

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 5262 OF 2018

Priyadarshani Manish Sharma
@ Priyadarshani Anil Pagare ... Petitioner
V/s.
Manish Rajnikant Sharma & Ors. ... Respondents

Ms. Rebecca Gonsalves for the Petitioner.
Mr. Ashok M. Saraogi for the Respondents.
Mrs. M.H. Mhatre, A.P.P. for Respondent-State.

**CORAM : INDRAJIT MAHANTY AND
V.K. JADHAV, JJ.**

DATE : 12th DECEMBER, 2018.

P.C. :

1 Heard Ms. Rebecca Gonsalves for the Petitioner, Mrs. M.H. Mhatre, A.P.P. and Mr. A.M. Saraogi for Respondent Nos.1 to 5. The present writ of Habeas Corpus has come to be filed by Priyadarshani Manish Sharma @ Priyadarshani Anil Pagare with a prayer seeking a writ of Habeas Corpus directing Respondents to forthwith produce the son of the Petitioner, i.e. Prajwal Sharma, before this Court and further to hand over custody of the said Prajwal Sharma to the Petitioner. At the outset it may be recorded herein that directions of this Court dated 04.12.2018 have been issued to the following effect :-

“The Child in question is in the custody of the Respondent No.1. The Respondent No.1 agrees to produce the child on 12.12.2018. We make it clear that this court would not go into the rival claims in respect of the custody of the child for which the parties would have to file appropriate proceedings.”

2 Pursuant to the aforesaid directions, Respondent No.1 has come along with child Prajwal Sharma to the Court today and the local police are present in Court. Learned Counsel for the Petitioner submits that Respondent No.1 had approached this Court earlier in a writ of Habeas Corpus registered as Criminal Writ Petition No.4058 of 2018 which came to be disposed of by the Division Bench of this Court by the order dated 31.10.2018 with the following directions :-

“1. Heard Mr.Nedumpara, learned counsel for the petitioner and Ms.Gonsalves for Respondent Nos.1 to 4 and learned APP for the respondent No.8-State.

2. The petitioner and the respondent No.1 got married in the year 2009 and out of the wedlock child named Prajwal is born and at present he is six years old. The respondent Nos.2,3 and 4 are the parents and brother of the respondent No.1.

3. There is matrimonial dispute between the petitioner and respondent No.1. Admittedly they are not staying together. It is the case of the petitioner that the minor child Prajwal was with him since 2014 and respondent No.1-the mother of the child forcibly removed the child from his

custody and therefore he has approached this Court making grievance that respondent No.1 to 4 has illegally detained the minor son Prajwal.

4. At the request of the Ms.Gonsalves, learned counsel for respondent Nos.1 to 4, we had deferred the hearing till today. Meanwhile petitioner was granted access to the minor son Prajwal at the residence of the respondent No.1. Ms.Gonsalves, the learned counsel for the respondent Nos.1 to 4 makes a statement that access is availed by the father – petitioner of minor son and this fact is not disputed by Mr.Nedumpara, learned counsel for the petitioner. Ms.Gonsalves submit that respondent No.1 has already filed a petition in the Family Court seeking divorce and also praying for continuation of the custody of the minor son. The copy of the said petition is placed on record by Ms.Gonsalves.

5. The present petition before us seeking a Writ in the nature of Habeas Corpus for production of the child and the petition contain allegation to the effect that the mother had forcibly removed child from the custody of the father. Since the petitioner is a father of the child and the respondent No.1 is mother of the child and the issue as regards custody of the child would lie before the appropriate Court which is empowered to grant custody of a child under the relevant provisions of the law. Since, now the whereabouts of the child are known to the petitioner, we express that the Writ of Habeas Corpus would not lie. The parties are relegated to the appropriate remedy for filing proceedings seeking custody of the child. The wife has already instituted the proceedings in the Family Court for continuation of the custody of the child. In such circumstances, we pass the following order :-

ORDER

(i) The petitioner is at liberty to make an interim application seeking temporary custody of the child either by filing independent proceedings or by filing application in the proceedings instituted by the wife. The Family Court shall decide the said application

after hearing both the sides as expeditiously as possible and in any case within 4 months from filing of the said application.

(ii) All points and contentions of the respective parties are kept open.

(iii) During the pendency of the petitioner's application seeking custody where he proposed to file before the Family Court, the respondent No.1 shall give access of the minor child Prajwal to the petitioner and his parents at her residence on every Saturday and Sunday between 4.00 p.m. to 7.00 p.m.

7. Both the parties i.e. petitioner and respondents are expected to create an healthy atmosphere for the child when the access is being availed and behave as responsible parents.

8. All concerned to act on an authenticated copy of this order.

3 Learned Counsel for the Petitioner submits that subsequent thereto Respondent No.1 visited the house of the Petitioner on 3rd and 4th November 2018 and thereafter again on 17.11.2018 along with the group of relatives and forcefully took away Prajwal from the custody of the Petitioner consequent to which the present writ of Habeas Corpus has come to be filed. It is contended on behalf of the Petitioner that Petitioner had lawful custody of her son Prajwal and the Respondent without resorting to lawful process as available to them and as directed by the High Court, in the earlier Habeas

Corpus Petition, resorted to unlawful means of taking forceful custody of the child, even though, proceeding Petition (L) No.7374 of 2018 has been filed by the Petitioner in the Court of the Family Judge, Bandra and the same remains pending before the said Court for consideration.

4 Mr. Saraogi learned Counsel appearing for the Respondent Nos.1 to 5 on the other hand contended that the directions of this Court dated 10.10.2018 had granted liberty to the Petitioner to move before the learned Judge of the Family Court, if the Petitioner so desires and he further contended that para (iii) of the order dated 10.10.2018 was only operational if the Petitioner had exercised his option of moving the Family Court seeking custody.

It is further contended that the father Respondent No.1 is also a lawful guardian of the child and therefore, the custody of the child being in the possession of the father cannot be termed or deemed to be unlawful. Apart from the above, various other contentions have been advanced which are not being noted hereunder since they serve no real purpose for decision of the present writ of Habeas Corpus.

5 Mr. Saraogi learned Counsel for Respondent Nos.1 to 5 also admits that Respondent No.1 had not till date exercised his option of

moving the Family Court Bandra for the purpose of custody of the child. He further contends that in a writ of Habeas Corpus, the main consideration of the Court ought to be the best interest of the child and in the present case even though there exists a dispute over the custody of the child between the parents, the child's interest is primary.

6 After hearing learned Counsel of respective parties and knowing the limitation of relief that can be granted in a Habeas Corpus proceeding any directions that we pass herein will not reflect on the legality or otherwise of the custody of the child, since such a matter is already pending adjudication before the Family Court Bandra, wherein, as in the earlier Writ Petition, this Court had directed disposal of the same within a period of four months.

7 In the light of the aforesaid circumstances, the only issue that appears for our consideration at the present juncture is as to whether the action of Respondent No.1 i.e. taking away custody of the child from the Petitioner on 17.11.2018 could be countenanced or accepted as lawful and in accordance with law. We are of the clear considered view that both parties to this dispute i.e. the Petitioner as well as Respondent No.1, being parents of the child, have a forum for adjudication of the disputes and

nothing stated in this order shall have any impact on the adjudication that will be made by the Family Court in this matter.

However, we make it clear that no party to a proceeding can be allowed to take law into his/her hand. Irrespective of the fact as to whether Respondent No.1 chooses to contest the application of the Petitioner wife before the Family Judge, Bandra, or not, is also not a matter for consideration by us in the present case. From the order of this Court dated 30.10.2018 (quoted herein above), it is clear that the Petitioner therein (Respondent No.1 herein) had expressed a desire or proposed to file a Petition for the custody of the child before the Family Court and on considering the said submission, this Court had directed Respondent No.1 (Petitioner herein) to give access to the minor child Prajwal to the Petitioner (Respondent No.1) and his parents at her residence on every Saturday and Sunday between 4.00 p.m. to 7.00 p.m.

This direction of this Court is a direction which had to be complied with by the Petitioner herein and we are of the considered view, that taking advantage of such a situation no party could show utter disregard, not only to the direction of this Court but also to the procedure of law and deprive the Petitioner from the custody of her child. It is well settled in law that no

matter what be the circumstances, rule of law has to always subsist and for such subsistence, it is absolutely necessary for all parties in dispute to revert to the process of law for the purpose of adjudicating of any dispute.

We are, therefore, clearly of the view that since Prajwal was in the custody of the Petitioner on 10.10.2018 i.e. on the date on which earlier Habeas Corpus at the behest of the husband came to be rejected, we have no other option other than to direct that the custody of child Prajwal be handed over to the Petitioner forthwith in the Court today. We also further make it clear that the right of access of Respondent No.1 to the child during the pendency of the proceeding shall also be determined by the Family Judge, Bandra. The Petitioner shall be responsible for the welfare of the child and to ensure that the child's welfare is best looked after, we direct the Child Welfare Officer or through any other appropriate Officer to make regular visits to the house of the Petitioner, to verify the welfare and well being of the child. The Petitioner also undertakes to look after educational needs of the child, we also direct the Police Station to make regular rounds of the house of the Petitioner in order to ensure that no further disturbance is caused in the matter.

8 We further direct that the Family Court, Bandra, to proceed with the Petitioner's application regarding custody, without being prejudiced in any manner, by any observation made herein. The writ of Habeas Corpus is allowed to the extent indicated herein above.

9 Later Mr. Saraogi learned Counsel for the Respondents seeks stay of operation of this order for a period of one week. Ms. Gonsalves, learned counsel for the Petitioner vehemently opposed the same. We are of the considered view that since no question of law has arisen for our consideration in the present case, especially in view of the fact that this Court has not decided any right *interse* between the parties and such rights are yet to be determined by the competent Court i.e. the Family Court, Bandra, the prayer for stay of operation of this order, stands rejected.

(V.K. JADHAV, J.)

(INDRAJIT MAHANTY, J.)