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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 709 OF 2022

Mr. Deepak S/o. Narayan Malani

Aged about 35 years,
Occu. Service, R/o.629,
W. Belden Avenur, Chicago,
Illinois Indian National.

.. Petitioner

Versus

1. State of Maharashtra

Through Police Commissioner
Mumbai, Office at D.N. Road,
Fort, Mumbai.

2. Police Station Officer,

Bandra Kurla Police Station,
Bandra Kurla Complex Road,
Mumbai.

3. Mrs. Isha w/o. Deepak Malani,

Aged about 35 yrs, Occu. Business,
R/o. 402 Signia Isles, G Block,
Bandra East, Mumbai, India.

.. Respondents

Mrs. Sangeeta S. Salvi, Advocate for Petitioner.

Mrs. J.S. Lohakare, APP for Respondent – State.

Mr. Rizwan Merchant a/w. Mr. Sagar Shete and Ms. Samrudhi Salavi,
Advocate for Respondent No.3.

CORAM	: A.S. GADKARI & MILIND N. JADHAV, JJ.
DATE	: 18th November 2022.

JUDGMENT (PER : MILIND N. JADHAV, J.)

. By the present Writ Petition, Petitioner has prayed for the following reliefs:-

“a. That the Writ of Habeas Corpus or any other appropriate writ may kindly be issued and order and direction to the Respondent no. 1, 2 and 3 to produce the Petitioner’s daughter Tiana and minor son Shrey before this Hon’ble court and handover her custody to the Petitioner in accordance with the judgement dated 28.9.2021 passed by the learned Cook County At Illionis (ANNEXURE : F);

b. That in the alternative to the prayer clause (a), the Writ of Habeas Corpus or any other appropriate writ may kindly be issued and order and direction to the Respondent no. 1, 2 and 3 to produce the Petitioner’s daughter Tiana and minor son Shrey along with their Passport before this Hon’ble court and the Respondent No. 3 be directed to visit US along with the daughter Tiana and minor son Shrey and their passport for attending the proceedings pending before the Hon’ble Court, in Illinois;

c. The Respondent No. 3 be held guilty for abducting the daughter Tiana and minor son Shrey and illegally removing her from the jurisdiction of the Hon’ble U.S. Court inspite of the orders of the Court and be punished with imprisonment.”

2. Petitioner is father of Tiana (daughter) aged 8 years and Shrey (son) aged 4 years. Respondent No.3 is their mother and Petitioner’s wife.

3. In prayer clause (a) Writ of habeas corpus is prayed for to produce the children before this Court and further relief is prayed against Respondents to handover the children to the Petitioner in accordance with the judgment and order dated 28.9.2021 passed by the Cook Country Court at Illionis (United States).

4. Learned Advocate for Petitioner began by submitting that both children are at present in the custody of Respondent No.3 i.e. their mother in Hyderabad. This is confirmed by the learned APP and Advocate Mr. Merchant. Hence, the corpus is found and its

whereabouts are known to the Petitioner. She submitted that Petitioner is at present in the United States of America (USA) and is giving instruction to her from there. She has urged the Court to direct Respondents to present the two children in Court and handover their custody to the Petitioner in execution of the judgment and order dated 28.9.2021 passed by the Cook County Court at Illinois (United States). In effect, she has sought the execution of the judgment passed by the Cook County Court by the present Writ Petition under Article 226 of the Constitution of India.

5. Prayer clause (c) is the same as the later part of prayer clause (a). Petitioner has urged that Respondent No.3 should be held accountable for abduction and illegally removing the daughter from the jurisdiction of Cook County Court and be punished with imprisonment.

6. Prayer clause (b) is in the alternative to prayer clause (a) wherein Petitioner seeks direction to Respondents to produce the children before this Court alongwith their passports and a further direction to Respondent No.3 to visit the United States alongwith the children for attending the pending Court proceedings in Illinois. It may be pertinent to note that the proceedings before the Court in Illinois are concluded.

7. At the outset, we may record that, once the whereabouts of

the two children are known to the Petitioner, the relief of habeas corpus stands worked out. Learned Advocate for Respondent No.3 submitted that the children are in safe custody of Respondent No.3 and Petitioner has complete knowledge of the same in view of prior Family Court proceedings as well as the Custody Petition being heard by the Family Court, Hyderabad. Hence, we asked the learned Advocate for Petitioner to argue on the maintainability of the Writ Petition seeking the desired reliefs as prayed for to put it simply. We called upon the Advocate of Petitioner to address us as to whether in the present Writ Petition which seeks a writ of habeas corpus, once the whereabouts and well being of the two children are known, can this Court or does this Court have the jurisdiction to execute the order dated 28.09.2021 passed by the Cook County Court at Illionis (USA). Instead of answering the question on maintainability, learned Advocate has argued that on reading the judgment passed by the Supreme Court in Civil Appeal No(s).3135-3136 of 2019 arising out of SLP (Civil) No(s).15892-15893 of 2018 in the case of ***Lahari Sakhamuri Vs. Sobhan Kodali***, this Court certainly has the jurisdiction to take cognizance of the present case and grant the desired reliefs as the case before the Supreme Court was also on identical facts and since the Supreme Court had heard and passed order in that case, this Court should consider the habeas corpus petition and grant the desired reliefs.

8. Before we proceed further, we may quote paragraph No.4 of the above decision of the Supreme Court which reads thus:-

“4. Before this Court may proceed to examine the question, there are plentitude of judgments of this Court but still each case has to be decided on its own facts and circumstances. Obviously, the ultimate goal which has to be kept in mind is the best interest of the child which is of utmost importance and of a paramount consideration.”

(emphasis supplied)

8.1. We may hasten to add that barring a few facts which are similar, we are unable to accept the submission of the Advocate for Petitioner that facts in that case are similar to the facts in the present case. Undoubtedly and admittedly both children in the present case are minor. They are with their mother in her safe care and custody which is of paramount importance today.

9. Learned Advocate for Petitioner has reiterated that, this Court has the power to execute the decree passed by the Cook County Court (USA). We therefore asked the learned Advocate as to what would be the appropriate execution proceedings in that case and in which Court should the proceedings be adopted / filed. However she has not shown us any provision of law as to how can we execute a foreign judgment in a Writ Petition in our extraordinary jurisdiction, save and except to repeat that since the Supreme Court has passed the order in the case of *Lahari Sakhamuri (supra)*, we should also embark upon the same exercise and provide relief to the Petitioner.

10. We are at pains to record that learned Advocate for Petitioner has not only failed to address the question put to her on maintainability and after taking instructions on phone from the Petitioner in the US has called upon us to deliver a judgment.

11. Both learned Advocates appearing for the parties agree that in so far as relief of habeas corpus is concerned, the same does not remain pending any further and stands complied with. We may hasten to add that the age of the children is such that their best interest would be served only in the custody of their mother (Respondent No.3).

12. Learned Advocate for Respondent No.3 has placed on record a copy of order dated 25.05.2021 passed by the Additional Family Court, Hyderabad in I.A.No. 209 of 2021 in O.P. No.795 of 2021. Paragraph Nos.4 and 5 of the said order are relevant in the context of the Petitioner's submission. They read thus:

"4) The copy of the Divorce petition filed by the respondent against the petitioner, in the Circuit Court of Cook County, Illinois, along with the cover sheet of the said case proceedings, prima-facie show that the respondent filed it in November 2020, seeking dissolution of marriage between the parties, sole allocation of decision making responsibility in respect of minor children, child support U/Sec. 505 of IMDMA(750 ILCS 5/505) and other reliefs.

5) It further prima-facie show that no relief for immediate custody of the minor children was sought by the respondent nor any such interim relief was granted by the said court. The petitioner prima-facie submitted that there are no directions from the said court, in respect of the custody of shared parental responsibility etc."

12.1. Next we would like to reproduce paragraph Nos.6 to 10 of the said order which are also relevant in the context of custody, welfare and interest of the two children. They read thus:-

“6) As seen from the record, the children are tender aged and prima facie living with the petitioner since July 2020, in India. The petitioner prima facie submits on affidavit, that the respondent is threatening and demanding for custody of the children to him. The respondent is resident of USA.

7) In these circumstances, the minor children shall not be disturbed from their present ordinary residence, during the present COVID situation, without following the due process of law.

8) Hence issue urgent notice to the respondent to explain why he should not be directed to, not to interfere in the custody of the minor children with the petitioner during present situation, and to inform this court, if there are any specific directions from any competent foreign court, given prior to this date, in respect of custody or residence of the minor children of the parties.

9) The respondent can make proper communication to the court email i.e., hyd.afcccc-ts@indiancourts.nic.in. In the mean while, the custody of the minor children with the petitioner, shall not be disturbed, without following due process of law and without intimation to this court.”

13. The cause title of the proceeding before the Family Court shows the address of Petitioner at Borivali (West), Mumbai which is c/o Mohan Narayan Malani. It appears that Mohan is the brother of Petitioner. The date of this order is relevant and requires to be noted. It is passed on 25.05.2021. Admittedly, Petitioner in the meantime was in USA. In the present Writ Petition, Petitioner is seeking execution of the order passed by the Cook County Court at Illinois which is dated 28.09.2021. This order has been passed subsequent to

the order dated 25.05.2021 passed by the Family Court at Hyderabad. Paragraph No.9 clearly records that in the mean while, the custody of the minor children with the petitioner, shall not be disturbed, without following due process of law and without intimation to this Court. Perusal of the said order shows that the order passed by the Cook County Court (USA) is the final order wherein the interest of Respondent No.3 and the two children is represented by Guardian *ad litem* Advocate who was appointed by the County Court in the absence of Respondent No.3. It is stated in the said order that both Petitioner and Respondent No.3 are married in India and their marriage is registered in India.

14. That apart, it is seen that proceedings under Section 498-A IPC are also filed by Respondent No.3 against the Petitioner in India. That on internal page of the said judgment, clause 4 and 5 read as under:-

“4. On November 30, 2020, Deepak filed an Emergency Petition to Return of the Minor Children to Illinois. That filing resulted in the May 18, 2021 Order to Return the Minor Children to Illinois, which order is incorporated by reference herein.

5. Despite Isha’s active participation in this Illinois divorce matter, she simultaneously, and without notice to this Court, opened a 489A case (aka Dowry Case) against Deepak in India in May 2021.”

15. We once again asked the learned Advocate for Petitioner to argue on the maintainability and to highlight the provisions of law

under which a judgment passed by the foreign Court can be executed and the forum for its execution. She has miserably failed to address us on the above applicable provisions and answer the query put by the Court.

16. Reading of the judgment of the County Court (USA) shows that several directions have been given, *inter alia*, apart from custody of the two children to both parties. Hence, seeking execution of only one direction i.e. custody of the two children under the garb of filing a habeas corpus Petition is unknown to us. We asked the learned Advocate to explain the same to us, but she continued to harp only on seeking custody. Though the amplitude of a Writ Petition filed under article 226 of the Constitution of India and styled as Criminal Writ Petition may be very wide, however the fundamental relief of identifying the location of corpus i.e. the two children has been satisfied in the present case. Petitioner has sought further directions for custody, imprisonment etc. as seen. We therefore do not think that under the garb of filing a petition of habeas corpus, we can execute the foreign judgment (Exh. F) only in respect of giving custody of the two minor children to the Petitioner at the behest of Petitioner. We do not comment any further and leave it at that.

17. We find that the Petition in so far as the whereabouts of the two children are concerned has worked itself out. Reading of the

record of the case indicates that Respondent No.3 being the mother of the two children does have the financial sufficiency to take care of the two children at present. We may add that the proceedings for custody/divorce, dissolution of marriage and 498-A are pending in India whereas on the other hand there is the order of the County Court of dissolving the marriage of the parties. Admittedly, the issue is not merely related to the custody of the two children, but is extremely comprehensive about consideration of the welfare and interest of the two minor children. We note that we are constrained to make the above observation as the Advocate of Petitioner has not addressed us on maintainability of the Petition and has only harped on the issue of custody of the two children to be handed over to the Petitioner. This Petition was argued in the first session before the recesses at length by the Advocate for Petitioner. She thereafter, sought time to take instructions on phone from the Petitioner who is in the USA and in the afternoon session she has called upon us to deliver the judgment.

18. Substantial time of the Court was taken up by this case without answering the Court's query and questions on maintainability. Hence, we are constrained to impose exemplary costs on Petitioner for continuing with the present Petition for seeking custody of the two children in a habeas corpus Petition and calling upon us to execute the

County Court order to the extent of custody only when the whereabouts of the children was known to the Petitioner.

19. Hence, we direct the Petitioner to pay costs of Rs.5,00,000/- to the Kirtikar Law Library, High Court, Mumbai within a period of two weeks from the date of uploading of the present judgment.

If the costs are not paid by the Petitioner as directed, the same be recovered as arrears of land revenue by the Collector, Mumbai from the Petitioner in accordance with law.

20. With the above direction, Writ Petition stands dismissed.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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