

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 900 OF 2021

Rohan S. Iyer ... Petitioner
V/s.
State of Maharashtra and Ors. ... Respondents

Ms. Trupti R. Shetty for petitioner

Dr. Uday P. Warunjikar a/w. Mr. Pankaj D. Purway for respondent nos.
2 to 4.

Mr. A.R. Kapadnis-APP for the State.

CORAM : SUNIL B. SHUKRE &
ABHAY S. WAGHWASE, J.J.

DATED : MARCH 15, 2023.

PC. :

. Heard.

2. This Court has already made a *prima facie* observation in the order dated 24th October 2022, that it is not even the case of the petitioner that the child is in unlawful custody of the respondents. This *prima facie* observation can turn itself into a finding when sufficient material is to be found for doing so by this Court which is in the own admission of the petitioner.

3. It is the case of the petitioner that deceased mother of the child had handed over custody of the child to her mother-in-law i.e. petitioner's mother and thereafter deceased mother of the child had committed suicide. These circumstances would clearly show that the

custody of the child held by the respondents cannot be said to be illegal or unlawful. It was handed over by the deceased mother of the child of her own volition. At least such custody cannot be stated to be an improper custody. Of course, as the father of the child and sole parent left, the petitioner would be a natural guardian for child, but, in order to invoke extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India, seeking issuance of Writ of Habeas Corpus, the petitioner would have to first establish that the custody held by the respondents is unlawful or improper, which has not been shown by the petitioner.

4. Learned counsel for the petitioner submits that now it is well settled law, that the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India can be invoked by the petitioner by filing a petition for writ of Habeas Corpus and the paramount consideration in such cases is of the welfare of the child. She relies upon the decisions of the Supreme Court in '*Tejaswini Gaud and Ors. vs Shekhar Jagdish Prasad Tewari and Ors.*¹ and '*Yashita Sahu vs. State of Rajasthan and Ors.*²

5. Shri Warunjikar, learned counsel for the respondents submits that even these cases refer to the requirement of illegal or improper nature of custody. He also submits that purpose of Habeas Corpus petition is to get immediate relief, but that purpose is now already over as this petition is pending for a period of about three years and in such a case, it would be appropriate that now the petitioner takes recourse to alternate remedy which is available under

1 (2019) 7 SCC cases 42

2 2020 (3) SCC cases 67

the frame work of family laws by approaching the Family Court.

6. No doubt, in the cases relied upon by the learned counsel for the petitioner it is stated as a principle of law that a writ of Habeas Corpus is maintainable if the child is in custody of another parent and in such a case paramount consideration is of welfare of the child, but, at the sometime, it has also been reiterated that the custody must be found to be wrongful or improper or unlawful. In Para 13 of the judgment in the case of *Tejaswini Gaud (Supra)*, the Hon'ble Apex Court has in particular, observed that "the Writ of Habeas Corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. It is also laid down that the writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it and in appropriate cases the writ Court would have jurisdiction to interfere.

7. Such being the law settled by the Apex Court and also the fact that now the need for grant of immediate relief no more exists as more than 3 years time has gone by, we are of the view that it would be appropriate to relegate the petitioner to the usual alternate remedy available under the family law regime.

8. The petition is accordingly dismissed with liberty to the petitioner to take recourse to such alternate remedy as may be available under the family law regime.

(ABHAY S. WAGHWASE, J)

(SUNIL B. SHUKRE , J)