

3] The case of the Petitioner is that he got married with the deceased Varsha on 18th November, 2013 and out of the wedlock son Brijesh was born to them on 21st September, 2016

4] It is further averred that unfortunately the wife of the Petitioner met with an accident while travelling in the train and passed away on 24th December, 2018. It is further averred that during the cremation of the petitioner's wife, respondent No.4 took away the child Brijesh and inspite of requests from the Petitioner-father for the custody of the child, the child was not handed over and hence the present Writ of Habeas Corpus has been filed.

5] An affidavit has been filed by the Respondent No.4 - father-in-law of the Petitioner inter-alia stating various facts which are not necessary to mention here, except stating in para 16 that he intends to file an application for declaration of guardian of Master Brijesh Gajendra Rathod before District Court, Thane under the Guardians and Wards Act.

6] It appears that there was some account of dissension between the parties and from the police report it appears that the deceased wife of the Petitioner while working under LIC Agent used to take the child to the house of her parents during the time when she used to go to office and on return from office she used to take the child back and reside in her matrimonial house.

7] In view of the aforesaid statement recorded in the report, it is clear that at the most, Respondent No.4 and his wife had temporary custody of the child during the period during which their daughter used to go for work.

8] Learned counsel for the Petitioner placed reliance on the Judgment rendered by this Court in the case of Shekhar Jagdish Prasad Tewari vs. State of Maharashtra & Ors. in Criminal Writ Petition No.5214 of 2018 and inter alia placed reliance upon finding of this Court in para 24, which is quoted below :

“Having considered these rival submissions, we are of the considered view that the father of the child is the natural guardian u/s 6 of the Hindu Minority and Guardianship Act, 1956. He is the surviving parent of the child. The child of about 17 months of age definitely needs love, care and affection of the father. It cannot be said that the welfare of the child will seriously be compromised if the custody is handed over to the father. The father is highly educated man and is gainfully employed in a prestigious company. There is no reason to deprive him from having custody of the child. As observed earlier, the child is of very tender age and is not yet capable of forming and expressing her wish. Therefore we are of the considered view, that the father is entitled to get the custody of his child. The ratio laid down by this Court in Amol Pawar’s case (Supra) is squarely applicable to this Petition.

It would be appropriate to note there that the aforesaid judgment relied upon by the learned counsel for the Petitioner has also been confirmed by the Hon'ble Supreme Court vide Judgment dated 6th May, 2019 in **Criminal Appeal No.838 of 2019 arising out of SLP (Cri) No.1675 of 2019**.

9] After hearing learned counsel for respective parties, we are of the considered view that the Petitioner being the father of the child is a lawful guardian under Section 6 of the Hindu Minority and Guardianship Act, 1956 since he is the only surviving parent of the child. The child is presently two years and 9 months old and definitely requires love and affection of his father i.e. the Petitioner. It cannot be said that the welfare of the child will seriously be compromised if the custody is handed over to the father.

10] It is stated on behalf of the Petitioner that the Petitioner is working in a Realty shop as a broker and earning sufficient money in order to look after the need of bringing up of the child. We, therefore, find no reason to deprive the Petitioner from having custody of the child. No doubt, the child is of a very tender age and is not capable of forming or expressing his desire. Therefore, we are of the considered view that the Petitioner-father is entitled to get custody of the child and the ratio laid down by this Court in the case of Amol Ramesh Pawar vs. The State of Maharashtra & Ors. Reported in 2014 SCC OnLine Bom 280 is squarely applicable to the present case.

11] After perusal of the affidavit filed by the Respondent, we also take note of the fact that Respondent No.4 who is father-in-law of the Petitioner and grand-father of the the child, has every interest in the welfare of his grandchild and has been looking after the child ever since the death of his daughter. Hence, it is but natural that during this period bond of love and affection would have developed between the child and the Respondents. The Petitioner was denied access to the child since December 2018. He deserves his sons love and affection. This is sufficient in our considered view. It is stated on behalf of the Petitioner that the Petitioner is residing alongwith his mother and younger brother and his wife and adequate support is available to look after the welfare of the child. However, there appears to be certain acrimony between the parties. Therefore, we are of the view that respondents may also be granted permission to meet the child and spend quality time with the child. Accordingly, we pass the following order :

ORDER

1] Writ Petition is allowed and rule is made absolute by issuing writ of Habeas Corpus directing Respondent No.4 to hand over custody of the child to the Petitioner on 29th June, 2019, at the residence of the Petitioner between 4.00 pm to 5.00 pm.

2] Learned counsel for Respondent No.4 submits on instructions that the Respondent undertakes to comply with

this order. We direct the Respondent/State to provide necessary aid to the Petitioner and Respondent, while handing over custody of the minor child in compliance of our directions.

3] Respondent No.4, his wife and family members shall have right of access to the child on every Saturday and Sunday between 9 to 6 pm at the residence of the Petitioner and the Petitioner shall co-operate and shall not obstruct Respondent No.4 and his family members from spending quality time with the child during this period.

4] We further direct that on every alternate week, respondent No.4 shall be entitled to take the child for an overnight stay with them and for such purposes, Respondent No.4 may take the child between 9.00 am to 10.00 am on every alternate Saturday and return the child to the Petitioner by 6.00 p.m. on Sunday.

5] Respondent No.4 is at liberty to initiate process /legal remedy including application under the Guardians and Wards Act and the present order shall not influence adjudication of such application.

6] With these observations and directions Writ Petition No.1324 of 2019 stands disposed off.

[A.M. BADAR, J]

[INDRAJIT MAHANTY, J]