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O.P.No.556 of 2024

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.08.2025

CORAM:

THE HON'BLE MR. JUSTICE K.KUMARESH BABU

O.P.No.556 of 2024

and

A.Nos.4520 of 2024, 1491 & 2817 of 2025

K.Sowbhagya Lakshmi

...Petitioner

Vs.

K.Ravikanth

... Respondent

PRAYER

This Petition has been filed praying that

a) the petitioner herein may be appointed as the Guardian of the person of the minor child, Pratibha Komaravolu born on 13.04.2015 now aged about 9 years and

b) the respondent may be directed to handover custody of the minor child, Pratibha Komaravolu born on 13.04.2015 now aged about 9 years, now residing at No.41/63, Old SBI Colony, West Tambaram, Chennai – 600 045 to the petitioner.

For Petitioner : Mr.V.Manoharan

For Respondent : Mr.M.I.Javid Akbar

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ORDER



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This Original Petition had been filed seeking to appoint the petitioner as the guardian of the minor child and to direct permanent custody of the petitioner. Applications have also been filed seeking for interim visitation.

2. Heard Mr.V.Manoharan, learned counsel appearing on behalf of the petitioner and Mr.M.I.Javid Akbar, learned counsel appearing on behalf of the respondent.

3. The Original Petition had been resisted by the learned counsel appearing for the respondent relying upon the order passed by the Sub-Judge, Alandur in HMOP.No.131 of 2022 dated 11.08.2022. According to him, the parties have filed OP for divorce on mutual consent. The petitioner herein had waived her right over the custody of the minor and hence she cannot maintain the petition as well as the right of visitation. The learned counsel for the respondent also relied upon the judgment of the Gujarat High Court in support of his contention made in ***Mausami Dilipkumar Bhatt Vs. Maunang Lalitkumar Gor*** reported in ***2025 SCC OnLine Guj 894***.



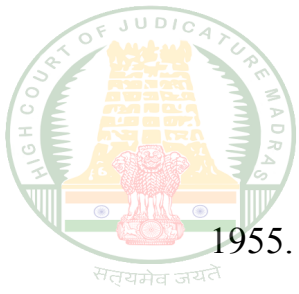
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4. Contesting the claim of the learned counsel for the respondent,

the learned counsel for the petitioner would submit that there can be no *res judicata* in a claim for custody of the minor child. He would submit that the apex Court had time and again held that with regard to the custody of the minor child there cannot be any *res judicata*, as the custody of the minor child would vary according to the circumstances that may arise in future. Therefore, he would submit that the preliminary objection raised by the respondent would have to be rejected. He would further contend that the petitioner would only seek visitation rights of the child and would not press the right for guardianship or permanent custody of the child.

5. I have considered the rival submissions made by the counsel on either side.

6. The petitioner/ mother had approached this Court seeking herself to be appointed as the guardian of the minor child and also seeking the custody of the minor child invoking the provisions under the Guardians and Wards Act, 1890. It is not disputed that the parties had filed a divorce on mutual consent under the provisions of Hindu Marriage Act,



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1955. By a fair and decreetal order dated 11.08.2022 the learned sub-Judge, Alandur in HMOP.No.131 of 2022 had granted decree of divorce.

He had also recorded that the petitioner herein had waived her right of custody of the minor child and the custody of the child was given to the respondent herein, who is the father of the minor child.

7. Reliance had been placed by the learned counsel appearing for the respondent on the judgment of the Gujarat High Court in ***Mausami Dilipkumar Bhatt Vs. Maunang Lalitkumar Gor*** reported in ***2025 SCC OnLine Guj 894***, wherein, a similar claim was made by the father of the minor child therein, the learned Judge of the Gujarat High Court after referring to Section 26 of the Hindu Marriage Act, 1955 had held that the application under the Guardians and Wards Act, 1890 cannot be invoked with the custody of the minor child, when the party had relinquished his right for custody and it is only proper for the person who had relinquished such right to approach the very same Court, which is competent civil Court for modification of the said order. For proper appreciation the relevant paragraphs are extracted hereunder:

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



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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



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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



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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



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minor child Krishvi 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.

8. I am in agreement with the view expressed by the learned Single



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Judge of the Gujarat High Court. The petitioner herein only seeks for visitation of the minor child. There has been no allegation of any ill-treatment to the minor child. All allegations made was that the respondent had refused to allow the petitioner to meet the minor child. Admittedly the minor child is also studying in a CBSE school.

9. In such view of the matter, I am of the view that the present Original Petition and the interim applications cannot be permitted to be canvassed by the petitioner before this Court by invoking the provisions of the Guardians and Wards Act, 1890 and the petitioner should only approach the Court which granted the decree of divorce under the provisions of the Hindu Marriage Act, 1955.

10. In fine, this Original Petition stands **dismissed**, with liberty to the petitioner to approach the Court which granted the decree of divorce for modification of the same. No costs.

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Index :Yes/No

Speaking/ Non-speaking order

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