpose, if so required, necessary force may be employed. The father will have visitation rights to meet his son, Anav at Smt. Meenakshi's home. The father, Ram Narayan shall be permitted by Smt. Meenakshi to meet their son, Anav twice a month

on the second and fourth Sundays of each month between 10:00 a.m. to 2:00 p.m. During these visitations, Smt. Meenakshi shall ensure that due courtesy is extended to Ram Narayan and the meeting between the father and the son is facilitated.

34. It is, in these terms, that the *rule nisi* is made **absolute**. Costs shall go easy.

35. Let a copy of this order be sent to Ram Narayan s/o Bhujendra @ Pintu, respondent no. 9 by the Joint Registrar (Compliance) through the learned Chief Judicial Magistrate, Shamli. A copy of this order be also sent by the Joint Registrar (Compliance) to the learned Chief Judicial Magistrate, Shamli and the Superintendent of Police, Shamli for compliance. A copy of this order be also sent to the learned District Judge, Shamli for his record.

Order Date :- 02.12.2020
Anoop