

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

CRIMINAL WRIT PETITION NO. 1809 OF 2022

Ankita Siddharth Gaur
Nee : Ankita Singh

... Petitioner

V/s.

The State of Maharashtra and Ors.

... Respondents

Mr. Siddhesh Bhole i/b. SSB Legal & Advisory for the Petitioner
Mr. Rajiv Patil, Senior Advocate i/b. Mr. N.P. Deshpande with Ms.
Kanchan Pathak for Respondent No.2.
Ms. M.H. Mhatre, APP for the Respondent - State

***CORAM : NITIN JAMDAR &
N.R. BORKAR, JJ.***

DATE : 25 AUGUST 2022

P.C. :-

By this Petition, the Petitioner is seeking a writ of habeas corpus for a direction to the Respondent No.2 to produce the corpus and handover the custody of the corpus to the Petitioner.

2. The corpus is a boy, named, Shaurya. The Petitioner is his mother and the Respondent No.2 is his father. The Petitioner is residing at Dubai (UAE) and the Respondent No.2 is residing at Pune.

3. As regard the maintainability of a petition of a habeas corpus where the custody of the child is sought by either of the parents, the learned Counsel for the Petitioner has relied upon the decisions of the Apex Court in the cases of *Rajeshwari Chandrasekar Ganesh v/s. The State of Tamil Nadu and Ors.*¹, *Vasudha Sethi and Ors. v/s. Kiran V. Bhaskar and Anr.*², *Tejaswini Gaud and Ors. v/s. Shekhar Jagdish Prasad Tewari and Ors.*³, *Lahari Sakhamuri v/s. Sobhan Kodali*⁴, *Prateek Gupta v/s. Shilpi Gupta and Ors.*⁵, *Nityhya Anand Raghavan v/s. State (NCT of Delhi) and Anr.*⁶, *Vivek Singh v/s. Romani Singh*⁷, *Surya Vadanam v/s. State of Tamil Nadu*⁸, *Shilpa Aggarwal v/s. Aviral Mittal*⁹, *V. Ravi Chandran v/s. Union of India and Ors.*¹⁰, *Surinder Kaur Sandhu v/s. Harbax Singh Sandhu*¹¹ and *Mrs. Elizabeth Dinshaw v/s. Arvand M. Dinshaw and Anr.*¹².

4. It is settled that the writ of habeas corpus in the matter of custody of the child by one parent against another is maintainable. However, this remedy is not to be exercised in every dispute over custody of the minor. In the case of *Tejaswini Gaud*, the Hon'ble Supreme Court has observed thus :

1 WP (Criminal) No. 402 of 2021

2 (2022) SCC OnLine SC 43

3 (2019) 7 SCC 42

4 (2019) 7 SCC 311

5 (2018) 2 SCC 309

6 (2017) 8 SCC 454

7 (2017) 3 SCC 231

8 (2015) 5 SCC 450

9 (2010) 1 SCC 591

10 (2010) 1 SCC 174

11 (1984) 3 SCC 698

12 (1987) 1 SCC 42

“ In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.”

(emphasis supplied)

Therefore, the issue that would arise is whether respective cases of the parties would require a detailed evidence or it can be decided on mere affidavits on the issue of welfare of the minor, or more appropriately be decided by the competent court under the relevant laws.

5. The Respondent No.2 has filed an application for custody of the child bearing P.D. No. 67 of 2021 in the Family Court at Pune on 10 November 2021. In this application, the

Respondent No.2 has prayed that he is entitled to the permanent custody of the child Shaurya and the Petitioner be restrained from taking custody of the child otherwise than in due process of law. In this application, the Petitioner had moved an application for interim access. The Family Court, Pune permitted the Petitioner to have video/ audio calls access on assigned dates.

6. We have perused the application filed by the Respondent No.2 in the Family Court at Pune. There is no reply filed to this petition. However, in this petition, the parties have filed their pleadings and their respective cases.

7. According to the Petitioner, the Petitioner was residing with the Respondent No.2 in Dubai with their son since 26 October 2021. There were differences between them. Respondent No.2 came to India with the child. The Petitioner approached the Court at Dubai seeking custody of their minor son and on 11 November 2021, the Court at Dubai directed the custody of the child to the Petitioner -mother. The Respondent No. 2 did not comply with the order of the Dubai Court on the ground that the Respondent No.2 has taken away the child from the Petitioner and has been kept in illegal custody, the present petition is filed.

8. The Respondent No.2, in the reply affidavit filed with the petition and in the application in the Family Court, has put forth the case that the Respondent No.2 and the Petitioner got married on 25 January 2015 at Pune. Thereafter, they residing at Mumbai for 3 ½ years. From May 2018, the Respondent No.2 took a job in Dubai. Thereafter, the Respondent No.2 has made allegation that the Petitioner used to return back late at night and has alleged that she was having illicit affair with the person named. It is stated that the Petitioner has converted herself in Islam with an intention to marry the person named. According to the Respondent No.2, in these circumstances, the Respondent No.2 had to move his son Shaurya as he fears remarriage of the Petitioner and conversion, and consequent effect on his child. The Respondent No.2 has contended that the Petitioner approached the Dubai Court and had invoked sharia law, which the Court applied, but it is not applicable as the parties are governed by Hindu law. The Respondent No.2 stated that Shaurya is admitted in a reputed school in Pune and the Respondent No.2 has now settled in Pune and is staying with the family.

9. In the reply affidavit filed by the Respondent No.2, an affidavit of Mrs. Nikita Rahul Singh, that is, sister of the Petitioner, filed in the Family Court is annexed where she has supported the Respondent No.2, that is, her brother-in-law, stating that the

allegations made by the Respondent No.2 of illicit relationship of the Petitioner are correct. In the affidavit filed by the Respondent No.2 in the Family Court, he has placed the discussion with the wife of the person named on record.

10. Having considered these pleadings and rival contentions, we cannot outrightly reject the case of the Respondent No.2 and direct the custody of the child forthwith to be handed over to the Petitioner. The rival contentions as above would require evidence. If the allegations against the Petitioner made by the Respondent No.2 are correct, then harmful influence on the child cannot be ruled out. Currently, the child is studying in the school and is staying with his father and family. However, we do not intend to draw any final conclusions in this regard. We have referred to the above contentions to underscore the need for a detailed examination on evidence. We are informed that the Family Court has kept the matter for consideration on 12 September 2022.

11. We, therefore, deem it appropriate to let the Family Court at Pune decide the issue of custody of the child, which according to us, in this petition for habeas corpus, cannot be decided.

12. The Writ Petition is accordingly disposed of.

13. We make it clear that our observations are in the context of the non exercise of extraordinary jurisdiction of this Court and the application for custody filed by the Respondent No.2 or any application that the Petitioner files, would be decided on their own merits.

N.R. BORKAR, J.

NITIN JAMDAR, J.

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