

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL WRIT PETITION NO. 3951 OF 2022**

Dattatreya Kamble

...Petitioner

Versus

State Of Maharashtra And Ors.

...Respondents

Mr.Anirban Tripathy, Advocate for Petitioner.

Mr. Ajay Patil, APP for Respondent-State.

Mr. Mihir Desai, Senior Advocate i/by Ms. Sankskruti Yagnik for Respondent Nos. 2 to 5.

**CORAM : A. S. GADKARI AND
PRAKASH D.NAIK, JJ.****DATE : 10th JANUARY, 2023.**

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P.C.:-

. By the present Petition under Article 226 of the Constitution of India, the Petitioner is seeking Writ of *Habeas Corpus* for production of corpus of his son, namely Master Varad aged about 12 years.

2. Heard Mr.Tripathy, learned Advocate for the Petitioner, Mr.Patil, learned APP for Respondent No.1-State and Mr.Desai, learned Senior Advocate for Respondent Nos. 2 to 5. Perused record produced before us.

3. It is an admitted fact on record that, the wife of Petitioner had lodged a FIR against the Petitioner for the offences punishable under Sections 307, 323, 406, 504 & 506, 498-A r/w. 34 of IPC.

4. It is to be noted that, the Petitioner had earlier filed Miscellaneous Application No.983 of 2018 under Section 25 of the Guardian and Wards Act and under Section 6 of the Hindu Marriage Act for the custody of the child in the Sessions Court at Pune. That, the said Application was dismissed for want of prosecution by the concerned Court.

5. That, thereafter the Petitioner filed Civil Miscellaneous Application No.16 of 2021 in the Court of District Judge-2 at Kopergaon.

It is also an admitted fact on record that, the Petitioner had on an earlier occasion filed Writ Petition No.2226 of 2022 for the same relief before this Court. This Court by an Order dated 28th July 2022 disposed off the said Petition with direction to the District Court at Kopergaon to decide the application of Petitioner bearing Civil Miscellaneous Application No.16 of 2021 filed under the provisions of the Guardians and Wards Act for the custody of Master Varad.

By an Order dated 29th August 2022, the learned District Judge-2, Kopergaon decided the said Miscellaneous Application No.16 of 2021 and disposed it off on the ground that, the said Court has no territorial jurisdiction to decide the same. The trial Court also granted liberty to the Petitioner to file an application before the District Court at Pune for the same relief. The said Order dated 29th August 2022 holds the field even as of today as the Petitioner has accepted it. Upon a query raised by this Court to the learned Advocate for Petitioner, he on instructions from

Petitioner, who is personally present in the Court, submitted that, the Petitioner has not challenged the said Order before the Higher Court.

6. In this precise background, Petitioner has again filed present Petition for *habeas corpus* of his son.

Learned Advocate for Petitioner by relying on the decision of the Supreme Court in the Case of *Tajaswini Gaud and Others Vs. Shekhar Jagdish Prasad Tewari and Ors. reported in (2019) 7 SCC 42* submitted that, the present Petition for habeas corpus is maintainable.

There cannot be second opinion about the proposition of law laid down by the Hon'ble Supreme Court in the said decision. However, the facts in the case in hand totally differ from the facts in the case of *Tajaswini Gaud* (supra).

As noted earlier, the Petitioner on earlier occasion had already availed substantive alternate remedy available at his disposal by filing Miscellaneous Application No.16 of 2021 under the Guardians and Wards Act. The Order dated 29th August 2022 disposing of the said Application holds the field even as of today. The Petitioner is well aware of the fact that, he is having substantive alternate remedy at his command, which as a matter of fact he on earlier occasion had availed of.

7. The Hon'ble Supreme Court in the case of *Bombay Metropolitan Region Development Authority Vs. Gokak Patel Volkart* reported in (1998) 1 SCC 642 has held that, once the Petitioner actually

avails alternate remedy available to him, the Writ Petition under Article 226 of the Constitution of India should not be entertained.

8. It is the settled position of law and as has been decided in a catena of decisions by Hon'ble Supreme Court, ordinarily the Court will not entertain a Petition under Article 226/227 of the Constitution of India, where the Petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Though no hurdle can be put against the exercise of the constitutional powers of the High Court it is a well-recognized principle which gained judicial recognition that, the High Court should direct the party to avail himself of such remedies one or the other before he resorts to a constitutional remedy. Reliance of placed on the following decisions :-

- i) *Thansingh Nathmal Vs. The Superintendent of Taxes, Dhubri & Ors. reported in AIR 1964 SC 1419.*
- ii) *A. Venkatsubbiah Naidu Vs. S. Chellappan & Ors. reported in (2000) 7 SCC 695.*
- iii) *Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil reported in (2010) 8 SCC 329.*
- iv) *Radhey Shyam & Anr. Vs. Chhabi Nath & Ors. reported in (2015) 5 SCC 423.*
- v) *Genpact India Private Limited Vs. Deputy Commissioner of Income-Tax & Anr. reported in (2019) 419 ITR 440 (SC).*
- vi) *Virudhunagar Hindu Nadargal Dharma Paribalana Sabai & Ors. Vs. Tuticorin Educational Society & Ors. reported in (2019) 9 SCC 538.*

9. In view thereof, as the Petitioner is well aware of the fact of having and availing of substantive alternate remedy at his command, we are not inclined to entertain the present Petition.

10. Petition is accordingly dismissed.

(PRAKASH D. NAIK, J.)

(A. S. GADKARI, J.)