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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION (HABEAS CORPUS) NO. 471 of 2026

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA Sd/-

and
HONOURABLE MR.JUSTICE D. M. VYAS Sd/-

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Approved for Reporting	Yes	No
	✓	

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KINJAL D/O HARESHKUMAR PANCHAL
Versus
STATE OF GUJARAT & ORS.

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Appearance:
MR DHARM K RAVAL(10689) for the Applicant(s) No. 1
HARI K BRAHMBHATT(9070) for the Respondent(s) No. 2,3,4,5,6,7
MR CHINTAN DAVE, APP for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA**
and
HONOURABLE MR.JUSTICE D. M. VYAS

Date : 11/02/2026

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA)

1. Kinjal has filed this petition seeking for issuance of writ of habeas corpus and to direct the respondent police to secure the corpus i.e , her 4 year old daughter and to produce her before this Court as she was in the unlawful custody of her husband Bhavik Hasmukbhai Panchal.

2. It is the case of Kinjal that she got married to Bhavik Hasmukhbhai Panchal, respondent No.2 herein on

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1.12.2020 and out of this wedlock, they have a daughter named who was born on 13.12.2021.

3. It is submitted by both the learned counsels that in May 2024, Kinjal and Bhavik Hasmukhbhai Panchal separated and it is also admitted that when they got separated, Kinjal left her matrimonial house along with the daughter and started residing with her parents.

4. Thus, it is not in dispute that was in custody of petitioner- Kinjal from May 2024 and this custody of Kinjal over was admittedly not questioned in any legal proceedings nor was it actually objected to by Bhavikbhai.

5. In fact, Bhavikbhai, in his reply, has stated as follows in relation to the separation:

> "5.2. Subsequently, on 30.12.2021, a baby girl namely was born from the wedlock. Disputes arose between the parties and consequently, on 11.05.2024, **the Petitioner left the matrimonial home along with the minor daughter and started residing at her paternal home in Palanpur**. It is pertinent to note that the phone call recording where the petitioner is specifically stating that she has left the matrimonial house on her own motion and she also stated that she is not interested in staying with the answering respondent, regardless of the future consequences. A pen drive disclosing the said conversation is attached herewith.
>
> 5.3. On 19.05.2024, the respondent husband called the mother of the petitioner and requested her to make

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him talk to the Petitioner as the petitioner was not taking any calls from the answering respondent. In the said conversation the mother of the petitioner specifically threatened the respondent husband that you have no right over the daughter and you can do what you deem fit. A pen drive disclosing the said conversation is attached herewith.

5.4. On 13.10.2024, the husband upon request made by the petitioner called the maternal uncle of the petitioner to settle the dispute between the parties, however, the maternal uncle specifically threatened to hit the respondent and asked him not to ever call or text the petitioner. A pen drive disclosing the said conversation is attached herewith."

6. It is, therefore, admitted that Kinjal was having the custody of when she parted company with her husband in May 2024. It is also clear from the above that Bhavikbhai did not initiate any proceedings regarding the custody of his minor daughter, who was about 3 years old as of May 2024.

7. Bhavikbhai, in his reply, has stated that on or about 5.5.2025, he addressed a communication to his Samaj leaders that there were differences between him and Kinjal and despite efforts to settle the disputes due to the unresponsive attitude of Kinjal, the matter could not be settled and as a consequence, it was necessary that the Samaj should get involved and settle the issue.

8. Bhavikbhai also states in his reply that pursuant to this request to the community, the Samaj fixed a date of hearing as 27.6.2025, but Kinjal did not appear and as

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she was unavailable and consequently, a fresh date was fixed.

9. Bhavikbhai states that on 2.7.2025, Kinjal withdrew the admission of from Podar International School and thereafter, made a written communication dated 10.7.2025 to the School seeking for refund of the fees. It would be appropriate to extract the entire letter, since a lot of emphasis is laid on this communication by the Learned Counsel of Bhavikbhai which will be considered later in this judgment:

> "To
> The Principal,
> Podar Internation School
> Akashan Road,
> Palanpur.
>
> Subject: Application for refund of school fees.
>
> Respectedd Sir/ Madam,
>
> I am Panchal Kinjal, parent of , who was tudying in Nursery at your esteemed institution. Due to My Divorce, I have withdrawn my child's admission from the school on 2nd July2025.
>
> I kindly request you to process the refund of the school fee already paid, as per the school's refund policy. I have attached the necessary documents, including the fee receipt and withdrawal application for your reference.
>
> I would be grateful if you could initiate the refund process at the earliest and credit the amount.
>
> Thanking you for your cooperation,
>
> Yours sincerely,
>
> Panchal Kinjal
> [redacted]
>
> Date: 10.07.25

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Mother's name: Sd/- Kinjal"

10. It is stated, in the reply, that the admission of was withdrawn due to the divorce that had been agreed upon and it is sought to be urged that though the customary divorce had not taken place, yet Kinjal was prepared for giving up the custody of and therefore, she had sought for refund of the school fees.

11. It is also stated that when this communication was addressed to the school on 10.7.2025, was in the custody of Kinjal and she was conscious of the fact that she would have to handover the custody of to Bhavikbhai and this was because the date fixed by the Samaj was the following day and Kinjal was aware that on that day, there would be a separation of both parties and that she would not be interested in retaining the custody of . For the sake of clarity, the exact averments in the reply will have to be reproduced, which are as under:

> "5.9. On 02.07.2025, the Petitioner withdraws the admission of the daughter from Podar International School, Palanpur. It is pertinent to note that thereafter on 10.07.2025, the Petitioner made a written communication to the school authority of the daughter that the admission of the daughter was withdrawn on 02.07.2025 owing to the divorce of the Petitioner and therefore, the school fee must be refunded. *It is also pertinent to note that though the customary divorce had not taken place, however, still in advance the Petitioner was prepared for the fact that she doesn't want the daughter to stay with her. Therefore, she had written a letter to the school*

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> *authority to get the refund of the school fee. When the letter was addressed to the school, the daughter was with the Petitioner, however, the Petitioner was aware and conscious of the fact that she will hand over the daughter to the husband on the date when the separation was to take place because the community centre had already through oral communication already given the next date of hearing of the said issue and it was very much known to the wife that on that day there would be separation of both the parties and she is not interested in continuing with the custody of the daughter.* The said document is a handwritten letter written by the Petitioner herself by her own which can be verified. Therefore, she is completely aware that the custody of the child is no longer going to be with her. A copy of the said hand written document by the petitioner - Kinjal is annexed hereto and marked as Annexure R-5."

12. It is the case of Bhavikbhai that on 11.7.2025, he and Kinjal voluntarily dissolved their marriage by executing a separation deed and this was a customary divorce. The copy of the divorce deed is also produced. As per the terms of this divorce deed, it is the case of Bhavikbhai that the marriage was dissolved and Kinjal had agreed to handover the custody of the daughter to him and that the daughter would be taken care of by him.

13. Kinjal in her petition states as follows as regards this separation deed:

> "3.2 Petitioner submits that her signature on the Separation Deed was obtained by a forcefully and through fraud and criminal deception on 11.07.2025 by respondent no. 2. *The Respondents (Husband and In-laws) induced her to sign by falsely promising that custody of the minor daughter would be handed over to her immediately upon execution. However, once*

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> *the Respondents (Husband and In-laws) secured her signature to satisfy their social divorce requirements, they reneged on their promise and forcibly withheld the four-year-old child, effectively snatching the corpus away from the biological mother (petitioner).*"

14. As could be seen from the said averments, it is her case that her signature was obtained forcibly and she was induced to sign the said document on the false promise that she would be handed over the custody of her minor daughter immediately after the same was executed, but, once she signed the document, her husband and her family members had reneged on their promise and had refused to handover the custody of the daughter and this amounted to obtaining the custody of her daughter unlawfully.

15. It may be pertinent, at this juncture, to notice that the couple admittedly got separated in May 2024 and till July 2025 i.e., for nearly 1 year and 2 months, it was Kinjal - the mother who was in custody of the daughter. No reasons are forthcoming in the deed as to why the mother was giving up the custody of her 4 year old daughter who had remained with her ever since the date of the separation.

16. Kinjal has also stated in her petition that she had lodged a police complaint on 24.12.2025 against Bhavikbhai and other family members of him, in which she has reiterated the contention that she was deceived

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into signing the separation deed and that the custody of her daughter was taken away from her fraudulently.

17. It may be pertinent to state here that in the complaint, she had also said that she had initiated pre-litigaton proceeding in November 2025 against her husband for securing the custody o .

18. Bhavikbhai contends before this Court that both these facts are actually suppressed in the petition and the custody of had been voluntarily handed over by Kinjal. He submits that [redacted] has filed this petition on the very day that the mediation was scheduled to be conducted. Bhavikbhai, therefore, contends that it can never be argued that the custody over his minor daughter would not amount to either an illegal confinement or an unlawful custody. He specifically seeks to contend that the custody of the 4 year old daughter was voluntarily handed over to him under the separation deed and, therefore, a petition for Habeas Corpus cannot be maintained as the custody had been handed over voluntarily and his custody over his daughter was lawful.

19. It is argued that if Kinjal disowns the separation deed, her remedy would be to approach the appropriate Court challenging the said separation deed and she cannot file a habeas corpus petition to get over the separation deed and secure the custody of the daughter

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which she had voluntarily handed over.

20. It is also argued that if it is the case of Kinjal that the welfare of the child would be better served if her custody was handed over to her, even then, she would have to approach the Family Court under the relevant law and make out a case that the welfare of the child would be better served if custody was handed over to her and at any rate, the petition seeking for issuance of a writ of habeas corpus was not maintainable.

21. In the light of the above contentions advanced by Kinjal and Bhavikbhai, the question that would arise for consideration in this petition is as to

a. Whether the rival claims of the father and mother over the custody of a minor child can be examined by the High Court in exercise of its habeas corpus jurisdiction?
b. Whether the custody of the 4 year old ' by her father Bhavikbhai on the basis of the Separation Deed dated 11.07.2025 could be construed as lawful custody and he would be entitled to retain her custody? Or
c. Whether the custody of the 4 year old ' should be ordered to be handed over to her mother-Kinjal by this Court while exercising the habeas corpus jurisdiction?

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Re: Question "(a)"

22. Bhavikbhai contends that it is impermissible in law for this Court to entertain the claim by his wife for the custody of their 4 year old daughter in the exercise of the habeas corpus jurisdiction of this Court. Reliance was placed on the following decisions:

a. Somprabha Rana & Ors v. State of Madhya Pradesh & Ors.[(2024) 9 SCC 382]

b. Rajeswari Chandrasekar Ganesh v. State of Tamilnadu [(2023) 12 SCC 472]

c. Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari [(2019) 7 SCC 42]

d. Nithya Anand Raghavan v. State of NCT of Delhi [(2017) 8 SCC 454]

e. Neha D/o. Pareshbhai Thaker v. Dharmesh Haribhai Patel [2025: GUJHC: 74565]

23. In the decision of Somaprabha Rana, which was relied upon by Bhavikbhai, the Apex court after considering a series of decisions rendered by it over a period of time (including some of the decisions relied upon in this case has ultimately held as follows:

> "6. After having perused various decisions of this Court, the broad propositions of settled aw on the point can be summarised as follows:
> a. Writ of Habeas corpus is a prerogative writ. It is an extraordinary remedy. It is a discretionary remedy;

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b. The High Court always has the discretion not to exercise the writ jurisdiction depending upon the facts of the case. It all depends on the facts of individual cases;

c. Even if the High Court, in a petition of Habeas Corpus, finds that custody of the child by the respondents was illegal, in a given case, the High Court can decline to exercise jurisdiction under Article 226 of the Constitution of India if the High Court is of the view that at the stage at which the Habeas Corpus was sought, it will not be in the welfare and interests of the minor to disturb his/her custody; and

d. As far as the decision regarding custody of the minor children is concerned, the only paramount consideration is the welfare of the minor. The parties' rights cannot be allowed to override the child's welfare. This principle also applies to a petition seeking Habeas Corpus concerning a minor."

24. As could be seen from the above, the writ of habeas corpus is a discretionary remedy and the exercise of this discretion depends on the facts and circumstances of the individual case. More importantly, the Apex court has held that the "best interests" of the child should be the overriding concern of the Court while exercising its habeas corpus jurisdiction.

25. Thus, the argument of the learned counsel of Bhavikbhai that the custody of which was voluntarily handed over by [redacted] amounts to lawful custody and cannot be interfered by entertaining a writ seeking for issuance of habeas corpus cannot be accepted, since the fundamental and basic principle of

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law in cases relating to the custody of a minor child while exercising habeas corpus jurisdiction would be an examination and determination of the best interests of the minor child. Question (a) is accordingly answered.

Re: Question "(b)" & "(c)"

26. Since both these questions are interrelated, they are considered and decided together.

27. Under our laws relating to the custody of minors are governed by the personal laws of the minor. The provisions of the G & WC Act also govern the powers of the Court in appointing a guardian of a minor and S. 6 of the G & WC Act declares that the provisions of the Act shall not take away or derogate the power to appoint a guardian of a minor to which the minor is subject to. This would therefore mean that the question relating to appointing a guardian for a minor would essentially be governed by the personal law to which the minor is subject to. In the instant case, as the corpus is a Hindu, her guardianship will be governed by the provisions of the Hindu Minority & Guardianship Act, 1956.

28. In normal circumstances i.e., when there is no marital discord between the parents, the custody over a minor is jointly exercised by both his parents and it is not

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exclusive to either of his parents. It is expected that both the parents would take care of the interests of the minor in a manner which is most beneficial to the betterment of the child. However, in the event of a marital dispute or in a case where it becomes necessary to appoint a guardian to a minor, the provisions of the Hindu Minority & Guardianship Act, 1956 would be attracted.

29. Section 6(a) of the Hindu Minority & Guardianship Act, 1956 states that the natural guardian of a Hindu minor in the case of an unmarried girl would be the father and after him the mother. The proviso to S. 6 (a) states that in case a minor who is less than 5 years, the natural guardian would normally the mother. Thus, in the instant case, as is only 4 years old, normally, [redacted]-the mother would be the natural guardian.

> "6. Natural guardians of a Hindu minor.—The natural guardians 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 the 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).

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Explanation.—In this section, the expressions "father" and "mother" do not include a step-father and a step-mother."

30. Section 13 of the Hindu Minority & Guardianship Act, 1956 declares in unequivocal terms that the welfare of the minor would be the paramount consideration when it comes to a Court appointing a guardian for a Hindu minor.

> "13. Welfare of minor to be paramount consideration.—(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.
>
> (2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

31. Section 2 of the Hindu Minority & Guardianship Act, 1956 also makes it clear that the provisions of the Guardian and Wards Act would be in addition and not in derogation of the Hindu Minority & Guardianship Act, 1956.

32. Section 17 of the Guardian and Wards Act also states that while appointing a guardian the Court shall be guided by the circumstances that is for the welfare of the minor.

> "17. Matters to be considered by the Court in appointing guardian. —(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

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(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

* * * * * (omitted)

(5) The Court shall not appoint or declare any person to be a guardian against his will."

33. Thus, the legal provisions relating to the custody of a minor and the judicial pronouncement, ultimately, state that the main point to be considered is the welfare of the child or what is known as the "best interests" of the child.

34. If there is a dispute between the parents and the issue is relating to custody of the child (corpus), in the normal course, either of the parents are required to approach the appropriate Court and seek for custody under the law which is applicable to them and if they are able to establish that the welfare of the child is better served if custody is handed over to them by placing cogent material, secure an order from the Court to that effect.

35. However, despite this legal position, in far too many cases, including the present one, attempts are made by one of the parents to somehow secure the custody of the child and thereby exclude the spouse from exercising any

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custodial rights, which results in unseemly litigation. The custody over the child is basically sought to be used as a weapon and as a leverage to achieve a favourable outcome in a marital dispute. This recourse adopted by warring parents leads to unnecessary trauma to a minor child, who at times, is not even able to discern as to what the litigation is all about and whether the fight is for her own good.

36. In the instant case, as noticed above from the admitted facts, marital discord between Kinjal and Bhavikbhai arose in May 2024, when Kinjal got herself separated and when was barely 3 years old. It is, in fact, admitted by Bhavikbhai that when Kinjal left her marital home and went to live in her parental home, his minor daughter was 3 years old and Kinjal took her along to her parental home and was taking care of her. Thus, from May 2024 the custody of , the minor daughter was with Kinjal until the disputed separation deed came into being.

37. In other words, for more than 1 year and 2 months commencing from May 2024, the 3 year old child was in the custody of Kinjal. Admittedly, during this period Bhavikbhai did not exercise any custodial rights over . This can be gathered from the very plea of Bhavikbhai in his reply that Kinjal was not responding to his phone calls and he was forced to call her mother to

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complain about this. This would thereby indicate that he also did not get a chance to visit his 3 year old daughter for this entire period of 1 year and 2 months.

38. Now, coming to the disputed Separation deed dated 11.7.2025, at the outset, we would be constrained to observe that this deeds does not inspire confidence to us as a document which dissolved the marriages and settled the custody of .. This is because the first page of the divorce deed is the embossed stamp paper followed by a page from which deed commences. This page from which the deed commences appears to have been inserted subsequently. We say so because the font size is smaller than the font in the remaining two pages and the line spacing of this page is also reduced as compared to the font size of the second and third page which also have a bigger line spacing. This indicates that the 1st page is inserted to ensure that some contents are to be adjusted in the opening page and there are two handwritten lines at the bottom of the page. Given this glaring disparity, *prima facie*, it is our view that this document is suspicious and the possibility of the first page having been inserted or substituted cannot be ruled out, though there is a signature of Kinjal at the bottom of the first page.

39. There are also a couple of more reasons which fuels this suspicion regarding the execution of this separation deed.

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40. Admittedly, as per the pleadings of the husband, the Samaj members had fixed the date of their hearing as 27.6.2025 and since Kinjal was unavailable, the date was refixed as 11.7.2025. It is therefore, clear that between the period from 27.6.2025 to 11.7.2025, there was absolutely no chance of any deliberations having taken place between Kinjal and Bhavikbhai or the respective family members.

41. Learned counsel for the petitioner, however, seeks to place great emphasis on the handwritten letter said to have been submitted by Kinjal to the principal of the school on 10.7.2025, whereby, she has stated that she had withdrawn 's admission on 2.7.2025 and was seeking for refund of the fees. Great emphasis is laid on the statement made in this letter of Kinjal to the effect "**Due to My Divorce**". An argument is sought to be made out that Kinjal, by virtue of this letter, had admitted the divorce and the consequentially, also the execution of the Separation deed.

42. In our view, this argument cannot be accepted. Firstly, as stated above, there was no deliberation between the parties during the period 27.6.2025, the first date fixed by the Samaj for deliberations on the marital dispute which did not take place due to the unavoidability of Kinjal and till 11.7.2025 i.e., the re-fixed date, on which

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day the separation deed is supposed to have been executed.

43. When the separation deed was admittedly executed on 11.7.2025, the question of Kinjal stating that she had secured a divorce on 10.7.2025, while addressing a letter to the School, renders the entire separation deed doubtful. This is because, if the meeting between the family members regarding the divorce was scheduled only on 11.7.2025, on which date the deed was entered, the question of there being an acceptance of the divorce a day before on 10.07.2025 would not be possible at all. In other words, Kinjal is supposed to have stated that she had divorced Bhavikbhai even before the deed was executed, which would be implausible, more so, when even according to Bhavikbhai's pleadings there was no deliberation conducted before 11.07.2025.

44. It must also be noticed here that this letter does not state that Kinjal was withdrawing the admission on 02.07.2025 (i.e., 9 days before the separation deed was executed) because she had handed over custody of Tejaldhi to her husband because of the divorce. The letter is in fact silent regarding the custody of Tejaldhi.

45. It is also to be noticed here that the fact that Kinjal was addressing a letter stating that she was withdrawing the admission of Tejaldhi would also lead to the inference

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that she was the one who had admitted and thereby, by necessary implication, she was in custody of [redacted] till July 2025.

46. There is yet another factor why the separation deed is rendered suspicious. It must be noticed here that this separation deed which is a notarized document contains an endorsement at the end of the document, which reads as follows:

> "Both parties (husband & wife) are agreed for divorce in the presence of witness both side. The system & custom is adopted for divorce, the community but, if they can get decree by the court in time."

47. By this endorsement said to have been made by the Notary-Advocate Sri. Purohit, it is clear that the couple were not dissolving their marriage through a purported customary divorce. This is because, the parties have been informed and also agree that they could get a decree of divorce through the court in time. In essence, this endorsement in the document would only lead to the inference that the document only recorded an agreement to divorce wherein it had been agreed that there could be future dissolution of the marriage by seeking for a decree from a Court. This would therefore also mean that the marriage subsisted till an appropriate decree from the Court was obtained.

48. We are fortified in arriving at this conclusion

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because the learned counsel for the petitioner submitted that, subsequently, in the month of September 2025, a petition under Section 13B of the Hindu Marriage Act, seeking for dissolution of the marriage by mutual consent had been prepared and was also agree to be filed before the Family Court. It was stated by the learned counsel for Bhavikbhai during the course of his arguments and it has also been stated in the reply that Kinjal was required to come out to the Court to present the joint petition along with Bhavikbhai, but, on coming to the Court premises, she created a ruckus and refused to sign the said document. Thus, the preparation of a joint petition seeking for dissolution of the marriage by mutual consent is an admitted fact between the parties.

49. The original 13B petition which contains the signature of Bhavikbhai is placed on record and this contains a clause which reads as follows.

> "(૮) છુટાછેડા બાદ પુત્રી ત્રિશીકા નો કબજો અરજદારનં.૧ વાળા પાસે રહેશે અને તેના ભરણપોષણ અને ઉછેર કરવાની જવાબદારી અરજદારનં. ૧ વાળા ની રહશે. અરજદાર નં.૨ પોતાની પુત્રીને તેણીની ઈચ્છા થાય ત્યારે સ્વખર્ચે મળી શકશે."
>
> **Translated version**:
>
> After the divorce, the custody of daughter shall remain with Applicant No. 1, and the responsibility of her maintenance and upbringing shall be borne by Applicant No. 1. Applicant No. 2 shall be entitled to meet his daughter at her own expense whenever she so desires.

50. As could be seen from this clause, even as of September 2025, when the petition was to be filed under

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section 13B, the custody of the minor daughter was stated to be with Kinjal and it had been agreed to hand over the custody of [redacted] to Bhavikbhai only after the divorce was granted. It cannot be in dispute that merely on the filing of a petition under S.13B of the Hindu Marriage Act, a divorce is not granted immediately or automatically, but the law mandates that there must be a cooling period of 6 months and the couple have to thereafter appear before the Court and reiterate their desire to dissolve the marriage by mutual consent.

51. It therefore follows from the petition prepared under Section 13B of the Hindu Marriage act, which contains the signature of Bhavikbhai, it is not in dispute that the custody of would be lawfully given to him only after the marriage had been dissolved by mutual consent through the orders of the Court. The petition prepared under Section 13B of the Hindu Marriage Act, thereby, virtually renders the customary deed of no consequence.

52. If the husband had admittedly decided to file a Section 13B petition and sought to dissolve his marriage, this presupposes that he himself had not accepted that the separation deed, amounted to a customary divorce. The proposed filing of a Section 13B petition, by itself, goes to show that the separation deed would be of no relevance and more importantly the specific recital that the custody of the child would be handed over only after

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the marriage was dissolved makes it clear that the husband would not have the right to have the custody of the child until the marriage was dissolved.

53. We wish to state here that we are making these observations only for the purpose of this case and we are going by whatever is stated by the husband for the purposes of determining whether *prima facie*, the custody of the 4 year old child by him is lawful or not. To reiterate, if the father were to himself admit in a petition which was to be filed in a Court of Law, that he would be entitled to custody only after divorce was granted, it is obvious that he cannot claim that he was in exclusive and lawful custody prior to the dissolution of the marriage. Given the fact that the custody of the 4 year old was with the mother right from May 2024 and does not admit that she handed over custody to the father coupled with the fact that the father in his Section 13B petition stated that he would be getting the custody of the child would be handed over to him after the marriage was dissolved by the grant of a decree of divorce by mutual consent, we are constrained to hold that the custody of the 4 year old child by the father cannot be termed as lawful.

54. An argument is sought to be advanced that the separation deed cannot be doubted and as a consequence the voluntary handing over cannot also be doubted because of the affidavit filed by the witnesses to

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the separation deed, which is produced along with the reply. It is no doubt true that an averment is made in the affidavit by the witnesses that the document was executed by the parties and interestingly it is only stated that Bhavikbhai had volunteered to take the custody of and had undertaken to bear all expenses of . It is not forthcoming from this affidavit whether Kinjal had agreed to this offer or even whether she was asked about her willingness to give up custody of in favour of Bhavikbhai. In the absence of the consent of Kinjal being sought and her consent having been obtained for handing over the custody of , the affidavit cannot be accepted as proof of consent of Kinjal for voluntarily handing over custody of .

55. Apart from the above, we may also take into consideration the crucial, if not the most important question as to what would be the paramount consideration when it comes to the custody of the 4 year old child. It cannot be in dispute that, as per the proviso to Section 6 (a) of Hindu Minority & Guardianship Act, 1956, the natural guardian of a girl child who is just about 4 years and one month old, would be the mother. The law, basically, recognizes that a girl child who is yet to complete 5 years of age can effectively and practically be taken care of only by the mother and not by the father. It also stands to common sense that a father would not be

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able to take care of a child below 5 years in the manner that a mother can.

56. In the present case, it is also not in dispute that Bhavikbhai is a businessman and has to occasionally travel out of his hometown due to his business engagements. During our interaction also, he submitted that though he could not be with the child all the time, his parents would take care of all the needs of the child and the welfare of the child would be better served if he was given custody of his daughter. He also sought to argue before us that his wife was also working and therefore, she would also be faced with the same problem of being with the child 24x7 and given the totality of the circumstances, the child would be better taken care of by him and his parents.

57. We are unable to accede to this argument of Bhavikbhai.

58. As stated above, was with her mother from May 2024 till she was allegedly handed over to her father in the month of July 2025. Thus, for a period of almost 14 months, when she was extremely young i.e. about 3 years, she has spent 1 year and 2 months with her mother and a bond would have been created between the mother and child. Therefore, to separate the mother from her girl child, who is just about 4 years old, and who had been brought up only by the mother for about 1 year 2 months,

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would not be in the interest of the child and would cause trauma to the child. By transferring the custody to the father, we would be basically forcing an entirely new and strange ecosystem on the child and she would be forced to face people who are basically strangers to her she had not even seen as she has been living with her mother in May 2024 when she was only about 3 years old.

59. On 16.01.2026, taking into consideration the tender age of [redacted], we had already directed that custody of [redacted] be handed over to the mother and the father had accordingly acceded to the order and handed over custody of [redacted]. We, therefore, hold that the mother would be entitled to retain the custody of her 4 year's old daughter. Question (b) and (c) is accordingly answered.

60. We are also of the view that the father i.e. Bhavikbhai, shall also have the right to visit his daughter on every weekend on Saturday and Sunday between 3.00 pm and 5.00 pm at the house of Kinjal and he will be allowed unhindered access between 3.00 pm and 5.00 pm.

61. We may also wish to add that we are passing this order subject to the right of Bhavikbhai to approach the appropriate Family Court to establish that the custody of the child should be given to him as it would be in the interests of the child and he is in a better condition to take care of the welfare of his daughter.

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62. It is also clarified and made clear that the observations made in this order shall not be construed by the Family Court as this Court rendering an opinion on the merits of the claim of the mother or the father in relation to the custody of [redacted]. The Family Court shall take an independent view of the matter on the basis of the evidence that is adduced before it.

63. The original separation deed and the petition prepared under Section 13B of the Hindu Marriage Act which was placed on record by Bhavikbhai shall be a part of this record and a certified copy of these documents shall be made available to Bhavikbhai to enable him to produce it in a proceeding that he may want to initiate before the Family Court. If the Family Court requires the aforesaid original documents, it may address a letter to the Registrar General of this Court and the documents shall then be directly transmitted to the concerned Family Court.

64. The writ petition is accordingly ALLOWED.

Sd/-
(N.S.SANJAY GOWDA,J)

Sd/-
(D. M. VYAS, J)

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