

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 15369 of 2025****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J. C. DOSHI**

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| Approved for Reporting | Yes | No |
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MANSIBEN W/O DHARMENDRABHAI KESHAVJIBHAI GHETIYA D/O  
BHAGVANJIBHAI GANESHBHAI BHIMANI

Versus

KESHAVJIBHAI DAMJIBHAI GHETIYA

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Appearance:

MR PREMAL S RACHH(3297) for the Petitioner(s) No. 1

MR HENIL M SHAH(10677) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J. C. DOSHI**

**Date : 23/03/2026**

**JUDGMENT**

1. By way of this petition under Article 227 of the Constitution of India, the petitioner - mother has prayed for the following reliefs:-

*“A) YOUR LORDSHIPS be pleased to issue appropriate writ, direction or order and be pleased to quash and set aside the impugned order dated 11.09.2025 passed by the Ld. I/C Judge, Family Court, Dhrol-Jodia below Ex. 19 in Civil Misc. Application No. (DC) 03 of 2025, in the interest of justice;*

*(B) YOUR LORDSHIPS be pleased to stay the execution, operation and implementation of impugned order dtd. 11.09.2025 passed below Ex.19 in Civil Misc. Application No. (DC) 03 of 2025, pending the admission, hearing and final disposal of this application;*

*(C) YOUR LORDSHIPS be pleased to grant such other and further reliefs, as are deemed fit, in the interest of justice;"*

2. The order passed below Exh.19 has been passed by the learned Family Court, Jodiya - Dhrol in CMA filed by the respondent - original petitioner herein u/s 12 of the Guardian and Wards Act, 1890 seeking permanent custody of minor son "A" (identity of the minor is hidden) from the petitioner - mother - mother. original petitioner is grandfather of the minor. During the pendency of the petition, the learned Family Court, without having any prayer below Exh.19, passed the following order:-

*"1. Opponent is directed to remain present with minor at Family Court, Dhrol, on each working Thursday to have access to applicants to minor in the court premises itself from 11.00 a.m. - 05.00 p.m. till the disposal of the present application on merits.*

*2. During the span of access, opponent and applicants have to sit together and opponent will not act in any manner prejudice to the interest of the applicants. Opponent will not remain present with her second husband during such meeting.*

*3. Both the parties will take care of food for minor in the court premises. Applicants can give gifts, clothes and toys to the minor and opponent will accept it and permit minor to use it and will cooperate in such access."*

3. It is in the aforesaid background, the petitioner - mother has approached this Court.

4. Heard learned advocate Mr. Rachh for the petitioner - mother and learned advocate Mr. Henil Shah for the respondent - original petitioner.

5. Learned advocate for the petitioner - mother would submit that Exh.19 filed before the learned trial Court is just a pursis, whereby the respondent - original petitioner has made some declaration only and no relief was claimed therein, yet the learned Family Court passed order impugned in this petition and directed the petitioner - mother to remain present on every working Thursday in the Court along with the minor, who is aged two and half years, between 11:00 a.m. and 5:00 p.m. and granted access to the respondent - original petitioner and further restrained the second husband of the petitioner - mother from remaining present there. He would further submit that second husband of the petitioner - mother is not party to the proceedings, and yet, the learned Family Court in excess of its jurisdiction, passed the impugned order against non—party to the proceedings, which itself shows the so called merits of the impugned order. He would further submit that consequent to passing of order below Exh.19, the learned Family Court also passed common order below Exhs.28, 29 and 30, whereby the petitioner - mother was directed to remain present before the Cluster Family Court, Dhrol - Jodia on each working Thursdays except holiday and further, the petitioner - mother was directed to

celebrate birthday of the minor in the Court premises. He would further submit that the learned Family is expected to take approach in welfare of a child, however, the learned Family Court has taken otherway round approach, which is established from the fact that the minor, who is not leaving an inch from the lap of the petitioner mother, is directed to keep in temporary custody between 11:00 a.m. and 5:00 p.m. Therefore, he would further submit that the learned Family Court has taken complete illogical approach.

5.1 Upon above submissions, learned advocate Mr. Rachh prays to allow this petition and to quash and aside the impugned orders.

6. *Per contra*, learned advocate Mr. Shah for the respondent - original petitioner would submit that after the death of son of the respondent - original petitioner, sometime before completion of one year, the petitioner - mother has contracted second marriage and thereafter, she shifted to her second matrimonial house with the minor without the consent of the respondent - original petitioner and hence, the respondent - original petitioner has been completely cut of from the access to the minor and therefore, the learned Family Court has passed correct and proper order. He would further submit that this Court under limited jurisdiction should not interfere with the impugned order, which is otherwise just and legal order.

6.1 Upon above submissions, learned advocate Mr. Shah requests to dismiss the petition.

7. Having heard learned advocates for both the sides and having considered the impugned order, it is utter surprise to this Court that the respondent - original petitioner herein though did not ask for any relief below Exh.19, which is just a pursis. The learned Family Court passed order below Exh.19 and granted visitation right plus temporary custody between 11:00 a.m. and 5:00 p.m. on each working Thursday. Noticeably, Exh.19 is pursis, whereby the respondent - original petitioner herein declared some facts, which is a unilateral declaration on the part of the respondent - original petitioner. Below pursis, the learned Family Court at the maximum can pass order of "Recorded" not beyond that.

8. What further could be noticed from the impugned order that the minor is barely two and half years old. The minor, when was present before the Court, he was constantly crying and was intended to go outside with his mother and stepfather, which infers that the minor was not ready to leave an inch from the lap of his mother i.e. the petitioner - mother. The learned Family Court noted that the petitioner - mother is not leaving the minor from her lap for a single moment and such conduct is creating obstacle in obtaining Children Assessment Report. According to this Court, the finding of the learned Family Court is complete uncalled for and insensitive.

9. In custody matter family court is required to adopt sensitive, humane and child centric approach. The Family

Court must construe that disputes over custody are not merely legal contests between the fighting party, but the issue is directly affecting the emotional, psychological, and developmental welfare of the child. The expression “sensitive approach” implies that the court must act as *parens patriae*—a guardian of the child’s best interests—rather than strictly adjudicating adversarial claims. Proceedings should be conducted in a manner that minimizes trauma, avoids hostility, and prioritizes the child’s welfare above the legal rights of the fighting litigants. The Hon’ble Apex Court has consistently emphasized that custody matters require empathy and flexibility. In **Gaurav Nagpal v. Sumedha Nagpal, 2009(11) SCC 42**, the Hon’ble Apex Court defined the approach and duties of Court in a custody matters and expect that mature and clear approach has to be taken up when conflicting demands are made by the parties. The Hon’ble Apex Court further held that object and purpose of the Guardian and Wards Act, 1890 is not a mere physical custody of the minor, but protection of the right of ward’s health and welfare. Relevant para are extracted as under:-

*“43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being in force.*

44. xxxxxxxx

45. xxxxxxxx

46. n Rosy Jacob V/s. Jacob A. Chakramakkal, 1973 1

SCC 840, this Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

47. Again, in *Thrity Hoshie Dolikuka V/s. Hoshiam Shavaksha Dolikuka*, 1982 2 SCC 544, this Court reiterated that the only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

48. xxxxxxxx

49. xxxxxxxx

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in *Mousami Moitra Ganguli's case* (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

**51.** The word 'welfare' used in Sec. 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases.

59. One must not lose faith in humanity. It is an ocean; if a few drops of the ocean are dirty, the ocean does not become dirty. If nothing ever went wrong in one's life, he or she would never have a chance to grow stronger. One should never forget that today well lived makes every yesterday a dream of happiness and tomorrow a vision of hope. Marital happiness depends upon mutual trust, respect and understanding. A home should not be an arena for ego clashes and misunderstandings. There should be Physical and mental union. Marriage is something, Ibsen said in "The League of Youth" you have to give your whole mind to. If marriages are made in Heaven as Tennyson said in *Aylmer's Field*, why make matrimonial home hell is a big question."

10. Similarly, in **Nil Ratan Kundu v. Abhijit Kundu, 2008 (9) SCC 413**, the Hon'ble Apex Court while observing about custody of a minor, held as under:-

"In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper

*guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor."*

**11. In Yashita Sahu v State of Rajasthan, (2020) 3 SCC 67, the** Hon'ble Apex Court held that the welfare of the child is paramount in matters relating to custody. In this context, we may refer to Para 22 thereof, which reads as follows:

"22. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what matter the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents.

*It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights. (emphasis supplied) .”*

12. Thus, a “sensitive approach” in custody matters entails; (1) Prioritizing the best interests and welfare of the child above parental rights; (2) Conducting proceedings in a non-adversarial and child-friendly manner; (3) Considering emotional, psychological, and developmental factors and (4) Avoiding mechanical or technical application of law. The Family Court is expected to adopt a sensitive, humane, and child-centric approach in a child custody matter keeping in mind that such proceedings concern the welfare and future of a minor rather than the legal victory of fighting litigants. The court acts in the capacity of *parens patriae* and must exercise discretion with empathy, patience, and sensitivity to the emotional needs of the child. The Family Court must place the child’s physical, emotional, moral, educational, and psychological welfare above the legal rights or claims of the fighting litigants. The Court should evaluate age and gender of the child, emotional bonding with each parent, stability of home environment, educational and developmental needs and wishes of the child, if of sufficient maturity.

13. In **Halsbury's Laws of England (Fourth Edition, Vol.13)**, the law pertaining to the custody and maintenance of

children has been succinctly stated in the following terms:

*"809. Principles as to custody and upbringing of minors. Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."*

14. Applying the settled legal position of law, at the end of the aforesaid discussion, this court finds that the view and approach of the learned Family Court is unfathomable. Barely two and half years aged minor has become the subject matter in a custody dispute and whereby, has become victim of inhuman approach. The petitioner - mother who has just contracted second marriage is forced to visit the court along with the minor having age of two and half years old on every Thursday to have access to the respondent - original petitioner and that too at an interim stage. Such order forcing the petitioner mother and the minor to visit court premises on every Thursday under the guise of access to grandparents is uncalled for and unjust. A lot more can be said, but this Court restrained itself from observing further.

15. It is also to be noted that some other orders passed in other applications are found to be not befitting to the

principle of best interest and welfare of a child. Vide order below Exh.15, firstly the learned Family Court directed the minor to remain present in the first death anniversary of his father in Diamond Factory at Dhrol, then again vide order below Exh.18, which was passed on an application for adjournment, the Court called for the report from the Medical Officer of Astha Hospital about medical condition of the minor though no one has prayed or asked for, thereby, the learned Family court has doubted the reason stated by the petitioner mother in seeking time to file reply. It is noticeable that some harsh order was passed below Exhs.28, 29 and 30, whereby application filed by the petitioner - mother at Exh.28 was rejected and she was forced to remain present on every Thursday in Court premises with the minor except the date where Thursday is holiday. Further, she was to remain present between 10:00 a.m. and 5:00 p.m. in the court premises. This kind of harsh and obdurate approach of the court is unacceptable. All that could be noticed that these kind of orders are passed at interim stage, without reading the evidence. The point of view of the learned Family court may not be biased, but at the same time, no less than *partis pris*. Under the circumstances, present petition deserves consideration.

16. Before parting with the order, the observation of the Hon'ble Apex Court in case of **Rosy Jacob V/s. Jacob A. Chakramakkal, 1973 1 SCC 840** being relevant, reads as under:-

*“14. ....The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father. is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. ....”*

17. With the above observations and findings, present petition is allowed. Impugned order dated 11.09.2025 passed by the Ld. I/C Judge, Family Court, Dhrol-Jodia below Ex. 19 in Civil Misc. Application No. (DC) 03 of 2025 is hereby quashed and set aside.

SHEKHAR P. BARVE

(J. C. DOSHI,J)