


MHSN040004462023 	Presented on : 09.05.2023. Registered on : 09.05.2023. Decided on : 07.03.2026. Duration : 2 yrs. 09 mts. 26 ds. <u>Exhibit No. 32</u>
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IN THE COURT OF
DISTRICT JUDGE-2 & ADDL. SESSIONS JUDGE, ISLAMPUR
TAHISIL WALWA DIST. SANGLI

PRESIDED OVER BY ANIRUDDHA Y. THATTE.

Misc. Civil Application No. 26/2023.

Amol Sarjerao Sanmukh,

Age: 34 yrs. Occu. : Agriculture,

Address: Wathar, Tal . Karad,

Dist Sangli

Petitioner.

VERSUS

Priyanka Amol Sanmukh,

Age: 31 yrs. Occu. Service

R/o. Sagaon, Tal Shirala,

Dist Sangli.

Respondent.

Advocate for Petitioner: Patil Ravi Bhagwanrao.

Advocate for Respondent: Patil Shubhangi Vikram.

JUDGMENT

(Delivered on 07.03.2026)

1] This is an appeal by the respondent in the Trial Court taking exception to the order passed by the Trial Court i.e. Civil Judge Senior Division Islampur, on 02.05.2023 below **Exh.10** in Hindu Marriage Petition No.288/2022. It was an application for

interim custody of the child filed by petitioner under section 26 of the Hindu Marriage Act. The original petition pending before the Trial Court is a petition for divorce under section 13(1) (1A) of the Hindu Marriage Act 1955.(Here-in-after it is referred as “the H.M.A.”). Parties are referred as per their status before the Trial Court.

THE BRIEF FACTS FOR THE PURPOSE OF THIS APPLICATION AND APPEAL CAN BE SUMMARISED AS UNDER:

2] Petitioner is the wife and respondent is the husband. It was their love marriage. They got married on 13.02.2012. This fact is not in dispute. A female child i.e. Advika is having date of birth 12.07.2017. On the date of filing of the application under section 26 the child was five years old. It is alleged that, the petitioner was staying at Mumbai with the child in one rented room. Petitioner’s sister was also staying with petitioner, taking care of the child. The child was admitted in one school in Mumbai. On 06.10.2022 the respondent/husband made in unsuccessful attempt to take the child with him forcefully. Then on 10.10.2022 when petitioner’s sister Hema was taking child to the school, it is alleged that respondent/husband forcefully took the child with him. Since then the child is in his custody.

3] The petitioner/wife has filed petition for divorce under section 13(1),(1A) of the H.M.A. and pending said petition, application **Exh.10** came to be filed for interim custody for the child.

4] The respondent/husband filed his reply at **Exh.13**. He

denied allegations made against him a forcefully taking child with him. It is his contention that when the child was of a tender age petitioner started doing job. She did not take care of the child. She avoided to give motherly love to the child. The respondent/husband is taking good care of the child with the help of his mother and the child has developed good bond of love with respondent's mother. The child is admitted in Krishna English Medium School at Wathar and respondent/husband is taking good care of the child. He prayed for rejection of the application.

5] The learned Trial Court by taking into consideration the rival pleadings and arguments passed impugned order there by allowing the interim custody of the child to the petitioner/mother and hence this appeal by respondent/husband.

6] I have heard learned advocate Shri. Ravi Jadhav for the respondent/husband, he argued that the child did not want to stay at Mumbai in the company of the mother. The respondent/husband is taking good care of the child by admitting her in good school and is taking care of overall development of the child. It was the petitioner/wife who gave custody of the child on her own to the husband. Now the child is studying in Third standard and as respondent/husband is staying with his family members including mother and sister-in-law, there are female members in the family to take needful care of the child in future considering the likely changes in her body i.e. starting menstrual cycle and therefore, it can not be said that, only the petitioner/wife can take good care of the child. According to him, the interest of the child, welfare of the

child shall be of prime consideration and wish of the child shall be respected by the Court.

7] While countering the argument of the advocate for the respondent/husband, advocate Shri. A.S. Nalwade, the argument of the advocate for petitioner/wife argued that it was the husband who took forceful custody of the child and for same non-cognizable report is filed by the petitioner/wife to the local police. The petitioner being a mother is the natural guardian of the child. She will be in a better position to take care of the child's needs, particularly when the menstrual cycle of the child starts in due course. The Trial Court has rightly taken into consideration the interest of the child and has rightly passed an order which requires no interference.

8] The following point arise for my consideration to which I give my findings for the reasons below :

Sr. No.	Points	Findings
1	Whether applicant/mother entitled for the custody of the child as prayed ?	In the negative
2	Whether the impugned order warrants interference in appeal ?	In the affirmative.
3.	What order ?	Appeal allowed as per final order.

REASONS**AS TO ALL POINTS :**

9] At the outset I may note that, the advocate for the respondent has placed on record the written notes of argument at **Exh.29**. There in he has made reference of the Judgment of **Hon'ble Calcutta High Court of year 1949**, however, has not placed on record the entire text of said judgment. But, the learned advocate has put reliance on another judgment of Hon'ble Calcutta High Court in the case of **Rohit Kumar Modwel V/s. Sudipa R. Modwel reported in (1995) 1 CALLT 359 (H.C.)** and he supplied the printout generated from **Indian Kanoon website**. In para 8 of this judgment it is held,

Para No.8 - "The children are not mere chattels nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the consideration of their welfare as human beings so that they may grow up in a normal balanced manner as a useful member of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

”

10] The learned advocate for the appellant has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Gayatri Bajaj V/s Jiten Bhalla reported in AIR 2013 S.C. 102**. He

has also put on record the copy of the judgment generated from **Indian Kanoon website**. In this case in para No.12 and No.14 it is held as under ;

Para No.12- *“51 That when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Ganguli’s case the court has to give due weightage to the child’s ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.*

52. The word ‘welfare’ used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parents patriae jurisdiction arising in such cases.”

Para No.14 - *from the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest*

and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child couple with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factor are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

11] Since the application is filed **under section 26 of the Hindu Marriage Act** let us see the relevant provision. Section 26 provides as under :

Section 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.”

12] The plain reading of the section shows that in any proceeding the Court is competent to pass such an interim orders and make such provisions in the decree as it may be deemed just and proper with respect to the custody of minor children. But it also provide, such order shall be passed consistently with their wishes wherever possible. Thus Section 26 says when the Court is passing an order for custody of the child the order shall be consistent with the wish of the child.

13] In the case of **Gayatri Bajaj** the Hon'ble Supreme Court has also held that an order of custody of a minor children is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. The desire of the child coupled with availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parents to take care of the child are some of the relevant factors that have to be taken into account by the Court. The desire, interest and welfare of the minor shall be of paramount consideration.

14] Now keeping in the mind the above legal principles let us deal the relevant facts. Admittedly petitioner/wife and respondent/husband both are working. The petitioner/wife is doing job at Mumbai whereas the respondent/husband at Karad. Thus prima facie it can be said that both are having financial capacity to take care of the education and other needs of the child. Both have ability and means for proper upbringing of the child. At present the child is studying in the English Medium School at Wathar, Tal.

Karad, Dist. Satara.

15] As already discussed above the Court has to take into consideration the wish of the child and therefore this Court had a meeting with the child in camera, in absence of parents but in presence of the advocates of the parties. It is clear from the discussion with the child that, she did not wish to join the custody of the mother at Mumbai and one of the important reason she expressed for same is, at Mumbai she has no sufficient place to play. She has friends at Wathar and more importantly she is taking cricket coaching at Wathar i.e. she is pursuing her hobby by attending the cricket coaching. Since the child is a girl, keeping in the mind her needs in future when her menstrual cycle would start, this Court made inquiry as to who are other members of the family when she is staying with her father at Wathar. It is clear that, it is a joint family and she is staying with her paternal aunt as well as grand-mother and she told that, those two ladies are taking care in absence of her father. Even she told that her grand mother cooks dishes of her choice. This shows not only there are female members available in the family when the child is staying with her father but her care is also taken by the members of the family. Though the child expressed a wish to stay with mother, she has specifically stated that she want her mother to join her at Wathar but she did not wish to join mother at Mumbai. Her this wish has to be kept in the mind in the light of need as to availability of conducive and appropriate environment for proper upbringing as held by Hon'ble Supreme Court in the case of Gayatri Bajaj.

16] From the facts which are coming before this Court it is clear that, a petitioner/mother is staying in a rented room in Mumbai which is a small house, the child has expressed there is no sufficient place to play at Mumbai. At Wathar the child has friends, she plays with them, she is attending the cricket coaching center, her father is taking her to the school and she returns home by school bus. She has good set-up and she has good set life at Wathar in the company of her father. So taking into consideration the schooling and other activities of a child as those transpired after interacting with her. I find in Mumbai there will not be availability of conducive and appropriate environment for the child considering the paucity of the sufficient place, playgrounds and size of the house. In a place like Wathar the child is attending to English Medium School, she is following her hobby by attending the cricket coaching. She has friends at Wathar and there are female members in the family to take care of the child. Under this circumstances, I find it would be in the interest of the child if she is allow to continue to stay at Wathar.

17] The Trial Court in its order has observed that when it met the child was not ready to join mother at Mumbai but Trial Court did not take into consideration the other factors like availability of the conducive and appropriate environment for a child at Mumbai. Therefore, the impugned order is not proper. Keeping in the mind the welfare of the child and the wish of the child it is in the interest of the child to allow her to continue to stay in the company of her father pending main marriage petition and

therefore, I answer point No.1 in the negative and point No.2 in affirmative and pass following order;

ORDER

1. The appeal is allowed.
2. The impugned order passed by Civil Judge Senior Division Islampur on 02.05.2023 below application Exh.10 in H.M.P. No.288/2022 is set-aside consequently the application Exh.10 stands rejected.
3. Parties to bear their own costs.

(Dictated and pronounced in open court.)

Date: 07.03.2026.

**(Aniruddha Y. Thatte.)
District Judge 2 Islampur.**