

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

CRIMINAL WRIT PETITION NO. 5679 OF 2019

Kedar G. Gantha

...Petitioner

Versus

The State of Maharashtra and Anr.

...Respondents

...

Mr. Karansingh B. Rajput for the Petitioner.

Mr. V.B. Konde-Deshmukh, APP for Respondent No.1– State.

...

**CORAM : S. S. SHINDE &
N. J. JAMADAR, JJ.**

DATE : 20th NOVEMBER 2019

PER COURT :

1. Heard the learned counsel for the Petitioner. The Petitioner has invoked the writ jurisdiction of this Court seeking writ of Habeas Corpus against Respondent No. 2, his wife to produce Kimyraa, their daughter before this Court.

2. The Petitioner alleges that the Respondent No. 2 has detained his daughter illegally. The Respondent No. 2 was working as a bar girl prior to her marriage with the Petitioner. Their marriage was solemnized on 17th May 2014. The Respondent No. 2 and her parents had assured the Petitioner that the Respondent No.2 would thenceforth follow the life of virtue. After marriage, certain disputes arose between the parties. In the incident of fire, which occurred at Kamala Mill compound, in December

2017, the Petitioner and Respondent No. 1 were trapped. The Petitioner suffered severe burn injuries. The Respondent No. 2, however, left the matrimonial home along with daughter, leaving the Petitioner to fend for himself. The Respondent No. 2 again resorted to her previous occupation; of a bar girl. The future of the daughter Kimyraa is at stake. To ensure the welfare of the daughter and protect her from the ill-influences of Respondent No. 2 it is necessary to handover the custody of the daughter to the Petitioner.

3. Certain documents have been placed on record in support of the aforesaid assertions.

4. Learned counsel for the Petitioner urged that, though apparently, it is a case of matrimonial dispute and the alternate remedy of the proceedings before the Family Court is available, in the circumstances of the case, which according to him are grave, this court would be justified in invoking writ jurisdiction to ensure the welfare of the child. In order to buttress these submissions, the learned counsel for the Petitioner placed reliance on the judgments of Hon'ble Supreme Court **Gohar Begam Vs. Suggi Alias Nazma Begam And others**¹, and of the Gujarat High Court in the case of **Sejalben Arpit Shah W/o. Arpit Jitendrakumar Shah Vs. State of Gujarat** ².

¹AIR 1960 SC 93

² R/Special Criminal Application No. 1022 of 2019.

5. We have carefully considered the averments in the petition and the submissions advanced across the bar. We are not inclined to entertain the petition in exercise of the extraordinary writ jurisdiction. Firstly, it is not the case of the Petitioner that the Petitioner was unaware about the occupation of the Respondent No.2 before their marriage. Secondly, the Respondent No.2 allegedly left the matrimonial home after a couple of months of the incident of fire at Kamla Mill Compound, which occurred in December 2017. The Petitioner had known that his daughter-Kimyraa has been in the custody of the Respondent No.2, since then. There is a delay of more than one and a half years in invoking the jurisdiction of this court for a writ of Habeas Corpus. Thirdly, there is no material to indicate that the custody of Kimyraa with the Respondent No.2 amounts to illegal detention. Fourthly, the thrust of the submission on behalf of the Petitioner is that the welfare of Kimyraa would be better served if she remains in the custody of the Petitioner. The fact that Kimyraa is a four and a half years old girl cannot be lost sight of. At such a tender age, a girl child is in need of the care and protection of her mother.

6. So far as the allegations levelled against the Respondent No.2 about her behaviour and its deleterious effects on the future of Kimyraa, in our view, these aspects can be legitimately and effectively considered by the Matrimonial or Family Court. The reliance placed by the learned counsel for the Petitioner on the judgments in the cases of **Gohar Begam**

(Supra) and **Sejalben Arpit Shah** (Supra) does not advance the cause of the Petitioner.

7. In the case of **Gohar Begam** (Supra), the Appellant's daughter was in the custody of the Respondent, who had no legal right whatsoever to the custody of child. Thus, the Supreme Court, had entertained the petition for Habeas Corpus. Whereas, in the case of **Sejalben Arpit Shah** (Supra), though the Gujarat High Court had entertained the petition for Habeas Corpus filed by mother against the father of the girl child, discarding the objections about the tenability on the count of alternate remedy, yet, it is pertinent to note that the fact that the girl child (who was just 14 months old) required the care and protection of her mother weighed with the Court becomes evident from the observations in paragraph 52, which reads under:-

"52. The "tender years rule" has found statutory recognition and the legislative policy undertaking thereto is based not only on the social philosophy but also realities and points in the direction that the custody of minor children who have not completed the age of 5 years should ordinarily be with the mother irrespective of the fact that the father is the natural guardian of such minors. When moved for a writ of Habeas Corpus and in exercising the general and inherent jurisdiction in a child custody case, the Court is required to bear this legislative prescription in mind while judging the issue as to the welfare of the child. In the present case, Priyanshi is just 14 months old. The parties are Hindus and the "tender years rule", as statutorily recognized, is immediately attracted in their case and should not be ignored in judging her welfare."

8. For the foregoing reasons, we are not inclined to entertain the petition.

9. The petition stands rejected.

(N. J. JAMADAR, J.)

(S. S. SHINDE, J.)