IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 2780 of 2025
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2025
In R/FIRST APPEAL NO. 2780 of 2025

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

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Approved for Reporting Yes No

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[redacted]

Versus

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Appearance:
MR MAHARSHI S JOSHI(10223) for the Appellant(s) No. 1
SUDHANSHU A JHA(8345) for the Appellant(s) No. 1
MR BHUNESH C RUPERA(3896) for the Defendant(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE SANGEETA K. VISHEN**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 09/12/2025
ORAL JUDGMENT
(PER : HONOURABLE MS. JUSTICE SANGEETA K. VISHEN)

1. Captioned appeal is directed against the judgment dated 07.07.2025 (hereinafter referred to as "the impugned judgment") passed by the learned Judge, Family Court No.3, Ahmedabad in Civil Miscellaneous Application No.192 of 2023 (hereinafter referred to as "the application"), whereby, the learned Judge, *inter ali*a, has ordered exclusive visitation rights to the appellant-mother to meet and see minor son "[redacted]" on every 1st and 3rd Sunday of each calendar month between 10 a.m to 5 p.m at any public place in Ahmedabad or any other place where the child is comfortable. Further direction is issued that the appellant-mother can talk to her

child through video call / voice call once in a week for 30 minutes as per the convenience of the child.

2. Mr Sudhanshu Jha, learned advocate has submitted that the impugned judgment suffers from illegality inasmuch as, while partly allowing the application, three major factors have not been considered viz. (i) that mother is a natural guardian of the child below five years of age; (ii) agreement dated 03.10.2022 for customary divorce is null, void and void ab-initio it having executed under duress and coercion and would be hit by Section 23 of the Indian Contract Act, 1872 (hereinafter referred to as “the Act of 1872”) and (iii) the welfare of the child.

2.1 It is submitted that as per one of the conditions contained in the agreement dated 03.10.2022 for customary divorce (hereinafter referred to as “the deed of divorce”) the custody of the minor son, who is less than five years, is to remain with the father. Allowing such condition to operate, would defeat the provisions of the law. It is submitted that Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as “the Act of 1956”), explains the status of the natural guardian of hindu minor. In the matters of custody of a minor child who is below five years, shall ordinarily be with the mother. Thus, such condition would be covered within the sweep of Section 23 of the Act of 1872 and in turn, against the provision of Section 6 of the Act of 1956. It is further submitted that various factors, have not been taken into account viz. the income and the residence. The income of the wife compared to the income of the husband, is higher. The appellant-mother is residing in a flat comprising 2 BHK, sufficient for a mother and son, whereas the father is possessing a small apartment consisting of one hall and a kitchen. The three factors are disregarded while deciding the application. As against this, what weighed was the emotional bond

of the father and son. It is submitted that it is but natural that when son is staying for such a long period with the father, he would get emotionally attached to the father which aspect ought not to have been considered by the Court below. Reliance is placed on the judgment in the case of *Akshay Gupta vs. Divya and others* of the High Court of Punjab and Haryana at Chandigarh passed in CR-641 of 2019.

2.2 It is further submitted that the mother being the natural guardian of the minor child, the custody is presumed to be with the mother. It is submitted that it is a settled position of law that the custody of a minor child to mother would result into overall welfare of the child for, the mother can take care of the child in much better ways than any other persons. The appellant-mother, is more qualified as she is possessing the qualification of Diploma in Electrical Engineering compared to the qualification of the respondent-father. It is submitted that the appellant-mother initially was doing a job; however, currently, she is engaged in freelancing work. It is submitted that the respondent-father, is doing job in two shifts, one in the morning from 9:30 a.m. to 11:30 a.m. and in the afternoon from 2 p.m. to 7 p.m. According to the job profile and the timings of the respondent-father, the son, would not be taken care of properly whereas the job profile of the appellant-mother, is more flexible and she would be in a position to take care of the child in a better way. Also, there is nobody else in the family of the respondent-father to take care of the son. It is, therefore, submitted that the learned Judge committed an error in providing limited visitation rights and denying the custody of the child.

3. On the other hand, Mr Bhunesh Rupera, learned advocate appearing for the respondent-father, has submitted that the marriage took place in the year 2015. The child was born in the year

2021. It is further submitted that when the child was one and half years old, he was left by the appellant-wife. Besides, as per customary divorce that took place in the month of October 2022 the appellant-mother agreed that she shall not claim the custody of the child. She was not desirous of having the custody of the child. When it was agreed and she did not claim the custody of the child at that point of time, it would not be proper on her part to turn around and now claim the custody, almost after a period of more than a one year from the date of separation.

3.1 It is submitted that when the application was filed seeking custody, arrangement was agreed that the mother would meet the child as per the time agreed; however, on certain occasions, the mother has not shown her inclination to meet the child. It is submitted that claim of the appellant-mother about staying at Ahmedabad is also doubtful as, all throughout the address mentioned of hers, is of Siddhpur. Even in the examination-in-chief address shown is of the Siddhpur and not Ahmedabad. The appellant-mother since is engaged in freelancing work, it is difficult to believe that that she would be staying at Ahmedabad.

3.2 It is further submitted that in the absence of challenge to the customary divorce deed, it is incorrect to contend that it is null and void and is not acceptable. If at all it is considered as null and void or in violation of provision of Section 23 of the Act of 1872, it has to be challenged before the Court of competent jurisdiction by filing a suit or as per the available remedy. Having accepted the customary divorce deed, it would not be open for the appellant-mother now to contend it as null and void. Assuming without admitting that the customary divorce deed is null and void, the provision of Section 6 of the Act of 1956 uses the term “ordinarily” and it means not necessarily. Therefore, what is to be seen is the welfare of the child,

which is paramount, for granting the custody and in the case on hand, the respondent-father is sufficiently taking care of the child. The child, is admitted in reputed school which is affiliated with the CBSE Board and as per the report card the child is faring well. The school, is located at a nearby place from the present residence and as per the job profile of respondent-father, the timings are flexible so as to sufficiently take care of the child. Besides there are other family members residing in the vicinity who takes care of the child. It is submitted that as of now, the child is of four years and six months of age i.e. close to five years and is comfortable in staying with the father. So far as the residence is concerned, it would not be correct to say that the house is one room and kitchen. It is an independent tenement and according to the need, it can be expanded by putting up additional construction.

3.3 While inviting the attention to the photographs placed on record (page nos.200 and 201), it is submitted that they suggest that not only in the studies but also in the extracurricular activities the child has excelled. It is also submitted that the income which is being earned by the respondent-father is sufficient to maintain the son and himself. Reliance is placed on the judgment in the case of *Chandrikaben Hargovinddas Parmar w/o Jayprakash Nareshkumar Joshi vs. Jaiprakash Narshbhai Joshi* passed in First Appeal no. 1932 of 2021. It is submitted that this Court, did not entertain the First Appeal and allowed the custody of the child to remain with the father. Reliance is also placed on the judgment in the case of *Poonam Wadhva vs. Ajay Wadhva* of the Hon'ble Supreme Court passed in Special Leave Petition (CRL) no.12458 of 2024). It is submitted that in the case before the Apex Court, as the son was not willing to part company of his father, custody was allowed to be retained by the father.

3.3 It is therefore, submitted that the Court below has rightly considered all the factors viz. the age and the welfare of the child; the appellant-mother willingly surrendering the custody of the child to the respondent-father, while taking the divorce. Only thereafter, the learned Judge, has allowed limited visitation rights and in the absence of any error committed, the judgment, does not warrant interference and the appeal, may kindly be dismissed.

4. Heard the learned advocates appearing for the respective parties. Accorded thoughtful consideration to the paper-book and the documents placed on the record.

5. The brief facts stated are thus: The marriage between the appellant and the respondent was solemnized on 10.08.2015 and on 07.05.2021, the child was born. Due to irreconcilable differences, the parties agreed to a customary divorce and the deed of divorce was executed. As per the condition no.2 of the deed of divorce, the permanent custody of the child was given to the respondent-father as the appellant-mother waived her claim to custody while retaining limited visitation rights of meeting the child as per the convenience of both the parties.

6. After more than a year, on 08.11.2023 the appellant-mother preferred an application under the provision of Section 25 of the Guardian and Wards Act, 1890 (hereinafter referred to as “the Act of 1890”) read with sub-section (2) of Section 6 of the Act of 1956. Application Exh.5 was decided by passing an order dated 03.08.2024, whereby the custody of the child was handed over to the appellant-mother with limited visitation right to the respondent-father. The interim order dated 03.08.2024, was subject matter of challenge and this Court, directed the Family Court to conclude the hearing of the suit. Accordingly, vide impugned judgment, the

request of the appellant-mother for permanent custody of the child is rejected. The appellant-mother, has been given exclusive visitation right to meet and see the minor son "[redacted]" on every 1st and 3rd Sunday of each calendar month between 10 a.m. to 5 p.m. at any public place suitable to the parties. Moreover, the appellant-mother is allowed to talk to her child through video call / audio call once in a week for 30 minutes as per the convenience of the child. The appellant-mother is also permitted to meet and see her minor child on his birthdays for three hours as per the convenience of the child. Being aggrieved, the appellant-mother has preferred the captioned appeal.

7. The following issues were formulated in the application:

> (i) whether the applicant proves that the welfare of the minor child is not with the opponent but is with the applicant;
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> (ii) whether the applicant proves that in the interest and paramount welfare of the minor child, the permanent custody of the minor child be given to the applicant.

Both the above-referred issues were decided in negative.

8. Discernibly, on 03.10.2022, the parties have executed a divorce deed – Exh.29A. Condition no.2 which is in vernacular, free english translation of the relevant excepts would be thus;

> "During the existence of the marriage of both the parties, son '[redacted]' was born on 07.05.2021 whose permanent custody shall remain with the second party; however, the first party if she wishes to meet the child, the meeting shall be arranged as per the convenience of both."

9. Therefore, the above condition unequivocally provides that the permanent custody of the child shall be with the respondent-father. Now before this Court it is sought to be contended that the divorce deed was executed under duress and coercion and is not out of freewill. Decision to hand over the custody was conscious decision taken by the appellant-mother and it cannot be said that it was under force or pressure or coercion. It is difficult to fathom that if the appellant-mother was of the opinion that agreement was a result of a coercion why did she not challenge. The first thing the mother would do, is to challenge it. After almost one year and one month, the appellant-mother preferred the application seeking permanent custody of the child; however, until now the divorce deed is not challenged. It is also sought to be argued that the agreement, is void-ab-initio and is hit by the provisions of Section 23 of the Act of 1872 for, the condition depriving the custody of the child to the mother is barred by law. It is also argued that if such a condition is allowed to be prevailed, it would defeat the spirit of section 6(a) of the Act of 1956 which provides that the custody of the minor who has not completed the age of 5 years shall ordinarily be with the mother. At this stage, section 6 of the Act of 1956 is worth referring to and is quoted hereinbelow:

> "6. Natural guardians of a Hindu minor.—The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—
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> (a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
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> (b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;
>
> (c) in the case of a married girl—the husband:
>
> Provided that no person shall be entitled to act as the natural

guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.—In this section, the expressions "father" and "mother" do not include a step-father and a step-mother."

10. Therefore, the question which arises for the consideration in the appeal is whether the Family Court in the facts of the case was justified in allowing the custody of the child to the respondent-father and visitation rights to the appellant-mother ? The issue would also be as to whether the respondent-father, is ensuring the welfare of the child and adequately attending to his needs ? Answer to both issues are in affirmative.

11. With regard to the issue of the custody of the child, there is no quarrel with the proposition that welfare of the child is paramount and is to be considered. It is true that the appellant-mother is a natural guardian; however, the respondent- father is a natural guardian as well. It is not in dispute that appellant-mother left the child when he was 16 months old and substantial time is passed and now the child is four and half years. All the while the child had the company of the father and now he would be completing 5 years soon.

12. At the outset, this Court, would like to make a reference of the interaction that took place during the pendency of the proceedings. This Court, had the occasion to interact with the child in chamber, on more than one occasion. Upon such interaction with the child, this Court, has observed that the child is being taken care of in a proper, decent and satisfactory manner. Additionally, child is admitted to a school affiliated with a Central Board located nearby

the residence of the respondent-father. This Court, did not find any shortcomings in the grooming or upbringing of the child. This Court, is satisfied that though the child is of the tender age of four and half years, possesses all the etiquettes, discipline and courtesies. The child shares a close bond with his father. Moreover, the respondent-father is aware about each and every need of the child. This Court, also finds from the photographs Exhs.63 and 64 placed on the record the child engaging in the extracurricular activities. Further photographs which are placed on the record Exhs.60 and onwards, substantiate the bonding between the respondent-father and the son. The above observations are further substantiated by the evidence on record. Exh.72 which is the report card of the child. The child is performing well as, the over all assessment of the child is graded as “Very Good”. So far as the fee aspect is concerned, it is taken care of by the respondent-father, who is regular in paying the fees and incurring other expenses. Therefore, so far as the grooming and the studies of the child are concerned, this Court, does not find anything objectionable and is more than satisfied that the child is being taken care of properly.

13. It is also sought to be argued that the respondent-father is earning less compared to the earnings of the appellant-mother. Said contention is also misplaced and dehors the documentary evidence on the record. Undisputedly, the respondent-father, is doing job in two shifts, first shift from 09:30 a.m. to 11:30 a.m. and second shift in the afternoon from 02:00 p.m. to 07:00 p.m. The respondent-father is earning a regular decent salary of Rs.55,000/- (Rs.40,000/- + Rs.15,000/-). It is not in dispute that the maternal aunt and other family members are residing in the neighborhood and in the absence of the respondent-father, the maternal aunt and other family members are taking care of the child. This Court, has also taken a judicial notice of the fact that the maternal aunt has

religiously attended every hearing in this matter. Such regular attendance demonstrates the concern and affection of hers for the child.

14. It is claimed by the appellant-mother that she is more qualified and possess the degree of Diploma in Electrical Engineering and is earning well. To substantiate the earning, bank statements have been produced on the record of the years 2022-2023, 2023-2024 and 2024-2025. The bank statements, demonstrate that there is no regular income received by her and rightly so as it is claimed that she is doing freelancing. Moreover, the figures indicated in the bank statement in the month of March 2025, is Rs.32,587/- and the last entry, gives a pitiable picture. During the course of the hearing, it is claimed that the appellant-mother is earning around Rs.70,000/- to Rs.80,000/- per month; however, there is nothing on the record to suggest or substantiate the income of the appellant-mother of Rs.70,000/- to Rs.80,000/-per month. It might be that the appellant-mother is earning well; however, the bank statement of the year 2025 does not give a satisfying picture. In the absence of any evidence, this Court, would not like to comment further as the bank statements are enough to indicate the income of the appellant-mother.

15. It is also claimed that compared to the house of the respondent-father, the appellant-mother occupies a spacious flat of 2 BHK and hence, the child would be more comfortable with her. While, the respondent-father is residing in a small house consisting of one room and kitchen; such claim is baseless and cannot be accepted. It may be noted that although small, it is independent, decent apartment of the ownership of the respondent-father with a prospect of further construction in future. Therefore, it is difficult to fathom as to how the apartment of the respondent-father is

insufficient in terms of the space to accommodate the respondent and the child. As against this, the appellant-mother is staying in the flat on rent. This is not to suggest that staying on rent would be a negative factor and against the appellant-mother; however, the respondent-father is not required to shell any amount towards rent. Therefore, the said contention also does not require to be accepted and is rejected.

16. Having discussed so, this Court would now briefly advert to the impugned judgment. As recorded hereinabove, the issues were formulated and were answered accordingly. The Family Court, has discussed the agreement of customary divorce, in paragraph 12.2. The contention of the appellant-mother that she was coerced to sign the divorce papers, is noted. It is also recorded that it is a case of the appellant-mother that she was coerced and the divorce deed was executed under the duress or pressure; however, admission of the appellant-mother is considered that she has not filed any criminal complaint regarding the coercion or execution of the deed under duress. As discussed hereinabove, the decision to hand over the custody was a conscious decision and cannot be said to be under duress or pressure.

17. Moreover, the Family Court, in paragraph 22 has observed that the appellant-mother left the child when he was only 16 months old and stayed away and since then, the child is in the constant care and custody of the respondent-father. The Court has also taken note of the age of the child of being 4 years and before this Court, the child is around 4 and half years. All through out, the child was in the constant care and protection of the respondent-father and has extended phenomenal love and affection and taking sufficient care in grooming him. Considering the welfare of the child, in paragraph 23, the Family Court has discussed about the qualification and

capacity of both the parents and it is concluded that the respondent-father is taking all necessary care as required in furtherance of the overall welfare of the child including emotional, educational and his physical well-being. We are in full agreement with the learned Judge. The appellant-mother could not point out that the child's welfare is compromised in any manner in the current situation. Paragraphs 23 to 25 of the impugned judgment, it is observed thus:

> "23. In the present fact and circumstances as brought on record through the evidence of both the sides as discussed above, the opponent-father is taking care of all necessary action as required for overall welfare of the child, including the emotional, educational and his physical well-being. There is nothing on record and the applicant is also not able to demonstrate that the child [redacted]'s welfare is being compromised in any manner in current living situation with the opponent. To bring out the child from the custody of the father with whom he is living for last 3.5 years and with whom he has developed strong emotional bond, and thereafter to put him in totally strange and new environment with the applicant-mother, cannot be considered to be in welfare of the child [redacted].
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> 24. Hence, in view of the above discussion, the applicant has failed to prove that the welfare of the minor child is not being taken care of by the opponent, and that the child's welfare would be better served by the applicant. Therefore, this points No.1 and 2 are answered in the negative.
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> 25. Considering the peculiar circumstances of this case, this Court also feels that the applicant-mother might have love and affections towards her child being his biological mother and might have desire to meet the child also. On the other hand, the child should also not deprived off from getting love and affections from the mother during his childhood and he should not become the victim of the disputes between the parties and at the same time, he should also not be used as a tool in their battle. The child cannot be treated as a property or a commodity. It is the duty of both the parties to see well-being of the minor child and it is also their duty to see that minor child does not lose contact of her non-custodial parent."

18. The Family Court, therefore, after being satisfied of overall welfare and interest of the child, did not entertain the application and allowed the custody of the child to remain with the respondent-

father, with a rider that the appellant-mother shall have exclusive visitation rights to meet and see minor son "[redacted]" on every 1st and 3rd Sunday of each calender month from 10:00 a.m. to 05:00 p.m. at any public place.

19. The judgment in the case of Akshay Gupta (supra) of Punjab & Haryana High Court cited, would be of no assistance. The issue raised was about the territorial jurisdiction and is dealt with by the Court interpreting the provisions of section 6(a) of the Act of 1956.

20. In the facts of the case the appellant mother had executed a divorce deed and has handed over the custody of child taking a conscious decision and hence, she cannot claim superior custody right. In the absence of any perversity pointed out by the learned advocate appearing for the appellant-mother, this Court, is of the opinion that the impugned judgment does not warrant any interference so also the appeal. The appeal, therefore, is dismissed. No order as to costs.

21. Connected civil application shall also stands dismissed accordingly. Registry is directed to remit the Record & Proceedings to the Court concerned forthwith.

(SANGEETA K. VISHEN,J)

(NISHA M. THAKORE,J)

RAVI P. PATEL