

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO. 6529 OF 2025

..Petitioner

VERSUS

1.

2.

..Respondents

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Advocate for Petitioner : Mr. S.R. Bagal  
Advocate for Respondent Nos.1 & 2 : Mr. U.B. Bilolikar

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CORAM : S. G. CHAPALGAONKAR, J.

RESERVED ON : JUNE 23, 2025

PRONOUNCED ON : JULY 15, 2025

JUDGMENT :-

1. The petitioner impugns order dated 22.04.2025 passed by learned District Judge, Mukhed, District Nanded below Exhibit-5 in Civil Misc. Application No.04 of 2025.

2. The petitioner had married with late Vitthal Shinde in the year 2018. The couple was blessed with a daughter namely \*\*\*\*. On 30.07.2024, couple divorced by mutual consent. Custody of minor

\*\*\*\* was maintained with husband on undertaking of respondent no.2 that she will take care of her.

3. Unfortunately, on 05.01.2025, petitioner's husband passed away. Thereafter, respondents/paternal grandparents of minor \*\*\*\* filed Civil Misc. Application No.02 of 2025 before learned District Judge seeking declaration of their appointment as guardian of minor. Immediately thereafter, the petitioner filed Civil Misc. Application No.04 of 2025 claiming custody of minor \*\*\*\*g along with an application at Exhibit-5 for interim custody. Learned District Judge, Mukhed vide impugned order dated 22.04.2025 rejected application for interim custody. Hence, present writ petition.

4. Mr. Bagal, learned advocate appearing for petitioner submits that minor \*\*\*\* is aged about 5 ½ years. After death of her father, only petitioner is natural guardian. Being mother, she is entitled for custody of minor. According to Mr. Bagal, the grandparents cannot claim better right of custody as against mother, who can take better care of minor daughter. Mr. Bagal would submit that respondents are old aged persons and facing several health issues. They are residing in rural area where the facilities of education are not upto mark. The petitioner is residing at Nanded where she can take better care and provide best educational facilities. According to Mr. Bagal, the welfare of minor can be well achieved by handing over custody to petitioner. In support of his contentions, he

relies upon observations of Hon'ble Supreme Court in the case of **Tejaswini Gaud and Ors Vs. Shekhar Jagdish Prasad Tewari and Others<sup>1</sup>**, **Vivek Kumar Chaturvedi and Another Vs. State of Uttar Pradesh and Others<sup>2</sup>** and the judgment of High Court of Madras in case of **R. Munuswamy and Another Vs. J. Raja** in C.M.A. No.2162 of 2018 decided on 14.09.2023.

5. Per contra, Mr. Bilolikar, learned advocate appearing for respondents submits that petitioner resided hardly for a period of one year with her husband after the marriage. The child was in custody of husband and paternal grandparents. Even when the couple separated under decree of divorce by mutual consent, custody of minor child was handed over to husband as per undertaking of respondent no.2/grandmother assuring court to take care of minor. He submits that the infant child was abandoned by petitioner. Mr. Bilolikar would further invite attention of this Court to the document depicting that respondents have ensured best education to minor\*\*\*\*. He would further submit that when the child was interrogated by the learned District Judge, it was noted that she was comfortable in the custody of grandparents and reluctant to go with mother. According to Mr. Bilolikar, the welfare of child can be achieved by continuing her custody with respondents. He would submit that disturbing custody of child at this stage would have serious impact on her mental and

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1 AIR 2019 SC 2318

2 2025 (2) JT 296

physical health. Mr. Bilolikar submits that the learned District Judge has taken into consideration all relevant material and ruled in favour of maintaining custody of minor with respondents. Therefore, no interference is called in the impugned order in exercise of writ jurisdiction by this Court. In support of his contention, he relies upon the observations of Hon'ble Supreme Court in the case of **Nirmala Vs. Kulwant Singh and Ors**<sup>3</sup>.

6. Having considered submissions advanced and on consideration of material on record, it is evident that the issue of interim custody of minor girl aged about 5 ½ years is raised in this petition. Undisputedly, the child is in custody of respondents for almost last four years. Even when petitioner and her husband obtained decree of divorce by mutual consent, custody of minor was retained by husband and for care of child, respondent no.2/grandmother has given an undertaking. Unfortunately, on 05.01.2025, the husband passed away and minor remained in exclusive custody of respondents. At this stage, petitioner- Mother stepped into action and initiated her efforts for custody of minor. At this stage, reference can be given to Section 6 of Hindu Minority and Guardianship Act, 1956, which reads thus :

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3 AIR 2024 SC 2344

**“6. Natural guardians of a Hindu minor.—**

The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) **in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;**

(b) in case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).”

7. Sub-clause (a) of Section 6 clearly stipulates that in case of an unmarried girl, the father and after him, the mother is natural guardian of minor. Even it stipulates that in case of minor who has not completed five years, the mother would have precedence in the matter and custody of minor. Therefore, legally speaking, the minor girl child should be given in custody of mother unless it is established that she has adverse interest or incapacity to secure welfare of minor.

8. It is trite law that the Courts are empowered to hand over custody of minor. The welfare of minor is supreme consideration though provisions of special statutes govern rights of parents or

guardians. Turning back to facts of present case, it can be observed that the parents of minor could not continue matrimonial relationship which led to divorce by mutual consent. It is also matter of record that after marriage petitioner mostly resided at maternal home with her parents and had very short period of cohabitation with husband. The contents of divorce decree depicts that petitioner accepted continuation of minor's custody with husband, with assistance of respondent no.2.

9. As observed in aforesaid paragraphs, at this interim stage, the Court will have to primarily look for welfare of child. When it comes to a girl child aged about 5 ½ years, the Courts cannot be oblivious of fact that it is the mother who can be the best person to have custody. The care and support by natural mother to a child is unparalleled and cannot be replaced by anyone else. In present case, in light of aforesaid facts, the observations of Hon'ble Supreme Court in case of Vivek (supra) particularly para 10 are relevant which reads thus :

*“10. We cannot but observe that the learned Single Judge has not endeavored to elicit the child's attitude towards his father. Admittedly, the child, after his birth, was with his parents for about 10 years till the death of his mother. He was separated from the father in 2021 and has been living with his grandparents, who cannot have a better claim than the father, who is the natural guardian. There is no allegation of any matrimonial dispute when the mother of the child was alive nor*

*a complaint of abuse perpetrated against the wife or son. The father, the natural guardian, we reiterate, is well employed and educated and there is nothing standing against his legal rights; as a natural guardian, and legitimate desire to have the custody of his child. We are of the opinion that the welfare of the child, in the facts and circumstances of this case, would be best served if custody is given to the father.”*

10. The aforesaid observations would show that merely because grandparents or other relatives had nurtured the child for some period, the natural guardian cannot be denied right of custody of child unless it is shown that welfare of minor would be jeopardize. Similarly, in case of **Gautam Kumar Das Vs. NCT of Delhi and Others**<sup>4</sup>, the observations in para 12 are relevant which read thus :

*“12. Insofar as the fitness of the appellant is concerned, he is well educated and currently employed as Assistant General Manager (Class A Officer) in Central Warehousing Corporation, Delhi. The appellant's residence is also in Delhi whereas respondent No. 6 to whom the custody of the minor child was handed over to by respondent No. 5 is residing at a remote village in West Bengal. Apart from taking care of his children, the appellant can very well provide the best of the education facilities to his children. The child Sugandha Das, who lost her mother at tender age, cannot be deprived of the company of her father and natural brother. At the relevant time, the appellant had no other option but to look upon the sisters of his deceased wife to nurture his infant child.”*

11. In present case, when petitioner divorced from her husband, she left custody of minor with him, however that does not mean that she had abandoned the child. The record shows that petitioner was herself depending on her parents at the time of divorce and she has no source of income at all. Further, when father was readily available to take care of child, petitioner might have thought it fit to maintain custody with him. The record indicates that circumstances have been drastically changed after minor lost her father. Now, petitioner/mother is only natural guardian. She has placed on record the material to indicate that she is now engaged in business and has sufficient earning to maintain herself and child. Even, better education of child can be achieved at Nanded where the facilities of education are much more better than the place of respondents.

12. Perusal of impugned order shows that the learned District Judge emphasized on fact that the child is residing with grandparents for more than four years and handing over custody at this stage may have adverse impact on health of child. No doubt, aforesaid factors are relevant, but as child grows in age, the difficulties would be more in the matter of handing over custody. In present case, nothing is brought on record to show that petitioner/natural mother is not in a position to take appropriate care of minor girl or maintaining custody with grandparents would ensure better welfare.

13. In that view of matter, writ petition deserves to be allowed in terms of prayer clause (C) and it is accordingly allowed.

14. However, considering the fact that minor is in the custody of grandparents for longer period and looking to fact that they are also interested in taking care of minor, petitioner shall file an undertaking before learned District Judge that respondents would not be prevented access to child on Saturdays or/and Sundays any time from 10.00 am to 06.00 pm and permit them to take away the child, if they desire. Even on days of festivals, birthday, if respondents wish to visit the child, they shall not be prevented.

15. During Diwali, Christmas or Summer vacations respondents shall be entitled for temporary custody of minor for such period as fixed by Learned District Judge on their specific application.

16. Writ Petition stands disposed of in aforesaid terms. The observations made in this order are only for disposal of writ petition. Final decision shall be taken by learned District Judge without influenced by the observations in this order.

**(S.G. CHAPALGAONKAR, J.)**

17. Learned advocate appearing for respondents seeks stay of order. However, for reasons stated in order, prayer is rejected.

**(S.G. CHAPALGAONKAR, J.)**