

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

78 CRIMINAL WRIT PETITION NO.957 OF 2022

SUVARNA W/O NILESH JAGDALE
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

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Advocate for Petitioner : Mr. Zia Ul Mustafa
APP for respondent / State : Mr. R. V. Dasalkar
Advocate for respondent No.6 : Mr. S. B. Khan
Advocate for respondent nos. 7 to 10 : Mr. G. J. Kore

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CORAM : SMT. VIBHA KANKANWADI
AND
RAJESH S. PATIL, JJ.

DATE : AUGUST 17, 2022

PER COURT : -

1. While invoking the constitutional powers of this Court under Article 226 of the Constitution of India, the petitioner has prayed for issuance of writ of habeas corpus against the respondents for the production of her minor daughter aged 2½ years before this Court and to hand over the custody of the child to her.

2. What is not in dispute is that the petitioner got married to respondent no. 6 and the child was born on 25.11.2019. The petitioner has alleged that she was ill-treated by respondent nos. 6 to 10 and was forced to leave the house along with the
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minor daughter on 10.12.2021. She is residing with her parents at Shahada. The petitioner has contended that the respondent no. 6 has forcibly taken the daughter with him by giving threats on 11.12.2021 and, therefore, she had approached the Magistrate's Court by filing proceedings under Section 97 of the Code of Criminal Procedure seeking custody of the daughter. That application was filed on 13.12.2021, however, it came to be rejected. Thereafter, she has filed proceedings under the Domestic Violence Act before the Judicial Magistrate First Class, Shahada and also the application for the custody of the minor daughter under the provisions of the said Act. That application came to be allowed on 10.03.2022, however, according to the petitioner though the attempts were made, the respondent no. 6 has not handed over the custody of the child to her and even after she approached the learned Judicial Magistrate First Class once again for implementation of the order passed by him, it is stated that it has been avoided on one or the other pretext and the other respondents have even not conveyed the whereabouts of the respondent no. 6 and the child. It is the petitioner's contention that she started hunger strike in front of the office of learned Collector, Nashik and then upon the assurances given by the Police Officers, she had to call off her hunger strike. The petitioner contends that the respondent no. 6 and his family members are deliberately avoiding even to attend the matter before the JMFC, Shahada and all her efforts to get the custody of the child have failed. Hence, she has approached this Court.

3. By order dated 02.08.2022, notice was issued. Further, though the matter was on Board on 10.08.2022, the child was produced before this Court and the child was along with respondent no. 6 and 8. However, since the date that was given for appearance in view of the order dated 02.08.2022 was 17.08.2022, the matter was entertained and the custody of the child was continued with respondent no. 6 and 8 till today.

4. Today the child has been brought by respondent no. 6 before this Court.

5. Heard Mr. Zia Ul Mustafa, learned advocate for the petitioner, Mr. R. V. Dasalkar, learned APP for respondent/State and Mr. S. B. Khan, learned advocate for respondent no. 6.

6. The learned advocate appearing for respondent no. 6 has tried to raise many points. The first and foremost was to refer the matter for mediation, however, learned advocate for the petitioner is objecting to the same in view of the fact that certain messages have been exchanged stating to be giving the threats to the life. Secondly, the point that has been raised is that the application filed under Section 97 of the Cr.P.C. by the petitioner was rejected and that came to be allowed under Section 21 of the Domestic Violence Act, which can be said to be temporary and the respondent no. 6 has challenged the said order by filing Criminal Application No. 7/2022 before the learned Addl. Sessions Judge, Shahada. However, it has been pointed out by the learned counsel

appearing for the petitioner that the application for temporary stay of the order/execution of the order passed by the learned JMFC, Shahada, under Domestic Violence Act was rejected by the learned Addl. Sessions Judge, Shahada, Dist. Nandurbar, on 12.05.2022. It was then submitted on behalf of respondent no. 6 that he had approached this Court by way of revision, however, it has not been circulated. Further point that has been tried to be submitted that the child is living without the mother since November-2021 and now the child is unable to stay without the father and the custody of father cannot be said to be illegal.

7. As aforesaid, since the petitioner has not shown willingness we cannot refer the matter for mediation at this stage. Secondly, there was no proper explanation as to why the revision has not been got circulated by the respondent no. 6 before this Court and, therefore, the position as on today stands is that there is no stay to the order passed below Exh. 5 in Criminal Application No. 658/2021, which was the application under Section 21 of the Domestic Violence Act, which came to be allowed by the learned Magistrate on 10.03.2022. Since the proper explanation is not coming forward as to why the said order is not obeyed and as aforesaid there is no stay to the said order, the custody of the child with respondent no. 6 beyond 10.03.2022 will have to be taken as illegal.

8. Section 21 of the Domestic Violence Act empowers a Judicial Magistrate First Class to pass an order in respect of

temporary custody of the child. Under such circumstance, taking into consideration the fact that the age of the girl is 2½ years as on today and when the order was passed by the learned Magistrate, it was less than that, as well as, the fact that as per Section 6(a) of the Hindu Minority and Guardianship Act, 1956 the custody of the child below age of 5 years should be ordinarily be with the mother and the said mandate of the legislature will have to be honoured by the Courts of Law. It appears that the learned Magistrate has passed the said order directing the respondents to hand over the temporary custody of the child to the petitioner.

9. Under such circumstances, unless there would have been a stay to the said order respondent no. 6 could not have justified in keeping the custody of the child with him. Orders passed by the Courts of Law should be obeyed by the citizens and, therefore, this is a fit case where we should use our constitutional powers under Article 226 of the Constitution of India and, therefore, we direct the respondent no. 6 to hand over the custody o the child immediately to the petitioner – mother. The petition therefore stands disposed of in terms of prayer clause ‘B’.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

LATER ON :-

10. It appears that, though the order was passed before the recess, the implementation was not done and, therefore, at 02:54

p.m., the matter was again called out and the respondent no. 6 was directed to hand over the child to the petitioner. He was maintaining that the girl should be kept with him and on his behalf, the learned advocate representing him made a statement that it is requested that respondent no. 6 be allowed to have visitation rights. First of all, it cannot be considered in a writ of habeas corpus. Secondly, what we had observed in the morning as well as in the afternoon is the reluctance of the respondent no. 6 and also that the threatening words those were used by him.

11. Under such circumstances, we cannot even consider that prayer but we still give liberty to the respondent no. 6 that if at all he wants to have visitation rights, he may pray it at any appropriate proceedings which are pending before the Magistrate or even in the revision before this Court. Now the custody of the girl has been given to the petitioner in our presence. These observations are required to be made even after the disposal of the writ petition in view of the aforesaid constrained circumstances.

12. As the learned advocate for the petitioner is requesting for the safe journey of the petitioner with the child, the respondent no. 1 is directed to give escort or necessary protection till she reaches her house with the child.

13. Authenticate copy of this order be given to the advocates appearing for the respective parties to act upon.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE