

Reserved On : 27/03/2026**Pronounced On : 07/04/2026****IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 23694 of 2022****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J. C. DOSHI***Sd/-*

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Approved for Reporting	Yes	No
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KSHITIJ JAWAHARLAL SHAH

Versus

ZARA KSHITIJ SHAH

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Appearance:

MR. YATIN OZA, SR. ADVOCATE assisted by MS SRUSHTI A

THULA(5014) for the Petitioner(s) No. 1

MR RIDDHESH TRIVEDI(6581) for the Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE J. C. DOSHI**CAV JUDGMENT**

[1] By way of this petition under Article 227 of the Constitution of India, the present petitioner has prayed for the following reliefs:-

"a. YOUR LORDSHIPS may be pleased to admit and allow this application;

b. YOUR LORDSHIPS may be pleased to quash and set aside the order dated 05-08-2022 passed by the Ld. Family Court No.3, Ahmedabad in Execution Application No.4 of 2022 and direct the Ld Family Court to implement and execute the

order dtd. 12.1.2017 vide Civil Application No.67/2016;

c. YOUR LORDSHIPS may be pleased to grant any other and further relief as may be deem fit in the light of equity and justice.”

[2] The facts taken up from the pleadings in nutshell are that the parties to the proceedings had been legally wedded husband and wife. The marriage between the parties was solemnized on 21.11.2011 as per the Hindu Rites and Rituals. Out of the wedlock, daughter namely 'J' borne on 03.09.2012, (minor daughter is referred to as 'J' for hiding her identity) and then, differences and disputes arrived between the parties entailing to the separation of husband and wife whereby the wife went to her parental home along with minor 'J'. There are several litigations took place between the parties and one of them is Civil Misc. Application No.67 of 2016 before the Family Court, Ahmedabad.

[2.1] This litigation between the husband and wife was initiated by the husband against the wife under Section 26 of the Hindu Minority & Guardianship Act and the Guardians and Wards Act, 1890 for the custody of the minor daughter 'J'. The wife went to the parental home in June, 2012 for delivering her child but did not return to stay with the husband.

[2.2] In the custody matter, in Civil Misc. Application No.67 of 2016, a compromise arrived at between the parties and joint compromise pursis was placed before the Court vide Exhibit-17 to the proceedings and consequently, the Principal Judge, Family Court, Ahmedabad passed the judgment and

decree dated 12.01.2017 in terms of compromise pursis filed by the parties. Some other litigation took place in interregnum between the parties whereby the present petitioner unsuccessfully filed the contempt proceedings as well as proceedings for the custody of the minor and ultimately, filed the Execution Petition No.4 of 2022 before the Family Court No.3, Ahmedabad for execution of the compromise decree arrived at between the parties. The Family Court, Ahmedabad by order dated 05.08.2022 pleased to dismiss the *Darkhast* by holding that the compromise decree arrived at between the parties is become unworkable due to subsequent development and since the petitioner remained unsuccessful in other proceedings, a compromise decree cannot be executed.

[2.3] By way of this petition, the order dated 05.08.2022 passed by the Family Court, Ahmedabad is called to the challenge.

[3] Learned Senior Counsel Mr. Yatin Oza assisted by learned advocate Ms. Srushti Thula appearing for the petitioner argued at length.

[3.1] The thrust of the argument that the learned Executing Court exceeded its jurisdiction and gone beyond the compromise decree arrived at between the parties by assigning the metaphysical thoughts instead of supplying cogent reasons. He would further submit that the Executing Court cannot go behind the decree but it needs to execute the decree as it stands. This is the settled principle of law but has been truly ignored by the learned Executing Court.

[3.2] Learned Senior Counsel also argued to the extent that, though the petitioner remained unsuccessful in getting the interim or permanent custody of the minor, he cannot be prevented from accessing the visitation right which he received in a compromise decree. Learned Senior Counsel further submits that the learned Trial Court confused between the right of permanent or interim custody and the visitation right of the petitioner, being a biological father of the minor 'J' to meet his daughter but by the impugned order, the learned Executing Court by refusing to execute the decree, has also negated the very right of the petitioner to meet minor 'J' in capacity of biological father and thereby, the learned Executing Court has frustrated the petitioner's right.

[3.3] Learned Senior Counsel further submits that in a contempt proceeding initiated before the Division Bench of this Court, it has been specifically observed that contempt proceedings is not maintainable as the order having been complained of being not fulfilled is executable order and such finding itself sufficiently say that the Executing Court was required to execute the order derived through compromise as it stands but by the impugned order, the Executing Court has downcasted the compromise decree. Consequently, the right of the father, on misleading itself that in the contempt proceedings and other proceedings for getting custody of the child, the petitioner remained unsuccessful, has been thwarted.

[3.4] Lastly, learned Senior Counsel submits that the Executing Court cannot verify the legality or validity of the

decree sought for execution, it remains binding to the parties and executable until decree is specifically disturbed or set aside by the Higher Court. He would further submit that in the present case, the Executing Court decided the issue as if it is sitting in appeal and believed that the compromise decree is non-executable. Such consideration of the Executing Court is uncalled, unjustified and according to learned Senior Counsel, it is in excess of jurisdiction vested with the Executing Court.

[3.5] Notwithstanding with the argument of legality and validity of the impugned order, learned Senior Counsel also argued, having referred to page No.44, that till the corona time period, petitioner was granted access and visitation right twice a week approximately for 14 hours to his daughter and had a privilege to sit with his daughter. He would further submit that the daughter was so happy and comfortable during visitation. He would further submit that therefore there is no reason to believe that the visitation access of the petitioner to the minor is uncomfortable and against the interest of the minor.

[3.6] In all, learned Senior Counsel submits that the learned Executing Court has committed serious and patent illegality. By passing the impugned order, under the law, the Executing Court has committed jurisdictional error and since it goes to the root of the case, and by the impugned order, the Executing Court nullifies the compromise decree arrived at between the parties, this Court under supervisory jurisdiction needed to interfere. Thus, with these submissions, learned Senior Counsel submits to allow this petition and to quash and

set aside the impugned order and direct the Executing Court to proceed further in the matter.

[4] *Per contra*, learned advocate Mr. Riddhesh Trivedi, appearing for the respondent - wife mainly submits that the petitioner by one or other litigation is continuously harassing the wife. He would further submit that uptill now, in total 11 litigations are filed by the petitioner and also filed litigation before the Hon'ble Supreme Court including the litigation for perjury and contempt, not only against the wife but also against her lawyer. The act and conduct of the petitioner therefore classifies that how he was dealing and harassing the wife on one or other pretext of litigation. It is submitted that this is another form of litigation filed with an ulterior motive to harass the wife.

[4.1] Learned advocate Mr. Riddhesh Trivedi, refers to the earlier litigation filed between the parties and submits that it was the case of the petitioner himself that the compromise decree arrived at between the parties and recorded by the Family Court, execution of which is non-workable and is against the best interest of the child. He would further submit that since the petitioner himself agreed to the terms that decree sought to be executed, itself becomes a non-workable and same has been recorded by the competent Court, execution of it is not maintainable.

[4.2] He further submits that the submission of the petitioner is rather in teeth of principle of estoppel, the petitioner's blow hot and cold in same breath. In some

litigation, he said that the compromise decree is non-workable and is against the interest of the children. Whereas, in the present case after loosing hope in other litigation against the wife including the litigation for permanent and interim custody, the petitioner now intends to execute the decree which he has already declared non-workable.

[4.3] Learned advocate Mr. Trivedi submits that the wife has filed the petition for getting divorce decree, the present petitioner appeared as party in the matter, wife succeeded in getting the divorce decree and now, she is remarried. Mr. Trivedi, learned advocate further submits that in the divorce proceedings, at no point of time, the present petitioner has raised the issue about visitation right or custody of the minor. Therefore, the filing of the execution petition before the learned Trial Court or filing of this petition having lost in the execution petition by the petitioner itself is a frivolous attempt to harass the wife who is already departed from the matrimonial cord and settled in her new life along with minor.

[4.4] Learned advocate Mr. Trivedi, refers to the order dated 30.10.2024 passed by the coordinate Bench in the matter, and submitted that the minor 'J', who is now nearly the age of 14 or 15 years, has strongly resisted to go with petitioner when the Court inquired the same in the chamber. He would submit that the interest of the child is paramount consideration against the interest of the litigating party and no decree can force a minor 'J' to face the visitation or access of the father against her wish.

[4.5] Learned advocate Mr. Trivedi, referred and relied to the judgment in the case of **Vikram Vir Vohra V. Shalini Bhalla** reported in **(2010) 4 SCC 409**, to submit that every custody / visitation orders, invariably are of temporary nature, they cannot be made rigid, final and the minor children cannot be forced to follow the compromise executed between the litigating parents. He also referred to the judgment in the case of **Rosy Jacob V. Jacob A. Chakramakkal** reported in **(1973) 1 SCC 840**, to submit that child is not a chattel and cannot be forced to face a particular order whereby parents were litigating and then, agreed to certain terms.

[4.6] Mainly on the aforesaid submissions, learned advocate Mr. Trivedi, while supporting impugned order, requests to dismiss the present petition with cost.

[5] Regard being had to the rival submissions of the either side and perusal of the impugned order and the relevant documents filed in the petition, at the outset, I may refer and reproduce the order passed by the coordinate Bench of this Court on 30.10.2024, which reads as under:-

“Pursuant to the request being made by this Court, child Jhaktruti has remained present in the Court. The matter was taken up in chamber. Considering the request of the appellant father to meet child during the Diwali Vacation, the wishes of the minor child were inquired, however she has strongly resisted to aforesaid request of the father. Ms. Thula, learned advocate for the petitioner has submitted that looking to the separation period, the child may be referred to Dr. Rakesh Kapoor, Child Physiologist so as to see to it that

bearer which the child has developed in meeting the father can be meltdown. Mr. Trivedi, learned advocate for the respondent requested to take appropriate instructions in this regard.

Let this matter be notified on 19.11.2024 for further consideration."

[6] In wake of above factual aspect, let refer compromise decree recorded in Civil Misc. Application by the Family Court whereby litigating party i.e. mother and father of the minor 'J', agreed to certain terms. These terms are reproduced as under:-

"[A] The applicant shall pick up daughter once in a week (Tuesday) from the school to his home and shall handover the daughter to opponent approximately 8 p.m. in the evening.

[B] When the child attains the age of 5 years, the applicant shall take child twice in a week (Tuesday & Friday).

[C] In case of any change in the day both the parties shall mutually understand and change the day and intimate the school.

[D] During the vacation, the applicant-father shall be entitled to take the child as per above mentioned day. During the vacation the applicant - father can take away child from 10 a.m. To 7 p.m.

[E] In case of any holidays in school, the applicant-father shall be entitled to pick up child before or after that day and intimate school accordingly."

[7] The minor 'J', at the relevant point of time when compromise arrived between the litigating parents, was just a toddler, barely of the age of 4 to 5 years. Whereas, when

aforesaid order was passed by the coordinate Bench of this Court on 30.10.2024, she must be of the age of 13 or 14 years. Tone and tenor of the order evidences that minor 'J' who is of adolescence age, has strongly resisted to meet her father. In the aforesaid background where child is not ready to meet her father, let examine whether in this facts situation the learned Executing Court has committed any jurisdictional error or not?

[8] The petitioner herein has filed Civil Misc. Application No.43 of 2018 before the Family Court, Ahmedabad subsequent to the aforesaid proceedings and sought the custody of the minor 'J'. The petitioner appears to have filed application Exhibit-5 in the Civil Misc. Application whereby he had sought interim custody. The Family Court passed an order on 02.02.2019 below Exhibit-5 having referred the earlier compromise / agreement executed between the parties and nixes the application. The learned Family Court recorded the following finding:-

"8. From the above terms and conditions, both parties have settled the dispute, which was previously filed by the petitioner about the custody of minor. When both the parties have settled their dispute by way of compromise and relying upon said terms and conditions of compromise, Court has passed final order, then on same cause of action, no petition for interim custody can be filed. Also looking to the birth certificate produced by the petitioner vide Mark-4/1, it appears that baby girl Jhankruti was born on 3.9.2012 while the present petition has filed on 15.3.2018. Hence, on the day

of presentation of this petition, minor was 5 and years old. Hence, at that age, custody of minor is required to be continued with mother. If custody is changed, the mind of the minor would be affected psychologically, which would be harmful for her future life. Moreover, when petitioner and opponent being a highly qualified person have settled their dispute by some terms and conditions, then no interference is required by this Court, which was previously decided by my predecessor. Also this Court cannot sit as an Appellate Court to decide the veracity of said order. If petitioner is aggrieved by terms and conditions of previous compromise order, then he may prefer the appeal before the higher forum. Merely on the guise of welfare of the child, no interim custody can be handed over to the petitioner. Hence, I am of the view that present application filed by the petitioner is false and vexatious and only with intention to harass the opponent. Hence, it is required to be dismissed with heavy cost. Hence, I pass following order.

ORDER

[1] Application of the petitioner is hereby rejected with the cost of Rs.5,000/-.

[2] The petitioner is hereby directed to pay Rs.3,000/- to the opponent."

[10] The averments of the petitioner in Civil Misc. Application No.43 of 2018, in the background of aforesaid observations of the Family Court, deserve notice. It has been stated by the petitioner that the compromise arrived between the husband and wife in earlier proceedings being CMA No.67 of 2016 is not workable and not a child centric. The averments and pleadings of the petitioner in CMA No.43 of 2018 read as

under:-

“(B) Earlier compromise was not child centric: At the time of earlier compromise under Order 23 Rule 3, Plaintiff had not seen her daughter for almost 9 months (except 1 or 2 occasions), his mother was not well and she wanted to see her grand-child as soon as possible and Plaintiff came to know that the Hon'ble Judge Shri M.J. Mehta who was looking their case was retiring in the month of Jan'17. So he thought that if compromise not done immediately, it would take another couple of months to meet the child, by the time chances were likely that child might have even forgotten her father. "Best Interest of the Child" never remained the main theme of this compromise. This is not the scenario now because child has grown up and cannot easily forget her father as she is in constant touch of her father with the grace of order of Hon'ble Court. So Plaintiff wants couple of many missing points (like overnight stay, access of child on child's and father's birthdays, access on Father's days, on Festivals, on family and social functions, equal pain theme of this comprom vacation rights to take her for travelling etc.) to be child has How covered in the order. It is pertinent to be noted that Section 3(9) of Juvenile Justice (Care & Protection of Children) Act, 2015, while defining "Principle of Non- waiver of rights" states that "No waiver of any of the right of the child is permissible or valid, whether sought by the child, or person acting on behalf of the child, or a Board or a Committee and any looking their case was retiring in the month of Jan'17. So he thought that if compromise not done immediately, it would take another couple of months to meet the child, by the time chances were likely that child might have even forgotten her father. "Best Interest of the Child" never remained the main theme of this compromise. This is not the scenario now because child has grown up and cannot easily forget her father as she is in constant touch of her father with the grace of order of Hon'ble Court. So Plaintiff wants couple of many missing points (like overnight stay, access of child on child's and father's birthdays, access on Father's days, on Festivals, on family and social functions, equal pain theme of this comprom vacation rights to take her

for travelling etc.) to be child has How covered in the order. It is pertinent to be noted that Section 3(9) of Juvenile Justice (Care & Protection of Children) Act, 2015, while defining "Principle of Non- waiver of rights" states that "No waiver of any of the right of the child is permissible or valid, whether sought by the child, or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver."

[11] The petitioner against the judgment and order passed below Exhibit -5 in Civil Misc. Application No.43 of 2018 preferred the Special Civil Application No.5065 of 2019 before this Court, wherein in para-1 of the CAV judgment passed by the coordinate Bench on 12.06.2020, the multiple prayers asked by the petitioner in the SCA have been reproduced, which read as under:-

"(a) To admit and allow this petition:

(b) To quash and set aside the order dated 2.2.2019 passed by the learned Judge, Family Court No.3. Ahmedabad in Civil Misc. Application No.43 of 2018; and modify the order to the extent that the;

(b-1) Respondent be directed to take admission of the child in neighborhood school preferably in morning session.

(b-2) Previous standard of child access to petitioner for 14 hours split in 2 days a week be maintained irrespective of school time changes in future. (Till the time respondent changes the school, petitioner is already to keep the child on Tue 4.30 pm to 8 p.m. and Friday evening 4.30 pm to Saturday noon 1 pm in such a way that after reducing 9 inactive hrs. of sleep, petitioner father and daughter both can at least maintain bonding of total 14 hours per week as per the original agreement of both the parties (vide CMA-DC-67/2016).

(b-3) Pick up from school by petitioner to his home be maintained..

(b-4) In case of holidays or adjustment required by either party, changes of days be adjusted and carried forward mutually.

(b-5) -Child access timing of 10 AM to 7 PM during vacations be maintained but days to be set for 5 days a week Monday to Friday as respondent is working in office whereas petitioner is working from home.

(b-6) Equal rights be given to petitioner to take his child for travelling out of Ahmedabad during vacations and during occasions.

b-7) Equal access of child be given to both the parents on (a) Birthdays of child and parents (b) all festivals (c) Father's / Mother's days.

(b-8) Respondent nowhere be allowed to represent herself as single guardian of the child "Jhankruti".

c. During the pendency and final disposal of the present petition, Your Lordships may be pleased to stay the implementation, operation and execution of the order dated 2.2.2019 passed by the Ld. Judge, Family Court No.3. Ahmedabad in Civil Misc. Application No.43 of 2018:

d. During the pendency and final disposal of the present petition, Your Lordships may be pleased to grant parenting rights to the petitioner as prayed for in paragraph (b) and its sub-paras above;

ar singer.

e. Pass any such order and/or further orders that may be thought just and proper, in the facts and circumstances of the present case.

f. To pardon petitioner-father in case he has failed in any compliance / Rules / Protocols during his entire legal representation as party-in-person."

[12] The coordinate Bench of this Court has recorded the argument of the petitioner. Para 4.1 reads as under:-

"4.1 The party-in-person has attached all the relevant records including the decision delivered by the Apex Court in case of Central Board of Trustees as well as the communication which took place during the passage of time and thereby, contended that simply because on earlier occasion, the compromise took place, the same cannot be thrust upon for all time to come. The party-in-person has further contended that compromise is not such which reflects that for all time to come, the party-in-person has surrendered his right of custody and visitation right. To contend that, a reference is made to Page Nos. 126 and 136 of the petition compilation. The party-in-person has contended that he has a capacity to even maintain the child and it is only on account of rift between the party-in-person and the respondent, the child is deprived of parental affection. Therefore, the overall circumstance is clearly suggesting that the order which has been passed is unjust, improper and not in consonance with the material on record. Too technical approach is adopted by the trial court, according to the party-in-person while dealing with the welfare of the child. By taking such plea before the Court, a request is made to grant the reliefs as prayed in the petition."

[13] The circumstances noticed by the coordinate Bench of this Court, in para 6 (1), are required to be reproduced as under:-

"6. Having heard the party-in-person and the learned advocate appearing for the contesting respondent and having gone through the material on record, following circumstances are not possible to be unnoticed by this Court:

(1) With a view to explore the possibility of overall resolution between the parties, a specific attempt was made to resolve this dispute through the Gujarat High Court Mediation Center. But then, unfortunately, the same has not been worked out. As a result of this, the petition has been taken up for its disposal. Apart from the aforesaid fact. It appears to this Court that the parents are not at ad idem and are fighting tooth and nail. in which the welfare of the child has stuck up. Considering the age of the minor girl child and considering the fact that the mother would be a natural guardian, no tinkering with the welfare of a child in any manner is possible. On the contrary, keeping in view the original proceedings i.e. Civil Misc. Application No.67 of 2016, a specific compromise is arrived at between both the parties, undisputedly signed at Exh. 17. It is not in dispute that the same has not remained a workable formula and, therefore, when that be so, the compromise agreement which took place on 12.1.2017 and since the same is in operation, this Court is not inclined to disturb in exercise of extraordinary jurisdiction, more particularly when the trial court has taken into consideration such issues. However, with a view to see that what would be the effect of said compromise which has attained finality, the trial court at an interim stage, has exercised the discretion which is vested in law. This Court finds no irregularity nor any perversity in such finding, more particularly when the findings are based on overall consideration and analysis of material on record.

(2) Additionally, what has been challenged before the Court is an interim order dated 2.2.2019 passed below Exh.5 in pending Civil Misc. Application No.43 of 2018 and, therefore, to grant the relief which has been sought would tantamount to grant a substantial relief without proper adjudication. Hence, keeping in view the settled proposition of law, instead of interfering with the order impugned passed below Exh.5, this Court is of the opinion that such issue entangled in the main proceedings i.e. Civil Misc. Application No.43 of 2018 deserves to be decided as early as possible. While examining the order impugned in the petition, which is well supported by material on record, the scope of Article 227 of the Constitution of India is also not possible to be ignored by this

Court and as such, keeping in mind the decision of the Apex Court in case of Sneh Gupta v. Devi Sarup & Ors.. reported in (2009) 6 SCC 194, on the issue of scope of Article 227 of the Constitution of India, the Court is unable to substitute the finding since the party-in-person is not in a position to assign any distinguishable circumstance. Relevant observations contained in Para.41 of the aforesaid decision are reproduced hereinafter :

“4]. xxxxxxxxxxxx”

[13.1] Therefore, the coordinate Bench specifically recorded that the compromise arrived at between the parties in CMA No.67/2016 has not remained a workable formula. To be noticed that the order passed by the coordinate Bench has been unsuccessfully assailed before the Hon’ble Supreme Court in Special Leave Petition (C) No.9251 of 2020.

[14] At this juncture, the argument of the learned advocate appearing for the petitioner in contempt matter being Misc. Civil Application No.381 of 2021 is required to be gone through. It has been recorded in para 6 of the oral order dated 01.02.2020 passed by the Division Bench of this Court. Para-6 thereof reads as under:-

“6 It is the contention of Ms. Srushti A. Thula, learned counsel appearing for the complainant that order dated 12.1.2017 passed in Civil Misc. Application No.67 of 2016 under which visitation right was agreed upon having not been complied, the complainant is left high and dry and is not able to meet the child or have access to the child or in other words the visitation rights granted under the compromise has stood wiped out by the inaction on the part of the respondent and as such, the respondent requires to be proceeded. She would also contend that the order dated 12.1.2017 has merged with the order dated 2.2.2019 passed in Civil Misc. Application

No.43 of 2018 which has since got merged with the order dated 12.6.2020 passed by this Court and as such, the respondent is to be proceeded for committing willful disobedience of the order dated 12.6.2020.”

[15] The petitioner therefore has attempted at every nook and corner to disturb the other side - wife and perhaps become aggrieved once she got divorce decree and the daughter - minor 'J' lives with her, strongly resisting to go with the father. It is petitioner's own say that the order passed in CMA has been merged with the order dated 02.02.2019 in CMA No.43 of 2018 and therefore, it is a willful disobedience of the defendant - wife not to permit husband to visit the daughter. Then petitioner, having remained unsuccessful in all proceedings, filed execution petition to execute compromise decree which described by him either non-workable and against child welfare as is merged with other order. The petitioner changed version and submits differently on his convenience. The application of petitioner is therefore unjust and unfair.

[15.1] Apt to note that, the conduct of the petitioner has been noted by the coordinate Bench in oral order dated 01.02.2022 in MCA No.381 of 2021 and found the application is mischievous, frivolous and filed with an intention to take a dig at the respondent who is the wife of the complainant. The Division Bench of this Court has also directed to pay cost of Rs.20,000/- to the wife. The order of contempt proceedings is also challenged before the Hon'ble Supreme Court vide SLP (C) No.8975 of 2022 but it remained unsuccessful.

[16] It is in this juxtaposition, to be noticed that the petitioner, by hook and crook, wants to disturb his wife, indulging her in litigations. The petitioner on hand says that the compromise arrived in CMA No.67 of 2016 is not workable and against the welfare of the child and it is not a child centric, thus immediately turned to file the execution proceedings once lost the proceedings of interim or final custody of the minor 'J' uptill the Hon'ble Supreme Court. Therefore, it seems that in same breath, petitioner speaks two different aspects. Principle of approbate and reprobate is attracted.

[17] In ***Bhagwant Sharan (Dead through Legal Representatives) Vs. Purushottam & Ors.*** reported in **(2020) 6 SCC 387**, the Hon'ble Supreme Court reiterated the principle of estoppel/election/approbrate or reprobate. Para-27 thereof reads as under:-

"27. The doctrine of election is a facet of law of estoppel. A party cannot blow hot and blow cold at the same time. Any party which takes advantage of any instrument must accept all that is mentioned in the said document. It would be apposite to refer to the treatise Equity-A course of lectures' by F.W. Maitland, Cambridge University, 1947, wherein the learned author succinctly described principle of election in the following terms:-

"The doctrine of Election may be thus stated: that he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it..."

*This view has been accepted to be the correct view in **Karam***

Kapahi and Ors. v. Lal Chand Public Charitable Trust and Ors. reported in **(2010) 4 SCC 753**. The plaintiff having elected to accept the Will of Hari Ram, by filing a suit for eviction of the tenant by claiming that the property had been bequeathed to him by Hari Ram, cannot now turn around and say that the averments made by Hari Ram that the property was his personal property, is incorrect.”

[18] The Madras High Court in the case of ***G. Nagaiyan and Another Vs. K. Palanivel, S.A.No.125 of 2014***, by judgment dated 29.03.2022, refers to the well-established law of equity that man cannot approbate and reprobate, which are as under:-

“24. It is a well-established rule in equity that a man cannot approbate and reprobate. The general rule, which originated from Scotland and is the foundation of the principle of election, was set out by Lord Redesdale in the early case of Birmingham v. Kirwan (1805 2 Sch. &Lef. 449) in the following way:

“The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election.”

25. Years later in *Smith v. Baker* [[L.R.] 8 C.P. 350], Honeyman, J., explained the doctrine thus:

“As to the general rule of law there is no dispute. A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage.”

26. In *Verschures Creameries Limited v. Hull and*

Netherlands Steamship Company [[1921] 2 K.B. 608], the Court of Appeal noted that the doctrine of election was not confined to instruments alone. These principles were finally approved by the House of Lords in *Lissenden v. C.A Bosch Limited* [[1940] A.C. 412], where Viscount Maugham pointed out as under:

“My Lords, I think our first inquiry should be as to the meaning and proper application of the maxim that you may not both approbate and reprobate. The phrase comes to us from the northern side of the Tweed, and there it is of comparatively modern use. It is, however, to be found in Bell’s Commentaries, 7th ed., vol. I., pp. 141-2; and he treats “the Scottish doctrine of approbate and reprobate” as “approaching nearly to that of election in English jurisprudence.” It is, I think, now settled by decisions in this House that there is no difference at all between the two doctrines.”

27. Turning to its application to Wills and other instruments, Viscount Maugham opined thus: “The doctrine is founded on the intention, explicit or presumed, of the testator in the case of a will and of the author or donor in the case of instruments, namely, the intention that a man shall not claim under the will or instrument and also claim adversely to it.”

28. These principles have been consistently followed in this country. In *R.N. Gosain v. Yashpal Dhir*, (1992) 4 SCC 683, the Supreme Court has observed as under:

“Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing

some other advantage”.

[See: Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd. [[1921] 2 K.B. 608, 612 (CA)], Scrutton, L.J.]”

29. *In Joint Action Committee of Air Line Pilots’ Assn. Of India v. DG of Civil Aviation, (2011) 5 SCC 435, the Supreme Court has held thus:*

“12. The doctrine of election is based on the rule of estoppel--the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity..... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily.”

30. *In Union of India v. N. Murugesan ((2022) 2 SCC 25), the English decisions on the point were cited with approval by the Supreme Court. It is important to notice that the Supreme Court has recognised it as a principle emanating out of the common law and not from the statutory text of Section 115 of the Evidence Act. This is clear from the following observations:*

“A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party.”

31. *In its latest decision in Premalata @ Sunita v. Naseeb Bee (Civil Appeal Nos 2055-2056 of 2022), decided on 23.03.2022, the Hon'ble Supreme Court applied the doctrine of approbate and reprobate holding that a litigant cannot be permitted to take two different/contradictory stands before two different forums. The Hon'ble Supreme Court has observed as under:*

"The respondents - original defendants cannot be permitted to take two contradictory stands before two different authorities/courts. They cannot be permitted to approbate and reprobate once the objection raised on behalf of the original defendants that the Revenue Authority would have no jurisdiction came to be accepted by the Revenue Authority/Tahsildar and the proceedings under Section 250 of the MPLRC came to be and thereafter when the plaintiff instituted a suit before the Civil Court it was not open for the respondents - original defendants thereafter to take an objection that the suit before the Civil Court would also be barred in view of Section 257 of the MPLRC."

32. *In the considered view of this Court, the respondent is not entitled to claim for any right or title over the 'C' schedule property. There is no requirement for this Court to undertake the exercise of finding out how much of property was acquired and how much was left out by the Government. This is in view of the fact that the respondent went before the competent Civil Court and obtained a Decree on the ground that no right or title was conveyed to him under the sale deed dated 27.8.1974 marked as Ex.B3. This crucial fact was lost sight of by both the Courts below and both the Courts unnecessarily undertook the exercise of finding out the ownership of the respondent over the 'C' schedule property. The third substantial question of law is answered accordingly."*

[19] In view of the above and applying the ratio thereof, this Court is of the considered opinion that the execution

before the learned Trial Court was ill-conceived and frivolous attempt on the part of the petitioner and the petitioner, having lost the litigation / battle for getting interim or permanent custody of the minor or even failed to get any contempt proceedings against the wife for not following the order of the Court, started the fresh litigation by seeking execution of the compromise decree which he himself termed as non-workable and against the welfare of the child.

[20] At this juncture, I refer to the recent judgment of this Court in Special Civil Application No.15369 of 2025 whereby this Court has highlighted that in a custody matter, the Family Court is required to adopt sensitive, humane and child centric approach and interest of the child has to be kept on higher footing than the interest of the litigating parents. The Court, in a custody matter, should concern about the welfare and future of the minor rather than the legal victory of fighting litigants. The relevant paragraphs are extracted as under:-

*“9. In custody matter family court is required to adopt sensitive, humane and child centric approach. The Family Court must construe that disputes over custody are not merely legal contests between the fighting party, but the issue is directly affecting the emotional, psychological, and developmental welfare of the child. The expression “sensitive approach” implies that the court must act as parens patriae—a guardian of the child’s best interests—rather than strictly adjudicating adversarial claims. Proceedings should be conducted in a manner that minimizes trauma, avoids hostility, and prioritizes the child’s welfare above the legal rights of the fighting litigants. The Hon’ble Apex Court has consistently emphasized that custody matters require empathy and flexibility. In **Gaurav Nagpal v. Sumedha***

Nagpal, 2009(11) SCC 42, the Hon'ble Apex Court defined the approach and duties of Court in a custody matters and expect that mature and clear approach has to be taken up when conflicting demands are made by the parties. The Hon'ble Apex Court further held that object and purpose of the Guardian and Wards Act, 1890 is not a mere physical custody of the minor, but protection of the right of ward's health and welfare. Relevant para are extracted as under:-

"43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being in force.

44. xxxxxxxx

45. xxxxxxxx

46. In Rosy Jacob V/s. Jacob A. Chakramakkal, 1973 1 SCC 840, this Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

47. *Again, in Thrity Hoshie Dolikuka V/s. Hoshiam Shavaksha Dolikuka, 1982 2 SCC 544, this Court reiterated that the only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.*

48. xxxxxxxx

49. xxxxxxxx

50. *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 Mousami Moitra Ganguli's case (supra), the Court has to 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.*

51. *The word 'welfare' used in Sec. 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 govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.*

59. *One must not lose faith in humanity. It is an ocean; if a few drops of the ocean are dirty, the ocean does not become dirty. If nothing ever went wrong in one's life, he or she would never have a chance to grow stronger. One should never forget that today well lived makes every yesterday a dream of happiness and tomorrow a vision of hope. Marital happiness depends upon mutual trust, respect and understanding. A home should not be an arena for ego clashes and misunderstandings. There*

should be Physical and mental union. Marriage is something, Ibsen said in "The League of Youth" you have to give your whole mind to. If marriages are made in Heaven as Tennyson said in Ayloner's Field, why make matrimonial home hell is a big question."

10. Similarly, in ***Nil Ratan Kundu v. Abhijit Kundu, 2008 (9) SCC 413***, the Hon'ble Apex Court while observing about custody of a minor, held as under:-

"In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor."

11. In ***Yashita Sahu v State of Rajasthan, (2020) 3 SCC 67***, the Hon'ble Apex Court held that the welfare of the child is paramount in matters relating to custody. In this context, we may refer to Para 22 thereof, which reads as follows:

"22. A child, especially a child of tender years requires

the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what matter the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights. (emphasis supplied) ."

12. Thus, a "sensitive approach" in custody matters entails;(1) Prioritizing the best interests and welfare of the child above parental rights; (2) Conducting proceedings in a non-adversarial and child-friendly manner; (3) Considering emotional, psychological, and developmental factors and (4) Avoiding mechanical or technical application of law. The Family Court is expected to adopt a sensitive, humane, and child-centric approach in a child custody matter keeping in mind that such proceedings concern the welfare and future of a minor rather than the legal victory of fighting litigants. The court acts in the capacity of *parens patriae* and must exercise discretion with empathy, patience, and sensitivity to the emotional needs of the child. The Family Court must place the child's physical, emotional, moral, educational, and

psychological welfare above the legal rights or claims of the fighting litigants. The Court should evaluate age and gender of the child, emotional bonding with each parent, stability of home environment, educational and developmental needs and wishes of the child, if of sufficient maturity.

13. In **Halsbury's Laws of England (Fourth Edition, Vol.13)**, the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:

"809. Principles as to custody and upbringing of minors. Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

16. Before parting with the order, the observation of the Hon'ble Apex Court in case of **Rosy Jacob V/s. Jacob A. Chakramakkal, 1973 1 SCC 840** being relevant, reads as under:-

"14.The children are not mere chattels: nor are they mere play-things 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 considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members 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.”

[21] Here it is a dispute of visitation right raised after petitioner lost the right to seek the permanent or interim custody of minor ‘J’. The compromise decree was effected on 12.01.2017. Thereafter, multiple litigations took place between the litigating parents. The petitioner claims that he was enjoying visitation right up to corona period. He placed reliance upon photographs at page Nos. 44 & 45 of the compilation, to submit that minor ‘J’ was happy and comfortable during visitation and thus, no harm in giving visitation right to father. The argument is irrelevant and unacceptable on the reason that when coordinate Bench on 30.10.2024, attempted to know desire of minor ‘J’, she strongly resisted to meet her father – petitioner herein.

[21.1] At the same time, it is to be noticed that the petitioner battled for permanent custody of minor ‘J’ and has filed different unsuccessful litigations against the wife during the time period. Apt to note in comparison of visitation right and custody right, the visitation right would come much low on pedestal against the right of custody. The petitioner lost the right to have custody including interim custody is now not entitled to have visitation right. The visitation right and right over the interim custody are just two facets of same dispute and stand on the same footing.

[22] Aptly, it can be said that the order of custody remains interim forever due to its nature. In the case of **Vikram Vir Vohra (supra)**, the Hon’ble Supreme Court held

that the nature of the proceedings, custody order cannot be made rigid and final. They are capable of being altered and modified keeping in mind the interest of the child. Relevant paragraphs thereof read as under:-

“12. In a matter relating to custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.

13. In Rosy Jacob vs. Jacob A Chakramakkal [(1973) 1 SCC 840], a three judge Bench of this Court held that all orders relating to custody of minors were considered to be temporary orders. The learned judges made it clear that with the passage of time, the Court is entitled to modify the order in the interest of the minor child. The Court went to the extent of saying that even if orders are based on consent, those orders can also be varied if the welfare of the child so demands.

14. The aforesaid principle has again been followed in Dhanwanti Joshi vs. Madhav Unde - [(1998) 1 SCC 112].

15. Even though the aforesaid principles have been laid down in proceedings under the Guardians and Wards Act, 1890, these principles are equally applicable in dealing with the custody of a child under Section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a strait jacket. Therefore, each case has to be dealt with on the basis of its peculiar facts.

16. In this connection, the principles laid down by this

Court in Gaurav Nagpal vs. Sumedha Nagpal reported in (2009) 1 SCC 42 are very pertinent. Those principles in paragraphs 42 and 43 are set out below:

"42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force".

[23] Applying the aforesaid principle to the facts of the present case, according to this Court, visitation rights are also not absolute or permanent, they are inherently temporary and flexible, designed to adopt to evolving need of the child. The guiding principle is always the child's welfare. If visitation right no longer serve purpose, forceful execution of it can be refused. Thus, in the present case, the learned Executing Court has rightly refused to execute compromise decree and thereby has not committed any error. To be noted that the compromise decree is arrived at between the mother and the father, would not bind minor 'J' against her wish and she cannot be forced to meet the father, when she declined to meet which is reflecting from the order dated 30.10.2024 passed by the coordinate Bench of this Court and revisited by this Court hereinabove.

[24] The child welfare since remains very sensitive, cognitive and always at the paramount, can be a sufficient

principle to negative a compromise arrived between the mother and the father, which is inherently of temporary nature. In the aforesaid circumstances, this Court finds no reason to interfere with the impugned order.

[25] At this juncture, I refer to the judgment of the Hon'ble Supreme Court in the case of ***Garment Craft v. Prakash Chand Goel*** reported in ***(2022) 4 SCC 181 [(2022) 2 SCC (Civ) 424]***, whereby the Hon'ble Supreme Court defined the scope of petition under Article 227 of the Constitution of India as under:-

“15. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal [Celina Coelho Pereira (Ms) and Others v. Ulhas Mahabaleshwar Kholkar and Others, (2010) 1 SCC 217]. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to

justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.

16. Explaining the scope of jurisdiction under Article 227, this Court in Estralla Rubber v. Dass Estate (P) Ltd., (2001) 8 SCC 97 has observed:-

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can

set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.”

[26] Thus, power under Article 227 of the Constitution of India being one of judicial superintendence cannot be exercised lightly to upset conclusion, unless finding of the learned Trial Court is erroneous, unjust, illogical or of the nature that no prudent man would arrive in ordinary sense; or finding impugned is shocking to the Court's conscience or conclusion is so perverse that it becomes absolute necessary in interest of justice for the Court to interfere.

[27] In present case, in view of the aforesaid reasons, petitioner failed to bring the case within the corner to exercise power under Article 227 of the Constitution of India. Consequently, petition being arid of merits is dismissed. Rule is discharged.

Lalji Desai

(J. C. DOSHI,J.)