IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE AMAR NATH (KESHARWANI)

WRIT PETITION No. 14089 of 2022

BETWEEN:-

SAURABH MALPANI S/O SHRI SHYAM MALPANI, AGED ABOUT 36 YEARS, 701, NAVKARAN PLOT 117, LOKHANDWALA MUMBAI AT PRESENT ADD. 238 DORRIS AVENUE UNIT NO. 1802, TORONTO ONTARIO M2N6W THROUGH SHYAM MALPANI S/O RADHAKRISHNA MALPANI R/O 701, NAVKARAN PLOT, 117, LOKHANDWALA (MAHARASHTRA)

.....PETITIONER

(BY SHRI PRABHJIT JAUHAR WITH SHRI FIROZA DARUWALA, LEARNED COUNSEL FOR THE PETITIONER.)

AND

1. **HOME DEPARTMENT THROUGH ITS PRINCIPAL SECRETARY VALLABH BHAWAN (MADHYA PRADESH)**
2. **SUPERINTENDENT OF POLICE R/O OFFICE OF SUPERINTENDENT OF POLICE , (MADHYA PRADESH)**
3. **OFFICER IN CHARGE OF POLICE STATION POLICE STATION LASUDIYA INDORE (MADHYA PRADESH)**
4. **DIVYA MALPANI W/O SAURABH MALPANI, AGED ABOUT 35 YEARS, CRYSTA 1 APOLLO DB CITY NIPANIA UNIT NO. 1403 (MADHYA PRADESH)**
5. **MIRAYA MALPANI (MINOR) C/O DIVYA MALPANI R/O CRYSTA 1 APOLLO DB CITY NIPANIA UNIT NO. 1403 (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI BHASKAR AGRAWAL, LEARNED GOVT. ADVOCATE FOR RESPONDENT/STATE.)

(SHRI A.S. GARG, LEARNED SR. ADVOCATE WITH SHRI RAUNAK CHOWKSE, ADVOCATE FOR RESPONDENTS NO.4 AND 5).

Reserved on : 15.12.2022.

Pronounced on : 21.12.2022

This revision having been heard and reserved for judgment, coming on for pronouncement this day, the ***JUSTICE SHRI VIVEK RUSIA*** *pronounced the following :*

ORDER

The petitioner being the father of respondent No.5 (corpus) and husband of respondent No.4 has approached this Court by way of the present petition under Article 226 of the Constitution of India seeking writ in the nature of *Habeas Corpus* for the custody of respondent No.5 from respondent No.4. The petitioner has filed the present petition through his father by giving the Power of Attorney. At the time of filing the present petition, the petitioner was in Toronto(Canada).

Facts of the case

1. According to the petitioner, he is a permanent resident of Canada. He was married to respondent No.4 on 18.1.2014 in Lonavala following Hindu customs and rituals. After the marriage, the petitioner and respondent No.4 were shifted to Chicago (USA). Respondent No.4 gave birth to respondent No.5 on 29.8.2016 in Chicago, hence she is a citizen of the USA by birth. According to the petitioner, his parents as well as his in-laws used to visit

Chicago and stay with them. Respondent No.4 with an intention to settle in the USA took admission to Masters in Architecture and for which the entire expenses were borne by the petitioner and his relatives. In the year 2019, the petitioner was accepted by the College in Canada for the Degree of MBA and he was given the approval of permanent residency in Canada on 7.6.2018. Respondent No.4 decided to stay in Chicago to complete her Master's course in Architecture and the petitioner alone moved to Toronto to pursue the studies of MBA.

2. The petitioner, respondent No.4 and respondent No.5 came to India in month of December 2019 during Christmas break to attend the marriage in the family. Thereafter, they all returned to Canada and Chicago respectively to pursue their studies. They again travelled to India in the month of June, 2020.

3. According to the petitioner, in April 2021, the parents of respondent No.4 came to Canada and stayed with them up to September 2021. They started disturbing his family life and due to this respondent No.4 started fighting with him. In the month of December 2021, respondent No.4 argued with the petitioner and after which she left the house along with respondent No.5 with all important documents like her passport, etc. to live in the house of her cousin's brother in Canada. However, after two days, she called the petitioner to take her back to the house in Chicago. After returning home, respondent No.4 insisted the petitioner to sign a written permission allowing her to take respondent No.5 to India.

The parents of respondent No.4 also requested the petitioner to send respondents No.4 and 5 to India. On their request, the petitioner agreed to send them to India for a short visit with the hope of their return by April, 2022. According to the petitioner, he was not permitted to contact his daughter so he came to India and tried to solve the dispute amicably with the help of common friends. Even in India, he was not permitted to meet his daughter. Somehow, on 2.4.2022 respondent No.4 allowed the petitioner to meet with his daughter and during a short meeting, she disclosed her willingness to stay with him. The petitioner had a return ticket to Canada on 6.4.2022 and on his boarding respondent No.4 disclosed her intention of cancelling her tickets of 10.4.2022 for Canada and decided to stay in India with respondent No.5. The petitioner was informed that respondent No.5 has been given admission in a School at Indore. According to the petitioner, respondent No.5 deserves better education and a standard of life that she can get only in the USA or in Canada. Thereafter, various emails were exchanged between the petitioner and respondent No.4 to resolve the dispute.

4. Respondent No.4 sent a divorce notice to the petitioner on 28.4.2022 through her lawyer. The petitioner replied to it denying the divorce. Since respondent No.4 has made up her mind to stay in India with respondent No.5 depriving the petitioner to stay with his wife and daughter, therefore, the petitioner has filed the present petition in the nature of habeas corpus.

5. Respondents No.4 and 5 have appeared before this Court *suo motu*, therefore, vide order dated 19.7.2022 this Court has restrained the police to intervene in this matter in order to bring them before this Court.

Reply of respondents No. 4&5

6. Respondent No.4 has filed the reply by submitting that this writ petition is not maintainable as respondent No.5 cannot be said to be in illegal custody of respondent No.4 who is her biological mother. She has filed the divorce petition before the Family Court being Case No.1335/2022 along with an application for permanent and interim custody of respondent No.5. Respondent No.4 also filed an application on 28.6.2022 for an anti-suit injunction to restrain the petitioner from commencing with the petition filed by him in the Superior Court of Justice, Canada. The petitioner filed an application under Order 7 Rule 11 of the C.P.C. alleging that neither the petitioner nor respondent No.4 were domiciled in India. The application for custody has been heard on 11.7.2022, but the order has not been passed because of the pendency of the present petition. It is further disclosed in the return that the petitioner has approached the Superior Court of Justice, Toronto, Canada inter alia seeking a divorce from respondent No.4 and custody of respondent No.5, which he has suppressed before this Court in the present writ petition, hence he has not approached with clean hands. Respondent No.4 after receipt of notice from the Canadian Court filed the reply on 11.7.2022. *The Canadian Court has passed the order on*

13.7.2022 inter alia directing respondent No.4 to return respondent No.5 to Toronto within 30 days and in the event respondent No.4 did not comply with the same, respondent No.5 could be escorted on a return flight to Toronto by the petitioner or his parents or his brother and/or sister-in-law, etc. It is further submitted that the Court at Toronto has made an interim arrangement to the effect that the child i.e. corpus shall reside primarily with respondent No.4 upon return to Toronto. However, the petitioner has been permitted to meet the child every Monday and Wednesday from 3.30 pm. until 7.30 pm.; and alternating weekends from Friday at 3.30 pm. until Sunday at 6.00 pm. If respondent No.4 does not return to Toronto with the child, the child shall reside exclusively with the petitioner. Respondent No.4 has filed a copy of the aforesaid order as Annexure R/4 with the reply. Respondent No.4 has raised an objection about the maintainability of this petition and also levelled the allegations that the petitioner is mentally unstable and taking regular treatment from a Psychiatrist which he has admitted as per Para 59 of the order dated 11.7.2022 passed by Superior Court of Justice, Family Court, Toronto. She, therefore, prayed for the dismissal of this writ petition.

7. The petitioner, however, has filed a lengthy rejoinder and thereafter, filed an application for bringing numerous additional documents, photographs, etc. on record. Respondent No.4 filed an additional reply.

Submission of petitioner's counsel

8. Learned counsel appearing for the petitioner submitted that the petitioner is staying in USA and Canada since 2008. Respondent No.4 was aware even prior to the marriage that she has to settle in the USA with the petitioner and she also decided to take admission to the Masters of Architecture. She delivered the child in the USA with the intention to make her a US citizen. Otherwise, the delivery could have been affected in India. The Canadian Court is competent and after considering the welfare and interests of the child the Canadian Court has passed the order which respondent No.4 is bound to comply with the same. Since the minor daughter and her mother and father are domiciled in Canada, therefore, the Canadian Court is the competent Court to decide and adjudicate upon the question of custody and welfare of the minor child. The petitioner will take care of his daughter if her custody is given to him. In support of his contention, learned counsel has placed reliance on the judgment passed by the apex Court in the case of ***Rohith Thammana Gowda V/s. State of Karnataka : 2022 SCC OnLine SC 937*** in which the Apex Court has directed the return of the child to USA while issuing a writ of *habeas corpus*. Learned counsel has also placed reliance on the judgment passed by the apex Court in the case of ***Anusha Reddy Akepati V/s. Ghadiam Harshvardhan Reddy*** passed in SLP (Crl.) No.1550/2022 was decided on 16.3.2022 whereby the apex Court upheld the order passed by the High Court of Telangana directing the return of a 2 year old child to the USA where his interest and welfare fell. In the case of ***Nithya***

Raghavan V/s. State of NCT of Delhi : (2017) 8 SCC 454 it has been held by the Apex Court that the Court can even in matters of summary enquiry, decline the return of the child to the native country if such return is shown harmful to the child. Learned counsel for the petitioner submits that since daughter of the petitioner is a USA citizen and having a permanent residency of Canada, the Canadian Court is a competent Court to adjudicate about the welfare and interest of the child. In the case of ***Yashita Sahu V/s. State of Rajasthan : (2020) 3 SCC 67*** the apex Court has held that the nationality of the child is very important while exercising the jurisdiction since the child was born in USA and the mother did not come back to India for delivery, it indicates that the parents wanted the minor child to be a citizen of USA. Learned counsel for the petitioner has also placed reliance on various judgments passed in similar facts and circumstances, in which the custody of the child has been handed over and to visit out of the country. He, therefore, prayed that the writ in the nature of habeas corpus be issued.

Submissions of respondent' senior counsel

9. On the other hand, senior counsel appearing for respondent No.4 contended that the corpus is of 6½ years of age girl and her future will be secured with her mother in India as she is residing with her parents. The petitioner is all alone residing in Canada, he is not in a regular job and has no permanent source of income, his parents are in India. The petitioner may lose his job at any time.

Normally, the daughter feels more safe with the mother. The petitioner is frequently shifting from Canada to the USA and from the USA to Canada. In such circumstances, there would not be proper care and upbringing of the corpus. The custody of the minor daughter cannot be handed over to the petitioner especially when respondent No.4 has filed the divorce petition alleging cruelty, harassment, abnormal behaviour, etc. against the petitioner. The petitioner is under regular treatment with a Psychiatrist which he had admitted before the Court in Canada. The father of respondent No.4 is financially supporting the petitioner as he transferred CAD 2,00,000 (around Rs.1.25 Crores) in the account of the petitioner and this amount has been misappropriated by him.

10. It is further submitted by the learned senior counsel that on 25.10.2021 at around 4 am., the petitioner emotionally and physically abused respondent No.4 , made violent gestures and broke a tray table. She had to call the Emergency Distress Number, but on persuasion made by the petitioner, she did not lodge the report to the Police Patrolling Officer. Therefore, in such circumstances, unstable and abnormal behaviour of the petitioner, it would not be safe to give the custody of a 6½ years girl to the petitioner. Even the Canadian Court has not granted full-time interim custody of respondent No.4 to the petitioner. Respondent No.5 hardly lived 29.5 months in USA and 16.5 months in Toronto (Canada) and for the rest of the time, she lived in India with her mother. The petitioner cannot allege that respondent No.4 would not

get better studies and a safe environment in India because he himself was born and educated in India.

Appreciations & Conclusion

11. Admittedly, the petitioner is residing abroad for a long time and has settled there. During Corona Covid-19 period, he was working online from home. Now there is no Corona epidemic, therefore, he has to join the office and work in the office . He is all alone in Canada as there is no female member in the family to look after his 6½ years old daughter in his absence . Looking at the age of the corpus it would be in her interest that she should live with her mother here in India. Even the Court in Canada has observed in the order dated 13.7.2022 that respondent No.5 shall primarily reside with respondent No.4 and the petitioner will have only the visiting rights on every Monday and Wednesday and alternatively at the weekends. The final order has not been passed by the Canadian Court.

12. Respondent No.4 has also approached the Family Court along with an application seeking permanent custody of respondent No.5. The betterment and welfare of the child is a matter of evidence and the same is liable to be decided by the Court concerned.

13. Learned counsel for the petitioner has placed heavy reliance on the case of Yashita Sahu (supra) but the facts of the present case are different. In that case, *Yashita Sahu* being the mother brought 3 ½ daughter brought to in volition of the injunction granted by a foreign court but in this case respondents no 4 & 5 came to India

much before passing the order by the Court in Canada. In the case of Yashita Sahu the Apex court has directed that in case the mother is not willing to go to the USA then the husband shall ensure that the child to the USA must be accompanied by one of the parents. In this case, there is no such pleading that the parents of the petitioner would be residing in Canada if the daughter is given in his custody. Even otherwise the Apex court has held as under

" The child is less than 3 years old. She is a girl and , therefore , there cannot be no manner of doubt that she probably requires her mother more than her father . This is the factor in favour of wife ."

14. In the case of Nilanjan Bhattacharya (supra) also the facts are different from the present case as the Hon'ble Apex court has observed that the husband's mother would be accompanying the child to New Jersey and the second respondent i.e. wife not shown any particular inclination to retain the child with her in India. In such circumstances, the Apex court has held that the interest and welfare of the child would be subserved to enable the father to the child with him to the US. But in the case at hand, the mother is not willing to part the daughter from her as she is extensively contesting all the litigation against the petitioner to secure the custody of the child.

15. The petitioner is not making any allegation about the abnormal behaviour of respondent No.4 towards respondent No.5. It is not the case of the petitioner that respondent No.5 would not be

safe with respondent No.4. He is seeking custody of respondent No.5 to take her Canada as she would get better life and future which she would not get in India. Therefore, there are no exceptional circumstances in this case which warrant this Court to repatriate a 6½ year old girl with the petitioner from India to Canada. There is no valid reason to keep away the daughter from her mother. Hence, we do not find any ground to issue a writ of *habeas corpus* in this petition and the same is liable to be dismissed.

Accordingly, this petition fails and is hereby dismissed.

[VIVEK RUSIA]
JUDGE.

[AMAR NATH (KESHARWANI)]
JUDGE.

Alok/-

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