

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.381 OF 2021

Junned Ahmed Mujib Khan,
Age : 44 years, Occu. Service as Teacher,
R/o Alamgir Colony, Parbhani,
Tq. and Dist. Parbhani. ... Petitioner.

Versus

1. The State of Maharashtra,
Through its Secretary,
Home Department, Mantralaya,
Mumbai.
2. The Police Inspector,
Chawani Police Station, Aurangabad,
District Aurangabad.
3. The Commissioner of Police,
Aurangabad City, Aurangabad.
4. Furkhan S/o Sannulla Khan,
Age : 28 years, Occu. Nil,
R/o Near Hamida Majid, Vasant Nagar,
Pusad, Tq. Pusad, Dist. Yewatmal.
5. Sultana W/o Sannulla Khan,
Age : 55 years, Occu. Business,
R/o Near Hamida Majid, Vasant Nagar,
Pusad, Tq. Pusad, Dist. Yewatmal.
6. Sannulla Khan Kalandar Khan,
Age : 60 years, Occu. Business,
R/o Near Hamida Majid, Vasant Nagar,
Pusad, Tq. Pusad, Dist. Yewatmal. ... Respondents.

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Advocate for Petitioner : Mr. Patil Indrale Anand V.
APP for Respondent/s-State : Mr. G. O. Wattamwar.
Advocate for Victim & Respondent Nos.5 & 6 : Mr. Ravindra B.
Narwade Patil.

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**CORAM : V. K. JADHAV, AND
SHRIKANT D. KULKARNI, JJ.**

DATE : 14.06.2021

JUDGMENT (Per V. K. Jadhav, J.) :-

1. Heard. Rule made returnable forthwith.

2. By way of the present writ petition, the petitioner is seeking issuance of the writ of the Habeas Corpus against the respondents directing them to produce his minor daughter namely Khaleda Subiya Junned Ahmed Khan and to hand over her custody to him.

3. Brief facts leading to the present writ petition are as follows :

According to the petitioner, his minor daughter was kidnapped from Aurangabad on 22.10.2019. Consequently, his brother-in-law has lodged the report with Chawani Police Station, Aurangabad pursuant to which FIR bearing No.339 of

2019 came to be registered against unknown persons for the offence punishable under Section 363 of the IPC. After few days, the petitioner's wife had informed to the concerned Police Station and pointed out that one Furkan S/o Sannulla Khan is responsible for the incident and he has kidnapped their minor daughter in collusion with his parents and other accused persons. Thus, the concerned Police Station has recorded the statement of the petitioner and his wife, however, inspite of recording the statement of the petitioner and his wife, the concerned Police Station has not proceeded to take steps to find out the whereabouts of their daughter. The petitioner has approached the concerned Police Station for inquiry, several times. However, every time he was informed that the necessary steps are being taken to search their daughter and the petitioner will be informed when his daughter is found. According to the petitioner, the police authorities for the reason best known to them, are not proceeding with the investigation of the crime in its true spirit and consequently, their minor daughter could not be traced out. Thus, the petitioner is constrained to approached this

Court for seeking the writ of Habeas Corpus against the respondents in the facts and circumstances of the present case.

4. By order dated 12.03.2021, this Court has directed the respondent Nos.2 and 3 - Police Authorities to search and produce the minor daughter of the petitioner namely Khaleda before the Court. Thereafter, time to time this Court has monitored the progress and recorded the same in the order dated 30.03.2021, 08.04.2021, 22.04.2021 and 29.04.2021. On 06.05.2021 the learned Prosecutor has informed to this Court that the team was sent to Hyderabad to trace out the ATM centre from where the amounts were withdrawn by the probable kidnapper from the accounts of his father Sannulla Khan Kalandar Khan and the said ATM centre was traced out at Banjara Hills, Hyderabad. Thus by recording the same, the matter was listed on 10.06.2021.

5. On 10.06.2021, the missing girl Khaleda was produced before the Court. She was accompanied by her mother-in-law Sultana and father-in-law Sannulla Khan. The missing girl was brought to the Court along with their child. This Court (Coram : Ravindra V. Ghuge and B. U. Debadwar, JJ.) has interacted

with the missing girl in the open Court and also carefully perused the statement recorded by the police. It was revealed that the child has been born to the missing girl on 13.09.2020, admittedly, she was nine months short of becoming an adult. As per the version of the missing girl, she got married on 03.06.2021. The learned counsel for the petitioner has expressed that the parents of the missing girl desired to see her and sepak to her and in view of the above, the petition was listed on 14.06.2021 at 2.30 p.m. by directing the police authorities to escort the missing girl and her child, to keep them in Savitribai Phule Shaskiya Mahila Vastigruh at Nutan Colony, Aurangabad and protect them till they are produced before the Court on the aforesaid date and time. Accordingly, today i.e. on 14.06.2021, at about 2.30 p.m. the missing girl Khaleda along with her child was produced before this Court again.

6. The learned counsel for the petitioner, Mr. A. V. Indrale Patil submits that in the peculiar facts of the present case, it would be just and proper to invoke the 'parens patriae' doctrine. The learned counsel submits that on 22.10.2019, the daughter of petitioner namely Khaleda found missing and she was minor at that time. In the peculiar facts of the present

case, even recorded by this Court in the order dated 10.06.2021 that the child has been born to the missing girl on 13.09.2020, admittedly, she was nine months short of becoming an adult. It is also pertinent that the missing girl has got married on 03.06.2021. The learned counsel for the petitioner submits that even though the missing girl is now major, however, she is a vulnerable adult. Thus, this court under Article 226 of the Constitution of India can exercise the parens patriae doctrine. The learned counsel submits that even though the missing girl has stated about the date of marriage as 10.11.2019, however, Nikah was performed on 03.06.2021. Thus, the constitutional courts may also act as a parens patriae so as to meet the ends of justice.

7. We have also heard the learned APP for the State.

8. In a case, *Shafin Jahan Vs. Asokan K. M. and others* reported in *(2018) 16 Supreme Court Cases 368*, Hon'ble Supreme Court by referring the ratio laid down in the various cases, thoroughly discussed and observed the purpose of the Habeas Corpus writ petition. In paragraph Nos.18 and 27 of

the judgment, the Supreme Court has made the following observations :

“18. The aforesaid adumbration calls for restatement of the law pertaining to writ of habeas corpus which has always been considered as "a great constitutional privilege" or "the first security of civil liberty". The writ is meant to provide an expeditious and effective remedy against illegal detention, for such detention affects the liberty and freedom of the person who is in confinement.

27. Thus, the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the 7 (2011) 10 SCC 781 primary duty of the State to see that the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subterfuge. The role of the Court is to see that the detenu is produced before it, find out about his/her independent choice and see to it that the person is released from illegal restraint. The issue will be a different one when the detention is not illegal. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end.”

9. The Hon'ble Supreme Court in the aforesaid case, in paragraph Nos.31, 39, 45 has explained the doctrine *parens patriae* in the following manner :

*“31. Another aspect which calls for invalidating the order of the High Court is the situation in which it has invoked the *parens patriae* doctrine. *Parens patriae* in Latin means “parent of the nation”. In law, it refers to the power of the State to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or*

individual who is in need of protection. "The parens patriae jurisdiction is sometimes spoken of as 'supervisory'".

39. Constitutional courts in this country exercise parens patriae jurisdiction in matters of child custody treating the welfare of the child as the paramount concern. There are situations when the court can invoke the parens patriae principle and the same is required to be invoked only in exceptional situations. We may like to give some examples. For example, where a person is mentally ill and is produced before the court in a writ of habeas corpus, the court may invoke the aforesaid doctrine. On certain other occasions, when a girl who is not a major has eloped with a person and she is produced at the behest of habeas corpus filed by her parents and she expresses fear of life in the custody of her parents, the court may exercise the jurisdiction to send her to an appropriate home meant to give shelter to women where her interest can be best taken care of till she becomes a major.

45. Thus, the constitutional courts may also act as parens patriae so as to meet the ends of justice. But the said exercise of power is not without limitation. The courts cannot in every and any case invoke the parens patriae doctrine. The said doctrine has to be invoked only in exceptional cases where the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian."

10. It is thus clear that there are situations when the Court can invoke the parens patriae principal and the same is required to be invoked only in exceptional situations. For example, where a person is mentally ill and produced before the Court in a writ of Habeas Corpus, the Court may invoke the aforesaid doctrine. On certain other occassion, when a girl who is not a major has eloped with a person and she is

produced the person at the behest of the Habeas Corpus filed by her parents and she expresses fear of life in the custody of her parents, the Court may exercise the jurisdiction to send her to an appropriate home meant to give shelter to a women where her interest can be best taken care of till she becomes a major. It is also explained by the Supreme Court that the said exercise of the power 'parens patriae' is not without limitation. The Courts cannot in every and any case invoke the parens patriae doctrine and the same has to be invoked only in exceptional cases where the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the Court that the said parties have either no parent / legal guardian or have an abusive or negligent parent / legal guardian.

11. Thus, coming to the facts of the present case, in the order dated 10.06.2021 of this Court (Coram : Ravindra V. Ghuge and B. U. Debadwar, JJ.), it is mentioned that the missing girl as well as her mother-in-law Sultana Begum are present in the Court and her father-in-law along with the child is waiting outside the court premises. This Court has perused the statement of the missing girl and even interacted with the

missing girl in the open Court. In Paragraph No.4, this Court has recorded the summary of the interaction.

“4. We have perused the statement of the missing girl and we interacted with her in open Court. She has very firmly stated that she does not desire to reside with her parents. She would continue to reside with her husband. The child is about nine (9) months old and the couple are taking care of the child. Her mother-in-law Sultana Begum and father-in-law Sannulla Khan are also residing with her at Bhainsa.”

12. We have also carefully gone through the report submitted by Mr. A. P. Dhole, Assistant Police Inspector and the statement of the missing girl. Missing girl Khaleda has stated in her statement that the Sultana W/o Sannulla Khan has made a proposal of the marriage of her son Furkan Khan with the missing girl Khaleda, however, her father (petitioner herein) did not like the said proposal. However, till that time the missing girl and the said Furkan Khan met each other and fallen in love. Even the missing girl Khaleda has expressed her desire with her parents to marry with the said Furkan Khan, however, the petitioner-father has refused for the same. The missing girl has tried her level best to convince her father, uncle-Sarfaraj Khan, mother-Saniya and other elderly members of the family, however, they have not only refused for the same,

however, started extending beating to her. The family members including the petitioner have also insisted her to forget the said proposal so also Furkan Khan. Even her parents have sent her to the house of her maternal uncle situated at Aurangabad. Her maternal uncle was also against the said marriage. Even she was subjected to beating by her maternal uncle on the said count. Missing girl Khaleda further stated in her police statement that she was not willing to marry with any other person except Furkan Khan. Thus, on 22.10.2019 on her own, she voluntarily left the house of her uncle and went to Nagpur by railway. Missing girl Khaleda had informed to her father on phone that she had gone to Nagpur and also called upon the said boy Furkan Khan on his phone informing him that she had come to Nagpur. Thus, the said boy Furkan Khan, who was also equally loving her, had come to Nagpur on 23.10.2019. The missing girl has further stated in her statement that since 23.10.2019 she had stayed along with said boy Furkan Khan at various places in Nagpur and thereafter went to Bhainsa, Nirmal District, Telangana and started residing there in rented room. The missing girl has further explained that on 13.09.2020 she had given birth to a male child whose name is

Azlan Zain. On 03.06.2021 she got married with the said Furkan Khan as per Islamic rites at Bhainsa. The police authorities have also produced before us the copy of the Nikahnama produced before them by the missing girl so also the birth certificate issued by the Bhainsa Municipality, Nirmal District, Telangana State in respect of their son Azlan Zain where the name of the mother is mentioned as Khaleda Sobiya and name of the father mentioned as Furkan Khan. The date of birth is mentioned as "13.09.2020".

13. We have also interacted with the missing girl Khaleda in the open court. She remained present in the Court along with her small child. She was also accompanied by her mother-in-law namely Sultana and father-in-law Sannulla. Missing girl Khaleda has repeated the same story. She has also told us that she has attained the puberty when she was 13 years of age. She has educated upto 11th standard in Science Faculty. We also interacted with the in-laws of missing girl. They have stated before us that missing girl Khaleda is their daughter-in-law and the said child Azlan Zain is their grand son. They have explained to us that they are residing together at Pusad and their son Furkan Khan is working in Telangana.

14. As recorded in the order dated 10.06.2021, the learned counsel for the petitioner has submitted that the parents of the missing girl desired to see her and speak to her. We have thus inquired with the police authorities and found that the parents are present in the Court premises. We have thus called upon them in the Court Hall. We have permitted them to interact with their daughter in the open Court. We have noticed that the petitioner-father has kept his hand on the head of the missing girl and given her blessings. Even mother has also interacted with her daughter in the open Court. We have thereafter asked the petitioner-father as to whether he wants to say anything, however, her father said that he has nothing to add and he was worrying about his daughter but now he has showered his blessings on her.

15. The learned counsel for the petitioner has thereafter solicited few minutes to interact with parents of the missing girl outside of the court hall. After some time, the learned counsel for the petitioner has informed to us that the petitioner is no more interested in prosecuting the present petition.

16. In the aforesaid case *Shafin Jahan* (supra) Hon'ble Supreme Court has observed that the superior courts can exercise their jurisdiction *parens patriae* in a case of persons who are incapable of asserting a free will such as minors or persons of unsound mind. The exercise of that jurisdiction should not transgress into the area of determining the suitability of the partners to a marital tie. That decision rests exclusively with the individuals themselves. Neither the State nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the State. Courts as upholders of constitutional freedoms must safeguard these freedoms. In a case *Soni Gerry Vs. Gerry Douglas* reported in **(2018) 2 SCC 197**, a three Judges Bench, in paragraph No.10, it is observed as follows :

“10. It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/ He is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of parens patriae. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation.”

17. In the instant case, missing girl Khaleda when brought before the Court, she was found to be major. She had informed to us that she got married. She had performed Nikah with the said Furkan Khan on 03.06.2021. It is needless to say that under Muslim law, marriage or Nikah is a contract. Muslim law recognises the right of adults to marry by their own free will and the conditions for a valid Muslim marriage are (i) Both the individuals must profess Islam; (ii) Both should be of the age of puberty; (iii) There has to be an offer and acceptance and two witnesses must be present; (iv) Dower and Mehar; and (v) Absence of a prohibited degree of relationship. We are not inclined to make any comment on the validity of the marriage. However, the marriage can be dissolved at the behest of the parties to it by competent Court of law.

18. The petitioner-father was not ready to accept the marriage proposal put forth by the said boy Furkan Khan. The petitioner-father in good faith was intending to protect the interest of his daughter, however, the same cannot be at the cost to curtail the fundamental rights of the daughter, who, out of her own free will voluntarily got married with the said

Furkan Khan. There is nothing to suggest that the missing girl Khaleda suffers from any kind of mental incapacity or vulnerability. Thus, in the facts of the present case, the writ of Habeas Corpus is absolutely unnecessary. We are of the firm opinion that the said doctrine parens patriae is inapplicable to the facts and circumstances of the present case. We thus, proceed to pass the following order :

ORDER

- (i) The girl Khaleda Subiya Junned Ahmed Khan is at liberty to pursue her futher activities and to live her life in accordance with law.
- (ii) We accordingly discharge the Rule of Habeas Corpus and dispose off this writ petition.

(SHRIKANT D. KULKARNI, J.)

(V. K. JADHAV, J.)

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vmk/-