



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF MARCH 2023

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL

W.P.H.C. NO.46 OF 2022

BETWEEN:

MR. SANKAR VISWANATHAN

... PETITIONER

(BY MR. SHADAM FARASATH A/W
MR. SHYAM HARINDAR, ADV., FOR
MR. RAGHURAM CADAMBI, ADV.,)

AND:

- 1 . STATE OF KARNATAKA
REP. BY THE MINISTRY OF HOME AFFAIRS
GOVERNMENT OF KARNATAKA
VIDHANA SOUDHA
BANGALORE-560001.
- 2 . MS. RAMYA SANKAR

3 . MR. P.R. RAMAKRISHNAN

4 . MS. JAYANTHI RAMAKRISHNAN

... RESPONDENTS

(BY MR. THEJESH P, HCGP FOR R1
MRS. ANU CHANGAPPA, ADV., FOR R2-R4)

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THIS WPHC IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, 1950 R/W SECTION 482 OF THE CRIMINAL PROCEDURE CODE, 1973, PRAYING TO ISSUE A WRIT IN THE NATURE OF HABEAS CORPUS OR ANY OTHER ORDER, DIRECTING RESPONDENT NO. 1 TO PRODUCE MASTER SIDDHARTH SANKAR BEFORE THIS HONBLE COURT AND TO ENSURE THAT THE PHYSICAL CUSTODY OF THE MINOR SON SIDDHARTH SANKAR IS TRANSFERRED TO THE PETITIONER AND THE CHILD IS REPATRIATED TO HIS HABITUAL PLACE OF RESIDENCE I.E. GERMANY. ISSUE A WRIT IN THE NATURE OF MANDAMUS AND/OR ANY OTHER APPROPRIATE WRIT OR ORDER DIRECTING APPROPRIATE CRIMINAL ACTION/PROCEEDINGS AGAINST RESPONDENTS NO.2 TO 4.

THIS WPHC HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 02.03.2023, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, **ALOK ARADHE J.**, MADE THE FOLLOWING:

ORDER

This writ petition has been filed by the petitioner seeking the following relief:

Issue a writ in the nature of Habeas Corpus or any other order, directing respondent No.1 to produce Master Siddharth Sankar before this Hon'ble Court and to ensure that the (physical custody of the minor son Siddharth Sankar is transferred to the petitioner and the child is repatriated to his habitual palace of residence i.e., Germany.

2. Facts giving rise to filing of this writ petition briefly stated are that the petitioner as well as respondent No.2 (hereinafter referred to as the wife) got married on 07.10.2013 at Bangalore, Karnataka. The wife joined the matrimonial home in Germany. Thereafter, on 21.10.2016 a child viz., Master

Siddharth Sankar (hereinafter referred to as the son) was born in Germany. It appears that on account of matrimonial dispute, the wife left Germany on 16.05.2017 along with the son. The petitioner thereupon filed a petition on 17.05.2017 before the jurisdictional court in Germany seeking custody of the son. However, by the time i.e., 17.05.2007, an order was passed by the jurisdictional court in Germany granting custody to the petitioner and directing that the son will not be taken out of the borders of the Germany, the wife had already landed in India with the son.

3. The petitioner thereafter on 01.06.2017 preferred a petition in Germany for return of the son on the ground that wife is staying in India in contravention of the order dated 17.05.2017 passed by the German Court and that the visa of the child was due to expire in two months and therefore, it was

necessary for the child to return to Germany. However, the wife on 01.06.2017 bought the child's e-visa converted into stay visa by Foreigners Regional Registration Officer (FRRO), Bangalore.

4. The wife thereafter filed a petition on 07.06.2017 seeking dissolution of marriage as well as permanent alimony of Rs.4 Crores and permanent custody of the son. Thereafter, she filed a petition under Section 6 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act' for short) on 13.06.2017 and sought a declaration that she be declared as natural guardian of the son and be permitted to continue to have custody of the son.

5. Thereafter wife entered appearance in German court on 07.11.2017 and the petitioner as well as the wife agreed that the petitioner shall pursue the dispute with regard to custody of the son in India.

The petitioner further agreed that in case, wife returns to Germany, the abduction charges against her would be dropped. The petitioner thereafter, filed petitions from 13.11.2017 till 28.01.2019 seeking visitation rights. The petitioner thereafter, has filed this petition on or about 27.05.2022 seeking the writ of habeas corpus.

6. Learned counsel for the petitioner submitted that the issue, whether the child brought unilaterally by one parent from his native country to another country should be directed to be returned to his native country has to be decided, keeping in view the best interest of the child. It is argued that the wife brought the son to India without obtaining the consent of the petitioner. It is further submitted that petition under the Act was filed on 13.06.2017, by conceding the fact that son is a German citizen as well as the fact that jurisdictional court at Germany had

passed an order on 17.05.2017. It is contended that the child's upbringing will be better in the German system as the son is a German citizen.

7. It is argued that as per United Nations Conventions on Human Rights (UNCRC), the minor child should return to Germany. It is pointed out that under Section 2(2) of Commission for Protection of Child Rights Act, 2005, all the rights of children in UNCRC are incorporated in Indian Domestic Law and the Indian Courts can apply international treaty obligations to domestic cases. It is further pointed out that wife has indulged in forum shopping and getting funded for her litigation in Germany. It is also pointed out that Mr.Ambi Venkatraman is a business man settled in Europe and is not in part of the Indian Diplomatic Staff or Indian Embassy in Germany. It is contended that he is a Honorary Consul General of India to Luxemborg and not even Germany. It is also

argued that petitioner is willing to abide by such terms and conditions as may be imposed by this court and will take care all financial needs of the wife in case, she shifts to Germany. In support of aforesaid submissions, reliance has been placed on decisions of Hon'ble Supreme Court in '**VASUDHA SETHI VS. KIRAN V. BHASKAR**', 2022 SCC ONLINE SC 43, '**LAHARI SAKHAMURI VS. SOBHAN KODALI**', (2019) 7 SCC 311, '**YASHITA SAHU VS. STATE OF RAJASTHAN & ORS.**', (2020) 3 SCC 67, '**ELIZABETH DINSHAW VS. ARVIND M.DINSHAW & ANR.**', (1987) 1 SCC 42', '**NALSA VS. UNION OF INDIA & ORS.**', (2014) 5 SCC 438 and '**NILANJAN BHATTACHARYA VS. STATE OF KARNATAKA & ORS.**', 2020 SCC ONLINE SC 928

8. On the other hand, learned counsel for wife submitted that the son is not in illegal custody and learned IVth Additional Family Judge, Bangalore by

an order dated 08.06.2017 passed in M.C.No.2716/2017, has granted an interim custody and restrained the petitioner and his agents from coming within 500 meters of the son. It is urged that petitioner and wife are pursuing the alternative remedy of custody and guardianship in respect of the son in M.C.No.2716/2017 and G & WC No.173/2017. It is pointed out that the son is living in Bangalore for past about more than 5 years and the family court at Bangalore is the most suitable forum to decide the custody of guardianship of the son. It is contended that the petitioner is guilty of suppression of facts and abuse of court proceedings. In support of aforesaid submissions, reliance has been placed on decisions of Hon'ble Supreme Court in **'TEJASWINI GAUD & OTHERS VS. SHEKAR JAGDISH PRASAD TEWARI & OTHERS', (2019) 7 SCC 42, 'RAJESWARI CHANDRASEKAR GANESH VS. STATE OF TAMIL**

NADU & OTHERS', AIR ONLINE 2002 SC, 'S.P.CHENGALVARAYA NAIDU (DEAD) BY LRS VS. JAGANNATH (DEAD) BY LRS & OTHERS', AIR 1994 SC 853, 'G.NARAYANASWAMY REDDY (DEAD) BY LRS VS. GOVERNMENT OF KARNATAKA & OTHERS', AIR 1991 SC 1726 and 'K.D.SHARMA VS. STEEL AUTHORITY OF INDIA LIMITED & OTHERS', (2008) 12 SCC 481.

9. We have considered the submissions made on both sides and have perused the record. The United Nations (UN) General Assembly Summit in 1990 adopted a declaration on survival , protection and development of children. In 1990 in which India participated and also acceded to Convention on Rights of a child (CRC) on 11.12.1992. Article 9 of UN Convention of Rights for Child provides that a child shall not be separated from his or her parents against his will except when competent authorities subject to

judicial review determine in accordance with applicable laws and procedure that such separation is necessary for best interest of the child. Article 35 mandates the State parties to prevent abduction of children for any purpose in any form. The Parliament has enacted an Act viz., The Commission for Protection of Child Rights Act, 2005. The aforesaid Act is an Act to provide for constitution of a National Commission and State Commissions for protection of child rights and Children's Court for providing speedy trial of offences against will or violation of child rights and for matters connected therewith or incidental thereto

10. From careful scrutiny of the decision of a three Judge Bench of Hon'ble Supreme Court in **'NITYA ANAND RAGHAVAN VS. STATE AND ANOTHER', (2017) 8 SCC 454**, following broad propositions which are relevant for deciding the

controversy in hand can be culled out:

(i) When the child is removed from the foreign country by a parent, the custody of the child would be presumed to be legal and merely because there is an order of the foreign court directing the mother to produce the child before it, the custody of the child would not be unlawful per se.

(ii) In such a case, the parent of the child who does not have the custody of the child can be asked to resort to the substantive remedy prescribed for getting the custody of the child.

(iii) In dealing with the issue pertaining to the custody of the child, the welfare of the child is of paramount consideration and the court has to take into account all the attending circumstances as well as totality of situations.

(iv) If the child has been brought to India, the Courts in India may conduct either a summary enquiry or an elaborate enquiry on the question of custody. In case of a summary enquiry, the Court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child.

(v) It is open for the Court to decline the relief of return of the child to the country from where the child was removed irrespective of a pre existing order of return of child by a foreign court.

(vi) The principle of Comity of Courts cannot be given primacy or more weightage for declining the matter of custody or for return of the child to the native State.

11. The aforesaid decision in the case of **NITHYA ANANDA RAGHAVAN SUPRA** was considered in **LAHARI SAKHAMURI VS SOBHAN KODALI', (2019) 7 SCC 311** and in Paragraph 41, it was held as under:

The essence of the judgment in Nithya Anand Raghavan's case(supra) is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc. cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

The aforesaid decisions in **NITHYA ANANDA RAGHAVAN and LAHARI SAKHAMURI** supra, were again considered and relied upon in **TEJASWINI GAUD VS SHEKHAR JAGDISH PRASAD, YASHITA**

SAHU VS STATE OF RAJASTHAN', (2020) 3 SCC 67
and **'AMYRA DWIVEDI (MINOR) THROUGH HER**
MOTHER, POOJA SHARMAN DWIVEDI VS. ABHINAV
DWIVEDI AND ANOTHER', (2021) 4 SCC 698.

12. The principle of comity of courts is salutary in nature, yet it cannot override the consideration of best interest and welfare of the child. The principle of comity of courts in the facts of a case has to yield to paramount consideration i.e., interest and welfare of the child, which has to be examined in the facts of each case. The issue with regard to best interest and welfare of the child has to be answered bearing in mind the totality of facts and circumstances of each case.

13. In **'RAJESHWARI CHANDRASHEKAR GANESH VS. STATE OF TAMIL NADU AND ORS.', AIR ONLINE 2022 SC 1009**, the Hon'ble Supreme court in Para 89 has held as follows:

89. *The question as to what would be the dominating factors while examining the welfare of a child was considered in Walker v. Walker & Harrison, 1981 New Ze Recent Law 257 and it was observed that while the material considerations have their place, they are secondary matters. More important are stability and security, loving and understanding care and guidance, and warm and compassionate relationships which are essential for the development of the child's character, personality and talents. It was stated as follows*

“Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure

that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."

14. In the backdrop of aforesaid well settled legal position, in the instant case, following circumstances have to be taken into account to ascertain the best interest and welfare of the child, which is of paramount consideration:

(i) The son who is removed from Germany by the wife is not in illegal or unlawful custody and by an dated 08.06.2017 passed in M.C.No.2716/2017 has

granted interim custody to the wife. The relevant extract of the aforesaid order, reads as under:

"Respondent his family members or any agents acting under him are hereby restrained from coming within 500 meters of the wife and her minor son viz., Siddharth Sankar till next date of hearing and wife is granted temporary custody of the minor child viz., Siddharth Sankar till next date of hearing".

(ii) The German Court, Stuttgart has recorded an agreement between the petitioner and the wife to pursue the matter pertaining to minor child in Indian Courts. The aforesaid agreement recorded in the order dated 07.11.2017 passed by District court, Stuttgart - Bad Cannstatt, reads as under:

"The petitioner and the respondent are above this agreed that the habitual residence of their common child Siddharth

Sankar, born on 21.10.2016 at her mother until other agreement of the child's parents as well as until otherwise decided by the court."

(iii) The son is in Bangalore and stays with the wife as well as his grand parents. Neither any averment has been made nor any ground has been urged in the petition with regard to unsuitability of the wife to take care of the son.

(iv) The petitioner is employed and is working in Germany. The son is presently residing with the mother and his grand parents in Bangalore, in an atmosphere which is conducive to his overall growth.

(v) The presence of grand parents and their love and affection for the son is needed for better growth of the son and the same would not be available in Germany where the petitioner stays alone.

(vi) At this point of time, if the wife is directed to shift to Germany, the environment of the child would suddenly and abruptly be changed which would disturb the son's daily routine and his education in formative years.

(vii) The interim custody of the son has been granted to the wife by an interim order dated 08.06.2017 passed by the family court in M.C.No.2715/2017. The aforesaid interim order is still in force and therefore, in violation of the aforesaid interim order, which binds the parties, this court in exercise of extraordinary jurisdiction would not direct repatriation of the son to Germany.

(viii) The aforesaid agreement binds the petitioner and disentitles him to any relief in exercise of extraordinary jurisdiction.

15. The writ of habeas corpus is a prerogative writ and is an extraordinary remedy. It is a writ of right not a writ of course and may be granted only when the reasonable or probable cause been shown. The exercise of extraordinary jurisdiction for issuance of writ of habeas corpus would be dependant on jurisdictional fact where the petitioner establishes a prima facie case that detention is unlawful. It is only when such a jurisdictional fact is established, the petitioner becomes entitled to the writ as of right. [See: '**RAJESHWARI CHANDRA SHEKAR GANESH *supra***']. The son is in the custody of the wife in pursuance of an interim order dated 08.06.2017 passed in M.C.No.2716/2017 by Family Court, Bangalore. The aforesaid interim order is still in force. Therefore, the custody cannot be said to be illegal. The remedy of writ of habeas corpus cannot be used for enforcement of an exparte order passed by the

German Court, which was not in existence at the time when the son left Germany. No exceptional circumstances are made out by the husband to demonstrate that the son should be repatriated to Germany and in case, the son continues to stay with the wife in Bangalore, it would not be in the interest of the son. No material, which is convincing or persuasive enough has been produced by the petitioner for grant of the relief.

16. As we have already held that no case for repatriation of the son to Germany has been made out, it is not necessary for us to advert to the offer made by the petitioner. It is pertinent to note that petitioner has not sought custody of the son but is merely seeking repatriation of the son to Germany. Ordinarily, bearing in mind that it is in the best interest of the child to have parental care of both the parents, we would have granted visitation rights.

However, the issue with regard to grant of visitation rights is pending adjudication before the Family court, wherein several orders have been passed in favour of the petitioner. Therefore, we refrain from doing so.

17. We may now deal with the submissions made on behalf of the petitioners. The contention that under United Nations Convention and Human Rights, the child should return to Germany, is concerned, the same does not deserve acceptance as by an interim order dated 08.06.2017 passed in M.C.No.2716/2017, passed by the Family court, the custody of the son has been given to the wife and the petitioner has been restrained from coming within 500 meters of the wife and the minor son.

18. For the aforementioned reasons, in our opinion in the best interest of the son, he should be allowed to stay with the wife in India till the issue

pertaining to custody of the son in a proceeding under the Guardian And Wards Act, 1890 is adjudicated.

19. It is made clear that the observations / findings in this order have been made for the purposes of deciding the controversy in this petition and will have no bearing on any other proceeding, which has to be dealt with on its own merit.

For the aforementioned, reasons we do not find any merit in this petition. The same fails and is hereby dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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