

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 5924 OF 2019

Khaled Kamal Hussein Mohamed Kassem
An Egyptian Citizen, residing at Villa 64,
Jasmine 2, 1st Settlement, New Cairo, Cairo,
Egypt and also residing at 555, Grand
Millennium, Hotel Apartments, Abu Dhabi,
UAE.

...Petitioner

VERSUS

1. **State of Maharashtra**
Through Chandan Nagar Police Station,
having its address at Chandan Nagar,
Pune.
2. **Paulami Apte**
An adult Indian inhabitant, aged 43 years,
having her address at Flat No. 203,
Citrine Nyati Empire, Kharadi,
Pune 411 014.
3. **Mrs. Chhanda Ghosh,**
An adult Indian citizen, aged about 66 years,
having address at Flat No. 203, Citrine Nyati
Empire, Kharadi, Pune 411 014.

...Respondents

...

APPEARANCES-

Mr. Navroz Seervai, Senior Advocate a/w Mr. Subir Kumar, Mr. Akash Rebello, Ms. Chahat Dhingra, Ms. Samiksha Manek i/by Mr. Subir Kumar for the Petitioner.

Ms. Sonal a/w Mr. Rohit Gupta, Mr. Nirupama Kar, Ms. Tishaa Maheshwari i/by Inter Juris for Respondent nos. 2 and 3.

Mr. V.B. Konde – Deshmukh, APP for Respondent – State.

**CORAM : S. S. SHINDE &
N. B. SURYAWANSHI, JJ.**

**RESERVED ON: 28th JANUARY, 2020.
PRONOUNCED ON: 30th JANUARY, 2020.**

JUDGMENT [PER S S SHINDE, J.]

1. This petition is filed praying therein to issue writ of Habeas Corpus or any other writ, orders/direction to direct the respondents to produce the body of the person i.e. Kian Kaseem son of Petitioner who has been illegally confined by Respondent No. 2 and 3 before this Hon'ble Court and further to hand over custody of Kian Kaseem to the Petitioner.

2. Respondent No. 1 herein is the State of Maharashtra. Respondent No. 2- Paulami Apte is the sister of wife of the Petitioner namely Soumi Ghosh and Respondent No. 3 is the mother of wife of the Petitioner. The Petitioner as well as Respondent No. 2 and 3 have raised various disputed question of facts. However, for the purpose of deciding the present petition, the relevant facts in brief, are as under:-

The Petitioner is an Egyptian national who was working in Mumbai with Weatherford India. He started working with Weatherford India in November 2006 and was stationed in Mumbai till January 2014. In July 2007 he met Ms. Soumi Ghosh who was also working in the same office. The Petitioner and Soumi were in a relationship from November 2007. In

2011, Soumi Ghosh moved to Calgary, Canada to work as a log analyst for Weatherford. Despite the distance, the Petitioner and Ms. Soumi Ghosh continued their relationship.

3. It is the case of the Petitioner that, in October 2012, the Petitioner and Soumi Ghosh were engaged. Despite the Petitioner and Soumi Ghosh living in different parts of the world their relationship continued. In August 2014, the Petitioner and Soumi Ghosh got married at the Egyptian Embassy in Myanmar. In October 2014, the Petitioner and Soumi Ghosh also got a certificate of marriage under the Special Marriage Act issued by the marriage office of Pune district. After marriage, the Petitioner and Soumi Ghosh tried to conceive naturally but for medical reasons this was not successful. However, their second attempt with In Vitro Fertilization (IVF) was successful. It is the case of the Petitioner that, in December 2018, Soumi Ghosh temporarily moved to Pune to be with her parents during the last 3 months of her pregnancy, during which the Petitioner continued to visit Soumi in Pune from time to time and resided at the Petitioner's in-law's residence.

4. On 3rd February 2019, the Petitioner's son Kian Kaseem was born in Jehangir hospital in Pune. It is the case of the Petitioner that, the Petitioner was present before and during the delivery. The Petitioner arrived

in Pune on 2nd February 2019 for the delivery of his son and remained in Pune till 16th February 2019 and thereafter the Petitioner again came back to visit his wife and son, Kian Kaseem in Pune from Dubai on 10th March 2019 and left on 16th March 2019 for Dubai to resume his work. Thereafter the Petitioner again came back to Pune on 16th April 2019 from Egypt to see his wife and son.

5. On 17th April 2019, the Petitioner's wife Soumi Ghosh fell unconscious at around 6.30 am. She was admitted to Jehangir hospital where after approximately 2 hours of emergency medical treatment she was declared dead. It is alleged by the Petitioner that, soon after the death of Petitioner's wife, Respondent No. 2 (sister in law) started forcing him to leave the child with her in Pune and return to work. The Petitioner refused and stated that his child would remain with him. It is alleged that, Respondent No. 2 after death of Petitioner's wife pressurized the Petitioner to leave the job at Algeria and settle in Pune. It is alleged that, such action of Respondent No. 2 clearly speaks of interfering with the personal life of the Petitioner with the sole intention to take the illegal custody of the Petitioner's minor son, Kian Kaseem. Thereafter, Petitioner along with Kian as well as Respondent No. 2 traveled to Egypt on 16th June 2019 where they resided together in the Petitioner's apartment. The Petitioner, his son and Respondent No. 2 lived in the same apartment in Cairo with the consent of

Respondent No. 2 where they resided in different rooms and Respondent No. 2 always kept Kian with herself, mostly with the door locked. The Petitioner took all the efforts to clean, sterilize the clothes, utensils everything that was required for Kian whereas the Respondent No. 2 never took the efforts to do the same and in fact further kept the surrounding unhygienic.

6. However, from somewhere around September 2019, the arguments between the Petitioner and Respondent No. 2 increased as the Respondent No. 2 became over possessive over the Petitioner's son and would quarrel with the Petitioner about the trivial issues relating to the Petitioner's minor child. It is the case of the Petitioner that, at this juncture, both the Petitioner and Respondent No. 2 discussed about their future togetherness and the Petitioner clearly told the Respondent No. 2 that the Petitioner and Respondent No. 2 cannot marry in future.

In September 2019, the Petitioner was offered a new position in Abu Dhabi UAE as he had requested a less demanding position and no travel and the ability to work remotely from home so that he could spend more time with his son. The Petitioner, his son and Respondent No. 2 moved to Abu Dhabi on 1st September 2019.

7. However, the relationship between Respondent No. 2 and the Petitioner deteriorated. Respondent No. 2 was extremely possessive about the Petitioner's son, during her stay with the Petitioner and Kian in Egypt and UAE, she never allowed the Petitioner to take Kian outside for walk alone or even let him take Kian to visit his family who were also residing in Egypt itself. She would never let Kian be away from her even if that meant the child would be away from his own father, the Petitioner herein. It is alleged that, the Respondent No. 2 has in fact hatched in her mind a conspiracy during the second week of September 2019 at Dubai wherein the Respondent No. 2 started planning about taking the custody of the Petitioner's son, Kian Kaseem. It is alleged that, the Respondent No. 2 thereafter all of a sudden told the Petitioner to book the tickets for Pune, India. On hearing the same, the Petitioner apprised the Respondent No. 2 that since the Residency Visa of the Petitioner is issued and Kian's visa would further take a month, it would not be appropriate to travel back to India at this juncture. However, the Respondent No. 2 insisted to go only for 3 days. Under these circumstances, the Petitioner booked the round-trip tickets for the Petitioner, Respondent No. 2 and his son, Kian Kaseem from 27th September 2019 till 30th September 2019. It is further alleged that, soon after the arrival of Respondent No. 2 in Pune, on 27th/28th September 2019, Respondent No. 2 went out of house informing the Petitioner that she wanted to see a cardiologist and psychiatrist and that she had to do some

medical tests.

8. On 28th September 2019, police inspector from Chandan Nagar police station came to the apartment of the Petitioner's in laws house at approximately 11 pm., and requested the Petitioner to come to the police station with them. At that point of time it was informed by the Respondent No. 1 that, the Respondent No. 2 has filed some complaint against the Petitioner hearing that the Petitioner was shocked and further requested Respondent No. 1 that, since the Petitioner's son was asleep it would be more appropriate that the Petitioner visit the police station in morning. However, Respondent No. 1 insisted the Petitioner to come to the police station immediately. At the police station he was informed that Respondent No. 2 had complained to them that the Petitioner had sexually harassed the Respondent No. 2 and also that, he has harassed his son Kian Kaseem who was at the time 6 months old. The Petitioner explained to the police inspector that the allegations were false, and he showed the text messages, chats and e-mails between him and Respondent No. 2.

It is alleged that, Respondent No. 1 told the Petitioner not to return to his in law's apartment and told the Petitioner to shift in a hotel without his son. The action of Respondent No. 1 was shocking to the Petitioner as having no substance in the complaint made by Respondent

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No.2, the Respondent No. 1 threatened to take action against the Petitioner and further told the Petitioner to leave his son at the Petitioner's in-law's house. On 1st October 2019, the Petitioner was once again called to the Chandan Nagar police station and was told that, the Respondent No. 2 had requested for custody of the child and if the Petitioner did not agree to the same, she would see that a false FIR is registered against the Petitioner. It is therefore clear that the Petitioner who otherwise has no criminal record and has always gone out of his way to help the family of his late wife was being balckmailed/harassed by his sister in law-Respondent No. 2 to transfer custody of his son to her. After the said incident, Petitioner's son Kian Kaseem has illegally and wrongfully been detained by Respondent Nos. 2 and 3 at their Flat No. 203, Nyati Empire, Kharadi, Pune, Maharashtra.

9. It is further alleged that, the respondents are not allowing the Petitioner to contact with his son and have threatened the use of police machinery against him if he attempted to take away his son. In fact, since the Petitioner is employed outside India, the Petitioner had to return back to work to complete the Residence Visa in Abu Dhabi and the same was completed on 23rd October 2019. During the period from 4th October 2019 till date, the Petitioner's son has been kept in illegal custody by Respondent No. 2 in particular and therefore, the Petitioner being a Foreign National has approached this Hon'ble Court as the Respondent No. 1 has further

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threatened the Petitioner with dire consequences if the illegal demands of Respondent No. 2 are not fulfilled by the Petitioner.

10. In this background, the Petitioner has prayed for issuance of writ of Habeas Corpus for producing the body of the person i.e. Kian Kaseem and further direct Respondent No. 2 and 3 to hand over the custody of Kian Kaseem to the Petitioner.

11. On 09.12.2019, the Petitioner has filed affidavit cum undertaking on behalf of Petitioner's mother Samira Ahmed Hussein Mostafa, wherein it is stated as under:-

1. I say that, I am the Petitioner's mother and I have been raising my own 4 children as well as my 9 grand children in the past. I say I shall, by all means, support my son to take care of my grandson at all times and give my grandson's welfare at most priority.

2. I state and undertake that, if my son is granted the custody of my grandson, I shall move to Abu Dhabi effective immediately to take care of my grandson at all times.

3. In the view of the foregoing, I humbly state that, my grandson's custody should be handed over to my son

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i.e. the Petitioner above-named for the primary reason of his welfare and well-being and further due to the fact that my son, the Petitioner abovenamed is my grandson's i.e. Kian Kaseem's only living parent and the natural guardian.

12. The Petitioner has filed additional affidavit and stated that, during the access given to him he found that, child Kian is not being properly looked after by Respondent No. 2 and 3. It is stated that, Respondent No. 3 is not capable of taking care of child Kian. It is further stated that, Petitioner's mother Samira Ahmed Hussein Mostafa and his father Kamal will live at Abu Dhabi so as to take care of child Kian, after receiving his custody by the Petitioner.

13. Pursuant to the notices issued to respondents, Respondent No. 2 and 3 caused appearance through their solicitor Interjuris. Affidavit in reply on behalf of Respondent No. 2 and 3 was filed on 11.12.2019. The said affidavit was filed for the limited purpose for opposing admission of the petition with liberty to file further detail affidavit.

14. The preliminary objection has been raised for maintainability of the writ petition on the ground that, the Petitioner is an Egyptian citizen

and does not have locus to file the present writ petition. It is stated that, the Petitioner is not Indian citizen and therefore, the writ petition is not maintainable at the behest of the Petitioner. It is stated that, child Kian Kaseem is not in illegal custody and therefore, question of issuance of writ of Habeas Corpus would not arise. The Petitioner has alternate efficacious remedy for redressal of grievance and therefore, writ petition filed by the petitioner deserves no consideration. The paramount consideration of child Kian should be looked into since his age is 10 months. Moreover child Kian was born on 3rd February 2019 at Pune is residing at the same address as stated in his birth certificate relied upon by the Petitioner along with Respondent No. 3 who has better legal right to have the custody of the child in the absence of mother of the child. On this ground alone the Petitioner is not entitled to get any reliefs as prayed for in the petition and the petition deserves to be dismissed with cost. It is stated that, merely because the Petitioner is the natural guardian hence it automatically entitles him to custody of the child is not tenable in law or otherwise. Legal position clear that, for custody of minor child who is at a tender age cannot be put in the hands of an unfit parent just because he is a natural guardian as his father. In selecting a proper guardian of the minor, the paramount consideration should be the welfare and well being of the child. That, child Kian will not be safe with the Petitioner as Petitioner is temperamental, domineering, has sexually harassed Respondent No. 2 and had pedophilic

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tendencies. Therefore, it is clear that, Petitioner cannot give proper environment for development and upbringing of child due to his temperamental attitude and unnatural tendencies. Therefore, Petitioner is unfit to take custody of child Kian. It is stated that, if the custody of the child Kian is given to the Petitioner, he will move the child out of jurisdiction of this Court, since he is working at Abu Dhabi. In reply to pleadings in the petition, it is stated that, since the birth of child Kian, Respondent No. 2 has always resided with the child and has taken care of the child Kian. After unfortunate demise of her sister, she sacrificed her career and travelled with the Petitioner to take care of child Kian to the extent that child Kian is presently most comfortable and feels secured with Respondent No. 2 as well as with Respondent No. 3. Without prejudice to the aforesaid, child Kian Kaseem, who is being born to Muslim father i.e. the Petitioner, it is settled position under the Mohommedan Law, the maternal grandmother has the first right to the custody of the child in the absence of biological mother. Therefore, there is no illegality about the custody of the child by Respondent No. 2 and 3 who stay together along with child Kian at his place of birth. As Respondent No. 2 was very close to her sister, in her absence situation demanded that due to her attachment with child Kian since his birth, hence Respondent No. 2 decided take care of child Kian and travelled with the Petitioner. Respondent No. 3 was Principal in Bal Bikas School and she prematurely retired in or around mid

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2000. Respondent No. 3's husband Mr. Ashok Kumar Ghosh was an employee of State Bank of India and enjoyed a good reputation in the Bank, who is presently retired and draws pension. The flat wherein Respondent No. 2 and 3 are residing with child Kian is gifted to Respondent No. 2 by father of Respondent No. 2 to her. Therefore, allegation in the petition that Respondent No.2 is unemployed lady and financial condition of entire family is poor is vehemently denied by Respondent No. 2 and 3. It is stated that, the contention of the Petitioner that, he financially helped Respondent No. 2 and 3 for the treatment of Respondent No. 3 and husband of Respondent No. 3 has financial problems and has allegedly borrowed money from large number of vendors is vehemently denied. It is stated that, it is in the best interest of the child Kian to remain in the joint custody of Respondent No. 2 and 3 for well being and proper development and care in the environment familiar to him. It is stated that, Respondent No. 2 due to love and affection for her sister and the new born child Kian left her settled profession and work, agreed to give a thought about possible relation with Petitioner and travelled with him. However, Respondent No. 2 had made it clear to Petitioner that, she is doing it only for her sister and the child Kian and if she will develop feelings for him and for their relationship in future she may consider marrying him.

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15. The contention of the Petitioner that, Respondent No. 2 suddenly told to book tickets to Pune, is not correct. The reason for their travel to Pune was suggested by the Petitioner as the Petitioner was to relocate to UAE and Respondent No. 2 and child Kian's visa was expiring and it warranted Respondent No. 2 with child Kian to exit the country, hence Respondent No. 2 along with child Kian had to return to India along with Petitioner for extension of the VISA. It is also alleged that during stay of Respondent No. 2 in Cairo as well in other places, on numerous occasions Petitioner tried to sexually abuse her and further the incident on 14.08.2019 at Cairo had shaken her confidence to start family with the Petitioner. After landing in Pune, Respondent No. 2 gathered her courage and for her own and for child Kian's safety went to Chandan Nagar police station to file a complaint based on the incidents of molestation, sexual harassment for the physical and mental assault inflicted upon Respondent No. 2 by the Petitioner as well as the incident of 14.08.2019. It is stated that, Petitioner's contention that Respondent No. 2 allegedly coaxed the Petitioner to come to India with an alleged sinister plot to take forceful custody of child Kian is utterly false and frivolous.

16. It is stated that, it is Petitioner's own admission that, his job demanded lot of travel and in his absence only Respondent No. 2 was residing with child Kian. Moreover, it is Petitioner's own submissions that

Respondent No. 2 was possessive about Petitioner's son which clearly indicates that Respondent No. 2 is a concerned aunt almost like a mother to child Kian and by no stretch of imagination it can be construed that Respondent No. 2 was irresponsible as suggested by Petitioner in his petition. The contention of the Petitioner in his additional affidavit that Respondent No. 3 is not capable to take care of Petitioner's son, is completely denied. The mother of Petitioner never lived together with child Kian to make any emotional bonding, hence the question of change of custody at the hands of parental grand parents is not in the best interest of child Kian as such Respondent No. 3 being maternal grand mother has prior right to custody of child Kian. Moreover, it is pertinent to note that, Petitioner's parents do not have any bonding with child Kian. If they were so concerned towards child Kian, they could have come and stayed with child Kian after demise of Petitioner's wife. The proper care of child Kian is being taken in the house of Respondent No. 2 and 3. On 10.12.2019 when the Petitioner along with his mother visited the residence of Respondent No. 2 and 3 to meet child Kian and Petitioner's mother wanted to hold him, child Kian started crying profusely as child Kian was unfamiliar with Petitioner's mother. At this stage, for well being of child Kian it is imperative that the custody of child Kian should not be altered, lest it may have devastating consequence on the development of the child. It is of utmost importance for the child that, the child should get full and

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harmonious development of his personality need love, grow up in the care under responsible guidance and most importantly moral and psychological security, which baby Kian can get from Respondent No. 3 and from Respondent No. 2, not from the Petitioner.

17. Respondent No. 2 has filed further affidavit in reply denying allegations in the petition, rejoinder and affidavits dated 03.12.2019 and 09.12.2019 filed by the Petitioner. It is stated that, sister of Respondent No. 2 i.e. Soumi Ghosh has very close bonding with Respondent No. 2 and she used to share personal issues with Respondent No. 2. In fact, sudden demise of her sister Soumi Ghosh in the early hours on the fateful day of 17th April 2019, was shocking incident in mysterious circumstances, which left her family devastated as she was in fact sending chat messages and photographs of memories of previous events to her mother until 3 AM that morning while she was with Petitioner in her room at their residence. It is stated that, she used to lovingly call 2nd respondent, 'Didibhai', Soumi's nickname is 'Tushki' but lovingly they both used to refer each other as 'Mamla'. They fondly call child Kian as 'Dozo' and the Petitioner is referred as 'Dodo'.

It is stated by Respondent No. 2 that, petition has been filed by the Petitioner by falsely and wrongfully alleging kidnap and alleged illegal

detention of child Kian by Respondent No. 2 and 3 allegedly in collusion with Respondent No. 1. It is stated that admittedly child Kian was born in Pune, which has been the first home for child Kian since his birth. Further admittedly, Petitioner has resided in their same residence after the unfortunate demise of her sister Soumi until Petitioner and Respondent No. 2 mutually decided to travel to Cairo, Egypt as the Petitioner had to resume his work in Cairo and it was in the best interest of child Kian for Respondent No. 2 to move with Petitioner as after Soumi, Respondent No. 2 was the closest to the child Kian like a mother to him. It is pertinent to note that, even Petitioner's whole family was living in Cairo but Petitioner did not have confidence on his family to take care of child Kian rather was confident that Respondent No. 2 would be the best person to take care of child Kian in the absence of her sister Soumi. Respondent No. 2 therefore, states that, allegations of alleged kidnap or of illegal detention are frivolous, without any basis and have been made as an after thought almost two months after the Petitioner moved out from Respondent No. 2's residence pursuant to the police complaint filed by Respondent No. 2 against the Petitioner immediately after returning back to India on 27th September 2019.

18. It is further averred in the affidavit in reply that, there is absolutely no case made out by the Petitioner to suggest any forceful

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detention of the child Kian by Respondent No. 2 or Respondent No. 3, and it was the Petitioner's after thought attempt after taking legal advice to file the present petition for almost 2 months of having no contact with Respondent No. 2 and 3. It is stated that, child Kian is an Indian national who has been so far brought up in the care and custody of Respondent No. 2 at all times and from time to time also in the care and custody of Respondent No. 3. Respondent No. 2 gave child Kian priority over her career. Even the Petitioner himself admitted on several occasions that, after Soumi, Respondent No. 2 is the second mother to Kian and an amazing mother and even that the Petitioner told Respondent No. 2 that, he was very happy with Respondent No. 2. It is stated that, Dr. Raghav Barve certified that Respondent No. 2 can resume work and therefore, custody of child Kian to be restored with Respondent No. 2 and 3. Respondent No. 2 and 3 have first preference over all others to have custody of child Kian till he attains majority. Moreover, Respondent No. 3 who has lost her daughter, naturally has more love and affection towards the child, and child Kian will be safer in the hands of Respondent No. 3 than with Petitioner and his mother. Therefore it is prayed that, petition may be rejected.

19. In reply to affidavit in reply filed by Respondent No. 2 and 3, the Petitioner has filed rejoinder and denied the allegations made in affidavit in reply against him. It is stated that, Petitioner is well qualified

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and secured degree in Master of Business Administration (MBA) from IIM, Kozhikode which is one of the primer institutions in India for MBA. He has a very good job and getting decent salary to look after his child. In past also he had taken care of his wife and child. The Petitioner is deeply attached to his son Kian. He used to travel frequently to Pune to see his wife. Further Kian was born on 3rd February 2019, he has frequently travelled to Pune to remain with his wife and son. When his wife passed away on 17th April 2019, he took leave of two months, only to take care of his son Kian Kassem. Further his son moved with him to Egypt on 16th June 2019 and was living with him in his custody until September 27, 2019. Respondent No. 2 also accompanied them. From the date of birth of his son, he always has been concerned about the welfare of his child. He even took a paycut to have a job where he could work from home to take care of his son. He had custody of his son until on 28th September 2019 when the Respondent No. 2 misused the machinery of police and kidnapped his son. After kidnapping of his son, he consulted lawyers at Pune and finally filed appropriate proceedings at Bombay. He is in India from 21.11.2019 till date again solely for his son. It is stated that, child Kian is never been familiar with Respondent No. 3 who is the maternal grand mother, as child Kian has been living with Petitioner in Egypt and Abu Dhabi. Respondent No. 3 has not been concerned with the custody or the welfare of his son. Respondent No. 3 is elderly lady who has got operation for Breast Cancer, herself

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requires proper care and will not be able to devote time for child Kian. It is stated that, Petitioner is natural guardian and the presumption is that it is in the best interests of child Kian that he should live with the Petitioner. Respondent No. 2 cannot claim custody. She is also unable to take care of herself due to an accident. There are enough family members in Petitioner's house which will be conducive for the growth of child Kian. The mother is a fit person and she has also given an undertaking to this Court that she will be staying with him at Abu Dhabi. At Abu Dhabi, brother of Petitioner also stays who is married and has two children aged about 13 years old and 8 years old.

20. It is stated that, there is malicious attempt on the part of Respondent No. 2 and 3 to justify the illegal acts committed by them. It is stated that, Petitioner is willing to bring his son to India twice a year so that the Respondents can have access to child Kian. The Respondent No. 2 and 3 are welcome to come to Abu Dhabi to meet child Kian. It is stated that, the allegation of remarriage in future is not correct and in any event it has no bearing on the issue of custody. The question of "irreparable loss" and "prejudice" cannot arise as the child was never living in India. He has ordinarily been living in Cairo and Abu Dhabi. It is stated that, child Kian is familiar with Petitioner's parents. The Petitioner has placed on record photographs of his son with his father and mother in Egypt to show that

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child Kian is familiar with them.

21. Mr. Seervai, learned senior counsel appearing for the Petitioner submits that, it is settled law that, writ of Habeas Corpus lies to restore the custody of a minor from a person who is not his legal guardian. In support of aforesaid contention learned senior counsel pressed into service exposition of law in the case of Gohar Begam V. Suggi Alias Nazma Begum¹ and Tejaswini Gaud V. Shekar Jagdish Tewari². He submits that, it is not a proceeding to determine who should have custody. The limited scope of inquiry is whether the detention of a minor child was illegal and without authority of law. In support of aforesaid contention he relied upon the observations made by Hon'ble Supreme Court in Para 19 in the case of Tejaswini Gaud (supra). He further submits that, the welfare of the child is the paramount consideration. The Court will not rely on averments made in thin air to determine who is entitled to the custody of the minor. In support of aforesaid contention, he pressed into service the exposition in the case of Manju Seshachalam V. Vijay Thirugnanam³. He submits that, in the said case it was held that, no reliance could be placed on a vague unregistered adoption deed that did not even specify the date or time of adoption. Various factors are to be kept in mind to determine the welfare of the child including the child's comfort, health, education and intellectual

1 (1960) 1 SCR 597

2 (2019) 7 SCC 42.

3 (2018) SCC Online Kar 621

development. The Courts have repeatedly held that the welfare of the child is the best served by giving the custody of child to the legal guardian. The child should not ordinarily be deprived the company of the father, especially, in the absence of the mother. In support of aforesaid contention learned senior counsel invites our attention to the exposition in the case of Tejaswini Gaud (supra) so also Poolakkal Ayisakutty V. Parat Abdul Samad⁴. Learned counsel submits that, the Supreme Court has held that, merely because a person has taken care of the child for some time, does not entitle them to retain custody of the child. The inquiry is as to whether the natural guardian is unfit to take care of the child.

22. Learned senior counsel submits that, the Petitioner is the only person under law qualified to be the guardian and to have custody of Kian. It is also undisputed that when parties marry under the Special Marriage Act, their personal law no longer applies. In support of aforesaid contention, our attention is invited to Para 10.7 in the case of M V. A⁵. The Special Marriage Act is a secular law that permits parties to a marriage to avail secular and uniform remedies, and aids them in overcoming the constrains or discrimination faced in their own personal laws as held by Madras High Court in the case of Reginald Danies V. Saojam⁶. It is for this reason that the Petitioner and his wife chose to marry under the Special

4 2004 SCC Online Kar 161

5 2018(3) ALL MR (JOURNAL) 65

6 AIR 1969 Mad 365.

Marriage Act.

Therefore, once the Special Marriage Act applies, the application of personal law ends. In the present case the Petitioner (a Muslim) with Soumi Ghosh (a Hindu) by marrying under the Special Marriage Act chose to give up their personal laws and be governed by the secular and uniform statutes the law of India. In support of aforesaid contention learned senior counsel invites our attention to the observations made in Para 23 in the case of Dr. Abdur Rahim Undre V. Smt. Padma Abdur Undre⁷.

23. Learned senior counsel submits that, in the present case neither Muslim nor Hindu law will apply to determine guardianship/custody of the Kian. Even for the sake of arguments alone, it is presumed that Muslim Law applies, neither Respondent No. 2 nor Respondent No. 3 have any rights to custody of Kian, as he has been removed from the ordinary residence of the Petitioner. In support of aforesaid contention learned counsel pressed into service the exposition of law in the case of Siddiq-un-Nissa Bibi V. Nizam-Uddin Khan⁸. Under Section 6 of the Hindu Minority and Guardianship Act, 1956, the parents are in the first instance entitled to guardianship and custody of a minor child. Therefore, there is no question of reference to the personal law. The

⁷ 1982 SCC Online Bom 29.

⁸ 1931 SCC Online ALL 203.

substantive provision of Guardians and Wards Act, 1890 apply in full force as it is the general and secular law regulating question of guardianship and custody for all children within the territory of Indian irrespective of their religion. Section 19 of the Guardians and Wards Act makes it clear that mother or father of a minor is the natural guardian, and another person can only be appointed as guardian if the parent is “unfit”. Learned counsel invites our attention to the Section 19 of the Guardians and Wards Act.

24. It is further submitted that, to prove the Petitioner to be “unfit”, the Respondents would have to file a petition for Guardianship under the applicable law. The test of whether a person is unfit has been the subject of judicial interpretation in a number of cases. The position of law has been summarised in the case of Reginald Daniel (supra) that the test is to ascertain whether the legal guardian is “unfit” to be guardian, The test is not whether the Petitioner is “less unfit” than the Respondent. The Respondents would, after returning custody to the Petitioner as the only lawful guardian of Kian, have to show that the Petitioner is “unfit” to be a Guardian by instituting appropriate proceedings.

The Guardians and Wards Act also does not make a distinction between custody and guardianship. Therefore, for the welfare of the child both custody and guardianship have to be with the Petitioner, unless he is

proved to be “unfit” in an appropriate proceeding.

For the limited purpose of the present Habeas Corpus petition, it is clear that the Guardians and Wards Act in the first instance recognizes only the parents of a unmarried minor as Guardians. Therefore, the detention of Kian in the custody of the Respondent Nos. 2 and 3 is illegal.

25. It is submitted that, welfare of the child demands that Petitioner be given custody of Kian. It can be seen that in the present case, it is undisputed that Kian was in the custody of the Petitioner from the birth of his son, including after the death of his wife on 17th April 2019 until 28th September 2019 when after the child was forcibly taken from the Petitioner by misusing the police machinery. Child Kian was living with the Petitioner in Cairo, Egypt and Abu Dhabi. Even prior to the birth of Kian, the Petitioner and his wife were residing in Dubai and intended to emigrate to Canada. The Respondents admittedly agreed that it was in the best interests of the child to travel and live with his father i.e. the Petitioner in Cairo after his mother’s death. The Petitioner had only agreed to let Respondent No. 2 come to Cairo to help in taking care of the child. The Petitioner is the natural guardian of Kian has been in his or his late wife’s custody throughout i.e. from birth and till 28th September 2019, when such custody was illegally taken from him. Neither Respondent No. 2 nor 3 have

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been in custody of Kian. There is no reason why Kian should be separated from the company of his father, the Petitioner with whom he has been living in Cairo and Abu Dhabi. Merely, because a person has taken care of child briefly it does not mean that they can retain custody of the child. In support of aforesaid contention learned senior counsel invites our attention to Para 35 in the case of Tejaswini Gaud (supra).

The welfare of the child ordinarily dictates that custody be given to the father over relatives (except the mother). Learned senior counsel in support of aforesaid contention once again placed reliance in the case of Tejaswini Gaud (supra) and Poolakkal Ayisakutty (supra).

26. Learned senior counsel submits that, it can be thus seen that removal of Kian from the custody of the Petitioner is a disruption to the existing state of affairs. Furthermore, it is in the best interest of Kian that he be in the custody of the Petitioner for the following reasons:-

Firstly, the Petitioner is Kian's father and the only living parent- a child should not be deprived of the natural love and affection of his parents. The Petitioner lives in Abu Dhabi and if Respondent Nos. 2 and 3 are allowed to continue their unlawful detention of Kian, there is a real danger that Kian's father would be cut out of his life. The intention of the Respondent's to cut Kian's father out of his life is clear from their statement

that custody of Kian should be granted to them 'till he attains majority' and that they will provide access to Kian 'at their residence' with advance notice. The Petitioner is a foreign national who is domiciled outside India, and such an agreement would result in Kian being deprived of a father-this is well known to the Respondents, and in fact is their objective.

Secondly, the Petitioner has specifically taken a new role in Abu Dhabi which requires no travel and enables him to work from home, so that he could spend time and dedicate himself for the upbringing of his child. The Petitioner's mother who has bonded with Kian when the Petitioner was in Cairo with Kian will live with the Petitioner to provide any support that is needed. Thirdly, the Petitioner is highly educated and is working with a top multi national firm and is earning a good salary in UAE. Fourthly, the educational opportunities available to Kian in Abu Dhabi will far greater. In fact, this would be in line with the wishes of the Petitioner and his deceased wife who were living in Dubai and wanted to emigrate to Canada for a better future.

27. Learned senior counsel further submits that, it may also be seen that the leaving Kian in the custody of the Respondent No. 2 and 3 is not in his best interests for the following reasons:-

Firstly, Respondent No. 2 is currently recovering from major

surgery and is unable to take care of herself, let alone Kian. Respondent No. 3 has had surgery for cancer and is unable to take care of herself. Kian is in the care of care-taker. Kian has allergies which were unattended to by the Respondents and Petitioner is giving treatment to Kian, for the same. Therefore, the Respondents are unfit to have custody of Kian. Secondly, Respondent No. 3 was never interested in taking care of the child. the child has been living with the Petitioner and Respondent No. 2 has also been living with them. It is therefore surprising that for the first time since the death of the Petitioner's wife, Respondent No. 3 is now seeking to exercise some purported rights to custody of Kian. Thirdly, the financial position of the Respondents is not stable. There have been instances of collection agents coming to the house due to the business dealings of Respondent No. 2's father. This has been admitted by Respondent Nos. 2 and 3. This is not a good environment for a child. Fourthly, the allegations made by Respondent Nos. 2 and 3 against the Petitioner are outlandish, reckless, and without a shred of corroborating evidence. Every possible allegation that Respondent No. 2 can think of has been hurled at the Petitioner. These allegations are completely contrary to the correspondence between the parties wherein Respondent No. 2 time and time again acknowledged that the Petitioner is a wonderful and doting father. It is clear from the Respondent's own affidavits that Respondent No. 2 has carefully created a record and executed a calculated attempt to misuse the police machinery

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and illegally seized custody of Kian from the Petitioner. This plan was clearly formulated once Respondent No. 2 realised that the Petitioner did not wish to have a relationship with her. The Respondents have also for the first time now gone as far as attributing these allegations to the dead wife of the Petitioner, who had a child with him and who wished to emigrate to Canada with him. Respondent No. 2 by suppressing documents has also alleged that Kian is not the Petitioner's son. This shows the moral character of Respondent No. 2 who will make any allegations and go to any length to achieve her goals. These are nothing but malicious, libellous and calculated allegations that have been made by Respondent No. 2 to misuse the police machinery to seize custody of child Kian. It is clear that neither Respondent Nos. 2 nor 3 are fit persons to take care of Kian given their conduct. Fifthly, Respondent No. 2 on her own showing will have to travel extensively for work. Respondent No. 3 is unable to take care of Kian. Sixthly, Respondent No. 2 is divorced twice, and such fact is conveniently not disclosed in the reply and she is not fit to take care of the infant child. It is not known if she will re-marry again and what will be the consequences for Kian.

In the circumstances, it is submitted that, custody of Kian be handed over to the Petitioner who is his only living parent and legal guardian.

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28. Ms. Sonal, learned counsel appearing for Respondent Nos. 2 and 3 submits that, writ of Habeas Corpus is a high prerogative writ which can be issued only by a Superior Court. The Court has to be satisfied of the following before it issues writ of Habeas Corpus to produce a minor-

- (a) The detention is illegal and without any authority of law;
- (b) That it is in the welfare of the child that his/her custody be given to the Petitioner.

29. It is submitted that, child Kian is admittedly an Indian citizen and a Muslim. It is pertinent to note that admittedly, the late mother of Kian got pregnant outside India through IVF but she and the Petitioner consciously chose India for delivery which indicates that the parents of child Kian wanted him to be an Indian citizen. An Indian child is presumed to have his father's religion. In support of aforesaid contention learned counsel invites our attention to Para 23 and 24 of judgment of Hon'ble Supreme Court in the case of Commissioner of Wealth Tax Vs. Late R Sridharan⁹, Raj Kumar Gupta Vs. Barbara Gupta¹⁰.

Learned counsel further submits that, under the Muslim Personal Law which is applicable to Kian, his custody ought to remain with Respondent No. 3. In support of aforesaid contention learned counsel invites our attention to Para 230 and 236 of Mulla Principles of Mohd. Law

⁹ (1976) 4 SCC 489

¹⁰ (1989) CalLJ 195

21st Edition (Revised by Professor Iqbal Ali Khan). It is submitted that, maternal grand mother is preferred over paternal grandmother. In support of aforesaid submission learned counsel pressed into service judgment of Lahore High Court in the case Abadi Begam Vs. Alimullah Khan¹¹, Mt. Nur Begum Vs. Mt. Begum & Ors, reported in AIR 1934 Lah 274. Learned counsel submits that, even the Respondent No. 2 has a preferential right to custody of Kian over the Petitioner. Learned counsel once again invites our attention to Para 230 and 236 of Mulla Principles of Mohd. Law (supra). It is pertinent to note that, Petitioner has made Kian's maternal grandmother i.e. Respondent No. 3 as respondent to the petition and not Kian's maternal grandfather.

30. It is urged that, applications for guardianship and/or custody are governed by the provision of the Guardians and Wards Act, 1890. Section 17 of the Guardians and Wards Act, 1890 itself provides that in appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of the Section, be guided by what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. Guardianship and custody are different under the provisions of the Guardians and Wards Act, 1890 as well as under the Muslim Law. The Courts have held that under the Guardians and Wards

11 1907 ILR 29 ALL 110

Act, 1890 the right of a natural guardian to custody is not absolute. In support of aforesaid submission learned counsel relied upon the exposition of law in the case of Anjali Kapur Vs. Rajiv Bajjal¹².

It is urged that, under Muslim Law, the father is the natural guardian of the child. However, for matters of custody, the mother has the first right to custody upto the prescribed age and failing the mother of the child, certain female relations have the right of custody. Only in the absence of all specified female relations that the father or his prescribed male relations have the right of custody upto prescribed age. This difference between custody and guardianship under Muslim Law has been recognized and given effect to by the Courts. In support of aforesaid submission learned counsel placed reliance on reported judgment of Hon'ble Supreme Court in the case of Athar Hussain Vs. Syed Siraj Ahmed & Ors¹³.

31. Learned counsel submits that, judgment of Hon'ble Allahabad High Court in Siddiqun-Nissa (supra) relied upon by the Petitioner is, with respect, erroneous and contrary to Muslim Law. In any event, in the facts of the said case the welfare of the child was held to be with the father and not maternal grandmother. The said judgment relies upon a judgment of the

12 (2009) 7 SCC 322.

13 (2010) 2 SCC 654.

Privy Council in the case of Imambandi Vs. Sheikh Haji Mutsaddi¹⁴ authored by Ameer Ali, J. The said case dealt with an alienation of the property of Muslim minor children by their mother and held it to be void in view of the fact that under the Muslim Law, the mother is only entitled to the custody of the person of her minor upto a certain age, according to the sex of the child but, she is not the natural guardian. The father alone or if he be dead, his executor is the legal guardian. Under Muslim Law, in absence of the mother, the mother's mother (Respondent No. 3) has the custody of the person of Minor (Kian). Neither Mulla nor Tyabji mention any requirement of the mother's mother being within the jurisdiction of the father to be entitled to custody.

The said judgment has been dissented to by later judgment of Allahabad High Court. That, the Petitioner and Soumi Ghosh were married under Special Marriage Act, 1954 makes no difference to the personal law applicable to child Kian. It has a bearing on the parties to the marriage limited to the extent provided under Sections 19 to 21A of the said Act. In the circumstances, the custody of child Kian with Respondent No. 3 is legal.

32. It is submitted that, welfare of the minor is the paramount consideration even in a petition for Habeas Corpus. The same has been held in the judgment relied upon by the Petitioner. In support of aforesaid

¹⁴ 1918 (20) BOMLR 1022

contention learned counsel pressed into service exposition of law in the case of Gohar Begam (supra), Tejaswini Gaud (supra), Smt. Manju Malini Seshachalam (supra), Dr. Veena Kapoor Vs. Varinder Kappor¹⁵ and Bhagwan Vs. Asho¹⁶k. In the facts of each of those cases, the Court had come to a categorical finding that the welfare of the child lay with the Petitioner and/or that the Respondent was unfit to have custody of the minor.

The Petitioner is unfit to have custody of Kian for various reasons. It is pertinent to note that Kian's mother was apprehensive about bringing up Kian in the environment of her matrimonial home and wanted to shift to Pune permanently. In support of aforesaid submission learned counsel invites our attention to the annexures to the affidavit in reply, in the nature of chats between Respondent No. 2 and Kian's mother at Pages 113 to 115.

The Petitioner has pedophilic tendencies. These Respondents have mentioned in detail the incident which was witnessed by Respondent No. 2 on 14th August 2019. The Petitioner has baldly denied the allegations and has alleged that there was altercation between him and Respondent No. 2 on that day. Kian's mother had also informed Respondent No. 2 about the pedophilic tendencies of the Petitioner towards his niece. In support of

15 (1981) 3 SCC 92

16 2012 SCC Online Bom 986.

contention raised herein above learned counsel invites attention of this Court to the averments in affidavit in reply.

33. It is submitted that, the Petitioner has denied the allegation in the affidavit in reply filed by Respondent No. 2 and 3. However, the fitness of the Petitioner to have the custody of child Kian can only be decided by leading evidence in the appropriate Court.

34. On the other hand, Respondent No. 2 and 3 are fit to have the custody of Kian. Kian was born in Pune and Respondent No. 3 and 2's home was his first home where he stayed with his late mother. From his birth, child Kian has been taken care of by Respondent No. 3 and/or Respondent No. 2 throughout. Tender age rule is recognized by both, Muslim Law as well as Guardians and Wards Act, 1890. Though Respondent No. 3 is a cancer survivor, she is mentally and physically fit to take care of herself and Kian. The Respondent No. 3 has recovered from her cancer and has remained present of hearings along with Respondent No. 2 and/or her husband. The husband of Respondent No. 3 is also fit and able to take care of himself. Respondent No. 2 has completely recovered from the accident and has been present for hearings of the present writ petition. Even the petitioner trusted Respondent No. 2 to take care of the child though his mother and sisters live in the same city i.e. Cairo in Egypt.

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The Petitioner's mother has never lived with child Kian until the interim arrangement.

Respondent No. 2 is earning well. Respondent No. 3 was Principal in a school. Being a former teacher, Respondent No. 3 is well suited to have custody of Kian. Respondent No. 3's husband was an employee of State Bank of India and draws a pension. The financial condition of the family of Respondent No. 3 and 2 is stable. Respondent No. 3 and 2's family is and has always been a close knit family. In fact, the Petitioner has stayed with Respondent No. 2, Respondent No. 3 and Respondent No. 3's husband like a family in the past.

The marriage registration of the Petitioner and Soumi Ghosh under the Special Marriage Act which was done in Pune, as well as the marriage receptions held at Pune and Bangkok, were witnessed only by Respondent No. 3, 2 and Respondent No. 3's husband whereas no one from the Petitioner's family was present, but not in Myanmar as has been inadvertently mentioned in the affidavit in reply of Respondent No. 2 and legal submissions earlier presented in this Court.

35. Even in the cases of petition for writ of Habeas Corpus in case of Inter Country Dispute between the parents of a foreign citizen minor who has been brought to India and where there is an order by the native

country directing a parent to produce the child, Courts have held that neither the principle of Comity of Courts nor the doctrines of 'intimate contact' or 'closest concern' or 'first strike rule' would supersede the considerations of welfare of the child. In support of aforesaid contention learned counsel pressed into service exposition of the Hon'ble Supreme Court in the case of Nithya Anand Raghavan Vs. State (NCT of Delhi)¹⁷ followed in Prateek Gupta Vs. Shilpi Gupta & Ors¹⁸ and Kanika Goyal Vs. State of Delhi¹⁹. It is submitted that, the judgment of Hon'ble Supreme Court pronounced on 20.01.2020 in Yashita Sahu Vs. State of Rajasthan²⁰ is distinguishable on facts.

As the Petitioner is foreign national while child Kian is an 11 months old Indian citizen, if the Petitioner is allowed to take Kian out of India on the basis of a summary enquiry, it would be impossible to get Kian back. The undertaking given by the Petitioner or his mother cannot be enforced once Kian is taken out of the jurisdiction of this Hon'ble Court. The argument about Abu Dhabi is a far fetched argument. The Court cannot rely upon such arguments made by the Petitioner. Pertinently, the Petitioner himself has studied in IIM, Kozhikode. It is submitted that, false statements made by the Petitioner disentitle him to discretionary relief. The Petitioner has falsely contended that his relationship with Respondent No.

17 (2017) 8 SCC 454.

18 (2018) 2 SCC 309

19 (2018) 9 SCC 578.

20 Criminal Appeal No. 127 of 2020.

2 was a brother-sister relationship while the chats between the Petitioner and Respondent No. 2 show otherwise.

36. It is argued that, the Petitioner has falsely stated in the petition that Respondent No. 2 had sent his C.V. without his knowledge. The Petitioner has suppressed from this Hon'ble Court that he had forwarded his C.V. to Respondent No. 2 by his email dated 8th May 2019 and had also sought Respondent No. 2's help in getting a job. The Petitioner was looking for job opportunities in India.

The Petitioner has further falsely alleged in the petition that Respondent No. 2 is a non working lady and therefore would not be in a position to maintain Kian. In view of the evidence produced by Respondent No. 2 is working and earns well, the Petitioner has the audacity to now state that Respondent No. 2 is too busy to look after Kian as she travels extensively for work.

37. The Petitioner has made claims of financially helping Respondent No. 2 and her family before and even after the death of his wife. The Petitioner had in fact made the bank transfers mentioned in the petition during his wife's pregnancy. The Petitioner had transferred Rs. 1.30 lakhs to Respondent No. 2 after his wife's death as he was closing his Citi

Bank account and wanted an OCI card.

The allegation of illegal confinement and kidnap of child Kian is belied by the conduct of the Petitioner. It is an admitted position that after 29th September 2019 till the filing of the petition on or around 9th December 2019, the Petitioner did not make any attempt to find out the well being of Kian. The Petitioner's contention that he had to return to Abu Dhabi to complete the Residency Visa shows that he was more concerned about the same than Kian. Moreover, the said contention is contrary to his chats in September 2019 that he did not care for the residency visa of Abu Dhabi.

38. The Petitioner has admittedly studied in India and has worked in India. The Petitioner is familiar with India and was again looking for job opportunities in India. The Petitioner has also applied for OCI Card. In these circumstances, it is surprising that the Petitioner has till date not filed any police complaint of "kidnapping" against Respondent No. 2 or 3. The Petitioner did not approach the Egyptian Embassy for help but went back to Egypt/UAE. The allegation is an afterthought. The Petitioner has not approached this Hon'ble Court with clean hands. The Petitioner's credentials are poor. The high prerogative writ of Habeas Corpus is a discretionary remedy. In view of falsehoods and suppression by the Petitioner and in view of disputed questions of fact which cannot be

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decided on affidavits, this Hon'ble Court may direct the Petitioner to apply to the appropriate court for custody of child Kian after factual determination of the rival claims by leading evidence. More so, as the Petitioner is admittedly an Egyptian national and intends to take child Kian- an 11 month old Indian citizen out of the jurisdiction of this Hon'ble Court.

39. It is argued by the learned counsel for 2nd and 3rd respondent that, the Hon'ble Court will have to decide that the welfare of the minor child lies with the either the Petitioner or the Respondent Nos. 2 and 3. It is submitted that, it is an admitted position that the child has been taken care of by Respondent No. 2 and 3 from his birth till he left for Cairo in June, 2019. Thereafter, the child has been cared for by Respondent No. 2 like a mother. To be able to give motherly love and care to Kian, Respondent No. 2 had left her old parents and work in India and joined the Petitioner in Cairo, Egypt. The Petitioner has time and again acknowledged this fact. In the eyes of the Petitioner, Respondent No. 2 was a great mother. On numerous occasions the Petitioner has stated this fact in the chats he had with Respondent No. 2. He has made statements like, 'you are an amazing mom', 'we love you a lot best mama', 'I am sure Kian loves you the most'. The Petitioner had booked return tickets for Respondent No. 2 as well before coming to India on 27th September 2019 as he intended to take back

Respondent No. 2 with him and Kian as he continued to believe Respondent No. 2 to be the best person to take care of Kian. The child was merely 2 months old when his mother passed away. From the point of time he has been under the care of the Respondent No. 3 and 2. The only motherly face that the child recognizes is that of Respondent No. 2 as he has spent majority of his lifetime of about 11 months with Respondent No. 2. The bond between Respondent No. 2 and Kian is of mother and child. It is pertinent to note that, the natural environment Kian has stayed in his entire lifetime is the one with Respondent No. 2 in it, whether in India or outside India. Child Kian was born in Pune and stayed there till June 2019, for few days in July 2019 and then from 27th September 2019 till date has been in Pune. So for all practical purposes the natural environment for Kian is to stay in Pune under the care of Respondent No. 2 and 3. Kian's mother called on Respondent No. 2 and 3 for her delivery and taking care of the child as can be seen from the chats between the two sisters. Respondent No. 2 was very close to her late sister.

40. In reply to submissions made by learned counsel appearing for 2nd and 3rd respondent, learned senior counsel appearing for the Petitioner has submitted note of rejoinder on behalf of the Petitioner. Relying upon said note learned senior counsel submitted that, there is no mention/justification on how the respondents are in custody of Kian. The

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Respondents have not justified how they were legally in custody of child Kian after 27th September 2019. From the undisputed facts on record it is clear that the Petitioner (who is child Kian's natural guardian) had lawful custody of child Kian. What is significant is that this was never disputed and was with the knowledge and consent of the Respondents. Respondent Nos. 2 and 3 did not have custody of child Kian at all from the time of his birth till 28th September 2019. It is clear that Respondent Nos. 2 and 3 got custody of Kian only on the night of 28th September 2019 by misusing the police machinery. They have not demonstrated how they have lawfully assumed custody of child Kian from the Petitioner. There has been no answer therefore to the fundamental issue raised in the Petition.

The Respondents belated allegation that the Petitioner voluntarily gave upon custody of child Kian is without any basis. As stated in Manju Seshachalam (supra) any allegations made in thin air cannot be considered for the purposes of deciding custody. The Respondents had to demonstrate how they lawfully obtained custody of child Kian- they have not done so. All the respondents have sought to do is state that Respondent No. 3 has an 'entitlement' to custody of child Kian. There is a vast difference between actually being in lawful and legal custody, and the abstract assertion that one is, in law 'entitled' to custody.

41. It is further submitted that, even assuming that Muslim personal law applied, custody of child Kian must be with the Petitioner for the following reasons:-

- (i) Under Muslim Personal Law, a non-Muslim cannot have custody over Kian;
- (ii) Under Muslim Personal Law, when the child is removed from the ordinary place of residence of his father, custody/hiznat of the child would no longer vest in Respondent No. 3.

Preposition (i) is clearly seen from paragraphs 246 and 249 of Tayabji, Muhammadan Law, Faiz Badruddin Tyabji, 3rd Edition, which clearly establishes that a Muslim is preferred over a non-Muslim. Neither Respondent No. 2 nor Respondent No. 3 is a Muslim, and they are therefore not entitled to custody of child Kian. The only answer of the Respondents is that such a disqualification would be discriminatory and would violate fundamental rights. This of course does not consider the fact that the said respondents have not challenged the said law in any proceedings, nor have they even pleaded in their replies that the said personal law violates fundamental rights. In any event, as is clear from the judgment of the Hon'ble Bombay High Court in State of Bombay Vs. NarsuAppa²¹, personal law cannot be challenged on the basis that it is discriminatory under articles 14 or 15. The said judgment has not been

21 1951 SCC OnLine Bom 72

overruled.

Proposition (ii) is clearly supported by the judgment in Siddq-Un-Nissa Bibi (supra). It is clear from the said judgment that when a child is removed from the ordinary place of residence of the father which is at present at Abu Dhabi and earlier at Cairo, Egypt such that his right and duty of supervision of the child is impaired and right of “hiznat” is lost. The Respondents have sought to distinguish the said judgment on the following grounds.

- (a) That the said judgment is wrong, as Mulla does not mention the rule set out in the judgment in Siddiq-Un-Nissa Bibi (supra). Therefore, the said rule is not a rule of Muslim personal law;
- (b) That the said judgment has been dissented to by later judgments of the Allahabad High Court in Sakina Begam Vs. Malka Ara, Hafizur Rahaman Vs. Shakila Khatoon and Khurshid Gauhar Vs. Siqqiunnisa.

At the outset it must be noted that, the relevant passage in Siddiq-Un-Nissa Bibi (supra) has been authoritatively quoted by the Hon’ble Supreme Court in Athar Hussain (supra).

With respect to clause (a) hereinabove it is submitted that Mulla’s commentaries does not exhaustively set out Muslim personal law. The commentary of the said author cannot be said to be a higher source of law than a judgment of the Hon’ble Allahabad High Court, which has also

been approved by the Hon'ble Supreme Court. The learned author is but one of many authors who set out and collate Muslim personal law. Tayabji for example contains various rules of Muslim law these are not found in Mulla. Most importantly, the commentary in Mulla has not considered, let alone doubted the correctness of the judgment in Siddiq-Un-Nissa Bibi (supra). Therefore, the mere fact that the ratio set out in Siddiq-Un-Nissa Bibi (supra) does not find mention in Mulla does not in any way affect the ratio. With respect to clause (b) herein above it must be pointed out that above judgments in Sakina Begam Vs. Malka Ara and Hafizur Rahaman Vs. Shakila Khatoon did not purport to overrule Siddiq-Un-Nissa Bibi (supra) at all and arose in very different facts and circumstances. They do not doubt the rule in Siddiq-Un-Nissa Bibi (supra).

42. It is submitted that, the judgment in Khurshid Gauhar V. Siddiquinisa was of a single judge and the same could never overrule the decision of the division bench in Siddiq-Un-Nissa Bibi (supra). Indeed, on a closer reading, it did not purport to do so. The Hon'ble Court in the facts of that case held that the mother could not be denied custody as the parties were in fact living close together and the general supervision of the child was not effected. In the present case, keeping the child with Respondent No. 3 would result in the Petitioner who lives in another country being deprived of all the rights of general supervision of Kian. In any event in

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case of conflict, the view of the large bench i.e. the court in Siddiq-Un-Nissa Bibi (supra) would prevail. Therefore, even under Muslim law Respondent Nos. 2 and 3 cannot have custody of child Kian.

43. It is further submitted that, Muslim law cannot and does not apply, as the Petitioner and his wife were married under the Special Marriage Act and for the following reasons:-

(a) The Muslim Personal Law (Shariat Application) Act only applied when all the parties are Muslim. In the present case, the wife of the Petitioner, and Respondent Nos. 2 and 3 are Hindu. Therefore, Muslim personal law will have no application.

(b) The parties were married under the Special Marriage Act. As held by this Hon'ble High Court in Robaba Khanum Vs. Khodadad Boman Irani²², in a situation where the parties are from different religions, the religion of neither party would apply. The secular laws of India as set out in Guardians and Wards Act would apply. The judgment in CIT Vs. Sridharan is not applicable as it did not arise in the context of marriage, and the rights and duties arising out of the same. The said case was a dispute relating to taxation of an HUF that relate to property rights.

22 1947 ILR Bom 223

(c) If Muslim law or any personal law was held to be applicable, it would lead to absurd and onerous results. As shown above, Tayabji clearly states that if one of the parents is a non-muslim, custody goes to the Muslim parent irrespective of the age of the child. This would mean that though the parties agreed to get married under the Special Marriage Act, in all cases where spouses were of a different religion, even a mother's right to custody as also that of the father would stand forfeited due to the application of personal law. This would undermine the parents choice to get married under the Special Marriage Act, and entirely defeat the purpose of the Special Marriage Act.

44. Learned senior counsel appearing for the Petitioner submits that, the allegations made by the respondents against the petitioner are false and malicious. It is submitted that, the Respondents have blindly made all sorts of allegations against the Petitioner in their affidavits including that he was not the father of Kian; that the relationship between the Petitioner and his late wife was bad that she wanted to move back to Pune; that the Petitioner has pedophilic tendencies; the Petitioner suffers from anger issues and OCD; the Petitioner molested the Respondent; that the Petitioner did not financially help his wife when she was studying in Canada; that the Petitioner did not take care of his wife during pregnancy;

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the Petitioner's excessive drinking etc. and Respondent No. 2 being held hostage by the Petitioner.

It is further submitted that, Petitioner had comprehensively dealt with these allegations by producing documentary evidence where possible. This shows that the entire gamut of allegations are false, and are nothing but a cold and calculated attempt by the Respondents to get custody of Kian, by an attempt at a character assassination.

Learned senior counsel for the Petitioner submits that, as far as the allegation that the late wife of the Petitioner wished to move to Pune permanently, is concerned, the same is clearly incorrect. The respondents failed to point out that the said chats were of July 2018, and were another manifestation of the normal ups and downs in any marital relationship. Indeed, the late wife of the Petitioner submitted applications for emigration to Canada first on 19.10.2018 for both the Petitioner and herself much after the said dates. She was in correspondence with the relevant authorities until a few days before her demise. Indeed, they had booked a vacation at the Hilton, Shilim. This is just another one of the Respondents' attempt to show that there was discord between the Petitioner and his wife by suppressing their own emails that showed that this was part of the normal ups and downs of a marital relationship. Therefore the statement/submission that the Petitioner's late wife wanted to live permanently in Pune is incorrect.

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The allegations that the Petitioner has pedophilic tendencies has been falsely and irresponsibly made by the Respondents. This allegation is completely false and is contrary to the chats between the parties where the Petitioner is acknowledged by Respondent No. 2 as being a doting father. The petitioner has set out in detail the events of 14th August, 2019 in his rejoinder, with supporting documents including Uber receipts and a doctors prescription. It is clear from the same that the said allegations is absolutely incorrect.

It is further submitted that, the Respondent has not also for the first time alleged in their note that 'the Petitioner would not have been happy if their child turned out to be a girl'. This has not been pleaded in either of the two detailed affidavits filed by the Respondents. The insinuation made by the Respondents are denied and can be seen from the chats themselves. It shows that the Respondents even at this stage are seeking to make every possible allegation against the Petitioner. It must be noted that these chats do not involve the Petitioner, but are allegedly between the Respondent No. 2 and the late wife of the Petitioner. It is therefore clear that all of the above allegations are false and are without any basis.

Learned senior counsel submits that, the stay of his late wife in India was only temporary. It is common both in Indian and Egyptian culture

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that a couples first child is delivered at maternal residence/location. The Respondents contention that Kian's natural environment is Pune is absolutely incorrect. Both his parents were living and had lived abroad for many years, and in fact intended to emigrate to Canada. By birth Kian is both and Indian and Egyptian citizen. Indeed both Respondents recognized that Kian's interest would be best served by him moving with his father to Cairo. It is only now that the Respondents raise a completely baseless argument that Kian's natural environment is in Pune.

Furthermore, the Respondents contention that the Petitioner will take Kian outside the jurisdiction of the court is unfounded for the following reasons. The Petitioner has agreed to abide by orders of this Hon'ble Court. As the UAE is a reciprocating country, and orders of this court can easily be enforced in the UAE. As stated earlier, Kian has been growing up outside India, a fact that the Respondents agreed would be in his best interest. Kina's parents lived outside India for many years and wanted to emigrate to Canada. Kian's natural environment is therefore not in India. The Respondents have removed Kian from the custody of the Petitioner during a temporary 3 days visit to India by misusing the police machinery. It is only therefore natural that Kian should be move with the Petitioner to Abu Dhabi. They have no difficulty in driving the Petitioner to courts in India, and cannot now take refuge in saying that the Petitioner

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resides outside the jurisdiction.

45. We have heard learned senior counsel Mr. Seervai appearing for the Petitioner, learned counsel Ms. Sonal appearing for Respondent No. 2 and 3 and learned APP Mr. V B Konde-Deshmukh, APP for Respondent No. 1 at length. We have carefully perused the petition and annexures thereto, copies of voluminous documents submitted by the Petitioner and also Respondent Nos. 2 and 3 with affidavit in reply filed by them and written notes of arguments. At the outset, we make it clear that, as and when necessary we will make reference to only relevant facts while deciding the legal issues and welfare of the child. The Petitioner and also Respondent No. 2 have made wild allegations against each other. However, we refrain ourselves from entering into an exercise of appreciation of said personal allegations made by Petitioner and contesting respondents against each other. Our concern is to the extent of finding out legal position in respect of maintainability of the petition, whether the Petitioner is unfit to have the custody of child Kian, and if child Kian continues in the custody of the Petitioner, whether it would be against the interest and welfare of the child.

46. So far maintainability of petition for issuance of writ of Habeas Corpus at the instance of the Petitioner, who is Egyptian national. It would

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be appropriate at this juncture to make reference to Para 13 of the exposition of Hon'ble Supreme Court in the case of Gohar Begam (supra), which reads 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 infants to direct its custody to be placed with a certain person. In R. v. Greenhill, (1836) 4 Ad and El 624 at p. 640: 111 ER 922 at p. 927 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 (1857) 7 El. And B1. 186: 119 ER 1217. In Halsbury's Laws of England, Vol.IX, Art. 1201 at page 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 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 S. 491 in a fit case that the custody of an infant be delivered to the applicant: see Rama Iyer v. Naatraja Iyer, AIR 1948 Mad 294, Zara Bibi v. Abdul Razzak, 12 Bom LR 891 and Subbaswami Goundan v. Kamakshi Ammal, ILR 53 Mad 72: (AIR 1929 Mad 834). If the courts did not have this power, the remedy under S. 491 would in the case infants often become infructuous.”

47. In the recent pronouncement in the case of Tejaswini Gaud (supra) the Hon'ble Supreme Court held as under:-

Habeas corpus proceedings are not to justify or examine the legality of the custody. It 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. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. 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. 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. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

While making aforesaid observations the Hon'ble Supreme Court has relied upon the exposition of Supreme Court in Gohar Begam (supra) and Manju Malini Seshachalam (supra).

48. The Hon'ble Supreme Court in the case of Yashta Sahu Vs. State of Rajasthan & Ors²³, while considering the contention of learned

²³ Criminal Appeal No. 127 of 2020.

counsel appearing for the Petitioner therein that a writ of habeas corpus would not lie for the custody of the child since child could not be said to be in illegal detention, as the child was in the custody of the mother who is natural guardian in Para 9 held as under:-

*9. 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 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. Aravand M. Dinshaw and Ors.**²⁴, **Nithya Anand Raghavan (supra)** and **Lahari Sakhamuri vs. Sobhan Kodali**²⁵ 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.*

49. The Hon'ble Supreme Court in the case of Nithya Anand Raghavan (supra) in Para 47 observed that, in habeas corpus petition the High Court must examine at the threshold, whether the minor is in lawful or unlawful custody of another person i.e. private respondent named in the writ petition. Keeping in view the said observations we propose to find out

²⁴ (1987) 1 SCC 42

²⁵ (2019) 7 SCC 311

whether the child Kian was in custody of the Petitioner prior to 28th September 2019, before filing the complaint by the 2nd respondent against the Petitioner in Chandannagar Police Station? It appears from the facts stated in the petition that, in December 2018, Soumi Ghosh i.e. the wife of the Petitioner moved to Pune to be with her parents during last three months of her pregnancy, during which the Petitioner continued to visit Soumi in Pune from time to time and resided at the Petitioner's in-law's residence. On 3rd February 2019, the Petitioner's son Kian Kaseem was born in Jehangir hospital in Pune. It is not disputed that, the Petitioner arrived in Pune on 2nd February 2019 and remained in Pune till 16th February 2019 and thereafter the Petitioner again came back to visit his wife and son Kian Kaseem in Pune from Dubai on 10th March 2019 and left on 16th March 2019 for Dubai to resume his work. Thereafter, Petitioner again came back to Pune on 16th April 2019 from Egypt to see his wife and son. On 17th April 2019, Petitioner's wife Soumi Ghosh died. Thereafter, as stated by the Petitioner, Petitioner took two months leave so as to look after child Kian. Thereafter, on 16th June 2019, Petitioner alongwith Kian as well as Respondent No. 2 travelled to Egypt, where they resided together in the Petitioner's apartment. Thereafter, in September 2019, Petitioner was offered a new position in Abu Dhabi UAE, as he had requested a less demanding position and no travel and the ability to work remotely from home so that he could spend more time with his son. The Petitioner, his son

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and Respondent No. 2 moved to Abu Dhabi on 1st September 2019. Thereafter, on 27th September 2019, Petitioner alongwith his son and Respondent No. 2 came in Pune. It is admitted position that, Respondent No. 2 went to Chandannagar Police Station on 28th September 2019 to make complaint against the Petitioner. It further surfaced on record from the affidavit in reply filed by the 2nd respondent that, on 28th September 2019, after filing complaint by her to the police officer in-charge Mr. Shankar Kharate, the police brought the Petitioner to the Police Station, where the police inquired regarding complaint made by Respondent No. 2, from her as well as the Petitioner till wee hours in the morning of 29th September 2019, after which the police visited the residence of Respondent No. 2 to pick up the Petitioner's belongings. However, thereafter child Kian remained in the house of 2nd and 3rd respondent and his custody was not handed over to the Petitioner who is natural guardian. It is the contention of Respondent No. 2 that, though Respondent No. 2 spent 10 hours in Chandannagar Police Station, but to her dismay FIR was not lodged against the Petitioner by concerned police officer. In our opinion, because of said complaint 2nd respondent practically stopped entry of the Petitioner in her house, but she did not hand over child Kian to the Petitioner.

As already observed on plain reading of facts, child Kian was in the custody of the Petitioner being a father till 28th September 2019. It is

true that, earlier child remained in the house of Respondent No. 2 and 3 till 16th June 2019. But, it cannot be ignored that, the Petitioner continued his visits to the house of Respondent No. 2 and 3 before and after birth of child Kian. The Petitioner's wife died on 16th April 2019. He took leave from his work from 16th April 2019 onwards for two months to look after child as contended by him in the petition. Thereafter, as already observed from 16th June 2019 till 27th September 2019, the Petitioner, his son and Respondent No. 2 lived together. It is only on 28th September 2019, when Respondent No. 2 filed complaint with Chandannagar Police Station and concerned police officer whose name is mentioned herein above visited the house of Respondent No. 2 and 3 in the morning on 29th September 2019 to pick up the petitioner's belongings, the Petitioner has to leave the house of 2nd and 3rd respondent, however, child Kian remained in said house. Therefore, it is abundantly clear that, resultantly the Petitioner was prevented from having access to Child Kian. Indisputably, the Petitioner is legal guardian of child Kian. The wife of Petitioner died on 16th April 2019. As already observed, though the Petitioner is legally entitled to have access to child Kian being a natural guardian, the same access was stopped due to complaint filed by Respondent No. 2 with Chandannagar Police Station, and child Kian remained in detention of 2nd respondent since his custody was not given to the Petitioner.

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The Supreme Court in the case of Gohar Begam (supra) held that, the appellant (therein) was legally 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. The Hon'ble Supreme Court in the case of Tejaswini Gaud (supra) held that, writ of habeas corpus is prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. In the present case as already discussed in our considered view there was improper detention of child Kian by the 2nd respondent in the house of Respondent No. 2 and 3, and therefore, petition praying therein to issue writ of habeas corpus is maintainable.

The next issue for consideration is whether the Petitioner is unfit to have the custody of child Kian and if child Kian continues in the custody of the Petitioner, whether it would be against the interest and welfare of the child?

Learned counsel appearing for 2nd and 3rd respondent relying upon the averments made in the affidavit in replies filed by 2nd and 3rd respondent would urge that, the Petitioner is unfit for custody of child Kian. We have carefully perused the averments in both the affidavit in replies.

The 2nd respondent has made personal allegations against the Petitioner and tried to contend that, the Petitioner is unfit to hold the custody of child Kian. In our *prima facie* opinion if 2nd and 3rd respondent are of the opinion that, the Petitioner is unfit to have the custody of child Kian on the basis of allegations made in the affidavit in replies, they are at liberty to approach the court of competent jurisdiction to prove the said allegations. In the present petition, we are considering the prayer of the Petitioner to restore the custody of child Kian to him, since till 28th September 2019 child Kian was in the custody of the Petitioner.

The Petitioner is well qualified and has secured degree in Masters of Business Administration (MBA) from IIM Kozhikode, which is one of the premier institutions in India for MBA. He has secured job and as contended by the Petitioner he is getting descent salary to look after child Kian. In past also he had taken care of child Kian. He used to travel frequently to Pune to see his wife and child. Indisputably, the Petitioner is only surviving parent of the child and natural guardian. The child of about 11 months of age definitely needs love, care and affection of the father. It also appears that, the economic condition of the Petitioner is stable. Keeping in view the qualification of the Petitioner, so also he is gainfully employed and working in reputed position, there is no reason to deprive him from having custody of child Kian. The child is of 11 months of age and

he is not capable of forming and expressing his wish. We are alive to the authoritative pronouncement of the Hon'ble Supreme Court and various High Courts that, in determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force. The Hon'ble Supreme Court in the case of Nithya Anand Raghavan (supra) held that, welfare of the child is of paramount consideration. In the recent pronouncement in the case of Yashita Sahu (supra) the Hon'ble Supreme Court while discussing the welfare of the child being the paramount consideration in custody cases, in Para 17, 18 and 19 held as under:-

17. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

18. The child is the victim in custody battles. In this fight of

egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.

19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient

visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

50. As it is clear from the observations made by the Hon'ble Supreme Court in Para 18 that, just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. In the present case, it is admitted position that, the Petitioner is the only surviving parent and natural guardian of child Kian. As already observed he has taken care of child Kian in past and there is no room for doubt that, he can look after welfare of child Kian even in future.

The question of uprooting the child from Pune is required to be taken into consideration. However, the child Kian is only of 11 months of age and is not capable of forming and expressing his wish. The ultimate

future of child Kian would lie with the Petitioner being only surviving parent and natural guardian. The Petitioner is only natural guardian and has neither abandoned nor neglected the child. Due to demise of Petitioner's wife Soumi Ghosh, the child Kian was of two months old at the relevant time, and the child Kian was taken care of by 2nd and 3rd respondent. Child Kian lost his mother when he was just two months and he cannot be deprived of love of his father for no valid reason.

51. The mother of the Petitioner through the Petitioner has filed the affidavit giving an undertaking that, she will stay with Petitioner at his working place i.e. at Abu Dhabi so as to take care of child Kian. The Petitioner has also denied the allegation made by 2nd respondent that he is likely to marry in near future and therefore, that would affect the interest and welfare of child Kian. Therefore, keeping in view the discussion in foregoing paragraphs, we feel that, child Kian's custody is required to be restored with the Petitioner.

52. Learned counsel appearing for 2nd and 3rd respondent vehemently argued that, the Petitioner is Muslim and therefore, child Kian is admittedly an Indian citizen and a Muslim. Under the Muslim Personal Law, which is applicable to child Kian, his custody ought to remain with

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Respondent No. 3. Learned counsel during the course of her arguments invited our attention to the various judgment of Hon'ble Supreme Court and also High Courts in support of aforesaid contention. In our opinion, 2nd and 3rd respondent by resorting to the appropriate remedy as available in law can claim the custody by leading evidence. In that case Court of competent jurisdiction can take into consideration various disputed questions of fact raised by 2nd and 3rd respondent in their affidavit in replies. As already discussed, the custody of child Kian was with the Petitioner till 28th September 2019, and therefore, just to restore his custody which was illegally interrupted by the 2nd respondent from 28th September 2019, till this Court (Coram:- S.S. Shinde & Prithviraj K Chavan, JJ.) passed the order on 13th December 2019 thereby giving an interim custody of child Kian to the Petitioner. We have entertained the petition for issuance of writ of habeas corpus.

We have considered the rival contentions and issues raised in the petition. Admittedly, the marriage of the Petitioner with Soumi Ghosh was registered under the Special Marriage Act. It is submitted by learned senior counsel appearing for the Petitioner that, since the marriage is registered under the Special Marriage Act, their personal law no longer applies.

Be that as it may, we do not wish to elaborate on the said aspect

of application of personal law for the reason that child Kian is born out of wedlock between Petitioner who is Muslim by religion and late Soumi Ghosh who was Hindu by religion, secondly, child Kian is 11 months old and it would be harsh to brand him by a particular religion since he is of very tender age, and he is not capable of forming and expressing his wish.

53. Keeping in view the discussion made hereinabove, if Respondent No. 2 and 3 wish to contest the issue that the Petitioner is unfit or is not legally entitled to have the custody of child Kian, in that case, they are free to approach the court of competent jurisdiction for adjudication of their legal rights. In case 2nd and 3rd respondent invoke jurisdiction of the competent court dealing with custody matters, we leave open the issue of application of personal law so also adjudication of disputed questions of facts and appreciation of documents and evidence, if any, for consideration of said Court. Once again we make it clear that, we have entertained the present petition only to the extent of restoration of custody of child Kian to the Petitioner keeping in view main criteria of welfare of child Kian, as the child was in the custody of the Petitioner till 27th /28th September 2019. The proceedings, if any, initiated for custody of Kian by Respondent No. 2 and 3, the same may be decided on its own merits, without being influenced by observations made in this judgment.

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54. It is true that, the Petitioner is only surviving parent and natural guardian of child Kian. Removing child Kian from the house of 2nd and 3rd respondent and restoring the custody of child Kian to the Petitioner might cause some problems initially, but that will be neutralized with the passage of time. However, till the child Kian is settled down in the shelter of Petitioner at his place of work, 2nd and 3rd respondent so also husband of 3rd respondent shall have access to the child. It cannot be forgotten that, 3rd respondent is mother-in-law of Petitioner and 2nd respondent is sister-in-law. As it appears from undisputed position on record that till 27th September 2019, child Kian remained even in the company (not in custody) of 2nd respondent, through out from his birth and also in the company of 3rd respondent from his birth till 16th June 2019 and from 28th September 2019 till this Court (Coram:- S S Shinde and Prithviraj K Chavan, JJ.) by order dated 13th December 2019 granted an interim custody of the child to the Petitioner. In that view of the matter and keeping in view the observations of the Hon'ble Supreme Court in the case of Yashita Sahu (supra) that a child, especially a child of tender age requires the love, affection, company, protection of both parents and also observations of the Supreme Court in Para 36 and 37 in the case of Tejaswini Gaud (supra), we are inclined to give visitation rights to 2nd and 3rd respondent so also husband of 3rd respondent.

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The Petitioner has filed affidavit-cum-undertaking pursuant to the liberty granted by this Court by order dated 28th January 2019. The relevant contents of said undertaking reads as under:-

I, Khaled Kamal Hussein Mohamed Kassem, the Petitioner, residing at Villa 64, Jasmine 2, 1st Settlement, New Cairo, Cairo, Egypt and also residing at 555, Grand Millennium, Hotel Apartments, Abu Dhabi, UAE do hereby state on solemn affirmation as under:-

- 1. I do hereby undertake to this Hon'ble Court to bring my son, Kian to meet Respondent No. 3 at Respondent No. 3's residence with whom Respondent No. 2 at present resides, four times a year for a duration of a week at a time, if this Hon'ble Court is pleased to restore the custody of my child Kian to me.*
- 2. I further undertake that Respondent No. 2 alongwith Respondent No. 3 can come to visit my residence in Abu Dhabi (or wherever I may be located due to the exigencies of my job), to be with my son Kian, initially with advance notice to me. They shall be welcomed at my residence when they visit, and I shall provide unhindered access of my son Kian to Respondent No. 3 and 2 during such visits. Such visits by Respondent No. 2 alongwith Respondent No. 3 to be of a duration of time not*

exceeding 15 days & 4 times in a year. Such time of 15 days may be the extended as per the mutual agreement if required.

3. *I state that, I am also willing to provide access over Video-Conferencing facility where the Respondents can see my son from time to time, as directed by this Hon'ble Court. I state that my mother has given an undertaking to stay with me at Abu Dhabi (or wherever I may be located due to the exigencies of my job).*

4. *I state that I shall at all times, abide by the Orders of this Hon'ble Court and shall not act in contravention of such orders.*

5. *The undertaking given in para 2 with respect to Respondent No. 2 being given access when she visits Abu Dhabi (or the city in which I may be located due to exigencies of my job) along with Respondent No. 3 is independent of issues raised and submissions made by the Petitioner in this Petition regarding Respondent No. 2.*

Solemnly affirmed at Mumbai)

Dated 28th day of January 2020)

In the light of discussion in foregoing paragraphs, so also in the light of an undertaking given by the Petitioner, we pass the following order:-

ORDER

- (i) Writ Petition is allowed in terms of prayer clause (a).
- (ii) The interim custody of child Kian given to the Petitioner by order dated 13th December 2019 passed by this Court is made absolute, and accordingly custody of child Kian is restored back with the Petitioner.
- (iii) The Petitioner shall maintain the custody of child at Pune preferably in the vicinity nearby the house of 2nd and 3rd respondent for eight weeks from today.
- (iv) The Petitioner and his mother or Petitioner and his sister or Petitioner alone or his mother alone or his sister alone can stay with child Kian, as per their convenience during the aforesaid period.
- (v) During the aforesaid 8 weeks period, the Petitioner and his mother or Petitioner alone or his mother alone or his sister alone shall take child Kian to the residence of 2nd and 3rd respondent on Monday, Tuesday, Wednesday, Thursday and Saturday at about 1.00 PM. The 2nd and 3rd Respondent and also husband of 3rd respondent, jointly or singly, will have free access to child Kian in between 1.00 PM to 6.00 PM on aforesaid day's. The 2nd

and 3rd respondent and husband of 3rd respondent shall properly treat the Petitioner, his mother or his sister as the case may be, when they visit their residence.

- (vi) The arrangement stated in aforesaid clause (iii) to (v) shall remain in force till 27th March, 2020.
- (vii) After 27th March, 2020, the Petitioner can take the child along with him at his working place at Abu Dhabi.
- (viii) The Petitioner shall at least four times in a year bring the child at Pune after every 2 and ½ months for at least one week.
- (ix) When the Petitioner will bring child Kian after 2 and ½ months for the period of one week, he shall stay with his child in the nearby vicinity of the house of private respondents for one week. The Petitioner shall take child Kian at the residence of 2nd and 3rd respondent at about 12.30 PM on Monday to Friday. During the said period, 2nd and 3rd respondent and husband of 3rd respondent shall be given free access to child Kian for six hours on everyday. The 2nd and 3rd respondent and husband of 3rd respondent shall properly treat the Petitioner.
- (x) In case 2nd and 3rd respondent and husband of 3rd respondent wish to visit the child at Abu Dhabi, the Petitioner shall provide unhindered access to child Kian during such visits. Such visits by

Respondent No. 2 alongwith Respondent No. 3 and also husband of Respondent No. 3 or Respondent No. 2 and Respondent No. 3 to be of a duration of time not exceeding 15 days and four times in a year. Such time of 15 days may be extended as per the mutual agreement if required. The Petitioner shall allow the private respondents to meet child Kian for minimum 6 hours on every day during their visit to the residence of Petitioner at Abu Dhabi. However, with mutual understanding said duration can be extended. However, 2nd and 3rd respondent shall intimate the Petitioner at least before one week in advance of such visit.

- (xi)** The 2nd and 3rd respondent and her husband be given access from video-conferencing facility by the Petitioner to see child Kian on every alternate day, preferably in between 7.00 PM to 9.00 PM IST, for not less than 15 minutes.
- (xii)** During the stay of the Petitioner, his mother or sister as the case may be, in India the Respondent No. 1 shall not take any coercive action against them in relation to the subject matter of this petition.
- (xiii)** Parties are at liberty to initiate and pursue other remedies as may be available in law.

(xiv) Rule is made absolute in above terms and accordingly writ petition stands disposed of.

(N. B. SURYAWANSHI, J.)

(S. S. SHINDE, J.)

