

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 579 OF 2021**

Rakesh Tulsidas Rathod
aged 39 years, Indian Inhabitant,
Permanently residing at A/402, Keavya
Heights CHS Ltd., Near J. H. Poddar
School, Bhayandar (West), Dist. Thane
Pin Code 401 101.

...Petitioner

Versus

1. Jayraj Vishram Vapikar
aged 66 years
2. Sachin Jayraj Vapikar
aged 42 years
(both residing at C/604, Raj Hill
Building, Dattapada road, opp. Lohar
Suthar Hall, Borivali (East),
Mumbai – 400 066.
3. State of Maharashtra
(through the Public Prosecutor, High
Court (A.S.) Mumbai).

...Respondents

Mr. Subhash Jha, i/b Law Global, for the Petitioner.
Mr. Tejash Dande, a/w Mr. Bharat Gadhavi, Mr. Vishal Navale,
Mr. Ankit Aghade, Ms. Tushna Shah, i/b Tejash Dande
& Asso., for Respondent nos.1 and 2.
Ms. Mallika Ingale, Appointed as Amicus Curie.
Mrs. S. D. Shinde, APP for the State/Respondent no.3.

**CORAM: S. S. SHINDE &
N. J. JAMADAR, JJ.**

RESERVED ON: 29th SEPTEMBER, 2021

PRONOUNCED ON: 1st FEBRUARY, 2022

JUDGMENT:- [PER : N. J. JAMADAR, J.]

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsels for the parties, heard finally.

2. This petition under Article 226 of the Constitution of India is instituted for writ of habeas corpus to produce Master 'J', the son of the petitioner, who is alleged to be in the illegal custody of respondent nos.1 and 2, the father and brother, respectively of late Neeta, the wife of the petitioner; and for direction to the respondents to hand over the custody of Master 'J' to the petitioner.

3. Shorn of unnecessary details, the background facts leading to this petition can be stated as under:

(a) The marriage of the petitioner was solemnized with Neeta, the daughter of respondent no.1, on 24th May, 2011 at Vapi, Gujarat, in accordance with the Hindu Vedic Rites and Customs. Post marriage, the petitioner and Neeta resided at Bhayandar, District Thane. On 6th July, 2012, they were blessed with son Master 'J'. Neeta initially worked as a Lecturer in a Sydenham College and after birth of Master 'J' Neeta joined Abhinav College of Arts, Commerce and Science at Bhayandar. In the year 2015, Master 'J' was admitted in RBK School, at Mira Road (E), Thane. The petitioner is M.B.A. He is gainfully employed with a prominent builder, at Mumbai.

(b) In the month of May, 2017, Neeta was diagnosed with cancer. Neeta underwent treatment at Bombay Hospital and

HCG Apex Cancer Centre, Dahisar (W). On 8th May, 2019, Neeta passed away.

(c) The petitioner asserts that suppressing the condition of Neeta, respondent nos.1 and 2 forced the petitioner to admit Master 'J' in St. Francis School, Borivali (W) as respondent nos.1 and 2 were residing at Borivali. After the death of Neeta, the petitioner got the admission of Master 'J' at St. Francis School, Borivali, cancelled, and readmitted him in RBK School at Mira Road. Respondent nos.1 and 2 did not allow the Master 'J' to attend RBK School and instead they got Master 'J' admitted in C. P. Goenka School, Borivali, without the consent of the petitioner and obtaining School Leaving Certificate from the former school. The petitioner claimed to have made repeated requests to respondent nos.1 and 2 to hand over the custody of Master 'J' to him. However, respondent nos.1 and 2 refused. Thus, Master 'J' has been in illegal custody of the respondents since May, 2019.

(d) Faced with the aforesaid situation, the petitioner filed Criminal Writ Petition No.5172 of 2019 in this Court. Since the said petition was not properly drafted and pursued the petitioner sought to withdraw the said petition. It was further asserted that, based on legal advice, the petitioner has

instituted a petition being No.D-74 of 2019, before the Family Court, Bandra, seeking custody of Master 'J' under the provisions of Hindu Minority and Guardianship Act, 1956 (the Act, 1956). However, the petitioner asserts, the said proceeding before the Family Court being a long drawn process and not an efficacious remedy, the petitioner is constrained to invoke the writ jurisdiction of this Court.

4. In the petition, certain allegations are made about the improper medical treatment of Neeta, alleged suppression of the condition of Neeta and respondent nos.1 and 2 being not suitable to be entrusted with the custody of Master 'J'. In contrast, the petitioner claims to be best situated to have the custody of Master 'J', being the father and natural guardian. Respondent nos.1 and 2 are thus not entitled to deprive the petitioner of his legitimate right to have the custody of Master 'J'.

5. Respondent nos.1 and 2 have filed an affidavit-in-reply and resisted the prayer of the petitioner. Respondent nos.1 and 2 contend that Master 'J' has been residing with respondent nos.1 and 2 since more than five years. They have been taking care of Master 'J' as well as Neeta till her death. Respondent nos.1 and 2 claimed to have borne entire expenses of the treatment of Neeta to the tune of Rs.25 to 30 lakh. In contrast, the petitioner

had paid a marginal amount of Rs.70,000/- only for the treatment of Neeta. The petitioner had not attended to Neeta. She was dropped at the place of the respondents after she was diagnosed with cancer. The petitioner had utterly failed in discharging his duties as a husband and father.

6. Respondent nos.1 and 2 have categorically denied that Master 'J' was admitted in St. Francis School against the wishes of the petitioner. Banking upon a document, namely, Personal Information Sheet at RBK School, wherein respondent no.1 was shown as the guardian of Master 'J', duly signed by the petitioner, respondent nos.1 and 2 assert that Master 'J' has, in fact, been in the custody of respondent nos.1 and 2 with the consent of the petitioner. Thus, no case for exercise of extraordinary jurisdiction under Article 226 of the Constitution of India is made out. Respondent nos.1 and 2 further contend that since Master 'J' has been residing with the respondents almost since his birth, Master 'J' has developed love and affection towards the respondents. Master 'J' is not willing to leave the respondent no.1's family. Master 'J' is comfortable in the environment which he currently finds himself in. And a direction for transferring the custody of Master 'J' will cause severe emotional and psychological impact.

7. Referring to the proceedings instituted by the petitioner in the Family Court and a petition bearing No.D-56 of 2019 instituted by Urmila, the wife of respondent no.1 (the maternal grand-mother of Master 'J'), the respondents contend that the petitioner has resorted to forum shopping after his prayer for interim custody was rejected by the Family Court. As a substantive petition for custody is subjudice before the Family Court, this Court may not entertain a petition under Article 226 of the Constitution of India.

8. Lastly, the respondent nos.1 and 2 assert that the welfare of Master 'J' would be better subserved if he remains in the custody of the respondent nos.1 and 2. They are financially well settled. They have the time, resources, manpower and desire to bring up Master 'J' in a conducive atmosphere. The respondent nos.1 and 2 have contested the claim of the petitioner that he is gainfully employed. It is contended that the petitioner could not take proper care of late Neeta, *inter alia*, citing his financial condition. Nor the petitioner has complied with the order of the Family Court directing payment of a sum of Rs.5,000/- per month towards the maintenance of Master 'J', except for a couple of months. Thus, the petition deserves to be dismissed.

9. An affidavit-in-rejoinder is filed by the petitioner.

10. As Master 'J' is 9 year old, we interviewed him in chamber.

11. In the light of the aforesaid pleadings and facts, we have heard Mr. Subhash Jha, the learned Counsel for the petitioner, Mr. Dande, the learned Counsel for respondent nos.1 and 2 and Mrs. S. D. Shinde, the learned APP for the State. In the intervening period, since there was no representation for respondent nos.1 and 2, we had requested Advocate Mallika Ingale, to assist the Court. We have heard Ms. Ingale, the learned *Amicus Curie*, as well.

12. Mr. Jha, the learned Counsel for the petitioner, at the outset, strenuously submitted that the peculiarity of the instant case is that the petitioner, who is the natural guardian is pitted against the relatives of the wife of the petitioner, who have no legal right and authority to retain the custody of Master 'J'. Mr. Jha would urge that the cases where the dispute as to the custody of a child is essentially between two parents, stand on a different footing. In the case at hand, no other person can claim right to the custody of Master 'J'. Can a father be deprived of the custody of the son, at the behest of the persons, who do not have any semblance of right, is the question which corps up for consideration in this petition, urged Mr. Jha. In such a situation, according to Mr. Jha, the principle of paramountcy of

welfare of the child is required to be approached from a different perspective.

13. Per contra, Mr. Dande, the learned Counsel for respondent nos.1 and 2, assailed the tenability of the petition. Elaborating the submission, Mr. Dande would urge that the Family court is seized of the petitions, being Petition No.D-56 of 2019 filed by respondent no.1's wife Urmila and Petition No.D-74 of 2019 filed by the petitioner. In Petition No.D-56 of 2019, Consent Terms were executed by and between the parties for interim access and interim maintenance, on 23rd October, 2019. Subsequent thereto, the Family Court has passed a number of orders and even rejected the prayer of the petitioner for interim custody. Thus, according to Mr. Dande, since petitioner has already invoked an efficacious alternate remedy, the instant petition does not deserve to be entertained.

14. It was further submitted that the very premise of the petition that the custody of Master 'J' with respondent nos.1 and 2 is illegal, is flawed. In fact, in the wake of Neeta being diagnosed with cancer, the petitioner himself had brought Master 'J' to the house of respondent no.1, in the month of April – 2017. Since then Master 'J' has all along been residing with

respondent no.1 and his family members. Thus, Master 'J' cannot be said to be in illegal custody.

15. Taking the Court through the orders passed by the Family Court, Mr. Dande would further urge that the petitioner has by his conduct dis-entitled himself from seeking custody of Master 'J'. The petitioner has antagonized Master 'J' and the aggressive, violent and rude behaviour of the petitioner has further alienated the child. Mr. Dande would urge that Master 'J' being a 9 and ½ year old boy, is in a position to make an intelligible choice. Master 'J' has decisively indicated his preference to be with respondent no.1 and his family members, where he gets the desired love and affection. Master 'J' cannot be uprooted from the environment he is accustomed to and comfortable with, against his wishes. In any event, in the totality of the circumstances, the welfare of Master 'J' would be better secured if the custody is retained with respondent nos.1 and 2.

16. Mr. Dande placed a strong reliance on the judgment of the Supreme Court in the case of *Tejaswini Gaud and other vs. Shekhar Jagdish Prasad Tewari and others*¹ to bolster up the aforesaid submissions.

1 (2019) 7 Supreme Court Cases 42.

17. Ms. Ingale, the learned amicus, invited the attention of the Court to the Personal Information Sheet (Exhibit-A to the reply) in support of her submission that the material on record does not indicate that Master 'J' was admitted in school without the consent of the petitioner. Referring to the acrimonious disputes between the petitioner and respondent no.1 and his family members, as manifested in lodging of the reports with police and allegations and counter allegations, Ms. Ingale would urge that the claim for custody can only be judged on the touchstone of the welfare of Master 'J'. The legal right of the petitioner cannot override the paramountcy of the welfare of the Master 'J'. Ms. Ingale, relied upon the recent judgment of the Supreme Court in the case of *Yashita Sahu vs. State of Rajasthan & ors.*,² wherein the concept of paramountcy of welfare was expounded.

18. Mr. Jha, the learned Counsel for the petitioner, joined the issue by canvassing a submission that the aforesaid challenges on behalf of respondent nos.1 and 2 lose sight of the fundamental fact that the petitioner being the father is the only natural guardian and the moment respondent nos.1 and 2 refused to hand over the custody of Master 'J' to the petitioner,

² (2020) 3 SCC 67.

the same became illegal. In such a situation, according to Mr. Jha, writ of habeas corpus is the only efficacious remedy. A father cannot be relegated to the remedy of proceeding before the Civil/Family Court, in a case, where the persons who do not have any right whatsoever detain the child. Viewed from this prospective, the fact that the petitioner had instituted a proceeding before the Family Court for custody of Master 'J', is of no consequence, submitted Mr. Jha.

19. To lend support to the aforesaid submission, Mr. Jha placed strong reliance on the judgments of Allahabad High Court in the cases of *Sukhdeo Rai vs. Ram Chandar Rai*,³ *Abdul Aziz Khan vs. Nanhe Khan*,⁴ *Vinayak Goyal vs. Prem Prakash Goayal and others*⁵ and the judgment of this Court in the cases of *Shekhar Jagdish Prasad Tewari vs. State of Maharashtra*,⁶ *Khaled Kamal Hussein Mohamed Kassem An Egyptian Citizen vs. State of Maharashtra*⁷ and the judgments of the Supreme Court in the cases of *Gohar Begam vs. Suggi alias Nazma Begam and others*⁸ and *Tejasvini Gaud* (supra).

3 1924 ILR (ALH) 706.

4 1925 ILR (ALH) 332.

5 1981 Allahabad Law Journal 752.

6 2019 ALL MR (Cri) 2568.

7 2020 Online Bombay 166.

8 AIR 1960 SC 93.

20. We have given our anxious consideration to the submissions canvassed across the bar. To begin with, the question of tenability of the petition, in the peculiar facts of the case, warrants consideration. We are inclined to proceed on the premise that Master 'J's custody was entrusted to respondent no.1 and his family members, with the consent of the petitioner, not for the reasons that the allegations and counter-allegations support such a view but for the sheer weight of the circumstances. Neeta, the mother of Master 'J' was diagnosed with cancer in the month of April/May, 2017. Master 'J' was then hardly five years of age. Neeta, as the record indicates, stayed at her parental home while she was undergoing treatment. It is quite natural that Master 'J' continued to be with Neeta and respondent no.1, since Neeta was diagnosed with cancer. In this backdrop, in our view, the question as to whether respondent no.1 and his family members came to have the custody of Master 'J' lawfully or otherwise, pales in significance. What bears upon the determination of the controversy at hand is the refusal of respondent no.1 and his family members to part with the custody of Master 'J', after Neeta passed away.

21. Indubitably, the petitioner being the father of Master 'J' is the natural guardian under Section 6 of the Act, 1956. There is no qualm over the natural relationship between the petitioner and Master 'J' and juridical status of the petitioner.

22. In this context, it would be advantageous to consult the pronouncement of the Supreme Court in the case of *Gohar Begum* (supra). In the said case, a petition for writ of habeas corpus was filed for recovery of a illegitimate female infant of an unmarried Sunni Muslim mother. On the date of the application, the child was less than six years old. The said child was in the custody of the respondent, which was presumably with the initial consent of the appellant. In that context, the Supreme Court after adverting to the principles of Mohammedan Law, enunciated the legal position as under:

"7. On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants.

In The Queen v. Clarke (1) Lord Campbell,, C. J., said at p. 193:

"But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty."

The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of Section 491 would clearly be applicable to the case and the appellant entitled to the order she asked.

8. We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have 'not given any reason in support of their view and we are clear in our mind that view is unsustainable in law."

(emphasis supplied)

23. On the remit of a writ of habeas corpus, the Supreme Court observed as under:

"13. It is further well established in England that in issuing a writ of habeas corpus a court has power in the case of an infant to direct its custody to be placed with a certain person. In *The King v. Greenhill (1) Lord Denman, C. J.*, said:

"When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will 'go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

See also *Queen v. Clarke*. In *Halsbury's Laws of England, Vol. IX, Article 1201* at p. 702 it is said;

"Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person."

Section 491 is expressly concerned with the directions of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the Courts in our country have always exercised the power to direct under Section 491 in a fit case that the custody of an infant be delivered to the applicant: see *Rama Iyer v. Nataraja Iyer*, *Zara Bibi v. Abdul Razzak* and *Subbuswami Goundan v. Kamakshi Ammal*. If the courts did not have this power, the remedy under Section 491 would in the case of infants often become infructuous."

24. A useful reference, in this context, can also be made to the judgment of the Supreme Court in the case of *Sayed Saleemuddin vs. Dr. Rukhsana and others*,⁹ wherein, after referring to the aforesaid pronouncement in the case of *Gohar Begam* (supra), the Supreme Court enunciated the legal position as under:

“10. This Court in the case of [Gohar Begam v. Suggi Alias Nazma Begam and others](#) (1960(1) SCR 597) dealt with a petition for writ of Habeas Corpus for recovery of a illegitimate female infant of an unmarried Sunni Muslim mother, took note of the position under the Mohammedan Law that the mother of an illegitimate female infant is entitled to its custody and the refusal to restore such a child to the custody of its mother would result in an illegal detention of the child within the meaning of Section 491 of the Criminal Procedure Code. This Court held that the dispute as to the paternity of the child is irrelevant for the purpose of the application and the Supreme Court will interfere with the discretionary powers of the High Court if the discretion was not judicially exercised. This Court further held that in issuing writs of Habeas Corpus the Court have power in the case of an infant to direct its custody to be placed with a certain person.

11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken

out of the custody of their father and left in the care of their mother.”

25. At this juncture a profitable reference can be made to the judgment of the Supreme Court in the case of *Tejasvini Gaud* (supra), on which reliance was placed both by Mr. Jha and Mr. Dande. A brief reference to the facts which obtained in the case of *Tejasvini Gaud* (supra) would assist in properly appreciating the law expounded therein. In the said case, the child, barely three months old, came to stay with the appellants, who were the sisters and brother-in-law of the wife of the respondent as the child’s mother was diagnosed with cancer and at the same time the respondent - husband was diagnosed with Tuberculosis Meningitis and Pulmonary Tuberculosis and was required to be hospitalised. The child’s mother passed away on 17th October, 2018. When the respondent - father sought custody of his infant daughter, the appellants refused to hand over the custody.

26. Under such circumstances, where the appellants came to be entrusted with the custody of the infant under peculiar and unavoidable circumstances, this Court in *Shekhar Jagdish Prasad Tewari* (supra) passed an order directing the transfer

of the custody of the infant to the father. The Supreme Court affirmed the judgment of this Court.

27. In the process, the Supreme Court considered the aspect of the tenability of a petition for habeas corpus. The observations in paragraphs 19 to 21 are instructive and hence extracted below:

“19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

21. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent- father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India.”

(emphasis supplied)

28. The facts in the case of *Tejaswini Gaud* (supra) have a striking resemblance to the facts of the case at hand, except the fact that the child therein was one and half year old and Master ‘J; is nine and half year old and in a position to indicate his preference.

29. It would be contextually relevant to refer to the pronouncement of the Supreme Court in the case of *Yashita Sahu* (supra), wherein, the Supreme Court after considering the previous pronouncements on the aspect of maintainability of writ habeas corpus, ruled in favour of the maintainability in emphatic terms as under:

“10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in *Elizabeth Dinshaw vs. Arvand M. Dinshaw & Ors.*, *Nithya Anand Raghavan vs. State (NCT of Delhi) & Anr.* and *Lahari Sakhamuri vs. Sobhan Kodali among others*. In all these

cases the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.”

(emphasis supplied)

30. It is imperative to note that the aforesaid pronouncement was made in the context of a petition where the custody of the child was sought by one parent from another, which ordinarily cannot be alleged to be illegal. A fortiori, the principle applies with greater force where a natural guardian seeks the custody of a child from the relations of one of the parents. The remit of writ of habeas corpus is thus not restricted only to the cases where the custody of the child can be said to be unlawful or illegal. Thus, the submission on behalf of respondent nos.1 and 2 that since Master ‘J’ was entrusted to respondent no.1 with the consent of the petitioner, the petition cannot be entertained does not merit countenance.

31. The legal position thus seems to have been crystallized to the effect that ordinarily, the person seeking custody has to invoke the jurisdiction of Civil/Family Court in accordance with the statutory provisions. However, in exceptional cases, the writ Court is not precluded from exercising the extraordinary jurisdiction to determine the rights of the parties to the custody of a minor, in a habeas corpus petition. A situation where the

custody of the minor child is alleged to be with a person other than parent/lawful guardian, and the petitioner is indisputably the natural guardian, the exercise of writ jurisdiction appears legitimate. It is a different matter that the writ Court having regard to the attendant facts of the case and the nature of the inquiry warranted, may decline to exercise the writ jurisdiction.

32. We are, however, not persuaded to accede to the broad proposition sought to be forcefully canvassed by Mr. Jha that in a situation, like the present one, where a parent claims custody of the child from a person, who has no right to the custody of the child, the aspect of welfare of the child is not required to be delved into deeply.

33. In our view, the distinction sought to be drawn between the two situations, namely, where the custody of the child is sought by one parent from another parent and where the custody of the child is sought by a parent from a person who is not the parent / lawful guardian, in the matter of application of the principle of paramountcy of the welfare of the child, is not well founded. Even in a case where the custody of a child is sought from the person who is not a parent/lawful guardian, the question of interest and welfare of the child is required to be delved into as the Court exercises a *parens patriae* jurisdiction.

The proposition that in the matter of determination of the issue of custody of child, it is not the right of the parties but welfare of the child, which is of determinative significance applies with equal force to a situation like the case at hand. In such a situation, there may be qualitative difference in the degree of application of the principle, to the facts of the given case. However, it cannot be urged that the principle does not come into play at all.

34. Even in the case of *Tejaswini Gaud* (supra), which was banked upon by Mr. Jha, the Supreme Court reiterated that while deciding the child custody cases the Court is not bound by the legal right of the parent or guardian and the paramount consideration ought to be interest or welfare of the child. The observations in paragraphs 26 and 34, on which reliance was placed by Mr. Dande, are material and hence extracted below:

“Welfare of the minor child is the paramount consideration:-

26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

.....

34. As observed in Rosy Jacobll 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.”

(emphasis supplied)

35. On the aforesaid touchstone, reverting to the facts of the case, it is imperative to note the circumstances in which Master ‘J’ came to reside with respondent no.1. As indicated above, the fact of Neeta being diagnosed with cancer in the year 2017 necessitated the shift of Neeta and Master ‘J’ from the house of the petitioner to her parental home. It is nobody’s case that the said move was driven by any act or omission attributable to the petitioner. The unfortunate circumstances, in which Neeta and Master ‘J’ found themselves, forced them to stay with respondent no.1. It is but natural that Master ‘J’ developed great liking and affection to respondent no.1 and his family members, on account of the long stay and the love and affection which respondent no.1 and his family members must have bestowed upon him.

36. The developments which occurred, in the intervening period, and, especially, post death of Neeta are required to be appreciated through the aforesaid prism. The fact that the

petitioner gave consent to enroll Master 'J' in St. Thomas School, which was nearby the residence of respondent no.1, thus cannot be arrayed against the petitioner. At that point of time, the petitioner and respondent no.1 were in unison that, in the given circumstances, it was expedient that Master 'J' studied in a nearby school as Neeta was fighting the disease. Likewise, the circumstance that in the Personal Information Sheet respondent no.1 was shown as the guardian of Master 'J', thus cannot be construed as an abdication of the responsibility by the petitioner.

37. Evidently, the petitioner and respondent no.1 and his family members turned astray post death of Neeta, when the petitioner demanded the custody of Master 'J'. We do not find it necessary to delve into the allegations and counter allegations. These issues are essentially rooted in facts. The initiation of the proceedings, firstly, by Urmila Vapikar, the maternal grandmother of Master 'J', being Petition No.D-56/2019 for appointment as a guardian of Master 'J' and, secondly, by the petitioner being Petition No.D-74/2019 for custody of Master 'J' are required to be considered in the backdrop of the disputes which arose between the parties over the custody of Master 'J', post death of Neeta.

38. Mr. Dande as well as Ms. Ingale, laid stress on the fact that initially the parties had filed consent terms and, later on, the Family Court by an order dated 6th November, 2020, rejected the application of the petitioner for interim custody while directing virtual access. Attention of the Court was also invited to the order dated 5th March, 2021, whereby the Family Court stayed the proceedings in Petition No. D-74/2019 instituted by the petitioner as the petitioner had instituted petition for habeas corpus in this Court, with a direction to the petitioner to make an election.

39. The situation which thus obtains is that the petitioner invoked the jurisdiction of the Family Court for custody of Master 'J'. As the petitioner simultaneously invoked writ jurisdiction, the said proceedings came to be stayed by the Family Court. We have noted that in child custody matters the ordinary remedy is before the Family/Civil Court. However, in exceptional circumstances, the writ Court can exercise the extraordinary jurisdiction despite the existence of such ordinary remedy. The fact that the petitioner has invoked the jurisdiction of the Family Court, in the peculiar circumstances of the case, where the juridical status of the petitioner is not in dispute, in

our view, does not preclude this Court from exercising the extraordinary writ jurisdiction.

40. This propels us to the pivotal issue of the welfare of Master 'J'. Whether, in the facts of the case, the Court would be justified in directing the transferring of the custody of Master 'J' is the moot question. The expression welfare of the child is of wide connotation. It is not restricted to physical comfort and well being. It subsumes in its fold, *inter alia*, emotional, intellectual and overall holistic development of the child. In the case of *Gaurav Nagpal vs. Sumedha Nagpal*¹⁰, the Supreme Court expounded the connotation of the term welfare as under:

“43. The word 'welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.”

41. In the *Nil Ratan Kundu and anr. vs. Abhijit Kundu*¹¹ the considerations for determination of the proper custody of a minor child were illuminatingly postulated by the Supreme Court, as under:

10 AIR 2009 Supreme Court 557.

11 (2008) 9 Supreme Court 413.

“..... In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.

42. Welfare of the minor is thus a broad and elastic expression. Every factor which bears upon the overall development of the child needs to be given due weight. The approach of the Court in ascertaining and determining the welfare of the minor ought to be well informed and pragmatic. It is thus said that the Court is called upon to deal with a human problem with a humane touch.

43. In the case at hand, the Court has to consider the wishes and preferences of Master ‘J’, as well. We interacted with Master ‘J’ in the presence of his grandmother Urmila Vapikar. During the course of our interaction with Master ‘J’, we found that Master ‘J’ finds himself extremely comfortable in the company of respondent no.1 and his family members. Master ‘J’ indicated a strong reluctance to speak with the petitioner. He expressed

a strong desire to continue to stay with respondent no.1 and his family members.

44. Mr. Dande, the learned Counsel for respondent nos.1 and 2, in the light of the aforesaid preference indicated by Master 'J', would urge that as Master 'J' is in a position to make an intelligible choice, it would be impermissible to direct the transfer of custody against the wishes of Master 'J'. It is this aspect of the matter which made us to give utmost serious consideration and ponder over the situation.

45. It is true that Master 'J' being a nine and half year old boy was in a position to indicate his preference. We attach due weight to his choice. However, in our view, in the circumstances of the case and having regard to the age of Master 'J', the preference of Master 'J' alone cannot be a decisive factor.

46. Again, the circumstances in which Master 'J' came to reside with respondent no.1 assume critical significance. It is not a case that there was either marital discord or failure to bestow requisite love and affection upon Master 'J', which was a driving factor for Master 'J' to come to reside with respondent no.1. It was an unfortunate and unforeseen event of Neeta being diagnosed with cancer, which made them to shift to respondent no.1's place. Nor is it a case that Master 'J' has all along been

residing with respondent no.1 since his birth. As indicated above, by the passage of time, Master 'J' has developed a strong bond of affection and love towards respondent no.1 and his family members. The animosity towards the petitioner, thus seems to be a learned trait. It is not impossible to unlearn, provided a conducive environment is created.

47. At this stage, it is pertinent to note that the fact that the petitioner and respondent no.1 and his family members were at loggerheads over the custody of Master 'J' must have contributed to the further alienation of Master 'J'. The passage of time and the negative estimation of respondent no.1 and his family members about the petitioner might also have played a significant role. This is recognised as a 'parental alienation syndrome'.

48. The reluctance to join the company of, or animosity towards, the father does not seem to be based on the experience which Master 'J' have had, when the petitioner, Neeta and Master 'J' were residing together. The possibility of the perspective of Master 'J' being influenced by the views of respondent no.1 and his family members about the character, personality and overall bearing of the petitioner, cannot be ruled out. At a impressionable age such articulation about the

opposite party, in a custody battle, often affects the capacity to exercise an intelligible preference. It is quite possible that when a child spends time with a non-custodial parent, he may be disabused of such perception.

49. A useful reference, in this context, can be made to the judgment of the Supreme Court in the case of *Vivek Singh vs. Romani Singh*¹² where the Supreme Court adverted to the parental alienation syndrome. In the said case, the child had remained with the appellant father from the tender age of 21 months and when the matter came up before the Supreme Court, the child was eight years and three months old. In the said backdrop, the Supreme Court found the reluctance of the child to join her mother quite natural and obvious. It was thus observed as under:

“16.3 It is in these circumstances that child Saesha from the tender age of 21 months has remained with the appellant and today she is 8 years and 3 months. Obviously, because of this reason, as of today, she is very much attached to the father and she thinks that she should remain in the present environment. A child, who has not seen, experienced or lived the comfort of the company of the mother is, naturally, not in a position to comprehend that the grass on the other side may turn out to be greener. Only when she is exposed to that environment of living with her mother, that she would be in a position to properly evaluate as to whether her welfare lies more in the company of her mother or in the company of her father. As of today, the assessment and perception are one sided. Few years ago, when the High Court passed the impugned judgment, the ground realities were different.”

(emphasis supplied)

50. The Supreme Court also adverted to the possibility of the custodial parent making efforts to paint the non-custodial parent in a negative fashion. In that context, the Supreme Court referred to the 'parental alienation syndrome' and its psychologically destructive effects as under:

"18. The intensity of negative feeling of the appellant towards the respondent would have obvious effect on the psyche of Saesha, who has remained in the company of her father, to the exclusion of her mother. The possibility of appellant's effort to get the child to give up her own positive perceptions of the other parent, i.e., the mother and change her to agree with the appellant's view point cannot be ruled out thereby diminishing the affection of Saesha towards her mother. Obviously, the appellant, during all this period, would not have said anything about the positive traits of the respondent. Even the matrimonial discord between the two parties would have been understood by Saesha, as perceived by the appellant. Psychologist term it as 'The Parental Alienation Syndrome'[4]. It has at least two psychological destructive effects:

(i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality."

(emphasis supplied)

51. The aforesaid pronouncement in the case of *Vivek Singh* (supra) was followed by the Supreme Court in the case of *Sheoli*

*Hati vs. Somnath Das.*¹³ In the said case, the Supreme Court also referred to its judgment in the case of *Thirty Hoshie Dolikuka vs. Hoshiam Shavaksha Dolikuka*¹⁴ to underscore the fact that in embittered relationship between the parents, the attempt of one spouse poisoning the mind of the child against the other spouse has disastrous effect. In the case of *Thirty Hoshie Dolikuka* (supra), the Supreme Court did not find it expedient to give primacy to the wishes of the child.

52. In the light of the aforesaid exposition of the legal position as regards the possible effects of a child being continuously in the custody of one parent, on the estimation towards the non-custodial parent, in the facts of the present case, in our considered view, it would not be expedient to be guided by the preference of Master 'J'. The Court cannot loose sight of the fact that Master 'J' has lost his mother at a young age. Master 'J' requires the parental love, care, affection and protection for overall development. Conversely, it casts onerous responsibility on the petitioner to singly give justice to the role, which both the parents are expected to discharge. In our view, it may not be appropriate to deprive Master 'J' of the parental love, care and affection.

13 (2019) 7 Supreme Court Cases 490.

14 (1982) 2 SCC 544.

53. It is true that with the passage of time and development of the bond with respondent no.1 and his family members, Master 'J' may find it difficult to adjust to a changed environment. However, it is not the case that Master 'J' had not lived with the petitioner, at all. There is material to indicate that the petitioner also has a support system in place in the form of his parents. Nonetheless, to ensure that Master 'J' is not suddenly uprooted from the family of respondent no.1 and the environment he is accustomed to, and the level of confidence and trust between the petitioner and Master 'J' is gradually built, we deem it appropriate to initially direct physical access to, and overnight stay with, the petitioner and also reasonable time to enable Master 'J' to acclimatize with the petitioner and the new environment. In our view, the measures we propose to put in place would also give an opportunity to the petitioner to prove himself as a responsible, caring and loving father. In order to ensure that there is continuity in education and Master 'J' retains the bond with respondent no.1 and his family members, we deem it appropriate to direct that Master 'J' shall be allowed to continue his schooling at C. P. Goenka School, Borivali. All the expenses of Master 'J', starting with the next academic year,

including the school fees and transportation etc. shall be borne by the petitioner.

54. We trust that respondent nos.1 and 2 and their family members would also realise that it is in the best interest of Master 'J' that he is united with his father. If Urmila Vapikar, grandmother of Master 'J', wishes to prosecute the Petition No. D-56 of 2019 filed before the Family Court, she is at liberty to do so. We may not be understood to have expressed any opinion on the merits of the said petition and the Family Court shall decide the same on its own merits and in accordance with law.

55. For the forgoing reasons, we are inclined to allow the petition in the following terms. Hence, the following order:

: O r d e r :

- (i) The petition stands allowed.
- (ii) Respondent nos.1 and 2 shall hand over the custody of Master 'J' to the petitioner in the week commencing from 22nd August, 2022.
- (iii) In the meanwhile, the petitioner shall have physical access to Master 'J' on every alternate Saturday or Sunday from 10.00 am. to 6.00 pm., commencing from 12th February, 2022 to 24th April, 2022.

- (iv) The petitioner shall pick up Master 'J' from the residence of respondent no.1 at 10.00 am. and drop him back at 6.00 pm.
- (v) The petitioner shall not have the right of access in the weekend during which Master 'J' has final examinations.
- (vi) From 14th May, 2022, onwards Master 'J' will stay with the petitioner overnight, once in a fortnight.
- (vii) The petitioner shall pick up Master 'J' from the residence of respondent no.1 at 4.00 pm. on Saturday and drop him back by 2.00 pm. on Sunday.
- (viii) This access shall continue till respondent nos.1 and 2 hand over the custody of Master 'J' to the petitioner in the week commencing from 22nd August, 2022.
- (ix) Master 'J' shall be allowed to continue his study in C. P. Goenka School, Borivali.
- (x) All the expenses of Master 'J' including the school fees and transportation etc. shall be borne by the petitioner from the next academic year, i.e. 2022 – 2023.

- (xi) In the event, respondent nos.1 and 2 do not hand over the custody of Master 'J' to the petitioner by 27th August, 2022, respondent no.3/State shall provide the necessary aid to the petitioner to take custody of Master 'J'.
- (xii) After the custody of Master 'J' is handed over to the petitioner, respondent nos.1 and 2 shall have the right of physical access to Master 'J' once in a fortnight.
- (xiii) The petitioner shall drop Master 'J' at the residence of respondent nos.1 and 2 every alternate Saturday / Sunday, at about 8.00 am. and take him back at about 6.00 pm.

Rule made absolute in aforesaid terms.

No costs.

Before parting, we record our appreciation for the able assistance rendered by Advocate Mallika Ingale, the learned *amicus*.

[N. J. JAMADAR, J.]

[S. S. SHINDE, J.]