

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 2800 of 2020

CHAVDA TWINKLE D/O MANOJBHAI W/O AJRUDIN ALLAUDIN MAMTI

Versus

STATE OF GUJARAT

Appearance:

MAYANK R CHAVDA(9250) for the Applicant(s) No. 1

for the Respondent(s) No. 3

NOTICE NOT RECD BACK(3) for the Respondent(s) No. 2,4,5,6

PUBLIC PROSECUTOR(2) for the Respondent(s) No. 1

CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI

and

HONOURABLE MR. JUSTICE N.V.ANJARIA

Date : 17/07/2020

ORAL ORDER

(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. In this petition, preferred under Article 226 of the Constitution of India so also under Articles 14 and 21 of the Constitution of India on 03.07.2020, after hearing learned advocates for the applicant, we deemed it appropriate to pass the following order:-

“1.The petitioner, herein, is the mother, who is aggrieved by the alleged action of cruelty by her husband and in-laws. She also has made a grievance that she was driven out, after she delivered twin boys, namely Niyaz and Nizam. She also is aggrieved that after the conversion of her religion, the marriage had taken and now, she has nowhere to turn to. Considering the young age of the children, she made all possible attempts to find an amicable way of getting them back. However, no heed is paid to the same, till date. She also made an attempt of lodging the FIR, but, the police asked her to go to Rajkot for the said purpose. Due to pandemic, the petitioner is unable to travel to Rajkot.

2.NOTICE, returnable on 9THJULY, 2020.Learned APP waives service of notice for respondent Nos. 1 and 3. Respondent No.3 is also permitted to be served, directly through E-MODE.

Respondent No.4 shall be served through respondent No.3.

3.On the returnable date, either the children shall be produced before this Court through Video Conference at the nearest Court in the presence of the learned Presiding Officer concerned, if not, action taken report shall be submitted.

4.We need to observe, at this juncture, that the law is well settled that any complaint given anywhere is to be registered by the police with '0' number, and then, it can be sent to the concerned police station, having the jurisdiction over the area and the parties are not be sent from the post to pillar. Let the APP intimate the same to the Police authority concerned”

2. On 09.07.2020, since the High Court needed to be closed on account of pandemic due to Covid-19 virus, the matter was taken up on 14.07.2020 where the following order was passed:-

“1.This Court on 03.07.2020 passed the following order:-“1. The petitioner, herein, is the mother, who is aggrieved by the alleged action of cruelty by her husband and in-laws. She also has made a grievance that she was driven out, after she delivered twin boys, namely Niyaz and Nizam. She also is aggrieved that after the conversion of her religion, the marriage had taken and now, she has nowhere to turn to. Considering the young age of the children, she made all possible attempts to find an amicable way of getting them back. However, no heed is paid to the same, till date. She also made an attempt of lodging the FIR, but, the police asked her to go to Rajkot for the said purpose. Due to pandemic, the petitioner is unable to travel to Rajkot.2. NOTICE, returnable on 9TH JULY, 2020. Learned APP waives service of notice for respondent Nos. 1 and 3.Respondent No.3 is also permitted to be served, directly through E-MODE. Respondent No.4 shall be served through respondent No.3.3. On the returnable date, either the children shall be produced before this Court through Video Conference at the nearest Court in the presence of the learned Presiding Officer concerned, if not, action taken report shall be submitted.4.We need to observe, at this juncture, that the law is well settled that any complaint given anywhere is to be registered by the police with '0' number, and then, it can be sent to the concerned police station, having the jurisdiction over the area and the parties are not be sent from the post to pillar. Let the APP intimate the same to the Police authority concerned.”2.Today, Mr.Kilan Chandarani appearing for respondent respondents No.4 to 6 has assisted the Court. According to him, the applicant mother

is divorced. Therefore, the children's father is jeopardized after the custody is given away. She has no fixed place to reside and is already in another relationship. According to him, mother of the present applicant also is supporting the cause of her husband.3.Mr. Mayank Chavda, learned advocate for the applicant has strongly objected to all these objections being raised on the part of the husband, as according to him,she has been driven out of the home and her mother is not supporting her who in fact,insisted on both the children to be given away to the husband and her divorcing husband and yet,she is not ready to take the applicant back. He has also further urged that the applicant being mother she would definitely look after both the twins and her other details of sustenance. He will be filing before the Court by way of affidavit, for which he required 24 hours of time. He has raised the grievance that father is already having three criminal antecedents. 4.Ms. Jhaveri, learned Additional Public Prosecutor has independently submitted the application of applicant raising the grievance with regard to the children's custody and other grievance raised before the Gandhinagar police station has already now taken shape of the First Information Report. She also shall find out whether there is any semblance of truth of the father having criminal antecedents.5.As both the sides are desirous of filing the affidavit, let the same be done by giving an advance copy to the other side. 6.Matter shall be posted on16.07.2020. Both the corpora have been brought before this Court. Mother-in-law of the applicant and the sister-in-law have produced the corpora. Both of them are very young and one of them was not even awake. Paternal aunt submits that she is looking after one of the children named Navaz, as she does not have children of her own and mother-in-law looks after the other child named Nizam. 7.Considering the fact that both the children are found to be with the in-laws of the applicant and they are very young, after receiving the affidavits from both the sides, we shall hear the parties and pass further order on 16.07.2020. 8.Their production was through the District Court in presence of learned Additional District Judge Ms. Kajal D. Dave. She has also assisted us ably and is further requested to converse with the in-laws of the present applicant for knowing further details of children. Request is made to her to remain present on16.07.2020 and also ask the parties to remain present through video conferencing with Corpora. Let applicant remain present from her Advocate 's office or independently through Video Conferencing on16.07.2020.”

2. Thereafter, the matter was fixed on 16.07.2020 and the order

passed by this Court is as follows:-

“1.Pursuant to the order passed by this Court on 14.07.2020, today applicant –Twinkle is before us through video Conferencing and both the children of hers being the corpora have been produced before us through video conference arranged at the Court of Mrs. K.D.Dave, 4thAdditional District and Sessions Judge, Rajkot. In our presence, the mother had spoken to the children and we also have been able to converse with the petitioner at length. We have also seen the affidavit-in-reply, rejoinder affidavit and the document of deed of divorce so also the affidavit of the mother of the present petitioner.

We have heard rival versions of both the sides and before we decide and adjudicate upon the issues which have been brought before us, we would like the petitioner to meet both the children in person which can be possible at Rajkot in presence of learned 4thAdditional District and Sessions Judge Mrs. K.D.Dave. The petitioner has agreed to travel tomorrow itself. 3.Considering the First Information Report that she has lodged, the Superintendent of Police, Gandhinagar shall make necessary arrangement for a lady Police Officer to accompany her so that no untoward incident occurs. Let her remain present tomorrow at the Court of learned 4thAdditional District and Sessions Judge, Rajkot at 1:00 o'clock. The children also shall be called at 1:00 o'clock. Let the meeting of mother and both the children only be arranged in presence of Learned presiding officer Mrs. Kajal Dave, the 4th Additional District and Sessions Judge before we meet them through VC during the course of Court timings.

4.The further hearing in this case shall take place tomorrow and both the sides shall be further heard on that day

5.Learned APP ensures to communicate this order to the Superintendent of Police, Gandhinagar and also coordinate her to be escorted. 6.Matter to appear tomorrow i.e. on 17.07.2020.”

3. We notice that in the interregnum respondent No.4 filed affidavit-in-reply, where he denied all allegations made in the petition. According to him, initially for six months, he and the applicant lived together and after being assured of the

relationship, she got the marriage registered under the Special Marriage Act. Twins Nizam and Navaz were born to her. It is alleged against her that she developed contact with one of his friends and that was the cause of dispute. It is also further alleged that her mother and brother tried to intervene. However, she refused to accept the mistake and also alleged against her about having the intimacy with her female classmate.

3.1. It is also his say that she since was desirous of living freely, she agreed to the divorce on the stamp paper of Rs.100/- and they separated. This was executed in presence of her mother and brother both and there are other witnesses to support on the side of the application. The same came to be executed on 14.08.2019. He denied the allegations of her having been beaten and driven from her matrimonial home on the ground that the execution of the said document is 14.08.2019 and henc, her being driven away on 13.08.2019 has no basis. On the custody of the minors also,It is contended that he had not agreed the children to be retained by the applicant. She is residing all by herself and not with her parents and she has no fixed place of abode. Mother of the applicant is

also aware of the disputes between two of them and she chose to file affidavit in favour of respondent No.4. He has alleged that looking to the past and looking at her conduct and the factum of her application under Guardian and Wards Act before the learned District Judge, Gandhinagar on 04.03.2020 and suppression of the said fact while preferring this application would dis-entitle her to the discretionary relief under the writ of habeas corpus.

4. The affidavit-in-reply is accompanied by deed of divorce dated 14.08.2019 as detailed in his affidavit so also the affidavit of the mother of applicant, wife of one Mr.Hitesh Patel, who is the resident of District: Chanpur, Maharashtra. The mother also has confirmed the details, which has been furnished by respondent No.4. She also confirmed that it was decided to hand over the custody of minors to respondent No.4 and divorce deed according was executed on 14.8.2019. He and her son Zineth brother of the present applicant, signed as witnesses. She also had gone to an extent of alleging her own daughter in various ways unfortunately and we choose not to reiterate such contents in this order which prima facie appear to malign the daughter as the relationship between the two is not cordial at all. Long

and short of her affidavit is that she supports respondent No.4 fully and stressed that her daughter has no capability to maintain both the children, who are twins.

5. Copy of application NO.4/2020 preferred before the learned Principal District & Sessions Judge, Gandhinagar also is brought on record, which is preferred by the present applicant seeking custody of both the children on 04.03.2020. Copy of the First Information Report which has been lodged with Mahila police station, Gandhinagar by the present applicant against the respondent No.4 for the offences punishable under sections 498A, 323, 504,506(2) and 114 of the Indian Penal Code dated 13.08.2019 is forming part of the record.

6. Additional affidavit filed by the applicant states that she resides at Sarghasan, District: Gandhinagar. She initially lived at Vibhag-III at Sarghasan and was paying rent of Rs.4000/- per month. Her rent agreement was to expire on 02.10.2020. However, now she has shifted to Nano-city, Gandhinagar. The rent agreement is yet to be executed because of the pandemic. She also had requested the Court to direct any kind of inspection of her residential place, if need so arises. She also further says that for her livelihood,

she runs tiffin service and she started the same for her livelihood from the time she parted ways with respondent No.4 and presently is earning Rs.25,000/- per month. She would be expected to look after the children financially, physically and also to impart education to both of them. She is unable to go to her mother who married thrice and as the mother herself is against her and she has by way of a conspiracy joined her husband and in-laws, she has to be on her own. She has alleged against husband that he has criminal antecedents, who deals with prohibited liquor and it is also reported in the newspaper. The First Information Report also is shared with the Court along with newspaper reports. It appears that one offence is of 28.02.2019 registered with DCB police station, Rajkot, which also reflects his name, where the liquor worth Rs.1.73 lakhs has been seized by the police.

7. We have heard learned advocate Mr. Chavada for the applicant, who along the line of the petition and the additional affidavit filed by the applicant has argued before us. According to him, it has been a pure mistake on the part of the applicant not to have made a mention of the application preferred under the provisions of Guardians and Wards Act.

However, that cannot be a bar to file writ petition of habeas corpus for which he has sought to rely on the decision of the Apex Court rendered in the case of **Gohar Begam vs Suggi Alias Nazma Begam And Others** reported in AIR 1960 SC 93.

8. He has urged that the custody of the young children should be ordinarily with mother and these are twins children, who are very young and it is not advisable to leave them with anyone else. He pointed out further that the father has got criminal antecedents. The entire story of divorce deed has been concocted and marriage of the couple had been under Special Marriage Act, for they both being of different religions, divorce could not have taken place on Rs.100/- stamp paper. He reiterated the fact that the mother of the applicant is hostile to her very cause. According him, she herself has not been in a position to remain steady in any relationship. With Mr. Hitesh Patel, it was her third marriage and there also presently, she has not continued. He urged that the applicant has her steady income and have her rented premise which can be verified and, therefore, the children may be entrusted to the mother and be not left to the mercy of any one else when she is willing to take their

custody. For 11 months she had not come forward, only because she wanted to stabilize her own life.

9. Mr. Chandrani for the respondents No.4 to 6 has strongly objected to this and urged that the custody to mother of young kids may not be objected to ordinarily nor can it be overlooked by the Court, but in the instant case, as she has tried to suppress the vital facts. The address given in the cause title of the petition is different from the one given in the additional affidavit. He also has urged that the factum of divorce deed also has not been revealed in the petition and mother's affidavit speaks volumes of her conduct. In presence of her own mother and brother, the divorce has taken place where she has handed over the custody of the minors to the husband and moreover, the mother also had stated that presently she resides with a lady with whom she had intimacy while she was in the 8th Standard. He earnestly urged the Court not to disturb the custody of the children.

Having heard both the sides and also having considered the material on record, we need to make a specific mention that we are alive to the scope of the writ of habeas corpus and we also are conscious that ordinarily when there are other effective and efficacious remedies available, which would enable the parties to take recourse to, promptly and effectively the issuance of writ of habeas corpus may not be desirable to be issued. However, as held in case of **Gohar Begam vs Suggi Alias Nazma Begam**

And Others(supra) even when other remedy for custody under the Guardians and Wards Act is available, that is no justification to deny issuance of Writ of Habeas Corpus when the court is dealing with the infant. In the pre-partition period, the power of issuing writ of habeas corpus was conferred upon the High Court through section 491 of the code of criminal procedure Code 1898. This provision empowered the High Court to issue writs in cases of illegal or unlawful detention in the public or private custody. Relevant paragraphs deserve reproduction at this stage;

The Queen v. Clarke (1) Lord Campbell,, C. J., said at p. 193:

" But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty."

The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of [s. 491](#) would clearly be applicable to the case and the appellant entitled to the order she asked.

We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have 'not given any reason in support of their view and we are clear in our mind that view is unsustainable in law.

Before making the order the court is certainly called upon to consider the welfare of the infant concerned. Now there is no reason to think that it is in the interest of the child Anjum to keep her with the respondent. In this connection it is relevant to state that at some stage of the proceedings in the High Court the parties appeared to have arrived at a settlement whereby it had been agreed that the child Anjum would be in the custody of the appellant and the respondent would have access to the child. The learned Judges of the High Court however were not prepared to make an order in terms of this settlement because, as they said, " It did not appear to be in the interest and welfare of the minor ". Here again they give no reason for their view. Both parties belong to the community of singing girls. The atmosphere in the home of either is the same. The appellant as the mother can be expected to take better care of the child than the respondent. Trivedi has acknowledged the paternity of the child. So in law the child can claim to be maintained by him. She has no such right against the respondent. We have not been able to find a single reason how the interests of the child (1) (1857) 7 E.L. & B.L. 186: 119, E. R. 1217.

would be better served if she was left in the custody of the respondent and not with the appellant.

We further see no reason why the appellant should have been asked to proceed under the Guardian and [Wards Act](#) for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under [s. 491](#) of the Code. The fact that she had a right under the Guardians and [Wards Act](#) is no justification for denying her the right under [s. 491](#). That is well established as will appear from the cases hereinafter cited.

The learned Advocate for the respondent said, we should not interfere with the order of the High Court as it was a discretionary order. The learned Judges however have not given any reason which led them to exercise their discretion in the way they did. We are not satisfied that the discretion was judicially exercised.

We are clear in our view that the judgment of the High Court was wrong and should be set aside.

It is further well established in England that in issuing a writ of habeas corpus a court has power in the case of an infant to direct its custody to be placed with a certain person. In *The King v. Greenhill* (1) Lord Denman, C. J., said:

" When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will 'go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

See also *The Queen v. Clarke* (2). In Halsbury's Laws of England, Vol. IX, [art. 1201](#) at p. 702 it is said; " Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas (1) (1836) 4 AD & E 624, 640; III E.R. 922, 927. (2) (1857) 7 E.L. & B.L. 186; 119 E.R. 1217.

corpus, and the custody awarded to the proper person." [Section 491](#) is expressly concerned with the directions of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the Courts in our country have always exercised the power to direct under [s. 491](#) in a fit case that the custody of an infant be delivered to the applicant: see [Rama Iyer v. Nataraja Iyer](#) (1), [Zara Bibi v. Abdul Razzak](#) (2), and [Subbuswami Goundan v. Kamakshi Ammal](#) (3). If the courts did not have this power, the remedy under [s. 491](#) would in the case of infants often become infructuous.

We, therefore, set aside the judgment and order of the High Court and direct the respondents other than the State of Bombay to make over the custody of the child Anjum to the appellant. Let the child be produced by the respondents before the Registrar, Appellate Side, High Court of Bombay, and the Registrar will then make over custody to the appellant. The passport in respect of the child Anjum deposited in this Court by the respondents may be made over to the Advocate on record for the appellant. The injunction restraining the removal of the child Anjum outside Greater Bombay will continue till she is delivered to the appellant. Appeal allowed.

10. What is far more important is to see as to whether the age of the twins is such where they can reveal their minds and what would be in their interest to do ! when obviously they are unable to state themselves for not having completed 3 years, their welfare would be of paramount consideration of the court. Assuming that they are with their father, with serious disputes over the deed of divorce on the ground that it has no sanctity in the eyes of law so far as the couple is concerned who married under the Special Marriage Act and with criminal antecedents of father, mother if chose not to wait for the matter of custody in civil litigation is finalised, it cannot be held against her. It is a hard reality that the matters of custody under the civil laws did not fall in the bracket of priority in the present conditions of Pandemic due to COVID-19 viruses. Again, one of the twins also does not reside with father but with paternal aunt, as admitted by her before this court during the production of Corpora through VC .
11. Here, it is a case of a young lady, who is separated from her husband after they both chose to marry under the Special

Marriage Act, who aggrieved by the depriving her of her motherhood of both the children, who are twins, Nizam and Nawaz, by respondent No.4. It is the requirement of the statute that once having chosen to be spouses under the Special marriage Act, it is necessary for the parties to take recourse to the very law to even permanently sever the ties. In the instant case, although the marriage took place as mentioned hereinabove under the Special Marriage Act for the reasons best known to respondent No.4, who claims to have got the purported document executed on the Rs.100/- stamp paper before the Notary. That itself is raising question mark in relation to this very document. However, we are not presently to adjudicate upon the said issue and any claim made on the strength of the said document or any refusal that comes from the Respondent no.4 claiming through this document, shall need to be presently denied. For the purpose of writ of habeas corpus, we have chosen not to permit reliance on the said document noticing the very question of validity of this document coupled with serious allegations of against mother of the applicant as all these can be sorted out by the respective parties in the appropriate proceedings.

12. Our prime concern is the children and their custody here. It is a trite law that till they become 06 years of age, the custody ordinarily shall have to be with mother unless their welfare is an issue with the Court. By alleging against her about relationship of of hers with his friend and thereafter, the allegations of her having been intimate with one of her girl friends, while she was in 8th standard, we feel that there has to be some limit to the nature of the allegations against the mother of twins who is asking for the custody of her children so that they can be brought up in a decent environment, more particularly, after being gravely concerned about their bringing up, education etc. in wake of alleged involvement of Respondent no.4 in illegal activities. There appears to be clear intent and careful design to see that the she does not stand on her own and also be left with no self esteem and gets completely bogged down and bent under the heap of allegations. We chose not to be led by any of these allegations and attempts of character assassination, which is a favoured design to bring down the self esteem and morale of a lady who dares to shape her life with dignity and self help, after leaving her matrimonial home. Version of the Respondent draws support from the

affidavit of the mother who appears to have married thrice, after the applicant had lost her father at the age of 1 ½ years. Her hostility with her own daughter is unfathomable but that surely, cannot rule and govern the life of hers or her children. She appears to have joined hands with respondent No.4 for the reasons best known to her. We chose not to opine conclusively on this relationship and leave it for the parties to work out in which ever proceedings they choose to agitate. For now, being satisfied that the applicant has her own rented premises and she runs the tiffin service and she claims to have her own consistent income and for her livelihood and for her children, she earns Rs.25,000/- and even otherwise, the right of the children to be maintained by both the parents does not go away, welfare of children requires their custody to be handed over to the applicant mother. She is found to be earning and also when we conversed with her, she is found to be organised in her thoughts and actions ,educated (studied up to second year of graduation)and can handle her life pretty well, we direct the handing over of the custody of both the children to applicant mother today itself.

13. Let the same be made over in presence of Ms. Kajal D.

Dave, learned Additional Sessions Judge, Rajkot. Since the applicant has travelled pursuant to our order dated 16.07.2020, it is not out of place to make a mention that as requested by us learned Additional Sessions Judge had arranged the meeting of the applicant-mother and the children in her chamber. Applicant was meeting the children after some months and she has reported that the meeting was very cordial and heart warming. She also video recorded the meeting of the applicant with the children and this recording has been shared with the Court. We are satisfied from the oral report submitted by the learned Additional Sessions Judge coupled with the video recording shared with us that the period of 11 months has not made any difference in either the children to the mother or in their adjusting themselves with her.

14. Considering the fact that she has been accompanied by the lady PSI in wake of her First Information Report against her husband, we direct the PSI concerned to accompany her with both the children and escort her up to her residence. Respondent No.4 and her relatives who brought children at Court premises shall arrange to bring basic clothings of both the boys so that the applicant may not find it difficult to

manage with basic things on immediate basis. We further have made a request to the learned Additional Sessions Judge, Mrs.Dave to ensure that this direction of bringing basic clothes of the children is complied with before 6.00 p.m. Today to enable her to leave for Gandhinagar. For the next six months, S.P., Gandhinagar, shall ensure that there shall be a periodical visit and supervision so far as both the children are concerned. Welfare officer from the Department of Women and Children Welfare, shall visit every fortnight the corpora and the applicant at her residence for ensuring the well being of corpora. The applicant shall not be hindered in any respect by respondent No.4 and any attempt to take law in hands by him or anyone at his instance shall be viewed very seriously.

15. At this stage, learned advocate Mr. Chandrani, requests to stay the operation of the order. Request is not acceded to as the very purpose of grant of custody would get frustrated .
16. This Court places it's deep appreciation on record for the assistance rendered with sensitivity in conducting the matter through Video Conferencing by Ms. K. D. Dave, learned 4th Additional District And Sessions Judge,Rajkot.
17. Petition stands disposed of accordingly.

(MS. SONIA GOKANI, J.)

MISHRA AMIT V./sudhir

(N.V.ANJARIA, J.)

