

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 2004 OF 2022

Rahul Rajan Shinde ... Petitioner

Versus

State of Maharashtra & Ors. ... Respondents

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Mr. Subhash Jha with Mr. Siddharth Jha i/b. Law Global for the
Petitioner.

Ms. M.H. Mhatre, APP for the State.

Mr. R.V. Kamble for Respondent Nos.2 and 3.

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**CORAM : NITIN JAMDAR AND
 N.R. BORKAR, JJ.**

DATED : 18 AUGUST 2022

P.C. :-

1. By this petition, the Petitioner, that is, father of the child Rajul is seeking a writ of habeas corpus to direct Respondent Nos. 2 and 3, who are the maternal grandparents of the child, stating that they have kept the child in illegal custody.

2. The Petitioner got married to Chhaya, the daughter of Respondent Nos. 2 and 3 at Amravati on 14 November 2011. On 4 September 2012, the girl child Rajul was born. In

September 2015, the Petitioner's wife left the matrimonial home and initiated proceedings under the Protection of Women from Domestic Violence Act, 2005. The Petitioner also filed proceedings under the Special Marriage Act, 1954 in the District Court, Pune. While proceedings were pending, the Petitioner's wife expired on 5 September 2018 as she was suffering from cancer.

3. In the Special Marriage Petition No. 104 of 2016, which was pending on the file, the Respondent Nos. 2 and 3 filed a Miscellaneous Application No. 4 of 2019 under Section 38 of Special Marriage Act, 1954 and under Section 7 (17) of Guardians and Wards Act, 1890 seeking to declare themselves as parents of the child. Respondent Nos. 2 and 3 also sought transfer of Special Marriage Petition No. 104 of 2016, which is pending in the District and Sessions Court at Pune, filed by the Petitioner for divorce. The learned Single Judge, Nagpur Bench of this Court by order dated 3 July 2019 transferred the marriage petition filed by the Petitioner to the Court of Additional District and Sessions Judge, Achalpur, Amravati.

4. By order dated 22 February 2022, the learned District Judge-1, Achalpur directed the custody of the child Rajul to be given to the Petitioner and also declared Respondent Nos.2 and

3 as additional guardians. Respondent Nos. 2 and 3 filed First Appeal No. 358 of 2022 in this Court (Nagpur Bench) so also the Petitioner filed First Appeal No. 352 of 2022. The appeals were disposed of by the learned Single Judge by order dated 12 April 2022 holding that the wishes of the child was not considered and the trial Court directing to ascertain the wishes of the child. On 5 February 2022, the learned District Judge-1, Achalpur passed an order whereby the custody of the child Rajul was directed to be given to Respondent Nos. 2 and 3. This order dated 5 February 2022, as we are informed, is not challenged further by the Petitioner.

5. The learned Counsel for the Petitioner submitted that under Section 6 of the Hindu Minority and Guardianship Act, 1956, the Petitioner being the natural guardian has the right to custody of his daughter and Respondent Nos. 2 and 3 do not have any legal right. The learned Counsel submitted that even though it is correct that the proceedings have been taken out to handover the custody of the child to the Petitioner and the competent courts have dealt with the same, the Petitioner is not precluded from invoking extra ordinary jurisdiction of this Court by seeking a writ of habeas corpus. The learned Counsel submitted that the Petitioner being the natural guardian of the child is entitled to her custody and there is nothing on record to

demonstrate anything diverse as against the Petitioner and therefore, depriving the Petitioner from custody of his child and retaining the same with Respondent Nos. 2 and 3, who have no legal right, amounts to illegal detention. The learned Counsel submitted that the Hon'ble Supreme Court in the case of *Tejaswini Gaud and others Versus Shekhar Jagdish Prasad Tewari and Others*¹ has laid down that the petition for custody of a minor child is maintainable where detention by a parent or others is illegal. The learned Counsel submitted that the Petitioner is deprived of the custody of the child since almost eight years and it would be unreasonable to drive the Petitioner to further legal proceedings. The learned Counsel for Respondent Nos. 2 and 3 opposing the petition submitted that the Petitioner had participated in the ordinary remedy availed by the parties and if the decision is rendered, the Petitioner, without challenging the same, again cannot invoke a petition for habeas corpus.

6. We have considered the rival contentions. The Hon'ble Supreme Court in the case of *Tejaswini Gaud and others (supra)*, after taking review of the earlier decisions, has summarized the position of law as under :

¹ (2019) 7 Supreme Court Cases 42

“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”.

(emphasis supplied)

Thus a writ of habeas corpus seeking custody of the child from a parent and others is maintainable in certain situation and the existence of the ordinary remedy would not be a bar, however, what is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavit and where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and 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. Therefore, question arises is whether in the facts and circumstances of this case the writ jurisdiction should be exercised.

7. The proceedings have been pending between the parties on the very of the custody of the child since the year 2019. The

learned District Judge-1, Achalpur first had an occasion to consider this question in the order passed on 22 February 2022. Before the learned District Judge-1 Achalpur, Respondent Nos. 2 and 3 had argued that since the death of their daughter, that is, mother of the child, they are taking care of the minor child and they are providing facilities more than a natural guardian. This was countered by the Petitioner contending that the Petitioner being the father is the only natural guardian and he is ready to give better education. The parties had examined witnesses. The Petitioner also examined himself. Based on the ground that the Petitioner has a legal right to custody, the learned District Judge directed the Respondent Nos. 2 and 3 to be handed over to the Petitioner. Both the parties filed first appeals and the learned Single Judge by order dated 12 April 2022 observed that wishes of the minor child, who is 9 years of age, were not ascertained, which was necessary to do so. This order emphasizing the need to ascertain the wishes of the minor child for custody was not challenged higher and the parties presented themselves before the learned District Judge. The learned District Judge carried out a detailed exercise, as can be seen from the order dated 5 May 2022. The learned District Judge drew charts vis-a-vis contribution by the Petitioner and Respondent Nos. 2 and 3 towards welfare of the child and arrived at a considered opinion that it was in the interest of the

child that custody be with Respondent Nos. 2 and 3.

8. In the case of *Tejaswini Gaud and others (supra)*, the Hon'ble Supreme Court has also emphasized on the welfare of the child and not only on the legal right of the parents. Furthermore, in this case, that for welfare of the child a detailed enquiry is required, is clear from three judicial orders, which are before us. Parties have led evidence on this issue. The parties have already invoked the remedies under the ordinary law. Nothing stopped the Petitioner from challenging the order dated 5 May 2022 on its own merits. Once this exercise has been conducted by the competent court in which the parties have participated, evidence has been led, this is a fit case for the appellate court to assess the evidence and pronounce a determinative conclusion and not an appropriate case to exercise the writ jurisdiction.

9. Leaving it open to the parties to pursue their remedies further under the ordinary law, writ petition is disposed of. We make it clear that our observations in this order are in the context of non exercise of the extraordinary jurisdiction.

TRUPTI
SADANAND
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TRUPTI SADANAND
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(N.R. BORKAR, J.)

(NITIN JAMDAR, J.)