

HIGH COURT OF JAMMU & KASHMIR
AT SRINAGAR

WP(C) no.114/2021 with CrIM no.961/2021

Mahrukh Iqbal

...Petitioner

Through: Mr. Areeb Kawoosa, Advocate.
Mr. Attir Kawoosa, Advocate
Mr. Baba Musharif, Advocate

v.

UT of J&K & ors.

...Respondents

Through: Mr. B. A. Dar, Sr. AAG for 1 to 3;
Respondents 5, 6 and 7 present in
person.

Coram:

Hon'ble Mr. Justice Ali Mohammad Magrey

Order
31.08.2021

1. This petition under Article 226 of the Constitution has been filed by the petitioner, 2nd wife of respondent no.4 herein (the first wife having been reportedly divorced prior to second marriage with the petitioner) seeking recovery of her 20 days' old female child from the private respondents and delivery of her custody to her. The petitioner has also sought mandamus to direct the official respondents 1 to 3 to ensure that the fundamental rights of the petitioner and her suckling baby, which include but is not limited to right to food, are not violated. Her further prayer is for a direction to the official respondents to register an FIR against the private respondents for commission of offences by them against the infant baby girl under appropriate provisions of law, including under Sections 315, 340, 342, 344, 346, 361, 363, 365, 368, 369, 503, 506, 511 IPC; and also for the commission of offences by them against the petitioner under appropriate provisions of law, including for offences under Sections

339, 340, 341, 342, 343. 346, 350, 451, 352, 357, 362, 365. 368, 503, 506 IPC.

2. The case of the petitioner is that she hails from Jammu. Her marriage with respondent no.4 was solemnized on 09.11.2020 at Jammu. Respondents 5, 6 and 7, respectively, are the step-father, real mother and step-brother of respondent no.4. The petitioner came to live with her husband at her in-laws house at Srinagar. In July, 2021, she consulted a Gynaecologist/Doctor in relation to her pregnancy. The Doctor advised and recommended her to undergo a Caesarean-section (C-section) delivery. Contrary to the medical advice, according to the petitioner, respondent no.4, her husband insisted on normally delivering the baby. It is alleged that the private respondents, instead of taking care of the petitioner and abiding by the Doctor's advice, were forcing her to undergo 'natural delivery'. This led to respondent no.4, her husband, halting interaction with her and deserting her in the last month of her pregnancy. The other private respondents are also stated to have deserted her. The petitioner, being in the advanced stage of her pregnancy and having no one to fall back upon in Srinagar, was compelled to call her parents from Jammu. They flew to Srinagar on 23.07.2021 in order to take care of her, and shifted her to Hotel Heemal, situated at Boulevard. On 07.08.2021, the petitioner states, she was admitted in Government JLNH Hospital, Rainawari, Srinagar. The Doctors at the Hospital, after conducting medical tests, including ultra-sonography, advised her to undergo C-section delivery on the very same day as the baby's life was under threat. It is stated in the petition that she tried to inform her husband, i.e., respondent no.4 about it, but to her dismay and shock, he had blocked her phone number. However, the petitioner states to have informed respondent no.6, her mother-in-law, about the same. A female child was born to the petitioner on the same day, i.e., 07.08.2021 undergoing C-section. She remained admitted in the Hospital till 09.08.2021. During the time the petitioner remained admitted in the Hospital, it is alleged that whenever the respondents visit her, they created hue and cry at the

Hospital. It is averred that respondent no.6 threatened her at the Hospital that she would take away the petitioner's new born child. Petitioner's husband also came to the Hospital with some goons and threatened her of dire consequences for having undergone C-section against his wishes and the wishes of other private respondents. It is alleged that thereafter, respondent no.7, i.e., the step-brother of the petitioner's husband, came to the Hospital alongwith a maid. He took the infant in his lap and tried to run away with the child. However, the parents of the petitioner intervened and called the Police. Due to their intervention, the said attempt of respondent no.7 to snatch the petitioner's suckling baby was foiled.

3. It is further averred in the petition that, after the above incidents, respondents 5 and 6 came to the Hospital on 09.08.2021 and apologized to the petitioner for the conduct of the private respondents. They assured the petitioner that no harm would be caused to her or to the infant by them and requested her to accompany them to the matrimonial home. The petitioner believed their apologies to be genuine and agreed to their request. She was discharged from the Hospital on the same day and, upon return to the matrimonial home alongwith the infant at Waqeel Colony, Nishat, Srinagar, the private respondents snatched the suckling baby from her arms and forcefully locked and confined the petitioner in a room. It is stated that from 09.08.2021 till 11.08.2021 she was allowed to breastfeed her infant only on three occasions. From 11.08.2021, it is averred, respondents 4, 6 and 7, in connivance with respondent no.5, did not get the child to her. It is alleged by the petitioner that eversince she has not been shown her infant child, who is barely a few days old. The petitioner also alleges that since she was confined in a room and was not allowed to step out, all her medical records, prescriptions and other documents were found missing, except that she was able to lay hands on one medical prescription/admit card which pertains to the time when she was admitted in Govt. JLNH Hospital, Rainwari because of pregnancy related medical emergency. She also states that she noticed that the

clothes, bedding and other articles which were bought by her months before for her child were also missing from the matrimonial home. It is stated that the petitioner enquired from her step-father-in-law, respondent no.5, about the whereabouts of her infant baby and that on 11.08.2021 he informed her that the other private respondents had gone out with the infant baby of the petitioner and would be back by the evening. However, when the private respondents did not return till late evening with the infant child, she again enquired about her from respondent no.5 who told her that she would never be able to see her infant daughter again and that he will make sure that the petitioner craves for the sight of her child. According to the petitioner, thereafter, she was locked and illegally/wrongfully confined in the room for eight consecutive days and even her phone was snatched from her by respondent no.5. On 18.08.2021 she somehow managed to get hold of her mobile phone and contacted the Women's Police Helpline to lodge a complaint after which she was taken to the Women Police Station, Rambagh. She informed the Women's Grievance Cell that her infant daughter was illegally taken from her and unlawfully detained by the private respondents and was missing for the past seven days then. However, no action was taken on petitioner's complaint and respondent no.5, being an influential person, managed to suppress the situation. Thereafter, it is stated that the petitioner went to her parents.

4. Above are the details of the woeful events the petitioner, according to the petition, has undergone and has been put to.

5. When this petition came up for consideration before this Court on 27.08.2021, the respondents 5 and 7 were present in person. After hearing both the parties, this Court passed the following order:

“When this matter was taken up for consideration and on hearing the parties along with their counsels, the respondent no.5, the father of respondent no.7, undertook to surrender the baby before this Court at 4.30 pm.

In view of above undertaking the Registrar Judicial shall take the custody of the infant in presence of the petitioner and handover the baby to the petitioner on

identification by the counsel for the petitioner on the undertaking that due care will be taken of the infant.

List on Tuesday the 31.08.2021.”

6. The matter has again come up today. The Registrar Judicial has made a note signed by him at 05.50 pm on 27.08.2021 stating therein as under:

“Lordship as per the Hon’ble Court order dated 27th August, 2021 passed in the above titled writ petition, Respondent No.5 was required to surrender the infant before the office of the undersigned at 4:30 PM and after receiving of infant, was to be handed over to the petitioner mother, after adhering to some conditions laid in the Hon’ble Court order supra.

Lordship, it is submitted that Respondent no.5 has not brought the infant in the office of the undersigned despite awaited (sic) till 05.45 PM, as such, has failed to comply with the direction of the Hon’ble Court. It is further submitted that the Sr. Medical Officer Dr. Irfan Hussain along with Dr. Riyaz Ahmad Malla (Paediatrician) were made available for medical examination of the infant before handing over to her mother.

Matter is, as such, submitted before the Hon’ble Court for appropriate orders.”

7. The private respondents 5, 6 & 7 are present in person before the Court. However, even now they have not produced the child. Instead, they expressly stated before the Court that they are not going to part with the custody of the baby girl in favour of the petitioner, alleging that she does not possess good antecedents. Mr. Zahoor A Shah, respondent no.5, was pointedly asked about the implementation of order passed by the Court on 27.08.2021 and the undertaking furnished by him in the open Court to produce the child before the Court at 4.30 pm on that day, but without any satisfactory reply, he insisted on grant of time to make submissions qua rejection of the claim of the petitioner.

8. The intentions of the private respondents are clear. The 24 days old female child continues to be deprived of her mother’s milk, care and bondage since 11.08.2021, i.e., for the last 20 days. There is no

denying the fact that breast milk is a natural and perfect mix of almost all vitamins, proteins and fats, meaning everything a baby needs for proper growth, besides, being easily digested by babies than artificially prepared infant formulas or cows' milk. It also contains antibodies that help the suckling babies fight off viruses and bacteria and breastfeeding lowers the babies' risk of catching infections and allergies. Breastfeeding has also been linked to higher Intelligence Quotient in later childhood. Apart from such benefits, breastfeeding results in skin-to-skin touching and eye contact between the mother and the baby and it is said that these help the babies to develop a bond with mothers and resultantly they feel secure. It is thus imaginable to what loss the infant female child of the petitioner has so far been put to physically, mentally and otherwise, and to what pain and agony the mother of the petitioner has been put.

9. It may be mentioned here that the petitioner has also filed a contempt petition against the private respondents. That petition will be dealt with separately. It is stated in para 4 thereof that the petitioner has every apprehension that her daughter, who is 19 days old, might have been killed by the private respondents. This is a serious apprehension. Given the facts and circumstances narrated above, this Court has no reason to brush aside this apprehension of the petitioner. The private respondents, despite undertaking before the Court, have reportedly not produced the child before the Registrar Judicial on 27.08.2021. The deprivation to which the child has been put, as narrated above, may be more serious and fatal for a child of her tender age than an attempt to kill the child.

10. In light of the above, this Court cannot act as a mute spectator but, in the interest of justice, necessary measures need to be taken to save the life and health of the child and with a view to doing so, it becomes imperative to secure her recovery and save the mother from the agonizing situation she has been put to. In light of the above, instantly the following orders are made:

i) that the Senior Superintendent of Police, Srinagar, is directed to take all measures, whatever are necessary, to ensure recovery of the female child of the petitioner from the private respondents by 4.30 pm today. The Senior Superintendent of Police and/or the Police team he may assign such duty or may be accompanying him shall be authorised to raid any place and household they may suspect the child has been confined in or kept hidden;

ii) that the Senior Superintendent of Police or the Police team he may assign the duty, while being in search of the child, may keep a Magistrate along and available to meet any eventuality or to fulfil any legal formality;

iii) that the Senior Superintendent of Police or the Police team he may assign the duty, while being in search of the child, shall keep a Paediatrician along and available who may be summoned from Children Hospital, Sonawar, Srinagar, or some other Hospital, depending upon the convenience of the Sr. SP/Police team for conducting immediate medical check-up of the child on his recovery to assess her health condition, the trauma she must have physically and mentally suffered and undergone, and ailments, deficiencies or health problems caused to her by lack of breast milk and mother's care due to her separation from her mother by the private respondents. The Police shall make a detailed report in this regard accompanied by the medical report of the aforesaid medical check up;

iv) that the Senior Superintendent of Police or the Police team he may assign the duty, shall record the exact time and place of the recovery of the child; from whom she is recovered; in what condition she was kept; and mention it in its report to the Court;

v) that the Senior Superintendent of Police or the Police team he may assign the duty, and the Doctor they may associate

with themselves for medical check up of the child on her recovery, shall also contact the Medical Superintendent of JLNH Hospital, Rainawari, and ascertain from him on the basis of their records, supported by copies thereof, as to what was the body weight of the child and the status of her general health at the time of her birth, and assess, comparatively, whether she has gained weight normally or not, and/or has lost her weight and whether her overall growth has been normal, abnormal or retarded on account of separation from her mother and lack of breast milk. Details in this regard shall be incorporated in the Police/Medical report of the Doctor;

vi) that on recovery of the child in case the Doctor accompanying the Sr. Superintendent of Police and/or the Police team is of the opinion that she needs to be checked by more than one Doctor or a team of Doctors or Board of Doctors for any reason whatsoever, he shall advise the Police accordingly and the Sr. Superintendent of Police and/or the Police team shall act accordingly. The Doctor/team or the Board of Doctors, as the case may be, shall also advise the treatment for any ailment suffered or contracted by the child during her separation from her mother or special care that would be needed by her for recovery and betterment of her health;

vii) that the Doctor/Team of Doctors/Board of Doctors, as the case may be, may also suggest, if possible, a tentative, minimum compensation that should be granted in favour of the mother of a child who suffers the trauma etc. etc. as in the instant case, for the future care of such child so that he/she may be properly looked after by mother for better, effective and speedy recovery from such trauma etc.;

viii) that on recovery of the child and conduct of her medical check up and after completing other formalities as may be necessary, the Sr. Superintendent of Police Shall produce her

before the Registrar Judicial of this Court, who shall then proceed in the matter as provided in this Courts order dated 27.08.2021;

ix) that the petitioner may, and she is left free to, if so advised, file a proper complaint before the concerned Police Station for the commission of the alleged offences by the private respondents either against the child or against her, as mentioned by her in this petition, or as may surface on recovery of the child. On any such complaint being filed by her, the concerned Police shall proceed therein in accordance with law uninfluenced by any factor, whatsoever.

11. List this matter tomorrow at 2 PM for further proceedings. Meanwhile, the private respondents are directed to file their response to the petition.

12. The Registrar Judicial shall forthwith communicate copy of this order through fax, mail and/or any other available, speedy mode to the Senior Superintendent of Police, Srinagar, for information and compliance. A copy of the order be also immediately provided to Mr. B. A. Dar, learned Sr. AAG, signed by the Court Secretary.

13. List tomorrow i.e 01.09.2021 along with the main petition.

(Ali Mohammad Magrey)
Judge

Srinagar
31.08.2021
Syed Ayaz Hussain, Secy.