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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 04.04.2018

% Judgment delivered on: 01.05.2018

\+ **W.P.(CRL) 357/2018**

KIRAN LOHIA ..... Petitioner

Through: Ms. Malavika Rajkotia, Ms. Rytim Vohra and Ms. Akriti Tyagi, Advocates

versus

THE STATE GOVT OF NCT OF DELHI & ORS ..... Respondents

Through: Mr. Rahul Mehra, Standing Counsel, GNCTD with SI Amit S, PS – Vasant Vihar
Ms. Kamini Jaiswal, Advocate with Mr. Sanjeev Sharma, Advocate
Ms. Nivedita Sharma and Ms. Palak Mishra, Advocate for R-5

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE P.S.TEJI

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner has preferred the present writ petition to seek a writ of habeas corpus commanding the respondents to produce her minor daughter in the Court and to set her at liberty into the custody of the petitioner. The

petition is directed primarily against her husband who is impleaded as respondent No. 4.

GIST OF PROCEEDINGS

2. In the petition as originally filed, the petitioner had also impleaded Mr. Ajey Lohia, father of respondent No. 4, as respondent No.5. The reason for impleadment of respondent No. 5 as a party respondent was that at the time of filing of the writ petition (which was filed initially on 31.01.2018), the minor daughter of the petitioner and respondent no.4 – Baby Raina, was with respondent No.5 and his wife at Dubai, while the petitioner and respondent no. 4 were in India. In terms of this Court's order dt. 08.02.2018, Baby Raina was brought from Dubai to Delhi and then she was in the custody of respondent No.4. Consequently, vide order dated 19.02.2018, respondent No. 5 Ajey Lohia was deleted from the array of parties, on his own request.

3. On 05.03.2018, we interacted with the petitioner and respondent No.4 in Chamber. It was made clear to the parties that the present proceedings would not be converted into custody proceedings in respect of the minor child, and the said issue necessarily would have to be decided by the Family Court concerned in appropriate proceedings. After hearing learned counsels at some length, we suggested to the parties an interim- without prejudice arrangement, keeping in mind the welfare of the minor child and the concerns of the parties with regard to her welfare. Since the hearing on merits was still underway and the matter was being dealt practically on a day to day basis, we had not recorded a detailed order on 05.03.2018, lest it

prejudices the case of either party. The matter was adjourned to 07.03.2018, and thereafter to 08.03.2018.

4. On the said date, respondent No. 4 sought an adjournment which we were not inclined to grant. We informed respondent No. 4 that in case he does want an adjournment to engage another counsel, he should be willing to handover the custody of the minor child, in the interregnum, without prejudice to his rights and till the matter is heard, to the petitioner. Eventually, respondent No.4 produced the infant child Baby Raina who was handed over to the petitioner subject to the certain conditions.

5. At this stage, we may reproduce an extract from our order dated 08.03.2018 which captures some of the relevant facts, some submissions of the petitioner, and narration of the proceedings which had taken place before the Court till the passing of the said order. The same reads as follows:

> *"1. The petitioner has preferred the present writ petition to seek a writ of habeas corpus, i.e. to seek a direction to the respondents to produce her minor daughter Raina in the Court and to set her at liberty in the custody of the petitioner. The petitioner is the mother of the child Raina, who is one year old. She was born on 23.02.2017 to the petitioner and respondent no.4. Unfortunately, the petitioner earlier suffered two miscarriages and, consequently, Raina was born through surrogacy.*
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> *2. The petitioner and respondent no.4 experienced marital disputes and differences. In December 2017, the petitioner had planned to travel to USA with her minor daughter on an annual holiday. However, since the petitioner could not secure the visa for the child's nanny, the said trip was delayed. In the meantime, the father of respondent no.4, Ajey Lohia – who was*

initially impleaded as respondent no.5 in the petition, requested the petitioner if he could take Raina along with the maid from Delhi to Thailand for a four day family trip. The petitioner was driven into giving her consent on the emotional plea that that the father - Ajey Lohia was a cancer survivor, and did not have much time to live and spend time with his granddaughter.

3. According to the petitioner, respondent no.4 and his father did not want her to accompany them on the trip to Bangkok. Accordingly, Mr. Ajey Lohia took the minor child with him to Bangkok, Thailand. After spending some time in Thailand with the child Raina, he took her to Dubai – where he has a residence. The petitioner reached Dubai on 29.12.2017 with plans of leaving for USA from Dubai itself. The parents of the petitioner and her brothers are all residing in USA. However, the visa of the maid for USA could not be secured.

4. According to the petitioner, on 30.12.2017, she was denied access to Raina and she was told that Raina would not be allowed to leave for USA without the maid. On 31.12.2017, the petitioner was informed that she would be handed over Raina's passport so that they could travel together to New York on 04.01.2018. However, on the following day, respondent no.4 had a change of mind and refused to hand over the passport of the minor child to the petitioner. She was driven out of the house of the father of respondent no.4 in Dubai. Consequently, the petitioner came back to New Delhi.

5. After coming back to New Delhi, the petitioner preferred the present writ petition. The same was listed before the court on 05.02.2018. On the said date, notice was issued to respondent no.4 and respondent no.5 Ajey Lohia. On 08.02.2018, respondent nos.4 and 5 put in appearance through their counsel. Ms. Geeta Luthra, Sr. Advocate appeared on behalf of respondent no.4, whereas Mr. Vikas Sharma appeared for the then respondent no.5. This court directed the said respondents not to leave India till further orders. They were directed to surrender their respective passports on the same

day before the SHO, Vasant Vihar. The FRRO was also directed to ensure that neither of them leaves India to any foreign country till further orders of the court.

6. This court was informed by Ms. Luthra that the child was presently with her paternal grandmother and one nurse at Dubai. This court expressed the view that the child could not be left without the company of either of the parents. Ms. Luthra then gave an undertaking to the court, on instructions from respondent no.4, that Raina shall be brought back to Delhi before the next date. This court also directed respondent nos.4 and 5 to file their respective counter affidavits before the next date of hearing, which was fixed for 13.02.2018.

7. Counter affidavit was filed on behalf of respondent nos.4 and 5 on 13.02.2018. This court was informed that the child had been brought back to India and was at the residence of respondent no.4. This court granted access to the petitioner and her parents, to the residence of respondent no.4 to meet the child at any time. However, the child was not to be removed from the residence of respondent no.4 by the petitioner. This court also directed that the child shall not be removed from Delhi, unless orders are obtained from the court. The injunction against respondent no.5 from travelling outside India was lifted, since the child had been brought back. The matter was adjourned to 19.02.2018.

8. On 19.02.2018, Crl. M.A. No. 3166/2018 moved by the petitioner to seek a formal amendment of the prayer made in the writ petition. Notice of the said application was issued to the respondents. They were granted time to file their reply. Respondent no.5 was deleted from the array of respondents, since the dispute essentially was between the petitioner and respondent no.4, who are the parents of the minor child.

9. On 27.02.2018, the said application for amendment was allowed, and the arguments in the writ petition commenced. Learned counsel for the petitioner was partly heard and the

matter was adjourned to 28.02.2018. Further arguments were heard on 28.02.2018. During all these hearings, respondent no.4 was continuously represented through either the senior counsel or his counsel on record. On 27.02.2018, Mr. Ravi Gupta, Sr Advocate along with Mr. Sanjeev Sharma, Mr. Gopal Dutt and Ms. Archin Mishra, Advocates appeared on behalf of respondent no.4. On 28.02.2018, once again, respondent no.4 was represented through the aforesaid counsels minus learned senior counsel. The matter was further adjourned to 05.03.2018, and thereafter it was adjourned to 07.03.2018. Since this court was busy in hearing some other matter, it was adjourned for today."

6. In our order dated 08.03.2018, we recapitulated the proceedings which had transpired on 05.03.2018. In respect of the proceedings of 05.03.2018 we recorded:

"*10. We may observe that we had interacted with the parties in chamber on the request of counsel for respondent no.4 on 05.03.2018. We had then made it clear to the learned counsels that the present proceedings could not be converted into a custody proceeding in respect of the minor child, and that the said issue would necessarily have to be decided by the Family Court concerned in appropriate proceedings. We had, however - after interacting with the parties, made a suggestion to both the parties regarding the interim arrangement that, in our view, appeared to be in the interest of the child and also addressed the concerns of the parties i.e. the petitioner and respondent no.4. We had suggested the interim custody of the minor child could be with the petitioner mother considering her infancy, with regular visits of the child to the residence of respondent nos.4 and his father - practically on a daily basis, so that she could spent (sic spend) time with them and derive love and affection from them as well. We had been informed that respondent no.4, his parents and the petitioner were all residing in the same locality i.e. Vasant Vihar, New Delhi.*

Learned senior counsel for the respondent no.4 sought a short adjournment to consider the said proposal."

7. The terms and conditions, subject to which we had granted interim custody of the child to the petitioner, were as follows:

(i) The child shall remain in the custody of the petitioner till the decision of the writ petition. However, the petitioner is directed not to remove the child from Delhi.

(ii) The passport of the child is with respondent No.4. He shall continue to retain the same for the time being.

(iii) The petitioner may engage a maid to look after the child.

(iv) The petitioner has informed the Court that she has taken on rent the premises situated at 37, Paschimi Marg, Vasant Vihar, New Delhi. Though, the petitioner is residing at E-12/1, 3rd Floor, Vasant Vihar, New Delhi; his parents are residing at B-20, Ground Floor, Vasant Marg, Vasant Vihar, New Delhi. During the working of this interim arrangement, neither party shall change his/ her address without prior intimation to the Court. Ajey Lohia shall also continue to live at the same address, and no change shall be made without prior intimation to this court.

(v) The child shall be left at the residence of the parents of the respondent No.4 (as desired by respondent No.4) at 02:00 p.m. on week days i.e. Monday to Friday, and shall be collected at 07:00 p.m. on the same day by the petitioner.

(vi) On Saturdays, the child shall remain in the custody of the petitioner, with no visitation rights to respondent No.4 or his parents.

(vii) On Sundays, the child shall be left at the residence of

parents of the respondent No.4 (as desired by respondent No.4) at 10:00 a.m. in the morning, and collected at 07:00 p.m. in the same evening by the petitioner. We have made this arrangement keeping in view the welfare of the child, since the child, admittedly, was with respondent No.4 and his parents till now, ever since the child was taken to Bangkok and Dubai, and brought back to Delhi, with the petitioner having visitation rights.

(viii) At the time of visitation, the respondent No.4 and his parents shall not remove the child from the residence.

(ix) During the time when the child is with respondent No.4 and his parents, she shall be accompanied by the maid employed by the petitioner.

(x) The visitation rights shall be operated from tomorrow, i.e. 09.03.2018 onwards.

(xi) This arrangement shall continue till the petition is disposed of.

(xii) Both the petitioner and the respondent No.4 shall strictly abide by this condition, and if it is reported that either of the two parties have not complied with this condition, or have resisted its compliance, this Court shall re-consider the arrangement.

(xiii) This arrangement has been worked out without prejudice to the rights & contentions of either of the parties. It is not a reflection of the merits of the case of either party.

8. On 13.03.2018, the order dated 08.03.2018 was slightly modified inasmuch, as, the child was to remain with the petitioner on Sundays, and was to be handed over to respondent No. 4 and his parents on Saturdays in modification of clauses (vi) and (vii) of the aforesaid conditions. This arrangement is continuing in operation presently. The submissions of

learned counsels were thereafter heard on 03.04.2018 and on 04.04.2018, and judgment reserved.

9. The matter was jointly mentioned by learned counsels on 16.04.2018. Learned counsels placed before us the order passed by the Supreme Court in SLP(Crl.) No. 3340-41/2018 on 13.04.2018, wherein the Supreme Court requested this Court to dispose of the present writ petition by 10.05.2018, since the controversy relates to the custody of a child in the present petition. On the said date, we permitted learned counsels to file their respective written arguments in two pages confined to the aspect with regard to the power of the court to grant relief in relation to interim custody in a writ of habeas corpus under Article 226 of the Constitution of India. Consequently, learned counsels have delivered their respective written submissions. We have perused and considered the same as well.

SUBMISSIONS OF THE PARTIES

10. Ms. Rajkotia has submitted that a writ of habeas corpus is maintainable in relation to the custody of a minor child, where the custody of the minor child is unlawful or illegal, and where the welfare of the child requires that the present custody be changed to that of another person. In such proceedings, the role of the High Court in examining the aspect of custody of minor child is on the touchstone of the principle of *parens patriae*. In this regard, Ms. Rajkotia, has placed reliance on ***ABC Vs. State of NCT*** AIR 2015 SC 2569. Reference is also made to ***Nithya Anand Raghavan Vs. State (NCT of Delhi) and another*** AIR 2017 SC 3137 and ***Ruchi Majoo Vs. Sanjeev Majoo*** AIR 2011 SC 1952.

11. Ms. Rajkotia submits that Baby Raina was initially in the custody of the petitioner and it was with the consent of the petitioner that the child was taken by the father of respondent No.4, (erstwhile respondent No.5), firstly to Bangkok and from there to Dubai on a vacation. In this regard, reference is made to paragraph (a) on page 24 of the counter affidavit of respondent No.4, wherein he, inter alia, states:

> *"(a) That on 15.12.2017, the respondent No.4's father who is a cancer survivor asked the petitioner as to whether it was possible for her leave the baby with him for few days to visit Bangkok and Dubai as they were to go for vacations to the said places on 20.12.2017. The respondent (sic petitioner) gave her consent to respondent No.4's father for taking the minor child of the parties for vacations."*

However, the petitioner was denied entry into the residence of Shri Ajey Lohia (erstwhile respondent no.5) at Dubai even to meet the child, let alone to bring her back to India. The petitioner being the lawful guardian of the one year old minor child, was entitled to maintain the present petition to retrieve her from the custody of Shri Ajey Lohia, at Dubai, and to get the custody of the minor child with herself.

12. She submits that custody of a minor child, who has not completed the age of five years, should ordinarily be with the mother, as provided under Section 6(a) of the Hindu Minority and Guardianship Act, 1956 ('HMG Act' for short). She submits that the law presumes that it is in the best interest of the child – who is under five years of age, that the child should remain in the custody of the mother. This presumption is rebuttable, but the burden to rebut the same is heavy, and lies on the other parent. She submits that the

said burden has not been discharged by the respondents.

13. Ms. Rajkotia submits that the petitioner being the biological mother of Baby Raina, has been looking after her from the beginning. In this regard, Ms. Rajkotia has drawn our attention to the text messages exchanged by the petitioner with one Dr. Rajiv Seth, a pediatrician, since March, 2017, for periodic vaccination of the child and in relation to other aspects. Ms. Rajkotia has also drawn our attention to Whatsapp communications exchanged between the petitioner and respondent No.4, in relation to the bringing up and handling of the minor child. She submits that these conversations show the concern that the petitioner has for her child, and her disapproval of the manner in which respondent No.4 and his family members were pampering and handling the child.

14. Ms. Rajkotia submits that the petitioner is a successful and established professional with a high reputation as a dermatologist. She is responsible for the success of the clinics which have been set up, and which are being managed by respondent No.4. Ms. Rajkotia submits that the petitioner was interested in cutting down her professional engagements to spend more time with Baby Raina, whereas respondent No.4 was keen on expanding the business. In this regard, she places reliance on conversations exchanged between the petitioner's father and Ajey Prakash Lohia – the father of respondent No.4.

15. Ms. Rajkotia submits that in their counter affidavit, the respondents have not been able to bring out any cogent aspect, which would suggest that the custody of the minor child with the petitioner would be detrimental to the

interest of the minor child, or would not be in her welfare. Therefore, she submits that till the issue of custody of the minor child is resolved in appropriate proceedings before the Family Court, in the interregnum, the petitioner should have the custody of the minor child considering that she is only one year old, and the petitioner is her biological mother.

16. On the other hand, the submission of learned counsel for respondent No. 4 is that the present petition is premised on false and concocted averments. Learned Counsel submits that the respondent No.4, or his parents, never intended to separate Baby Raina from the petitioner. Respondent No. 4 is keen to repair his relationship with the petitioner, so that they can live together as a family with their minor child in their own best interest. Respondent submits that after correspondence with Ajey Prakash Lohia – the father of respondent No.4, the petitioner had come over to Dubai and was living with respondent No. 4 and the minor child at the house of Ajey Prakash Lohia in Dubai. She had planned to travel to USA with the minor child to visit her parents and brother in USA. However, the Visa for USA for the maid could not be secured and, consequently, she could not travel to USA. Learned Counsel submits that, over an argument with respondent No.4, the petitioner tried to take the extreme step of jumping off the balcony of the house in Dubai and commit suicide. Only with a view to save the minor child from witnessing the disputes between the petitioner and respondent No.4, respondent No.5 asked the petitioner and respondent No.4 to leave the house and to return after the petitioner and respondent No. 4 settled their disputes. Accordingly, they checked into a hotel room and after respondent No. 4 asked for forgiveness of Ajey Lohia,

respondent No.4 returned to the house of Ajey Lohia, his father. However, the petitioner did not diffuse the situation, and chose to return to India. Thereafter, she preferred the present petition.

17. It is argued on behalf of the respondent that a writ of habeas corpus would not lie to seek custody of a minor child, particularly when the same is with a lawful guardian. It is submitted that respondent No.4 being the father, is one of the lawful guardian of the minor child. In this regard, reliance is placed on ***Githa Hariharan (Ms.) and another Vs. Reserve Bank of India and another*** (1999) 2 SCC 228 and, in particular, following extract from the said decision:

> *"43. ……..It is an axiomatic truth that both the mother and the father of a minor child are duty-bound to take due care of the person and the property of their child and thus having due regard to the meaning attributed to the word "guardian", both the parents ought to be treated as guardians of the minor. As a matter of fact, the same was the situation as regards the law prior to the codification by the Act of 1956. The law, therefore, recognised that a minor has to be in the custody of the person who can subserve his welfare in the best possible way — the interest of the child being the paramount consideration.*
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> *44. In the event, the word "guardian" in the definition section means and implies both the parents, the same meaning ought to be attributed to the word appearing in Section 6(a) and in that perspective, the mother's right to act as the guardian does not stand obliterated during the lifetime of the father and to read the same on the statute otherwise would tantamount to a violent departure from the legislative intent. Section 6(a) itself recognises that both the father and the mother ought to be treated as natural guardians and the expression "after" therefore shall have to be read and*

interpreted in a manner so as not to defeat the true intent of the legislature."

18. Learned counsel submits that the petitioner cannot short-circuit the proceedings already initiated by the respondent before the guardianship court under Guardians and Wards Act, 1890, by filing or pursuing the present proceedings. The respondent has submitted that on 12.03.2018, i.e. after the interim custody of the minor child was directed to be handed over to the petitioner by this Court on 08.03.2018, the respondent has initiated the proceedings under the Guardians and Wards Act, 1890. Only thereafter, the petitioner has sought amendment of the writ petition. Learned counsel for the respondent has placed reliance on ***Sumedha Nagpal Vs. State of Delhi and ors.*** (2000) 9 SCC 745, wherein the Supreme Court dismissed a writ of habeas corpus filed by the mother under Article 32 of the Constitution of India to seek the custody of the child by, inter alia, observing as follows:

"2.....since these are disputed facts, unless the pleadings raised by the parties are examined with reference to evidence by an appropriate forum, a proper decision in the matter cannot be taken and such a course is impossible in a summary proceeding such as writ petition under Article 32 of the Constitution.

3. Without expressing any view of the pleadings raised in this case and making it clear that it is neither appropriate not feasible in the present case to investigate the correctness of the same and decide one way or the other, we propose to relegate the parties to work out their respective rights in an appropriate forum like the Family Court or the District Court in a proceeding arising under Section 25 of the Guardians and Wards Act read with Section 6 of the Act or for matrimonial relief."

19. Reliance is also placed on ***Sheela Vs. State NCT of Delhi*** (2008) 149 DLT 476 (DB). This Court dismissed a Writ of Habeas Corpus filed by the mother, and asked the parties to *'battle out the custody of the child in appropriate proceedings before the appropriate fora'*. The relevant para is as follows:

> *"9. ....Even otherwise, the custody of the child, in our view, must be given to the parent capable of ensuring the welfare of the child and it is not for this court in writ proceedings to determine where the welfare of the child lies. This is essentially a matter of evidence and in the domain of the Guardian Court. We, therefore, see no conceivable reason to trespass or stray into the said domain by issuing a writ of habeas corpus in favour of the petitioner for handing over the custody of the child to the petitioner, which is presently with the respondent No.2. A three-Judge Bench of the Hon'ble Supreme Court in the case of Dr. (Mrs.) Veena Kapoor V. Shri Varinder Kumar Kapoor (1981) 3 SCC 92 has observed as under:*
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> > *"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. It is difficult for us in this habeas corpus petition to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be determined."*

20. For the same purpose, reliance is placed on ***K.Suganya Vs.***

Superintendent of Police MANU/TN/1617/2011 decided on 14th March, 2011. The Madras High Court held:

> *".....this court is of the considered view that the habeas corpus petition filed under Article 226 of the Constitution of India shall not be the appropriate proceedings to make a decision as to who, between the petitioner and the 4th respondent, shall be entitled to the custody of the child. It needs elaborate enquiry, in which opportunity is to be given to both the parties to lead evidence. The same can be conveniently done only in a civil court/ family court. For the said reason alone, we are of the considered view that the present habeas corpus petition should fail and the same deserves to be dismissed."*

21. At the same time, learned counsel for the respondent No.4 has also argued that the issue of custody of a child has to be decided by application of the doctrine of *parens patriae* i.e. by applying the concept of '*welfare of the minor child*' as of paramount importance.

22. Reference is also made to ***Sumedha Nagpal*** (supra) to submit that the rights arising under proviso to Section 6(a) of the HMG Act would not militate against the welfare of the minor child. Respondent No.4 has also argued that since the minor child Baby Raina has been born out of surrogacy, Section 6(a) cannot be invoked, since the mother of a child born out of surrogacy, is not naturally attached to the child.

23. Learned Counsel for respondent No. 4 has drawn the attention of the court to the Whatsapp conversations that the petitioner has had with her friend – one Ms. Yixiu Zheng, to submit that the petitioner apparently is having an extra-marital affair. The submission of respondent No.4 is that

the petitioner is too busy partying, practically on a daily basis. She returns home late in the night in an inebriated condition, and she barely spends 15 to 20 minutes in a day with minor child. The child has always been looked after by respondent No.4 and his parents.

24. Respondent No.4 has also placed reliance on the Whatsapp conversations exchanged between respondent No.4 and the petitioner's mother, wherein the petitioner's mother has also expressed her concern over the manner in which the petitioner is conducting herself. He submits that the petitioner is undergoing psychiatric therapy for depression.

25. Respondents have also drawn the attention of the court to Sections 7 and 17 of the Guardians and Wards Act, 1890, to submit that it is the welfare of the child which should be seen while appointing a guardian in respect of a minor child. The submission is that even while formulating an interim arrangement, the said aspect should be of paramount consideration. Ms. Kamini Jaiswal has also sought to draw a comparison of the advantages in granting the interim custody of the minor child to respondent No.4, in preference to the petitioner.

26. Ms. Jaiswal submits that the petitioner is living in a rented accommodation presently, and her parents and brother are American citizens and are settled in USA. Even the petitioner holds an American passport. Though the parents of the petitioner/one of them may be in India presently, the same is only a stop-gap arrangement, and once neither of them are in India, there would be nobody to look after the minor child in the absence of the petitioner – who is a working professional, apart from a socialite. The

submission of learned counsel for respondent No.4 is that he being the father, is most concerned about the minor child being left in the company of only maids and servants, as that would expose the minor girl child to all kinds of risks, and pose the danger of her being harmed and exploited. On the other hand, the parents of the respondent No.4 are always at home, and the paternal grandmother of the minor child is totally responsible for her upbringing; for preparing her meals and feeding her, and; spending time with her.

27. Learned counsel for respondent No. 4 further submits that respondent No. 4 has not much interest in socializing or partying, and he is more of a family man and likes to spend his time with his family. In contrast, the petitioner is a busy professional and is also interested in maintaining an active social life, and is hardly available to the child to take care of her and spend time with her.

28. Respondent relies upon ***Nil Ratan Kundu and another Vs. Abhijit Kundu*** (2008) 9 SCC 413 to submit that welfare of the child is not to be measured by money only, nor merely physical comfort and that the word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. The tie of affection cannot be disregarded.

29. In her rejoinder, learned counsel for the petitioner has argued that the submissions of respondent No.4 tantamount to character assassination of the petitioner. The messages exchanged between the petitioner and her female friend are her private affair, and no reliance can be placed on the same, as it

breaches the petitioner's fundamental right to privacy. In any event, the same has no adverse bearing on the petitioner's role as a mother qua the one-year-old minor daughter. She submits that her parents or, at least one of them, wish to spend time in India with her and their granddaughter. She also submits that the petitioner is a responsible mother and well aware of her responsibilities towards her daughter and about her well being. Under no circumstances, the petitioner would expose her child to any risks or dangers.

OUR CONSIDERATION

30. We have given our thoughtful consideration to the rival submissions of the parties. So far as the submission of respondent No.4 with regard to non-maintainability of this petition is concerned, we do not find any merit in the same. The earliest relevant date to be considered by the Court, while examining the legality of detention – in a petition to seek a writ of Habeas Corpus, is as on the date of institution and preliminary hearing of the petition. In this regard, we may refer to the decision of the Supreme Court in ***Kanu Sanyal v. District Magistrate, Darjeeling & Ors.***, (1974) 4 SCC 141. The Supreme Court, inter alia, observed in ***Kanu Sanyal*** (supra):

> "*4. ... ... **It is now well settled that the earliest date with reference to which the legality of detention challenged in a habeas corpus proceeding may be examined is the date on which the application for habeas corpus is made to the Court.** This Court speaking through Wanchoo, J., (as he then was) said in A.K. Gopalan v. Government of India: [AIR 1966 SC 816 : (1966) 2 SCR 427 : 1966 Cri LJ 602]*
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> > *"It is well settled that in dealing with the petition for habeas corpus the Court is to see whether the*

detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the date of the hearing."

31. The Supreme Court further observed in the same paragraph:

"*... ... the earliest date with reference to which the legality of detention may be examined is the date of filing of the application for habeas corpus and the Court is not, to quote the words of Mr Justice Dua in B.R. Rao v. State of Orissa [(1972) 3 SCC 256] "concerned with a date prior to the initiation of the proceedings for a writ of habeas corpus*".

32. We had occasion to consider the issue of maintainability of a writ of habeas corpus in ***Moin Akhtar Qureshi v. Union of India & Ors.***, W.P.(Crl.) No.2465/2017 decided on 01.12.2017. After analyzing several decisions of the Supreme Court, this Court and other High Courts, it was held:

"*We have set out in-extenso, the well-settled legal position with regard to maintainability of a writ petition under Article 226 of the Constitution of India to seek a writ of Habeas Corpus in respect of a person who is detained under the orders of a Competent Court.* ***It is equally well-settled by a catena of decisions, taken note of hereinabove, that the earliest date with reference to which the illegality of detention may be examined in a Habeas Corpus proceeding, is the date on which the application for Habeas Corpus is made to the Court, if nothing more has intervened between the date of the application and the date of hearing.*** *The decisions taken note of hereinabove show that, in some cases, it was the date of return in the writ proceedings which was considered as the relevant date to determine as to whether the detention of the arrestee was illegal, while in other cases, the Supreme Court also observed that the issue would have to be determined by*

reference to the position emerging on the date of hearing of the petition. The Full Bench of this Court in ***Rakesh Kumar*** *(supra), after a detailed analysis of the earlier decisions, including the decisions in* ***Madhu Limaye*** *(supra),* ***Kanu Sanyal*** *(supra),* ***Niranjan Singh Nathawan*** *(supra),* ***Ram Narayan Singh*** *(supra),* ***A.K. Gopalan*** *(supra),* ***Pranab Chatterjee*** *(supra),* ***Talib Hussain*** *(supra) and* ***Col. Dr. B. Ramachandra Rao*** *(supra), held that if, up to the date of hearing of the writ petition, it is shown that the detention/ arrest of the person is valid, the mere fact that his detention had been invalid earlier, would not entitle such a person to have any redress in a Habeas Corpus petition*". (emphasis supplied)

33. The undisputed factual position is that the custody of the minor child, before she was taken to Thailand and thereafter to Dubai, was with the petitioner. Since the child was taken with the consent of the petitioner, she continued to remain in the custody of the petitioner, as her custody with Ajey Lohia was only permissive. However, the claim of the petitioner is that she was not allowed to meet, much less take away the child in Dubai, and the petitioner returned to India without the child, she lost the custody of the child to Ajey Lohia in Dubai. When the writ petition was preferred before this Court on 31.01.2018, and initially listed before us on 05.02.2018, the actual custody of the minor child was neither with the petitioner, nor with respondent No.4. The custody was, as on those dates, with erstwhile respondent No.5 i.e. Ajey Lohia and that too in Dubai, whereas both the petitioner and respondent No.4 were in India. It was only under the directions of this Court- issued on 08.02.2018, that the minor child was brought back to India. This position was informed to the petitioner and recorded by the Court in the order dated 13.02.2018. Even on that date, the custody was not with the petitioner, but with respondent no.4. Since the

petitioner's contention is that the minor child is only one year old, and in terms of Section 6(a) of the HMG Act the custody of the minor child ordinarily should be with the mother in the best interest of the child, the examination of the said submission is essential and for that purpose the petition is maintainable. Reliance placed on ***Githa Hariharan*** (supra) is not appropriate in the facts of the case. There is no denying the fact that respondent No. 4 is also a guardian of the minor child. However, the legislative intent in Section 6 (a) of HMG Act is clear, that the "custody" of a child under the age of 5 years shall ordinarily be with the mother-guardian, in preference to the father-guardian.

34. Section 6 of the Hindu Minority and Guardianship Act, 1956, insofar as it is relevant reads as follows:

> *"6(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****;"* (emphasis supplied)

35. Section 6(a) of HMG Act is a provision dealing with the aspect of "custody" and not "guardianship" of the minor child. Thus, ***Githa Hariharan*** (supra) is not relevant for our purpose.

36. Respondent No. 4 has stated in his written submissions that the petitioner sought amendment of the writ petition on 16.03.2018, i.e., after he had initiated the custody proceedings under the Guardians and Wards Act, on 12.03.2018. Factually, this is not the position. The application for amendment i.e. Criminal M.A. No. 3166/2018 had been moved by the

petitioner prior to 19.02.2018. On the said application, notice was issued to the respondents, including, respondent No.4 on 19.02.2018 and the said application was allowed by this Court vide order dated 27.02.2018. The order granting interim custody of the minor child to the petitioner was passed on 08.03.2018, when no proceedings for custody of the child were pending before any forum. Only thereafter respondent No.4 initiated the proceedings as per his own disclosure on 12.03.2018.

37. On the aspect of maintainability of a petition under Article 226 of the Constitution of India, to seek a writ of habeas corpus in respect of minor child, in such like circumstances, there are numerous precedents. We may only take note of ***Syed Saleemuddin v. Dr Rukshana & Ors.***, (2001) 5 SCC 247 and ***Ruchi Majoo*** (supra). In ***Syed Saleemuddin*** (supra), the Supreme Court has held:

> *"10. This Court in the case of Gohar Begum v. Suggi [AIR 1960 SC 93 : 1960 Cri LJ 164 : (1960) 1 SCR 597] dealt with a petition for writ of habeas corpus for recovery of an illegitimate female infant of an unmarried Sunni Muslim mother, took note of the position under the Mohammedan law that the mother of an illegitimate female infant is entitled to its custody and the refusal to restore such a child to the custody of its mother would result in an illegal detention of the child within the meaning of Section 491 of the Criminal Procedure Code. This Court held that the dispute as to the paternity of the child is irrelevant for the purpose of the application and the Supreme Court will interfere with the discretionary powers of the High Court if the discretion was not judicially exercised.* ***This Court further held that in issuing writs of habeas corpus the courts have power in the case of an infant to direct its custody to be placed with a certain person***.

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

38. In ***Ruchi Majoo*** (supra), the Supreme Court observed:

> "*58. ... ... A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views the rival claims, if any, to such custody*".

Thus, we reject the submissions of learned counsel for respondent No.4 that the present petition was not maintainable either on the date of its filing; or on the date of its initial listing on 05.02.2018, and on subsequent dates or on the date when the Court passed directions for interim custody of

the minor child on 08.03.2018; or on the date when the same was finally heard and judgment reserved.

39. In the context of a situation where the child has been brought into India from a foreign country by one of the parents, and the other has approached the Court with a writ of Habeas Corpus, it has repeatedly been held that the Court may undertake a detailed inquiry into the aspect of welfare of the minor child and finally determine the said issue, or it may undertake a summary enquiry, and leave the parties to have the same determined in appropriate proceedings by the competent Court. In this regard, reference may be made to ***Dhanwanti Joshi Vs. Madhav Unde***, (1998) 1 SCC 112, and ***V. Ravi Chandran Vs. Union of India & Ors.***, (2010) 1 SCC 174.

40. In our view, in the context of a child who is an Indian citizen and resident, and whose parents are also Indian residents, the scope of the proceedings under Article 226 of the Constitution – if the said jurisdiction is justifiably invoked, would be to undertake only a limited enquiry into the aspect of best welfare of the minor child for working out an interim living arrangement, and leave the parties to operate the statutory mechanism which is available to the parties to have the said issue determined after a thorough enquiry. This Court does not, normally, determine issues of disputed facts in writ proceedings. Since the parties are residents in India, there is no reason why they should not be relegated for determination of the issue of custody by the competent Court, particularly when respondent No. 4 has already initiated custody proceedings. This course of action would also

be in accordance with the decisions relied upon by the respondent No. 4 in ***Sumedha Nagpal*** (supra); ***Sheela Vs. State NCT of Delhi*** (2008) 149 DLT 476 (DB); and ***K.Suganya Vs. Superintendent of Police MANU/TN/1617/2011***. Thus, we are undertaking only a summary enquiry into the said issue, i.e. what would be the best living arrangement for the minor child – considering she is only about one year old, which would meet her needs of love – from her parents, grandparents and others, and care – physical, psychological, etc., which are essential for her development and upbringing, so that she is least adversely affected by – and remains insulated from the effects of her parental discord. We leave it to the parties to approach the competent Court to have the issue of custody decided upon after a more detailed enquiry.

41. The child in question is a one year old baby girl. Though, she was born out of surrogacy – since the petitioner suffered two earlier miscarriages, she is nevertheless the biological mother of the petitioner child, and respondent No.4 is the biological father of the child. Thus, it is only natural that the petitioner and respondent No. 4 – and their respective family members, hold love and affection in their hearts for the minor child. We cannot accept the submission of respondent No.4 that the petitioner-though being the biological mother of the minor child, would have any less love or affection for her since the minor child was born out of surrogacy. The said submission of learned counsel for Respondent No.4 cannot be accepted for various reasons. Firstly, the minor child is the biological child of the petitioner and respondent No.4 and the sense of belonging, love and affection that the petitioner would hold for the minor child would be no less,

merely because minor child was born out of surrogacy. If this submission of respondent No. 4 were to be accepted, it would also mean that respondent No. 4 would not hold the same love and affection for the minor child, as he would have held and experienced, for a child born to him from his wife i.e. the petitioner, naturally. Secondly, even in respect of an adopted child, the parents, by and large, express and feel the same sense of love and affection with equal intensity as they would feel in respect of their naturally born child. The submission of the respondent No.4, in our view, devalues the great qualities of love and bonding that are experienced not only by human beings, but all animal species. In our view, there is no basis for this submission of learned counsel for respondent No.4, and we reject the same.

42. Prior to the child being taken by Mr. Ajey Lohia to Bangkok and thereafter to Dubai in December, 2017, it is clear that the petitioner was residing with respondent No. 4 in her matrimonial home, and it was with her consent that the paternal grandparents took the minor child Raina to Bangkok and thereafter to Dubai for a holiday. The fact that the petitioner granted consent to the minor child being taken by Ajey Lohia to Bangkok, and thereafter to Dubai, demonstrates the mutual understanding and regard that they had between themselves, and the confidence that the petitioner and respondent No.4 had in Ajey Lohia and his wife in taking care of the minor child, even in their absence. The Whatsapp communications exchanged between the petitioner and Ajey Lohia show that after the child had been taken by Ajey Lohia to Bangkok, the petitioner desired to join them at Bangkok. Though, at one stage, Ajey Lohia offered to the petitioner to come to Bangkok, and from there to proceed to Dubai, it appears that on

account of paucity of accommodation, Ajey Lohia suggested that she may join the family at Dubai, instead.

43. The petitioner then proceeded to Dubai and, it appears that there was some incident on account whereof the petitioner returned to New Delhi (India) without the minor child. While the petitioner claims that she was not allowed to enter the house of Ajey Lohia in Dubai and to meet, much less to take the child, the respondents deny this allegation. In these proceedings we are not getting into the said issue, as it is even otherwise not considered necessary for us to do so, considering the scope of the present petition.

44. A perusal of Section 6(a) of the HMG Act shows that the legislature has considered it appropriate, that in respect of a minor child, who has not completed the age of five years, the custody should normally be with the mother. The reason for the same is not difficult to fathom. The reason, simply put, is that normally, a mother is biologically and psychologically attuned to look after and protect the child. It comes naturally to the mother to be sensitive to the needs of the minor child – be it food, hygiene, clothing, comfort and protection. This is not to say that the father of a minor child cannot have the same level of concern or sensitivity.

45. Respondent No.4 has claimed before us, and expressed himself with sincerity and honesty – when he claims that from the time when Baby Raina was born, he has been looking after her and mothering her in every way. However, that does not lead to the conclusion that the petitioner has taken a back seat in this regard. The correspondence that the petitioner has apparently had with the pediatrician Dr. Rajiv Seth from 29.03.2017

onwards, till January 2018, shows that the petitioner was taking interest in addressing the medical needs of the child since she was fixing up the appointments with the doctor. The petitioner evidently, was coordinating with regard to the vaccinations to be given to the child from time to time.

46. The conversation between the petitioner and respondent No. 4 over Whatsapp also shows that the petitioner has shown her concern for the welfare and upbringing of the minor child. It appears that she did have arguments with respondent No. 4 with regard to the manner in which the child was – according to her, being pampered and the same was not the best way to bring up the child. We do not wish to get into the issue whether the concerns flagged by the petitioner in her conversation with respondent No. 4 are well founded, or not. However, they do show that the petitioner indeed had concern for the minor child. The conversations between the petitioner and Ajey Lohia also show that the petitioner – being the mother, was missing her child and wanted to be with her when Ajey Lohia had taken the child to Bangkok. Thus, it appears to us that the petitioner being the mother of the minor child has concern for her child, and loves the child like any mother naturally would. It also appears to us that she has been taking care of the child.

47. Respondent No. 4 has, however, raised other concerns, namely, that the petitioner is a psychiatric patient and taking treatment for depression; of the petitioner being very busy professionally; of her also being a socialite; of the petitioner indulging in partying routinely on a daily basis and consuming alcohol and returning late in an inebriated condition; of the petitioner having

liaisons and an extra-marital affair; of the petitioner not having any other family member at home to take care of the minor child while she is away at work or at social gatherings, since her parents and brothers are all settled in USA and permanent residents of USA.

48. In our view, the professional and social obligations and activities of the mother need not necessarily have an adverse impact on the upbringing and safety of the minor child. In today's day and age, women are actively pursuing their professions and avocations. They are also socializing as their peers, friends, family and colleagues. That does not mean that they are necessarily failing in performance of their maternal obligations. In fact, working women are, by and large, having to put in extra time and effort to keep both ends up, and they are doing it successfully. The child is an infant. At this age, the child has little understanding of the actions and conduct of the parents, particularly, those acts and conduct which take place outside the child's environment.

49. Learned counsel for the petitioner drew our attention to a judgment of a learned Single Judge of this Court (Madan Lokur, J – as his Lordship then was) in ***Pavan Kumar Jha vs. Sapna Moudgil Jha,*** MANU/DE/1136/2004, decided on 10.11.2004. In this case the allegation of the father of the child was that the child had seen his mother indulging in a sexual act with another man when the child was only two years old, and that he had vivid memories of the same, even when he attained the age of 6-7 years. The father claimed that the child was, therefore, reluctant to meet the mother. The father relied on the opinion of a Consultant Child and Adolescent Psychiatrist, who

opined that the child experienced trauma on re-living those memories and that it was desirable that the child was not forced to meet the mother for some time. The mother, however, denied any such incident. It was argued on behalf of the mother that, in any event, the child could not have remembered any such alleged adulterous relationship after so many years on account of infantile amnesia, which makes children forget events, even if, they indeed witness the same.

50. The Court held that the act of the infant child witnessing the sexual activity of his mother with another man did not tantamount to "sexual abuse" as defined in "Gale Encyclopedia of Psychology", and in a document obtained from the American Academy of Pediatrics. The Court also did not agree with the petitioner's/father's submission that the child was traumatized on account of his meetings with his mother. The Court further observed;

> *"In the long run, even if it were assumed that the respondent had any adulterous relationship, it would be necessary for her and for Abhinav to come to terms with other realities and complexities of human relationships. Ideally, both the parents should make a joint effort to achieve this. Unfortunately, this does not seem possible in the present case. Therefore, each parent should at least make an individual effort."*

51. In the present case, there is only an allegation of the petitioner indulging in adultery, which is premised on – what is claimed to be, the WhatsApp communication exchanged between her and one of her lady friends. The aspects of admissibility of What's App conversation; the weight attached to be such conversations – which is described by learned counsel for the petitioner as being similar to '*Locker Room Talk*' between

men; and other related issues, would arise for consideration in appropriate proceedings. In these proceedings, we are not inclined to delve into the same. Moreover, it is not even the allegation of respondent no. 4 that the petitioner has already indulged in adultery, much less that she has indulged in sexual activity in the presence of the minor child. This being the position, we are not impressed by the said submission of respondent no. 4.

52. It is primarily the home where the child spends her time. On account of disputes that have arisen between the petitioner and respondent No. 4, the petitioner has taken a separate premises on rent. Her parents came to live with her, and till the time when we reserved the judgment, her father was still continuing to live with her. We also inter-acted with the petitioner in court and inquired whether she was alive to the undesirability of leaving the female minor child with only the maids and servants while she was away to work, or at social gatherings. She has responded by stating that she is very much alive and conscious of the said position. She stated that her father was at home when she is away.

53. Our inter-action with the petitioner does not give us the impression that she is mentally or psychiatrically unstable to look after the minor child at this stage. The reasons for her seeking help of counselors could be manifold. It is not uncommon for people to resort to counseling when they have matrimonial disputes. She has had two miscarriages earlier. In today's day and age, when one is faced with stress originating from different aspects of life, one may seek professional help from a trained counselor to resolve one's dilemmas, and reduce his or her stress. It is no longer a taboo in our

society to consult a psychotherapist, or a psychiatrist, or a counselor, as it was in the earlier days. Merely because a person may go for such like therapy and consultation, it does not follow that the person does not possess mental equilibrium, or is mentally unsound. Such trained professionals are becoming more relevant in today's day and age, considering the fact that the families are smaller, and one may not have siblings and other elders in the family readily available to talk to, and discuss private and personal issues.

54. From the materials placed on record, which we have considered summarily without going through a trial, it cannot be said that respondent No. 4 has been able to dislodge the presumption cast by Section 6(a) of the HMG Act – of the welfare of the minor child in remaining with the petitioner mother.

55. As noticed hereinabove, we have, by our interim arrangement dated 08.03.2018, devised a mechanism so that the child is able to spend time with both the parents and both sets of grandparents during the day. Since the child is only about one year old, and is presently not even going to school or play school, and the petitioner and respondent No. 4 and his parents are residing in the same vicinity in Vasant Vihar, she can be easily transported to and fro and can receive the love, affection, care and attention of both the parents and both sets of grandparents, which, obviously is in her best interest. This arrangement, in our view, is the best arrangement for the present. The warring parents have the time to have the issues of custody and visitation thrashed out in the competent Court, before baby Raina starts going to school/ play school.

56. Learned counsel for respondent No.4, as well as respondent No. 4 in his personal inter-action, have submitted that Baby Raina is in the habit of waking up early in the morning around 6 o'clock, and it is at that time of the day when she is most active and playful. Respondent No. 4 has submitted that when the couple was living together with the child, he would spend that precious time of the day with the minor child playing with her and bonding with her. He has submitted that the life style of the petitioner is such that she wakes up late in the morning around 10 am, and till then the child is attended to only by the maids. He has, therefore, argued that he should be granted access to the child during the early hours of the day. In our view, all such factors and aspect can be placed before the competent Court and the Court would consider the same, keeping in view the best interest of the child.

57. Accordingly, we dispose of the present petition by continuing the arrangement devised by us in our order dated 08.03.2018, as modified by our order dated 13.03.2018. The said arrangement shall continue to remain in force till so long as it is varied by the competent Family Court in appropriate proceedings that have been filed by the respondent-father to seek custody and visitation rights in respect of the minor child. We make it clear that we have assessed the submissions of the parties only summarily, and the competent court shall be free to arrive at his own conclusions – both at the interim stage, and at the final stage, after considering the materials placed before it, and the submissions advanced before it by the parties. It also goes without saying that in case of change of any circumstance, it shall be open to the parties to bring the same to the notice of the competent Family Court and

the same shall be considered by the concerned Court while passing further orders.

58. The petition stands disposed of in the aforesaid terms.

(VIPIN SANGHI)
JUDGE

(P. S. TEJI)
JUDGE

MAY 01, 2018
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