

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.9349 OF 2021

**PRASHANT ARUN CHAVAN
VERSUS
SMT. HEMLATA KANHAIYALAL LOHAR AND ANOTHER**

...
Advocate for Petitioner : Mr. A. S. Savale
Advocate for Respondent Nos. 1 & 2 : Ms. S. T. Kazi

...

CORAM : SMT. BHARATI DANGRE, J.

DATE : 24th JANUARY, 2022

PER COURT :

1. Heard the learned counsel for petitioner and the learned counsel for respondents.
2. The petitioner is aggrieved by the order passed by the District Court-1, Shahada, Dist. Nandurbad, on 13-07-2021, on Exhibit-5 in Misc. Civil Application No.16/2020, instituted by the petitioner seeking interim order under Section 12 of the Guardians and Wards Act, to visit his minor son Harsh, who is aged 10 years and presently in the custody of wife.
3. I need not dive deep into the relationship between the parties, but suffice it to note that, on their marriage being solemnised in the year 2008 a child was born out of the wedlock in the year 2010.

Since the relationship turned sour, the parties agreed for divorce by mutual consent in HMP No.08/2016 and the decree came to be passed by the learned Civil Judge Senior Division, Shahada, on 29-07-2016, on the basis of the consent terms arrived between the parties.

Perusal of the consent terms in the form of agreement which resulted in separation of the parties without contest, record that the petitioner husband is now re-married and he has one daughter from the new marriage and the terms of agreement settled the amount of permanent alimony for the wife as well as for the son with a specific fact being recorded that the child Harsh who was aged 05 years at the time when the divorce decree was obtained by mutual consent, would permanently stay with his mother and for his well being and future education he showed willingness to part with an amount of Rs.3,00,000/-.

It was also agreed that the terms of settlement arrived between the parties would put an end to the relationship and each of them would not claim any right over the property of each other either movable or immovable. This formed basis of the decree for divorce.

4. After 05 years i.e. to be precise on 07-12-2020, the petitioner filed Misc Civil Application No.16/2020 in the Court of District Judge, Shahada, by invoking Section 8 of the Guardians and

Wards Act, seeking custody of his minor son Harsh, in which he filed Exhibit-5 seeking visitation rights. True it is that the petitioner is a father of the child who is minor and by instituting proceedings under Section 8 of the Guardians and Wards Act, and parent claiming to be the guardian of a minor is entitled to file an application and the provision to determine the application is set out in Section 11 and powers to make interlocutory order for protection of minor is conferred under Section 12 of the said Act.

5. The petitioner is father of son Harsh and therefore, cannot be prohibited in law to seek his custody and merely because the permanent custody is granted to the mother, he would not be precluded from filing an application, which deserve a consideration as per the provision of the Act.

Whether the application is to be granted or not in the facts and circumstances of the case, would be within the discretion of the learned District Judge who shall exercise the power under provisions of the Guardians and Wards Act. The interim application also deserves to be decided on merits.

The ground set out in paragraph No.7 of the impugned order that in a decree of divorce by mutual consent under Section 13-B of the Hindu Marriage Act, where the permanent custody was granted to

the mother, can be a ground for rejection of the application on merits but the application for visitation cannot be merely refused on that ground and it is expected to be decided on its own merits, considering the welfare of the minor, which is of paramount consideration.

On the aspect that the petitioner husband has never availed custody of the child or even enjoyed any visitation rights, it is quite possible that the child who is now in understandable age may not accede to the request and ultimately the Court will have to pass an order based on the merits of the matter, deciding whether the petitioner/applicant is entitled for the custody. One of the reason given by the learned Judge, refusing the visitation right is the COVID pandemic and considering it safe and proper in the interest of the child, the interim application is rejected.

6. In the aforesaid circumstances, since the agreement between the parties i.e. husband and wife would not preclude the father from claiming guardianship over the child, if the Court deem it fit, by assessing the merits of the matter and whether it can be conducive in the interest and welfare of the minor child whose custody is claimed for the first time after he has reached age of 10 years, the learned Judge shall redetermine the application by taking into consideration the will of

the child also.

Necessarily the impugned order is quashed and set aside with liberty to the learned Judge to determine the application for interim custody, without being prejudiced solely with the understanding between the parties, which is converted into a decree and has dissolved the marriage between themselves. This surely has not dissolved the relationship between the father and son should be borne in mind.

The application is remitted back to the learned Judge for reconsideration. Writ petition is allowed, as aforesaid.

(SMT. BHARATI DANGRE, J.)