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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/FIRST APPEAL NO. [REDACTED] of 2024**

With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
In R/FIRST APPEAL NO. [REDACTED] of 2024

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[REDACTED]

Versus

[REDACTED]

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Appearance:

MR MANISH S SHAH(5859) for the Appellant(s) No. 1

VIVEK R TRIVEDI(7716) for the Defendant(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE BIREN VAISHNAV
and
HONOURABLE MR. JUSTICE MAULIK J.SHELAT

Date : 16/10/2024

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1. With the consent of the learned advocates of the respective parties, the matter is taken up for final hearing.
2. **Admit.** Mr.Vivek R. Trivedi, learned advocate, waives service of notice of admission on behalf of respondent.
3. The father is the appellant before us, who has challenged the judgment and order dated 29.04.2024 passed by the learned Family Judge, Family Court No.2, Ahmedabad in Civil Misc.Application No.100 of 2023 below Exh.41 filed by the respondent - mother seeking permanent custody of daughter [REDACTED] under Section 25 of the Guardian and Wards Act. By the order under challenge, the application of the mother for custody of her daughter, has been allowed. Hence, this Appeal.



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4. The facts in brief are as under:-

4.1 The application was filed by the respondent - mother under Section 25 of the Guardian and Wards Act for the custody of her daughter [REDACTED]. The case of the respondent - mother was that she married the appellant on 01.12.2019. They were living together. Daughter [REDACTED] was born on 17.10.2020. The case of the respondent - applicant before the Family Court was that the father - appellant started inflicting mental and physical cruelty, that he was a head strong person, drank alcohol and quarreled with the mother. It was not proper for the father to retain custody of the daughter.

4.2 In the application, the mother further stated that a false complaint of theft was filed against her on 10.11.2022. Pursuant to this complaint, she along with her daughter and her family members were called to the police station on 10.11.2022 at the Danilimda Police Station, she was threatened to confess the crime of theft and she having refused to do so, the police took away custody of her daughter and handed over the daughter to the father. The complaint before the police station regarding theft was lodged on 17.11.2022. She obtained anticipatory bail. Under this circumstance, she approached the Court that she, as a mother, being a natural guardian, would deserve the custody of the daughter looking to the welfare of the child.

4.3 The application was opposed by the appellant - father. That the case of the appellant - father is that it is he, who should be granted the custody as he was more financially capable of taking care of the daughter and it was in the interest of the child that the father be given custody.

4.4 Both the appellant - father and respondent - mother were examined and cross-examined and the Family Court, by the order



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under challenge, granted the custody to the mother. The father is, therefore, in appeal.

5. Mr. Manish Shah, learned advocate for the appellant - father would submit that during the currency of the marriage, the family, essentially the father and the mother of the appellant, noticed that some gold ornaments belonging to the family were missing. As a result thereof, the appellant filed an FIR on 17.11.2022 alleging that the wife - respondent had committed theft of the ornaments. He would, therefore, submit that prior to the filing of the complaint, the mother left the matrimonial home on 05.11.2022 with the daughter. Proceedings were initiated by her under the provisions of Section 97 of the Code of Criminal Procedure applying for a search warrant of the child. That application was rejected by the Judicial Magistrate First Class against which a revision application was filed, which was also rejected by the Court of Additional District and Sessions Judge, Botad.

6. Mr. Shah, learned advocate would also invite the attention of this Court to the order passed by the Session Judge at Botad to submit that the Application for search was rejected and therefore, it was in the fitness of things that the father retains the custody of the child. Taking us through the application is filed by the mother, Mr. Shah would submit that not one averment is made in the application to suggest that the mother was entitled to the custody on the ground of paramount consideration of the welfare of the child. He would submit that the allegations made in the application regarding the character of her husband are misconceived, which should not weigh with the Court in considering whether the custody of the child should be with the mother.

7. Mr. Shah, learned advocate would further submit that at Barwala, there is no English medium school whereas in



Ahmedabad, the child will have an opportunity to undergo her education at an English medium school. The accommodation with that the wife - mother occupies is smaller i.e., a 3 bedroom house whereas father - appellant has much better accommodation and therefore, considering the focus on the child's future, welfare and stable environment for education and financial standing where the husband is a sales officer in a private firm, whereas the family of the wife has 2 brothers of whom one is mentally unstable and whereas the other faces criminal cases, certainly, it will be the husband, who should have the custody of the child. The maternal grandfather of the daughter is also a principal of the school. Financial means, therefore, are much better with the father, and the custody, therefore, should be retained by the father. He would take us through the evidence on record, especially the cross-examination of the wife to submit that from the cross-examination, it is evident from the record that nothing has come on record regarding the character of the father nor has she satisfied the Court on the aspect of welfare. He would take us through the cross-examination of the husband - appellant herein. Mr. Shah, learned advocate would take us to the FIRs filed against the brother-in-law which are annexed to the paper book, which include FIRs arraigning the brother-in-law for the offence under the Gambling Act, etc., to submit that the mother should not get the custody of the child due to the questionable character of the family.

8. Mr Shah, learned advocate would rely on a decision of the Punjab and Haryana High Court in the case of **Kajal Vs. Rajesh Rana reported in 2015 SCC Online P&h 3487**. Inviting our attention to paragraph 9 onwards, he would submit that though it is true that the mandatory requirement maybe that the natural guardian is the mother, such a requirement cannot be interpreted to mean that the father can never be given the custody of an infant.



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9. Reliance was also placed on the decision of the Orissa High Court in the case of **Anil Kumar Pradhan and others Vs. Smt. Madhabi Pradhan, reported in 2015 SCC OnLine Ori 417**, inviting our attention to para 25.

10. Mr Vivek Trivedi, learned advocate for the respondent - appearing on caveat for the mother - respondent herein would support the order of the Family Court granting the custody to the mother. He would invite our attention to the averments made in the application to submit, that it is wrong for the advocate of the appellant to say that there were no averments made in the application with regard to the welfare of the child. Taking us through the relevant paragraph in the application, which reflected the character of the father, he would submit that the mother deserves to be given the custody of the child and unfortunately, in context of criminal proceedings initiated against her through the police, the father forcibly took away the custody of the child on 10.11.2022 from Danilimda Police Station. Observations of the trial Court in recording that in welfare of the child, it was the paramount consideration that the mother be given custody, cannot be faulted. He would invite our attention to the relevant cross-examination of the appellant - father, where he has admitted that the custody of the child, was taken away from the mother at the police station by the father.

11. We have considered the submissions made by the learned advocates for the respective parties.

12. We know that the application was made under Section 25 of the Guardians and Wards Act. Section 25 of the Act talks of title of guardian to custody of ward, which reads thus:-



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“25. Title of guardian to custody of ward

(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the [Code of Criminal Procedure, 1882 (10 of 1882)][*Now see Section 97, Criminal Procedure Code, 1973 (2 of 1974).*].

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.”

13. Reading of the section would indicate that it is in the circumstances as the present, where a ward is removed from the custody of a guardian and where the Court is of the opinion that it is for the welfare of the ward to retain the custody of the guardian, an order can accordingly be made.

14. We need to consider certain circumstances while assessing the legality of the order passed by the Family Court. It is not disputed by the parties that post the marriage in the year 2019, on 05.11.2022, 3 years after the marriage, the mother with her daughter [REDACTED] left the matrimonial house. Apparently, reading of the FIR filed against her, it appears that the husband - appellant has alleged that while they were undertaking cleaning of the house, the mother-in-law of the respondent found some ornaments missing from the household and therefore, the needle of suspicion of theft was focused on the daughter-in-law/the respondent herein. As a precursor of the lodging of this FIR, Danilimda Police station thought it fit to summon the mother together with her family, including the child [REDACTED] to the police station for recording a statement. It is in this background, before considering the question



of welfare of the child, we need to see the conduct of the husband and that of the police. It is apparent from the cross-examination recorded by the Court below that though the denial has been made by the appellant - husband that he had any connection with one, Gopalbhai at Dani Limda police station, it was admitted that he took the custody of the child i.e., daughter - [REDACTED] from the police station. That when the child [REDACTED] had come with her mother at the police station, the very fact that the father gained custody right under the nose of the police at the police station brings forth the complicity of the officers at police station at Danilimda. The police has acted as agents by misusing their uniform for taking over the custody of the child, which was otherwise under the shelter of the mother - Respondent.

15. Much can be said about the conduct of the police and our hands are tied while deciding this issue because we are considering the legality of the order under the Act passed by the Family Court, we otherwise would not hesitate in castigating the police authorities for acting hand in glove to play with the sentiments of a mother of a minor daughter.

16. Let us now consider whether the trial court had committed any error in passing an order while considering the paramount welfare of the child.

17. The application filed for custody indicates that trauma faced by mother in the family where apart from being treated badly by the family, the allegation is that the father would insist in consuming alcohol in the presence of a young daughter, who at that point, was only aged 2 years old. The date of birth of the child is 17.10.2020 and tomorrow i.e. is 17.10.2024 that the child would complete the age of 4 years. It was also alleged by the respondent in the Guardians and Wards Act application, the present Appellant,



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had some relationship outside the marriage, with this issue, we may not be influenced. The wife has been examined. We are in agreement with the judge, who records that in such unfortunate circumstances that the wife - Mother ought to be given the child's custody. Reading of the examination-in-chief of the mother indicates that the father would insist in consuming alcohol and if the daughter and the family would refuse, he would make it a point that the daughter sits on his lap while he consumes alcohol. In the event of an argument, he would physically abuse the wife i.e., mother in this case. She has, in her examination-in-chief with pain stated that but for the welfare of the child, she would silently suffer the agony and the torture that was inflicted by the husband. Ultimately, on 05.11.2022, when a similar incident was brought to light, she lost her patience and left the matrimonial home.

18. Without attributing any motives to the criminal case that the wife faces, the circumstances post leaving of the matrimonial home by the wife, would indicate that there was a concerted attempt to malign the character of the mother. The police has in complicity played a role in doing so. On 10.11.2022, the mother and her family were called at the Danilimda Police Station under the guise of having a statement recorded. It has come on record by way of an admission in the cross-examination of the father that at the police station, [REDACTED] custody was taken away by the father right under the nose of the police officer.

19. An effort has been made by the learned advocate for the appellant to impress upon us, and suggest that the welfare of the child would be better off with the father by taking us through the FIRs lodged against his brother-in-law and suggesting that the daughter would have better opportunities because Ahmedabad had English medium schools and their father had a bigger



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accommodation and was, therefore, more capable to focus on the daughter's future in light of better financial standing.

20. We may not be influenced by what has been argued on the question of the maintenance amount that may be due to the mother in an independent proceeding pending against husband as the paramount consideration is of the welfare of the child, which would weigh before us the decisions cited before us by the learned advocate for the appellant, have one clear underlying loud message which is that, yes, it is the welfare of the child, which is of paramount consideration and may be in the facts of the case, it is not that the father can never be given the custody. The question that we beg to answer is does the present appellant- father deserve the custody of a child in the circumstances that we have before us? Section 4 of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred as "the Act") defines the term "natural guardian" to mean the guardian mentioned under Section 6. Reading of Section 6 of the Act would indicate that the natural guardian in the case of a boy or an unmarried girl are 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.

21. Reading of the order under challenge would indicate that learned Family Judge after recording the evidence of both the parties, has noted that the Court is only concerned with the welfare of the child, needless to say that the welfare of the child is always the paramount consideration for deciding the custody of the minor child. The judge notes that the effect of separation of spouses on a child's psychological, emotional and even to some extent physical. While doing so, he has relied upon a decision of the Supreme Court in the case of **Vivek Singh vs Ramani Singh reported in 2017**



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(3) SCL 231. It is beneficial for this order that we reproduce para 19 of the decision, which reads as under:-

“19.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 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 profound and enduring attachment to her. Psychological theory hypothesises that the mother is the centre 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 fulfil her individual potential and to form attachments to other individuals and to the human community.”

22. What is **noteworthy** in reading the aforesaid paragraph is that the Supreme Court records that there is an underlying notion that a child's primary need is for the care and love of its mother, where she has been its primary care giving parent. Empirical studies show that mother and infant bonding begins at the child's birth and an infant as young as two month old, frequently shows sign of stress, when the mother is replaced by substitute care giver. An infant typically responds preferentially to the sounds of its mother's voice and actively demands her presence.

23. Para 20 does record an exception, that no doubt the presumption in favour of maternal custody as sound child welfare policy is rebuttable and in a given case, it can be shown that father is better suited to have custody of the child, however, such an assessment can be only after level playing field granted to both the parents.



24. What we also note that the child there was aged 8 years, whereas in the present case, the Child [REDACTED] date of birth is 17.10.2020 and will complete her 4 years of age tomorrow i.e., 17.10.2024 and when she was forcibly taken away from the custody of the mother, she was aged only 2 years. It is in these circumstances, that the paramount consideration of welfare of the child has been considered by the Family Court and the learned Judge observed that the role of the mother in the development of the child's personality can never be doubted. It appears from her evidence that she is graduate and therefore, she is able to give her daughter who is toddler, a basic education. It is not fathomable to accept an argument made by learned advocate of Appellant that future of daughter [REDACTED] may be affected as there is no English Medium School in the vicinity or nearby area where the respondent at present is residing with her parents. Welfare of child should not be judged from medium of school especially when child is toddler. It is a far fetched an argument that to progress in life, one needs to study in an English medium school from inception. According to us, medium of school education has no direct bearing on welfare of child. It is not out of place to mention here that maternal grandfather of girl [REDACTED] is a Principal in a School.

25. In the facts of the present case, we note that there are serious allegations against the father's character. We may need not go into it but the fact, which remains is that the mother did have the custody of the child when she left the matrimonial house and the custody of the daughter was snatched away with the complicity of the Police officer of the Danilimda Police Station on 10.11.2022 and prior thereto, the daughter for two years was with the mother. She is a minor, who would complete 4 years on 17.10.2024 and there is no reason why the custody should not be given to the



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mother - respondent herein.

26. We are of the firm view that no person should act in a manner not recognized in law. If someone tries to take undue advantage by misusing authority of Police thereby gained in any manner whatsoever then such person can not be allowed to enjoy the illegal gain.

27. It appears that pending the appeal, Contempt Petition is filed by Respondent-mother against Appellant-father for not complying the impugned judgment/order by not handing over Custody of minor daughter [REDACTED] to mother wherein it is reported to us that an interim arrangement was made that from Monday to Friday, the daughter will be with the mother and on Saturday and Sunday with the father.

28. In light of the above stated facts, reasons, and the case law discussed as we are dismissing the appeal of the appellant - father, then as consequences of the same, the interim arrangement shall not continue. The impugned judgment and decree is hereby confirmed. The appeal is accordingly dismissed. Civil Application also stands disposed accordingly.

29. Before parting with this decision, we would like to make some observation on conduct of Police Agency which acts nowadays as instrumental in settling private dispute of parties in a manner not recognized by law. we are conscious of the fact that we are dealing with the child's custody case in dealing with our roster in family matters but here is the case where learned Family Judge while recording the evidence of the parties recorded that the custody of the child, was taken away by a parent in complicity with the Police authorities i.e., Danilimda Police Station. We may put



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C [REDACTED]

ORDER DATED: 16/10/2024

this order to the notice of the authorities competent i.e., the Secretary, Home Department of the State of Gujarat that the Police personnel in State of Gujarat be warned not to act as agents in such sensitive matters, which deal with the custody of the child and be engineers in conspiracy of custody, which is best left to be decided by Family Courts and not by men in uniform, who abuse their position, particularly, in a case like the present one when the FIR had no relation to matrimonial or custody issues.

30. A writ of this order be send to the Secretary, Home Department of the State of Gujarat for information.

Sd/-

(BIREN VAISHNAV, J)

Sd/-

(MAULIK J.SHELAT,J)

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