



Gaikwad Rd

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO. 6649 OF 2021**

**REPORTABLE**

**... PETITIONER**

**~ VERSUS ~**

**... RESPONDENT**

**APPEARANCES**

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<b>FOR THE PETITIONER</b>	<b>Ms Aarti Sathe, with Aasawari Kadam &amp; Madhusmita Saud.</b>
<b>FOR RESPONDENT NO.</b>	<b>None.</b>

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**CORAM : Neela Gokhale, J.**

**DATED : 4th May 2023**

**ORAL JUDGMENT (Per Neela Gokhale J):-**

1. **Rule.** None appears for the Respondent despite service. The Respondent has consistently remained absent and has not filed any reply. Ms Aarti Sathe, learned Counsel along with Ms Aasavari Kadam and Ms Madhusmita Saud appears for the Petitioner husband. Rule is made returnable forthwith.

2. Admittedly, the marriage between the parties was dissolved by a decree of divorce by mutual consent, by the learned Family Court at Bandra, Mumbai, on the basis of consent terms dated 3rd July 2017 and 11th December 2017.

3. Clauses 8(a) to (d), (g), (h) (i) & (l) of the consent terms read as thus:

“(a) It is mutually agreed between the Petitioners that son shall remain in the joint custody of the Petitioners.

(b) It is mutually agreed between the Petitioners that if either of the Petitioners gets remarried, he/she will handover the custody of son to the other Petitioner who has not got remarried.

(c) It is mutually agreed between the Petitioners that the school vacation i.e. Summer, Diwali and Christmas vacations of son shall be equally shared by both the Petitioners until remarriage of either Petitioners.

(d) It is mutually agreed between the Petitioners that they shall be at liberty to take son out of Mumbai i.e. any place in India during Summer, Diwali and Christmas Vacations. During the vacation outing with son both the Petitioners agrees and undertakes to this Hon'ble Court that they will make son available on phone to the non-custodian parent during vacation and shall allow son to speak/talk.

(g) It is mutually agreed between the Petitioners that none of the Petitioners shall take son abroad during vacation and or otherwise without the written consent of each other.

(h) It is mutually agreed between the Petitioners that the Petitioner No.2 mother shall be at liberty to avail free access of son . It is mutually agreed between the Petitioners and while exercising right of access both the Petitioners shall not exercise the said right by disturbing the regular studies/school of son Krishang.

(i) It is mutually agreed between the Petitioners that they shall make/keep son available for regular access and shall not create any hurdle for regular/vacation access.

(l) It is mutually agreed between the Petitioners that they both will take care of son and shall keep himself/herself available with son during the absence of other Petitioner. In any circumstances son shall not be neglected.”

4. The physical custody of minor child is with the Petitioner husband. It is the contention of the Petitioner that his wife has remarried and now residing with her husband.

5. Considering the changed circumstances, the Petitioner husband moved an application before the learned Family Court, under Section 26 of the Hindu Marriage Act, 1955 (“HMA”) read with Order XXXIX Rule 1 of the Code of Civil Procedure 1908 (“CPC”) read with Sections 34 and 37 of the Specific Relief Act 1963 read with Section 151 of the CPC, seeking modification of the consent terms to the extent that the Petitioner father be declared as a sole, permanent and legal custodian and guardian of minor son . Prayer (b) to the application also sought modification/variation of clause 8(a) (c) (d) (g) (h) (i) (l) of the consent terms dated 3rd June 2017.

6. The learned Family Court rejected the application.. holding that the same being made under the provisions of Section 151 of the CPC was not maintainable. The Court was of the view that in view of a specific provision for declaration of custody of child under the Guardianship and Wards Act, 1890, resort to Section 151 of CPC cannot be exercised. It is this order that is assailed by the Petitioner in the present writ petition.

7. Heard Ms Sathe, learned Counsel for the Petitioner. Section 26 of the HMA reads thus:

**“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:

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.”

8. It appears that the view of the Learned Family Court is far too hyper technical. The Family court is correct in holding that the Petitioner must file a petition under the Guardian and Wards Act, 1890 to seek his appointment as legal guardian of the child. However, in so far as the prayer relating to modification of the order is concerned, an application under Section 26 of the HMA is perfectly tenable. Matters of custody of children are sensitive issues, requiring an appreciation and consideration to 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 as interlocutory orders and by the very 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 at various stages of life, including the circumstances of the parents in so far relating to the welfare of the child.

9. The Petitioner has relied upon the precedent laid down by the apex court in the matter of *Rosy Jacob vs Jacob A Chakramakkal*.<sup>1</sup> The apex court held that all orders relating to custody of minors were considered to be temporary orders. The three judge Bench of the apex court 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 the orders are based on consent, those orders can be varied, if the welfare of the child so demands.

10. The application for modification of consent terms in respect of custody and access of minor child has been admittedly made under provisions of Section 26 of the HMA read with the provisions of other statutes including Section 151 of the CPC. As far as the prayer seeking appointment of the Petitioner father as guardian of the child is concerned, the learned Family Court is correct in holding that relief in respect of guardianship of child may be sought under the provisions of the special statute namely Guardianship and Wards Act, 1890. However, in respect of the other prayers seeking variations of orders in respect of custody and

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1 (1973) 1 SCC 840.

access of child, an application under Section 26 of the HMA can be sustained.

11. In view of foregoing, the order impugned is partially set aside. The Family Court is directed to hear the application for modification/variation of the consent terms or any other modification relating to the custody and access of the minor child. The learned Family Court shall permit the parties to adduce additional evidence, to the limited extent relating to the modification application.

12. Rule is made partially absolute. There will be no order as to costs.

**(Neela Gokhale, J)**