

**IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE  
BEFORE**

**HON'BLE SHRI JUSTICE SUBODH ABHYANKAR**

**ON THE 12<sup>th</sup> OF JULY, 2023**

**MISC. PETITION No. 2119 of 2023**

**BETWEEN:-**

**SMT. SHWETA JARIYA W/O UPENDRA JARIYA,  
AGED ABOUT 37 YEARS, OCCUPATION: HOUSE  
WIFE 46 MAIN ABHINANDAN NAGAR, GROUND  
FLOOR, SUKHLIYA DISTRICT INDORE.  
(MADHYA PRADESH)**

**.....PETITIONER**

***(BY SHRI AMIT BHATIA, ADVOCATE)***

**AND**

**UPENDRA JARIYA S/O SHRI OMPRAKASH  
JARIYA, AGED ABOUT 42 YEARS, OCCUPATION:  
SERVICE PRESENT ADD. 13 AAKASH NAGAR,  
NEAR DRP LINES DISTRICT BARWANI  
(MADHYA PRADESH)**

**.....RESPONDENT**

***(BY SHRI YOGESH KUMAR GUPTA, ADVOCATE )***

.....  
*This petition coming on for admission this day, the court  
passed the following:*

**ORDER**

1] This petition has been filed by the petitioner/wife under Article 227 of the Constitution of India against the order dated 16.03.2023, passed in Case No.RCS-HM No.879 of 2022 by II Principal Judge, Family Court, Indore, whereby the petitioner's application filed under Section 26 of Hindu Marriage Act, 1955 for

custody of her son, has been rejected.

2] In brief the facts of the case are that the petitioner and the respondent/husband's marriage was solemnized on 21.11.2007, and out of this marriage they have two children viz., daughter Mukta aged 14 years and son Dhruv aged 6 years.

3] Admittedly, there is a marital discord between the parties, which has led to filing of a petition for divorce by the respondent/husband on 12.04.2022, and according to the petitioner during the pendency of the aforesaid proceedings, the respondent took away the children from her possession and kept them at his sister's house at Badwani, and refuse to send them back to the petitioner, who is residing at Indore. Thus, an application under Section 26 of the Hindu Marriage Act, 1955 has been filed for custody of the children and during the pendency of the application, their daughter Mukta returned to the petitioner and thus, although the trial Court has allowed the custody of the daughter to remain with the petitioner, but her son Dhruv has been directed to remain with the respondent/husband and being aggrieved, the present petition has been filed.

4] Counsel for the petitioner has submitted that the petitioner is the natural guardian of her son and thus, the application in respect of son also ought to have been allowed by the learned Judge of the Family Court. It is submitted that the son is residing with sister of the respondent, whereas the respondent himself is serving in Pune in an I.T. Company. Thus, actually the respondent has sought the custody of their son only to keep him at her sister's house.

5] Counsel for the respondent, on the other hand, has opposed

the prayer and it is submitted that no case for interference is made out as the learned Judge of the Family Court had interacted with the child and was satisfied that he is residing with his father and his relatives for quiet some time, and is also studying in a reputed school of Badwani, and has also found him to be a happy and healthy child, and also considering the allegations levelled by the husband against the wife that she would wipe out his lineage (*Vansh*). Counsel for the respondent has also submitted that the respondent is already paying a sum of Rs.10,000/- to the petitioner, and is also looking after the school fees and other expenses of their daughter, and the petitioner is also residing at Indore in the house of the respondent only and thus, it is submitted that no interference in the impugned order is called for.

6] Heard counsel for the parties and perused the record, and also interacted with petitioner – Shweta Jariya, the respondent – Upendra Jariya as also their son Dhruv Jariya separately, in the chamber of my Court.

7] On due consideration of submissions and on perusal of the record, it is found that undisputedly the son of the petitioner and the respondent is residing at Badwani, and as informed by the respondent himself he is serving in Pune in a Software Company, and their son Dhruv is residing in the house of his sister at Badwani, and is also studying in a reputed school of Badwani. Thus, it is apparent that the respondent/husband is not in a position to personally look after his son, and he has no option but to keep him with his sister only, who is residing in Badwani.

8] While interacting with the child and her parents in the

chamber, he has simply stated that he wants to reside with both the parents, the wife has stated that she is willing to reside with the husband, whereas the husband has clearly stated that it is not possible to reside with the petitioner anymore.

9] So far as the petitioner is concerned, she is undoubtedly the natural guardian of her son Dhruv and when it comes to custody of a child, the paramount consideration that should weigh with the court is the welfare of the child, and this court has no reasons to believe that the mother of the child would not be a good choice to care of his welfare and overall upbringing. In the considered opinion of this court, the welfare of the child in the present case cannot be compromised only because some bald allegations have been levelled by the husband against his wife/petitioner, especially when the sister of the child is already residing with her mother. This court is also of the considered opinion that while granting custody of a child, the preference has to be given to the natural guardian only to the exclusion of other relatives of the husband, unless there are some special reasons, which are none in the present case.

10] In such circumstances, to deprive Dhruv, who is only 6-7 years old, the love and affection of his mother, and the company of his elder sister, is neither desired nor it is called for. Even according to the respondent/husband, their daughter is also studying in Indore at a reputed school, and he has no objection if the daughter resides with the mother, as admittedly, he himself has returned his daughter to her mother's house.

11] Resultantly, the **impugned order dated 16.03.2023 is hereby set aside and the petition stands allowed.** It is directed that the

respondent Upendra Jariya shall return his son Dhruv Jariya to his wife's custody within a period of two weeks from 24.07.2023 and shall also bear all his expenses including his schooling at Indore. He is also directed to ensure that his son Dhruv is admitted in some reputed school of Indore.

**12]** So far as the visitation rights of the respondent/husband are concerned, it is directed that the respondent husband would be allowed to communicate with his son/daughter through video conferencing on every Sunday morning for one hour between 11-12 am. He would also be entitled to take both the children or his son only, for outing for four hours, once on any Sunday of every month till the final disposal of the suit. If the aforesaid arrangement is found to be inadequate by the respondent, he is also at liberty to file an appropriate application before the Family Court for modification of the same and for further orders, as per the Child Access and Custody Guidelines framed by this Court.

**13]** With the aforesaid directions, the petition stands *allowed* and *disposed of*.

**(Subodh Abhyankar)**  
**Judge**

**Pankaj**