

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

CRIMINAL WRIT PETITION NO.634 OF 2025

Pooja Abhijit Dhanashetty
@ Pooja Suresh Shinde

.... Petitioner

versus

The State of Maharashtra & Ors.

.... Respondents

.....

- Mr. Prashant Pandey, Ms. Ridhima Mangaonkar, Mr. Dinesh Jadhawani, Mr. Pramod Sharma i/b. W3Legal LLP, Advocate for Petitioner.
- Smt. M. M. Deshmukh, APP for the State/Respondent.
- Mr. Vikas Shivarkar, Advocate for Respondent Nos.4, 5 and 6.

**CORAM : SARANG V. KOTWAL &
S. M. MODAK, JJ.**

**RESERVED ON : 16th APRIL, 2025
PRONOUNCED ON : 28th APRIL, 2025**

ORDER : (PER : SARANG V. KOTWAL, J.)

1. Heard Mr. Prashant Pandey, learned Counsel for the Petitioner, Mr. Vikas Shivarkar, learned counsel for the Respondent No.2, 4, 5 and 6 and Smt. M. M. Deshmukh, learned APP for the State.

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2. This Petition is filed by the mother of the two children

who are aged 4 years and 3 years respectively. The elder daughter is 4 years of age and the younger son is 3 years of age. Both the children at present are in the custody of the Respondent No.4, who is the husband of the Petitioner. The Respondent Nos.5 and 6 are the parents of the Respondent No.4. The Petitioner and the Respondent No.4 were married. They were first cousins. The Respondent No.4 is the son of maternal aunt of the Petitioner. The Petitioner is suffering from disability. Her hearing and speech are 100% impaired. According to the Petitioner, the Respondent No.4 is running a business. Learned counsel for the Respondent No.4 stated before the Court that he is an Advocate and also has some family business. The Petitioner got married with the Respondent No.4 on 26/05/2019. Their daughter was born on 14/04/2020 and the son was born on 14/05/2021. It is the case of the Petitioner that she was subjected to cruelty, taunts and domestic violence at the hands of the Respondents and that of the Respondent No.5 in particular. She had to leave her matrimonial house on 12/06/2021 and thereafter was not allowed to come back. She lodged an FIR vide C.R.No.254/2021 at Talegaon Dabhade Police Station, u/s

323, 354-A, 498-A r/w 34 of the Indian Penal Code on 30/06/2021. On 02/07/2021, the Petitioner approached the Bhartiya Mahila Federation (Thane Samiti) to seek custody of her minor children. The Respondent No.4 executed consent terms on 05/07/2021. He filed an application for Restitution of Conjugal Rights in District Court at Pune. On 28/02/2022, the Petitioner sought transfer of that application to Mumbai. The application was allowed and that application for Restitution of Conjugal Rights was transferred to Mumbai.

3. During pendency of that application for Restitution of Conjugal Rights, the Respondent No.4 filed Petition for divorce before the Civil Judge Senior Division, Vadgaon, Pune. Some consent terms were executed before the Court at Vadgaon. But they were withdrawn by the Respondent No.4. On 03/05/2023, an NC bearing No.339/2023 was registered against the Respondent Nos.4 and 6 u/s 503, 506 of the Indian Penal Code at Talegaon Dabhade Police Station by the Petitioner.

4. The Respondent No.4 filed FIR at Talegaon Dhabhade

police station vide C.R.No.597/2023 against the Petitioner's parents mainly u/s 384 and 385 of the Indian Penal Code i.e. for extortion. On 02/02/2024, the Petitioner lodged an NC No.281/2024 at Dharavi police station against the Respondent No.4 and his two associates for threatening her brother.

5. Till August 2024, the children were with the Petitioner. On 03/08/2024, the Respondent No.4 and his two nieces took the Petitioner and her children to a Mall and under some pretext took away both the children. They were taken to Pune. Thereafter the Petitioner could not meet the children.

6. It is also an accepted fact by both the sides that the Petitioner's daughter suffers from 'Thiamine metabolism dysfunction syndrome 2' and that without medication, the daughter suffers from epileptic attacks.

7. This is the acrimonious past between the couple. In this background, the Petitioner has approached this Court by way of this Petition for writ of habeas corpus. There are other ancillary

prayers for taking action against the police authorities, for not taking action and not registering the crime against the Respondent No.4.

8. The order dated 02/04/2025 records that the Petitioner wife has already approached the Family Court, for custody of their children. The Family Court is seized of the matter. The order dated 02/04/2025 records that the learned Judge in-charge of that application was requested to decide the issue of the children's custody at the earliest. It was directed to be decided independent of the present proceedings.

9. In this background, we have heard the learned counsel for the parties.

Mr. Pandey made the following submissions :

10. Since the children were taken away illegally by deceit and by abduction from the legal custody of the Petitioner, the custody of the children should be restored with the Petitioner.

The Petitioner cannot be made to run from pillar to post seeking custody of the children in this situation. The interim custody can be granted under habeas corpus Petition to secure ends of justice. The Petitioner had to leave the matrimonial house because of the continuous trauma she was facing due to the conduct of the Respondent Nos.4 to 6. Till the children were taken away on 03/08/2024, they were in the custody of the Petitioner. The Petitioner has already initiated various complaints against the Respondent Nos.4 to 6. Various proceedings including proceedings for Restitution of Conjugal Rights are already pending between the parties. The FIR is lodged against the Petitioner's parents by the Respondent No.4 vide C.R. No.597/2023 at Talegaon Dabhade police station. Therefore, it is not possible for the Petitioner to go to Pune to meet her children. The age of the children is below 5 years and therefore u/s 6 of the Hindu Minority and Guardianship Act, the custody of the children should remain with the mother. In the order dated 25/02/2025 passed in this Petition, the opinion of the Medical Officer was recorded that the elder daughter of the Petitioner was clinically stable and could travel from Pune to

Mumbai. He submitted that it is a settled law that the welfare of the child is of paramount consideration. He relied on section 4, 6 and 12 of the Rights of Persons with Disabilities Act 2016. He relied on the judgment of the Hon'ble Supreme Court in the case of *Tejaswini Gaud and Others Vs. Shekhar Jagdish Prasad Tewari and others* as reported in (2019) 7 Supreme Court Cases 42. He also relied on the case of *Meenakshi and Another Vs. State of U.P. and Others*, as reported in *2020 SCC OnLine ALL 1475*, in which the Allahabad High Court has taken a view that the custody of the minor child of being below age of 5 years ought to be with the mother. He further relied on the various other judgments. They are as follows :

- (1) *Rajeswari Chandrasekar Ganesh Vs. State of Tamil Nadu and others*, as reported in (2023) 12 Supreme Court Cases 472;
- (2) *Nirmala Vs. Kulwant Singh & Ors.* as reported in *2024 SCC OnLine SC 758*.

11. As against these submissions, Mr.Shivarkar learned counsel for the Respondent Nos.4, 5 and 6 submitted that the

allegations made against the Respondent Nos.4 to 6 are totally false. The Petitioner has already approached the Family Court at Mumbai for custody of the children. It would be the proper forum which could decide the welfare of the children as well as custody of the children. For that, the husband can participate in those proceedings. Both the sides can then prove their case for custody of the children. He submitted that the Petitioner is not in a position to look after the children. She is residing with her parents. He submitted that as mentioned earlier, the daughter is suffering from 'Thiamine metabolism dysfunction syndrome 2', which requires constant attention and care by a Pediatric Neurologist. At present, she is under the treatment of a specialized Doctor in Pune. He has been treating the daughter since the beginning of her ailment. She is required to take physiotherapy sessions for 5 days in a week at Pune. Therefore, the welfare of the children in this particular case is by retaining the custody with the Respondent No.4.

12. We have considered these submissions. The undisputed fact is that the Petitioner has instituted Custody Petition No.D-20

of 2025 on 13/03/2025 at Family Court, Mumbai, for custody of children. The Petitioner's father is working in MSEB, Thane and her brother is working in a private company as a private security person, at Wadala. The Petitioner is residing at Dharavi.

13. Mr. Pandey referred to various judgments of Hon'ble Supreme Court. In Tejaswini's case, the Hon'ble Supreme Court has held thus :

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.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by

whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

Welfare of the minor child is the paramount consideration

“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.”

Mr. Pandey has also referred to the case of ***Somprabha Rana and others Versus State of Madhya Pradesh and others***, as reported in ***(2024) 9 Supreme Court Cases 382***. The relevant portion is thus:

“13. We believe that considering the peculiar facts of the case and the child's tender age, this is not a case where custody of the child can be disturbed in a petition under Article 226 of the Constitution of India. Only in

substantive proceedings under the GW Act can the appropriate Court decide the issue of the child custody and guardianship. Regular Civil/Family Court dealing with child custody cases is in an advantageous position. The Court can frequently interact with the child. Practically, all Family Courts have a child centre/play area. A child can be brought to the play centre, where the judicial officer can interact with the child. Access can be given to the parties to meet the child at the same place. Moreover, the Court dealing with custody matters can record evidence. The Court can appoint experts to make the psychological assessment of the child. If an access is required to be given to one of the parties to meet the child, the Civil Court or Family Court is in a better position to monitor the same.

14. In **Rajeswari's** case the relevant paragraph is paragraph No.127, which reads thus:

“127. We would therefore hold that in the case at Bar, the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between the rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult.”

15. In **Nirmala's** case again observations made in Tejaswini's case were reiterated. Thus, the prime consideration in such case is about the welfare of the child.

16. Sections 4, 6 and 12 of the Rights of Persons with Disabilities Act are as follows :

Section 4. Women and children with disabilities.

- (1) The appropriate Government and the local authorities shall take measures to ensure that the women and children with disabilities enjoy their rights equally with others.
- (2) The appropriate Government and local authorities shall ensure that all children with disabilities shall have right on an equal basis to freely express their views on all matters affecting them and provide them appropriate support keeping in view their age and disability."

Section 6. Protection from cruelty and inhuman treatment.

- (1) The appropriate Government shall take measures to protect persons with disabilities from being subjected to torture, cruel, inhuman or degrading treatment.

- (2) No person with disability shall be a subject of any research without,—
- (i) his or her free and informed consent obtained through accessible modes, means and formats of communication; and
 - (ii) prior permission of a Committee for Research on Disability constituted in the prescribed manner for the purpose by the appropriate Government in which not less than half of the Members shall themselves be either persons with disabilities or Members of the registered organisation as defined under clause (z) of section 2.

Section 12. Access to justice.

- (1) The appropriate Government shall ensure that persons with disabilities are able to exercise the right to access any court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigative powers without discrimination on the basis of disability.
- (2) The appropriate Government shall take steps to put in place suitable support measures for persons with disabilities specially those living outside family and those disabled requiring high support for exercising legal rights.
- (3) The National Legal Services Authority and the State

Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987) shall make provisions including reasonable accommodation to ensure that persons with disabilities have access to any scheme, programme, facility or service offered by them equally with others.

- (4) The appropriate Government shall take steps to—
 - (a) ensure that all their public documents are in accessible formats;
 - (b) ensure that the filing departments, registry or any other office of records are supplied with necessary equipment to enable filing, storing and referring to the documents and evidence in accessible formats; and
 - (c) make available all necessary facilities and equipment to facilitate recording of testimonies, arguments or opinion given by persons with disabilities in their preferred language and means of communication.

17. As far as the reliance of these provisions of the Rights of Persons with Disabilities Act are concerned, they are in a totally different context. The Petitioner obviously has a right to access to justice and in fact has taken recourse to not only filing the present Petition, but also by filing the proper application for

custody before the Family Court at Mumbai. She is assisted by her learned counsel as well. The matter of custody of the children will have to be decided on the consideration of welfare of the children, which is a consistent view taken by the Hon'ble Supreme Court in various judgments.

18. However, when the facts are disputed; it is for the competent Court to decide the application for custody preferred under the Hindu Minority and Guardianship Act because the disputed question of fact can be resolved only by leading evidence and holding counselling session. The enquiry in the habeas corpus is summary in nature.

19. The circumstances in which the children are taken away are also disputed. This aspect can also be considered by the Family Court in the Custody Petition. The question of welfare of the children can be conclusively decided by the Family Court in the Custody Petition, which is already preferred by the Petitioner and which can be contested by the Respondent No.4.

20. As far as the present Petition is concerned for consideration of welfare of the children, we have taken into consideration, the following circumstances :

- (1) The daughter is suffering from 'Thiamine metabolism dysfunction syndrome 2'. She was always under the treatment of a Doctor at Pune. It is an admitted fact that no treatment ever was started by the Petitioner for her daughter in Mumbai. The daughter was always given treatment in Pune. She requires frequent visits to the Doctor at Pune and also requires recovery physiotherapy sessions.
- (2) Because of matrimonial disputes and cases and counter-cases lodged against each other, it is not possible for the Petitioner to go to Pune as submitted by her learned counsel. Therefore, it is not possible for the daughter to continue taking treatment in Pune if custody is given to the mother.
- 3) The second child is younger by a year. At this tender age, when both the children are growing together, it would not be proper to separate them at this stage. The Petitioner's father and brother are busy in attending their service. Therefore, only her mother

can look after the children, to help the Petitioner At this stage, the Respondent No.4 is in a better position to look after the children and more importantly, is in a position to provide for all the medical facilities necessary for the proper treatment of the daughter.

21. Therefore, only for the purpose of deciding this habeas corpus Petition, we are of the opinion that, at this stage, the Respondent No.4 is in a better position to look after the children and therefore, the welfare of the children is continuing the custody with the Respondent No.4 in this case. However, as mentioned earlier, the disputed questions raised regarding the background and the manner in which the children were removed from the custody of the mother; will have to be decided by leading evidence before the Family Court. Since all these aspects are subjudice before the Family Court, they can be decided only after leading the evidence and after holding counselling sessions. We make it clear that the observations made in this order are restricted to passing of the order in this Petition. The Family Court seized of the Custody Petition shall not be influenced by these observations. Such custody Petition

shall be decided on its own merits and in accordance with law, based on the material produced before that Court, at an appropriate stage. The question of custody, interim custody, access, interim access can be decided by that Court.

22. With the result, it is not possible to grant relief to the Petitioner in this Petition. The Petition is accordingly dismissed.

(S. M. MODAK J.)

(SARANG V. KOTWAL, J.)