

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1636 OF 2015

Naveen Kumar Sharma

..Petitioner

Versus

The State of Maharashtra and others

..Respondents.

Mr.Omkar Mulekar i/b Mr.N.S.Mundargi, Advocate for the
Petitioner.

Mr.K.V.Saste, APP for State.

Mr.S.R.Ganbawale, Advocate for Respondent No.4.

**Coram : RANJIT MORE &
R.G.KETKAR, JJ.**

Date : 03rd SEPTEMBER 2015.

P. C. :

. By this Petition, petitioner is seeking writ of habeas corpus against respondents No. 1 to 4 by ordering them to produce minor child-Arjun before this Court.

2. The petitioner and respondent No.4 are husband and wife. The petitioner and respondent No.4 married in the year 2007. On 27/01/2009, son by name Arjun was born by the said wedlock. Due to minor disputes between the parties, several proceedings are pending before the Civil and Criminal Court. The parties filed consent terms on 09/01/2015 in P.D. Case No.14 of 2013 before the Family Court at Pune. The consent terms reveals

that custody of minor child- Arjun was given to the petitioner and respondent No.4 was given visitation rights. The learned Judge of the Family Court No. 4, Pune disposed of the said Petition in terms of the consent terms.

2. The petitioner alleged that the respondent No.4 has forcibly taken minor child- Arjun from his custody on 12/03/2015 and therefore, present Petition is filed for the reliefs mentioned in prayer clauses.

3. Respondent No.4 has opposed the Petition by filing reply. Respondent No.4 submits that the petitioner has not cleared huge arrears of maintenance which are about Rs.6 lacs approximately. Respondent No.4 further submits that already she has filed application before the Family Court, Pune for modification of the consent terms. It is the case of the respondent No.4 that minor child - Arjun is not being looked after by the petitioner properly and he is not ready to go to the petitioner.

4. The Counsel for respondent No.4 also placed on record petitioner's E-mail addressed to respondent No.4. E-mail shows that the subsequent to the date on which minor child- Arjun is alleged to have been taken forcibly by respondent No.4, the learned Mediator was appointed by the Sessions Court at Pune and the Mediation talks were going on before the learned sitting District Judge. E-mail further shows that the minor child- Arjun was being taken before the learned Mediator and the petitioner objected to

this. The learned Counsel for the petitioner does not dispute the contents of the E-Mail.

5. Mr. Mulekar relied upon the decision of the Apex Court in the case of *Cap.Dushyant Somal Vs. Smt.Sushma Somal*, **AIR 1981 Supreme Court 1026** and in particular paragraph 3 thereof. In that case, the appellant-husband and respondent-wife were married on 10/05/1973. A daughter Sweta was born on 16/05/1974 and a son Sandeep was born on 01/04/1975. The appellant and respondent were living separately since 1976 because of dispute and differences. The children were living with the mother. The respondent moved an application under the Guardians and Wards Act, 1890 alleging that in September 1977, Sandeep removed from the custody by the appellant. She obtained an ex-parte order and pursuant to the order, she recovered custody of her son Sandeep with the help of police. The respondent came out with the case that on 27/10/1980 at about 7 a.m., the appellant accompanied by three or four other persons came in a car and forcibly took away Sandeep. The respondent gave a report whereby, appellant registered a case under Section 363 Indian Penal Code, 1863 against her appellant. She thereafter instituted an application under Article 226 of the Constitution of India in the Delhi High Court for the issue of a Writ of Habeas Corpus directing the appellant to produce her son. The appellant filed a counter affidavit denying that he had kidnapped the child. He raised various objections to the maintainability of the petition. The preliminary objections were over-ruled. As the appellant had denied the

removal of the child, the High Court decided to examine witnesses. On behalf of the respondent, she examined herself and her mother. The appellant did not examine himself as a witness nor did he examine anyone else from his side. He also did not cross-examine his wife and mother-in-law. The High Court issued a Writ directing the appellant to produce the child on 17/12/1980, so that the custody of the child could be entrusted to the respondent. Despite the direction, the appellant did not produce the child. The High Court held him guilty of contempt of Court and directed him to be taken into custody and detained in a Civil Prison until he produced the child in the Court. In paragraph 3, the Apex Court has observed thus :

“ There can be no question that a Writ of Habeas Corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out. Nor is a person to be punished for contempt of Court for disobeying an order of Court except when the disobedience is established beyond reasonable doubt, the standard of proof being similar, even if not the same, as in a criminal proceeding. Where the person alleged to be in contempt is able to place before the Court sufficient material to conclude that it is impossible to obey the order, the Court will not be justified in punishing the alleged contemner. But all this does not mean that a Writ of Habeas Corpus cannot or will not be issued against a parent who with impunity snatches away a child from the lawful custody of the other parent, to whom a Court has given such custody. Nor does it mean that despite the contumacious conduct of such a parent in not producing the child even after a direction to do so has been given to him, he can still plead justification for the

disobedience of the order by merely persisting that he has not taken away the child and contending that it is therefore, impossible to obey the order. In the case before us, the evidence of the mother and the grand-mother of the child was not subjected to any cross-examination; the appellant-petitioner did not choose to go into the witness box; he did not choose to examine any witness on his behalf. The evidence of the grand-mother, corroborated by the evidence of the mother, stood unchallenged that the appellant-petitioner snatched away Sandeep when he was waiting for a bus in the company of his grand-mother. The High Court was quite right in coming to the conclusion that the appellant-petitioner had taken away the child unlawfully from the custody of the child's mother. The Writ, of Habeas Corpus was, therefore, rightly issued. In the circumstances, on the finding, impossibility of obeying the order was not an excuse which could be properly put forward."

6. Relying upon paragraph 3 of the decision, Mr.Mulekar submitted that the Apex Court laid down that a Writ of Habeas Corpus can be issued against the appellant who with impunity snatches away a child from the lawful custody of the other parent, to whom a Court has given such custody. In our opinion, the said decision does not advance the case of the petitioner herein. In that case, after considering the evidence on record adduced by witness, the High Court had directed the appellant to produce the child and the said direction was not complied. The High Court accordingly, held appellant guilty of contempt. It is in that context, the Apex Court has made observations in paragraph 3.

7. Having heard learned Counsel for respective parties and having gone through the Petition along with annexures, we find that the real dispute between the parties is about custody of the minor child-Arjun. Already proceedings are pending before the Family Court in this regard. The petitioner is in huge arrears of maintenance. The petitioner is also not ready to clear the arrears of maintenance.

8. In the circumstances, no case is made out for invocation of writ jurisdiction of this Court. Writ Petition is dismissed.

[R.G.KETKAR, J.]

[RANJIT MORE, J.]