

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

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DATED THIS THE 24<sup>TH</sup> DAY OF SEPTEMBER, 2021

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

**WRIT PETITION NO.16729 OF 2021 (GM-POLICE)**

**C/W**

**WRIT PETITION NO.15044 OF 2021 (GM-FOLICE)**

**IN W.P.NO.16729/2021:**

**BETWEEN:**

SMT. HUSNA BANU,  
W/O JAVEEN PASHA,  
AGED ABOUT 28 YEARS,  
R/AT NO.32, 1ST CROSS,  
SUBHANIYA MASJID, JJR NAGAR,  
BANGALORE SOUTH - 560 026.  
(BY SRI. SIRAJUDDIN AHMED, ADVOCATE)

...PETITIONER

**AND:**

- 1 . STATE OF KARNATAKA,  
SHO CHAMARAJPET POLICE STATION,  
HIGH COURT BUILDINGS,  
BANGALORE - 560 001.
- 2 . CHAIRMAN CHILD WELFARE COMMITTEE  
DR. MH MARIGOWDA ROAD,  
NEAR KIDWAI HOSPITAL  
BANGALORE - 560 029.
3. SMT. ANUPAMA DESAI,  
W/C RAO SAHEB DESAI,  
R/AT NO.98,  
WARD NO.3 MALAGITTI,  
KOPPAL 584 116.  
(VIDE COURT ORDER DATED 20/9/2021)

...RESPONDENTS

(BY SRI. VINOD KUMAR, AGA FOR R1;  
SRI. S.SUBRAMANYA, ADVOCATE FOR R3)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA PRAYING TO DIRECT THE RESPONDENTS TO HANDOVER THE CUSTODY OF THE TRACED OUT CHILD MOHAMMED ARHAAN TO THE PETITIONER AS SHE IS THE BIOLOGICAL MOTHER WITHOUT ANY FURTHER DELAY.

**IN W.P.NO.15044/2021:**

**BETWEEN:**

- 1 . SMT. ANUPAMA DESAI,  
WIFE OF RAOSAHEB DESAI,  
AGED ABOUT 38 YEARS,
- 2 . SRI. RAOSAHEB DESAI,  
SON OF SWAMYRAO DESAI,  
AGED ABOUT 46 YEARS,

BOTH RESIDING AT NO.98,  
WARD NO.3 MALAGITTI,  
KOPPAL.

...PETITIONERS

(BY SRI. VENKATESH PRASAD.R, ADVOCATE AND  
SRI. S. SUBRAMANYA, ADVOCATE)

**AND:**

- 1 . THE STATE OF KARNATAKA,  
REPRESENTED BY ITS  
CHIEF SECRETARY  
VIDHANA SOUDHA  
BANGALORE -01.
- 2 . DEPARTMENT OF WOMEN AND  
CHILD DEVELOPMENT,  
FIRST FLOOR, MS BUILDING,  
DR. B.R. AMBEDKAR VEEDHI,  
BANGALORE - 01.  
REP. BY ITS SECRETARY.
- 3 . CHILD WELFARE COMMITTEE,  
DR. M.H. MARIGOWDA ROAD,  
NEAR KIDWAI HOSPITAL,  
BANGALORE - 29  
REP. BY ITS CHAIR PERSON.  
(BY SRI. VINOD KUMAR, AGA)

...RESPONDENTS

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO CALL FOR ENTIRE RECORDS PERTAINING TO THE PETITIONER FILED IN THE SAID

HUMNA BANU, ON THE FILE OF R-3; QUASH THE IMPUGNED NOTICE DTD. 12.08.2021 ISSUED BY THE R-3 THROUGH THE JURISDICTIONAL POLICE TO THE PETITIONERS, WITH OUT CONSIDERING THE APPLICATION FILED BY THEM AND PROVIDING AN OPPORTUNITY OF BEING HEARD TO THE PETITIONERS VIDE ANNEX-B; AND ETC.

THESE WRIT PETITIONS COMING ON FOR **ORDERS** THIS DAY, THE COURT MADE THE FOLLOWING:

### **ORDER**

These two cases involve rival claims for the custody of a toddler between a genetic mother and a foster mother; this child is christened by the genetic parents as “**Master Mohammed Arhaan**” and later named by the foster mother as “**ADWIK**”. In a sense this matter reminds of the Jewish King Solomon (1010-931 BCE) who resolved such a dispute centuries ago and handed the child to the true mother after wisely identifying her and sent the pseudo-mother to the gaol; however, that is not much the case here and what pleasantly surprises the Court is the grace with which these two gentle women hailing from two different religious backgrounds conducted themselves during the course of proceedings.

2. With the above prelude, let me advert to the brief facts, now. The case in W.P. No. 16729/2021 is

filed by the genetic mother of the child, namely **Smt. Husna Banu** (hereafter 'genetic mother'); it is essentially for the custody of the child which has been with the foster mother **Smt. Anupama Desai** (hereafter 'foster mother') for a year or so; there was a Habeas Corpus case filed by the genetic mother in W.P.(H.C.) 60/2020, which eventually resulted in the child being traced at the lap of foster mother; the Chamrajpet Police, Bengaluru having registered Crime No. 54/2020, are investigating into the matter, is not much relevant for adjudication here.

3. The companion case in W.P.No. 15044/2021 is filed by the foster mother & her husband wherein they lay a challenge to the Police Notice dated 12.08.2021 whereby they have been directed to produce the child before the Child Welfare Committee on 18.08.2021; this notice owes its origin to the instruction of the said Committee issued to the Police, on the eve; strangely the genetic parents of the child do not figure as respondents in this case; however both the battling parties being

before the Court the “clubbed cases”, the arguable ground of non-impleadment of proper/necessary party pales into insignificance.

4. Both the writ petitions are taken together for disposal at the request of Bar; this Court vide interim order dated 21.09.2021 had issued the following direction, keeping in view the concerns expressed by the genetic parents:

*" .... Learned counsel appearing for the petitioner in the connected case Sri. Subramanya S submits that his client and the baby shall be present before the Court on 24.09.20021 at 10:30 a.m.*

*This Court very reluctantly adjourns the matter to Friday with the rider that in the event the respondent No.3 is not here with the baby, she runs the risk of being arrested and brought before the Court since the question of child's safety is involved in the matter.*

*The jurisdictional Child Welfare Officer shall keep vigilance on the movement of respondent No.3, her family and the baby in question; the said Officer will have all powers as are required for accomplishing this task.*

*Registry to hand a copy of this order to the learned AGA who in turn shall hand it to jurisdictional Police with instructions to keep co-vigilance with the Child Protection Officer, as mentioned above."*

In due obedience to the above direction, the foster mother appeared before the Court along with the child, this day.

5. The counsel for foster mother passionately argues for the dismissal of writ petition of the genetic parents and for allowing the one filed by his client; the gist of his argument is that: his client is absolutely innocent of the allegations made against her; she is only a victim of circumstances; she having fostered the child all these months abundant with love, affection & care should retain & rear it; that the genetic mother already has two children whereas the foster mother has none; a child well fostered for long cannot be parted away to the genetic mother without causing enormous violence to it; in matters of custody, interest of the child is paramount and therefore the claims founded on genealogy, *per se*, do not merit favour; in support of his submission he cites episodes from *Bhaagavatam* and mentions about Devaki, i.e., the genetic mother of Lord Krishna, permitting

Yashoda, i.e., the foster mother to retain custody of Infant *Krishna*.

6. The learned advocate appearing for the genetic mother per contra, contends that in matters of custody of the child as between the parents, the above argument of foster mother may be true; however as between a genetic mother and a foster one, the claim of the latter should yield to that of the former; he also notifies to the Court the agony which the genetic parents of the child have undergone since a year or so; he also highlights the difficulties of a lactating mother from whom the suckling infant is kept away; thus he seeks dismissal of the other petition and allowing of his clients'.

7. I have heard the learned advocates appearing for the parties and perused the petition papers; peculiarity of the case had generated a charged atmosphere in the Court Hall, for some time; learned members of the Bar namely; Smt. Rashmi Patel (HCGP), Smt. Shahida Shehnaz (CGC), Smt. Sunanda Rathod, M/s C.S.Prasanna Kumar, Shridhar Pradhu & B.S

Nagaraj, on request, rendered a valuable assistance in the matter. This Court is of a considered opinion that the custody of the minor child needs to be given to the genetic mother for the following reasons.

(a) The child in question took birth in a maternity home in Bengaluru city in the last summer and thus it is only a toddler as yet; this child having been lifted from the cradle of the hospital allegedly by some unscrupulous persons, ultimately landed on the lap of foster mother, is not in dispute; shorn of the pleadings, it is submitted at the Bar that the foster mother is only an innocent victim of circumstances; that was her case too; whatever be the epicenter of the *lis*, the undisputed fact remains that **Smt. Husna Banu** is the DNA-tested genetic mother of the child; as between the genetic mother and the foster mother, the claim of the former should have priority over the latter, subject to all just exceptions, into which argued case of the foster mother is not shown to fall; this augers well with reason, with law and with justice.

(b) The trouble with the case at hand is that it is of a kind not frequently recurring so as to enable any given Judge to profit merely by experience and thereby enable him to lay down thumb rules, especially when the elements involved are so complex; however a broad norm that in the matters of child custody, the claim of the strangers should yield to that of the genetic parents, gains support from **TEJASWINI GAUD vs. SHEKAR JAGADISH PRASAD TEWARI (2019) 7 SCC 42**; the Apex Court in the said case observed as under:

*" Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralized with the passage of time. However, till the child is settled down in the atmosphere of the first respondent-father's house, the appellants No.2 and 3 shall have access to the child initially for a period of three months for the entire day i.e. 08.00 AM to 06.00 PM at the residence of the first respondent. The first respondent shall ensure the comfort of appellants No.2 and 3 during such time of their stay in his house. After three months, the appellants No.2 and 3 shall visit the child at the first respondent's house from 10.00 AM to 04.00 PM on Saturdays and Sundays. After the child completes four years, the appellants No.2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11.00 AM to 05.00 PM and shall hand over the*

*custody of the child back to the first respondent-father before 05.00 PM. For any further modification of the visitation rights, either parties are at liberty to approach the High Court".*

(c) In all civilized jurisdictions the rules of international law animate the norms of domestic law, unless they are inconsistent: vide *JOLLY GEORGE VERGHESE vs. BANK OF COCHIN, (1980) 2 SCC 360*; the principle of “*the best interest of the child*” is enshrined in the International Convention on the Rights of the Child, 1989; Article 3 (1) of this Convention provides:

*"...in all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration . . .**"*

Similarly, Article 7(1) of the Convention says:

*“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the **right to know and be cared for by his or her parents**”.*

Article 8 (1) & (2) of the Convention provide for the *State Parties to respect the right of child inter alia to preserve its identity, ‘name and family relations as recognized by*

*law'. It also provides that where a child is illegally deprived of some or all of the elements of its **identity**, State Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily its identity.*

(d) Article 25 (2) of the Universal Declaration of Human Rights provides: *“Motherhood and childhood are entitled to special care and assistance...”*. Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR, 1966) recognizes right of the child to the measures of protection as are required by its status as a minor and the correlative duty resting on the shoulders of its family, society and the State. In October 1979 a Joint WHO/UNICEF Meeting on Infant & Young Child Feeding adopted the following statement:

*“Breastfeeding is an integral part of the reproductive process, the natural and ideal way of feeding the infant and unique biological and emotional basis for child development. ... It is therefore a responsibility of society to promote breastfeeding and to protect pregnant and lactating mothers to many influences that would disrupt it”.*

(e) Further, Section 3(ix) of the Juvenile Justice (Care and Protection of Children) Act 2015 which enacts *inter alia* the above principle of paramount interest of the child reads as under:

*"All decisions regarding the child shall be based on the primary consideration, that they are in the best interest of the child and to help the child to develop full potential."*

Section 2(9) of the said Act defines the term '*the best interest of the child*' to mean – "...The basis for any decision taken regarding the child, to *ensure fulfillment of his basic rights and needs*, identity, social well-being and physical, emotional and intellectual development."

f) The modern Medical Science says that breastfeeding is the best way to give babies all the necessary nutrients & antibodies, which provide a vital shield of protection; the experts in the field of neo-natal science are of a considered opinion that the interaction between the lactating mother and the suckling infant involves a world of messages, which is essential for the intellectual & emotional development of the child; WHO recommends exclusive breastfeeding until the baby

attains the age of at least six months; the research also shows that the adolescents & adults who were breastfed have less chance to be overweight & obese and that they demonstrate better IQ test results; breastfeeding lowers the risk of breast & ovarian cancers, diabetes & post partum depression, according to **Yukie Mokuo** of the UNICEF.

(g) In the light of domestic law and the international law as briefly discussed above, breastfeeding needs to be recognized as an inalienable right of lactating mother; similarly, the right of the suckling infant for being breastfed too, has to be assimilated with mother's right; arguably, it is a case of concurrent rights; this important attribute of motherhood, is protected under the umbrella of Fundamental Rights guaranteed under Article 21 of the Constitution of India; it is unfortunate that this pretty child for no fault remained un-breastfed, its lactating mother having had no access to it till now; in a civilized society such things should never happen.

(h) The contention of learned counsel appearing for the foster mother that his client should be permitted to retain the custody of the child consistent with what Devaki Maa allegedly did qua Yashoda Maa, as mentioned in *Bhaagavatam*, is bit difficult to countenance; no authoritative text of the episode is produced to show that there was any dispute of the kind between these two Women of Grace, in the era that is long gone by; in such matters, unsubstantiated episodes from some history or mythology do not much guide the decision making process; ordinarily, scriptures cannot be cited as precedents or as instruments having force of law, notwithstanding the light they throw when the path we tread is shrouded in darkness; in matters like this, scriptural texts are not treated as edicts of law, unless they are legislated expressly or by necessary implication or otherwise recognized; what a great American Judge of yester-century, **Justice Oliver Wendell Holmes, Jr.** had profoundly observed in **Lochner v. New York 198 US 45 (1905)** is worth reproducing:

*" . . . This case is decided upon an economic theory which a large part of the country does not entertain. . . It is settled by various decisions of this court that State Constitutions and State laws may regulate life in many ways, which we as legislators might think as injudicious . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . "*

(i) As to what great poets said about motherhood:

It is not impertinent to quote the poem '**My Mother**' penned by a Victorian poetess, **Ann Taylor (1782 - 1856)** of the "*Twinkle Twinkle Little Star*" fame; it touchingly expresses what a true mother means to a child:

*"Who sat and watched my infant head  
When sleeping on my cradle bed ,  
And tears of sweet affection shed?  
My Mother.*

*When pain and sickness made me cry,  
Who gazed upon my heavy eye,  
And wept for fear that I should die?  
My Mother . . ."*

Similarly, a 1860 poem of **Oliver Wendell Holmes, Sr.** (father of Justice Oliver Wendell Holmes, Jr.) **"A**

**Mother's Secret**", is worth mentioning for its brevity, beauty & emotive content:

*" ... Youth fades; love droops;  
the leaves of friendship fall;  
A mother's secret hope outlives  
them all".*

(j) The contention of counsel for the foster mother that she does not have any children whereas the genetic mother has already two at home and therefore, the custody of this child should be allowed to continue with his client, is ludicrous; children are not chattel for being apportioned between their genetic mother and a stranger, on the basis of their numerical abundance; the principle of distributive justice which intends to bridge the gap between "*haves and have nots*" is not invocable, at least in this case; it is a matter of common knowledge consistent with out experience that a genetic mother treats all her children as being an integral part of her body & soul, regardless of what the children do to her; this contention of foster mother is abhorrent to the very notion of motherhood.

(k) The foster mother now being convinced of legitimacy & priority of the claim of genetic mother has filed a Memo dated 24.09.2021 in the open court which reads as under:

*"The Third Respondent, has this date handed over the custody of the child, 'Adwik' to the petitioner herein. Therefore, the above case may be closed; handing over of custody may be taken note off in the interest of justice"*

She also gracefully delivered the custody of the child to its genetic parents; the genetic mother too, with equal grace, states that the foster mother may see the child whenever her heart so desires; such kind gestures coming from two women hailing from two different religious backgrounds, are marked by their rarity, nowadays; thus, this legal battle for the custody of the pretty child is drawn to a close with a happy note, once for all.

In the above circumstances, these Writ Petitions are disposed off; there is & shall be no cause of action

against the foster parents in civil or criminal law concerning the alleged kidnapping of the child.

The observations hereinabove made being confined to the disposal of these two Writ Petitions shall not influence the collateral proceedings taken and/or to be taken against others.

Before parting with this matter, this Court places on record its deep appreciation for the able assistance rendered by its official Research Assistant-cum-Law Clerk, Mr. Faiz Afsar Sait and the Law Intern Mr. Rithvik Mathur.

Costs made easy.

**Sd/-  
JUDGE**

Snb/