

SWAMINATHAN KUNCHU ACHARYA

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v.

STATE OF GUJARAT & ORS.

(Criminal Appeal No. 898 of 2022)

JUNE 09, 2022

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[M. R. SHAH AND ANIRUDDHA BOSE, JJ.]

Custody – Of minor child – 5 year old child lost his parents in the Covid-19 pandemic – Appellant is paternal grandfather of the child, and he and his wife– paternal grandparents sought custody of the child – Writ petition seeking writ of habeas corpus filed by appellant – Contesting Respondent No.4 is maternal aunt of the child – High Court handed over custody to respondent No.4 – Held: On facts and circumstances, High Court erred in not handing over and/or continuing the custody of the corpus–grandson to appellant / paternal grandparents – Income and/or the age and/or the bigger family cannot be the sole criteria to tilt the balance and not to give the custody of the grandson to the paternal grandparents – There cannot be any presumption that the maternal aunt being unmarried having an independent income; younger than the paternal grandparents and having a bigger family would take better care than the paternal grandparents – Appellant/paternal grandparents even managed to get admission of the minor in a school in Ahmedabad (where appellant was staying) – The minor will get better education in Ahmedabad, which is a Metro City compared to education in Dahod where respondent no.4 was staying – Further, being a retired person, the appellant / paternal grandparents would devote more time and take care of minor better than respondent No.4 who is serving in the government department – If balance is to be struck between the paternal grandparents and the maternal aunt, the balance would certainly tilt in favour of paternal grandparents – Impugned judgment of High Court quashed and set aside – However, the present order shall be subject to final outcome of the proceedings u/s.7 of the Guardians and Wards Act, pending before the competent court – Custody of minor corpus to continue with appellant /paternal grandparents, who are directed to take care of

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- A *the minor – However, respondent No.4 shall have visitation rights – Further, during vacation and/or holidays the appellant may permit the corpus to visit and stay with respondent No. 4, subject to wishes and convenience of the corpus and without adversely affecting the interest of the corpus including his education and even extra curriculum activities – Paternal grandparents as well as maternal aunt & her family (on maternal side) to act jointly and cordially and have cordial relations in the larger interest of the minor – Writ petition – Writ of habeas corpus.*

- C *Perry Kansagra v. Smriti Madan Kansagra, (2019) 20 SCC 753 and Ashish Ranjan v. Anupma Tandon and Anr. (2010) 14 SCC 274 – referred to.*

Case Law Reference

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|---|--------------------------|--------------------|-----------------|
| | (2019) 20 SCC 753 | referred to | Para 5.4 |
| D | (2010) 14 SCC 274 | referred to | Para 5.4 |

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.898 of 2022.

- E From the Judgment and Order dated 02.05.2022 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No.6708 of 2021.

D. N. Ray, Dillip Kumar Nayak, Ms. Disha Ray, Mrs. Sumita Ray, Advs. for the Appellant.

Rauf Rahim, Ali Asghar Rahim, Advs. for the Respondents.

- F The Order of the Court was passed by

M. R. SHAH, J.

- G 1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 02.05.2022 passed by the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 6708/2021, by which, in the writ petition seeking writ of habeas corpus for production of corpus – Pranav Acharya aged 5 years, filed by the appellant herein – paternal grandfather of the corpus, the High Court has handed over the custody of the corpus to the contesting respondent No. 4 herein – maternal aunt

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of the corpus, the appellant – original writ petitioner – paternal grandfather has preferred the present appeal. A

2. Appellant herein aged 71 years is the paternal grandfather of corpus. Respondent No. 4 is the maternal aunt to whom the High Court has given the custody of corpus.

2.1 Parents of corpus were working and residing in the Ahmedabad. The corpus and his parents were staying happily. Unfortunately, both the parents of the corpus died during the second wave of Covid-19. Father of corpus – Rajesh Acharya expired on 13.05.2021 and the mother of corpus, namely, Rakhi Acharya on 12.06.2021. While the parents of the corpus were infected with Covid-19, the minor corpus was residing with respondent No. 4 herein – maternal aunt. The appellant – original writ petitioner before the High Court – paternal grandfather approached the High Court by way of the present writ petition – for writ of habeas corpus alleging that respondent No. 4 – maternal aunt is not allowing them to enter the house of his son and daughter in law and to take belongings of corpus. It was also alleged that the appellant is not even permitted to meet the corpus. Therefore, the appellant – paternal grandfather sought custody of the minor corpus aged 5 years. By the impugned judgment and order, the High Court has given the custody of the minor corpus to respondent No. 4 – maternal aunt. At this stage, it is required to be noted that as such pursuant to interim order dated 13.09.2021 passed by the High Court, the interim custody of the minor corpus was given to the appellant, which remained with the appellant till the final disposal of the writ petition before the High Court. By the impugned judgment and order, the High Court has directed the appellant to give custody of the corpus on 31.05.2022. The High Court has also further observed that it is expected that respondent No. 4 to provide paternal grandparents a right to meet the corpus on regular basis, preferably twice in a month, whenever convenient to both the families. The operative portion of the impugned judgment and order passed by the High Court is as under: - B
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“7.2 In view of above facts and taking note of overall circumstances, in our opinion the welfare and best interest of Corpus is with Respondent No. 4 (maternal aunt) namely Hemangini @ Mintu Madanmohan Shuryanvanshi. Therefore, let H

A custody of Minor Corpus- Pranav Rajesh Acharya be given to maternal aunt i.e. Respondent No. 4. The Petitioner is directed to give custody of Corpus on 31st May, 2022 between 11:00 a.m. to 5:00 p.m. The Respondent No. 4 is directed to ensure the education of Corpus in the school at Dahod from new academic year. The procedural formalities for the admission is expected to be completed as early as possible.

7.3 Further, in order to balance the equities and considering the age of the Petitioner and his wife, we expect Respondent No. 4 to provide paternal grandparents a right to meet the corpus on regular basis, preferably twice in a month, whenever convenient to both the families. It is desirable that Respondent No. 4 during vacation and holidays may permit the Corpus to visit and stay with his grandparents, subject to the wishes of the Corpus. It is also expected to have video calling between the Corpus and the Petitioner on regular basis. Needless to say that Respondents are expected to act as a bridge between the Corpus and his paternal grandparents so that emotional bonding remains intact.

7.4 It is however made clear that this order shall not in any way prejudice the right of Petitioner for any application to be filed before competent court of law.”

2.2 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court directing to give custody of the corpus to respondent No. 4 – maternal aunt, the appellant – paternal grandfather of the corpus has preferred the present appeal.

3. Shri D.N. Ray, learned counsel has appeared on behalf of the appellant – paternal grandfather of the corpus and Shri Rauf Rahim, learned counsel has appeared on behalf of respondent No. 4 herein – main contesting party – maternal aunt of the corpus.

4. Shri Ray, learned counsel appearing on behalf of the appellant has submitted that the appellant is the paternal grandfather, who is seeking the custody of his minor grandson, who has lost both his parents.

4.1 It is submitted that the High Court has committed a grave/serious error in directing to handover the custody of corpus to respondent No. 4 who is the maternal aunt of corpus. It

is submitted that as such no valid reasons are given by the High Court on not to give/continue the custody of corpus with the paternal grandparents. It is submitted that the reasons given by the High Court while not giving custody to the appellant/paternal grandparents and instead to give custody to the maternal aunt are not germane. A B

4.2 It is submitted that there are no findings given by the High Court that the appellant being a paternal grandfather would not be in a position to take care of his grandson.

4.3 It is submitted that merely because the appellant – paternal grandfather is aged 71 years and his wife – paternal grandmother is aged 63 years and therefore, to presume that the paternal grandparents would not be in a position to take better care of the grandson cannot be accepted. It is submitted that there cannot be such a presumption. C

4.4 It is submitted that similarly the other reasons on the custody of the corpus is given to respondent No. 4 – maternal aunt is that she is having a bigger family. It is submitted that merely because respondent No. 4 is having a bigger family, there cannot be any presumption that they will take better care of the grandson of the appellant than the appellant – paternal grandparents. D E

4.5 It is submitted that even the corpus has also not stated anything against the appellant and his wife – paternal grandparents to the effect that he is not being taken care of well. F

4.6 It is submitted that therefore in the facts and circumstances of the case and the paternal grandparents would be in a better position to take care of their grandson, the High Court has committed a serious error in tilting the balance in handing over the custody of the corpus to respondent No. 4 – maternal aunt against the claim of paternal grandparents to have the custody of their grandson. G

5. Shri Rauf Rahim, learned counsel appearing on behalf of respondent No. 4 while opposing the present appeal has vehemently H

- A submitted that when by giving cogent reasons and looking to the welfare and larger interest of the child, when the High Court has directed to handover the custody of the corpus to respondent No. 4 – maternal aunt, the same may not be interfered with by this Court in exercise of powers under Article 136 of the Constitution of India.
- B 5.1 It is submitted that respondent No. 4 – maternal aunt is a spinster and in good health to look after, care and devote attention towards the welfare and upbringing of the corpus. It is submitted that maternal aunt is aged about 46 years of age and M.Com and a Central Government employee having decent salary.
- C It is submitted that so far as the appellant is concerned, he is a retired government employee aged 71 years. It is submitted that therefore, when the balance is struck, in that case respondent No. 4 – maternal aunt would be in a better position to look after and take care of the corpus than the appellant – paternal grandfather.
- D 5.2 It is submitted that as such the High Court has considered all the surrounding factors viz. (i) the maternal aunt is aged 46 years of age; (ii) she is an M. Com better qualified than the paternal grandfather; (iii) she is a central government employee having decent salary; (iv) the substantial positive difference of staying in a joint family being better suited to cater the educational needs including interaction with teachers, need of co-curricular activities. It is submitted that all the relevant factors for a wholesome development of corpus have been taken into consideration by the High Court. It is submitted that as such respondent No. 4 – maternal aunt has also got the corpus admitted on 09.07.2021 into St. Stephen's School, Dahod, which is a well reputed school. The said school is near to her residential accommodation in Dahod and there is no difficulty in travel.
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- G 5.3 It is submitted that the appellant – paternal grandfather is a retired person and living on pension which is not much.
- 5.4 It is submitted that as observed by this Court in the cases of **Perry Kansagra Vs. Smriti Madan Kansagra; (2019) 20 SCC 753** and **Ashish Ranjan Vs. Anupma Tandon**
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and Anr.; (2010) 14 SCC 274, in case of custody of a minor child paramount consideration remains welfare and interest of the child. A

5.5 Making the above submissions it is prayed to dismiss the present appeal.

6. We have heard learned counsel appearing on behalf of the respective parties at length. B

7. At the outset, it is required to be noted that the appellant is the paternal grandfather and he and his wife – paternal grandparents are seeking custody of their minor grandson, who has lost his parents in the Covid-19 pandemic. Respondent No. 4 is the maternal aunt to whom by the impugned order, the High Court has directed to handover the custody of the corpus. It is also required to be noted that the appellant is staying in Ahmedabad and respondent No. 4 – maternal aunt is staying in Dahod, which is a tribal area/district. C D

7.1 From the impugned judgment and order passed by the High Court and while handing over the custody of the minor to respondent No. 4 – maternal aunt what have been weighed with the High Court is that the appellant – paternal grandparents are old age – 71 and 63 years respectively against which respondent No. 4 is aged 46 years; that respondent No. 4 – maternal aunt is having a bigger family; that the appellant is a retired government servant – depending upon the pension against which respondent No. 4 is a government employee and therefore she will be in a better position to take care of the minor. Therefore, the High Court has opined that it will be in the larger interest and welfare of the child that the custody is handed over to respondent No. 4 – maternal aunt. However, at the same time, it is required to be noted that the corpus has shown his inclination to stay with the appellant – paternal grandparents, so recorded in one of the orders dated 23.12.2021. It is to be noted that the custody of the minor remained with the grandfather pursuant to the interim order passed by the High Court. Nothing is observed by the High Court that during the interim custody period, the appellant E F G H

- A – paternal grandparents did not take proper care of the minor. There was no grievance made by the minor. On the contrary and as observed hereinabove, the minor has shown his willingness to stay with the appellant. Nothing is observed by the High Court that during the interim custody period,
- B the appellant – paternal grandparents acted detrimental to the interest of the minor and/or they did not take proper care.
- 7.2 So far as the reasons assigned by the High Court while handing over the custody of the minor to the maternal aunt reproduced hereinabove, we are of the opinion that those reasons/grounds may be relevant but not germane. There cannot be any presumption that the maternal aunt being unmarried having an independent income; younger than the paternal grandparents and having a bigger family would take better care than the paternal grandparents. In our society still the paternal grandparents would always take better care of their grandson. One should not doubt the capacity and/or ability of the paternal grandparents to take care of their grandson. It is said that the grandparents love the interest rather than the principle. Emotionally also the grandparents will always take care better care of their grandson. Grand Parents are more attached emotionally with grandchildren. It is reported that they have also managed to get admission of the minor in a school in Ahmedabad. The minor will get better education in Ahmedabad, which is a Metro City compared to the education in Dahod. Being a retired person, the paternal grandparents would devote more time and take care of minor better than respondent No. 4 who is serving in the government department. Income and/or the age and/or the bigger family cannot be the sole criteria to tilt the balance and not to give the custody of the grandson to the paternal grandparents. At the cost of repetition, it is observed that neither the High Court has observed anything against the appellant or the paternal grandparents that they have not taken proper care of the minor grandson while interim custody of the corpus was them and/or they acted
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detrimental to the interest of the minor. We appreciate the efforts made by the High Court and it was very difficult choice by the High Court. However, on the facts and circumstances of the case narrated above and for the reasons stated above, we are of the opinion that the High Court has committed an error in not handing over and/or continuing the custody of the corpus – grandson to the appellant – paternal grandparents and to give custody of the corpus to respondent No. 4 – maternal aunt of the corpus. We are of the opinion that if the balance is to be struck between the paternal grandparents and the maternal aunt, for the reasons stated above, the balance would certainly tilt in favour of the paternal grandparents. However, we may not be misunderstood that the maternal aunt may not take proper care of the minor son of her deceased sister.

8. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court handing over the custody of the minor corpus to respondent No. 4 – maternal aunt rather than handing over the custody of the minor corpus to the appellant – paternal grandfather is unsustainable and the same deserves to be quashed and set aside and is accordingly, quashed and set aside. However, it is also made clear that the present order shall subject to the final outcome of the proceedings under Section 7 of the Guardians and Wards Act, pending before the competent court.

We direct that the custody of minor corpus – Pranav Acharya be continued with the appellant – paternal grandparents, who are directed to take care of minor – Pranav Acharya. The appellant is also directed to ensure the better education of the corpus in a school at Ahmedabad. However, respondent No. 4 shall have visitation right and we expect the appellant to provide a right to meet the corpus on regular basis preferably once in a month, subject to the convenience of the child. It is also further observed that during the vacation and/or holidays the appellant may permit the corpus to visit and stay with the maternal aunt – respondent No. 4, of course subject to wishes and convenience of the corpus and it may not adversely affect the interest of the corpus including his education and even the extra curriculum activities. It is also expected to have video calling between the corpus and maternal aunt on regular basis.

- A We request both, paternal grandparents and maternal aunt & her family (on maternal side) to act jointly and cordially and have cordial relations which shall be in the larger interest of the minor - Pranav Acharya. We request to all the concerned to forget bitterness and forget the past and look in the future taking into consideration the future of the minor -
- B Pranav Acharya, who unfortunately, has lost his parents at the age of five years only. With this hope and trust, we close the present proceedings. Present Appeal is accordingly Allowed. In the facts and circumstances of the case there shall be no order as to costs.

Bibhuti Bhushan Bose

Appeal allowed.