Rohith Thammana Gowda vs The State Of Karnataka on 29 July, 2022

Author: C.T. Ravikumar

Bench: C.T. Ravikumar, A.M. Khanwilkar

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

CIVIL APPEAL NOS. 4987 OF 2022
(Arising out of SLP(C)No.17166/2021)

ROHITH THAMMANA GOWDA …APPELLANT

VERSUS

STATE OF KARNATAKA & ORS. …RESPONDENT(S)

JUDGMENT

C.T. RAVIKUMAR, J.

1. Leave granted.

2. This appeal is directed against the Judgment and Order dated 07.09.2021 passed by the High Court of Karnataka at Bengaluru in Writ Petition (Habeas Corpus) No.76 of 2020. The appellant herein filed the said Writ Petition seeking the following main relief:

> "Issue a Writ of Habeas Corpus or any other appropriate writ, order or direction directing the Respondents to secure the minor Aarya Ranjini Rohith, the only child of the Petitioner, aged about 9 years, and produce the minor Aarya Ranjini Rohith before this Hon'ble Court and hand over the custody of the said minor child to the Petitioner who is the father of the minor, so that the child can be taken to the United States of America where he was born and is a citizen of and where he was living and studying in school".

3. As per the impugned judgment, the High Court rejected the writ petition, but subject to the visitation rights provided, thereunder, to the appellant. It is challenging the same that the above appeal has been preferred. Shorn of details, the case of the

appellant may be stated as hereunder:

> "The petitioner has been residing in USA for the past two decades or thereabouts. On 19.03.2008 the marriage between him and Respondent No.3 was conducted as per Hindu rites and ceremonies at Bengaluru. Soon after the marriage they shifted to USA and made it their matrimonial home. Both of them applied for Green Card (officially known as Permanent Resident Card) and obtained the same on 07.09.2010. It makes them entitled to live and work permanently in USA. On 03.02.2011 their son Aarya Ranjani Rohith was born in Washington, USA and he is a naturalised American Citizen with an American Passport.

The child was studying in the Third Standard in the Christa McAuliffe Elementary School in Washington School District during the year 2019–20."

4. Conflicts and confrontation occurred in the connubial relationship and they ultimately culminated in the incident which is the genesis of this proceeding. According to the appellant, on 03.03.2020, Respondent No.3 came to Bengaluru in India with the child, without his consent. At that time, the appellant was already in India to attend his ailing mother viz., from 27.02.2020 till 09.03.2020. Upon reaching USA he realized that the child was missing from the matrimonial home. He made initial enquiries at the school, in vain, and thereupon lodged a complaint with the Office of Children's Issues, USA, alleging that the child was kidnapped by respondent No.3–wife. Later, in the evening he could contact his father–in–law in India and on being informed of the availability of his wife and minor child at home in Bengaluru he withdrew the said complaint on 11.03.2020. Subsequently, he filed the Habeas Corpus writ petition before High Court of Karnataka at Bengaluru in September, 2020. He has also filed a Custody Petition in the Superior Court of Washington, County of King, on 22.1.2020 and obtained an ex–parte order dated 26.10.2020. The respondent was directed to return the child to the United States. On 29.10.2020 respondent No.3 participated in the proceedings before the US Court and moved a motion for vacating the ex–parte order. Consequently, the ex–parte order to return the child was vacated. Later, respondent No.3 filed a petition challenging the jurisdiction of the US Court and as per order dated 15.01.2020 the US Court upheld its jurisdiction over the minor child. Still later, she herself invoked the jurisdiction of the Superior Court of the State of Washington In and For King County, seeking temporary orders of child support and spousal support as also for appointment of a parenting evaluator. The US Court passed an order on 09.03.2021 granting her spousal support of $5000 USD per month subject to conditions. The US Court also passed an order directing her to return the child to US. Earlier, respondent No.3 filed a custody petition bearing G & W No.246/2020 before the Family Court Bengaluru. It was dismissed as being not maintainable for want of jurisdiction under Section 9 of the Guardians and Wards Act, 1890. (Now, the matter is pending before the High Court of Karnataka in Civil Revision Petition No. 318/2021). According to the appellant, in the circumstances only the US Courts got jurisdiction to decide the question of custody of the minor child. The contention of the appellant is that the High Court had ignored the orders of the US Court and also failed to take a proper decision on the question as to what would be in the best interest of the child. The appellant has taken up contentions and also produced documents in a bid to establish the affinity and affection of the child towards him, in this proceeding. Obviously, his attempt is to

establish that for the interest of the child, the child should return to US.

5. Respondent No.3 resisted the contentions of the appellant. Before the High Court she contended that though the child was brought to India without the appellant's consent subsequently she was permitted to have the custody of the child by the appellant himself as also by the US Courts. In support of the contention that the appellant had given consent for keeping the child in her custody she relied on an e□mail sent by the appellant herein on 15.03.2020. The fact is that the child is now, admitted in a school in Bengaluru and he is now pursuing his studies there. Obviously, respondent No.3 had raised the contentions before the High Court to establish that the child was not in illegal or unlawful custody and therefore, the appellant is not entitled to the prayer sought for and on the contrary, she is entitled to continue with the custody of the minor child.

6. A bare perusal of the impugned order would reveal that the High Court, as per the impugned order, rejected the contentions of the appellant that the child is in unlawful custody and respondent No.3 has been continuing with the custody of child in derogation of the orders of the US Courts to return the child to USA. The impugned judgment would reveal that the court had interacted with the child in the chambers and ascertained as to whether he was staying with the mother under compulsion. Paragraph 85 of the impugned judgment would reflect what had transpired during such interaction. It would reveal that the child had expressed his desire to stay with his mother and further informed that he was comfortable in the school and studying in the school for the past one year. He had also divulged the fact that he was not facing any difficulty in his schooling as also in his stay at Bengaluru. On an analysis of the rival contentions and the facts mentioned in paragraph 85 the High Court came to the conclusion that the child is comfortable and feels secured in the custody of his mother in Bengaluru. Ultimately, the High Court rejected the writ petition, but subject to the visitation rights, specifically mentioned in paragraphs 89 to 93 therein. In this circumstances, present appeal has been preferred assailing the judgment of the High Court dated 07.09.2021.

7. Heard the learned counsel appearing for the appellant and also the learned counsel appearing for respondent No.3.

8. At the outset we may state that in a matter involving the question of custody of a child it has to be borne in mind that the question 'what is the wish/desire of the child' is different and distinct from the question 'what would be in the best interest of the child'. Certainly, the wish/desire of the child can be ascertained through interaction but then, the question as to 'what would be in the best interest of the child' is a matter to be decided by the court taking into account all the relevant circumstances. When couples are at loggerheads and wanted to part their ways as parthian shot they may level extreme allegations against each other so as to depict the other unworthy to have the custody of the child. In the circumstances, we are of the view that for considering the claim for custody of a minor child, unless very serious, proven conduct which should make one of them unworthy to claim for custody of the child concerned, the question can and shall be decided solely looking into the question as to, 'what would be the best interest of the child concerned'. In other words, welfare of the child should be the paramount consideration. In that view of the matter we think it absolutely unnecessary to discuss and deal with all the contentions and allegations in their respective pleadings and affidavits.

9. To answer the stated question and also on the question of jurisdiction we do not think it necessary to conduct a deep survey on the authorities This Court in Nithya Anand Raghawan Vs. State (NCT of Delhi) & Anr. [(2017) 8 SCC 454], reiterated the principle laid in V. Ravi Chandran Vs. Union of India [(2010) 1 SCC 174] and further held thus :□"In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceedings instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre□existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm".

(Emphasis added)

10. In Ravi Chandran's case (supra), this Court took note of the actual role of the High Courts in the matter of examination of cases involving claim of custody of a minor based on the principle of parens patriae jurisdiction considering the fact that it is the minor who is within the jurisdiction of the court. Based on such consideration it was held that even while considering Habeas Corpus writ petition qua a minor, in a given case, the High Courts may direct for return of the child or decline to change the custody of the child taking into account the attending facts and circumstances as also the settled legal position. In Nitya Anand's case this Court had also referred to the decision in Dhanwanti Joshi Vs. Madhav Unde [(1998) 1 SCC 112] which in turn was rendered after referring to the decision of the Privy Council in Mckee Vs. Mckee [(1951) AC 352]. In Mckee's case the Privy Council held that the order of the foreign court would yield to the welfare and that the comity of courts demanded not its enforcement, but its grave consideration. Though, India is not a signatory to Hague Convention of 1980, on the "Civil Aspects of International Child Abduction", this Court, virtually, imbibing the true spirit of the principle of parens patriae jurisdiction, went on to hold in Nithya Anand Raghavan's case thus:

> "40. ... As regards the non□Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not

> resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation – be it a summary inquiry or an elaborate inquiry – the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature an objects to its return. We are in respectful agreement with the aforementioned exposition."

11. Having taken note of the position thus settled in the said decisions we will now consider the question whether such an exercise had been undertaken properly in this case. This is because in this case foreign Court, as noted above, passed orders for the return of the child to USA. There is nothing on record to show that such an order passed on the second occasion was also vacated subsequently. True that the first order to that effect passed on 26.10.2020 was subsequently vacated at the instance of the third respondent on 30.10.2020. However, going by the records the subsequent order passed in March 2021 Superior Court of Washington, County of King for the return of the child owing to non-compliance led to further order for contempt on 29.4.2021. The High Court, obviously, observed that though the U.S Court subsequently suspended the order of spousal support did not pass any order regarding the custody of the child and hence, custody of the child is continuing with respondent No.3. We have referred to those aspects solely for the purpose of pointing out that the High Court was aware of the existence of order for the return of the child by the US Court.

12. Be that as it may, we will now consider the question whether consideration was bestowed by the High Court in the matter in terms of the position settled by this Court in the aforementioned decisions i.e., by giving predominant importance to the welfare of the child. A scanning of the impugned judgment would reveal that the High Court had rightly identified the vital aspect that paramount consideration should be given to the welfare of the child while considering the matter.

13. We have stated earlier that the question 'what is the wish/desire of the child' can be ascertained through interaction, but then, the question as to 'what would be the best interest of the child' is a matter to be decided by the court taking into account all the relevant circumstances. A careful scrutiny of the impugned judgment would, however, reveal that even after identifying the said question rightly the High Court had swayed away from the said point and entered into consideration of certain aspects not relevant for the said purpose. We will explain the raison d'etre for the said remark.

14. The High Court, after taking note of the various proceedings initiated by the appellant before the US Courts formed an opinion that he had initiated such proceedings only with an intention to enhance his chance of success in the Habeas Corpus Writ Petition and to pre-empt any move by the wife (respondent No.3) for custody by approaching the Indian Courts. In other words, the initiation of proceedings before the US Court was motivated and definitely not in good faith and was also not in the best interests of the son. In this context, it is relevant to note that US Court concerned had, admittedly, ordered for the return of the child and owing to the non-compliance with the said order initiated action for contempt. The spousal support order passed by the US Court was also suspended for the reason of non-compliance with the order for return of the child. When US Court was moved and the court had passed orders the above mentioned observation can only be regarded as one made at a premature stage and it was absolutely uncalled for and it virtually affected the process of consideration of the issue finally. When the US Court passed such orders and not orders on the custody of the child it ought not to have been taken as permission for respondent No.3 to keep the custody of the child. At any rate, after the order for return of the child and orders for contempt such a plea of the respondent No.3 ought not to have been entertained.

15. Considering the fact that the marriage between the appellant and respondent No.3 was conducted in Bengaluru in accordance with Hindu rites and ceremonies, the High Court held that the US Courts got no jurisdiction to entertain any dispute arising out of the marriage. This conclusion was arrived at without taking into account the efficacy of the order passed by the US Court. It was not strictly for the return of respondent No.3 but was an order intending to facilitate the return of a naturalised citizen of America holding an American Passport. Paragraph 85 of the impugned judgment would reveal that the High Court had enquired about the desire and comfort of the child with respect to his schooling and stay during the interaction. The court found that the child expressed no difficulty in his schooling or his stay in Bengaluru and ultimately satisfied that the child is comfortable and secure with staying with his mother.

16. The child in question is a boy, now around 11 years and a naturalised US citizen with an American passport and his parents viz., the appellant and respondent No.3 are holders of Permanent US Resident Cards. These aspects were not given due attention. So also, the fact that child in question was born in USA on 03.02.2011 and till the year 2020 he was living and studying there, was also not given due weight while considering question of welfare of the child. Merely because he was brought to India by the mother on 03.03.2020 and got him admitted in a school and that he is now feeling comfortable with schooling and stay in Bengaluru could not have been taken as factors for considering the welfare of the boy aged 11 years born and lived nearly for a decade in USA. The very fact that he is a naturalised citizen of US with American passport and on that account he might, in all probability, have good avenues and prospects in the country where he is a citizen. This crucial aspect has not been appreciated at all. In our view, taking into account the entire facts and circumstances and the environment in which the child had born and was brought up for about a decade coupled with the fact that he is a naturalised American citizen, his return to America would be in his best interest. In this case it is also to be noted that on two occasions American courts ordered to return the child to USA. True that the first order to that effect was vacated at the instance of respondent No.3. However, taking into account all aspects, we are of the view that it is not a fit case where courts in India should refuse to acknowledge the orders of the US Courts directing return

of the minor child to the appellant keeping in view the best interests of the child. In our view, a consideration on the point of view of the welfare of the child would only support the order for the return of the child to his native country viz., USA. For, the child is a naturalised American citizen with American passport. He has been brought up in the social and culture value milieu of USA and, therefore, accustomed to the lifestyle, language, custom, rules and regulations of his native country viz., USA. Further, he will have better avenues and prospects if he returns to USA, being a naturalised American citizen.

17. In this case during the course of the arguments the learned counsel for the appellant on behalf of the appellant submitted that in case respondent No.3 wants to return and stay in US with her parents so as to have proximity to and opportunity to take care of the child the appellant is prepared to do the needful, if the respondent No.3 so desires. It is further submitted that the appellant is also prepared to find suitable accommodation for them in that regard.

18. In the light of the above discussion, we allow the appeal and the impugned judgment passed by the High Court in Writ Petition (Habeas Corpus) No.76/2020 is set aside. Consequently, the writ petition stands allowed and we issue following further directions:

> (i) Respondent No.3 shall ensure that the child returns back to United States of America forthwith. In that regard respondent No.3 as well as the appellant, whoever is in possession of the American passport of the child in question, shall do the needful in accordance with the law to enable the child's return to his native country viz., USA;
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> (ii) Respondent No.3 and the appellant shall take necessary action to get the child relieved from the present school and also to get him admitted in any school in USA where the appellant is presently residing, without causing much interruption to his studies;
>
> (iii) Respondent No.3, if she wants to accompany the child and stay back in USA will be at liberty to do so. If she requires arrangement of accommodation for herself and her parents in USA she may intimate her desire in that regard to the appellant.

Upon such intimation in writing the appellant shall forthwith do the needful to honour the assurance given to this Court, as noted above, so as to enable respondent No.3 and her parents, as the case may be, to accompany the child and also to stay back in USA provided they fulfil the necessary legal formalities for their travel and stay in USA;

(iv) All necessary legal formalities to enable the child's smooth return to USA shall be taken by respondent No.3 and the appellant expeditiously at any rate within a period of two months so that there will be minimum interruption in pursuing the studies of the child.

19. We also make it clear that if respondent No.3 requires custody or visitation rights of the child, she may do so by invoking the jurisdiction of appropriate forum in USA. Further, the observations made in this judgment shall not come in the way of respondent No.3, as the stated proceedings will

have to proceed independently.

20. There will be no order as to costs.

21. The appeal is disposed of as above.

22. All pending applications are disposed of.

.....J. (A.M. KHANWILKAR) .....J. (C.T. RAVIKUMAR) NEW DELHI;

29 July, 2022.