

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4668 OF 2019

Poonam Nikhil Oza

... Petitioner

Vs.

The State of Maharashtra & Ors.

... Respondents

Mr. Anil Lalla with Ms. Lalla i/b Lalla & Lalla for petitioner.

Mrs. M.M. Deshmukh, APP for the respondent Nos. 1 and 3/State.

Mr. Girish Godbole i/b Mr. Hemant Kenjalkar for respondent No.2.

CORAM : INDRAJIT MAHANTY &
N.B. SURYAWANSHI, JJ.

DATE : 17TH SEPTEMBER 2019.

P.C. :

1. Heard learned counsel for the respective parties.
2. Reply affidavit is filed by the respondent No.2 in court today.
3. The present Writ Petition came to be filed by the petitioner, viz., Poonam Nikhil Oza, inter alia alleging therein that she had left her matrimonial house on 10th December, 2018 and has started residing separately in Ghatkopar since then alongwith her

daughter, viz., Ditya borne on 15th May, 2015, i.e., approximately just about four years of age as on date, in view of the apparent clashes between the petitioner and her husband respondent No.2. Although various allegations have been made in the Petition itself and counter allegations have been made in the reply affidavit filed by the respondent No. 2, this court does not intend to enter into the aforesaid allegations and counter allegations and it is left open to the party to pursue such remedy as may be available to them before the appropriate court.

4. It has been mentioned in the Writ Petition that while petitioner was residing with her daughter Ditya at Ghatkopar, on 6th September, 2019 Ditya was forcibly taken away by the respondent No.2 and hence the present Writ Petition came to be filed.

5. Reply affidavit has been filed by the respondent No.2, husband, as to what transpired on 6th September, 2019 and the same is quoted hereinbelow :-

"I say that on Friday, 6 September, 2019, the Child made several calls to me requesting to take her to Malad. I visited the Petitioners house at Ghatkopar and my child willingly came to me and agreed with me to leave for Malad. Considering the past experience, I took my child to Ghatkopar Police Station West and informed Police Inspector on duty Ashok Shirsat that I am taking my daughter along with me to Malad. The Police Inspector inquired with the my child if she was

*willing to go with me and she responded positively.
Post intimation to the Police Inspector, I left for my
residence to Malad.”*

6. The learned counsel appearing for the respondent No.2 submits that a proceeding has been initiated before the Judge, Family Court, Bandra, viz., Petition No. A 975 of 2019 for divorce and Petition (L) No. 6266 of 2019 for custody.

7. The learned counsel appearing for the petitioner, on instructions, submits that his client has filed appearance in the divorce proceeding and would appear in the custody application filed by the respondent No.2.

8. We merely take into consideration the fact that a girl child Ditya was in the custody of the mother till 6th September, 2019, irrespective of allegations made that Ditya was forcibly taken away by the respondent No.2 and irrespective of the stand taken by the respondent No.2 that he had taken the child since she wanted to be with the father, this court need not enter into the nature of circumstances, under which the respondent No.2 took the custody of their daughter Ditya. We merely refer to section 6 of the Hindu Minority And Guardianship Act, 1956, which states that since the child has not completed the age of five years admittedly as on date, the custody of such child should ordinarily be with the mother (petitioner).

9. We are cautious of the fact that the respondent No. 2 has initiated proceedings mentioned hereinabove, we hope and trust that the petitioner will participate in the proceeding and file her say in the matter and we further direct the Family Court to take the application for custody on early date and decide it on merits without being influenced by the observations made by us in the present order.

10. Accordingly, we allow the present Writ Petition, by directing the respondent No.2, who has come with their child before the court, to forthwith hand over custody of the child to the petitioner and of course, subject to the ultimate outcome of the custody application filed by the respondent No.2 before the Family Court, Bandra. We reiterate that in the circumstances in the present case, since Ditya was in the lawful custody of her mother/petitioner herein on 6th September, 2019, this court is not entering into the circumstances under which the Respondent No.2 took custody of his child and we leave the matter open for adjudication by the Judge, Family Court. With such directions, the Writ Petition is allowed.

(N.B. SURYAWANSHI, J.)

(INDRAJIT MAHANTY, J.)