

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.5214 OF 2018

Shekhar Jagdish Prasad Tewari.
aged 47 years, Indian Inhabitant,
permanently residing at,
803, Skylark, Sector-6, Kharghar,
Raigad – 410 210, Maharashtra.

... Petitioner

Versus

1. State of Maharashtra,
(Through the Director General of Police,
Office of the DIG, Police Headquarters,
Shahid Bhagat Singh Road,
Mumbai – 400 001).
2. The Commissioner of Police,
Office of the Commissioner of Police,
Crawford Market, Mumbai – 400 001.
3. The Commissioner of Police,
Office of the Commissioner of Police,
Pune City, Pune.
4. The Senior Inspector of Police,
Dattawadi Police Station, Pune.
5. Shri Samir Pardeshi,
Permanently residing at,
16, Sagar Society, Near Rajivwade Udyan,
Sahakar Nagar-2, Pune – 411 009.
6. Ms. Anita Pardeshi
Indian Inhabitant.

7. Smt. Tejaswini Gaud
Indian Inhabitant.

8. Dr. Pradeep Gaud
Indian Inhabitant.
(Respondent Nos.6 to 8 residing at,
A-10, 3rd Floor, Sagar Darshan, Off. Carter
Road, Opp. YMCA, Khar,
Mumbai-400 052.)

... Respondents

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- Mr. Subhash Jha a/w Ms. Sanjana Pardeshi & Ms. Ankita Pawar i/b Law Global for Petitioner.
- Mrs. M. M. Deshmukh, APP for State.
- Ms. Flavia Agnes a/w Mr. Prasad Shenoy & Ms. Bindiya Rao for Respondent Nos.5 to 8.

CORAM : **INDRAJIT MAHANTY &
SARANG V. KOTWAL, JJ.**
RESERVED ON : **28th JANUARY, 2019**
PRONOUNCED ON : **06th FEBRUARY, 2019**

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. Rule.

2. Rule is made returnable forthwith and the Petition is heard finally with the consent of both the parties.

3. By this Petition, the Petitioner is seeking issuance of writ of habeas corpus, directing the Respondents to produce his minor daughter in the Court and hand over her custody to the Petitioner.
4. The Respondent No.1 is the State of Maharashtra and the Respondent Nos.2 to 4 are various police officers. The Respondent No.5 is the brother of the Petitioner's deceased wife Zela. Respondent Nos.6 and 7 are Zela's sisters and the Respondent No.8 is the husband of Respondent No.7.
5. The facts in the present case have a backdrop of unfortunate situations and tragedy. To a large extent the misfortune of the concerned parties still continues resulting in bitter battle for the child's custody. A 17 months old child is dragged in this battle. The child in question has already lost her mother, within about 14 months of her birth. At the time of filing of this Petition, the child was in custody of the Respondent Nos.5 to 8 and Respondent Nos.6 and 7 in particular are looking

after her. The Petitioner is claiming custody of the child being the only surviving natural guardian of the child.

6. Apart from the basic facts necessary for decision of this Petition, the Petitioner as well as Respondent Nos.5 to 8 have averred many facts touching upon the acrimonious relationship between the Petitioner and those Respondents. However, we do not deem it necessary to comment on these facts or decide on these issues except wherever they are necessary to be referred to for the decision of this Petition. Both the learned Counsel representing their respective clients, in their wisdom have not emphasized on these contentious and bitter issues, keeping in mind the future of the child. We appreciate their approach in arguing this Petition before us.

7. The Petitioner is a Post-Graduate in Management from Indian Institute of Management, Indore, which is a highly reputed institution in the field. He has satisfying career of about past 25 years and is working with Wipro Limited as a Principal

Consultant. The Petitioner got married with Zalam on 28/05/2006 at Navi Mumbai. During 5th month of her pregnancy, in May 2017, Zalam was detected to be suffering from breast cancer. The child was born on 14/08/2017. On 29/11/2017, the Petitioner himself collapsed from his own illness and he was detected to be suffering from Tuberculosis and Meningitis. The Petitioner himself had to undergo hospitalization in different hospitals for a prolonged period. In the Petition, the Petitioner has stated that after due medication and treatment, he is cured and is healthy.

8. It is undisputed that since Zalam was suffering from terminal illness and since the Petitioner himself was hospitalized for a serious ailment, the child was looked after by the aforementioned Respondents.

9. On 17/10/2018 Zalam succumbed to her illness. The child continued to be in custody of Respondent Nos.5 to 8. It is the case of Petitioner that on 17/11/2018 he visited Pune to seek custody of his child from Respondent Nos.5 to 7. The Petitioner even gave a complaint to Dattawadi Police Station on

the same day. The Petitioner had also lodged the complaint with Kharghar Police Station on 06/11/2018. The Police Officer in charge of Kharghar Police Station told him to seek appropriate relief from the Court.

10. Learned Counsel Mr.Subhash Jha for the Petitioner, submitted that u/s 6 of the Hindu Minority and Guardianship Act, 1956, the Petitioner is the only natural guardian of the child being her father. According to Mr.Jha, the Respondent Nos.5 to 8 have no legal authority to retain child's custody. He submitted that since the Respondent Nos.5 to 8 have no authority to retain the custody of the child, their refusal to hand over the custody amounts to illegal detention of the child and therefore writ of habeas corpus was the proper remedy available to the Petitioner to seek redressal of his grievance. In support of his contention Mr.Subhash Jha relied on a few judgments.

11. Mr.Jha invited our attention to the observations made by the Hon'ble Supreme Court in the case of **Gohar Begam Vs.**

Suggi Alias Nazma Begam and Others, reported in AIR 1960

SC 93. In this case, the mother was claiming custody of her daughter, who was raised by the mother's maternal aunt and the Respondent in that case had no legal right to the custody of the child. The Hon'ble Supreme Court took into consideration the issue of interest and welfare of the minor. It was observed in the said case that it was not necessary for the mother to proceed under the Guardian and Wards Act for recovering the custody of child though she had the right to do so. It was held that the mother had also clear right to an order for the custody of the child u/s 491 of Code of Criminal Procedure, 1898. It was held that the mother having right under the Guardians And Wards Act, was no justification for denying her right u/s 491 of Code of Criminal Procedure, 1898.

12. Relying on this judgment, Mr.Jha submitted that in view of the observations of the Hon'ble Supreme Court, the instant case is also a case of illegal detention. The Petitioner has a legal right to the custody of the child and therefore the writ of

habeas corpus can be issued in this case. He further submitted that the Petitioner should not be left to pursue his remedies under other laws.

13. Mr.Jha thereafter relied on the judgment of High Court of Karnataka in the case of Smt Manju Malini Sheshachalam D/o Mr. R. Sheshachalam Vs. Vijay Thirugnanam S/o Thivugnanam & Ors. Reported in 2018 SCC OnLine Kar 621. In this case, the Petitioner was the mother of the child. The child was looked after and raised initially by her sister and sister's husband. The Respondents got attached to the child and refused to part with the child. The Karnataka High Court relied on the judgment of Gohar Begam (supra) and few others and ultimately held that the moment the Respondent Nos.1 and 2 refused to hand over the custody of the minor to the Petitioner, who was the natural guardian, the detention of the child with the Respondents became illegal detention and the Writ for Habeas Corpus was maintainable.

14. Mr.Jha further relied on the judgment of this Court in the case of **Amol Ramesh Pawar Vs/ The State of Maharashtra & Ors. Reported in 2014 SCC OnLine Bom 280.** In that case, the Petitioner-father of the child was tried for committing murder of his wife i.e. mother of his child and the at the end of the trial he was acquitted. In the meantime, the child remained in custody of the Respondent No.6 in that case. It was argued that the consideration of the welfare of the child demanded that the child be retained by the Respondent No.6 in that case. However, this Court held thus;

“9. The Petitioner being the father of the child is the natural guardian. The Petitioner was prosecuted for an offence punishable under Section 498-A and 302 of the Indian Penal Code. The Petitioner has been acquitted of the said offence by the judgment of the Additional Sessions Judge, Satara, in Sessions Case No.120 of 2012 by judgment dated 26 April 2013. Since the judgment is of the year 2013 and practically 22 months have passed, no appeal against acquittal was filed by the State. Counsel for the Respondent now informs us that an

appeal against acquittal has been filed in the Court by Respondent No.6. However, since the Petitioner has been acquitted and the Petitioner is the natural guardian of the minor child, the Petitioner cannot be deprived from obtaining the custody of his minor child. If the Respondents feel that the Petitioner is disentitled to continue the custody of the minor, the Respondent may avail remedies available in law. The question is as to whether the welfare of the minor would warrant the handing over the custody of the minor to any other person is a question which can only be decided after the evidence of the parties is recorded and certainly not in this Petition. The Respondent, however, would be at liberty to file appropriate proceedings under the Hindu Minority and Guardianship Act for claiming custody of the minor child. The said proceedings if they are filed by Respondent No.6 would be decided in accordance with law. Presently the Petitioner being the father cannot be deprived the custody of his minor child.

- 10. We accordingly allow this Writ Petition and make rule absolute by issuing the Writ of Habeas Corpus directing Respondent No.6 to hand over the custody of the minor child Tejas to the Petitioner. In the*

event the custody of the minor child is not handed over to the Petitioner, we direct the Respondent State to provide the necessary aid to the Petitioner for taking the custody of the minor child. We accordingly direct the officer in-charge of the Baramati Police Station to provide the necessary aid to the Petitioner for taking custody of the minor child from Respondent No.6.”

15. In reply to the contentions raised by learned Counsel Mr.Jha, learned Counsel Ms. Flavia Agnes for Respondent Nos.5 to 8 made her submissions opposing grant of relief as claimed by the Petitioner. Ms.Agnes submitted that in case of this nature, the question of welfare of the child is of paramount consideration and must supersede the legal rights of the parties. She submitted that the custody of the child was handed over to the Respondents by the ailing mother of the child. The mother had expressed her wish that the Respondents should take care of the child. Ms.Agnes submitted that the Respondents are taking good care of the child and they are fulfilling their promise made to the mother of the child. She submitted that the child is

attached to these Respondents and handing over her custody to the Petitioner would affect the child adversely. She submitted that at least for few years this arrangement can be continued, in the meantime, the Petitioner can have access to the child and develop strong bond with the child. She submitted that, custody can be handed over to him after a few years.

16. In support of her contention, learned Counsel Ms.Agnes relied on a few judgments. Ms.Agnes first relied on the judgment of the Hon'ble Supreme Court in the case of *Kirtikumar Maheshankar Joshi Vs. Pradipkumar Karunashanker Joshi reported in (1992) 3 Supreme Court Cases 573*, In that case, the Honour'ble Supreme Court considered the issue of custody of the children. After the unnatural death of mother, children were living with their maternal uncle. The father was facing charge u/s 498-A of the Indian Penal Code. The Honour'ble Supreme Court has taken into consideration the will of the children. They expressed their willingness to remain with their maternal uncle, who according

to them, was looking after them very well. The children did not want to live with their father. In that case, the Honour'ble Supreme Court permitted the maternal uncle to retain the custody of the children, though the father had preferential right to the custody being a natural guardian. In this case, the Honour'ble Supreme Court has taken into consideration wishes of children and accordingly passed the order. In the instant case before us, the child is of a tender age and hence is too young to express or even form her wish. Therefore the facts and ratio of this case will not be applicable to the instant case.

17. Ms.Agnes then relied on the judgment of **Athar Hussain Vs. Syed Siraj Ahmed and Others reported in (2010) 2 Supreme Court Cases 654.** In this case, the father of two minor children aged about 13 and 5 years was seeking their custody from the children's maternal aunt. The case was pending before the Family Court under the Guardians and Wards Act, 1890, between the parties. In this background the Hon'ble Supreme Court held thus;

“31. We are mindful of the fact that, as far as the matter of guardianship is concerned, the prima facie case lies in favour of the father as under Section 19 of the Guardians and Wards Act, unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations levelled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better.

34. Thus the question of guardianship can be independent of and distinct from that of custody in the facts and circumstances of each case.

35. Keeping in mind the paramount consideration of welfare of the children, we are not inclined to

disturb their custody which currently rests with their maternal relatives as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship. ”

Ms. Agnes therefore submitted that the ratio of this judgment lays down that irrespective of father being natural guardian, the custody was still given to the maternal relatives of the children keeping in view the welfare of the children as the paramount consideration. She therefore submitted that the ratio of this judgment is applicable to the facts of the present case.

18. In the said case in paragraph Nos.52 and 55, the Hon'ble Supreme Court has held thus;

“52. The High court had relied heavily on the preference made by Athiya Ali who then was 10 to 11 years old. In the opinion of High Court, she was capable of making intelligent preference. It may be true that 11 years is a tender age and her preference cannot be conclusive. The contention of

the appellant in this respect is also supported by the decision in Bal Krishna Pandey case (supra). But as we are not dealing with the question of guardianship, but only with the issue of interim custody, we see no reason why the preference of the elder child shall be overlooked. It may be noted that the Family Court had considered the fact that the younger child had instinctively approached his father while he met him in the Court premises while vacating the interim order of injunction. The second child who is just four years' old cannot form an intelligent opinion as to who would be the right person to look after him and, hence, we must give weight to the preference that Athiya had expressed.

55. *We, however, make it clear that the observations made in the order of the High Court as well as by this Court, if there be any, shall not be taken to be final while deciding the original application filed under Sections 7, 9 and 17 of the Act and the Family Court shall be at liberty to proceed with the disposal of the said proceeding independently of any of the observations made by this Court in this judgment. ”*

19. Therefore, in that case, the wish of at least the elder child was taken into consideration. The litigation was already pending before the Family Court for guardianship of the children. On these aspects, the present case differs from the facts in Athar Hussain's case (supra). In addition to this, in Athar Hussain's case the father of the children seeking custody had remarried. In the instant case before us all these situations are not present and therefore Athar Hussain's case will not help Ms.Agnes in advancing her submissions.

20. Ms.Agnes then relied on the case of *G. Eva Mary Elezabath Vs. Jayaraj and Others reported in AIR 2005 Mad 452.* In this case, the father abandoned his one month old male child in the Church premises and left the place. The child was raised by a third person at the instance of Church Director. While deciding the question of custody of the child, the Madras High Court held that the custody of the child could be retained by the person who raised the child and it was open to the father to approach the Family Court to establish his right. In this decision the welfare of the child was primarily considered. Thus,

Ms.Agnes again submitted that in the all these judgments, welfare of the child was of paramount importance irrespective of the legal rights of the parties.

21. In the case of G. Eva the facts were harsh. The father had abandoned his infant child in the Church premises and after about a couple of years was seeking his custody. In this background, the Madras High Court refused to hand over custody of the child to the father in the Habeas Corpus Petition.

22. The situation in the instance case before us is completely different. The Petitioner had never abandoned the child. Only the circumstances involving his health prevented him from taking care of the child and therefore ratio of G.Eva's case will not be applicable in the present facts before us.

23. Ms.Agnes also relied on a few judgments involving issue of custody of child between husband and wife. In those cases, the custody was sought by both the parents who were in any case natural guardians as mentioned u/s 6 of the Hindu

Minority and Guardianship Act, 1956. Though the order of preference is specifically mentioned in section 6, the dispute between the mother and father of the child for his custody is completely different from the dispute between one of the parents and other relatives of the child.

24. 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.

25. Having observed thus, we have to take into account the position of the Respondent Nos.5 to 8. When the child had lost her mother and when the father was hospitalized for a serious ailment, these Respondents have looked after the child. It is not contention of the Petitioner that the child was not taken care of or was not properly looked after. It is but natural that during all this period, the bond of love, affection would develop between the child and those Respondents. Though, the father has had no such opportunity, he deserves his daughter's love and affection. In this situation, in our considered view, it is only just and proper that the efforts put by these Respondents is recognized. However, there appears to be some serious acrimony between the parties. Therefore we are inclined to grant access only to the Respondent Nos.6 and 7 to meet the child and spend quality time with the child. In these circumstances, we pass the following order;

ORDER

- (i) The Petition is allowed and the Rule is made absolute by issuing Writ of Habeas Corpus directing the Respondent Nos.5 to 8 to hand over the custody of the child Shikha to the Petitioner within a period of 15 days from today. In the event, which we earnestly hope will not become necessary, the custody of minor child is not handed over to the Petitioner, we direct the Respondent/State to provide the necessary aid to the Petitioner for taking custody of the minor child.
- (ii) The Respondent Nos.6 and 7 shall have access to the child every Sunday between 09.00 a.m. to 06.00 p.m. at the residence of the Petitioner. The Petitioner shall cooperate and shall not obstruct the Respondent Nos.6 and 7 from spending time with the child during this period.
- (iii) Parties are at liberty to initiate and pursue other remedies as may be available in accordance with the law.
- (iv) Rule is made absolute in the aforesaid terms.

(SARANG V. KOTWAL, J.)**(INDRAJIT MAHANTY, J.)**