



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

**CRIMINAL WRIT PETITION (ST) NO. 10982 OF 2024**

Shahna Garg Advani ..Petitioner  
Versus  
The State of Maharashtra & Anr. ..Respondents

**WITH  
INTERIM APPLICATION (ST) NO. 25948 OF 2024  
IN  
CRIMINAL WRIT PETITION (ST) NO. 10982 OF 2024**

Mr. Vikram Deshmukh i/b. MS Legal for Petitioner.  
Mr. B.V. Holambe Patil, APP for State/Respondent.  
Mr. Mahesh Jethmalani, Sr. Advocate (appeared through V.C.) a/w.  
Ms. Gunjan Mangla, Pooja Jalan and Jimi Jakhadi for the  
Respondent No.2.

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

**RESERVED ON : 17 APRIL 2025  
PRONOUNCED ON : 28 APRIL 2025**

**ORDER: (Per Sarang V. Kotwal, J.)**

1. Heard Mr. Vikram Deshmukh, learned counsel for the  
Petitioner, Mr. Holambe-Patil, learned APP for the State and  
Mr. Mahesh Jethmalani, learned Senior Counsel for the  
Respondent No.2.

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2. This is yet another case where the child is an innocent victim in the bitter battle between his own parents. The petition is filed by the mother of a 10 year old child. The Petition is filed for directing the Respondent No.2-father of the child to produce the child before the Court and with further directions to restore the custody of the child with the Petitioner.

3. The parties, in the background of their unending grievances with each other, have filed voluminous pleadings and counter pleadings. However, basic facts as reflected from the petition are as follows:

The Petitioner got married with the Respondent No.2 on 28.11.2012 and started residing with him in their matrimonial house at Woodlands Apartment, Peddar Road, Mumbai. The Respondent No.2 had family business that runs a hotel/resort in Goa. The couple shifted to Goa. They were blessed with a baby boy on 14.01.2015, who is the innocent victim in this case. The child was born in USA at the instance of the Respondent No.2 as he wished that the minor child should hold an American passport.

There are other allegations in the petition against the Respondent No.2 regarding his other relationships. There are allegations that, even the Respondent No.2's family illtreated the Petitioner and her family. For better prospects in education for the minor child, the Petitioner decided to shift back to Mumbai. It was felt necessary that the matrimonial house needed renovation and, therefore, the Petitioner, the Respondent No.2 and their child shifted to a house taken on leave and license basis. In February 2024, the Petitioner came to know that the Respondent No.2 had terminated the lease of that house a year earlier by writing to the landlord, but the Petitioner was not informed about the same by the Respondent No.2. According to the Petitioner, the Respondent No.2's mother had categorically told her that the Petitioner was not welcome in the matrimonial house. On 25.03.2024, the Petitioner went to New York to meet the Respondent No.2's brother to find a solution for her matrimonial discord. She returned to Mumbai on 08.04.2024. She found that the Respondent No.2 had employed a security guard who used to stay in the house. He had planted 8 cameras in the house. It is mentioned in the petition that the Respondent No.2

deceitfully obtained the child's passport from the Petitioner. On 28.04.2024, when the Petitioner's mother had come to Mumbai from Delhi, the Respondent No.2 created a scene and made his displeasure known. The Respondent No.2 started tutoring the child with negative emotions against the Petitioner and her family. It is further mentioned that, on 30.04.2024, the Petitioner approached N.M.Joshi Marg police station with a complaint under sections 341, 354, 498A and 506 r/w. 34 of the I.P.C. and U/s.4 of the Dowry Prohibition Act. The police called the Petitioner and the Respondent No.2 for a joint meeting. On 30.04.2024, the Respondent No.2, without the consent and knowledge of the Petitioner, took the child from the house where they were residing. The child was taken to their house at Peddar Road. The child was kept away from her. Basically, on these facts the present petition is filed.

4. The Respondent No.2 has filed Affidavit in reply putting forth his own side of the story. One of the main contentions raised in the Affidavit in reply was that, the child was suffering from fear and anxiety and, therefore, he had to attend counselling sessions

with a Counselor Dr. Philip Trenchard, based in U.K. According to the Respondent No.2, it was always their intention and desire that the child should eventually go to a University in USA and thus integrating him into the US education system at an early age was beneficial for him. The Respondent No.2 himself had studied at Cornell University, USA. The Petitioner had also studied at Pratt School of Design, New York and had spent a few years working in the USA.

5. Learned counsel appearing for the Petitioner made the following submissions:

**SUBMISSIONS BY MR. VIKRAM DESHMUKH, LEARNED COUNSEL FOR THE PETITIONER:**

He submitted that the *habeas corpus* petition by one parent against the other when the child is taken away deceitfully, is maintainable. The Petitioner has filed the proceedings U/s.23 of the Protection of Women from Domestic Violence Act (for short 'D.V.Act'), but it is necessary to restore the custody of the child with the Petitioner as the child is taken away deceitfully. The child is completely brainwashed by the Respondent No.2-father and

hence, it is not good for the child's all around development. The mother's love and affection is more important for the child. He submitted that the WhatsApp messages exchanged between the petitioner and the child show that, in spite of her best efforts the child is not showing any willingness to even talk to her; which shows that he was completely brainwashed. In fact, this demonstrates that it is not the child but the father who was writing all the WhatsApp messages. The Respondent No.2-husband is a Green Card holder and, therefore, he has to stay in USA at least for 160 days. His parents are above 80 years of age, therefore, it is not possible for them to look-after the child. Therefore, when the Respondent No.2 is not in India, the child would not be looked after properly. The Petitioner is the only person who can take care of the child properly. He submitted that the child wrote some messages in his own handwriting which show that it cannot be thoughts of a 10 year old child. All this is affecting the proper development of the child. The Petitioner has filed proceedings U/s.23 of the D.V. Act before the then Metropolitan Magistrate, now, J.M.F.C., 40<sup>th</sup> Court, Girgaum, Mumbai, in the year 2024; in

which, the first prayer is for directions to restrain the Respondent No.2 and his family from removing the minor son from the care and custody of the Petitioner-mother. In support of his case, learned counsel relied on the following judgments:

- i) ***Gautam Kumar Das Versus NCT of Delhi and others***<sup>1</sup>
- ii) ***Imambandi and others v. Sheikh Haji Mutsaddi and others***<sup>2</sup>
- iii) ***Meethiyan Sidhiqu Versus Muhammed Kunju Pareeth Kutty and others***<sup>3</sup>
- iv) ***Wahidunissa Begum w/o Abdul Wahid and another vs. Shaikh Abdulla s/o SK. Maheboob***<sup>4</sup>
- v) ***Dadu Nemisha Balwan (since deceased) through L.Rs. Hirabai Dadu Balwan and others vs. Sadik Malikso Bargir and others***<sup>5</sup>

6. As against these submissions, Mr. Mahesh Jethmalani, learned Senior Counsel for the Respondent No.2 made the following submissions:

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1 (2024) 10 Supreme Court Cases 588  
2 Privy Council – 518 The Law Weekly 1919  
3 (1996) 7 Supreme Court Cases 436  
4 2000(1) Mh.L.J. 136  
5 2020(3) Mh.L.J. 874

**SUBMISSIONS OF MR. MAHESH JETHMALANI, LEARNED SENIOR COUNSEL FOR THE RESPONDENT NO.2.**

Mr. Jethmalani relied on the provisions of the Hindu Minority and Guardianship Act, 1956. He submitted that, as per Section 2, the said Act is in addition to, and not, save as expressly provided, in derogation of, the Guardians and Wards Act, 1890. He referred to the over-riding effect of this Act under section 5. He referred to Section 6(a) of the said Act to show who is the natural guardian of a Hindu minor. He also referred to Section 13 which speaks about the welfare of a minor. In support of his contention, he relied on the Judgments of the Hon'ble Supreme Court in the case of i) **Nithya Anand Raghavan Versus State (NCT of Delhi) and another<sup>6</sup>**, ii) ***Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba Versus State of West Bengal and others<sup>7</sup>*** and iii) ***Tejaswini Gaud and others Versus Shekhar Jagdish Prasad Tewari and others<sup>8</sup>***, iv) ***Nirmala Versus Kulwant Singh and others<sup>9</sup>*** and v) ***Somprabha Rana and others Versus State of Madhya Pradesh and others<sup>10</sup>***.

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6 (2017) 8 Supreme Court Cases 454

7 2021 SCC OnLine SC 3434

8 (2019) 7 Supreme Court Cases 42

9 2024 SCC OnLine SC 758

10 (2024) 9 Supreme Court Cases 382

## **REASONS AND CONCLUSION:**

7. We have considered these submissions. Section 5 of the Hindu Minority and Guardianship Act, 1956 has an over-riding effect as mentioned by Mr. Jethmalani. Section 6 of the said Act lays down as to who is the natural guardian of a Hindu minor in respect of his person and his property.

Section 6 of the Hindu Minority and Guardianship Act, 1956 reads thus:

**“6 - Natural guardians of a Hindu minor.-** The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

- (a) in the case of a boy or an unmarried girl—the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
- (b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;
- (c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

- (a) if he has ceased to be a Hindu, or
- (b) if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati or sanyasi*).

Explanation.—In this section the expressions “father” and “mother” do not include a step-father and a step-mother.”

Thus, Section 6 clearly states that, in case of a minor boy, the father is the natural guardian. The boy is now 10 years of age and is residing with his father as of today.

8. Section 13 of the Hindu Minority and Guardianship Act, speaks about the welfare of a minor which should be the paramount consideration. Section 13 reads thus:

**“13 - Welfare of minor to be paramount consideration - (1)**  
In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

This provision, as mentioned U/s.2 of the Hindu Minority and Guardianship Act will have to be read along with the provisions of the Guardians and Wards Act, 1890.

The corresponding important provision in the Guardians and Wards Act is Section 17; which reads thus:

**“17. Matters to be considered by the Court in appointing guardian -** (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If minor is old enough to form an intelligent preference, the Court may consider that preference.

(4)[omitted]

(5) The Court shall not appoint or declare any person to be a guardian against his will.

Therefore, the Court will have to consider all these factors to reach at the satisfaction as to who should have custody of the child. The welfare of the child is the most important aspect. It is held so in the case of *Tejaswini Gaud*. The relevant paragraphs-19, 20 and 26 are as follows.

**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.”

What follows from this Judgment is that, welfare of the child is of supreme consideration in such cases. The ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be. The power of the High Court in granting a writ is qualified only in cases where the detention of a minor is by a person who is not entitled to his legal custody. 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.

9. In the present case, on all these considerations, we are of the opinion that the petition cannot succeed. The father is the natural guardian. The child's custody cannot be termed as illegal custody. The disputed questions raised by the Petitioner cannot be decided conclusively in *habeas corpus* petition as the procedure is summary in nature. Welfare of the child is the paramount consideration.

10. In this context, it must be noted that, before closing the matter for orders, we interviewed the child in our chambers. We

found him to be an intelligent child. He was giving proper answers politely. Even, at this age, he was sure as to what education he wanted to pursue in future. Finding him to be an intelligent child, we specifically asked his desire and wish about residing with the Petitioner or with the Respondent No.2. On this, he specifically told us that he wishes to reside with his father i.e. the Respondent No.2 and not with the Petitioner. He told us that, he is always under a constant fear that the Petitioner may take him away from his father and that he may not be able to meet his father again.

It is a possibility that since the child is with the father for a few months now, the father could have conditioned his mind by tutoring. But at this stage, the boy very specifically told us his wish and, therefore, we are not inclined to take away the child from the Respondent No.2 and give the custody to the Petitioner. The Petitioner, of course has an option to exercise a remedy under both the above Acts, as the case may be, by approaching the competent Court and leading the evidence to prove as to what would be the welfare of the child in the facts of the case. But for that purpose, elaborate leading of evidence will be necessary.

Similarly, there should be proper counselling session where it can be decided whether the boy's mind is tutored by the father. All this exercise is not possible while deciding the *habeas corpus* petition, which is summary in nature. Similar view is taken by the Hon'ble Supreme Court in the case of *Nirmala*. The paragraph-19 of the said Judgment reads thus:

“19. We are of the considered view that in the peculiar facts and circumstances of the case, the High Court ought not to have entertained the habeas corpus petition under Article 226 of the Constitution of India. Since a detailed enquiry including the welfare of the minor child and his preference would have been involved, such an exercise could be done only in a proceeding under the provisions of the Guardians and Wards Act, 1890.”

11. In another Judgment in the case of *Somprabha*, the Hon'ble Supreme Court in paragraph-13 observed 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.

12. Learned counsel for the Petitioner has relied on the observations in the case of *Yashita Sahu Versus State of Rajasthan*<sup>11</sup> to contend that, in such cases, the petition for writ of *habeas corpus* is maintainable.

13. There is no doubt regarding the proposition that in a given case the petition for writ of *habeas corpus* brought by one parent against the other, is maintainable; provided, conditions laid down by the Hon'ble Supreme Court in the various judgments enumerated herein above are satisfied.

14. In this view of the matter, the proper remedy for the Petitioner would be to approach a competent court under the provisions of the Hindu Minority and Guardianship Act, 1956. No relief can be granted to the Petitioner in the present petition.

15. The Petition is accordingly dismissed.

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<sup>11</sup> (2020) 3 Supreme Court Cases 67

16. It is made clear that, all the observations regarding the welfare of the child are made only for the purpose of deciding the present petition, and at an appropriate stage, the competent Courts in future are free to take their own decision in accordance with law regarding the custody and welfare of the child.

(S. M. MODAK, J.)

(SARANG V. KOTWAL, J.)