



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

**CIVIL REVISION APPLICATION NO.166 of 2024
AND
WRIT PETITION NO.13307 OF 2023.**

Pankaj s/o Madhavrao Deshmukh,
age 37 years, Occ. Nil,
At present, Residing presently
at Yugandhar, plot no.7,
Janakpuri Colony, Garkheda Parisar,
Aurangabad.

Applicant.
Custodial father

VERSUS

Divyansha w/o Pankaj Deshmukh
age 28 years, Occ. Household,
residing at c/o Anita wd/o Avinash Naik,
at Post Barul, Tq. Kandhar,
District Nanded.

Respondents.
Non custodial mother

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Advocate for applicant : Mr. Hemant Surve

Advocate for Respondent : Mr. S.S. Deshmukh h/f Mr. A.P.
Deshmukh

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CORAM : S. G. CHAPALGAONKAR, J.

Reserved on : February 11, 2025.

Pronounced on : May 07, 2025.

COMMON ORDER :-

1. Both these matters are clubbed together as per order of the Senior Most Judge dated 5.12.2024 and placed for simultaneous hearing before this Court.

2. Civil Revision Application No.166 of 2024 takes exception to the order dated 27.9.2023 passed below Exhibit 12 by the District Judge-1, Kandhar, by which, application filed by the applicant seeking rejection of Civil M.A. No.184 of 2022 under Order VII Rule 11 of the Civil Procedure Code is rejected. Writ Petition No.13307 of 2023 takes exception to the order dated 27.9.2023 passed below Exhibit 15 by the District Judge-1, Kandhar in Misc. Civil Application No.184 of 2022, thereby granting prayer of respondent-wife for interim custody of minor in terms of section 6 (a) of the Hindu Minority and Guardianship Act, 1956 (for short the said Act). Both these applications are decided by this common order. (Parties hereinafter are referred to as per their original status in the proceeding before the District Judge i.e. Applicant-wife and Respondent-husband.)

3. Brief facts, giving rise to this litigation can be summarized as under :-

Applicant (original respondent) and respondent (original applicant) married on 26.12.2018. Couple is blessed with male issue on 1.2.2020, named as "Reyansh". Lateron, alleging mental illness to applicant-wife, husband instituted

petition for divorce before the Family Court, at Aurangabad. Respondent alleges that applicant started residing at her maternal home at Kandhar. She instituted four different proceedings against him. She filed a petition under section 6 (a) of the said Act seeking custody of the minor son vide Misc. Civil Application No.184 of 2022, which is subject matter of the present litigation.

4. Applicant claimed custody of the minor son aged about 2 ½ years. She filed an application for interim custody below Exhibit-15, whereas respondent filed an application below Exhibit-12 seeking rejection of the application invoking jurisdiction under Order VII Rule 11 of the Civil Procedure Code. Both these applications are decided by common order, which is impugned in present proceedings.

5. Mr. Surve, learned advocate appearing for the applicant vehemently submits that Civil Misc. Application No.184 of 2022 is liable to be rejected as District Judge, Kandhar sans territorial jurisdiction to entertain same as the minor, whose custody is sought, is residing with respondent at Aurangabad. He would further submit that application itself is not tenable since the respondent being father of the minor is

natural guardian and entitled to retain custody of minor son. The mother may be treated as natural guardian after father. Therefore, primarily, father would be entitled to custody of minor.

6. In support of his contentions he relies upon the judgment of the Supreme Court in case of **State of Punjab Vs. Dalvinder Pal Singh Bhullar and others etc.** (in Criminal Appeal No.753 to 755 of 2009), Judgment of High Court of Madhya Pradesh in case of **Keshav Prasad Sharma V. Halke Raikwar and another** (WP No.10239 of 2007), judgment of Division Bench of Allahabad High Court in case of **Chatrasal Singh Vs. Priyanka** in FA no.349 of 2015, and Judgment of Division Bench of Delhi High Court in case of **Jasmeet Kour Vs. Navtej Singh**, Mat APP (F.C.) 3 of 2017 dated 19.7.2017, Judgment of Supreme Court of India in case of **Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) (D) through L.Rs. And others** in civil appeal No.9519 of 2019 and judgment in case of **Sopan Sukhdev Sable Vs. Assistant Charity Commissioner** in Civil Appeal no.448 of 2004.

7. Per contra, Mr. Deshmukh, learned advocate appearing for applicant/Respondent herein submits that since

Reyansh/minor is aged about 2 ½ years, primarily his custody shall be deemed to be with the mother. He would rely upon wording employed in section 6 (a) of the said Act. In support of his contentions, he relies upon observations of the Supreme Court of India in case of **Roxann Sharma Vs. Arun Sharma** reported in **AIR 2015 SC 2232** and Judgment of the High Court of Punjab and Haryana at Chandigarh in case of **Akshay Gupta Vs. Divya and others in Cr-641 of 2019 (O&M)**.

8. Having considered the submissions advanced, it can be observed that husband filed application seeking rejection of proceeding in Misc. Civil Application No.184 of 2022 instituted by wife seeking custody of the minor. According to Mr. Surve, learned advocate appearing for the husband, minor is residing at Aurangabad alongwith husband. Therefore, Court at Kandhar, District Nanded lacks territorial jurisdiction to try and entertain the application.

9. At this stage, reference can be given to section 6, particularly clause (a) of Hindu Minority and Guardianship Act, 1956, which reads thus :-

6. Natural guardians of a Hindu minor.—

The natural guardian 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—

(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;)

b.....

c.....

10. The aforesaid provision has been interpreted by Punjab and Haryana High Court in case of Akshay Gupta. Observations made in paragraph nos 14 ad 15 are relevant, which reads thus :-

“14. In the aforesaid premise, I have no hesitancy to interpret section 6(a) *ibid* to mean and intend that even though a minor below five years may not be in physical custody/residing with mother, but her/his custody would be deemed to be at a place where the mother is residing. It is so held accordingly.

15. The respondent/mother herein, at the time of instituting proceedings before the Family Court, was the deemed natural guardian of the minor child. Therefore, the natural custody would also be presumed to be with mother, regardless of the place where the child was actually residing physically at that time.”

11. This Court finds that aforesaid observations of the Punjab and Haryana High Court are in tune with the legislative intent and purport of section 6 (a) and, therefore, if applicant has instituted the proceeding for custody of minor before the

Court within whose jurisdiction she is residing, objection as to jurisdiction of such Court in proceeding for custody of the minor on ground that minor is residing with father at place beyond territorial jurisdiction of such Court need not be entertained, particularly, when such objection is put in service as ground for rejection of plaint under Order VII Rule 11 of the Civil Procedure Code.

12. The powers under Order VII Rule 11 of CPC can be exercised within parameters set out therein i.e. when cause of action is not set out, the suit is not properly valued or stamped or suit from statement in plaint appears to be barred by law. Once Court entertains application under Order VII Rule 11 and eventually rejects plaint, it amounts to a decree, unlike return of plaint under Rule 10 of Order VII. Therefore, bar of territorial jurisdiction cannot be entertained as 'good ground' for exercise of powers under Order VII Rule 11 of the Civil Procedure Code.

13. Mr. Surve, learned advocate appearing for the applicant-husband endeavors to contend that respondent-wife has no cause of action to claim custody of minor since father is a natural guardian and he can retain the custody. Aforesaid

submissions appears to be misconceived not only because effect of section 6 (a) of Hindu Minority and Guardianship Act, but also law declared by the Supreme Court of India under section 142 of the Constitution of India in case of Roxann Sharma (supra), wherein Supreme Court observed in paragraph no.12, as under :-

“12. **The HMG Act** postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardized if the custody retained by the mother. **Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old.** It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this Section or for that matter any other provision including those contained in the G&W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.”

14. In light of the aforesaid observations, there cannot be doubt that as long as the child is aged below 5 years, his custody must be retained with mother. Therefore, the order granting interim custody to the applicant cannot be faulted with. Only because father is natural guardian under section 6, he cannot claim custody of the minor as mother would have

primacy in custody of person of minor, who has not completed age of five years.

15. Mr. Surve, learned advocate appearing for the husband relied upon observations of the Judgment of Division Bench of Allahabad High Court in case **Chatrasal Singh Vs. Priyanka** (supra) and submit that section 9 of the Guardian and Wards Act would govern jurisdiction of the Court to entertain the proceeding for appointment of the guardian, which stipulates that District Court having jurisdiction in place where minor ordinarily resides can entertain the application. However, sub-clause 3 of the Section 9 stipulates that District Court may return the application, if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction. Apparently, this provision deals with appointment of Guardian of property of minor. In case of custody of tender aged minor, application for rejection of plaint on the aforesaid ground would not be tenable.

16. In the result, this Court do not find any merit in Civil Revision Application as well as the Writ Petition. Hence, Civil Revision Application and Writ Petition stands **dismissed**.

17. At this stage, learned advocate appearing for the applicant/petitioner-husband prays for continuation of interim relief, however, for reasons recorded in this order and looking to plight of minor and his mother, prayer is rejected.

(S. G. CHAPALGAONKAR)
Judge.

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