



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR**

S.B. Criminal Miscellaneous (Petition) No. 7690/2026
CNR: RJHC010833692026 | URN: CRLMP / 13157U / 2026



-----Petitioner

Versus

1. State Of Rajasthan, Through Public Prosecutor.
- 2.
- 3.

-----Respondents

For Petitioner(s) : Mr. Awar Dan Ujjwal.
For Respondent(s) : Mr. Prem Singh Panwar, PP

HON'BLE MR. JUSTICE SUNIL BENIWAL

Order

Conclusion of Arguments &

Reserved on : 03/10/2026

Pronounced on : 06/10/2026

1. The present petition has been filed under Section 528 of the BNSS challenging the order dated 16.03.2026 passed by the learned Additional Chief Judicial Magistrate, Jaitaran, District Beawar in Case No. 341/2025, whereby the application filed by respondent No. 3 under Section 339 of the BNSS, seeking permission to pursue the pending maintenance proceedings on behalf of the minor children, has been allowed.



2. The facts in brief, as narrated in the petition, are that the petitioner married daughter of respondent no.2 and 3, on 21.04.2018, and two children, namely were born out of the wedlock. On 11.09.2025, Monika instituted proceedings under Section 144 of the BNSS, seeking maintenance from the petitioner.

2.1. In the meantime, the petitioner filed a petition under Section 13 of the Hindu Marriage Act, 1955, seeking dissolution of marriage, which was allowed *ex parte* vide judgment and decree dated 20.11.2025 passed by the learned Additional District Judge, Jaitaran. Subsequently, Monika expired on 09.02.2026. Thereafter, the petitioner filed an application under Section 25 of the Guardians and Wards Act, 1956, seeking custody of the minor children, contending that he, being their father, was their natural guardian.

2.2. Following the death of Monika, respondent no.3 - Smt.

wife of and maternal grandmother of the minor children, filed an application under Section 339 of the BNSS seeking permission to pursue the pending maintenance proceedings. Vide the impugned order dated 16.03.2026, the learned trial Court, permitted her to pursue the application under Section 144 of the BNSS on behalf of the minor children.

2.3. Hence, the present petition.

3. Learned counsel for the petitioner submitted that the learned trial Court failed to appreciate that respondent No.3's assertion that the petitioner was unwilling to take custody of the minor children was based merely on assumption and not on any specific



refusal. On the contrary, the petitioner is ready and willing to take their custody and maintain them according to his means.

3.1. He further submitted that the petitioner, being the biological father and natural guardian of the minors, is ready to assume their care and responsibility. After the death of the mother on 09.02.2026, respondent No.3, being the maternal grandmother, cannot claim custody in preference to the natural guardian without the competing claims being examined in light of the welfare of the children. Also, the petitioner has a regular source of income and is capable of providing for the children. It was contended that the learned trial Court failed to properly consider the welfare of the minors before permitting respondent No.3 to pursue the maintenance proceedings on their behalf.

3.2. Learned counsel lastly submitted that the learned trial Court has erroneously invoked and applied Section 339 of the BNSS, which has no application to the facts of the present case. Section 339 BNSS relates exclusively to permission to conduct prosecution and has no application to proceedings concerning maintenance of minor children. The provision has been misconstrued and its applicability has not been properly examined. Consequently, the impugned order deserves to be quashed and set aside.

4. Learned Public Prosecutor opposed the submissions made by learned counsel for the petitioner and submitted that the petitioner's challenge proceeds on a misconstruction of the impugned order and that mere reference to Section 339 BNSS, which pertains to permission to conduct prosecution, would not by itself vitiate the proceedings. He submitted that the claim for



maintenance of minor children is otherwise governed by Section 144 BNSS and the learned trial Court is competent to adjudicate the same. The petitioner's contentions regarding custody, natural guardianship and his willingness to maintain the children involve disputed questions of fact and cannot be made a ground for terminating the maintenance proceedings. No prejudice has been demonstrated to have been caused to the petitioner on account of the alleged reference to Section 339 BNSS, hence, the impugned order does not warrant interference by this Court.

5. Heard learned counsel for the parties and perused the material available on record.

6. It is not disputed that after the death of Monika on 09.02.2026, the two minor children are in the custody of respondent No.3, their maternal grandmother, and that separate proceedings regarding their custody are pending before the competent Court. The pendency of such proceedings, however, cannot affect the independent right of the minor children to claim maintenance under Section 144 of the BNSS. Such right is distinct from the question of custody or guardianship and is required to be adjudicated on its own merits. The custody proceedings concern the question as to with whom the minors should reside, keeping their welfare as the paramount consideration, whereas proceedings under Section 144 BNSS concern the statutory obligation to maintain them. Thus, the petitioner's claim of natural guardianship or his having instituted custody proceedings does not, by itself, determine or extinguish the children's claim for maintenance. The issue of custody cannot be conclusively



determined in the present proceedings merely for deciding the maintainability of their maintenance claim.

7. The contention of learned counsel for the petitioner that the petitioner is ready and willing to take custody of the children also does not furnish a ground to terminate the pending maintenance proceedings. Following the death of the mother, the maintenance claim of the minors must necessarily be represented by some person competent to pursue it. The questions of custody and maintenance operate in distinct fields and may proceed independently, subject to the orders passed by the competent Court.

8. The principal objection raised by the learned counsel for the petitioner, however, concerns the invocation of Section 339 BNSS. There is substance in the submission that Section 339 BNSS, by its express terms, deals with permission to conduct prosecution and does not constitute the substantive provision governing an application for maintenance under Section 144 BNSS. Section 339 BNSS is included in the Chapter XXVI dealing with general provisions as to inquiries and trials and provides for permission to conduct a prosecution by a person other than the specified prosecuting authorities. It is therefore not the provision which creates or regulates the right of a minor child to claim maintenance.

9. However, the mere reference to an inapplicable procedural provision cannot, in the facts of the present case, be permitted to defeat the substantive claim of the minor children. The Court is required to examine the substance and effect of the order rather



than its nomenclature alone. The material question is whether the learned trial Court, after the death of the mother, was justified in permitting a person who was presently caring for the minors to continue their pending maintenance claim before the Court for adjudication.

10. The answer, in the considered opinion of this Court, has to be in the affirmative. The learned trial Court was neither determining the ultimate question of custody or declaring respondent No.3 to be the permanent guardian of the minors nor was conferring upon respondent No.3 any independent right to claim maintenance from the petitioner for herself. The order, in substance, enabled the pending claim of the minor children to be prosecuted after the death of their mother.

11. It is settled position of law that procedural provisions are intended to advance the cause of justice and not to defeat substantive rights on account of mere technicalities. Hon'ble the Supreme Court, in **Willie (William) Slaney v. State of Madhya Pradesh, AIR 1956 SC 116**, while dealing with the effect of procedural irregularities, observed that procedural laws are designed to further the ends of justice and that an irregularity would not vitiate proceedings unless it is of such a nature as to cause substantial prejudice. The Court further emphasized that the effect of a procedural defect depends upon whether it strikes at the root of the proceedings or is merely an irregularity capable of being cured.

12. Keeping in view such proposition of law, it is significant to note that Section 144 BNSS itself contemplates that an allowance



may be directed to be paid to such person as the Magistrate may from time to time direct, while Section 147 BNSS expressly contemplates the delivery of the maintenance order to the person in whose favour it is made or to his guardian, if any, or to the person to whom the allowance is directed to be paid. The statutory scheme thus recognizes the practical necessity of dealing with maintenance claims involving persons who may require representation, like minor children.

13. The petitioner has also not demonstrated any prejudice caused to him merely because respondent No.3 has been permitted to pursue the maintenance claim on behalf of the minors. The petitioner shall remain entitled to contest the claim on all legally permissible grounds, including the alleged absence of neglect or refusal, his means, the needs of the children, the actual circumstances in which they are residing, and any other matter relevant to the determination of maintenance. Permitting respondent No.3 to represent the minors does not amount to an adjudication of any of these issues against the petitioner.

14. In the peculiar circumstances of the case, the death of the mother has created a situation in which the pending claim for maintenance of the minor children requires appropriate representation. The claim of the children does not perish with the death of the person who had initially instituted the proceedings on their behalf. The petitioner's assertion of natural guardianship and his willingness to take custody are matters which may have significance in the custody proceedings, but they do not, in



themselves, furnish a ground for extinguishing the minors' pending maintenance claim.

15. Consequently, although the learned trial Court ought not to have treated Section 339 BNSS as the substantive source of authority for permitting respondent No.3 to conduct the maintenance proceedings, the impugned order, when examined in substance, does not warrant interference to the extent that it permits the maintenance claim of the minor children to be pursued and adjudicated after the death of their mother. The reference to Section 339 BNSS is accordingly treated as an erroneous reference which does not, by itself, invalidate the substantive direction permitting representation of the minors for purposes of the pending maintenance proceedings.

16. Accordingly, the present petition is **disposed of**.

17. Needless to observe, the learned trial Court shall decide the maintenance application uninfluenced by any observation contained herein touching upon the merits of the rival claims, and shall afford the petitioner full opportunity to contest the claim in accordance with law.

18. Pending application(s), if any, stand(s) disposed of.

(SUNIL BENIWAL),J

RAKESH MATHUR

