

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO. 58 OF 2023

PETITIONER : Ashish Bhudev Kubade,
aged about 36 years, occu - Private
r/o Bajargao, Tahsil & District-Nagpur.

V E R S U S

RESPONDENTS :

1. State of Maharashtra
through Police Station Officer,
Police Station Amravati,
Tah. & District - Amravati.
2. State of Maharashtra
through Police Station Officer,
Police Station Kondali,
Tahsil-Katol & District-Nagpur.
3. Rupali Rajesh Harne
Aged about 31 years, occu-Private
r/o Yawali, Post-Mauli,
Tahsil & District-Amravati.
Mobile No. 9665940988.

Shri Madhur Deo, Advocate for petitioner.

Shri A. M. Kadukar, Additional Public Prosecutor for respondent Nos.1
and 2.

Ms. Kanchan Nimbolkar, Advocate for respondent No.3.

CORAM: VINAY JOSHI AND

BHARAT P. DESHPANDE, JJ.

DATE : 21/03/2023.

JUDGMENT : (PER BHARAT P. DESHPANDE, J.) :

1. **Rule.** Rule is made returnable forthwith. Heard the
learned counsel for the parties with consent.

2. The petitioner is an ex-husband of respondent No.3, who preferred present petition of Habeas Corpus with the following prayers :-

"i) issue a writ of Habeas Corpus or any other appropriate writ or order directing the respondents to forthwith produce the child namely Khushi Ashish Kubade aged about 7 years before the Hon'ble Court and further be pleased to hand over custody of the said child to the petitioner permanently;

ii) grant any other appropriate relief, which this Hon'ble Court deems fit and proper, in the facts and circumstances of the case."

3. In a nut shell, it is a case of the petitioner that he got married with respondent No.3 somewhere in August, 2014. Out of the said wedlock, they begotten one child by name "Khushi" somewhere in July, 2015. However, due to matrimonial differences between the spouses, respondent No.3 started residing separately. A petition was filed to resolve the differences in which respondent No.3 agreed to give divorce by mutual consent to the petitioner. It was further agreed that the child will remain in custody of the petitioner. The affidavits were filed by respondent No.3 before the Civil Court at Amravati, which is dated 20/06/2022 in which she voluntarily agreed that the daughter by name "Khushi" aged about

7 years would remain in custody of the petitioner whereas respondent No.3 will have only visitation rights. On the basis of such affidavit, Family Court at Amravati in HMP No.160/2021 passed Judgment dated 23/06/2022, thereby granting divorce by mutual consent.

4. It is the contention of the petitioner that subsequently, he admitted the child in the school namely; N. K. International Public School, Bajargao, Nagpur in 1st Standard. Somewhere on 07/11/2022 when the petitioner along with the child visited the Police Station so that respondent No.3 could meet child, the Police Officer abused and threatened the petitioner and forced him to hand over the child to respondent No.3. Under such pressure, the petitioner was constrained to allow respondent No.3 to leave the Police Station along with child. It is his contention that the custody of child with respondent No.3 though the mother is illegal, as she relinquished her right of custody of child by filing an affidavit and agreeing to grant divorce to the petitioner.

5. Reply has been filed on behalf of respondent No.2, Police Officer of the concerned Police Station denied allegations and claimed that the couple along with child visited the Police Station on 07/11/2022 claiming that they quarreled about the

custody of the child and requested the Police Officer to resolve such dispute. The respondent No.2 claimed that he only told the couple that handing over of custody of child is beyond their jurisdiction and therefore, requested them to leave the Police Station.

6. The respondent No.3 / mother of child filed a detailed affidavit. She admitted that by taking custody of child on 07/11/2022, as there is no such denial in the entire affidavit. It is her contention that the child was treated with cruelty by the petitioner and that said child is not ready and willing to reside with the petitioner. Accordingly, she took the child along with her.

7. Heard Shri Madhur Deo, learned counsel for the petitioner, Shri A. M. Kadukar, learned Additional Public Prosecutor for respondent Nos.1 and 2 and Ms. Kanchan Nimbolkar, learned counsel for respondent No.3.

8. Upon perusal of the affidavit filed by respondent No.3 before the Civil Court at Amravati, it is clear that she agreed to give divorce to the petitioner and also custody of the child forever. She only reserved her right to visit the child. On the basis of such affidavit, the Family Court passed a decree in favour of the petitioner, thereby granting divorce. It is not in dispute that on the

same day, child was handed over to the petitioner i.e. on 23/06/2022. Since then, child was residing with the petitioner, who took admission of the child in the nearby school. A child remained in custody of the petitioner till 07/11/2022, when respondent No.3 while visiting the child, took away her under the pretext that the petitioner treated her with cruelty.

9. Most of the facts are not disputed, though affidavit is filed. No doubt, there are allegations made against the petitioner regarding treatment given to the child. However, these are only allegations on affidavit. Admittedly, no proceedings have been filed by respondent No.3 before the Appropriate Court for grant of custody of the child on the grounds which are now found levelled in her affidavit against the petitioner.

10. While compromising the matter in connection with divorce, respondent No.3 voluntarily handed over the custody of child to the petitioner. It is also fact that respondent No.3 got married with another person even during the subsistence of her marriage with the petitioner. It seems that she agreed to grant divorce to the petitioner only on this count that she got married with another person. No coercion or force was found while respondent No.3 decided to file an affidavit before the Family

Court, thereby granting divorce to the petitioner as well as custody of the child. In such circumstances, the contention of the petitioner needs to be appreciated.

11. Shri Madhur Deo, learned counsel appearing for the petitioner placed reliance in the case of Dr. Amit Kumar Vrs. Dr. Sonila and others, reported in (2019) 12 SCC 711 and more specifically in Paragraph No.17 to buttress his contention that once respondent No.3 relinquished her right of custody of child, she is not entitled to take custody of the said child without intervention of the Court and on legal / acceptable grounds as under :-

"17. The trigger for respondent 1 claiming custody of the children only arose when the appellant asked her to contribute financially. It was not a case of financial difficulty, but the unwillingness of Respondent 1 to contribute for her own daughter, while simultaneously transferring amounts to a colleague of hers. It does appear that the proceedings initiated initially for the custody and thereafter for seeking cancellation of the decree of divorce were clearly an endeavour to pressurise the appellant not to claim any amounts. We may also invite attention to Order 2 Rule 2 of the Code of Civil Procedure, 1908 specifying that where a plaintiff intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so relinquished. Respondent 1 had relinquished

her rights to claim custody and the suit filed by her, thus, is also highly doubtful."

12. In the case of F. Youseff Vrs. M. Laila and others, reported in 1992 SCC OnLine Ker 257, the Hon'ble Kerala High Court reserved in Paragraph Nos.8 and 15 as under :-

"8. But there are certain special features to be considered in this case. The second respondent is a party to the agreement Ext. P1. This fact is admitted. But according to respondents 2 and 3, this agreement was executed under peculiar circumstances. Their case is that the agreement was executed in the presence of a Sub Inspector of police. Further, it is stated that the terms of the agreement were agreed to by the respondents under threat and coercion and those terms cannot be given effect to, particularly the term regarding custody of the child. In fact counsel very strenuously argued that the case cannot be decided on the basis of the agreement. There is some difficulty in accepting this submission. Ext. P1 agreement was executed on 22-1-1991. Pursuant to the agreement it is admitted that the husband has withdrawn the case he filed against the wife and wife also has withdrawn the case against the husband. This was done since it was provided in the agreement. If the agreement came into existence on vitiating circumstances, it is impossible to believe a follow up action on the part of both parties. The fact that the custody of the child was given to the father and the above circumstance shows that the agreement was acted upon by the parties. Further it has to be noted that respondents 2 and 3 did not demur and register their protest against the agreement. From the date

of the agreement till 13-9-1992, the custody of the child was with the father who is the natural guardian. The case of respondents 2 and 3 is that the child expressed her desire to be with the mother and so the child was taken by the mother from Quilon where the child was residing with her father's sister. The father - petitioner in this case got a different case. According to him, the child was taken from his house in his absence and against the protest of his mother. We cannot decide that question without more details and evidence. Nevertheless we hold that the child was taken by the mother without the consent of the father at a time when the child was in his lawful custody. Counsel for the respondents wanted to submit that at the time when the child was taken, the child was not in the custody of the father since the child was in the residence of the petitioner's sister. This argument cannot be accepted at all. It is significant that the mother has no suggestion of a case that she took the child with consent of the father's sister. The sister is only an agent for the father and really the child was in the custody of the petitioner-father. This aspect of the matter has been clearly stated in a decision reported in *Varadarajan v. State of Madras*, A.I.R. 1965 S.C. 942. The apex Court observed:

“Even where the minor girl is kept by her father at the house of his relative, she still continues to be in the lawful guardianship of the former.”

15. Counsel for the petitioner submitted that this Court has to take significant note of the fact that in this case the mother of the child wilfully abdicated her solemn obligation of taking care of the child and left it to the father by executing Ext. P1 agreement. The reality is that in many

cases one parent, for a variety of reasons, disappears from his/her life. But for many children it may be devastating to lose for ever a loved parent. The mother now says that the agreement was executed under compelling circumstances. We do not want to pronounce finally on this aspect of the matter. Nevertheless we feel that prima facie this agreement which was executed with her brother also as one of the signatories to the agreement has been acted upon by the partes. It is to be noted that as per this agreement, the child was given custody to the father for a considerable period of more than one year and the mother suddenly developed a desire to have custody and resorting to self help and not resorting to any court of law for getting custody of the child is a conduct which cannot be encouraged. The substitution of self help for due process of law in the matter of custody of a child cannot be considered as for the best interest of the child, nor such a procedure can be encouraged to ensure a wrong doer to gain advantage by his/her wrong doing. That is what has been stated by all the Courts, both by the Indian Courts and by the English Courts."

13. The above observations are squarely applicable in the matter in hand, since respondent No.3 though made allegations against the petitioner of treating the child with cruelty, did not file any such proceedings. The disputed question of fact which respondent No.3 is trying to project in her affidavit needs to be decided by the Competent Court in appropriate proceedings for grant of custody of the child. At this stage, we are only concerned as to whether custody of the child with respondent No.3 is illegal.

In this respect, the affidavit of respondent No.3 filed before the Family Court while deciding the petition for divorce is sufficient enough to hold that respondent No.3 relinquished right of custody of child and therefore, such custody of the child from 07/11/2022 has to be termed as illegal.

14. Ms. Kanchan Nimbolkar, learned counsel for respondent No.3 placed reliance in the case of Gaurav Nagpal Vrs. Sumedha, Nagpal, reported in (2009) 1 SCC 42, wherein the Hon'ble Apex Court considered the custody of minor on the touchstone of welfare of the child which has to be considered as paramount consideration in determining such question. There is no quarrel with regard to such proposition of law. However, we while dealing with request for Writ of Habeas Corpus, are required to consider whether the custody of child with respondent No.3 since 07/11/2022 is illegal and if so, whether the petitioner is entitled for the reliefs claimed.

15. Shri Madhur Deo, learned counsel for the petitioner pointed out that child was admitted in the school and since 07/11/2022, the child was not attending the school since respondent No.3 along with her husband are residing at Amravati whereas the school is at Bajargao, Dist. Nagpur. He further

submitted that the examinations of the child are scheduled from 24/03/2023.

16. Considering the above submissions and the fact that the child was admitted by the petitioner in the nearby school where he resides and final examinations are scheduled from 24/03/2023, it is expedient for the benefit and welfare of the child that she should be allowed to attend her final examinations so that her Academic Year would be completed. Similarly, we found that since respondent No.3 relinquished her right of custody of the child by filing affidavit before the Family Court, she is not entitled for custody of the minor without applying to the Competent Court. Therefore, we consider that paramount interest of the child is to hand over the custody to the petitioner.

17. Having said so, by allowing the petition, we hereby direct respondent No.3 (mother) to forthwith hand over the custody of the child - Khushi Ashish Kubade, aged 7 years to the petitioner.

18. Rule is made absolute in the above terms. There shall be no order as to costs.

[BHARAT P. DESHPANDE, J.]

[VINAY JOSHI, J.]

Choulwar