

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.96 OF 2021

- | | | |
|---------------------------------|---|----------------|
| 1. Veena Biswanath Mitra |] | |
| 2. Biswanath Benoy Mitra, |] | |
| Both R/at, Flat No.601, D- |] | |
| 8,Saracity, Kharabwadi, Chakan, |] | |
| Pune. |] | ... Applicants |

Versus

- | | | |
|---------------------------------------|---|-----------------|
| 1. Kamla Ashok Aher, |] | |
| R/at, Flat No.14, Sheetal |] | |
| Residency, B_Wing, Fule Nagar, |] | |
| Palase, Nasik Road, Nasik. |] | |
| 2. The Senior Police Inspector, Nasik |] | |
| Road Police Station, Bytco Point, |] | |
| Nasik-Pune Road, Nasik. |] | |
| 3. The Commissioner of Police, |] | |
| Nasik, Gangapur Road, Opp. |] | |
| KTHM College, Nasik, |] | |
| Maharashtra – 422 002. |] | ... Respondents |

...

Mr. Rajesh More for the petitioners.

Mr. R.P. Patil for respondent No.1.

Ms. S.D. Shinde, A.P.P. for respondent Nos.2 and 3.

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**CORAM : S.S. SHINDE &
MANISH PITALE, JJ.**

RESERVED ON : 18TH FEBRUARY, 2021

PRONOUNCED ON : 03RD MARCH, 2021.

J U D G M E N T:- [Per: Manish Pitale, J.]

1. Rule. Rule made returnable forthwith. Heard finally with consent of the learned counsel for the rival parties.

2. The parents of a minor child-Anurag have approached this court seeking a writ of habeas corpus to direct the respondents to produce the said minor son of the petitioners and a further direction to respondent No.1, grandmother of the said child, to hand over his custody to them. The said child is at the center of the controversy where the parents on the one hand and the grandmother on the other are claiming custody of the child.

3. The sequence of events leading to filing of the present writ petition starts from the marriage of petitioner Nos.1 and 2 on 25.02.2008. The said child was born out of the wedlock and now he is 12 years old. He was living with the petitioners i.e. his mother and father at Chakan, Pune and he took education from nursery to 4th standard at the Pius Memorial School in Chakan,

Pune. Petitioner No.2 i.e. the father of the child is an Electrical Engineer, working in a Multinational Company - 3M India Ltd., as Manager (Production and Planning).

3. In August, 2019 petitioner No.1 i.e. the mother of the child, suffered from gynecological problem for which she was advised surgery and to take complete rest. In this backdrop, the petitioners decided that while petitioner No.1 would undergo treatment for the said health issue, in order that there should not be any loss of studies of the child, he along with his mother i.e. petitioner No.1 would shift to Nasik where respondent No.1 i.e. the mother of petitioner No.1 resides. Accordingly, petitioner No.1 along with the child shifted to Nasik in a flat in the society in which respondent No.1 resides. The said respondent No.1 resides at Nasik with two unmarried sisters of petitioner No.1. The father of petitioner No.1 and her unmarried brother reside separately at Nasik. The petitioners thought that during the period when petitioner No.1 would undergo medical treatment at a hospital in Nasik, respondent No.1 and sisters of petitioner No.1 could take care of her needs as well as those of the child. Petitioner No.1 and the child shifted to Nasik to reside in the society in which respondent No.1 is having a flat and he was admitted in the 5th standard in St Xavier's High School at Nasik. Petitioner No.2 bought a flat in the same society for the convenience of petitioner No.1 and the child and he used to visit

them from Pune on weekends.

4. Petitioner No.1 underwent treatment at Nasik and upon her recovery sometime in March, 2020, the petitioners decided that petitioner No.1 could go back to Pune. But, due to the lockdown induced by the Covid-19 pandemic, petitioner No.1 was compelled to stay at Nasik. The academic year of the child was also continuing and, therefore, the mother and child continued to stay at Nasik. Thereafter, when travel restrictions were gradually relaxed in May, 2020, the petitioners discussed the issue amongst themselves and on 14.05.2020, they took a decision to take admission of their son in a school at Pune for the next academic year. It is alleged that when respondent No.1 became aware about the same, she picked up a quarrel with the petitioners and stated that she would not allow the child to be taken back to Pune. On 15.05.2020, the quarrel escalated further, leading to the petitioners filing a complaint before the police station i.e. respondent No.2 herein. On 16.05.2020, petitioner No.2 returned to Pune. The petitioners took admission of the child in Podar International School for the academic session 2020 – 2021 and paid the fees. They requested respondent No.1 and the sisters of petitioner No.1 to download the necessary applications for facilitating the child to attend online classes in the aforesaid school at Pune, since the classes in the school were being conducted only through online method. But, respondent No.1

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did not make any efforts in that direction.

5. On 26.05.2020, petitioner No.1 received a message from a teacher of the child in the school at Nasik. But, when the petitioners went to the said school at Nasik to collect the result and also to collect school leaving certificate, so that the child could join the school at Pune, the Principal of the school informed the petitioners that an application and letter purportedly written by the child were submitted to the school. The petitioners were shocked after reading the letter purportedly written by their child, as it was stated therein that he did not want the Principal of the school to give the school leaving certificate to the petitioners. Nonetheless, the petitioners collected the result of the child from the said school.

6. At this stage respondent No.1, on 19.05.2020, approached the Child Welfare Committee (hereinafter referred to as the Committee) at Nasik alongwith the child and orally made a request for grant of custody of the child to her. She claimed that the child was taking education at Nasik and that it would be in the interest of the child that his custody is continued with her. The child told the Committee that he had no complaints against respondent No.1 and his maternal aunts or uncle. On 09.06.2020, respondent No.1 gave an application to the Committee claiming that the child had suffered harassment from

his parents i.e. the petitioners herein, as also from the sister of petitioner No.2. On 13.06.2020, the petitioners appeared before the Committee and submitted an application along with documents. They placed their side regarding the events leading up to the child shifting from Pune to Nasik.

7. The Committee heard both sides and found that the child himself had stated that he wanted his parents as also respondent No.1, his maternal aunts and uncle. On the basis of material that became available on record and upon hearing all the parties, including the child, the Committee passed an order on 14.07.2020, directing that the custody of the child be handed over to his parents i.e. the petitioners. On 15.07.2020, the petitioners went to the school at Nasik and obtained the school leaving certificate of the child. At this stage, they received a notice from an advocate representing respondent No.1, whereby they were asked to hand over the school leaving certificate of the child. The petitioners gave a detailed reply to the same. The petitioners also applied before respondent No.2 police station of Nasik for police protection to take the custody of their child from respondent No.1. Respondent No.1 also approached the police station submitting a complaint against the petitioners and in this situation the petitioners were asked to remain present in the police station. They were informed that since the dispute appeared to be of a civil nature, it would be appropriate for the

disputing parties to approach the competent court for relief.

8. In the meanwhile, respondent No.1 approached the District Magistrate by filing an appeal against the order of the Committee. The petitioners also appeared before the District Magistrate and on 13.09.2020, the District Magistrate partly allowed the appeal. The District Magistrate held that since the Committee did not have any power under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, to give custody of a child, the order of the Committee could not be sustained. On this basis, the District Magistrate set aside the order of the Committee and remanded the matter for fresh consideration in terms of the provisions of the said Act. In the said order, the District Magistrate made some observations about the statements made by the child.

9. Aggrieved by the said order of the District Magistrate, the petitioners filed Criminal Writ Petition (Stamp) No. 3062 of 2020. Upon notice being issued in the said writ petition, respondent No.1 appeared before the Court. The Court (Coram: Revati Mohite Dere J.) tried to explore the possibility of amicable settlement and on 03.12.2020, the petitioners, respondent No.1, the sisters and brother of petitioner No.1 and the child were interviewed in chambers. On 04.12.2020, the writ petition was disposed of by quashing the orders of the Committee and the

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District Magistrate, as it was found that the proceeding initiated before the Committee under the provisions of the said Act was itself not maintainable. In the said order, it was observed that when the child was interviewed on 03.12.2020, it appeared, *prima facie*, that he was tutored.

10. It is after disposal of the said writ petition that on 09.12.2020, the petitioners filed the present writ petition with the aforementioned prayers. After placing the aforesaid sequence of events before this court in the writ petition, the petitioners submitted that the child ought to be handed over to them, they being the natural guardians and also because the future of the child was with his parents. It was stated in the writ petition that respondent No.1 was not educated, the sisters of petitioner No.1 as also her brother were all unmarried and that the child was shifted from Pune to Nasik only because of the medical issues faced by petitioner No.1. It was submitted that when the medical issues had been addressed, there was no reason for the child continuing with respondent No.1 at Nasik.

11. This court issued notice in the present writ petition, in response to which respondent No.1 filed her reply, claiming that the child was happy and content in living with respondent No.1 and his maternal aunts and uncle at Nasik. It was claimed that the petitioners used to quarrel at Pune amongst each other, due to

which the child was negatively impacted. It was further claimed that the child had a strong bonding with his grandmother i.e. respondent No.1 and that therefore, the child ought to continue in the custody of respondent No.1, with visitation rights to the petitioners. On 04.01.2021, this court directed the hearing to be fixed in chambers on 15.01.2021. On the said date it was adjourned to 21.01.2021, to be heard in chambers. But on the said date, neither respondent No.1 nor her advocate was present and therefore, this court directed respondent No.2 to ensure that the child was produced before this court on 03.02.2021. On the said date we interacted with the child, who stated that he desired to continue to stay with his grandmother i.e. respondent No.1. The petition was then set down for hearing on 18.02.2021, when the counsel representing the rival parties were heard at length and judgment was reserved.

12. Mr. Rajesh More, learned counsel appearing for the petitioners narrated the sequence of events leading to filing of the present writ petition. It is submitted that when the mother and father of the child are his natural guardians and they have the highest right to his custody, respondent No.1 is not entitled to continue to retain the custody of the child. It was submitted that petitioner No.1 had to shift along with the child from Pune to Nasik only because of medical issues and it was understood by all, including respondent No.1, that after the treatment of

petitioner No.1 was complete, she along with the child would shift back to Pune. It was submitted that the stay of the child at Nasik had continued beyond the necessary time period only because of the Covid-19 pandemic and the consequent lockdown. It was submitted that respondent No.1, as also the maternal aunts and uncle of the child had taken advantage of the situation and completely brainwashed the child, due to which he was making statements to the effect that he wanted to continue living only with respondent No.1 at Nasik. Learned counsel for the petitioners emphasized upon the fact that petitioner No.2 i.e. father of the child, is a highly educated person, being an Electrical Engineer working in a Multinational Company at Pune and that he along with petitioner No.1 are fully capable of taking care of their only child. It was submitted that the petitioners were being illegally deprived of the love and affection and company of their only child by respondent No.1. The future of the child was obviously with his own parents and there was nothing to show that any harm would ever be caused to the child in the company of his own parents.

13. Learned counsel appearing for the petitioners relied upon judgment of the Hon'ble Supreme Court in the case of the *Tejaswini Gaud & Ors. v. Shekhar Jagdish Prasad Tewari & Ors.*¹. It was submitted that in the said judgment, the Hon'ble Supreme Court had taken note of all relevant judgments pertaining to the

¹ (2019) 7 SCC 42

question of custody of a minor child in situations similar to the one that has arisen in the present case. By relying upon the said judgment, it was submitted that the writ petition seeking writ of habeas corpus was maintainable at the behest of the petitioners, being parents of the child and that the paramount consideration of welfare of the minor child was certainly in favour of the petitioners. It was further submitted that the child was not likely to get a healthy atmosphere for his overall development if his custody continued with respondent No.1 at Nasik. On this basis, it was submitted that the present writ petition deserved to be allowed.

14. On the other hand, Mr. R.P. Patil, learned counsel appearing for respondent No.1 submitted that since welfare of the child was of paramount consideration, in the facts and circumstances of the present case, respondent No.1 deserved to retain custody of the child. It was submitted that the child was having deep bonds of love and affection with his grandmother i.e. respondent No.1 and that therefore, his development from all perspectives would be much better with her at Nasik. It was submitted that there were matrimonial disputes between the petitioners and that sister of petitioner No.2 was living with them, who was handicapped and she was also a source of harassment to the child. It was submitted that therefore, the petitioners were not competent to take care of the child. On this

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basis, it was submitted that the writ petition deserved to be dismissed and, at the most, the petitioners could be granted visitation rights. It was also submitted that the petitioners could invoke relevant provisions of law before the appropriate court for custody of the child and that the present writ petition seeking the writ of habeas corpus was not maintainable. Learned counsel for respondent No.1 placed reliance on judgment of the Hon'ble Supreme Court in the case of *Nil Ratan Kundu & Anr. v. Abhijit Kundu*² and on judgment of the Andhra Pradesh High Court in the case of *L. Chandran v. Venkatalakshmi & Anr.*³ to claim that a child was also a person within the meaning of Article 21 of the Constitution of India and that it was the duty of this court to protect his fundamental right.

15. The facts of this case show that there is a serious emotional tug-of-war between the parents of the child on the one hand and his grandmother on the other, on the question of his custody. The petitioners, being parents of the child, are seeking a writ of habeas corpus on the basis that continued custody of the child with respondent No.1 is improper and that the child needs to be restored to them. It has been argued on behalf of respondent No.1 that when ordinary law is available to the petitioners for asserting their rights and seeking custody of the child, such a writ petition seeking a writ of habeas corpus ought not to be entertained,

² (2008) 9 SCC 413

³ AIR 1981 SC 1

particularly in the backdrop of the fact that the child is with none other than his own grandmother from the mother's side. Therefore, it would be appropriate to first consider the question of maintainability of the present writ petition, before entering into the merits of the matter.

16. In the case of the Tejaswini Gaud (supra), relied upon by learned counsel appearing for the petitioners, the Hon'ble Supreme Court considered the position of law with regard to maintainability of a writ petition seeking a writ of habeas corpus for custody of a minor child. It was noted that as far back as in 1960, in the case of Gohar Begum v. Suggi⁴, it was held by the Hon'ble Supreme Court that issuance of such a writ could be claimed when the petitioner approaching the court is entitled to custody of the minor child and there is a refusal by the respondent to restore such custody. After considering the judgments that followed the aforesaid judgment in the case of Gohar Begum (supra), the Hon'ble Supreme Court held that when father of the minor child, in that case being the natural guardian, had approached the court seeking custody of the child who was with the mother, sisters and brother of his deceased wife, he was justified in invoking the extraordinary remedy under Article 226 of the Constitution of India. Thus, it becomes clear that respondent No.1 cannot claim that the petitioners herein could not have invoked writ jurisdiction of this court, particularly

⁴ AIR 1960 SC 93

when they are admittedly the parents of the minor child and they are his natural guardians. It is significant that under Section 6 of the Hindu Minority and Guardianship Act, 1956, father is the first natural guardian of the child followed by the mother. Hence, we hold that the present writ petition filed by the petitioners is maintainable.

17. As regards the competing claims made by the rival parties for custody of the minor child, it is clear from the position of law laid down in various judgments of the Hon'ble Supreme Court, including the aforesaid judgment in the case of Tejaswini Gaud (supra), that the paramount consideration in such cases is welfare of the minor child. When there are conflicting demands made towards the custody of a minor child, the court has to take into consideration all relevant circumstances with the central idea of keeping the welfare of the child as the paramount consideration. The prevailing position of law makes it clear that the relevant factors for reaching a conclusion regarding the welfare of the child include ethical upbringing, economic well-being of the guardian, the overall comfort of the child, contentment, health, education, physical mental and intellectual development of the child and favourable surroundings. The court also has to see that no harm would be caused to the child upon directing custody to be given to a particular party. Thus, the higher right of a party to claim custody of a child is only a relevant factor, subservient to the

paramount consideration of welfare of the child on the touchstone of the aforesaid factors.

18. The facts as they emerge from the material available on record in the present case, demonstrate that the petitioners being the parents of the child are his natural guardians and they clearly have the highest right of his custody. The child has lived with his parents i.e. the petitioners from his birth till the age of about 11, when in the year 2019, he along with his mother had to shift to Nasik to live near respondent No.1, for the reason that petitioner No.1 had to undergo medical treatment at Nasik. Thus, it is not as if the child has all along lived with his grandmother, right from his birth. Petitioner No.1 along with the child were supposed to shift back to live with petitioner No.2 at Pune after the medical treatment of petitioner No.1 was completed at Nasik.

19. It has come on record that after the petitioners took the school leaving certificate of the child from the school at Nasik, they had enrolled him at a reputed school in Pune. Petitioner No.2, who is the father of the child, is a well educated person, being an Electrical Engineer working with a Multinational Company. He has all the economic means to properly take care of the needs of the child. The petitioners being parents of the child are well placed to take care of the educational, economic, emotional and other needs of the child.

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20. Although, respondent No.1 has made allegations in her reply before this court that there is matrimonial discord between the petitioners and that this has resulted in harassment to the child, there is nothing to indicate such a situation, other than the bare words of respondent No.1. It is significant that although respondent No.1 further alleged that the handicapped sister of petitioner No.2 is also a source of harassment to the child, in statements made before the Committee, the child categorically stated that he has not suffered any such harassment from the said sister of petitioner No.2.

21. It is also relevant that in the proceedings before the said Committee conducted in June, 2020, the child had categorically stated that he wanted his parents i.e. the petitioners and also respondent No.1 along with his maternal aunts and uncle. At that stage, there did not appear to be any hostility shown by the child towards his parents. It is thereafter, that the child seems to have made statements in December, 2020 before the learned Single Judge of this court, due to which it was recorded in the order dated 04.12.2020 passed by the learned Single Judge disposing of the aforementioned Criminal Writ Petition (Stamp) No. 3062 of 2020, that the child was, *prima facie*, tutored. Even when we interacted with the child on 03.02.2021, we found that the child appeared to be tutored for the reason that he kept stating that he

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wanted to be with respondent No.1, without any query being put to him. The child did not appear to be interested in interacting with us, other than making the said statement.

22. The material on record also shows that respondent No.1 is the grandmother of the child and that she does not appear to be educated, which is borne out by the fact that in the reply affidavit filed before this court, she has applied her thumb impression. In the house of respondent No.1 there are two unmarried maternal aunts and one unmarried maternal uncle of the child. Although there is nothing on record to show the economic condition of respondent No.1 and the aforesaid other persons living with her, no effort was made on behalf of respondent No.1 to show anything in that regard. The child has lived with respondent No.1 only from 2019 for more than one year. It is not as if the child has always lived with respondent No. 1, away from his parents. There can be no doubt about the fact that there is a special bond between a grandmother and her grandchild, but it cannot substitute the natural bond of parents with their child. We have already noted that the child has lived with his parents i.e. the petitioners right from his birth up to the year 2019 and there is no material on record to support the claims made on behalf of respondent No.1 that the child has suffered harassment at the hands of his own parents or even the handicapped sister of petitioner No.2. Therefore, we find that there is no substance in

the allegations made on behalf of respondent No.1 against the petitioners in this regard.

23. We are of the opinion that viewed from any angle, with reference to the factors that go into determining the welfare of the child, which is the paramount consideration in such cases, the ordinary comfort of the child in the present case, his contentment, health, education, physical moral and intellectual development, ethical upbringing and economic well-being, as also his future certainly lies with his parents i.e. the petitioners. It is a settled position of law recognized in various judgments, including aforesaid judgment of the Hon'ble Supreme Court in the case of Tejaswini Gaud (supra), that if the minor is old enough to form an intelligent preference or judgment, the court should consider such preference as well. But, it has been categorically laid down that the final decision rests with the court while exercising its *parens patriae* jurisdiction in such cases.

24. We find that in the present case, the child is about 12 years old. Even though the order of the Committee was ultimately set aside by this court, the child had specifically stated before the Committee that he wanted his parents i.e. the petitioners as also respondent No.1, indicating that there was no specific preference discernible at that stage. Yet, thereafter, before the learned Single Judge of this court and before us, the child kept stating that he

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wanted to remain with respondent No.1. As noted above, the learned Single Judge recorded in the order that the child was *prima facie* tutored and we also have come to the same conclusion. Thus, even if the child is about 12 years old and it may be said that he is old enough to form an opinion or preference, we feel that he appears to have been tutored to make statements before the court in favour of respondent No.1. Even otherwise, we are exercising our *parens patriae* jurisdiction to examine the material on record on the touchstone of the aforementioned factors to reach a conclusion regarding the paramount consideration of the welfare of the child.

25. We are of the opinion that in the facts and circumstances of the present case, the material available on record and upon application of the position of law laid down by the Hon'ble Supreme Court in various judgments, the present writ petition deserves to be allowed. Even in the judgment of the Hon'ble Supreme Court in the case of *Nil Ratan Kundu (supra)*, the manner of exercising *parens patriae* jurisdiction of the court has been indicated and also the need for giving due weightage to the above-mentioned factors while reaching a conclusion regarding the welfare of the child. Therefore, learned counsel for respondent No.1 is not justified in relying on the said judgment to contend that in the present case, the custody of the child needs to be continued with respondent No.1. We are of the opinion that

the facts of the present case are close to the facts in the case of the Tejaswini Gaud (supra), wherein father of the child had approached the court seeking a writ of habeas corpus when the child was retained in the custody of his mother-in-law and her family. The Hon'ble Supreme Court in the said case held as follows:

“34. As observed in Rosy Jacob v. Jacob A. Chakramakkal (1973) 1 SCC 840, earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, contentment, health, education, etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first

respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.”

26. The present case of the petitioners is on a better footing because in the above mentioned case the mother of the child had unfortunately passed away and yet the custody was directed to be handed over to the father, while in the present case the mother as well as the father of the child are before this court seeking the custody of their only child. We are of the opinion that, by applying the position of law elucidated by the Hon'ble Supreme Court in matters of this nature, in the facts and circumstances of the present case, by exercising our *parens patriae* jurisdiction, we are inclined to grant a writ of habeas corpus and consequent direction claimed by the petitioners. At the same time, such matters necessarily require a human touch and sensitivity towards the feelings of the child. It is evident in the present case that the child is also attached to his grandmother i.e. respondent No.1 and that therefore, it would be appropriate that respondent No.1 is permitted to continue her association with the child, even if the custody is to be handed over to the petitioners. Such association will be more significant during the initial period of the custody being restored to the petitioners and therefore, we propose to give appropriate directions in that regard.

27. In view of the above, the writ petition is allowed in the following terms:

- (i) Respondent No.1 is directed to forthwith hand over custody of the minor child-Anurag to the petitioners i.e. his parents. Respondent Nos.2 and 3 are directed to ensure compliance of the said direction issued to respondent No.1.
- (ii) During the period of first three months from this order, respondent No.1 would be entitled to visit and meet the said minor child on Saturdays and Sundays between 10.00 AM and 5.00 PM, without disturbing his academic and educational schedule. The petitioners may additionally permit respondent No.1 to meet the child on any other day of the week, if mutually agreed between them and respondent No.1.
- (iii) After the period of three months, the parties would be free to make arrangements as may be mutually agreed between them for

respondent No.1 to enjoy association with the child.

28. Rule made absolute in above terms. The writ petition is disposed of accordingly.

(MANISH PITALE, J.)

(S.S. SHINDE, J.)