

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

CRI. WRIT PETITION NO. 962 OF 2020

Ms.Pashton Gul Khairullah Dawlaty & anr.Petitioners

...Vs...

The State of Maharashtra & othersrespondents.

Mr. Mohammed S. Adenwala, Advocate a/w Ms Priya Patkar,
Advocate for the Petitioners.

Mr.J.P. Yagnik, A.P. P for respondent No.1-State.

Mr. Uzair Kazi, Advocate a/w Ms Ayoshi Soni, Advocate i/b YMK
Legal for respondent Nos.2 to 5.

CORAM: S.S. SHINDE & MANISH PITALE, JJ.

RESERVED ON: 23.03.2021.

PRONOUNCED ON: 20.04.2021.

JUDGEMENT (Per : Manish Pitale, J.)

The petitioners are Afghan nationals, who have filed the present writ petition seeking a writ of habeas corpus to direct respondent No.2 to produce her four sons before this Court and

for a further direction that the said children be handed over to the petitioners. The petitioner No.1 is the mother-in-law and petitioner No. 2 is the sister-in-law of respondent No.2. The son of petitioner No.1, also an Afghan national, who was studying in Mumbai, had married respondent No.2 on 16.07.2010. After marriage, respondent 2 moved to Kabul in Afghanistan with her husband. There were 4 sons born out of the wedlock. The first and the second sons were born in India in the years 2012 and 2014, while the third and fourth sons were born in Afghanistan in the years 2016 and 2017. It is undisputed that all the four sons are holding Afghanistan passports.

2. On 29.05.2017, when respondent No. 2 was pregnant with the fourth son, in a bombardment carried out by the Government of Afghanistan against terrorists, the husband of respondent No.2 was killed in Kabul. After the birth of the fourth son, respondent No.2 returned to India with all her four sons and started residing with her brother and parents at Kalyan near Mumbai. She came to India in February 2018 and from then on, she has been residing with her brother and parents.

3. The petitioners state that they came to India in January 2020 and met respondent No.2, as also the children. The petitioners state that they found respondent No.2 and the children living in poor condition with her brother and parents. The petitioners requested respondent No.2 to accompany them with her children to Kabul, so that all of them could live together in the spacious house that the petitioners claim to have at Kabul. The petitioners claim that they have sufficient resources to take care of respondent No.2 and the children because petitioner No.1 is earning pension while petitioner No.2 is a medical professional earning good salary. But, respondent No.2 refused to accompany them and when the petitioners did not get any relief even after approaching the Police Commissioner, they were constrained to file the present Writ Petition.

4. In the Writ Petition, the petitioners stated that petitioner No.1, being the grandmother, has a right to have the custody of the children, particularly when the petitioners are ready to take care of respondent No.2 also. According to the petitioners, they do not wish to take the children away from respondent No.2 and instead they desire that she along with the children should

accompany them to live at Kabul in Afghanistan because they rightfully belong to the aforesaid place. The petitioners have emphasized in the petition that all the four sons of respondent No. 2 are Afghan nationals and that they have been overstaying in India as their visas have expired. It is claimed in the petition that three sons of petitioner No.1 are residing in United States of America, who are ready to financially help the petitioners and that one of her sons is living in Kabul in the same house with his family, thereby indicating that respondent No.2 and the children will be taken care of financially as well as regarding their security needs. The petitioners have claimed that respondent No.2 and the children are living in penury in India, because her brother has no source of income and that all the members of the family of respondent No.2 in India are living in a single room, thereby showing that proper development of the children would take place if they reside in Kabul.

5. In the reply affidavit filed on behalf of respondent No.2, the facts pertaining to marriage, birth of children and the unfortunate death of husband of respondent No.2 are not denied. But, it is denied that respondent No. 2 and the children are living

in a state of penury with her brother and parents in Kalyan. The respondent No.2 claims that she is having her own reasonable source of income and that her brother is taking care of her needs and those of her children. She has stated in the reply that Afghanistan is a war-torn country and there is always danger of violence and threat to life and limb. She states that after the manner in which her husband was killed in bombardment by Government planes, she was in a state of shock and that she did not wish to go back to the said country where the future of the children is obviously bleak. The respondent No.2 has submitted that she cannot be forced to part with the custody of her children and that she herself does not desire to go back to Kabul to live with the petitioners. It is specifically stated that petitioner No.1 is now 79 years old and she is herself dependent on others. As regards financial condition of the petitioners, respondent No.2 has submitted that none of the male members of the family of the petitioners have come forward to support the prayers made in the present Writ Petition. On this basis, respondent No.2 has opposed the present Writ Petition.

6. Mr. Mohammed S. Adenwala, learned counsel appearing for the petitioners, has made submissions before this Court in tune with the contentions raised in the Writ Petition. The learned counsel emphasized on the claim that the petitioners are financially sound and that respondent No.2 as well as the children will be properly taken care of in Kabul. The facilities in terms of the house and financial ability of the petitioners were highlighted by the learned counsel for the petitioners and it was submitted that respondent No.2 always knew about the conditions in Afghanistan when she married the son of petitioner No.1. On this basis, it was submitted that respondent No. 2 was not justified in refusing to accompany the petitioners back to Kabul on the excuse that the conditions there were not suitable. The counsel for the petitioners submitted that if the best interests of the children were to be taken into consideration, it was necessary for the children to be taken to Kabul in Afghanistan because the financial condition of the petitioners is far better than that of respondent No. 2. It was emphasized that respondent No.2 along with the children is living with her brother and parents in a single room at Kalyan, which demonstrates that the children have hardly any opportunity to develop their personality.

7. The learned counsel for the petitioners placed reliance on judgment of the Hon'ble Supreme Court in the case of ***Yashita Sahu Vs. The State of Rajasthan***, reported in ***(2020) 3 SCC 67***. By placing reliance on various paragraphs of the said judgment, learned counsel of the petitioners submitted that it was in the best interest of the children in the present case that they be permitted to be taken to Kabul in Afghanistan where the financial, educational and other needs would be taken care of in a far better manner than in India where respondent No.2 has no source of income and she is completely dependent on her brother, who is himself not financially sound. It was also brought to the notice of this court that during the pendency of the Writ Petition, the father of respondent No.2 i.e. respondent No.4 herein, had died and that this factor also needs to be considered while deciding the present Writ Petition.

8. On the other hand, Mr.Uzair Kazi, learned counsel appearing for the contesting respondent Nos.2 to 5, submitted that in Mohammedan Law the mother of the children had the paramount right of custody of the children, particularly when their father had died. It was submitted that petitioner No. 1 is the

grandmother while petitioner No. 2 is the paternal aunt of the children and they have no right of custody of the children. It was submitted that if the petitioners wanted their right to be tested, they could institute appropriate proceedings for custody of the children under the provisions of the Guardians and Wards Act, 1890. It was submitted that the custody of the children with their mother i.e. respondent No.2 was absolutely legal and proper, thereby demonstrating that the present Writ Petition seeking a writ of habeas corpus is not maintainable. As regards financial condition of respondent No.2, it was submitted that the bank statement was placed on record and it was also sufficiently demonstrated with appropriate material on record that the brother of respondent No.2 was taking care and he is ready to take her care and that of her children. It was further submitted that when the husband of respondent No.2 had died in such unfortunate circumstances, she was justified in being anxious and apprehensive about returning back to the country where violence and danger to life are constant companions.

9. Learned Counsel further submitted that the future of the children was certainly in India as the two elder sons who were

eligible for school, were already attending school and the younger ones would also be admitted to school when they become eligible. It was submitted that none of the male members from the family of the petitioners had come forward to support the prayers made in the Writ Petition and that in the facts and circumstances of the present case, the petitioners had failed to make out their case for grant of prayers made in the Writ Petition. Insofar as reliance placed on the judgment of *Yashita Sahu Vs. The State of Rajasthan* (*supra*) was concerned, the learned counsel for respondent No.2 sought to distinguish the same by highlighting the fact that in the said case the father of the children was very much alive and a proceeding for custody had been initiated by the father in the foreign Court wherein an order of custody was operating in his favour.

10. In the present case, the husband of respondent No.2 was killed in bombardment by government planes and the petitioner had to leave Afghanistan with the children for her own and their safety. Apart from this, learned counsel for respondent No.2 relied upon judgment of the Hon'ble Supreme Court in the case of *Nithya Anand Raghavan Vs. State (NCT of Delhi)*, reported in

(2017) 8 SCC 454, wherein it has been laid down that the principle of comity of courts and all other aspects must yield to the welfare of the children. In fact, it has been laid down that the welfare of the children is of paramount consideration and that the Court must concentrate upon the same while deciding such cases. The learned counsel for respondent No.2 submitted that in the facts and circumstances of the present case, the best interest of the children lay in their continuing to reside with their mother in India and that therefore, the Writ Petition deserved to be dismissed. It was submitted that respondent No.2 was not averse to visitation rights being granted to the petitioners and that she would abide by directions given by this Court in that regard.

11. We have heard the learned counsel for the rival parties and perused the material on record. The facts of the present case show that respondent No.2 and the son of petitioner No.1 got married in India in July 2010 and that respondent No.2 accompanied her husband to live in Kabul, Afghanistan. It is also a fact that the four sons born out of the wedlock hold Afghanistan passports. But, the crucial fact in the present case is that the husband of respondent No.2 and the father of the children

admittedly died a violent death as a result of bombardment by Government planes against terrorists in Afghanistan. In fact, respondent No.2 was pregnant with the fourth child when the said unfortunate incident took place. It is not difficult to imagine the mental state of respondent No.2 when she suffered such a shocking event in her life. It is an admitted position that after the death of her husband in such unfortunate circumstances and after the birth of the fourth son, in February 2018, the respondent No.2 came to India with her four sons. She has been living in Kalyan near Mumbai, India, with her brother and parents since then. The material on record also shows that the eldest son is attending school in first standard and the second son is in Kindergarten. The third and fourth sons are yet to attain the age of eligibility for school admission. The respondent No.2 is living with her four children and according to her, she is striving to give them the best that she can.

12. Much emphasis has been placed on behalf of the petitioners on the alleged poor financial condition of respondent No.2, her brother and parents. It has been vehemently submitted that for proper development of the children, they need to be in

Kabul, Afghanistan, where the petitioners claim to have a huge house with enough resources to take care of the needs of the children. It has been submitted that the petitioners do not wish to take the children away from their mother and that therefore, they want respondent No.2 along with the children to accompany them to Kabul, so that all the financial and emotional needs of the children can be taken care of. The manner in which submissions have been made before this Court shows that the rival parties claim that the interest of the children would be best served if their respective claims are accepted. On the one hand the petitioners claim that the needs of the children can be taken care of only in Kabul, Afghanistan, while on the other hand respondent No.2 has claimed that the children have no future in Afghanistan for the reason that it is a war-torn country and that there is constant threat of violence. According to respondent No.2, the very survival of the children would be at stake if they are sent with the petitioners to Kabul. The brothers of the husband of Respondent No.2, except one, are residing in United States of America. Petitioner No.1 is an old lady aged about 79 years. These are also relevant factors in the present case.

13. Before considering the rival claims of the parties, it would be appropriate to refer to the position of law that has developed in this regard in our jurisprudence. Such cases involving claims by rival parties have been deliberated upon in various cases and the contours of law have now become fairly clear. In the case of the ***Nithya Anand Raghavan Vs. State (NCT of Delhi)*** (*supra*), the Hon'ble Supreme Court took into consideration various earlier judgments and it was laid down as follows:

“40. *The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on “Civil Aspects of International Child Abduction”. As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child’s welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she*

has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign Court if any as only one of the factors and not get fixated therewith. In either situation – be it a summary inquiry or an elaborate inquiry - the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition."

"42. *The consistent view of this Court is that if the child has been brought within India, the Courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the Court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be*

harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the Court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign Court. In an elaborate inquiry, the Court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State.”

14. The said position of law has been reiterated in subsequent judgments also. Therefore, it becomes clear that even if the principles of comity of courts, citizenship of minor children and other such aspects are relevant, all of them must yield to the best interest and welfare of the children. Thus, the best interest and welfare of children is of paramount consideration in such cases. As to what would be in the best interest and welfare of children would depend on the facts and circumstances of each

individual case. Even in the case of ***Yashita Sahu Vs. The State of Rajasthan*** (*supra*), upon which the learned counsel for the petitioners placed much emphasis, the aforesaid position of law laid down by the Hon'ble Supreme Court in the case of ***Nithya Anand Raghavan Vs. State (NCT of Delhi)*** (*supra*), was reiterated. It was in the facts of the said case, where an order regarding custody existed in favour of the father of the child and he had placed a detailed affidavit before the Court as to the manner in which he would be taking care of the child and the mother, that the Court passed its order directing the child to be taken back to the jurisdiction of the foreign Court.

15. In the present case, the father of the children is already dead and he admittedly died in most unfortunate circumstances. In the said case of ***Yashita Sahu Vs. The State of Rajasthan*** (*supra*), not only was the father alive, but he intended to take the child to the United States of America and it is recorded in the said judgment that the facilities available in the said country would certainly provide better education, social security etc. to the child. In the present case, the petitioners are Afghan citizens and they are claiming that they are entitled to take the children with them

to Afghanistan. It is also a matter of record that Afghanistan has been a war-torn country for the past few years, which has had its own impact on the socio-political conditions in the said country. In terms of such sociopolitical conditions, the situation in India is certainly different and better. We are also of the opinion that sending the children to Afghanistan has the likelihood of causing physical and psychological harm to them, which is a factor of great significance as held in the above quoted judgment of the Hon'ble Supreme Court in the case of *Nithya Anand Raghavan Vs. State (NCT of Delhi)*.

16. It is also relevant that the children have been in India since February 2018 and that the present writ petition was filed by the petitioners after 2 years in the year 2020. The children have developed roots in this country. The two elder sons of respondent No.2 are already attending school here and they are living with their maternal uncle and maternal grandmother. We also had an occasion to interact with respondent No.2 and the children in chambers on 12.03.2021, when the first and the second sons, who are school going children, expressed their desire to live in India with their mother. The third and fourth sons are too young to say

anything much in this regard. Nonetheless, they looked happy in the company of their siblings. All the children were well dressed and in healthy condition. The respondent No.2 also clearly stated that she desired to stay in India with her brother and her children.

17. Thus, it cannot be said that only because the petitioners claim that they are financially better off as compared to respondent No.2 and her brother, the best interest of the children will be in permitting them to be taken to Kabul in Afghanistan. In the facts and circumstances of the present case, we are of the opinion that the best interests and welfare of the children would be in their living with their own mother in India. The learned counsel for respondent No.2 has emphasized upon the position in Muslim Law to the effect that the mother has the paramount right to custody of her children, but that is not the only factor we are concerned with and applying the aforementioned position of law, we are of the opinion that on the test of best interest and welfare of the children, it would be appropriate that they continue in the custody of their mother i.e. respondent No.2. In any case, the custody of the children with their mother is neither illegal nor improper and

therefore, we are not inclined to issue a writ of habeas corpus as prayed by the petitioners.

18. At the same time, we are of the opinion that petitioner No.1, being the grandmother of the children and petitioner No.2, being their maternal aunt, they certainly have a right to continue their association with the children and that they deserve to be granted visitation rights. In this regard we propose to give appropriate directions.

19. In view of the above, the Writ Petition is dismissed. However, the petitioners would be at liberty to visit the children whenever they come to India. The respondent No.2 is directed to ensure that when the petitioners visit India and they desire to meet the children, she will ensure that arrangements are made for the children to meet the petitioners. The petitioners shall inform respondent No.2 in advance as to when they would be visiting India for meeting the children and respondent No.2 shall ensure that the children and the petitioners spend time with each other. It is also directed that respondent No.2 shall permit the petitioners to interact with the children through videoconferencing and such

other online video and audio facility, so that the association of the petitioners with the children continues. In this regard respondent No.2 is directed to ensure that the petitioners, if they so desire, can interact with the children on Saturdays and Sundays for at least half an hour between 4 PM to 6 PM. The petitioners and respondent No.2 would be at liberty to mutually decide further interaction and association between the petitioners and the children, as may be convenient to them.

20. Needless to say, the observations made in this judgement are limited for the purpose of deciding this Writ Petition only and shall be considered as independent to avail of appropriate proceedings as available in law for the custody.

21. The Writ Petition stands dismissed with the aforesaid observations and directions.

(MANISH PITALE, J.)

(S.S.SHINDE, J.)