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

**WRIT PETITION NO.5290 OF 2022
WITH
WRIT PETITION NO.11896 OF 2019**

Nadia Rashid

... Petitioner

V/s.

Shehzad Hemani

... Respondent

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Ms. Rebecca Gonsalves with Ms. Sarah Kapadia, Ms. Vasudha Chandwani and Ms. Arati Ranade i/by Ms. Veena Gowda for the petitioner.

Ms. Shaista Pathan with Ms. Pooja Shah i/by Neville Majra for the respondent.

CORAM : AMIT BORKAR, J.

DATED : JANUARY 19, 2023

P.C.:

1. The petitioner/mother has filed Writ Petition No.5290 of 2022 challenging orders dated 1st March 2021 and 16th February 2022 passed by the learned Family Court, Mumbai below Exhibits 135 and 139 respectively in Petition No.D-40/2015. Petitioner filed application below Exhibit 135 seeking a relief that the observations made by the Family Court at page 100 and 112 that “there is no issue of removal of child wrongfully and illegally” be deleted/struck off and she be permitted to put questions to the petitioner concerning the facts surrounding how the child was brought to India on 29th September 2016. Petitioner application

below Exhibit 139 seeking review of order dated 1st March 2021 rejecting application below Exhibit 133.

2. In Writ Petition No.11896 of 2019 the impugned order dated 10th October 2019 rejects request for production of documents as sought in paragraph 10(i), (ii) and (iii). The documents sought by the petitioner are as under:

- (i) All pages of the passport of the Petitioner with all endorsements, visas etc. from 2005 till date;
- (ii) All documents, including travel tickets, Indian VISA, official exit/emigration endorsement/stamp from the authorities of the Netherlands/exit point in EU on Insiya's travel documents, official entry/immigration endorsement/stamp from the authorities of India at the exit point into India on Insiya's travel documents, showing the travel of Insiya from the Netherlands to India in September 2016; and
- (iii) Documents to show the legality of Insiya's stay in India from September 2016 till date, including an Indian VISA.

3. The main reason which weighed with the trial Court for rejection of applications filed by the mother is that production of documents or questions asked in cross-examination as regards method of abduction of minor child from foreign country by adopting illegal means is not relevant for deciding the issues framed in the context custody of child proceedings.

4. The facts, as stated in the petition, relevant for adjudicating the said issues are stated as follows.

5. On 29th April 2011 the petitioner and respondent got married under the Special Marriage Act, 1954. On 6th March 2014 daughter, Insiya was born in Amsterdam, Netherlands. She got

citizenship of Netherlands by birth. In December 2014 petitioner/mother along with daughter returned to Amsterdam. On 6th April 2015 Insiya's Indian visa expired. On 23rd April 2015, petitioner filed an application seeking custody of minor daughter Insiya before the Noord Holland District Court, Netherlands. The respondent/father participated in the said proceedings and contested the same by filing reply. The father filed abduction case before the Hague District Court for custody of Insiya, which was rejected by order dated 6th July 2015. The said decision was confirmed by the Court of Appeals on 9th August 2015.

6. On 16th October 2015 father filed access application before the Noord-Holland District Court which permitted parental access to him and further directed him to hand over Insiya's passport to the petitioner/mother within five (5) days from 16th October 2015. He failed to hand-over Insiya's passport as directed. On 1st March 2016 the Noord-Holland District Court granted interim custody of Insiya to the petitioner/mother.

7. On 29th September 2016 Insiya was abducted from the custody of petitioner/mother at the behest of father from her parents' home in Netherlands. Case of abduction was registered by police. One kidnapper was arrested at the scene, two escaped with minor child Insiya. She was transported across the border to Germany and was thereafter brought to India.

8. On 10th November 2016, respondent/father filed an application before the Family Court seeking extension of custody of Insiya stating her to be in his custody from 29th September 2016.

On 20th December 2016 Insiya's passport was deposited with the Department of Civil Affairs of Municipality of Haarlemmermeer.

9. The Family Court framed issues in relation to custody and guardianship of minor daughter. The issues are as under:

- “1. Does the petitioner prove that the welfare of the minor daughter ‘Insiya’ is with him?
2. Whether the petitioner is entitled to get permanent custody of the minor daughter ‘Insiya’?
3. Whether the petitioner is entitled for declaration to be the legal guardian of the minor daughter ‘Insiya’?”

10. On 18th July 2017 Family Court passed an ex parte order continuing the interim custody of Insiya with the respondent/father till disposal of the petition.

11. The mother in October 2017 filed an application below Exhibit 29 challenging maintainability and jurisdiction of the Court and also seeking rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908.

12. This Court in Writ Petition No.61 of 2018 filed by mother directed the Family Court to decide the application for interim custody of minor within two (2) weeks and accordingly the Family Court by order dated 29th January 2018 directed return of Insiya to the petitioner/mother. On 13th April 2018 this Court set aside order dated 29th January 2018 in Writ Petition No.3367 of 2018, however, directed the Family Court to decide custody petition within one (1) year. While deciding the said petition, this Court in paragraph 25 observed thus:

“25. ...

The issue as to in what manner Insiya was brought to India, is of no significance since the parties in the petition before Family Court have independently instituted proceedings in furtherance of the Hague Convention of 1980 “Civil Aspects of International Child Abduction”. ...”

13. The Supreme Court in the special leave petition filed by the mother directed Family Court to try and dispose of the custody petition uninfluenced by the observations and findings of the High Court in order dated 29th January 2018 in Writ Petition No.3367 of 2018 . On 23rd July 2019, Family Court directed that the issue of jurisdiction shall be decided along with the main petition.

14. The respondent/father filed examination-in-chief by way of affidavit. On 26th September 2019, petitioner’s advocate filed an application below Exhibit 90 seeking production of documents concerning how the child was brought to India for stay in India and other documents. The Family Court by order dated 10th October 2019 partly allowed the said application rejecting documents sought in paragraph 10(i), (ii) and (iii). The said order is challenged in Writ Petition No.11896 of 2019.

15. The petitioner started cross-examination of the respondent/ husband. During the cross-examination, the Family Court refused to allow questions as to how child was brought to India. Application below Exhibit 135 seeking amendment of notes of evidence and permission to ask questions in relation to abduction of minor child was filed, which was rejected by the impugned order dated 1st March 2021. Hence the mother has filed present petition.

16. Today when the matter is called out for hearing, learned advocate for the respondent sought adjournment on the ground that Senior Advocate engaged in the matter is busy in other court. Ordinarily, adjournment is granted when the advocate on record is in personal difficulty. But adjournment cannot be granted on the ground of non availability of Senior Advocate. As rightly pointed out by the learned advocate for the petitioner, various orders passed by this Court during pendency of the petition show that the petition has been adjourned from time-to-time on various occasions. On 16th December 2022, learned advocate for the respondent requested for adjournment. At her request, the matter was adjourned to 10th January 2023. The matter was not shown on board on 10th January 2023. Therefore, it is circulated for today. In the morning session, learned advocate for the respondent sought adjournment on the ground of non-availability of Senior Advocate. Said request was rejected and petitions are placed for hearing in the afternoon session. In the afternoon session, learned advocate for the respondent submitted that Senior Advocate is busy in other court. In my opinion, virus of seeking adjournment has to be controlled. Seeking adjournment to suit as per schedule of Senior Advocate has adverse impact on schedule of court. Dates are assigned to each matter with a view to dispose off matter on that day or to pass some effective orders. Due to adverse impact of Covid pandemic large number of admission matters are pending. Everyday members of the bar complain about matters not reaching for admission or hearing. Therefore, an attempt is being made to dispose matters on the assigned date. Adjournment for next date

has an adverse effect on the matters assigned on the next date. Personal difficulty of advocate on record may, in the facts of the case, be a ground for adjournment, but seeking adjournment to suit Senior Advocate needs to be deprecated. Adjournment is not an indispensable right of an Advocate. Therefore, the request for adjournment was rejected. After refusing to adjourn matter, when the advocate for respondent was called upon to make oral submissions, she submitted that this court may pass order after recording her request to adjourn the matter for tomorrow. Such submission by the advocate cannot be countenanced as she has not stated as to why she cannot make submissions on merits of the matter. Hence, I have heard advocate for petitioner on merits.

17. Before entering into the validity of exercise of power by the Family Court, it needs to be noted that the Court of Amsterdam convicted respondent/father for abduction of minor daughter Insiya by observing as under:

“It is clear that the suspect, the father of Insiya, is primarily responsible for the kidnapping. He sought out people who could help plan and execute the kidnapping, commissioned it, and financed the entire operation.

The implementation of the professional kidnapping plan was violent and in any case unheard of in the Netherlands: three unknown men enter a house and kidnap a girl who is only two years old, at the request of her Indian father, who hired these men for this purpose. The kidnappers are prepared for the use of violence: one of the men is armed with a taser and tie-wraps and will act as a ‘doorstop’, with the purpose of letting the other two men (including the suspect) escape with the girl and kidnapping. There is also a violent confrontation in which – only the door stopper draws the short straw. But otherwise the plan succeeds completely: the

two men who take Insiya escape and together with another group of kidnappers they take her to the home of one of the kidnappers in Germany; from Germany Insiya is kidnapped and smuggled by the suspect to India, where she appears to be staying to this day.

The actions of the suspect

The suspect and his two-year-old daughter forcibly kidnapped so that he could take her to India and thereby also remove his daughter from the legal parental custody of her mother.

All in all, the suspect was guilty of two particularly serious crimes with great personal suffering as a result. A term of imprisonment of up to nine years may be imposed for the violent removal of a minor from legal parental authority. The circumstances under which the proven facts were committed justify a long unconditional prison sentence in the court's opinion.

Now that a situation in which an international child abduction can be regarded as more serious than in this case is difficult to imagine, the court considers the sentence to be appropriate. The court will therefore impose a prison sentence of nine years on the suspect for both proven facts.”

18. The respondent/father was convicted and sentenced for imprisonment of up to nine (9) years for violent removal of minor from the legal parental authority. The co-accused in the said case were convicted for prison terms of four (4) years and three (3) years by the Court in Netherlands.

19. In the light of aforesaid facts, the question is whether the conduct of the father of unauthorizedly abducting minor child from Netherlands to India has any bearing on the issue of welfare of the child, or not?

20. It is well settled that while considering welfare of a child

apart from physical comfort, moral and ethical values are paramount. The character of parents' plays important role in inculcating moral and ethical values in the child. The conduct of father sought to be brought on record by the mother in the form of documents and by way of putting questions in cross-examination as regards abduction of minor child will have reflection on the character of the husband. The observations are made by the Court in Netherlands while convicting the father holding that the father had hired professionals to kidnap minor child. There was violent confrontation. It is also observed that minor child was taken to Germany and thereafter smuggled to India. Such observations as regards the conduct of the father has material bearing on the character of the father. The observations made by the Court in Netherlands virtually holds that the father was part of organized crime to abduct the minor child. The material brought on record shows that visa of minor child has expired well before 29th September 2016. The said fact was noted by the communication dated 23rd February 2018 by Public Prosecution Office, District Prosecutor, Amsterdam.

21. There is another important aspect of the matter which trial court failed to consider is during journey of infant child (Insiya) from Netherlands to India via Germany, she might have have been exposed to life threatening incidents. Travel from Europe to India without visa carries risk of life for two years old infant. Whether father had exposed his two year old infant daughter to risk of life has material bearing in the context of welfare of child. Details of such travel of Insiya from Netherlands to India would demonstrate

as to whether father had exposed his two years old daughter possible dangerous situation.

22. The Family Court while rejecting request for production of documents mentioned in paragraph 10 (i), (ii) and (iii) held that such documents are not necessary considering welfare and interest of minor child. The questions asked to the respondent/father as regards journey of minor child from Amsterdam to India has been disallowed by the Family Court on specious ground that the said issue is not relevant for decision of custody of minor child. The Family Court observed that there is no issue of removal of child wrongfully and illegally by the father and, therefore, such questions are irrelevant.

23. While rejecting application below Exhibit 135, the Family Court relied on the observations in paragraph 25 quoted earlier to hold that said documents have no relevance to the issue involved. The review application filed by the petitioner relying on the order of the Apex Court clarifying that the Family Court shall decide the petition uninfluenced by the observations made in the order of this Court has not even been considered by the Family Court while rejecting the review application.

24. Therefore, in my opinion, the conduct of the husband/respondent in abducting the minor child possibly exposing her to life threatening situation has definite relevance on the character of father and welfare of minor. The details about manner of organised abduction of child through professional criminals shall have material bearing on the moral and ethical values of the

father. In my opinion, the cross-examination as regards the manner of abduction of minor child has definite bearing on the character of the father and, therefore, the impugned orders cannot be sustained.

25. Therefore, in my opinion, the Family Court was not justified in rejecting the application filed below Exhibit 90 filed for seeking documents in paragraphs 10 (i), (ii) and (iii) dated 10th October 2019; order dated 1st March 2021 rejecting application filed below Exhibit 135 seeking deletion of the observations at page 100 and 112 that '*there is no issue of removal of child wrongfully and illegally*'; and order dated 16th February 2022 rejecting application filed below Exhibit 139 seeking review of order dated 1st March 2021 passed below Exhibit 135.

26. For the aforesaid reasons, in my opinion, both the petitions deserve to be allowed.

27. Rule is made absolute in terms of prayer clauses (a) and (b) in Writ Petition No.11896 of 2019.

28. Rule is made absolute in terms of prayer clauses (a), (b) and (c) in Writ Petition No.5290 of 2022.

29. No costs.

(AMIT BORKAR, J.)