



**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CIVIL REVISION APPLICATION NO. 170 of 2024**

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE SANJEEV J.THAKER

Approved for Reporting	Yes	No
	Yes	


 Versus


Appearance:

ADITYA C YAGNIK(8228) for the Applicant(s) No. 1

JAYANI B SHAH(8495) for the Applicant(s) No. 1

MR.MANAN BHATT(6535) for the Opponent(s) No. 1

CORAM:HONOURABLE MR.JUSTICE SANJEEV J.THAKER

**Date : 06/03/2025
ORAL JUDGMENT**

“Children ought not to be victims of the choices adults make for them.”¹

1. The present Civil Revision Application has been filed challenging the order passed below Exhibit-15 by Family Court, Ahmedabad in CMA No.105 of 2021, whereby the application filed by petitioner wife under the provisions of Order VII Rule 11 of the Code of Civil Procedure has been

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Wade Horn [Former US Assistant Secretary for Children and Families]

rejected. Aggrieved, the defendant in the said proceedings has filed the present Civil Revision Application.

2. Rule returnable forthwith. Learned advocate Mr. Manan Bhatt waives service of notice of rule on behalf of the respondent. This matter is taken up for final hearing with the consent of the learned advocates for the respective parties.

3. The brief facts of the case are that the parties to the present proceedings had filed petition for divorce under the provisions of Section 13(b) of the Hindu Marriage Act. In the said petition, the parties had mentioned that the marriage of the parties had taken place on 23.01.2011 and from the said marriage a baby girl namely [REDACTED] was born in the year 2016 and as there were disputes between the parties to the present petition, the petitioner wife went to her parent's house on 23.07.2017 and both the husband & wife decided to file for divorce, under the provisions of Section 13(b) of the Hindu Marriage Act, and in view of the said settlement, the parties to the petition agreed that both the parties have received their belongings. The petitioner wife had waived all her rights of maintenance and her rights towards any of the properties that belonged to the respondent husband. In the said divorce petition,


both the parties have mentioned that the custody of minor child shall be with wife and while deciding the Family Suit No.1876 of 2019, the Family Court has considered the affidavits filed by both the parties to the present petition and after taking into consideration that, the minor child [REDACTED] is with the petitioner wife and as there was a mutual consent the minor, the Family Court ordered that minor girl shall remain with the petitioner wife. By an order dated 01.02.2020, the Family Court passed final order whereby the custody of the minor child was to remain with the petitioner wife.

4. It is submitted that thereafter, the petitioner husband issued a notice dated 03.11.2020 with respect to the custody of the minor child [REDACTED] and the said notice was replied by the petitioner wife through her advocate on 10.11.2020, and thereafter, the petitioner husband filed CMA No.105 of 2021 *inter alia* praying for the custody of minor child [REDACTED] under the provisions of Section 25 of the Guardian and Wards Act.

5. The petitioner wife filed an application under the provisions of Order VII Rule 11 of CPC on the ground that the petition is not maintainable under the Guardian and

Wards Act, as the judgment and decree were already passed under Section 13(b) of the Hindu Marriage Act, and therefore, the petitioner husband could not have filed petitioner under section 25 of the Guardian and Wards Act and the Family Court rejected the said application. Hence, the present Civil Revision Application.

SUBMISSIONS OF PETITIONER (DEFENDANT WIFE)


6. Learned advocate for the petitioner has mainly argued that no cause of action has arisen for the respondent husband to file the present application under Section 25 of the Guardian and Wards Act as the parties have already settled all the disputes by way of mutual consent and the judgment and decree to that effect is already passed in HMP No.1876 of 2019 whereby the Family Court has passed a final order whereby by the said order the custody of the minor  is with the petitioner wife.

7. Learned advocate for the petitioner wife has also argued that the Family Court could not have rejected the application under Order VII Rule 11 of CPC only on the ground that the respondent husband being biological father has statutory right of visitation in the Court. The learned

advocate for the petitioner wife has also argued that unless and until the judgment and decree passed in HMP No.1786 of 2019, is set aside on the issue of custody, the respondent husband could not have filed petition under Section 25 of the Guardians and Wards Act.

8. The learned advocate for the petitioner also argued that if the said petition under Section 25 of the Guardians and Wards Act is not rejected and ultimately if the Court comes to the conclusion that the custody is to be handed over to the respondent husband there will be contrary judgments i.e. the judgment which is passed under Section 13(b) of the Hindu Marriage Act which gives custody of the minor child [REDACTED] to the petitioner wife and if ultimately if the said proceedings under Section 25 of Guardian and Wards Act are continued and if the Court comes to conclusion that the custody has to be given to the respondent husband then there will be two contradictory judgments with respect to the custody of minor child [REDACTED]

9. Learned advocate for the petitioner has also argued that even in the petition filed under the provisions of Section 25 of Guardians and Wards Act, the petitioner has

not stated any reasons and/or given substantial and necessary facts that arose, after the judgment and decree passed in HMP No.1786 of 2019, whereby there are change of circumstances, by which the petitioner husband is entitled to seek modification, revocation and to seek custody of the minor child .

10. Learned advocate for the petitioner wife has argued that unless and until the said judgment and decree passed in HMP No.1876 of 2019 are revoked, modified under Section 26 of Hindu Marriage Act, the proceedings under Section 25 of Guardians and Wards Act cannot be invoked and in view of the said fact, the present Revision Application is required to be allowed and the order passed below Exhibit-15 is required to be quashed and set aside and the CMA No.105 of 2021 is required to be rejected being barred by law.

SUBMISSIONS OF RESPONDENT HUSBAND

11. The learned advocate for the respondent husband has argued that the petition under the Guardian and Wards Act is maintainable and cannot be rejected under the provisions of Order VII Rule 11 of the Code of Civil Procedure. It has been argued that while deciding an

application under Order VII Rule 11, the Court will only consider the plaint and the documents annexed with the plaint and looking at the said plaint and the documents, the present petition filed under the provisions of Guardians and Wards Act, cannot be said to be barred by law. Learned advocate for the respondent husband has also argued that when the divorce petition was filed, the child was below five years of age, and therefore, custody was stated to remain with the mother and now the minor child is eight years old, and therefore, the petition under the Guardians and Wards Act is maintainable. It has been argued that at the time of filing of mutual consent petition the respondent husband was made to understand that custody of girl child below five years shall always remain with the wife, and therefore, the respondent husband has waived his visitation and custody rights and in view of the said fact that the respondent husband is a biological father, the custody and visitation rights are required to be decided by the competent Court under the provisions of Guardians and Wards Act, and therefore, the present application under Order VII Rule 11 filed by the petitioner wife is nothing but a delay tactic to prevent biological father for visitation rights and custody of the minor child.

12. Heard learned advocates for the respective parties at length. No other and further submissions are made.

ANALYSIS

13. Before this Court decides all the issue under the provisions of Order VII Rule 11 of Code of Civil Procedure, it is required to be considered that when the parents are in conflict, the child's well being should remain paramount concern, the Court must ensure that minor child is not treated as an object to be passed back and forth, but rather a person whose stability and security must carefully be protected.

14. It is the fundamental right of a child, specially of a tender age to the love, care and protection of both parents. This is not only essential for a child's emotion and psychological development but is well recognized as a basic human right. The Court must exercise caution in assessing the claim made by each parents, free from any kind of bias and motive and must focus on the child's best interest. The primary and paramount consideration is always with the child's best interest which encompasses his/her physical and psychological well being.

15. In custody battles, child often becomes the unintended victim of their parents conflict. In the matter relating to the custody of the minor child, the Court must believe that it is dealing with a sensitive issue in considering nature of care and affection that a child requires in the growing stages of his/her life. That is why custody orders are always considered inter-locutory orders and by nature of such proceedings, custody orders cannot be made rigid and final and are always capable of being moulded or altered, keeping in mind the needs of the child, therefore, all orders relating to the custody of the minor child from their nature must be considered to be temporary orders made in the existing circumstances.

16. In this background, the facts of the present case are required to be looked into. In the present case, the parties to the present petition have settled all their disputes while filing a divorce petition under Section 13(b) of the Hindu Marriage Act and the Family Court while passing the judgment on divorce under the provisions of Section 13(b) has also passed an order whereby the custody of the minor child XXXXXXXXXX, has been handed over to the petitioner wife and it is only after that, the judgment and decree granting

custody of the minor child to the petitioner wife has attended finality. The respondent husband has filed an application under Section 25 of Guardian and Wards Act, if this Court looks at the provisions of section 25 of Guardian and Wards Act, which reads as under:-

“25. Title of guardian to custody of ward

(1)If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2)For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the [Code of Criminal Procedure, 1882 .

(3)The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.”

If the provision of section 25 of the Guardian and Wards Act are looked into, it specifically mentions that if the child leaves or is removed from the custody of guardian of his person and if the Court is of the opinion that it will be in the welfare of the child, the Court can pass order of return of the child to the custody of his guardian, the Court may make an order for his return and in the present case, if the provisions of Hindu Minority and Guardianship Act are looked into, more particularly,

the definition of section-4(b), the definition of guardian, means the person having the care of the person of a minor and in the present case, the petitioner wife is the person, who is having care of the minor [REDACTED], even as per the order passed by the Family Court in HMP No.1876 of 2019.

17. In the present case, though while deciding an application under Order VII Rule 11 of CPC, the contents of the plaint are to be looked into, however in HMP No.1876 of 2019, filed by the parties to the petition on the basis of the mutual consent under the provision of section 13(b) of the Hindu Marriage Act, the said consent has to be carefully read, regarding the voluntary statement, made by the respondent father for giving the custody of the child to the petitioner mother. The Court cannot ignore paramount consideration of the child as held by the Hon'ble Supreme Court in number of decisions that the welfare of the child should be the paramount consideration.

18. While filing mutual consent petition under Section 13(b) of the Hindu Marriage Act, the decision to give custody of the minor child [REDACTED] to petitioner mother,

was a conscious decision taken by the parties at the relevant stage and the same can hardly be categorized as a decision taken by force or fraud. Even during the pendency of the said petition under Section 13(B) of Hindu Marriage Act the parties had time to withdraw the settlement during the statutory period. As the said time is given to the parties to rethink on their decision. The parties in the present case agreed that the custody of the minor child will be with the petitioner wife.

19. In view of the said fact, the respondent husband independently relinquished his right to the claim of custody. Moreover, it is not the case of the respondent husband that the petitioner wife is not looking after the child and it is also not the case that the child is not taken care properly by the petitioner wife, the husband has relinquished his right for grant of custody of the child and that the custody has already been granted to the wife, the only alternative for the respondent husband is to file a petition under Section 26 of the Hindu Marriage Act, given reasons and subsequent events of the circumstances happening after the judgment and decree are passed in HMP No.1876 of 2019.

20. At the same time, it cannot be said that the custody that has been handed over to the petitioner wife is permanent. The fact remains that for invoking the provisions of section 25 of Guardians and Wards Act, the requirement is that the child leaves or is removed from the custody of his guardian and even then, an order for return of the child is not a matter of course but may be made by the Court only if the Court is further satisfied that such return would be for the welfare of the child. It is true that detention of a child by one against the wish of his/her guardian may in law amount to removal of the child from the custody of the guardian, within the meaning of section 25 of Guardians and Wards Act, but where, as here, mother has been entrusted with the custody of the child by an order of the competent Court and the child is all along, since such order, in her custody, retention of the child in such custody granted by the Court cannot, so long the order remains in force, amount to any removal of the child, even if such retention is now against the wish of the natural guardian.

21. In this view of the matter, the provision of section 26 of the Hindu Marriage Act is required to be read:-

“26. Custody of children. - In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.”

Therefore, if the respondent father feels that there has been some development or subsequent events which might require suspension, alteration or revocation of the earlier order of custody in favour of the petitioner wife, the respondent husband can move before the same the court which made the order, under the provisions of section 26 of Hindu Marriage Act as the said section 26 of the Hindus Marriage Act empowers the Court to pass interim order with regard to the custody and also gives the power to make such provision in the final decree. Section 26 of Hindu Marriage Act also states that, even after passing of the decree, the Court may from time to time revoke, suspend or vary any order passed in relation to the custody, maintenance and education of minor children. The respondent husband had made statements in

the earlier consent petition of divorce waiving his rights towards the custody of the minor child and also with respect to visitation of the minor child, the Family Court accepted the submissions of the parties and based on these submissions passed a judgment and decree of divorce dated 23.08.2019 and also passed the order with regard to the custody of minor child [REDACTED] to be with petitioner wife.

22. In view of the said facts the petition filed by the respondent husband was in breach of the facts stated in affidavit before the Family Court in Family Suit No.1876 of 2019. In the present case, there was no justification on the part of the respondent husband to approach the Court for the relief of custody of minor child after the judgment and decree passed in Family Suit No.1876 of 2019. However, as discussed hereinabove it is not about the rights of the parties but it is the fundamental right of the child and the primary consideration is the welfare of the child and not the rights of the parties and orders relating to the custody of the child even based on consent are liable to be altered in a given case if the same are against the welfare of child.

23. The court cannot invoke the provision of section 25 of the Guardians and Wards Act solely for the purpose of alteration and revocation of an order of custody made by the competent Court even if such revocation and alteration are required for the minor child's welfare only alternatively that the petitioner has is to move an application under section 26 of the Hindu Marriage Act.

24. Moreover, provisions of section 26 of Hindu Marriage Act is also required to be cautiously, otherwise as one of the party, with a view to get divorce, can agree for divorce and give custody of the minor child of the other spouse, and thereafter, after the child is settled with the other spouse, thereon custodial parent can state that as per section 26 of the Hindu Marriage Act, the non custodial parent seeks to suspend, revoke and alter the custody granted in the divorce petition and thereby jeopardise welfare and interest of the minor child, and therefore, the Court in such cases should not exercise summary jurisdiction as the Court has to look at the welfare and interest of the minor child and the same should be decided by trial after taking into consideration facts of each case and the Court will also have to take into consideration that the child is well settled with the custodial parent.

25. Moreover, while deciding said application under Section 26 of Hindu Marriage Act, the Court has to take into consideration events that were not known to the non custodial parent at the time of filing and delivery of the judgment granted custody in a matrimonial petition. The applicant who intends to file application under section 26 of Hindu Marriage Act, shall have to give specific time period that the non custodial parent came to the knowledge of the fact of change of circumstances. While deciding the said application the Court should also take into consideration the time period of such knowledge to the non custodial and the date of filing the said petition. Moreover, if there is a delay in filing an application under Section 26 the delay has to be explained by the non custodial parent and the steps taken by the non custodial parent to request the parent with whom the custody of the minor child is to rectify the same, so that the welfare and interest of the child is taken care of.

26. The following are some of the grounds on which the non custodial parent can seek an application under section 26 of the Hindu Marriage Act to revoke, suspend or vary the custody orders passed in a matrimonial dispute under

Hindu Marriage Act. Over and above, the grounds mentioned hereinbelow the Court can also take into consideration the other grounds as per facts of each case. Some of the grounds on which the appellant under section 26 can be filed are:-

- 1. Custodial parent not looking after the welfare and interest of the child post separation.*
- 2. Change of atmosphere due to re-marriage of the custodial parent i.e. child not adjusting with the new parent and does not wish to reside in the new atmosphere the same can be decided depending on child's age and maturity.*
- 3. Custodial parent not having the custody of the child, the child is given in care of the grandparents of the child.*
- 4. Altered Employment Status – Changes in a custodial parent's career, such as a job loss, a pay cut, or a shift to a more demanding work schedule.*
- 5. Death of the custodial parent.*
- 6. There is a Custody agreement violation.*

- 7. Parental fitness (medical issue newly developed with the cusodial parent).*
- 8. Child facing major health, psychological, medical issues, change in study results (school performance) etc.*
- 9. Relocation of the custodial parent and at the new place there is difficulty for child to stay/study.*
- 10. Custodial parent involved in legal cases and arrested.*
- 11. Child abuse, neglect, abandonment by the cusodial parent or by the custodial parents sorrounding.*
- 12. Child growing up and and wanting to spend time with both parents and expressing the said wish.*
- 13. Custodial parent not using appropriate fund for maintenance of the child/lowering the lifestyle status of child without any reason.*
- 14. Alternation of work schedule of custodial parent interfering with schedule of child.*
- 15. Child being left in care of helpers/day care/nannies while the non-custodial parent is in a better position to be available physically for the child.”*

27. In view of section 26 of the Hindu Marriage Act, no application under Section 25 of the Guardians and Wards Act can be maintained. Therefore, if there is any breach of any agreement then only course open to the parties was to approach the Court which pass the decree for divorce as contemplated under the provisions of section 26 of the Hindu Marriage Act. In the present case, the custody of the minor child is with the petitioner wife by an agreement between the parties and as the custody of the minor child is with the petitioner wife by a valid agreement between the parties, and therefore, the claim of the respondent husband being the father of the minor child becomes irrelevant and section 26 of the Act contemplates that the Court may, from time to time, revoke, suspend or vary such orders and the provisions previously made thereunder, and therefore, since no application was made under section 26 of the Hindu Marriage Act, no relief can be granted to the respondent husband arising out of an application under section 25 of the Guardians and Wards Act.

28. In view of section 26 of the Hindu Marriage Act, no application under section 25 of the Guardian and Ward Act

could be maintainable. Therefore, the present Civil Revision Application is allowed. Order passed by the trial Court is quashed and set aside and in view of the said fact, the proceedings before the trial Court i.e. CMA No.105 of 2021 is rejected under the provision of Order VII Rule 11 of Code of Civil Procedure.

29. In view of the said facts, the Civil Revision Application is allowed. Rule is made absolute.

(SANJEEV J.THAKER,J)

Manoj Kumar Rai