IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2364 OF 2024

Sahil Raju Gilani ..Petitioner
Versus
The State of Maharashtra & Anr. ..Respondents

WITH
INTERIM APPLICATION NO. 2483 OF 2024
……..
WITH
INTERIM APPLICATION (ST) NO. 21832 OF 2024
IN
CRIMINAL WRIT PETITION NO. 2364 OF 2024

Mr. Aabad Ponda, Sr. Advocate a/w. Ms. Fazaa Shroff, Mr. D. V. Deokar, Sachin Pandey and Mustafa Shroff i/b. Ms. Fazaa Shroff for Petitioner.

Mr. J. P. Yagnik, APP for State/Respondent.

Mr. Harish Salve, Sr. Advocate (appeared through V.C.) a/w. Mrs. Taubon Irani, Danish Aftab Chowdhary and Shreyas Chaturvedi for the Respondent No.2.

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

RESERVED ON : 15 APRIL 2025
PRONOUNCED ON : 28 APRIL 2025

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

1. This is a petition filed by the father of a girl child 'S' for the writ of *Habeas Corpus*. By way of interim order, the Petitioner has sought directions restraining the Respondent No.2 who is the mother of the child and the Petitioner's wife from taking away the minor girl outside the territory of India. Another prayer in the nature of interim relief is for the directions regarding access of the minor girl.

2. Heard Mr. Aabad Ponda, learned Senior Counsel for the Petitioner, Mr. Yagnik, learned APP for the State/Respondent No.1 and Mr. Harish Salve, learned Senior Counsel for the Respondent No.2.

3. The facts mentioned in the petition are that the Respondent No.2 was born in Pakistan. She became an Indian Citizen on 07.06.1995 and she was issued an Indian Passport on 28.08.1995. After that, she surrendered her Indian citizenship and became a U.S. National on 17.12.2007. The Respondent No.2 currently lives in India with an American Passport and travels with a PIO (Person of Indian Origin) Card which has expired on

24.03.2023. It is mentioned in the petition that the Respondent No.2 had applied for an OCI card on 27.06.2017, but FRRO rejected that application and had directed her to apply for an Indian VISA. The issue is pending before the Delhi High Court in Writ Petition (C) No.2063 of 2019 as the FRRO had initiated steps to cancel her PIO card. It is further mentioned in the petition that the Respondent No.2 is a fashion stylist, having a Bachelor's Degree from USA. She is a business woman and also works in Hindi film industry. She is an influencer on social media and because of her nature of work she has to travel frequently. According to the Petitioner, she does not have any fixed place of business and she has no concrete roots in India either on personal level or on the professional level.

4. The Petitioner got married with the Respondent No.2 on 06.10.2019. The couple was blessed with their daughter on 06.04.2022. The daughter was born in Mumbai and stayed in Mumbai from May 2022 up to 30.01.2024. She was admitted to a school in Mumbai. Mr. Ponda, learned senior counsel for the Petitioner submitted that the Petitioner has paid the school fees up

to July 2026. The child has a Passport on the Mumbai address. Her Aadhaar card and PAN card also has the same address. In this background, according to the Petitioner, the Respondent No.2, clandestinely, on the pretext of temporarily visiting her father in New Delhi, took away the minor child from Mumbai. The return tickets were booked for both, the nurse and the minor child for 11.02.2024, but the child was not brought to Mumbai and was kept in New Delhi. Instead, the Respondent No.2 sent a legal notice through her advocate for amicable resolution of marital dispute by taking recourse to pre-litigation mediation. The Petitioner replied to that notice vide the reply dated 20.03.2024. The Respondent No.2, in her notice, had made allegations of cruelty, domestic violence, financial deprivation and, physical and mental harassment; which the Petitioner has denied in his reply. The sum and substance of this background is that the child remained in New Delhi and, therefore, the Petitioner has filed this petition in the nature of *habeas corpus.*

5. In the meantime, the Respondent No.2 had filed a suit in the Court of Additional District Judge-05, Saket (South), New

Delhi, bearing Civil Suit No.368 of 2024 seeking following reliefs:

a) pass a decree of permanent injunction in favour of the plaintiff and against the defendant No.1 and his agents thereby restraining the Defendant No.1 from entering upon any part of the suit property bearing No. bearing No.4 Oak Drive, DLF, Chattarpur Farms, New Delhi-110030 in any manner.

b) pass a decree of Mandatory Injunction directing the Defendant No.1 herein to hand over the Passport of the minor daughter 'S' Gilani to the Plaintiff; and

c) pass a decree of mandatory injunction directing the Defendant No.1 to give his No objection for issuance of a new Passport of the minor daughter by the Defendant No.2 or in the alternative direct the Defendant No.2 to issue a passport in the name of minor daughter of the Plaintiff without insisting upon a No Objection from Defendant No.1 and handover the same to the Plaintiff.

d) Order the Defendant No.1 to pay for the cost of the suit."

6. The petition further mentions that, vide the order dated 29.05.2024, the Additional District Judge-05 granted ex-parte injunction against the Petitioner directing the Petitioner to deposit the passport of the child with that Court on or before 04.06.2024. The Petitioner challenged the said order before the High Court at

Delhi vide F.A.O. No.194 of 2024. The Delhi High Court vide the order dated 03.06.2024 stayed the operation of the order passed by the Additional Sessions Judge-05, Saket. In this background, Mr. Ponda, learned senior counsel appearing for the Petitioner made the following submissions.

SUBMISSIONS OF MR. PONDA, LEARNED SENIOR COUNSEL FOR THE PETITIONER.

7. The Petitioner was and had been the minor child's primary caregiver. He spent more hours in the day with the child. The Respondent No.2 who had a very erratic lifestyle on account of her business; frequently traveled and did not have any fixed place of business. She had no concrete roots in India. The child was enrolled in a school in Mumbai, but since she was taken away abruptly, she was unable to attend the school since January 2024. The Petitioner apprehends that the child would be taken away from him for good to the USA. The daughter is attached to him. She is in distress as she is unable to meet the Petitioner.

8. Mr. Ponda submitted that the pleadings in the petition are not specifically denied by the Respondent No.2 and, therefore, those pleadings will have to be accepted as uncontroverted facts.

Mr. Ponda submitted that, while considering the grant of directions in the nature of *habeas corpus*, religion of the parties must be taken into account. As per the Mahomedan Law, the father is the natural guardian of the child. It is now well established that the petition in the nature of *habeas corpus* is maintainable in respect of the disputes raised by one parent against the other for custody of the child. The manner in which the child is removed from custody of one parent also plays an important role in consideration of the reliefs which can be granted under the *habeas corpus* petition. Mr. Ponda referred to Section 352 and 354 of the Mahomedan Law.

Section 352 mentioned in the Mahomedan Law reads thus:-

> **"352. Right of mother to custody of infant children.** — The mother is entitled to the custody (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.

9. Mr. Ponda submitted that, though this particular provision mentions that the mother is entitled to the custody of a female child until the child attends puberty, it is qualified by

Section 354 as mentioned in the Mahomedan Law; which reads thus:

> **354. Females when disqualified for custody**.— A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody —
>
> (1) if she marries a person not related to the child within the prohibited degrees (ss. 260-261), e.g., a stranger, but the right revives on the dissolution of the marriage by death or divorce; or,
>
> (2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or,
>
> (3) if she is leading an immoral life, as where she is a prostitute; or,
>
> (4) if she neglects to take proper care of the child.

10. In particular, Mr. Ponda relied on Sub Section (2). Mr. Ponda submitted that, in this case the Respondent No.2 had gone and resided in New Delhi during the subsistence of their marriage; which is a place distant from the Petitioner-father's place of residence and, therefore, the Respondent No.2 has lost the right of custody of the child. In this context, he relied on certain Judgments. But, basically, his main thrust of argument was on Section 354 of the Mahomedan Law, and his contention is that the

Respondent No.2 has lost the right to have custody of the daughter. Mr. Ponda relied on the Judgment of the Hon'ble Supreme Court in the case of ***Athar Hussain V. Syed Siraj Ahmed and others***[1]***,*** and in particular he relied on paragraphs-33 and 34 which read thus:-

> "33. In *Siddiqunnisa Bibi v. Nizamuddin Khan, [AIR 1932 All 215]*, which was a case concerning the right to custody under Mohammaden Law, the Court held:
>
> "A question has been raised before us whether the right under the Mahomedan law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child by the father continues in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father."
>
> 34. Thus the question of guardianship can be independent of and distinct from that of custody in the facts and circumstances of each case."

11. As far as the maintainability of the *Habeas Corpus* petition is concerned, Mr. Ponda relied on the Judgment of ***Yashita Sahu Versus State of Rajasthan***[2] and ***Gohar Begam v. Suggi Alias***

1 (2010) 2 Supreme Court Cases 654
2 (2020) 3 Supreme Court Cases 67

Nazma Begam and others[3]. Though, in **Gohar Begam's case** the right of the Petitioner U/s.491 of the Code of Criminal Procedure, 1898 was mainly considered, but Mr. Ponda's argument was that the fact that a person may have a right under the Guardians and Wards Act, but it may not be the justification to contend that the said person has no right of custody U/s.491 of the Cr.P.C., 1898. Mr. Ponda relied on the following other judgments:

i) ***Gautam Kumar Das Versus NCT of Delhi and others***[4]

ii) Imambandi and others v. Sheikh Haji Mutsaddi and others[5]

iii) Meethiyan Sidhiqu Versus Muhammed Kunju Pareeth Kutty and others[6]

iv) Wahidunissa Begum w/o Abdul Wahid and another vs. Shaikh Abdulla s/o SK. Maheboob[7]

v) Dadu Nemisha Balwan (since deceased) through L.Rs. Hirabai Dadu Balwan and others vs. Sadik Malikso Bargir and others[8]

12. As against these submissions, Mr. Harish Salve, learned Senior Counsel appearing for the Respondent No.2 made the

3 AIR 1960 SC 93
4 (2024) 10 Supreme Court Cases 588
5 Privy Council – 518 The Law Weekly 1919
6 (1996) 7 Supreme Court Cases 436
7 2000(1) Mh.L.J. 136
8 2020(3) Mh.L.J. 874

following submissions:

SUBMISSIONS BY MR. HARISH SALVE, LEARNED SENIOR COUNSEL FOR THE RESPONDENT NO.2.

13. Mr. Salve raised a preliminary objection regarding very maintainability of this petition. He submitted that, if the child is in the lawful custody of one parent, then the petition for the relief of *habeas corpus* is not maintainable. The Petitioner had effective alternate remedy which he could avail. The paramount consideration in such petitions or in the matter for the custody of the child is "welfare of the child". The Guardians and Wards Act, 1890 covers such cases and the Petitioner can prefer appropriate proceedings under the said Act. Mr. Salve submitted that the Respondent No.2 had already preferred a petition under sections 7, 10 and 13 of the Guardians and Wards Act before the Judge, Family Court, Saket, New Delhi. Vide the order dated 31.08.2024, the said Court had restrained the present Petitioner from removing the child forcibly from the custody of the present Respondent No.2. He submitted that the competent Court is lawfully seized of the proceedings. The Petitioner could have participated in those proceedings for the same reliefs which he is claiming in the present

habeas corpus petition. The issues raised by Mr. Ponda in this petition can be necessarily considered by the said Family Court in those proceedings; which require elaborate leading of evidence and consideration of all the provisions. The Petitioner himself could have filed any similar petition under the Guardian and Wards Act if he was really interested in the custody of the child. Mr. Salve specifically referred to Section 4(2), 17 and 24 of the Guardians and Wards Act. According to him, the religion of the parties is not material as is clarified in the said Act itself. From the legal notice and the replies exchanged between the parties, it is quite clear that the Petitioner was aware of the dispute right from March 2024 and yet he has not taken any steps for the custody of the child. In support of his contentions, Mr. Salve referred to the following Judgments of the Hon'ble Supreme Court.

i) **Nithya Anand Raghavan Versus State (NCT of Delhi) and another**[9]

ii) **Rajeswari Chandrasekar Ganesh Versus State of Tamil Nadu and others**[10]

iii) ***Yashita Sahu Versus State of Rajasthan***[11]

9 (2017) 8 Supreme Court Cases 454
10 (2023) 12 Supreme Court Cases 472
11 (2020) 3 Supreme Court Cases 67

REASONS AND CONCLUSION:

14. We have considered these submissions. Before referring to the provisions of the Guardians and Wards Act, it would be advantageous to refer to the observations of the Hon'ble Supreme Court in the various judgments cited by both the sides. In **Nithya's** case which was decided by a three Judges Bench of the Hon'ble Supreme Court, the aspect of consideration of *habeas corpus* petition in a case of such nature was extensively considered and decided. The paragraph-47 of the said Judgment reads thus:

> "47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

15. Elaborating it further, the Hon'ble Supreme Court in Paragraph-53 has further observed that, being a girl child, the

guardianship of the mother is of utmost significance. Ordinarily, the custody of a girl child who is around 7 years of age must ideally be with the mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in custody of the mother. In the present case, the child is hardly 3 years of age. In paragraph-63 it is further observed that the Indian Courts are strictly governed by the provisions of Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction.

16. In our opinion, this observation directly settles the issue raised in this petition by the Petitioner. The Hon'ble Supreme Court has already observed that, in such cases, it can be presumed that the custody of the minor with her mother is lawful and only in exceptional circumstance the custody of the minor girl child would be ordered to be taken away from the mother for being given to any other person including the father, in exercise of writ jurisdiction. But, instead, the other parent can be asked to resort to substantive remedy for getting the custody of the child. Ordinarily, when the custody of a small girl child, who in this case is around

three years of age, is already with her mother, then it cannot be taken away from the mother unless there are circumstances to indicate that it would be harmful for the child to remain in the custody of her mother. Like in **Nithya's** case and even in the present case before us, no such material is forthcoming before us to show that the custody of the daughter if remained with the mother would be harmful to the daughter. Though, Mr. Ponda submitted that because of the erratic nature of her business, the Respondent No.2 is unable to spend sufficient time with the child, it is a disputed fact which cannot be held as the truth to deny the custody of the child to the mother. The Hon'ble Supreme Court has clearly observed in paragraph-63 of **Nithya's** case that the Indian Courts were strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor child within its jurisdiction.

17. Mr. Ponda tried to get over these observations by submitting that the parties in this case before us are Muslims and, therefore, these observations regarding Guardianship of a mother of a young daughter are not applicable. He has relied on

aforementioned Sections 352 and 354 of the Mahomedan Law, as well as, on the observations of the Hon'ble Supreme Court in the case of **Athar Hussain.** In this context, it is necessary to refer to the submissions of Mr. Salve with reference to Section 17 of the Guardians and Wards Act; 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.

Sub Section 2 of Section 17 specifically mentions that, 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. Thus, the religion of a party is not the only consideration before the Court in such cases for consideration of the welfare of the child. The religion of the minor is only one of the considerations, but it is not a decisive overriding factor. It is only one of the many factors which the Court has to consider as to what is for the welfare of the minor. In our opinion, for a three year old girl child, being in the custody of her mother would be for her welfare. The mother is earning sufficiently to provide for herself and for her daughter.

These observations are made only with reference to the submissions made by Mr. Ponda in respect of guardianship of the minor daughter whose mother has taken away the custody of the minor daughter and is residing at a distant place from the father. However, since that issue can also be considered by the Court seized of the petition under the Guardians and Wards Act, we are restricting our observations only for the purpose of deciding this *habeas*

corpus petition. The Hon'ble Supreme Court in **Nithya's** case has clearly observed that the proper remedy with the other parent who does not have custody is to resort to the substantive prescribed remedy for getting the custody of the child. It would be governed by the provisions of the Guardians and Wards Act, 1890. The said proceedings are already initiated by the Respondent No.2 before the Family Court, Saket, New Delhi.

18. In this context, a reference can also be made to the case of ***Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba Versus State of West Bengal and others***[12]**.** In **Jose's** case, the Hon'ble Supreme Court had referred to the case of ***Tejaswini Gaud and others Versus Shekhar Jagdish Prasad Tewari and others***[13] and paragraph-20 from the **Tejaswini's** case was quoted, in which it was held that, 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. Mr. Ponda submitted that, in **Jose's** case petition for custody of children was already

12 2021 SCC OnLine SC 3434
13 (2019) 7 Supreme Court Cases 42

pending and then *habeas corpus* petition was filed. In this case, *habeas corpus* petition was filed earlier and, therefore, consideration would be different and *habeas corpus* petition would be maintainable.

19. In this context, the observations of the Hon'ble Supreme Court in the case of **Nithya** in paragraph-63 are important, wherein it was observed that, it is not relevant as to which party first approached the Court or so to say "first strike".

In short, if the remedy is available, either of the parents can resort to the substantive remedy prescribed under the Guardians and Wards Act.

20. In **Rajeswari's** case, **Nithya's** case was considered, wherein, it was observed that, the principal duty of the court in such matters should be to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his or her present custody should be changed and the child be handed over to the care and custody of any other person. As mentioned earlier, in our opinion, it cannot be conclusively

observed that the custody of the child should be changed and that it should be handed over to the Petitioner.

21. Paragraph-99 of **Rajeswari's** case is important; which reads thus:

> "99. 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."

22. Paragraph-26 of **Tejaswini's** case reads thus:

> ***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."

Thus, it is consistent view in various judgments that the welfare of the child is of paramount consideration. Therefore, wherever it is a disputed question of fact which needs elaborate leading and consideration of evidence and the other provisions, it would be a proper course for a parent to exercise his right by approaching the appropriate Court under the Guardians and Wards Act, 1890; rather than pursuing the remedy under the *habeas corpus* petition. It is also well settled that the *habeas corpus* petition would be maintainable, but the relief can be granted when the facts are very clear and consideration of the welfare of the child demands interference by the Court under Article 226 of the Constitution of India. In the background of the facts of the present case, we do not find that this is a case where the Court can interfere by directing the Respondent No.2 to handover the custody of a minor child aged 3 years from the mother to the Petitioner-father. The Petitioner is always at liberty to participate in the proceedings preferred by the Respondent No.2 herein in the

Court at Delhi. All these issues can be decided in those proceedings. The Petitioner is at liberty to initiate appropriate proceedings in accordance with law for custody of the child. If such proceedings are preferred, it shall be decided in accordance with law, independently.

23. With the result, we are of the opinion that no relief can be granted in this petition by issuing a writ in the nature of *habeas corpus*. However, the petition was pending in this Court for quite some time and various orders were passed from time to time. The important ad-interim order was passed by the previous Division Bench of this Court on 18.06.2024. The relevant paragraph-5 of the said order reads thus:

> "5. On the basis of the sequence of events narrated before us, we are not in a position to dispel the apprehension and rather in the wake of the steps initiated by Respondent No.2, by filing a Petition before the Delhi High Court, challenging the cancellation of PIO card and the relief she has specifically sought before the Saket Court, which was even granted in her favour, though subsequently stayed by Delhi High Court, and though we deem it appropriate to issue notice to Respondent No.2, at this stage and in the interregnum to protect the interest of the Petitioner and to prevent Respondent No.2 from removing the child from India, while she is summoned before the Court and answer the notice issued, seeking a writ in the nature of habeas corpus, we deem it appropriate to grant ad-interim relief in terms of prayer clause (b)."

Though, this order was passed before the Respondent No.2 participated, it was continued subsequently from time to time and it is in operation till today. Therefore, we deem it appropriate to extend the said ad-interim relief for a further period of 60 days to afford a reasonable opportunity to the Petitioner to approach the appropriate Court for the custody of his minor daughter.

24. With these observations, the Petition is dismissed.

25. With disposal of the writ petition, both the interim applications are disposed of.

(S. M. MODAK, J.) (SARANG V. KOTWAL, J.)