

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3955 OF 2019

Mrs. Namita Mahendra Thanai	]	
Aged 35 years, Occ : Pvt. Service	]	
Res. At 501, C Wing,	]	
Gayatri Shivam Apartment,	]	
90 Feet Road, Thakur Complex,	]	
Kandivali 400 101	]	...PETITIONER

Versus

1.	The State of Maharashtra	]	
	Through Senior Inspector of Police,	]	
	Samta Nagar Police Station,	]	
	Kandivali (East), Mumbai 400 101	]	
2.	Mahendra Ramesh Thanai	]	
	Aged 42 Years, Occ : Service,	]	
	res. At 901 Erbent Building,	]	
	Skyline Oasis,	]	
	Vidyavihar (West), Priemer Road,	]	
	Mumbai 400 086	]	...RESPONDENTS

Dr. Uday P. Warunjikar a/w Ms. Vaishnavi M. Gujrathi for the Petitioner.
Mr. Manohar V. Shetty a/w Ms. Kavita Waghmare for Respondent No. 2.
Mr. V.B. Konde - Deshmukh, APP for Respondent – State.

CORAM : S. S. SHINDE &
N. B. SURYAWANSHI, JJ.

RESERVED ON : 13th JANUARY 2020
PRONOUNCED ON: 15th JANUARY 2020

JUDGMENT (PER S.S. SHINDE, J)

1. Rule. Rule made returnable forthwith. With the consent of counsel appearing for the parties matter is taken up for final hearing and heard.

2. This Writ Petition is filed under Article 226 of the Constitution of India with following substantive prayer :

- a) This Honourable Court be pleased to issue writ of habeas corpus or writ, order or direction directing the respondent herein to produce the child before this Honourable Court within such period as this Honourable High Court may deem fit and proper.

3. It is the case of the Petitioner that, the marriage between Petitioner and second Respondent was solemnized on 18th February 2008. Couple is blessed with male child by name Krishang on 2nd March 2017. Second Respondent is gainfully employed at New Zealand as Administrative Officer in a private company. He has been residing in New Zealand for 3 ½ years approximately, however, he used to frequently visit to India. Mother in law of the present Petitioner is staying at Ghatkopar. It is the case of the Petitioner that, whenever second Respondent used to come to India, he used to stay at the address mentioned in cause title.

4. It is the case of the Petitioner that, on 12th July 2019 the second Respondent herein took the child from the lawful custody of the present Petitioner. Before filing the present Writ Petition for about four months, Petitioner has shifted to the address mentioned in the cause title. She is now residing with her mother, father and unmarried sister. Second Respondent came to the house of parents of the Petitioner without any intimation and took the child and left for Ghatkopar address. Petitioner did protest while taking the child by second Respondent however, second Respondent forcefully took the child from the lawful custody of Petitioner. It is the case of the Petitioner that, Petitioner was orally informed by the second Respondent that child will be returned after couple of days. Therefore, Petitioner as well as her sister called second Respondent on his mobile phone however, second Respondent was avoiding to handover the child to Petitioner. As second Respondent has not handed over the child, meeting of elderly persons in the family was conveyed at Ghatkopar. In the said meeting second Respondent started making baseless, false and frivolous allegations against the Petitioner. Second Respondent went to the extent of making allegations of adultery against Petitioner. In view of such allegations there was no fruitful outcome of the said meeting. In the meantime on 17th July 2019 Petitioner received SMS from Dr. Mitesh Shah to whom child was taken by second Respondent that the child was suffering from cough, cold and fever and certain medicines were

prescribed. As the Petitioner received SMS about illness of the child, petitioner got worried. Therefore, immediately on 18th July 2019 she went to the place of second Respondent however, Petitioner was not allowed to meet the child. Petitioner has placed on record copy of said SMS received by her from Dr. Mitesh Shah. Since Petitioner was not allowed to meet the child, she went to the police authorities at Ghatkopar on 20th July 2019. However, police refused to take cognizance therefore, on 28th July 2019 Petitioner made an application in writing to Respondent raising her grievance that second Respondent is not allowing her to meet child. Petitioner tried to call second Respondent on various occasions however, there was no response from him. Petitioner also raised grievance before Maharashtra Women Commission on 22nd July 2019. On 24th July 2019 representation was made by Petitioner to the Maharashtra State Child rights Protection Commission. She also complained to the Child Welfare Commission Help Line Number 1098 on 24th July 2019 and on 25th July 2019. On 26th July 2019 Petitioner went to meet the child however, she was not allowed to meet the child. Petitioner contacted on phone to the Additional Commissioner of Police on 26th July 2019 and thereafter she made representation to the said authority. It is also the case of the Petitioner that, second Respondent is likely to go back to New Zealand taking child with him. There is apprehension that second Respondent may shift permanently to New Zealand. Second Respondent has informed her that he is going to file the

Petition seeking decree for divorce and custody of child. However, Petitioner has not yet received any notice from the concern court. It is stated that, Petitioner was not aware of the whereabouts of the child from the date of filing the Petition. On 26th July 2019 neither the second Respondent nor his family members allowed the Petitioner to meet child therefore, Petitioner was constrained to give call on phone number 100. On said date Petitioner also called on toll free number 103 i.e. helpline for protecting the child. It is the case of the Petitioner that, child was seen by her on 18th July 2019 and thereafter she was not allowed to meet child. She apprehends that child is not looked after properly though child is suffering from cough, cold and fever. The child needs attention of the mother i.e. Petitioner. Once petitioner called the second Respondent by making whats app call, the child was shown to her by second Respondent for less than one minute. However, on the aforesaid background facts the present Writ Petition is filed invoking the extra ordinary jurisdiction of this Court seeking directions to respondents to produce child before this Court.

5. Dr. Uday Warunjikar, learned counsel appearing for the Petitioner submits that, matrimonial home of the Petitioner is at Ghatkopar. Petitioner is presently residing with the parents at Kandivali. In the month of July second Respondent came in India and on 12th July 2019 took the child

from the lawful custody of Petitioner, though Petitioner protested for removing child from her custody. Petitioner and her brother tried to contact second Respondent however, second Respondent did not respond. It is only on 18th July 2019 after receiving SMS from Dr. Mitesh Shah, Petitioner came to know that child is suffering from cough, cold and fever. It is submitted that, child was in continuous custody of the Petitioner and in particular from 02nd March 2017 to 12th July 2019. Petitioner was constrained to file this Writ Petition since there was no access to child from 20th July 2019. Learned counsel submits that, child needs to be continued in the custody of Petitioner. Learned counsel appearing for Petitioner invites our attention to the observations made in paragraph 42 of the judgment of the Supreme court in the case of Nithya Anand Raghavan Versus State (NCT of Delhi) and Another¹ and submits that, the writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the Court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's

1 (2017) 8 SCC 454

freedom and his release when the detention is found to be unlawful. It is submitted that, paramount consideration must be about the welfare of the child. The matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would serve the interests and welfare of the minor. In a habeas corpus petition the High Court must examine at the threshold, whether the minor is in lawful or unlawful custody of another person i.e. private respondent named in the Writ Petition. Learned counsel also invites attention of this Court to the observations made in paragraph 10 of the judgment in the case of Roxann Sharma Versus Arun Sharma² and submits that, custody of minor who is not completed the age of 5 years shall ordinarily be with the mother. Learned counsel also invites attention of this Court to paragraph no 13 of the said judgment and submits that, Hindu Minority and Guardianship Act, 1956, postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Learned counsel relying upon the observations in paragraph 14 of the said judgment submits that Hon'ble Supreme Court has made it clear that, suitability to custody is not relevant where the child whose custody is in dispute is below five years since

² (2015) 8 SCC 318

the mother is per se best suited to care for the infant during his tender age.

6. Learned counsel also invites attention of this Court to the exposition of law by the Supreme Court in the case of Kanika Goel Versus State of Delhi and Another³ and in particular paragraph 32 thereof and submits that, the Hon'ble Supreme Court has reiterated the law laid down in the case of Nithya Anand Raghavan (supra). Learned counsel also invites attention of this Court to the exposition of law by the Supreme Court in the case of Kamla Devi Versus State of H.P. and Others⁴, wherein it has been held that, it is well established that writ of habeas corpus can be pressed into service for granting the custody of a child to the deserving spouse. Learned counsel also invites attention of this Court to the judgment of the Karnataka High Court in the case of Smt. Manju Malini Seshachalam Versus Vijay Thirugnanam and Others⁵ and also unreported judgment of the Delhi High Court in the case of K G Versus State of Delhi and Another decided on 16th November 2011 in Writ Petition (CRL) No. 374 of 2017. In the light of grounds taken in the Petition, additional affidavit, rejoinder affidavit and submissions made across the bar learned counsel appearing for the Petitioner submits that, Petition may be allowed.

3 (2018) 9 SCC 578

4 AIR 1987 HIMACHAL PRADESH 34

5 2018 SCC Online Kar 621

7. Pursuant to the notices issued to the Respondents, second Respondent has filed detailed affidavit on 13th August 2019. Learned counsel appearing for the second Respondent invites our attention to the averments in the affidavit in reply and submits that, second Respondent has filed a Petition before the family Court for a decree of divorce and for seeking permanent custody of the male child on the ground that the Petitioner had after the solemnization of the marriage been living in adultery with one 'X' who is employed as a Seamen Officer in Merchant Navy and on the ground that the Petitioner had subjected second Respondent to extreme mental cruelty. Since, the Petition for divorce is already been filed and pending before the Family Court it will be in the fitness of things and in the interest of justice that the Petitioner be directed to move the Court of competent jurisdiction to seek custody of the child. Disputed questions of fact arises for consideration in the present proceedings and therefore adjudication of disputed question of facts may not be undertaken by this Court. An order granting interim relief or order for interim custody, if passed by this Court is likely to prejudice the outcome of the result in the divorce petition pending before family court. Learned counsel submits that, ordinarily, Petitioner under Article 226 of the Constitution of India cannot be entertained where Petitioner has an alternate remedy, which without being unduly onerous, provides an equally efficacious remedy. In support of the aforesaid contention, learned counsel appearing for

the second Respondent pressed into service an exposition of law in following reported judgments of the Hon'ble Supreme Court; Thansingh Nathmal: Onkarmal Jawalprasad: Indrachand Premsuch: Ramdeo Satyanarayan: Indrachand Premsuch: Shewpratap Tantia Versus Superintendent of Taxes, Dhubri: Superintendent of Taxes, Dhubri: Superintendent of Taxes, Dhubri (In All the Appeals): Superintendent of Taxes, Dhub⁶, Kanaiyalal Lalchand Sachdev and Ors. Versus State of Maharashtra and Ors.⁷ City and Industrial Development Corporation Versus Dosu Aardeshir Bhiwandiwalla and Ors.⁸ Nivedita Sharma Versus Cellular Operators Association of India and Others⁹ Titaghur Paper Mills Company Limited Versus State of Orissa¹⁰ South Central Railway Employees Co-Op. Credit Society Employees Union Versus B. Yashodabai and Others.¹¹

8. Learned counsel invites attention of this Court to the paragraph no. 4 of the affidavit in reply and submits that, the said averments made it abundantly clear that the police had issued a look out notice for 'X' on the complaint of one 'Y' and he was arrested at the Mumbai Airport when he arrived from Dubai by the Immigration Officials and handed over to Kasturba Marg Police Station. Secondly, there is evidence which shows that the

6 1964 AIR(SC) 1419

7 2011 All. M.R. (Cri) 2036

8 2009 AIR(SC) 571

9 2011 (14) SCC 337

10 1983 AIR(SC) 603

11 2015 (1) All.M.R. 931

Petitioner and her sister had been to the Airport to receive 'X' on the date when he was arrested. Petitioner and her sister had spared no efforts and consistent and repeated determined attempts to get 'X' released on the spot by the meeting concerned Police Officers. This efforts and attempts on the part of the Petitioner and her sister is noted in the Police papers of the said case. Thirdly, the facts of the said criminal case is in short is that the wife of 'X' had lodged a complaint with the Borivali Police Station stating that her husband 'X' used to force her to have sex with strangers and the said sexual act was filmed / recorded by 'X' on a camera and the said wife was tortured and threatened stating that he would publicize the film if she refused to cooperate with him and refused to have sex with strangers. 'X' used to collect huge sum of money from those male persons having sex with his wife 'Y'. The filming of the sexual act was carried out discretely without the knowledge of the male person and the said male persons were subsequently being subjected to extortion and the said act of 'X', it is learnt that the Petitioner was a willing party. Fourthly, 'X' had adulterous relationship with the Petitioner and second Respondent had collected various evidence in the form of photographs, video recording and mobile chat and letters written by 'X'. Fifthly, second Respondent had collected various documents, photographs, video recordings, CCTV footage of the building and places visited by the Petitioner and 'X' together for carrying on the infidelity and adulterous acts. Sixthly, second

Respondent has evidence to show that 'X' used to transfer huge amounts of money to the bank accounts of the Petitioner and vice versa. Second respondent also received evidence of such bank transfers in the form of SMS received in the mobile. Seventhly, besides the Petitioner had unlawfully broken into second Respondent's house on 25th June 2019 when nobody was at home by calling a locksmith and making a duplicate key and entered the said house again on 29th June 2019 with her cousin sister, who committed the act of pilferage removal of various goods without knowledge and consent of second Respondent. Eighthly, Petitioner had voluntarily chosen to stay at her parent's home in Kandivali since April 2018 and did not inform anyone before coming to matrimonial home but was fully aware that there is nobody at home. Petitioner had discretely pilfered removed huge amount of cash and gold ornaments from matrimonial home in four suit case full and transferred and handed over the same to relatives of 'X' to arrange for his bail. The bail application of 'X' was thereafter filed in the Court of Sessions on 16th July 2019 being Bail Application No. 782 of 2019.

9. It is further submitted that, marriage of second Respondent with Petitioner had been solemnized as per Hindu Vedic customary rites and rituals. Marriage was a love marriage in Mumbai and there was a marriage solemnized before the Registrar of Marriages on 18th February 2008 and

subsequently on 18th April 2008 marriage was solemnized as per Hindu vedic customary rites and rituals at Kandivali, Mumbai. Out of the said wedlock there is one issue born and child is named as Krishang. It is submitted that, the behavior of the Petitioner since beginning was not proper. She never undertook home responsibilities. She would not attend calls given at her mobile by second Respondent. Petitioner was never interested in the household matters when he stayed with second Respondent, but always showed interest in the discussion and talking about the flow of events at her parents place. It is submitted that, behavior of the Petitioner was very suspicious. Mother of the Petitioner always interfered in the household matters of Petitioner and second Respondent. Petitioner frequently visit's house of her parents. Second Respondent decided to relocate overseas to New Zealand for higher studies (MBA – General Management) and for a better work life balance. It was his conscious decision weighing all pros and cons, with the intention to settle permanently in New Zealand. Petitioner was never interested in raising the child and as a result, she would pass on the responsibility to second Respondent's mother to look after the child even on holidays and Sundays. Second Respondent rarely remember her even lifting the baby in her arms and would often shrug the baby away if second Respondent tried to cuddle her. Petitioner used to come late at house and her behavior was infuriating particularly because at times the child would have

slept when she arrived around 9.30 to 10.00 p.m. On completion of studies in June 2017 second Respondent requested the Petitioner to move over to New Zealand until the child had grown up and was over 1 year old. The petitioner was putting up all flimsical excuses for not moving with second Respondent to New Zealand. In fact petitioners family persuaded her to go to New Zealand during a family meeting on 06th March 2019 but the Petitioner flatly refused despite persistent persuasion to visit New Zealand for atleast two weeks.

10. The petitioner would always try and be away from home and on most occasions, so that she could continue her cheating adulterous affair with her ex boyfriend. Even when the Petitioner would take Krishang along with she would be least bothered about second Respondent. Second Respondent had photographs to show indecent behavior and maintaining very close contacts with 'X' cuddling him and kissing him and also showing the Petitioner kissing 'X' while Krishang was being held in her lap. Such behavior is highly unacceptable. Learned counsel specifically invites attention of this Court to paragraph no. 16 of the affidavit in reply and submits that, the documents, photographs and video recordings mentioned in the said paragraph shows the very close connections and linkage of the Petitioner with 'X'. It is submitted that, in addition to 13 items mentioned in paragraph no. 16 of affidavit in reply, second Respondent is in a possession of the CCTV

footage of the Petitioner and 'X' entering in building and leaving the building wee hours after midnight. Learned counsel submits that, 'X' has been arrested on 23rd May 2019 by the Kasturba Marg Police Station on charges of 376(d), 377 and 120 B of IP Code and also offences under the Information Technology Act. Still said 'X' is in custody. It is submitted that, wife of 'X' lodged the complaint with the Police and discretely collected the various photographs and video recordings and screen shots of the various electronic gadgets of 'X' and then they approached the Police. Learned counsel at the cost of repetition submits that, wife of 'X' supplied various information, documents, whats app and other material between Petitioner and 'X' inter se relating to the nefarious deceitful and infidelity acts and behavior of the Petitioner and 'X' mentioned themselves. Petitioner left complete care of the child to mother of Second Respondent and Petitioner even doesn't know the child's eating pattern and would leave the child yearning and craving for mothers love and affection. Petitioner on her part was always busy on phone and she was also always in hurry to leave for work. If the Petitioner would not inform her mother where she is going and she was always keen to go without the child. Second Respondent used to make video calls to child practically daily and for speaking to child at 8.30 p.m. IST. He used to keep awake till 3.00 a.m. at midnight at New Zealand on account of the time lapses. Learned counsel submits that, Second Respondent is in possession of proof to show

that 'X' and Petitioner were together on 08th December 2018 from midnight 1.48 a.m. to 2.55 a.m. Second Respondent had video recording as evidence of the said fact. Petitioner in November 2018 had clearly messaged to Second Respondent that she was no longer interested in him and that she wanted to have divorce. Second Respondent disclosed about investments clearly indicating that Petitioner was in fact a part of all his investment. It is submitted that, second Respondent has always spent money for household expenses and Petitioner never spent money though she is in employment and earning salary. Second Respondent during his stay in India from 26th January 2019 to 08th March 2019 tried to know fault of the second Respondent in whole episode and Petitioner clearly stated that it was not at all fault of second Respondent. She stated that she had no feeling for second Respondent. Second Respondent had caught the Petitioner red handed whispering on the phone call at 2.00 a.m., chatting late in the night with her phone hidden beneath the blanket and many a times locking the bedroom door to be on the phone rather than taking care of crying baby.

11. It is submitted that, second Respondent wanted the Petitioner to take care of Krishang after he left for New Zealand on 08th March 2019 however, on 09th March 2019 he had received information that the Petitioner had taken Krishang with her at parents house.

12. Second Respondent reached Mumbai on 11th July 2019, he tried to call the Petitioner however, her mobile was switched off. On the next date i.e. 12th July 2019 he received reliable information that Krishang is at the parent's residence of the Petitioner and her younger sister was looking after child. Second Respondent reached to the resident of the Petitioner and found that her cousin sister Rashmi was at home along with Petitioner's sister in law. Petitioner's cousin sister Rashmi had then called up the Petitioner and informed her that second Respondent had come home. Second Respondent found that Krishang had sustained injury on the head skull on the back side and he also having cough, cold and fever. He even inquired from the Petitioner and other persons in the house under which circumstances Krishang sustained head injury. All of them consciously avoided to answer the question and did not disclose second Respondent the precise reason as to why Krishang suffered the head injury. Thereafter, Second Respondent asked the Petitioner over mobile and her sister at home as to why medical treatment was not provided to Krishang. They both maintained stoic silence on the issue. Then second Respondent informed the Petitioner that he was taking Krishang with him. He had also send whats app message to the Petitioner that he was taking child with him. He then waited at the said place for an hour and within this time Rashmi had made Krishang to speak to Petitioner on video call. He then took two toys of Krishang and left with him and there was no protest of any

kind as falsely alleged by the Petitioner and in fact he had even spoken to Petitioner while he was driving home and after reaching home again he arranged for video call to be made to the Petitioner and made Krishang talk to the Petitioner. Learned counsel submits that, as and when it is necessary second Respondent will rely upon the video recording and same would show that there was no protest of whatsoever nature by the Petitioner. After reaching at home, Reema Singh asked the Petitioner to furnish details of the doctor where Krishang was treated for head injury and Reema Singh provided doctor's original prescription along with medicines and even wrote the number of doses to be provided on the medicine bottles. Then second Respondent approached the said doctor so as to ascertain the nature and extent of injury and cause of injury, however, doctor did not divulge any details and hence second Respondent decided to get Krishang treated by his family doctor. Moreover, his family doctor treated Krishang and thereafter declared Krishang fit on 22nd July 2019 and then provided letter to affirm the same.

13. It is further submitted that, there was meeting on 14th July 2019 arranged by second Respondent at his residence wherein Petitioner along with her elder brother and sister in law attended the said meeting. There was discussion about divorce by mutual consent, Petitioner and her brother had agreed to divorce by mutual consent and had also agreed to permit second

Respondent to take permanent custody of Krishang and to permit the Petitioner to have access of Krishang. It is submitted that, in absence of the Petitioner in house, two ladies of Special Womens Organization visited the second Respondent's house to help the Petitioner to take custody of Krishang. It is submitted that, attempt was made to take forceful custody of the child and therefore, on 27th July 2019 second Respondent lodged a complaint with Chirag Nagar Police Station, Ghatkopar (W), Mumbai. During the course of argument on 06th January 2020 learned counsel appearing for second Respondent tendered across the bar copy of the case status report of pendency of Petition seeking divorce and custody of Krishang. It is submitted that, Petition was filed on 26th July 2019 and after objections were removed same was registered on 04th October 2019. On 11th December 2019 there was hearing and now next date before the Family Court, Bandra, Mumbai is on 3rd February 2020. It is submitted that, already summons is issued to the Petitioner and she is aware about filing of the Petition before the Family Court and therefore, Petitioner may seek relief from the said Court and Writ Petition may not be entertained. Relying upon paragraph 55 of the affidavit in reply it is submitted that, presently second Respondent has no plans to go out and even if he has to go out, he will make proper arrangements of safety and upkeep the maintenance of Krishang. Second Respondent being father of Krishang all of sudden left job and rushed to India upon learning that

Krishang is injured and sick. Second Respondent has love and affection for Krishang unlike the Petitioner as could be seen from her conduct. It is submitted that, second Respondent has no objection to provide access to the Petitioner and he is ready to give subject to giving undertaking by Petitioner that she will not forcefully take away Krishang from lawful custody of second Respondent and she meets under the respondent's surveillance. Second Respondent is providing medical treatment to child.

14. Learned counsel appearing for the second Respondent pressed into service exposition by the Supreme Court in the case of Prateek Gupta Versus Shilpi Gupta and Others¹² and submits that, custody of child with his biological father can by no means in law be construed as illegal or unlawful drawing invocation of Superior Courts jurisdiction to issue writ in the nature of habeas corpus as held in paragraph 38 of the said judgment. Relying upon the decision of the Supreme Court in the case of Ruchika Abbi and Another Versus State of National Capital Territory of Delhi and Another¹³ learned counsel submits that, in the facts of that case Supreme Court noticed that custody case between parents and minor daughter is pending before Family Court, meanwhile husband of appellant therein filed Writ Petition praying for issue of writ of habeas corpus for custody of child and consequential

¹² 2017 DGLS(SC) 1322

¹³ 2015 DGLS(SC) 1083

directions, which came to be allowed. Supreme Court held that since custody case between parents is pending before the Family Court Respondent – Husband shall retain the custody however, to drop child on every Saturday by 6.00 p.m. at the petitioners i.e. wife's resident and collect the child by 6.00 p.m. on the next day. However, during the pendency of main custody case, temporary custody directed to be remain with father. Relying upon observations in paragraph 29 in the case of Nithya Anand Raghvan (Supra) learned counsel submits that, the principal duty of the court is to ascertain, whether the custody of the child is unlawful or illegal, and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child.

15. In rejoinder to reply filed by the second Respondent and also arguments advanced by the counsel appearing for the second Respondent, learned counsel appearing for the Petitioner submits that, second Respondent has already filed the Petition before the Family Court at Bandra, Mumbai and therefore it is for him to prove the baseless and frivolous allegations made in reply before the said Court. It is submitted that, Petitioner was not aware about filing of any such proceedings by the second Respondent before the Family Court at Bandra since no notice / summons has been received by the

Petitioner. Petitioner has been informed that, second Respondent is in relationship with another girl at New Zealand and he is planning to leave India with Krishang is not at all safe in the custody of the second Respondent. Petitioner is entitled to get back the custody of her 2 years 8 months son. Second Respondent cannot be the beneficiary of his own wrong where he has taken forceful and fraudulent custody of a child of tender age and separated from him from his biological mother with whom child was residing since birth approximately 2 year 2 months. It is submitted that, though it is contended by second Respondent that, there are photographs, video graphs relating to averments made by second Respondent in paragraph 4 no such evidence is produced on record. Mere bald statement are made in the affidavit in reply. The allegations made in affidavit in reply are denied in toto. Allegations made against the Petitioner are frivolous and baseless and only with a view to retain the custody of Krishang by second Respondent. Learned counsel submits that, second Respondent has only intention to divert the subject of present issues involved in the Petition. Learned counsel invites our attention to the averments made in the rejoinder affidavit and submits that, Petitioner has given para wise reply to the affidavit in reply and denied the allegations. Learned counsel submits that, the allegations made in paragraph no. 19, 20 and 21 of the reply are with reference to some other person and to that effect second Respondent has not shown single document or FIR while taking

inspection of the documents of the second Respondent hence, the allegations made therein are denied. It is submitted that, Petitioner herself is looking after her child and paying the expenses, hospital charges and other care expenses regularly. Petitioner has paid all the expenses for the In Vitro Fertilization (IVF) process, childbirth, umbilical cord preservation (stem cells) and till date all the other medical charges. Second Respondent has deliberately changed the Petitioner online registered mobile number for the child doctor treatment, visit alerts. Although, the child was continuously sick and vomited on the Petitioner when she was visiting the child, she never received any alerts from the doctor where the child was taken for the treatment. When the Petitioner asked the reason, why no alerts are getting received on the Petitioner's registered mobile from the doctor, there was no reply from the second Respondent.

16. Petitioner never asked for divorce. The allegations about injury on the back side of the skull of the child is denied. No any medical papers are placed on record by second Respondent to show that there was injury on the back side of skull of the child. It is submitted that, mother of second Respondent was not present in the country for more than three months and she has arrived from Australia in Mumbai on 12th July 2019. The age of the child is around two years eight months as on today. Out of said period only for

approximately 93 days on the date of filing of rejoinder affidavit by the Petitioner, second Respondent was in India. Though it is stated by second Respondent that he has left the job in New Zealand, second Respondent be directed to furnish necessary documents with reference to the same. Second respondent has intention to leave India after making arrangements. It is submitted that, during the visit of Petitioner to see the Krishang at matrimonial home, Second Respondent tried to video graph so as to collect evidence to be used in the pending proceedings before the Court. It is submitted that, the parties may be restrained from using such video recording, photographs or any other evidence collected or electronic gadgets.

17. It is submitted that, Petitioner met Krishang at the place of second Respondent on certain occasions pursuant to the interim order passed by this Court. However, on 13th October 2019, Second Respondent obstructed petitioner from having an access to the child as well as committed an offences which is punishable under Section 506(2), 323 and 504 of the Indian Penal Code. On 13th October 2019 petitioner was constrained to lodge an FIR bearing CR No. 691 of 2019 registered with Ghatkopar Police Station. Petitioner was referred to Rajawade Municipal Hospital and she was medically examined and medical advise was given to her. Petitioner was required to be admitted in view of the injuries caused on account of assault

made by the second Respondent. She was admitted in the private hospital on 14th October 2019. At the time of admission marks on back, abdomen, hand and foot were noticed. There were three episodes of vomiting blood was complained to the doctor. Petitioner was treated in the hospital till 20th October 2019 and she was discharged on the same day. It is submitted that, Second Respondent has taken law in his hands. It is further submitted that, Petitioner has filed separate Contempt Petition alleging therein that violation of interim orders passed by this Court from time to time.

18. In reply to averments in additional affidavit in reply, learned counsel appearing for the second Respondent submits that, alleged incident dated 13th October, 2019 is captured / recorded in CCTV and second Respondent is ready to produce said record of CCTV. It is submitted that such alleged incident of beating by second Respondent to Petitioner has not happened at all. Learned counsel submits that, in reply to allegations made in the Contempt Petition he has filed affidavit wherein he has explained all details in respect of alleged incident occurred on 13th October, 2019. Learned counsel denied such alleged incident of beating as stated in an additional affidavit filed by the Petitioner.

19. At the outset we would like to deal with contention of second

Respondent that in view of an efficacious and alternate remedy available for redressal of grievance of the Petitioner, the Writ Petition is not maintainable. The Hon'ble Supreme Court in the case of Gohar Begum, Versus Suggi alias Nazma Begum and Others¹⁴, in paragraph no. 13 held thus:

13. It is further well established in England that in issuing a writ of habeas corpus a court has power in the case of infants to direct its custody to be placed with a certain person. In R. v. Greenhill, (1836) 4 Ad and El 624 at p. 640: 111 ER 922 at p. 927 Lord Denman C.J. said:

“When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody.”

See also (1857) 7 El. And B1. 186: 119 ER 1217. In Halsbury's Laws of England, Vol.IX, Art. 1201 at page 702 it is said:

“Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person.”

14 AIR 1960 SC 93

Section 491 is expressly concerned with directions of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the courts in our country have always exercised the power to direct under S. 491 in a fit case that the custody of an infant be delivered to the applicant: see Rama Iyer v. Naatraja Iyer, AIR 1948 Mad 294, Zara Bibi v. Abdul Razzak, 12 Bom LR 891 and Subbaswami Goundan v. Kamakshi Ammal, ILR 53 Mad 72: (AIR 1929 Mad 834). If the courts did not have this power, the remedy under S. 491 would in the case infants often become infructuous.

20. An exposition of law in the case of Gohar Begum (supra), has been consistently followed and there is no departure. An exposition of the Supreme Court relied in the case of Thansingh Nathmal (Supra), is arising out of the Assam Sales Tax Act, 1947 wherein appeal is provided for aggrieved person. The case of Kanhaiyalal Lalchand Sachdev and Others (Supra), is arising out of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 wherein under the said Act specific remedy is provided for aggrieved person. In the case of City and Industrial Development Corporation (Supra), in the said case it appears that, High Court directed respondent therein to initiate proceedings for acquisition of land in dispute, it is stated to be in possession of CIDCO for last 35 years when looking to the vital aspects like the capacity of the petitioner therein to

represent the so-called Trust, his authority to file the Petition, whether, the said Trust continued to be absolute owner possessing valid and subsisting title as on the date of petition, most important was the question of nature of the land, effect of filing of petition without impleading the Trust, while the Petitioner claimed himself to be trustee thereof, etc. Besides, the High Court ignored many more vital aspects. There remained some controversy and ambiguity with regards to Deed of Conveyance of Deed of Confirmation purportedly executed by respondent. Besides, there appeared certain suppressions in this regard by Respondent. In the case of Nivedita Sharma (Supra), the proceedings were arising out of the Consumer Protection Act, 1986 (for short, the 1986 Act). In the facts of the said case the Supreme Court ruled that remedy of appeal was available to concerned parties under Section 19 of the 1986 Act. In the case of Titaghur Paper Mills Company Limited (Supra), the Court was dealing with the provisions of Orissa Sales Tax Act. Therefore, the facts in the present Petition are clearly distinguishable vis a viz the facts in those cited cases.

It is true that, the remedies are available to the parties to the Petition however, keeping in view paramount interest of the child, his / her welfare and happiness so also safety and security, writ for habeas corpus is maintainable as already observed in the case of Gohar Begum (Supra).

21. In the present case admittedly, on 12th July 2019, second Respondent removed the child from the house of parents of the Petitioner at Kandivali. It is true that child was suffering from cough, cold and fever and therefore Krishang was taken to Dr. Mitesh Shash. Since Dr. Mitesh Shah was having mobile number of the Petitioner, he sent message to Petitioner. According to the Petitioner she met child on 18th July 2019 and thereafter, as contended by her in spite of her sincere efforts to meet the child, she could not meet the child. Before filing the Petition Petitioner approached to Maharashtra Women Commission and made representation before Maharashtra State Child Rights Protection Commission and approached before concerned police authorities raising her grievance about removing the child by the second Respondent from her custody. The Writ Petition is filed on 31st July 2019. In our opinion, the Writ Petition is filed with promptitude by the Petitioner. It is the contention of the second Respondent that child was taken / removed from the house of parents of Petitioner with the consent of her sister and also after sending message to Petitioner on whats app. We do not wish to elaborate on said aspects, suffice it to say that on 12th July 2019 when child was taken / removed by the second Respondent from the custody of the Petitioner, prior to it second Respondent was serving at least from June 2017 till 1st week of July 2019 in New Zealand. It is true that, second Respondent has stated in his reply that almost on every day he used to see child on video call and talk to

petitioner and said child. It is stated by the second Respondent that Petitioner went to reside in her parents house with child in the month of March 2019. Therefore, indisputedly Krishang was with Petitioner from March, 2019 till 12th July 2019. It is the contention of the second Respondent that, his mother is staying in matrimonial home that is on the address of second Respondent given in the cause title of the Petition and she is taking care of child Krishang. It appears that for three months prior to removing the child on 12th July 2019 by second Respondent from house of parents of the Petitioner, mother of the second Respondent was not available in India, in short before 12th July 2019, at least from 09th March 2019 child was with Petitioner in her parents house. The claim of the second Respondent that child was suffering from head skull injury at the back side and also fever, cough and cold when second Respondent took child Krishang from residence of the Petitioner, has been replied by the Petitioner in rejoinder affidavit denying the allegations that there was injury on the head skull at the back side of Krishang and Krishang was having fever, cough and cold. It is stated that, Petitioner herself has taken the child Krishang to the hospital for small scalp injury. The fact that, Dr. Mitesh Shah has mobile number of petitioner, and he sent SMS to the Petitioner when child was taken to the said Dr. Mitesh Shah on 17th and 18th July 2019. It would show that the child was shown to said Dr. Mitesh Shah earlier by the Petitioner and file of the child is opened and record is being

maintained by the said doctor.

22. It is the contention of the second Respondent that, he has filed Petition before the Family Court at Bandra, Mumbai for dissolution of marriage and decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955, so also custody of the minor son Krishang be handed over or retained by the Petitioner and the access as the Court may deem suitable be granted to second Respondent. During the course of hearing of the Writ Petition counsel appearing for the second Respondent has tendered across the bar copy of the said Petition and copy of the case status report which is already taken on record. It appears that said petition is filed on 26th July 2019 before the Family Court however, same was registered on 04th October 2019. First hearing date was on 11th December 2019 and next date for hearing is fixed on 03rd February 2020. Stage of the case is shown return of notice summons. During the course of arguments of learned counsel appearing for the Petitioner he informed this Court that on next date of hearing Petitioner is going to cause her appearance before Family Court. We have compared the averments in affidavit in reply filed by the second Respondent in the present Petition with the pleadings /avermments in the Petition filed before the Family Court at Bandra, Mumbai, and we find that almost all contentions raised in the reply have been raised in the said Petition. Since the said petition is

pending before the Family Court we do not wish to undertake exercise of adjudication of disputed questions of facts and appreciation of documents, photographs, video graphs, etc. since it may cause prejudice to the case of the parties. We are only considering that, what would be in the best interest and welfare of the child till the Family Court adjudicates the issue of interim custody or permanent custody and other reliefs claimed before the Family Court.

23. As already observed, the second Respondent has filed the Petition before the Family Court on 26th July 2019 and same was registered on 04th October 2019. There was no occasion for the Petitioner to cause appearance earlier since the said Petition was listed for first time before the Family Court on 11th December 2019 and summons is issued to the Petitioner and next date for hearing is 03rd February 2020. On 1st August 2019 Writ Petition was placed before the Division Bench (CORAM : INDRAJIT MAHANTY, & RIYAZ I CHAGLA, JJ.) this Court issued the notices to the respondents, which were made returnable on 13th August, 2019. The private service was also allowed. As an interim measure, this Court directed the Respondent No. 2, that he shall not take the child Krishang outside the jurisdiction of this Court without leave of this Court. On 13th August, 2019 Court noted the appearance of second Respondent through his counsel and also the affidavit filed by him. On said date the Petitioner as well as second Respondent were

directed to appear before Dr. Harish Shetty , MD., Psychiatrist at Dr. L.H. Hiranandani Hospital, Powai. Dr. Shetty was requested to examine both the parents as well as child to give his opinion in the best interest of the child as to whose custody this Court should handover the child till the competent Court decides the issue of custody. Dr. Shetty was requested to submit his report on or before 23rd August, 2019 in a sealed envelop addressed to the Registrar (Judicial) for production before this Court. In the interregnum second Respondent was directed to allow the Petitioner to spend time with the child. No objection of second Respondent was noted for allowing the petitioner to have access to child on daily basis subject to the convenience of the parties. In the meantime interim order dated 01st August, 2019 was continued. Again matter was listed on 26th August, 2019. The report of Dr. Shetty was received on said date. The copy of the said report was given to the parties. Dr. Shetty expresses his opinion as under:

MEDICAL CERTIFICATE

This is to state that both the parents were examined by me on the 16th and the 20th Aug 2019 at DR L H Hiranandani Hospital. There are a lot of resentments expressed by both against each other. After detailed conversations with both the common thread visible is that both are willing to work 'in the best interest of the child'. This I consider as a positive development and a sign of reasonable maturity in the parents as of today.

I would recommend that the status quo be maintained and the mother be allowed independent access on both days of the 'weekend' i.e. Saturday and Sunday at the residence where the child presently resides during the day as convenient to the parents. This access should be free and unfettered and no cameras should be used by either parents to record the access proceedings. The child should be left alone with the mother and the husband is requested to offer elementary courtesies as well as food and/or refreshments for the mother. The atmosphere by effort from both should be made peaceful and congenial in the best interests of the child.

I need more time to counsel the parents and the child so that the best interests of the child is protected and his emotional development not compromised.

24. The matter was directed to be listed on 18th September 2019. Thereafter, matter was again adjourn to 3rd October 2019 however, interim order granted earlier was continued. Thereafter, matter was listed time to time. Thereafter, on 25th November 2019 the second Respondent sought adjournment for filing the reply. On that date, earlier interim order was continued. Thereafter matter was listed on 02nd December 2019 but on joint request of the counsels matter was adjourned. On 17th December 2019, matter was heard and remained part heard. Thereafter on 19th December 2019 matter was substantially heard however, Advocate for the second Respondent could

not remain present due to some difficulty, to facilitate the advocate for the second Respondent to argue the matter, matter was adjourned to 03rd January, 2020. On 19th December 2019 this Court modified the earlier interim order and allowed the petitioner to meet the child Krishang from 3.30 pm to 7.30 pm on everyday and also allowed grand mother and grand father of maternal side to meet the child Krishang. It was further observed in the said order that, on 22nd December 2019 the grand mother, grand father of maternal side along with Petitioner are allowed / will have access to child Krishang from 3.30 pm to 7.30 pm. On 29th December 2019 and Petitioner's brother and his wife along with petitioner are allowed/ will have access to child Krishang from 3.30 pm to 7.30 pm. It was observed in the said order that until further orders second Respondent shall allow the Petitioner to meet child Krishang from 3.30 pm to 7.30 pm on everyday. The said interim order is being continued. On 03rd January 2020 learned counsel appearing for the second Respondent has concluded his arguments however, court noticed that the counsel appearing for the second Respondent has not replied averments in the additional affidavit filed by the Petitioner. Therefore, at his request matter was kept on 06th January 2020 at 3.00 pm and accordingly on 06th January 2020 at 3.00 pm matter was substantially heard and again advocate for the second Respondent prayed for day's accommodation and accordingly matter was heard on 08th January, 2020 and almost hearing was concluded on all issues

raised in the Petition except seeking response of the second Respondent to the averments in additional affidavit.

25. Petitioner has filed the additional affidavit wherein it is stated that, on 13th October 2019, second Respondent obstructed the petitioner from having an access to the child and petitioner was assaulted by second Respondent. Therefore, petitioner registered FIR bearing CR No. 619 of 2019 at Ghatkopar Police Station on 13th October 2019. Petitioner was referred to Rajawaide Municipal Hospital and Petitioner was medically examined and advise was given to her. Petitioner was required to be admitted in view of the injuries caused on account of assault made by the second Respondent. Petitioner was admitted in the private hospital on 14th October 2019. At the time of admission, marks on back, abdomen, hand and foot were noticed. There were two to three episodes of vomiting blood was complained to the doctor. Petitioner was discharged on 20th October 2019. It is alleged that second Respondent has not followed the order passed by the High Court and he has taken law in his hands. Petitioner has also filed the Contempt Petition.

As we have already recorded oral submissions made by the counsel appearing for the second Respondent about the alleged incident dated 13th October, 2019, we would appropriately deal with the said contentions raised in additional affidavit filed by the Petitioner and reply filed by second

Respondent in Contempt Petition, when we will hear the contempt Petition.

26. In the light of the discussion in foregoing paragraphs we are of the opinion that, it may not be desirable to have the custody of the child Krishang with second Respondent till the Family Court decides the prayer for temporary / interim custody of the child in pending Petition filed by the second Respondent. It is also stated by the second Respondent that, presently he has no plans to go to New Zealand and even if he has to go he will make proper arrangements for safety and up keep and maintenance of Krishang. In our prima facie opinion, when the child was with the Petitioner till 12th July 2019 and undisputedly in her exclusive custody atleast from second week of March 2019 till 12th July 2019. It would be appropriate to grant the temporary custody of child to the Petitioner till the appropriate orders are passed by the Family Court in respect of the interim custody of the child. There cannot be quarrel with the preposition canvassed by the counsel appearing for the second Respondent relying upon Prateek Gupta (Supra) that the custody of the child with his biological father can by no means in law be construed as illegal or unlawful drawing invocation of Superior Courts jurisdiction to issue writ in nature of habeas corpus. However, for limited period till the prayer of the parties is decided for interim custody of the Krishang keeping in view paramount interest and welfare of the child who is aged 2 years 8 months

should be with the Petitioner / mother. Hon'ble Supreme Court in the case of Roxann Sharma (Supra) held that, custody of the child aged below five years should be given to his / her mother unless father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardized if the custody is retained by the mother.

27. As already observed, second Respondent has filed the Petition before the Family Court wherein Respondent No. 2 will get opportunity to disclose cogent reasons that are indicative of likelihood of welfare and interest of Krishang being undermined or jeopardized if custody is retained by the Petitioner.

28. In the light of the discussion in foregoing paragraph, we pass the following order.

ORDER

- A)** Second Respondent is directed to handover the custody of child Krishang to the Petitioner in between 5.00 pm to 6.00 pm on 16th January, 2020.
- B)** Petitioner can accompany her parents with her to take custody of

Krishang from the second Respondent.

- C) The video recording of peaceful handing over the custody of the Krishang is permitted.
- D) We grant liberty to the second Respondent to file an appropriate application, if already not filed for temporary / interim custody till the Petition is decided by the Family Court. In case such application is filed we direct the Family Court to decide the said application for temporary / interim custody within three months from filing the application for temporary / interim custody.
- E) The Family Court shall endeavor to dispose of Petition finally as expeditiously as possible, however, within 9 months from today. Parties shall extend full cooperation for an early decision of pending petition before the Family Court.
- F) Second Respondent and his mother or second Respondent alone or mother of second Respondent alone will have access to the child Krishang in between 4.00 pm to 8.30 pm on everyday as per convenience of the second Respondent and his mother. In case second Respondent or his mother would not like to visit the child Krishang on

particular date, they may inform the Petitioner or her parents or her sister accordingly.

- G) Petitioner and her parents shall ensure that second Respondent and his mother are properly treated and allowed to meet child Krishang.
- H) The video recording, photographs or any other material collected by the parties during the visit of Petitioner to the child Krishang at the residence of second Respondent, is not permitted to be used by the parties in any Court proceedings including Petition pending before Family Court.
- I) The observations made herein before are confined to the adjudication of the present Writ Petition only, and the Family Court shall not get influenced by the said observations while deciding the Petition pending before the Family Court including the application for interim custody, if any, by the second Respondent and decide said Petition on its own merits.
- J) Rule made absolute on above terms. The Writ Petition stands disposed of accordingly.

(N. B. SURYAWANSHI, J.)

(S. S. SHINDE, J.)

AFTER PRONOUNCEMENT
DATED : 15th JANUARY, 2020

. After pronouncement of the judgment, the learned counsel appearing for Second Respondent prays for stay of the judgment and order pronounced today.

2. The prayer is vehemently opposed by the counsel appearing for the Petitioner.

3. In our opinion, the stay of this order would again create complications and would affect the interest of the child. In that view of the matter, and in view of the reasons stated in the judgment, we are not inclined to entertain the prayer for stay of the today's judgment and order.

(N. B. SURYAWANSHI, J.)

(S. S. SHINDE, J.)