



**THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**FIRST APPEAL NO.348 OF 2024
WITH
CIVIL APPLICATION NO.1183 OF 2024
WITH
CIVIL APPLICATION NO.5709 OF 2025
WITH
CONTEMPT PETITION NO.715 OF 2024**

1]

..Appellant

VERSUS

1]

...Respondent

Advocate for Appellant: Mr. Mahesh P.Kale
Advocate for the Respondent : Mrs.Madhaveshwari Mhase i/by Lex Aquila

CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 30th JUNE 2025

PRONOUNCED ON : 21st JULY 2025

JUDGMENT :

1. Heard both sides finally at the admission stage with their consent.
2. Appellant/wife has taken exception to the judgment and order dated 18.12.2023 passed by Learned District Judge, Nilanga in Civil M.A No.1 of 2021 thereby granting custody of minor son/ to respondent/husband, reserving visitation right of the appellant.
3. During pendency of appeal by way of interim order handing over of custody was stayed vide order dated 12.03.2024. The respondent was granted visitation right on every sunday vide order dated 19.06.2024. Due to practical difficulties, the order was modified on 25.06.2024. By further order dated 24.10.2024, the handing over of temporary custody was directed to be before Registrar (District Superintendent,Bidar). Despite above orders, appellant neither handed over temporary custody to the respondent nor could he exercise visitation right. Though parties were directed to remain present before court, the appellant was not present on 20.03.2024.
4. Contempt Petition No.715 of 2024 is filed for taking action against the appellant for defiance of the interim orders of High

Court. By order dated 21.11.2024 matter was adjourned. Appellant was again directed to produce the child before the Court on the next date. She was absent on 05.12.2024. The notice of contempt in a prescribed format was issued to the appellant. In this manner, custody of the minor/ remained with the appellant till this date.

By my previous order dated 16.06.2025, child was directed to be produced on 30.06.2025. Again on the ground of illness of the appellant, she and her son abstained from remaining present.

5. On 14.07.2025, Learned counsel for the appellant tendered on record affidavit disclosing illness of the appellant which prevented her from attending the Court on 30.06.2025. I interacted with the minor in the chamber on 14.07.2025. He showed his disinclination to stay with his father/respondent. The merits of the matter and legal position need to be examined independently.

6. Appellant and respondent were married on 31.10.2010.

is born on 27.10.2015. He is of 9 years and 9 months old. Appellant has withdrawn from the company of the respondent since 10.06.2020. She is staying at her parent's place at Bidar with minor son. Respondent is residing at Tq.Nilanga,Dist.Latur. Respondent filed Civil M.A No.1 of 2021 under Section 7 of The Guardians and

Wards Act,1890 (hereinafter referred to as 'Act' for the sake of brevity and convenience) before Learned District Judge, Tq.Nilanga praying for custody of and declaration of his guardianship over

7. It is contended in the application that appellant had caused harassment to the respondent and she was not interested in co-habitation. She had a paramour. She left his company on 10.06.2020 alongwith her son. It is contended that in all seven members of the family of the appellant were residing in the room. No proper care was taken about health and education of a child. Respondent was ready to provide all comforts to the child. Hence, for seeking custody and declaration, application was filed.

8. Appellant contested the application by stating that she was being ill treated on count of dowry. She was running a clothes business and she was providing every care to for his health and education. It would be harmful to handover the custody to respondent.

9. Appellant examined three witnesses. Respondent examined himself. During the course of hearing, presiding officer interacted with child on 06.07.2023. Considering submissions of the parties,

application of the respondent was allowed.

10. Learned counsel Mr.Kale for the appellant submits that welfare of the child is a paramount consideration and in view of Section 17 of the Act, impugned order is patently illegal. It is submitted that in the interaction dated 06.07.2023, child refused to go with father. Despite that impugned order was passed. It is submitted that respondent has no fixed source of income as against appellant who runs a business of clothes.

11. It is further submitted that impugned judgment and order is based on assumptions and surmises. There is no concrete evidence to make out a case for custody of a child. It is contended that considering Bidar is a district place and the school in which he is admitted, he needs to be retained in the custody of the appellant. My attention is adverted to the documents produced on record by the appellant by way of affidavit-in-reply. It is submitted that appellant's business has been registered. Appellant has resorted to the proceedings of maintenance against the respondent.

12. *Per contra*, Learned counsel Ms.Mhase would canvass the following submissions :

- a) Recourse to personal law is imperative from reading of Section 6 and Section 17(2) of the Act. A commentary of author Dr.Tahir Mahmood in book of 'The Muslim law of India' is pressed into service for topic of "Guardianship and custody of minor under personal law"
- b) Father is the natural guardian and entitled to custody after 7 years.
- c) The pleadings and the evidence of the appellant shows her falsehood and inconsistencies in respect of son, income and place of business. The document of *Udyam* registration certificate is stated to be afterthought.
- d) Appellant has taken inconsistent stand and claiming maintenance under D.V.A proceedings.
- e) No reliance can be placed on the so called interaction of the trial court.
- f) Conduct of the appellant is objectionable. She has defied orders of this Court and facing contempt proceedings.
- g) Appellant's brother is seen with deadly sharp weapon on the social media.

13. Both the parties have produced documents on record in the appeal which were not part of record of trial court. They did not

raise serious objection for production of documents previously and during the course of hearing. Even they relied upon the documents to corroborate their submissions. Impliedly the documents relied by them can be taken into consideration and they have no serious objections for the same.

14. During the pendency of present appeal, various interim orders are passed for handing over temporary custody to the respondent but under one pretext or the other those have not been complied with. Respondent has preferred Contempt Petition No.715 of 2024 for the defiance of interim orders of this Court. On 05.12.2024, a notice of contempt in prescribed format has been issued to the appellant. There is a reason to infer that she is not ready to part with the custody and for that purpose she has audacity to flout the Court's orders. Her conduct can be dealt with in contempt proceedings.

15. Parties are Muslims. They are governed by uncodified Muslim Law. Respondent filed application for appointment of guardianship and custody of the minor under Section 7 of the Act. It is apposite to refer Section 17 of The Guardians and Wards Act, 1890.

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.

(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.

(4) [***]

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

16. It is imperative for the Court to have due regard to age, sex and religion of the minor while deciding his welfare under Section 17(2) of Act. Learned counsel for the respondent Ms.Mhase has referred to Section 6 which is as follows :

6. Saving of power to appoint in other cases.—In the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject.

17. The conjoint reading of Section 6 and Section 17(2) makes it obligatory to consider personal law applicable to the minor in the matter of guardianship and custody. There is a substance that Muslim law needs to be considered.

18. My attention is adverted to commentary authored by Dr.Tahir

Mahmood in book of 'The Muslim law of India'. The book is also tendered across the bar for ready reference besides photocopies of the relevant extracts. Chapter-9 of the book pertains to law relating to 'Children and parents'. It's part-C is about 'Minority and guardianship'. Under Muslim law as per classification of guardianship provided by clause (IV), *wilayat-e-tarbiyat* means physical custody and upbringing is *hizanat*. The overall surveillance over the person of the minor is *wilayat-e-nafs*. Following is the relevant description of the terminologies :

2. *Wilayat-e-tarbiyat* is also popularly known as *hizanat*. There is no word in English which can convey in full the sense of *hizanat*. Sometimes it is described as 'custody', but *hizanat* is not merely the physical possession of the minor, it also includes the upbringing (*parvarish*) of the minor.

Wilayat-e-nafs is what is known in English as 'guardianship of person'. It includes all kinds of parental surveillance over the activities of the minor. Specifically, it includes:

(a) the power to take all important decisions (other than those relating to marriage and property) on behalf of the minor; and

(b) the obligation to maintain the minor and fulfill all genuine needs and requirements of the minor.

19. It is further stated that guardianship of a person in relation to a child vests primarily to it's father. The concept of *hizanat* and *wilayat-e-nafs* are distinct. The physical custody and day to day upbringing is the *hizanat*. All other aspects than *hizanat* would fall

in *wilayat-e-nafs*. It is specifically provided that primarily *hizanat* of a minor is with mother up to particular age. After reaching that age, custody of a mother, who is *hazina* is taken away and vested with father who is called as *wali* and *hazin of the child*. Following relevant extract is useful to refer :

3. There seems to be some confusion in India regarding the relative positions of *hizanat* and *waliyat-e-nafs* (i.e., guardianship of person). Some authors have said that *hizanat* itself is guardianship of person; some others have found it difficult to theoretically differentiate between the two consistently with the rules regulating their incidents.

The true position seems to be that Muslim law splits guardianship of person into two facets. One of these consists of the physical custody and day-to-day upbringing of the minor and this is called *hizanat*. All other aspects relating to the person of the minor are outside the scope of *hizanat*; they belong to the *waliyat-e-nafs*. These two facets of guardianship of person begin to run at the same time (i.e., when the child takes birth); and they also end at the same time (i.e., when its minority legally terminates). But, while *wilayat-e-nafs* is from the beginning till the end held primarily by the child's father, it is not so with *hizanat*. The law awards the *hizanat* of a minor, to begin with, primarily to its mother; it is taken away from her after the child attains a particular age (fixed by the law) or reaches a particular stage in life (also fixed by the law). While the mother holding the *hizanat* of her child is known as *hazina*, the father who holds the guardianship of its person is known as the *wali* (guardian). When *hizanat*, too, is held by the father, he is simultaneously the *wali* and the *hazin* of the child.

Thus, the guardianship of person in relation to a child belongs, primarily, to its father; the mother's being only a pre-emptive right to keep the father away, for a legally prescribed period only, from a particular aspect of guardianship of person, namely, the custody and physical upbringing of the child. However, when one parent is holding the *hizanat* of a child, the other cannot be denied access to it.

20. Following part of the Chapter throws light on the duration or the status of *hizanat*.

VI. Guardianship of Person :

1. For the purposes of *hizanat*, Muslim law divides the duration of minority in respect of every male minor into two stages (marahil). The limits of these stages are different from school to school. The following chart shows these 'stages under some schools :

Sr.No.	school	first stage	second stage
(i)	Hanfi law	since the birth of the child till he completes the age of seven years.	since the completion of seven years till the termination of minority.
(ii)	Ithna Ashari law	since his birth till he completes the second year of his age.	since the completion of the second year till the termination of minority.

2. During the first stage, the *hizanat* of the minor belongs to his mother; at the commencement of the second stage it passes on to his father.

21. Thus, it can be construed from the commentary on the personal law that *hizanat* of the minor to his mother continues upto 7 years and thereafter it passes on to his father. The commentary of the author referred above is relevant because in the case at hand age of the minor is 9 years and 9 months. Appellant's *hizanat* stands terminated after completion of age of 7 years and gets transferred to the respondent. If appellant has deprived the respondent from the right of *hizanat*, by implication of Section 6 and Section 17(2) of the Act, respondent is entitled to maintain the petition. The submission of learned counsel Ms.Mhase that personal law entitles the

respondent to claim custody, has substance.

22. My attention is adverted to the deposition of the appellant. It was stated that initially was admitted in 'Embassy public school' up to 2020 and thereafter he was admitted to 'Royal Raina Public School'. In her cross-examination she admitted that above referred contention is incorrect. The receipts produced by the appellant alongwith additional affidavit are of depositing the fees with 'Embassy public school' from 21.01.2021 to 06.06.2024. She is not sure about the school of the minor.

23. In her affidavit appellant deposed that clothes center was started in the year 2018 at Nilanga and she was getting income of Rs.10000/- from the said business. It is not made clear that as to how she is running business in a shop at Tq.Nilanga District Latur by staying at Bidar (Karnataka). The deposition of her father shows that appellant was not earning Rs.10000/- from the clothes business.

24. I have gone through *Udyam* registration certificate which appears to have been generated on 18.07.2024. It was not produced before the Court below. This certificate would not enure to the benefit of the appellant, as in all probabilities it is secured afterthought. Learned counsel for the respondent has referred to

maintenance proceedings initiated by the appellant claiming maintenance from the respondent by showing his income as Rs.25000/- per month. In the present proceedings, it would not be possible to comment upon the same.

25. Learned counsel for the respondent forcibly and successfully pointed out the inconsistencies in the evidence of the appellant which I have recorded in above paragraphs. Minor appears to be extremely attached to the appellant. Minor is of 9 years old and for few years further he needs appellant's protection and care physically. Respondent does not come with a positive case of his source of income except his plea of labour work and pension of his father. I am of the considered view that the deficiencies or lapses on the part of appellant is not sufficient enough to disentitle her to retain the custody of the minor.

26. I had an interaction exclusively with the minor on 14.07.2025. I found from various questions put to him, that he is intelligent and precious child. I also found that the bonding of the minor with the appellant is greater. He has flatly refused to go with the respondent. Under these circumstances, when personal law and codified law tilt in favour of the respondent, the judgment cited by learned counsel

for the appellant would assist me in arriving at the conclusion.

27. Learned counsel for the appellant relied on the judgment of the Supreme Court in the matter of **Gaurav Nagpal vs. Sumedh Nagpal** reported in (2009) 1 SCC 42, that was a matter of custody of minor under 'The Hindu Minority And Guardianship Act, 1956'. In that case child was staying with father and mother was seeking custody. Her application was allowed by the District Court. Being aggrieved he preferred appeal in the High Court, but it was dismissed. Thereafter, he approached the Supreme Court but he was unsuccessful. Reliance is placed on paragraph Nos.40 and 47 to 51 of the judgment. It is relevant to quote following paragraphs :

"49. In *Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu* [1984]3 SCC698, this Court held that Section 6 of the Act constitutes father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. [See also *Elizabeth Dinshaw (Mrs.) v. Arvand M. Dinshaw* (1987) 1 SCC 42; *Chandrakala Menon (Mrs.) v. Vipin Menon (Capt)*, (1993)2SCC6 .

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 Section 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.”

28. In the present case also appellant has flouted interim orders passed by this Court. But that will not disentitle her to retain custody of the child. On the legalistic basis though merits of the matter tilt in the favour of respondent, considering minor’s ordinary contentment, health and favourable surroundings, this Court is inclined to decide in favour of the appellant. When the personal law is pitted with comfort and welfare of the child, latter would have upper hand. I am fortified in my view by latest rendition of the Supreme Court in the matter of **Neethu vs. Rajesh Kumar** reported in MANU/SC/0920/2025. In that case mother was denied custody by the High Court. Mother filed a Review Petition which was allowed by the Supreme Court. In that case minor was found to have been in deteriorating mental health. Following is the relevant paragraph :

“34. The stability and security of the child is an essential ingredient for the full development of the child's talent and personality. Even most of the well grown adults do not perceive sudden and huge changes in their lives very comfortably and often exhibit symptoms of distress when confronted with such an imminent change to their regular life. It would be extremely harsh and insensitive for the courts of law to expect the child to accept and flourish in an alien household where his own biological father is akin to a stranger to him. We cannot turn a blind eye to the trauma that is being inflicted on the child in consequences of the orders of the courts of law handing custody to the father, who is alleged to exhibit apathy towards

the tender emotional state of the minor.”

29. Reliance is also placed on the judgment of the Supreme Court in the matter of **Gayatri Bajaj vs. Jiten Bhalla** reported in (2012) 12 SCC 478. In that case interaction was conducted by the Supreme Court with minor children who were staying with father.

Following paragraph is relevant :

“6. In the aforesaid facts and circumstances, we feel that if the children are forcibly taken away from the father and handed over to the mother, undoubtedly, it will affect their mental condition and it will not be desirable in the interest of their betterment and studies. In such a situation, the better course would be that the mother should first be allowed to make initial contact with the children, build up relationship with them and gradually restore her position as their mother.”

. In view of the above principles, I find that a minor in the case at hand would be more comfortable and safe with his mother/ appellant.

30. Learned counsel Mr.Mhase for the respondent relied on the judgment of Delhi High Court in the matter of **Smt.Akhtar Begum vs. Jamshed Munir** reported in AIR 1979 Delhi 67 and taken me through paragraph Nos.12 and 15. The principles are based upon the concept of personal law. The judgment can be of no avail to the respondent. The judgment cited above by the appellant need to be preferred.

31. I find that Learned District Judge did not take into account

the ratio laid down by Apex Court in the judgments cited above. There is want of humanistic approach. I do not find that interest of the minor is better secured by handing his custody to the respondent. It is overlooked that respondent did not adduced the evidence to show that he has better financial capabilities. There is no female member in his family. While exercising *parens patriae* jurisdiction, the wish of the minor as well as attending circumstances need to be considered. In that view of the matter impugned judgment and order is unsustainable. I, therefore pass following order :

ORDER

A) First Appeal is allowed.

B) The Judgment and order dated 18.12.2023 passed by District Judge, Tq. Nilanga, District Latur in Civil M.A.No.1 of 2021 is quashed and set-aside.

C) The respondent shall have visitation right and the temporary custody on following terms :

i) During long holidays/vacations covering more than two weeks the child will be allowed to be in the company of the father for a period of seven

days.

ii) The period shall be fixed by the father after due intimation to the mother who shall permit the child to go with the father for the aforesaid period.

iii) For once in a month preferably on Sunday or on festival day, appellant shall allow the child to meet the respondent at Bidar District Bidar (Karnataka). The handing over and restoration of the custody shall be in the presence of Superintendent, District Court, Bidar or competent officer appointed by him.

D) Civil applications stands disposed of.

E) Contempt Petition No.715 of 2024 shall be dealt with independently.

[SHAILESH P. BRAHME, J.]

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