



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.2071 OF 2024

Tejal w/o Akshay Chaudhari,
Age 23 yrs., Occ. Household,
R/o C/o Ramesh Raghunath Mahajan,
At Kerhale (Bk), Tq. Raver,
Dist. Jalgaon.

... Petitioner

... **Versus** ...

- 1 The State of Maharashtra
Through Superintendent of Police,
Office of Superintendent of Police,
Jalgaon, Tq. & Dist. Jalgaon.
- 2 The In-charge Police Officer,
Police Station, Muktainagar,
Tq. Muktainagar, Dist. Jalgaon.
- 3 The In-charge Police Officer,
Police Station, Raver,
Tq. Raver, Dist. Jalgaon.
- 4 Akshay Vijay Chaudhari,
Age 30 yrs., Occ. Private Service
(IT Engineer),
R/o Ashtavinayak Colony,
Near Bus Stop, Muktainagar,
Tq. Muktainagar, Dist. Jalgaon.

... Respondents

...

Mr. S.R. Andhale, Advocate for petitioner
Mr. N.R. Dayama, APP for respondent Nos.1 to 3
Mr. B.R. Kedar, Advocate for respondent No.4

...

**CORAM : SMT. VIBHA KANKANWADI &
SANJAY A. DESHMUKH, JJ.**

RESERVED ON : 01st AUGUST, 2025

PRONOUNCED ON : 20th AUGUST, 2025

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Heard learned Advocate Mr. S.R. Andhale for petitioner, learned APP Mr. N.R. Dayama for respondent Nos.1 to 3 and learned Advocate Mr. B.R. Kedar for respondent No.4.

2 Rule. Rule made returnable forthwith. The writ petition is heard finally with consent of both sides.

3 By invoking Article 21 and 226 of the Constitution of India the petitioner – mother is praying for following reliefs :

“(B) By issuing writ of *habeas corpus* or any other writ, order or directions in the like nature, the respondents No.1 to 3 may kindly be directed to produce the child of petitioner namely Kartik s/o Akshay Chaudhari before this Hon’ble High Court, in the interest of justice and they may kindly be handed over the custody of the petitioner.

(C) By issuing writ of mandamus or any other writ, order or directions in the like nature, the respondent No.1 may kindly be

directed to decide the representation dated 11.12.2024 filed by petitioner and please to pass necessary orders in that regard.”

4 Learned Advocate appearing for petitioner submits that the fact is not in dispute that petitioner and respondent No.4 are husband and wife. They got married on 04.06.2021. They are blessed with son, who is now aged 2 to 2½ years.

5 It is the petitioner’s contention that after a year of delivery she began experiencing muscle problems in her right hand. She consulted a doctor and it was diagnosed that she was suffering from Wet Gangrene of the right upper limb along with subclavian vein and SVC thrombosis as well as PTE. The doctors had recommended surgery and her right hand was required to be amputated from the shoulder. After the surgery respondent No.4 refused to cohabit with her due to her disability and since then she is residing with her parents. Neither respondent No.4 nor in-laws had attempted to contact her. Respondent No.4 has forcibly took custody of minor child from petitioner. Petitioner has filed PWDVA No.89/2024 before learned Judicial Magistrate First Class, Raver, Dist. Jalgaon. She had demanded interim custody of her child as per the provisions of Section 23 of the Protection of Women from Domestic Violence Act (for the sake of brevity

hereinafter referred to as “**the D.V. Act**”). Notices were issued and in-laws of petitioner had appeared, however, respondent No.4 intentionally avoided the service. Considering the facts and circumstances learned Judicial Magistrate First Class had allowed that application on 09.09.2024 and granted the interim custody of child to petitioner. The Protection Officer had submitted report to learned Magistrate, Raver on 11.09.2024 that when he had visited the house of respondents – in-laws, at that time the child was not with them. Respondents had not complied with directions given by learned Magistrate. Even the Protection Officer when attempted to affix the notice on the house of respondents, in-laws of petitioner restrained him. An application was then filed by petitioner at Exh.21 on 03.12.2024 before learned Magistrate that though respondent No.4 is residing in Muktainagar, he is avoiding Court notice as well as handing over the child to her. In the application petitioner had prayed for directions to be given to Raver Police to find out the child and to hand over the custody to her. To the said application in-laws had filed their say and after hearing both sides learned Magistrate had given directions to Raver Police as well as Protection Officer to find the child and hand over the custody to petitioner. Thereafter, Protection Officer, Raver filed report on 10.12.2024 before learned Magistrate that when he along with police had gone to the house of respondent No.4 for execution of order on 03.12.2024, they could not find respondent No.4 and child. Information was given by

parents that respondent No.4 is residing in Mumbai, but refused to give full address. The offence came to be registered on 10.12.2024 against parents and close relatives of petitioner vide First Information Report bearing Crime No.425/2024. The further proceedings has been taken by petitioner before learned Magistrate, however, it has not yielded in getting the custody of child. There is no compliance of order passed by learned Magistrate.

6 Learned Advocate for petitioner then submits that respondent No.4 had challenged said order passed by learned Magistrate before this Court by filing Criminal Revision Application No.109/2025. Hon'ble the Single Bench of this Court by order dated 04.04.2025 dismissed the revision. The order passed by this Court is then maintained before Hon'ble Supreme Court also; yet, there is no compliance. A joint pursis was filed on behalf of petitioner and respondent No.4 in view of the mediation and joint statement was made that respondent No.4 and petitioner would stay together and would continue their marital tie for the welfare of child. Thereafter, time to time the matter was listed and statement was made that presently they are residing together, however, petitioner was not given proper treatment. Child is not allowed to remain in custody for a long period. She is mentally harassed and then on 14.07.2025 when such statement was made, this Court ultimately stated that the matter would then be decided on merits. Petitioner

has been forced to go back to her parents' home and again the custody is not handed over to petitioner. Since petitioner is now handicapped, respondent No.4 is not willing to cohabit with her. It appears that the boy is hardly 2½ years old and requires mother's love and affection. She is the natural guardian as per the Guardians and Wards Act, 1890. The writ of *Habeas Corpus* is maintainable even though there might be alternative remedy. He relies on **Thirumalai Kumaran vs. Union Territory of Dadra and Nagar Haveli and others** [2003 (2) Mh.L.J. 53], wherein it has been held that -

“Even though the party has approached the Courts below under Section 97 of the Code of Criminal Procedure and had failed therein, in a given case and in the facts of peculiar case, the High Court may exercise its discretion to act for issuance of writ of *habeas corpus*. Power of the High Court are not taken away by Section 97 of the Code of Criminal Procedure.”

6.1 He also relies on the order passed by this Court in **Anita Mehul Sathliya vs. The State of Maharashtra and others** in Criminal Writ Petition No.1225 of 2024 decided on 27.08.2024, to which [SMT. VIBHA KANKANWADI, J.] was party, wherein also the child who was forcibly taken away and was aged 09 months was handed over to petitioner – mother.

7 Learned Advocate for respondent No.4 relies on the affidavit-in-reply of respondent No.4, wherein he has denied all the allegations. He

states that child is residing with father very peacefully and in good atmosphere since last one year. The question of custody of child must be ultimately decided under Section 25 of Guardians and Wards Act and under Section 6 of the Hindu Minority and Guardianship Act. Respondent No.4 denies the allegations about forcibly taking away of child. It is also denied that respondent No.4 and his family members had harassed the petitioner. Initially the petitioner had no desire to have a child and subsequently after conceiving she wanted the forcible abortion. After the birth of child she expressed that she does not want to feed the child and for that purpose she was taking pills for stopping milk. She avoided feeding the child, which resulted in developing small knots of milk in chest of petitioner. It had resulted in amputation of her right hand. The entire treatment has been given by respondent No.4. He has incurred about Rs.6,00,000/- for the same. During the course of her treatment she was not in a position to take care of son. Therefore, she had handed over the custody of child on 06.04.2024 when the child was less than 1½ year old to father and mother-in-law. She was not interested in keeping the child with her and this admission was given by her in her application under the D.V. Act. Since 06.04.2024 the child is emotionally attached to the mother of respondent No.4. Respondent No.4 and his family members are looking after him nicely and photographs, those have been produced, would disclose this fact.

Learned Magistrate had not heard respondent No.4. There was nothing on record to show that he was avoiding the notice. First Information Report was lodged by brother of respondent No.4 when abuses were given at the time of search of child in the house. Respondent No.4 is accepting the fact that learned Magistrate's order has been confirmed up to Hon'ble Supreme Court, however, the legal remedy is available to petitioner to get the order executed. Petitioner's family is politically strong and, therefore, police as well as Government Officers are supporting petitioner. Now, there is no attachment of petitioner with child and even when during the pendency of this petition as per the condition of petitioner, she herself, respondent No.4 started residing in the upper room of the house of respondent No.4. Now, she ought to have developed the bond between herself and child during the said period when she had united, but the petitioner has not made much attempts. After all the child had not seen the mother for so many months and calling respondent No.4's mother as 'Aai'. Child would have moulded and further journey of the marital life of petitioner and respondent No.4 would have been smooth if petitioner would have taken extra efforts for developing that mother and child bond. She started levelling allegations unnecessarily though her demands were fulfilled by husband. Under such circumstance, the case cannot be considered for issuing writ of *habeas corpus*.

8 Learned Advocate for respondent No.4 relies on **Sumedha Nagpal vs. State of Delhi and others** [2001 SCC (Cri.) 698], which is the case involving custody of child of tender age of about two years and petitioner was the mother, wherein it has been observed -

“Both parties do recognize that the question of custody of the child will have to be ultimately decided in proceedings arising under Section 25 of the Guardians and Wards Act read with Section 6 of the Act and while deciding such a question, welfare of the minor child is of primary consideration. Allegations and counter allegations have been made in this case by the petitioner and respondent not against each other narrating circumstances as to how the estrangement took place and how each one of them is entitled to the custody of the child. Since these are disputed facts, unless the pleadings raised by the parties are examined with reference to evidence by an appropriate forum, a proper decision in the matter cannot be taken and such a course is impossible in a summary proceeding such as writ petition under Article 32 of the Constitution.”

8.1 He further relies on **Mandy Jane Collins Major vs. James Michael Collins** [2006 (3) AIR (BomR) 14], wherein note has been taken of various decisions of this Court as well as Hon’ble Supreme Court, wherein welfare of the child was predominantly considered.

9 Before considering the facts, we would like to consider the legal history/background and requirements for issuance of writ of *habeas corpus*.

The writ of *habeas corpus* is the contribution of English Common Law for the protection of human liberty. Commonly known writ of *habeas corpus* is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or in private custody. In other words, *habeas corpus* is a writ requiring a person to be brought before a Judge or Court whose personal liberty has been jeopardised.

9.1 In **Mohd. Ikram Hussain vs. State of U.P** [AIR 1964 SC 1625] it has been observed that the writ of *habeas corpus* is not a writ of course and may be granted only upon reasonable ground or probable cause being shown. It may be refused when there is an alternative remedy available by which the validity of the detention may be examined. However, it cannot be refused only on the ground that alternative remedy is available.

9.2 In **Rashmi Ajay Kumar Kesharwani vs. Ajay Kesharwani** [(2012) 11 SCC 190] Hon'ble Supreme Court held that writ of *habeas corpus* should not be issued as a matter of course in cases where there is abuse of process of the Court. The facts of the said case were different; yet the basic law that was made applicable is required to be considered here.

9.2 In **Manubhai Ratilal Patel vs. State of Gujarat** [(2013) 1 SCC

314] it was held that -

“The writ of *habeas corpus* was devised for production of an individual in case of illegal restraint or confinement. It is of the highest constitutional importance to provide a swift and expedient remedy by determining the petitioner’s right to freedom and to protect the individual’s liberty against arbitrary action of the executive or by private persons. Its main objective is to release persons illegally detained or confined. It is a well-accepted principle that a *habeas corpus* petition cannot be entertained when a person is committed to judicial custody or police custody by the competent court by an order which *prima facie* does not appear to be without jurisdiction or passed in an absolutely mechanical manner or is wholly illegal. The Court is required to scrutinize the legality or otherwise of the order of detention which has been passed.”

However, in **Jagisha Arora vs. State of U.P** [(2019) 6 SCC 619] Hon’ble Supreme Court further explained that when there is a glaring case of deprivation of liberty, intervention in *habeas corpus* petition under Article 32 would then be warranted.

10 Here, we are also taking note of the decision in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others** [(2019) 7 SCC 42], wherein following are the observations -

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19 *Habeas corpus* proceedings is not to justify or examine the legality of the custody. *Habeas corpus* proceedings is a medium through which the custody of the child is addressed to the discretion of the court. *Habeas corpus* is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of *habeas corpus* is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

26 The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.”

10.1 It is further observed that the welfare of the child has to be determined owing to the facts and circumstances of each case and the court

cannot take a pedantic approach. We would also consider the Division Bench decisions of Hon'ble Rajasthan High Court at Jodhpur in **Dharmendra Choudhary vs. The State of Rajasthan and others** [MANU/RH/0245/2024], wherein also **Tejaswini Gaud** (supra) referred and **Rajeswari Chandrasekar Ganesh vs. The State of Tamil Nadu and others** [Writ Petition (Criminal) No.402/2021], decided on 14.07.2022 by Hon'ble Supreme Court, wherein it has been observed that -

“91. Thus, it is well established that in issuing the writ of *Habeas Corpus* in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of *Habeas Corpus* in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a *Habeas Corpus* petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a *Habeas Corpus* proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as *parens patriae*, has in promoting the best interests of the

child.”

10.2 It has been further observed in **Dharmendra Choudhary** (supra) that -

“The issue raised in a *habeas corpus* petition will always be subject to factual matrix of that particular case, and more particularly, in the cases pertaining to custody of a child, the Court will have to take into due consideration, recent changes, if any, in regard to the custody, which could determine the paramount welfare of the child in such cases. Any immediate and recent change in custody of a child, largely impacting his/her welfare, would certainly be a good cause for making effective adjudication by the Court.”

10.3 It has been further observed in **Dharmendra Choudhary** (supra) that -

“13. This Court holds that the custody issues which exist for a long period of time, as involved herein, may not be dealt with, in *habeas corpus* petition, except under certain extraordinary circumstances. In the present case, the litigation between mother and father shows agony and acrimony between the two sides which relates to the period soon after the birth of the child.”

11 Now, the further legal position that is helping the petitioner is that the child is around 2½ years of age now, but when she filed the application for grant of custody the boy was 22 months old. In various

decisions of this Court as well as Hon'ble Supreme Court it is held that till the age of five the child's natural custody would be with his or her mother.

12 Now, in the present case, first of all it appears that there is a dispute, as to whether the custody of the child was forcibly taken or it was handed over to respondent No.4 when the petitioner was hospitalized. However, we may not go into the said aspect as the interim custody of the child was granted as per Section 23 of the D.V. Act by the learned Magistrate. Of course, such custody would be subject to the substantial petition that should be filed by either of the parents under Guardians and Wards Act or the Hindu Minority and Guardianship Act. Section 21 of the D.V. Act starts with, "Notwithstanding anything contained in any other law for the time being in force" When such order is passed under Section 23 read with Section 21 of the D.V. Act, then the question would be, how the implementation of the said order can be made ? For that purpose we will have to read Section 28 of the D.V. Act, which provides for the procedure, which runs thus -

"28. Procedure. - (1) Save as otherwise provided in this Act, all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 or under Sub-Subsection (2) of Section 23.”

That means, the Magistrate has to follow the provisions of the Code of Criminal Procedure. That means, there is a provision for execution of the order. Now, the question is, when there is such provision, then whether this Court can exercise its powers for issuing writ of *habeas corpus* ? In other words, whether petition of *habeas corpus* can be filed as alternative to the execution of the order which is already passed under the provisions of Law ? Here, in this case, the said order is confirmed up to Hon’ble Supreme Court. It appears that after the confirmation of order by Hon’ble Supreme Court, petitioner has not knocked the doors of Magistrate for the execution of order and even prior to that had approached this Court. From the affidavit-in-reply it appears that respondent No.4 had filed appeal challenging Magistrate’s order before the Sessions Court and it appears that his stay application was rejected, then he approached this Court in revision. Here, we would like to stress that each party can exhaust the legal remedy available and the step taken cannot be termed as the action on the part of person challenging as avoiding the execution or a step in disobedience.

13 We will have to dedicate some space in this order to state as to what had happened before this Court. On 06.05.2025 respondent No.4 had

brought the child before Court and then pursis Exh.'X' was filed. After some deliberation that petitioner and respondent No.4 are willing to reside together and orally it was stated that initially it was for two days considering the welfare of the child. This deliberation was held in the chamber, wherein petitioner, respondent No.4 and Advocates representing them were present. The matter was adjourned to 09.05.2025. Then pursis Exh.'Y' was given that they will continue to explore the possibility by residing together for the welfare of the child. Then the matter was placed on 09.06.2025. On 09.06.2025 the Advocate for petitioner disclosed that petitioner is having some examination and, therefore, the matter was adjourned on 23.06.2025. On 23.06.2025 both the parties along with Advocates were present and disclosed to the Court that they want further more time. However, on 14.07.2025 learned Advocate for petitioner made a grievance that the matter was somewhat compromised and the parties are residing together, but according to petitioner, now she is mentally harassed. It was thought by this Court that now the possibility of settlement has extinguished and, therefore, we heard the matter on the adjourned dates. Thus, there was an attempt by this Court for bringing the husband and wife together for the welfare of child, but it failed.

is with the father since last more than one year and according to respondent No.4, he made all the efforts to stay with petitioner taking into consideration the welfare of the child, but, according to him, petitioner could not establish the bond as child had not seen the mother for a considerable time. We may not go much into those disputed facts, however, when certainly, there is an order granting custody of child to petitioner passed by a competent Court, then instead of getting the same executed if petitioner is coming before this Court by way of writ petition for issuance of writ of *habeas corpus*, we will have to then consider that respondent No.4, who is father, is having the custody against whom it is stated that order is passed *ex parte* by learned Magistrate.

15 The photographs produced would show that the child is happy with grandmother and other family members. If we consider the pleadings in application under D.V. Act i.e. PWDVA No.89/2024, in paragraph No.3 she states that she was required to undergo the amputation on 20.04.2024 and since she as well as her parents were in the hospital, the child was with the respondents i.e. husband and his family members. Though she has stated that entire expenses of hospital were borne by her father, along with affidavit copy of bank statement of respondent No.4 has been filed, which shows payments to Jaslok Hospital, Mumbai and according to petitioner, in her

pleadings in domestic violence proceedings after discharge respondents had not accepted her nor given the custody. She filed domestic violence proceedings on 09.09.2024.

16 At this stage, we are considering the welfare of the child as paramount consideration. At the same time, the petitioner would be at liberty to get the order executed. We do not want to convert the execution proceedings in the form of writ of *habeas corpus*. At the cost of repetition, the writ of *habeas corpus* cannot be issued as a matter of course and when proceedings for execution thereof is available, we do not find this to be a fit case where we should exercise our powers under Article 226 of the Constitution of India. Hence, following order.

ORDER

- i) Criminal Writ Petition stands dismissed.
- ii) Rule stands discharged.

(SANJAY A. DESHMUKH, J.)

(SMT. VIBHA KANKANWADI, J.)