

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

**MA No. 46/2025
Cav No.1995/2025**

Muskan @Shagufta Kousar

.... Appellant(s)/Petitioner(s)

Through: Mr. Shayaan Chouhan, Advocate.

Vs

Ashu Raja

..... Respondent(s)

Through: Mr. Virender Dev Singh, Advocate.

Coram: HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE

ORDER

02.07.2026

1. Heard learned counsel for the parties and perused the record. In terms of the previous order dated 30.06.2026, the respondent was directed to produce the minor girl child, namely, Ayra Vohra, aged about six years, studying in L.K.G., before this Court for interaction in Chambers. Today, the Court interacted with the child and found her to be an intelligent, cheerful and cooperative child.
2. The parties to the present petition profess different religions. Despite the social and religious differences, they solemnized their marriage according to Hindu rites on 29.05.2015 at Arya Samaj Mandir, Purani Mandi, Jammu. Subsequently, they also underwent a Nikah ceremony in accordance with Islamic rites on 12.06.2019.
3. The parties first met in the year 2013. After their marriage on 29.05.2015, they started residing together and were blessed with a female child, namely, Ayra Vohra. They appear to have lived together till the year 2023,

when matrimonial disputes arose between them, eventually culminating in litigation concerning the custody of their minor daughter. It is also borne out from the record that, owing to the matrimonial discord, the parties initiated multiple proceedings against one another. The dispute further escalated when the petitioner lodged an FIR on 20.10.2024 alleging commission of the offence of marital rape by the respondent. The said FIR has been challenged by the respondent before this Court in CRM(M) No. 938/2024.

4. According to the petitioner, owing to the matrimonial discord, the minor child had been residing with her. Apprehending that the respondent would forcibly remove the child from her custody, she filed a petition under the Guardians and Wards Act on 31.05.2024 seeking her appointment as guardian of the minor. At that point of time, the child had already been admitted to Junior International Daily Rising School and was residing with the petitioner at Sidhra. It is the petitioner's case that on 14.08.2024, the respondent forcibly removed the child from her custody and thereafter concealed both his own whereabouts and those of the child till 08.11.2024. Consequently, she lodged an FIR, pursuant to which the police traced the respondent and recovered the minor child. Thereafter, the child was produced before the Child Welfare Committee, which, on 08.11.2024, restored the custody of the child to the petitioner in the presence of the respondent's mother. It appears that during the pendency of the guardianship petition filed by the petitioner, the learned trial Court, by the impugned order dated 28.08.2025, held that the respondent, being the natural father of the minor child, had prima facie demonstrated that the

petitioner had obtained custody of the child by misrepresentation and by abusing the process of law. The trial Court observed that the petitioner had lodged a frivolous criminal complaint against the respondent, resulting in his arrest, and had thereby succeeded in obtaining custody of the child. The trial Court further noticed that, upon the respondent's application, the child was produced before it after considerable effort and also recorded that, on one occasion, the petitioner had attempted to withdraw the guardianship petition.

5. The trial Court was of the prima facie opinion that the child had initially remained in the custody of the respondent and that the petitioner had regained custody by resorting to criminal proceedings against him. It observed that the petitioner had secured the respondent's arrest on the basis of what it considered to be a frivolous complaint and had thereby obtained custody of the minor through an unfair process. Proceeding on the said premise, the trial Court directed that interim custody of the child be restored to the respondent-father. Accordingly, the child was handed over to him in open Court. However, the petitioner, being the natural mother, was granted visitation rights pending final adjudication of the guardianship proceedings.
6. Aggrieved of the aforesaid order, the petitioner has approached this Court primarily on the ground that the learned trial Court proceeded on the erroneous assumption that she had levelled false allegations against the respondent and, on that basis, had obtained custody of the child. It is contended that, in fact, the custody of the child had been restored to her by the Child Welfare Committee after interacting with the minor and being

satisfied that the child was comfortable and happy in her mother's company. It is further submitted that the trial Court failed to give due weight to the tender age of the child, the fact that she is a girl child, and the paramount consideration of her welfare. According to the petitioner, the learned trial Court was unduly influenced by the rival allegations exchanged between the parties without there being any evidence on record establishing that she had instituted a false criminal case against the respondent.

7. *Per contra*, learned counsel for the respondent submits that the petitioner obtained custody of the child by practicing misrepresentation and by levelling serious and false allegations of rape against the respondent. It is argued that the respondent had married the petitioner despite her being a divorcee with a child from her previous marriage and that, under the guise of the allegations of rape and molestation, the petitioner got the respondent arrested and thereafter succeeded in obtaining custody of the minor child. According to the respondent, the learned trial Court has correctly appreciated the factual background while passing the impugned order.
8. In rejoinder, learned counsel for the petitioner submits that the allegations levelled against the respondent cannot be brushed aside as false merely because the investigation is still pending. It is contended that this Court, in the proceedings arising out of the challenge to the FIR, has already permitted the investigation to continue. Therefore, according to the petitioner, the trial Court erred in proceeding on the assumption that the criminal case lodged by her was false. It is urged that the petitioner had no option but to report the incident to protect her dignity, personal liberty

and, more importantly, to safeguard the interests and welfare of the minor child.

9. I have heard learned counsel for the parties at length and have carefully perused the record.
10. At the outset, it needs to be noticed that the present proceedings arise out of an interlocutory order passed by the learned trial Court in a petition under the Guardians and Wards Act concerning the interim custody of a minor child. While exercising jurisdiction in matters relating to custody of children, the Court is not expected to determine the rights and liabilities of the parties as if finally adjudicating their matrimonial disputes. Equally, allegations and counter-allegations exchanged between the parties in pending criminal or matrimonial proceedings cannot, by themselves, constitute the sole basis for determining the issue of interim custody. The paramount consideration, at every stage, is the welfare and best interests of the minor child.
11. The learned trial Court appears to have been considerably influenced by the circumstance that the petitioner had lodged an FIR alleging commission of offences, including rape, against the respondent and that, subsequent thereto, the custody of the child came to be restored to her. On the said premise, the learned trial Court formed a prima facie opinion that the petitioner had abused the criminal process and had obtained custody of the child by practising misrepresentation. However, this Court finds that such a conclusion was neither warranted nor supported by any conclusive material available on record.

12. It is not in dispute that the FIR lodged by the petitioner is still under investigation. The respondent has challenged the said FIR before this Court in separate proceedings. However, this Court, while considering the challenge, has not quashed the FIR and has permitted the investigating agency to proceed with the investigation, though the filing of the final report has been deferred till further orders. Once the allegations are yet to be investigated and have not been adjudicated upon by any competent court, it was not open to the learned trial Court to record even a prima facie finding that the criminal proceedings initiated by the petitioner were frivolous or false and to employ such a finding as the principal reason for altering the custody of the minor child.
13. It is equally significant that the custody of the child had not been restored to the petitioner merely because an FIR had been registered. The record reveals that after the child was traced, she was produced before the Child Welfare Committee, which, upon interacting with the child and considering the attending circumstances, restored her custody to the petitioner. Whether such order was justified or otherwise is a matter which may be examined in appropriate proceedings, but the learned trial Court could not have ignored the said fact while determining the issue of interim custody.
14. It is a settled principle of law that while exercising jurisdiction under the Guardians and Wards Act, the Court acts as *parens patriae* and is required to determine the issue of custody exclusively on the touchstone of the welfare and best interests of the minor. The legal rights of the parents, including the preferential claim of a natural guardian under the personal

law, are always subordinate to the welfare of the child. In *Gaurav Nagpal v. Sumedha Nagpal* 2009 1 SCC 42, it was authoritatively held that the welfare of the child is the paramount consideration and transcends the legal rights of either parent. Similar principles were reiterated in *Nil Ratan Kundu v. Abhijit Kundu* and *Mausami Moitra Ganguli v. Jayant Ganguli* AIR 2008 SC 2262 wherein it was observed that the expression "welfare" is to be understood in its widest sense so as to include not merely the physical comfort of the child but also her moral, emotional, educational and psychological well-being.

15. In the present case, the learned trial Court appears to have attached undue significance to the allegations exchanged between the parties in the pending criminal proceedings while overlooking the determinative question as to whether transferring the custody of a six-year-old girl from one parent to another during the pendency of the guardianship proceedings would advance her welfare. Custody proceedings are not intended to adjudicate matrimonial disputes or determine the culpability of either parent. Unproved allegations and counter-allegations cannot, by themselves, furnish a sound basis for altering the custody of a minor. The Supreme Court in *Vivek Singh v. Romani Singh* AIR 2017 SC 928, emphasized that the Court must remain focused on the child's welfare and not permit collateral disputes between the parents to overshadow that paramount consideration.
16. Equally, this Court is unable to endorse the prima facie observation of the learned trial Court that the criminal case instituted by the petitioner was frivolous or false. The FIR admittedly remains under investigation, and the

challenge thereto is pending before this Court, which has permitted the investigation to continue. Until the competent criminal court records a finding upon completion of the investigation and trial, it was impermissible for the trial Court, in collateral custody proceedings, to prejudge the veracity of the allegations and employ such a conclusion as the principal reason for altering the custody of the minor. Such an approach is inconsistent with the settled principle that issues pending before the criminal court ought not to be prejudged in ancillary proceedings. Reference may also be made to *Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra* AIR 2021 SC 1918, wherein the Supreme Court cautioned against recording findings which have the effect of prejudging allegations that are still under investigation.

17. The interaction of this Court with the minor child also assumes relevance. Though the wishes of a child of about six years cannot be regarded as conclusive, such interaction enables the Court to assess the child's emotional comfort, sense of security and overall well-being. The Supreme Court in *Vivek Singh supra*, recognized that interaction with the child is an important aid in evaluating her welfare, although the preference expressed by a child of tender years cannot be treated as decisive.
18. Furthermore, the minor in the present case is a girl child of about six years who is presently attending school. At such a formative stage of life, continuity of care, emotional stability, educational consistency and a nurturing environment assume considerable significance. Frequent or abrupt changes in custody, unless dictated by compelling circumstances affecting the child's welfare, are ordinarily discouraged, as they may

adversely impact the child's emotional and psychological development. In *Roxann Sharma v. Arun Sharma* AIR 2015 SC 2232 the apex court has observed that although the father may be the natural guardian, the care and custody of a child of tender years would ordinarily remain with the mother unless circumstances indicate that such custody would be detrimental to the child's welfare. The governing consideration, however, always remains the welfare of the child and not the legal entitlement of either parent.

19. This Court is conscious that serious allegations have been levelled by each party against the other. At this stage, this Court expresses no opinion whatsoever on the merits or otherwise of those allegations, as the same are the subject matter of independent proceedings. Any observation made in the present order shall not influence the investigation, trial or adjudication in those proceedings. The custody of the minor cannot be decided by treating either parent as blameworthy merely on the basis of unproved allegations
20. In view of the aforesaid discussion, this Court is of the considered view, that the learned trial Court committed a jurisdictional error in allowing itself to be influenced by observations regarding the alleged falsity of the criminal case lodged by the petitioner, despite the fact that the matter is still under investigation. The impugned order, therefore, cannot be sustained in its present form.
21. Consequently, the impugned order dated 28.08.2025 is set aside. Pending final adjudication of the guardianship petition by trial Court, the interim custody of the girl child, Ayra Vohra, shall be given to petitioner-mother. The respondent-father shall, however, be entitled to visitation rights and

interim access to the child on such days and at such timings as may be fixed by the trial Court, keeping in view the convenience of the child and ensuring that she is able to maintain a healthy and meaningful relationship with both her parents. The ld. trial Court shall make an endeavor to dispose of the guardianship petition expeditiously, preferably within a period of six months from the date a copy of this order is made available to it, without being influenced by any observations contained herein, which are only for the purpose of deciding the present petition. Copy of the order be notified to Ld. Trial court for further compliance. Ordered as such.

(Sanjay Parihar)
Judge

Jammu
02.07.2026
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