Sejalben Arpit Shah W/O Arpit ... vs State Of Gujarat on 9 April, 2019

Equivalent citations: AIRONLINE 2019 GUJ 145, 2019 AIR CC 2721 (GUJ) (2019) 3 GUJ LR 2247, (2019) 3 GUJ LR 2247

Author: J. B. Pardiwala

Bench: J.B.Pardiwala, A.C. Rao

R/SCR.A/1022/2019 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 1022 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

and
HONOURABLE MR.JUSTICE A.C. RAO

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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SEJALBEN ARPIT SHAH W/O ARPIT JITENDRAKUMAR SHAH
Versus
STATE OF GUJARAT

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Appearance:
MR ASHISH H SHAH(2142) for the Applicant(s) No. 1

for the Respondent(s) No. 2
MR HEMANT B RAVAL(3491) for the Respondent(s) No. 3
MR KP RAVAL, APP PUBLIC PROSECUTOR(2) for the Respondent(s) No. 1
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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA
and
HONOURABLE MR.JUSTICE A.C. RAO

Date : 09/04/2019

ORAL JUDGMENT

R/SCR.A/1022/2019 JUDGMENT (PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. By way of this petition, the petitioner prays for a writ of habeas corpus as according to the petitioner, her minor daughter viz.Priyanshi, aged 14 months is in unlawful custody of the respondent no.3. The case on hand prima facie appears to be one of matrimonial dispute between the husband and wife. By this writ application, the writ applicant seeks the custody of her minor daughter from her husband.

2. On 18/03/2019, this Court passed the following order:

1. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

> "(A) The Hon'ble Court may be pleased to issue a writ of Habeas Corpus or any other appropriate writ, order or direction, directing the Respondents Nos.1 to 3 herein to produce Ms. Priyanshi ("corpus") before this Hon'ble High Court and further be pleased to set her at liberty by handing her to the petitioner mother;
>
> (B) The Hon'ble Court may be pleased to issue a writ of Habeas Corpus or any other appropriate writ, order or direction, directing the respondent 3 herein to hand over the custody of the corpus (Priyanshi) to the petitioner who is the legal custodian of the corpus;

(C) Pending admission, hearing and final disposal of this petition, this Hon'ble Court may be pleased to direct respondents Nos.1 to 3 to produce corpus before this Hon'ble Court.

(D) Such other and further reliefs, as are deemed fit, in the facts and circumstances of this case may kindly be granted."

2. The case of the writ applicant, in her own words, as pleaded in the writ application, is as under: "3.1 The petitioner states that the petitioner married Respondent No.3 on 9.12.2016. A copy of the certificate of registration of marriage is annexed herewith and marked as Annexure A. 3.2 The petitioner and Respondent No.3 were residing at the R/SCR.A/1022/2019 JUDGMENT residence of

the Respondent No.3 ("matrimonial home"). Immediately after marriage, the family of Respondent No.3 started instigating Respondent No.3 against the petitioner which led to quarrels between the petitioner and Respondent No.3. Even at the time when the petitioner was pregnant, the family of Respondent No.3 did not support the petitioner. The petitioner states that certain medical complications had arisen during pregnancy. The family of Respondent No.3 did not permit her to take rest nor did they give her the required medical help; owing to which, the petitioner was forced to go to her parental home to take medical treatment, where she was advised complete bed rest. During such time, the petitioner was compelled to stay at her parental home. The father, sister and brother of the petitioner took care of the petitioner. After immense care and medical treatment, the petitioner gave birth to a baby girl Priyanshi on 15.11.2017. Petitioner craves leave to refer and rely on medical records to delineate the complications which had arisen during her pregnancy as and when necessary or if called upon to produce by this Hon'ble Court. A copy of the birth certificate is annexed herewith and marked as Annexure B. 3.3 Soon after Priyanshi was born, the petitioner resumed her matrimonial life at the residence of Respondent No.3. Thereafter, time and again, the petitioner was subjected to mental and physical torture from Respondent No.3 owing to instigation from his family. The parents of Respondent No.3 had indicated to the petitioner that Priyanshi should be given away to the sister of Respondent No.3. At this juncture, it is necessary to point out that sister of Respondent No.3 who was married for more than four years did not have any children from her marriage. Therefore, the family of the Respondent No.3 made an attempt to convince the petitioner to give away Priyanshi to her sister in law. Since the petitioner resisted the attempt made by her in laws, she was mentally and physically tortured.

3.4 Despite continued torture from the family of Respondent No.3, the petitioner continued to live at the matrimonial home only with a view to safeguard the future of Priyanshi. However, on 15.1.2019, the petitioner was driven out from the matrimonial home by Respondent No.3 after forcibly taking away the custody of Priyanshi. The petitioner states that Priyanshi was forcibly snatched from the hands of the petitioner and the petitioner was driven out from the house.

3.5 The petitioner was forced to leave the matrimonial home and go to her father's residence. Thereafter, on 18.1.2019, petitioner lodged complaint before the Mahila Police Station, Bopal against Respondent No.3. However, till date no action has been taken R/SCR.A/1022/2019 JUDGMENT pursuant to such complaint.

3.6 Even prior to lodging such complaint, the petitioner had on 17.1.2019 called helpline No.181 seeking redressal of her grievance against Respondent No.3 who had forcibly taken away Priyanshi from her mother□petitioner. The petitioner states that the family of Respondent No.3 did not cooperate with the team who had visited the residence of the Respondent No.3 pursuant to such call made by the petitioner.

3.7 The petitioner has also filed an application under Section 97 of the Criminal Procedure Code inter alia praying for a search warrant and directing Respondent No.3 to remain present before the Learned Additional Chief Metropolitan Magistrate with daughter□Priyanshi. A copy of the application is annexed herewith and marked as Annexure□C. The petitioner states that on being pointed out by the Hon'ble Court that such application is not maintainable, the petitioner has

instructed the advocate for the petitioner to withdraw the same.

3.8 The petitioner states that the petitioner has made all possible attempts to secure the fourteen months old daughter who was forcibly taken away from her by Respondent No.3 and his family. However, all the efforts made by the petitioner have failed.

3.9 The petitioner states that the police authorities are also not cooperating with the petitioner even though illegal detention is caused by Respondent No.3. With a mala fide intention, Respondent No.3 has filed an application under Section 9 of the Hindu Marriage Act in the Family Court at Ahmedabad only with a view to seek legal protection.

3.10 The petitioner submits that the corpus is a fourteen months old baby girl who is being nursed/breastfed by the petitioner. The corpus is illegally detained by the Respondent No.3 and his family. Respondent No.3 has sought to interfere with the liberty of the petitioner as well as the corpus by illegally and unlawfully confining/detaining the corpus."

3. Thus, it appears from the pleadings that the writ□applicant has prayed for a writ of habeas corpus. The writ applicant is married to the respondent No.3, and in the wedlock, a daughter was born, named, Priyanshi, who, as on date, is fourteen months old. Priyanshi, as on date, is in the custody of her father. The parents of the respondent No.3 are taking care of Priyanshi. The respondent No.3 is a practicing chartered accountant.

R/SCR.A/1022/2019 JUDGMENT

4. Having regard to the nature of the dispute between the parties, we persuaded them to bury their differences and start living together in the interest of Priyanshi.

5. A request was made before us that the matter may be referred for mediation to the Mediation Center. Accordingly, on 12th February, 2019, this Court passed the following order:

> "1. The learned counsel appearing for the respective parties submitted that let the matter be referred to the mediation center to explore the possibility of an amicable settlement.
>
> 2. Let this matter be placed before the mediation center at the earliest. If the matter is settled before the mediation center, it is well and good and it will be in the interest of one and all, more particularly, the 14 months old baby. However, ultimately if the matter is not settled, then this court will have to decid prima□facie e the matter on its own merits. If the matter is to be heard on merits, then the reply of the respondent No.3 will be necessary."

6. Unfortunately, the mediation has failed. In such circumstances, the matter has been placed, once again, before us.

7. We tried our best to resolve the disputes between the parties. The husband has altogether a different story to narrate. He has filed an affidavit-in-reply, inter alia, stating as under;

> "2. At the outset I state and submit that the petitioner has no case for the Habeas Corpus. The petitioner and his husband were married in 9.12.2016. After that she has some mental problems but petitioner has suppressed that fact with the present petitioner and others. Even after that petitioner tried to take her for treatment and she always denied for it.
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> 3. After the birth of child Priyanshi on dated 17.1.2019 her mental health is not good and she always denied for treatment. Even petitioner has also informed about to his father but he did not care for it. The petitioner mother even did not taken care of child and she even not ready to touch another person of family. Even she was not look after child mother has not given any bath or feeding to the child. Even for that child Priyanshi has skin problem due to without bath. The petitioner has not given bath to the child for 15 days. At present Priyanshi's skin treatment is going on with doctor Dr. Vishwas Patel, M.B.B.S.D.D.V and she has problem in head skin problems.
>
> R/SCR.A/1022/2019 JUDGMENT
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> 4. This is not the first time but she left the house for more than seven times due to her mental problems. All these things are neighbours. Mr. Virendra Natvarlal Bhatt and Mayurkumar Indravadan Bhatt are also knowing this. Even on the day of dated 15.01.2019 and it is the next day of Uttrayan she has not prepared the food and started quarreling with the respondent No.3 and his family members. Moreover she tried to throw the child Priyanshi. Due to 15.01.2019 all the people are on the terrace and they have seen it this incident is occurred for two hours. Therefore people have ready to give deposition before the court and three neighbours have given affidavit cum declaration on 30.1.2019. It shows that she has abnormal behaviour. As the Special Criminal Application No.1022/2019 is based on misconception of facts and law and misinterpretation and superstation of facts.
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> 5. The petitioner has filed one Cri. Misc. Application No.255/19 under the under the Cr.P.C. Thereafter, she has filed this Special Criminal Application No.1022/19. In this Habeas Corpus, it is stated in Para No.3,7 that they will instruct the advocate for the petitioner to withdraw the same. The said application was not withdrawn and Ld. Addl. Chief Metropolitan Magistrate, Court No.9, Ahmedabad has dismissed the Cri.MIsc.Appl No.255/19 on dated 8.2.2019. The Ld. Trial Judge has also observed that custody is not illegal and petitioner is father. 6. The present respondent husband has also filed HMP No.130/2019 before the Family Court, Ahmedabad under Section 9 of Hindu Marriage Act and it is pending. The present Respondent No.2 is ready to take her wife and also for whole life he will make treatment of his wife. Therefore, respondent No.2 requested to this Hon'ble High Court to dismiss the Special Criminal Application No.102219.

7. The petitioner was not driven by the any person of the present respondent and she has left the house for her own. Even a false and fabricated allegation made that sister of the petitioner unable to give birth to child and she wanted Priyanshi. Even at home Respondent No.2 mother and father are also at home and respondent no.2□sister is married and staying separately. Therefore, mother and father of the respondent No.2 can look after Priyanshi very well. Therefore, respondent No.2 requested to this Hon'ble High Court to dismiss this Habeas Corpus petition filed by petitioner.

8. Even father of the petitioner has been working in Sheath Hospital at Paldi and he has suppressed the medical treatment of his daughter and also informed to the respondent no.2 for R/SCR.A/1022/2019 JUDGMENT separate cupboard for his daughter after marriage to hide the medical papers of his daughter. Even such type of condition is unusual. In marriage life of the petitioner, petitioner and her husband hardly stayed for 10 to 11 months. It shows that petitioner does not want to stay with the Respondent No.2.

9. Moreover petitioner Sejal has every where given different statement and story at Mahila Police Station. Under Cr.P.C. 97, before the Hon'ble High Court in this Habeas Corpus petition."

8. Thus, according to the respondent No.3, his wife is not in a stable state of mind. According to him, it will be too hazardous or rather dangerous to handover the custody of Priyanshi in her favour.

9. Since all our efforts to persuade the parties to reconcile have failed, we are left with no other option but to decide this petition on merits. Ordinarily, in this type of cases, if the child is just 14 months old, it is the mother who would be in a better position to take care. It would not have been very difficult for us to pass an appropriate order asking the respondent No.3 to handover the custody to the writ applicant. However, the respondent No.3 has brought something to our notice and that is the reason why we are not ready to take any chances. What has been alleged by the husband might be true or at the same time it might be just a figment of his imagination. The only option for us to clear the doubts which have been raised in our mind is to get the writ applicant examined by the Head of the department of Psychiatrist, Civil Hospital, Asarva. We took sense of the writ applicant in this regard. She is ready and willing to cooperate and subject herself to such medical examination. In such circumstances, we requested Mr. Raval, the learned APP appearing for the State to assist us in this regard. Mr. Raval, after taking instructions, submitted that the writ applicant should appear before the Head of the department of Psychiatrist, Civil Hospital, Asarva and necessary examination shall be undertaken. Mr. Raval further submitted that it will take around fifteen days for the doctors to study the case and arrive at an appropriate conclusion. Mr. Raval submitted that appropriate report shall be placed before this Court in a sealed cover.

10. In such circumstances, referred to above, for the present, we pass the following directions;

(i) The writ applicant is directed to appear before Dr. Prabhakar M.M., Medical Superintendent, Civil Hospital, Asarva, Ahmedabad on 25th March, 2019. Dr. Prabhakar M.M shall direct the writ

applicant to the department of Psychiatrist, Civil Hospital for the necessary medical examination.

R/SCR.A/1022/2019 JUDGMENT

(ii) The doctors concerned, on completion of the examination, shall prepare a report and place it in a sealed cover. The sealed cover containing the report shall be placed before us for our perusal.

(iii) One copy of this order shall be furnished to the concerned doctors of the department of Psychiatrist so that they are in a position to understand in what set of circumstances, the writ applicant is subjected to such examination. The doctors shall study the order and, thereafter, proceed to conduct the necessary tests. One copy of this order shall also be furnished to Mr. Raval, the learned APP, appearing for the State for its onward communication. One copy shall also be furnished to Mr. Ashish Shah, the learned counsel appearing for the writ applicant.

11. Post this matter for further hearing along with the medical report on 5th April, 2019. Direct service is permitted.

3. Pursuant to our order dated 18/03/2019 referred to above, the writ-applicant was kept under observation in the Psychiatric Ward of the Civil Hospital, Asarva at Ahmedabad. It appears that the writ-applicant was admitted as an indoor patient on 26/03/2019 and was kept under observation upto 03/04/2019. The report as regards the medical examination of the writ-applicant has been placed before us in a sealed cover.

4. The report prepared by Dr. Pallaviben Kapadia reads as under:-On Rorschach Protocol, the productivity is at an average level. The form level and popular concepts are indicative of good reality tie. No obvious psychotic features or major problem was elicited from Rorschach.

Report of Sr. Assistant Prof. Of Clinical Psychologist Pallaviben Kapadia.

5. There is one another report prepared by Dr. Prakruti Patel, which reads thus:- R/SCR.A/1022/2019 JUDGMENT Name: Sejalben Shah Age: 35 yrs/F Purpose: Fitness Certificate for Child Custody.

C/o A, 35 yrs old, Female patient named Sejalben, married, residing at father's home, Bopal, referred for OT assessment for mental fitness certification regarding high court case for 14 month old Female child custody.

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Informer -      Self (Sejalben Shah)
                Father (Shantilal Shah)

History
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Patient has 2.5 yrs of married life. According to patient from the beginning of married life patient was having mental torturing by mother-in-law, sister-in-law & husband of sister-in-law. Patient was pregnant in month of March, 2017. She was taken to gynec for regular sonographical check-up

and there they came to know about having female child. Female child was unwanted by the family. Patient was not feeling well there due to situation. Thus, father (Shantilal Shah) took her to his home for rest. She delivered a healthy female child on date 15/11/17. She was at father's place for next 7 months.

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Then in-laws took her to their place.
Then in-laws were forcing her to give her child's custody
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legally to her sister-in-law by legal adoption.

When she refused to this, they started causing mental harassment to the patient like "Food has not been prepared good."

"She is not having manners."

"She should not communicate with her parents."

"demands from her father mother in financial way."

When she refused to ask for money from parents they started rude behaviour.

Last fight was for not preparing food for in-laws & started fighting and forced her to leave the house.

According to patient child is with them & not allowing her to meet. Patient is telling that in-laws not taking care of female child & not giving proper food to child.

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MSC
Eye contact     - established
                - maintained.
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Mood - Good
Speech - relearent
Thought -     Normal
              No suicidal intention.
              No death wish.
              No delusion.
Perception
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Cognition Normal Intact
Judgment
Intelligence

Conclusion.

Patient is completely fit to have custody of female child.

Patient not having any mental fitness problem according to OT assessment.

Thus, patient is Fit for daughter's custody.

sd/-
Dr. Prakruti Patel
28/3/19

6. The entire file containing various other reports of the tests has also been placed before us for our perusal.

7. It appears from the aforesaid reports that the writ□applicant is absolutely fine and she is not suffering from any mental disorder as alleged by her husband i.e. the respondent no.3. The husband is a practicing Chartered Accountant. He has lot of complaints against his wife as regards her over□ all behaviour at home. According to the husband, the writ□applicant is not a good mother as she is not taking good care of her daughter. It is also the case of the husband that the writ□applicant at times behaves in a abnormal manner and once she also threatened to throw away the minor daughter from the balcony of their house. According to the husband, this episode was witnessed by the neighbours. It is the case of the husband that the writ□applicant walked out of her matrimonial home for no good reason leaving behind her minor daughter. It is also the case of the husband that the minor R/SCR.A/1022/2019 JUDGMENT daughter is being taken care of by his parents. According to the husband, the minor daughter is absolutely safe at his house and his parents are taking good care of his minor daughter.

8. We tried our best to persuade the parties to reconcile atleast in the interest of their minor daughter. However, after talking to them individually, including the father of the writ□applicant, it appears to be a case of an irretrievable breakdown of marriage. We do not see any ray of hope of reconciliation between the parties. In such circumstances, we are left with no other option, but to decide this application on merits.

SUBMISSIONS ON BEHALF OF THE WRIT□APPLICANT:□

9. Mr. Shah, the learned counsel appearing for the writ□applicant vehemently submitted that the writ□applicant is being harassed like anything by her husband and in□laws. On account of incessant harassment, the writ□applicant had to leave her matrimonial home, but while she left her matrimonial home, she was not permitted to take her daughter along with her. In such circumstances, she had to rush before this Court with this petition seeking a writ of habeas corpus.

10. Mr. Shah submitted that the writ of habeas corpus can be pressed into service for granting the custody of a child to the deserving spouse. He submitted that the minor daughter is just about 14 months old and in such circumstances, the love and care of the mother is very much essential. Mr. Shah submitted that the husband has levelled false and reckless allegations that his wife is mentally sick and in such circumstances, it would not be safe to allow her to be in company of their minor daughter. Mr. Shah submitted that the medical reports are now on record. The medical reports makes the picture very clear. There R/SCR.A/1022/2019 JUDGMENT is no problem of any nature with the writ□applicant.

11. Mr. Shah submitted that if the custody of the father cannot promote the welfare equally or better than the custody of the mother, then he cannot claim indefeasible right to the child's custody. He would submit that the "tender years rule" requires that the custody of the children of tender age must be left with the mother. In such circumstances referred to above, Mr. Shah prays that there being merit in this petition, the same be allowed and the writ of habeas corpus be issued directing the respondent no.3 to hand over the custody of the minor daughter to the writ□applicant.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.3:□

12. Mr. Hemant Raval, the learned counsel appearing for the respondent no.3 [husband] has vehemently opposed this writ□application. Mr. Raval has raised a preliminary contention as regards the maintainability of this petition seeking a writ of habeas corpus. Mr. Raval would submit that a petition under Article 226 of the Constitution of India, to seek a writ of habeas corpus in respect of a minor child is not maintainable. He would submit that the custody of the minor child with her father cannot be said to be an illegal or unlawful in any manner. He submitted that it cannot be said that the minor child is in unlawful detention. He submitted that if the writ□applicant wants the custody of her minor daughter, then she has to initiate appropriate proceedings before the appropriate Court under the provisions of the Guardians and Wards Act, 1890. Mr. Raval submitted that as the writ□applicant has an alternative remedy, this writ□application should not be entertained. Mr. Raval submitted that good care of the minor child is being taken by the father and grand□parents and in such circumstances, the custody should R/SCR.A/1022/2019 JUDGMENT not be handed over to the mother. In such circumstances referred to above, Mr. Raval prays that there being no merit in this petition, the same be rejected.

13. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether we should entertain this habeas corpus petition.

WRIT OF HABEAS CORPUS:□

14. The writ of habeas corpus has always been given due signification as an effective method to ensure release of the detained person from prison. In P. Ramanatha Aiyar's Law Lexicon (1997 edition), while defining "habeas corpus", apart from other aspects, the following has been stated: □ "The ancient prerogative writ of habeas corpus takes its name from the two mandatory words habeas. corpus, which it contained at the time when it, in common with all forms of legal process,

was framed in Latin. The general purpose of these writs, as their name indicates, was to obtain the production of an individual."

15. In Secretary of State for Home Affairs v. O'Brien reported in 1(1923) AC 603 (609)1, it has been observed that it is perhaps the most important writ known to the constitutional law of England affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty third year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of liege.

R/SCR.A/1022/2019 JUDGMENT

16. In Ranjit Singh v. The State of Pepsu (now Punjab) reported in AIR 1959 SC 843, after referring to Greene v. Secretary of State for Home Affairs reported in 1942 AC 284, the Supreme Court observed that the whole object of proceedings for a writ of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible. The Supreme Court quoted Lord Wright who, in Greene's case, had stated thus:

> "The incalculable value of habeas corpus is that it enables the immediate determination of the right to the appellant's freedom."

Emphasis was laid on the satisfaction of the court relating to justifiability and legality of the custody.

17. In Kanu Sanyal v. District Magistrate, Darjeeling and others reported in AIR 1973 SC 2684, it was laid down by the Supreme Court that the writ of habeas corpus deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty.

18. Speaking about the importance of the writ of habeas corpus, a two□Judge Bench, in Ummu Sabeena v. State of Kerala and others reported in (2011) 10 SCC 781, has observed as follows: □ "……the writ of habeas corpus is the oldest writ evolved by the common law of England to protect the individual liberty against its invasion in the hands of the executive or may be also at the instance of private persons. This principle of habeas corpus has been incorporated in our constitutional law and we are of the opinion that in a democratic republic like India where Judges function under a written Constitution and which has a chapter on fundamental rights, to protect individual liberty the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the Court by issuing a writ of R/SCR.A/1022/2019 JUDGMENT habeas corpus."

In the said case, a reference was made to the Halsbury's Laws of England, 4th Edn. Vol. 11, para 1454 to highlight that a writ of habeas corpus is a writ of highest constitutional importance being a remedy available to the lowliest citizen against the most powerful authority.

19. As a preliminary contention has been raised as regards the maintainability of this habeas corpus petition, we should deal with the preliminary contention first. Mr. Raval argued on behalf of the respondent no.3 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 the respondent no.3 being the father, is one of the lawful guardian of the minor child. In this regard, reliance is placed on a decision of the Supreme Court in the case of Githa Hariharan (Ms.) and another Vs. Reserve Bank of India and another (1999) 2 SCC 228 and, in particular, the 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, recognized that a minor has to be in the custody of the person who can sub□serve his welfare in the best possible way □□the interest of the child being the paramount consideration.

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 recognizes 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 W.P.(Crl.) R/SCR.A/1022/2019 JUDGMENT No. 357/2018 Page 13 of 35 interpreted in a manner so as not to defeat the true intent of the legislature.

20. Mr. Raval submitted that the writ□applicant could have initiated the proceedings before the appropriate Court under the Guardians and Wards Act, 1890. In such circumstances, this petition is not maintainable. In support of his submission, he has placed reliance on the decision of the Supreme Court in the case of 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.

21. Mr. Raval also placed reliance on one Division Bench decision of the Delhi High Court in the case of Sheela Vs. State NCT of Delhi (2008) 149 DLT 476 (DB). In the said case, a Division Bench of the Delhi High Court rejected 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 forum. Relevant paragraph is as follows:□R/SCR.A/1022/2019 JUDGMENT

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:

> 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.

> 22. Mr. Raval also placed reliance on K.Suganya Vs. W.P.(Crl.) No. 357/2018 Page 15 of 35 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 4 th 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.

> 23. Mr. Raval also placed reliance on the decision of the Supreme Court in the case of Ramesh Vs. Laxmibai : (1998) 9 SCC 266, wherein, the Supreme Court in context with Section□97 of the Code of Criminal Procedure, 1973 has observed as under:□ R/SCR.A/1022/2019 JUDGMENT "...From a perusal of the impugned order of the High Court, it appears to us that though the points which should weigh with a court while determining the question of grant of custody of a minor child have been correctly detailed, the opinion of the High Court that the revisional court could have passed an order of custody in a petition seeking search warrants under Section 97

> CrPC in the established facts of the case is untenable. Section 97 CrPC prima facie is not attracted to the facts and circumstances of the case when the child was living with his own father. Under the circumstances, we are of the opinion that the orders of the High Court dated 17□7□1996 and that of the learned Additional Sessions Judge dated 9□7□1996 cannot be sustained and we accordingly set aside the orders and the directions given therein."
>
> 24. Mr. Raval in last placed reliance on one decision of the Uttaranchal High Court in the case of Akanksha Budhiraja Vs. State of Uttarakhand and others; Habeas Corpus Petition No.23 of 2018;

decided on 25th June, 2018. Mr. Raval placed reliance on the following observations:□

6. In the present case, the facts are entirely different. Admittedly, Gaurav who is four years & eight months of age is as of now with his father at Moradabad. The parties admittedly Hindu by religion, therefore, respondent no. 4 who is the father of Gaurav is his natural guardian (as is his mother). The petitioner has not been able to show as to how the child, namely, Gaurav can be said to be in an illegal detention or illegal custody of his natural father.

7. The first and foremost aspect which has to be examined by this Court is whether Mst. Gaurav is in unlawful or illegal custody of respondent no. 4. Considering, however, that Gaurav is 5 years of age, his welfare is also of paramount importance, but that is not the subject matter of this Court, as that would fall under the jurisdiction of the Family Court, particularly when this Court finds that the custody of a child with his natural father cannot be said to be an illegal or unlawful custody.

8. The Constitution Bench of Hon'ble Apex Court in the case of Kanu Sanyal v. District Magistrate, Darjeeling reported in (1973) 2 SCC 674 had considered entire history and development of a writ of habeas corpus and had come 4 to the conclusion that the writ of habeas corpus is "essentially a procedural writ". Hon'ble Apex Court in the case of Kanu Sanyal (supra), in para 4, observed as under:

R/SCR.A/1022/2019 JUDGMENT "4. It will be seen from this brief history of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, 'in order that appropriate judgment be rendered on judicial inquiry into the alleged unlawful restraint'. The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice □immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody □together with the day and cause of his being taken and detained □to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf. The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and

effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by the Lord Halsbury, L.C. in Cox v. Hakes (1890) 15 AC 506, 'the essential and leading theory of the whole procedure is the immediate determination of the right to applicant's freedom' and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end."

9. Technically there may be a situation where it would still may possible to make out a case for a writ of habeas corpus by the mother where the child is in custody of the father, but first and foremost it has to be shown that the custody is unlawful or illegal. Moreover, in case any relief is granted to the petitioner, considering her fervent 5 prayer before this Court, this would amount to court's seal of approval that the child is in unlawful custody of his father. Such an order would preempt any proceedings which primarily and essentially lie in the domain of a Family Court. Moreover, the petitioner has not been able to show even prima facie that the child is in illegal custody of his father.

25. On the other hand, Mr. Shah submitted that a writ of habeas corpus petition is maintainable in relation to the custody of a minor child, where the custody of the minor child is unlawful or illegal, and R/SCR.A/1022/2019 JUDGMENT where the welfare of the child requires that the present custody be changed to that of another person. He submitted that 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, Mr. Shah has placed reliance on the decision of the Supreme Court in the case of 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.

26. We have given our thoughtful consideration to the rival submissions of the parties. So far as the submission of respondent no.3 with regard to non□maintainability of this petition is concerned, we do not find any merit in the same.

27. It is well established that the writ of Habeas Corpus can be pressed into service for granting the custody of a child to the deserving spouse. The following observations in para 13 of the decision in Gohar Begum v. Suggi alias Nazma Begum AIR 1960 SC 93 : (1960 Cri LJ

164) clinch the issue:

> "It is further well established in England that in issuing a writ of habeas corpus a court has power in the case of infants to direct its custody to be placed with a certain person. In R.v. Greenhill, (1836) 4 Ad. & El. 624 at P. 640 : 111 ER 922 at p. 927 Lord Denman C. J. said :
>
> 'When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the

> Court must make an order for his being placed in the proper custody.' See also (1857) 7 El Bl 186 : 119 ER 1217. In Halsbury's Laws of England, Vol.IX, Art.1201 at page 702 it is said :
>
> R/SCR.A/1022/2019 JUDGMENT Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper persons.' S.491 is expressly concerned with directions of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the courts in our country have always exercised the power to direct under S.491 in a fit case that the custody of an infant be delivered to the applicant : see Rama Iyer v. Nataraja Iyer, AIR 1948 Mad 294 : (48 Cri LJ
>
> 369), Zara Bibi v. Abdul Razza, (1910) 12 Bom LR 891 and Subbaswami Goundan v. Kamakshi Ammal, ILR 53 Mad 72 : (AIR 1929 Mad 834). If the courts did not have this power, the remedy under S.491 would in the case of infants often become infructuous."

28. These observations made in the context of S.491 of the Criminal P.C. 1898, apply with equal force in the exercise of the constitutional jurisdiction conferred upon this Court by Art.226 of the Constitution.

29. In the United States of America also it is recognized that Habeas Corpus is a proper legal remedy to obtain the discharge of an infant from a detention that is illegal, and to determine controversies concerning the right to custody of the infant. Habeas Corpus is a proper remedy on the part of one parent to recover a child from the other parent, either before or after the parents are legally separated or divorced. In a proper case the writ may be sued out by a tutor or guardian deprived of the custody of his ward, or by corporations and societies that have, in a legal manner, acquired the right to the custody of children. But one who is not related to the child cannot bring a Habeas Corpus proceeding without averring at least a prima facie legal right to custody.(See: Paras 99 and 118 at pages 249 and 264 of Vol. 39 of the American Jurisprudence, Second Edition).

30. The observations of the Supreme Court in Gohar Begum's case (AIR R/SCR.A/1022/2019 JUDGMENT 1960 SC 93) with regard to the issue of the writ of Habeas Corpus in child custody cases finds support also from the following statement of law occurring in Vol. 11, Article 1469 at page 779 of Halsbury's laws of England, Fourth (latest) Edition:

> "A parent, guardian, or other person who is legally entitled to the custody of a minor can regain that custody when wrongfully deprived of it by means of the writ of habeas corpus."

31. We have to our advantage a very exhaustive judgment on the subject delivered by a Division Bench of the Himachal Pradesh High Court in the case of Kamla Devi Vs. State of H.P. and others reported in AIR 1987 Himachal Pradesh 34. P.D. Desai, C.J.[As His Lordship then was] has

discussed the nature and purpose of the jurisdiction of the habeas corpus. We quote the observations.

11. It is well established that in issuing the writ of Habeas Corpus in the case of infants, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of, statute. The jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae , for the protection of its infant ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a habeas corpus petition, as applied to infants, is to determine in whose custody the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the Court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as Parens Patriae , has in promoting the best interests of the child. The following passages at Pages 249, 280 and 281 (Paras 99, 148 and 149) extracted from and the cases cited in footnotes 10, 14 and 19 at pages 280 and 281 of the American Jurisprudence, Vol. 39, Second Edition, make this position clear:

R/SCR.A/1022/2019 JUDGMENT "Where the writ is availed of for the latter purpose (to determine controversies concerning the right to custody of the infant), the proceeding partakes of the incidents of a suit in equity and is considered to be one in rem, the child being the res ..... The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. ..... In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. .....

Habeas corpus is a summary proceeding, and, as applied to infants, its primary object is to determine in whose custody the best interests of the child will probably be advanced.

The Considerations Which Must Weigh With the Court in Awarding Actual Custody:

12. The law is well settled that the natural duty of' a parent to protect an infant child rests with the parent having actual custody of the child. A person has actual custody of a child if he or she has actual possession of the child's person, whether or not that possession is shared with one or more other persons (See :

> Halsbury's Laws of England, Fourth Edition, Vol. 24, Articles 504 and 510 at pages 214□217). These factors have relevance in determining the dispute relating to the actual custody of a minor child.

13. As observed earlier, the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided R/SCR.A/1022/2019 JUDGMENT ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.

14. The general principle governing the award of custody of a minor is succinctly stated in the following words in Halsbury's Laws of England, Fourth Edition, Vol. 24, Article 511 at page 217 :

> "Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."

In the American Jurisprudence, Vol. 39, Second Edition, Para 148 at pages 280□281, the same principle is enunciated in the following words:

> "..... a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require."

In Foot Note 14 at page 281, the following extracts from two American cases are set□out which also emphasise this point:

> "The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate. Howarth v. Northcott, 152 Conn 460, 208 A 2d and 540, 17 ALR3d 758.

> The primary object of habeas corpus, as applied to infants, is to determine in whose custody the best interests of the infant will probably be advanced. Buchanan v. Buchanan, 170 Va 458, 197 SE 426, 116 ALR 688 ?

15. The Courts in India have also been guided by these considerations in deciding. child custody cases. In Rosy Jacob v. Jacob A. Chakramakkal, AIR 1973 SC 2090, which was a case arising under S.25 of the Guardians and Wards Act, 1890, the R/SCR.A/1022/2019 JUDGMENT pertinent observations made in this context being relevant are extracted hereinbelow:

> "The Court's power ..... is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions, to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom if ever identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading..... In our opinion, the dominant consideration in making orders under S.25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. ..... There is no dichotomy between the fitness of, the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote there welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under S.25 merely because there is no defect in his personal character and he has attachment for his children which every normal parent has. ..... The father's fitness from the point of view just mentioned cannot override considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute generally to be better fitted to look after the children being normally the earning member and head of the family but the court has in each case to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. ..... Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources. may be in a position to guarantee better health, education and maintenance for them. The children are not mere chattels : nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the

> R/SCR.A/1022/2019 JUDGMENT considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."

16. In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, AIR 1982 SC 1276, the Supreme Court reiterated this view in the following words:

> "The principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

17. It is, thus, clear that as between the competing claims of two parents in receipt of the custody of a minor child, the mere fact that the father is not unfit to be the custodian, is not determinative of the issue of its welfare. If the custody of the father cannot promote the welfare equally or better than the custody of the mother, then he cannot claim indefeasible right to the child's custody. Indeed, the "tender years rule" requires that the custody of the children of tender age must be left with the mother. The mother's protection for such children is indispensable, We cannot think of any other protection which will be equal in measure and substance to that of the mother in such circumstances.

18. The following passage occurring in Bailey on Habeas Corpus, Vol. I, page 581, is very much opposite in this context :

> "The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can R/SCR.A/1022/2019 JUDGMENT supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages would possibly stimulate."

19. An incidental aspect, which is to be borne in mind, may be adverted to In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may

properly consult the child, if it has sufficient judgement, (See : Para 148 at page 281 of Vol. 39 of the American Jurisprudence, Second Edition). The writ may, however, issue not only without the privity of the child, but even against his express wishes (See : Para 99 at page 250 of Vol. 39 of the American Jurisprudence, Second Edition). THE NATURE OF ILLEGALITY OF RESTRAINT PROVABLE IN CHILD CUSTODY CASES:

> 20. In Gohar Begum's case (AIR 1960 SC 93) (supra), it was observed in para 7 that when the respondent had no legal right whatsoever to the custody of the child, the refusal to make over the child to the custody of the person entitled thereto in accordance with law results in an illegal detention of the child within the meaning of S.491 of the Criminal P.C., 1898 and that, therefore, the writ of Habeas Corpus can legitimately issue. The following observations of Lord Campbell, C.J. in R.v. Clarke, (1857) 7 El. & Bl. 186 : 119 ER 1217, were quoted with approval:
>
> "But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty."

21. In Halsubury's Laws of England Vol. 11, Fourth Edition, Article 1469, page 779, the following pertinent observations clearly bring out the aforesaid position :

> ".....For the purpose of the issue of the writ, the unlawful detention of a minor from the person who is legally entitled to his custody is regarded as equivalent to an unlawful imprisonment of the minor. In applying for the writ it is, therefore, unnecessary to allege that any restraint or force is being used towards the minor by the person in whose custody and control he is for the time being."

22. The following observations in the American Jurisprudence, Vol. 39, Second Edition, at pages 250 and 280 (Paras 99 and 148), highlight the same point and throw light on the nature of inquiry which the court is required to make when moved for a writ of Habeas Corpus in the case of an infant:

R/SCR.A/1022/2019 JUDGMENT "Ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.

Unlike other cases in which the remedy is available, the writ lies where its subject is a child, notwithstanding that the child is not held in actual physical restraint but remains with the respondent through natural inclination. In the case of infants, an unauthorised absence from legal custody has been treated, at least for the purpose of allowing the writ to issue, as equivalent to imprisonment, and the right to have a child returned to legal custody has been treated as equivalent to a wish to be free; and proceedings in habeas corpus have so frequently been resorted to in order to determine the right to possession of a minor that the question of physical restraint need be given little if any consideration where a lawful right is asserted to retain possession. ... and it may issue

though the person in whose custody the child is denies that he is restraining or preventing the child from returning to his parents, if it appears that he harbours the child and refuses to permit the parents to exercise parental authority to enforce a return.

Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. ..... Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another."

23. It is, thus, clear that these cases are decided not on the legal right of the child to be relieved from the unlawful imprisonment or detention but on the Court's view of its best interests and welfare. The unlawful detention would be presumed in such cases when the person legally entitled to the custody of the infant is denied the same. It is not required also to allege and prove that any restraint or force is used against the infant.

32. In the very same judgment Their Lordship dealt with the question

- Whether an alternative remedy would be a Bar. The Bench proceeded to answer the said question as under:☐R/SCR.A/1022/2019 JUDGMENT

24. In Gohar Begum's case (AIR 1960 SC 93) (supra), the Supreme Court has ruled in no uncertain terms that a remedy under any special statute is distinct from the writ of Habeas Corpus. The following pertinent observations in part 10 of the judgement highlight this point :

> "We further see no reason why the appellant should have been asked to proceed under the Guardians and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under S.491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right under S.491. That is well established as will appear from the cases hereinafter cited." The cases referred to were both Indian and English cases.

The Legislative Policy Regarding The Custody Of A Child Of Tender Years:

25. The law, which generally lags behind social advances, has haltingly stepped in by enacting S.6 of the Hindu Minority and Guardianship Act, 1956 and taken a small step in the direction of treating the mother as better suited for custody till the minor attains the age of 5. The relevant portion of S.6 of the said Act reads as follows:

> "The natural guardians of a Hindu minor in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are ☐

(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) The "tender years rule" has thus found statutory recognition and the legislative policy underlying thereto is based not only on the social philosophy but also in realities and points in the direction that the custody of minor children who have not completed the age of 5 years should ordinarily be with the mother irrespective of the fact that the father is the natural guardian of such minors. When moved for a writ of Habeas Corpus and in exercising the general and inherent jurisdiction in a child custody case, the Court is required to bear this legislative prescription in mind while judging the issue as to the welfare of the child.

R/SCR.A/1022/2019 JUDGMENT

33. The Supreme Court in the case of Syed Saleemuddin v. Dr Rukshana & Ors., (2001) 5 SCC 247 has held as under:☐

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)

34. In Ruchi Majoo (supra), the Supreme Court observed as under:□R/SCR.A/1022/2019 JUDGMENT "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".

35. Thus, we reject the preliminary contention raised by the learned counsel appearing on behalf of the respondent no.3 that the present petition is not maintainable.

36. In view of the above, we now proceed to consider whether the custody of the minor child should be handed over to the mother or the custody should be permitted to be retained by the father.

37. It is well settled that in an application seeking a writ of habeas corpus for custody of minor child, the principal consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties. [See: Dr. (Mrs.) Veena Kapoor vs. Shri Varinder Kumar Kapoor (1981) 3 SCC 92 and Syed Saleemuddin vs. Dr. Rukhsana and others (2001) 5 SCC 247]. It is, therefore, to be examined what is in the best interest of the child Priyanshi and whether her welfare would be better looked after if she is given in the custody of the appellant, who is her father.

38. In the case of Nil Ratan Kundu, AIR 2009 SC (Supp) 732 (supra), the Apex Court opined as under:

R/SCR.A/1022/2019 JUDGMENT In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.

39. Thus, the Court should avoid a technical and legalistic view; it should adopt a pragmatic and realistic view in such a case. Moreover, the Court acts less as a Court of law, and more as a Court of equity. For it deals less with legal issues, and more with a human problem of the parents and the children. According to the Apex Court, "To repeat, issues relating to custody of minors and tender aged children have to be handled with love, affection, sentiments and by applying human touch to the problem." Ref. to Nil Ratan Kundu, AIR 2009 SC (Supp) 732 (supra).

40. The disturbing part of this litigation, irrespective of the fact whether the custody of Priyanshi with her father could be termed as unlawful or otherwise is that the husband projected his wife as mentally ill and not fit to take care of minor Priyanshi. As we are dealing with a matter in which the interest of 14 months old girl is involved, we did not wanted to take any chance and in such circumstances, very reluctantly thought fit to subject the writ-applicant to undergo medical examination. In fact it was very painful to ask a young lady to undergo tests of such nature. The writ-applicant in Paragraph-3.4 of her writ-application has stated as under:-3.4 Despite continued torture from the family of Respondent No.3, the petitioner continued to live at the matrimonial home only R/SCR.A/1022/2019 JUDGMENT with a view to safeguard the future of Priyanshi. However, on 15.1.2019, the petitioner was driven out from the matrimonial home by Respondent No.3 after forcibly taking away the custody of Priyanshi. The petitioner states that Priyanshi was forcibly snatched from the hands of the petitioner and the petitioner was driven out from the house.

41. We take notice of the fact that the afore-noted averments made in Paragraph-3.4 of the writ-application have not been directly or indirectly refuted by the respondent no.4. This prima-facie is suggestive of the fact that on account of matrimonial disputes, the writ-applicant had to leave her matrimonial home, but while leaving, she was not permitted to take alongwith her minor daughter Priyanshi.

42. As observed by the Supreme Court in Vivek Singh Vs. Ramani Singh : 2017 (3) SCC 231, in cases of this nature, where a child feels tormented because of the strained relations between her parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. However, even in such of dilemma, the paramount consideration is the welfare of the child. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts.

43. The Hindu Minority and Guardianship Act, 1956 lays down the principles on which custody disputes are to be decided. Section-7 of this Act empowers the Court to make order as to guardianship. Section-17 enumerates the matters which need to be considered by the Court in appointing guardian and among others, enshrines the principle of welfare of the minor child. This is also stated very eloquently in Section-13 which reads as under:-R/SCR.A/1022/2019 JUDGMENT "13. Welfare of minor to be paramount consideration. (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

44. The Supreme Court in the case of Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42 stated in detail, the law relating to custody in England and America and pointed out that even in those jurisdictions, welfare of the minor child is the first and paramount consideration and in order to

determine child custody, the jurisdiction exercised by the Court rests on its own inherent equality powers where the Court acts as 'Parens Patriae'. The Court further observed that various statutes give legislative recognition to the aforesaid established principles. The Court explained the expression 'welfare', occurring in Section 13 of the said Act in the following manner: "51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.

52. The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments."

45. We understand that the aforesaid principle is aimed at serving twin objectives. In the first instance, it is to ensure that the child grows R/SCR.A/1022/2019 JUDGMENT and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution. While the parents aim to ensure that the child is least affected by the outcome, the inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting thereby having a significantly negative repercussion in the advancement of the child. While these effects don't apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remains the objective of the parents to evade and the court's intent to circumvent. This right of the child is also based on individual dignity. [Vide Vivek Sing (Supra)]

46. Second justification behind the 'welfare' principle is the public interest that stand served with the optimal growth of the children. It is well recognised that children are the supreme asset of the nation. Rightful place of the child in the sizeable fabric has been recognised in many international covenants, which are adopted in this country as well. Child centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation. [Vide Vivek Sing (Supra)]

47. The Supreme Court has observed in Bandhua Mukti Morcha v.

Union of India & Ors., (1997) 10 SCC 549: R/SCR.A/1022/2019 JUDGMENT "4. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation,

developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood □socially, economically, physically and mentally □the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development."

48. Same sentiments were earlier expressed in Rosy Jacob v. Jacob A. Chakramakka, (1973) 1 SCC 840 in the following words:

> "15. ...The children are not mere chattels : nor are they mere play□things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society..."

49. The role of the mother in the development of a child's personality can never be doubted. A child gets the best protection through the mother. It is a most natural thing for any child to grow up in the company of one's mother. The company of the mother is the most natural thing for a child. Neither the father nor any other person can give the same kind of love, affection, care and sympathies to a child as that of a mother. The company of a mother is more valuable to a growing up female child unless there are compelling and justifiable R/SCR.A/1022/2019 JUDGMENT reasons, a child should not be deprived of the company of the mother. The company of the mother is always in the welfare of the minor child. [Vide Vivek Sing (Supra)].

50. The respondent no.3 is a chartered accountant. It goes without saying that he has tremendous love and affection towards Priyanshi. Even in the course of personal interaction with him, he made himself very clear that he would not be in a position to live without his daughter Priyanshi. At that point of time, with folded hands, we requested him to see that some settlement takes place, even if he has to sacrifice something very dear to him. During our interaction with the writ□applicant, we gathered an impression that she wants to live separately with her husband and Priyanshi. At the same time, the respondent no.3 is very firm that he would not leave his parents.

51. We are of the view that the mother should not be deprived of her right especially considering the tender age and child being a girl child. The grandparents may be taking very good care of Priyanshi, but at the same time, they cannot be a substitute for natural mother. In fact, there is no substitute for mother's love in this world. It appears that the grandparents are old. The respondent no.3 is a professional and must be keeping himself quite busy as a Chartered Accountant. Considering the

totality of facts and circumstances, the welfare of the child lies with the mother. At this stage, we deem fit to quote few observations of the Supreme Court in the case of Vivek Singh (Supra) as those are very apt so far as the case on hand is concerned. In Vivek Singh (Supra), the Supreme Court had to deal with almost an identical problem like the one on hand. The Supreme Court has observed as under:□This Court cannot turn a blind eye to the fact that there have been R/SCR.A/1022/2019 JUDGMENT strong feelings of bitterness, betrayal, anger and distress between the appellant and the respondent, where each party feels that they are 'right' in many of their views on issues which led to separation. The intensity of negative feeling of the appellant towards the respondent would have obvious effect on the psyche of Saesha, who has remained in the company of her father, to the exclusion of her mother. The possibility of appellant's effort to get the child to give up her own positive perceptions of the other parent, i.e., the mother and change her to agree with the appellant's view point cannot be ruled out thereby diminishing the affection of Saesha towards her mother. Obviously, the appellant, during all this period, would not have said anything about the positive traits of the respondent. Even the matrimonial discord between the two parties would have been understood by Saesha, as perceived by the appellant. Psychologist term it as 'The Parental Alienation Syndrome'. It has at least two psychological destructive effects:

> (i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.
>
> (ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.

The aforesaid discussion leads us to feel that continuous company of the mother with Saesha, for some time, is absolutely essential. It may also be underlying that the notion that a child's 4 The Parental Alienation Syndrome was originally described by Dr. Richard Gardner in "Recent Developments in Child Custody Litigation", The Academy Forum Vol. 29 No.2: The American Academy of Psychoanalysis, 1985). primary need is for the care and love of its mother, where she has been its primary care giving parent, is supported by a vast body of psychological literature. Empirical studies show that mother infant "bonding" begins at the child's birth and that infants as young as two months old frequently show signs of distress when the mother is replaced by a substitute caregiver. An infant typically responds preferentially to the sound of its mother's voice by four weeks, actively demands her presence and protests her absence by eight months, and within the first year has formed a R/SCR.A/1022/2019 JUDGMENT profound and enduring attachment to her. Psychological theory hypothesizes that the mother is the center of an infant's small world, his psychological homebase, and that she "must continue to be so for some years to come." Developmental psychologists believe that the quality and strength of this original bond largely determines the child's later capacity to fulfill her individual potential and to form attachments to

other individuals and to the human community.

52. The "tender years rule" has found statutory recognition and the legislative policy underlying thereto is based not only on the social philosophy but also in realities and points in the direction that the custody of minor children who have not completed the age of 5 years should ordinarily be with the mother irrespective of the fact that the father is the natural guardian of such minors. When moved for a writ of Habeas Corpus and in exercising the general and inherent jurisdiction in a child custody case, the Court is required to bear this legislative prescription in mind while judging the issue as to the welfare of the child. In the present case, Priyanshi is just 14 months old. The parties are Hindus and the "tender years rule", as statutorily recognized, is immediately attracted in their case and should not be ignored in judging her welfare.

53. In view of the aforesaid discussion, this petition succeeds and is hereby allowed. The respondent no.3 is directed to hand over the custody of the minor Priyanshi to her mother i.e. the writ□ applicant at the earliest. We would like to make it clear, however, that the order is of a temporary nature and that it is open to review according to the circumstances that may arise in future and that in such circumstances, the parties will be at liberty to apply to the court of competent jurisdiction for an appropriate relief. We are also of the view that the best interests of the minor children require that they should not be altogether deprived of the paternal affection and company and, R/SCR.A/1022/2019 JUDGMENT therefore, it shall be open for the respondent no.3 to visit the parental home of the writ□applicant to see and meet Priyanshi at any time. If the respondent no.3 wants to meet Priyanshi, then he shall not be restrained by the writ□applicant or any of her family members.

54. Before we close this judgment, we once again with folded hands request the parties to sit together and bury their differences keeping in mind the interest and welfare of the minor Priyanshi. If this problem is not sorted out by the parties at the earliest, then it will be too late in the day thereafter to think of reconciliation. This dispute between the parties is ultimately going to take a very heavy toll on the future of Priyanshi. In such circumstances, the family members, friends and elders from both the sides should make all possible endeavors to ensure that the parties reconcile and once again start living a happy marital life. Priyanshi at this age for no fault on her part is paying a very heavy price. It is too painful to leave Priyanshi to her fate and destiny.

55. The Habeas Corpus Petition is accordingly disposed of.

(J. B. PARDIWALA, J) (A. C. RAO, J) aruna