



2026:AHC:213203-DB

HIGH COURT OF JUDICATURE AT ALLAHABAD
FIRST APPEAL No. - 798 of 2026

Smt. Sudha Tomar

.....Appellant(s)

Versus

Smt. Shakuntala Devi

.....Respondent(s)

Counsel for Appellant(s)	: Manu Khare
Counsel for Respondent(s)	: Piyush Tripathi

AFR
Reserved

Court No. - 40

HON'BLE SARAL SRIVASTAVA, J.
HON'BLE SIDDHARTH NANDAN, J.

(Per: Siddharth Nandan,J.)

1. Heard Shri Manu Khare, Advocate appearing on behalf of the appellant and Shri Rakesh Pande, learned Senior Counsel assisted by Mr. Piyush Tripathi appearing on behalf of the respondents.

2. The present first appeal under Section 19 of the Family Courts Act, 1984 and Section 47 of the Guardians and Wards Act, 1890 (hereinafter referred to as the "Act, 1890") has been preferred against the judgment and order dated 21.07.2026, as well as the decree passed by the learned Additional Principal Judge, Family Court No. 2 at Agra in Misc. Civil Case No. 194 of 2021 (Smt. Sudha Tomar Vs. Shakuntala Devi), by way of which the suit filed under Sections 7 and 25 of the Act, 1890, for custody of Master Shreyansh Tomar, by her natural mother namely Smt. Sudha Tomar, has been refused.

3. The admitted facts are that the appellant was married to one Saurabh Tomar on 04.12.2017; and out of the wedlock, their son Master Shreyansh Tomar was born on 19.01.2020. But unfortunately the husband of the appellant died on 22.09.2020, when their ward was hardly eight months old. It is the case of the appellant that on 17.11.2020, her signatures were taken on a blank paper, under the pretext that the same are required for processing the insurance claim; but subsequently a forged agreement is said to have been prepared on the said blank papers, wherein it was transcribed that the child shall remain with the grandmother and she would have received Rs. 4,50,000/- in lieu of the same; and thereafter she was prevented from meeting her son, who was hardly ten months old. It is also an admitted case that out of the insurance amount of Rs. 25,00,000/-, only Rs. 12,50,000/- was given to the appellant and the remaining Rs. 12,50,000/- was transferred in the name of the appellant's deceased husband's brother; and it is contended, to which he had no entitlement and at best the opposite party, would have been entitled to 1/4th of the share, as per the Laws of Inheritance.

4. The appellant having filed Misc. Case No. 194 of 2021 on 06.08.2021, the opposite party filed her written statement, along with counter claim on 02.07.2024 under Section 7(1)(b) of the Act, 1890. It shall be pertinent to note here that even the statement of the ward was recorded as D.W.-5 on 20.04.2026, i.e, when he was hardly six years old.

5. Shri Manu Khare, Advocate appearing on behalf of the appellant vehemently urged before this Court that the mother is a natural guardian of the child and being the mother, the welfare of the child shall be best served under her guardianship. He has further submitted that time and again this Court has held that, so far as the custody of a minor child is concerned, the mother is entitled to the same, at least until the child is of a tender age, unless there is a clear disentitlement inferable. He has further submitted that the principle which has been acknowledged, arising from human nature, clearly states that the mother is best oriented to look after the welfare of an infant or a young child. The natural

instinct of a mother has always been regarded to be the best, to take care of the needs of a young child and secure his/her welfare compared to even against a natural father; whereas in the present case, in absence of the father, the welfare of the child is the best with the natural mother.

6. The only exception which has been recognized in law, with regard to the grant of custody of the child to the mother, is either when she is married to a stranger or the mother is living a demonstrable immoral life; and in absence of same, he asserts that the custody of a child who is of a tender age, with any other relative while his mother is around, would be unlawful custody. He has placed reliance upon a decision of this Court in **Vedika Dwivedi Vs. State of U.P. and others**¹. For ready reference, paragraphs 18 to 23 are reproduced below:

“18. The issue before this Court, in the instant case, is as to whether the custody of minor should be given to the mother (petitioner no.1) or the minor should remain in the custody of opposite party nos.2 to 5, who are grand-parents, uncle and aunt respectively of minor- Vedika Dwivedi.

19. In order to decide the aforesaid, this Court took note of the observations made by this Court passed in the case of Sahil and Another Vs. State of U.P. and Others, MANU/UP/1578/2020 : AIR 2020 All 213.

20. In the case of Sahil (supra), this Court, after considering the various pronouncements on the issue of custody of minor as also the relevant provisions of law, observed as under:

"19. It is clear from the position of law as it stands that so far as the custody of a minor child is concerned, the mother is entitled to it until the child is of tender age, unless there be a clear disentitlement inferable. This right of the mother to the child's custody is not based on the personal law of parties alone, but on a well acknowledged principle arising from human nature - and if this Court may dare say from the animal nature of man - that the mother is best oriented to look after the welfare of her infant or young child. The mother has always been regarded to be best equipped to take care of the needs of a young child, and secure his/ her welfare compared to a father. This right of the mothers is subject only to known exceptions, like her marriage to a stranger or the mother living a demonstrably immoral life. The mother's right is so well established, that in case of a minor of tender

1. AIR 2025 All 58

years, any other relative holding the child in his/ her custody while the mother is around, would be unlawful custody. Of course, the principle would not apply if the mother is disentitled under some reputed exception."

21. Upon due consideration of the aforesaid facts as also the observations made by this Court, quoted above, this Court finds force in the claim of next friend - Priya Devi, who is mother of the minor - Vedika Dwivedi and also of the view that the mother be regarded to be the best to take care of the young needs of the minor, a female child, and she would secure the welfare of the minor compared to the private opposite party nos.2 to 5, who are grand-parents, uncle and aunt, respectively, of the detenue- Vedika Dwivedi.

22. In view of the aforesaid, this Habeas Corpus Writ Petition succeeds and is allowed.

23. The custody of the minor, namely, Vedika Dwivedi, who is present before this Court, is provided to the next friend- Priya Devi, mother of the minor. The minor shall remain in custody of Priya Devi."

7. Responding to the same, Shri Rakesh Pandey, learned Senior Counsel submits that the appellant has deserted the child at a very tender age and since then he is living with his grandmother, who is around sixty years of age and is capable to take care of the child; and more so ever the grandmother is living with her other two sons, who not only support their mother financially but also the child, whose custody is being sought by the grandmother. He has heavily placed reliance on the statement of the child itself, wherein from the said statements it cannot be said that the child is not being taken care of by the grandmother or his upbringing is not in a conducive environment; and as such the welfare of the child is best with the grandmother. He has further placed reliance upon a compromise dated 17.11.2020, whereby it is stated that the Appellant had abandoned her claim; and also a Will dated 10.07.2020, executed by the father prior to his death, vesting the right of Guardianship, in his mother.

8. However, on a pointed query as to whether there is any source of income of the grandmother from which it can be said that she would be capable to meet out the financial needs of the child, the only reliance which was placed upon was on an Income Tax Return which was filed

showing the income of Rs. 5,00,000/-, i.e., just above the exempted limit of Rs. 4 Lacs for a senior citizen and with applicable deductions, tax paid shall be zero, under the ITR. No proof of any business or mode of earning can be demonstrated from the sole evidence which has been brought on record i.e., the Income Tax Return, so much as to decipher that the financial needs of the child can be met out.

9. A three Judges Bench in the case of **Githa Hariharan (MS) and Another Vs. Reserve Bank of India and Another**², while dealing with the construction of the word "after" used under Section 6(a) of the Hindu Minority and Guardianship Act, 1956 (herein after referred to as the "Act, 1956"), interpreted the same to mean "in the absence of"; and the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. The said interpretation was made by the Apex Court while determining as to whether Section 6(a) of the Act, 1956 violates Articles 14 and 15 of the Constitution of India, in much as the mother of the minor is relegated to an inferior position on the ground of sex alone, since her right as a natural guardian is made cognizable "after" the father in the said provision.

10. The aforesaid provision is being referred to for the purposes to understand the definition of "guardian" in Section 4(b) and "natural guardian" in Section 4(c) of the Act, 1956 in the context of the discrimination against the mother. The Apex Court therefore, while interpreting the word "after" in Section 6(a) of the Act, 1956, concluded that it means "in the absence of", referring to the father's absence.

11. In the present case admittedly the father not being there, the mother has to be construed as a natural guardian, as such can act validly on behalf of the minor.

12. For ready reference, para 10 of the judgment in the case of **Githa Hariharan** (supra) is reproduced here and below:-

2. (1999) 2 SCC 228

“10. We are of the view that Section 6(a) (supra) is capable of such construction as would retain it within the constitutional limits. The word "after" need not necessarily mean "after the lifetime". In the context in which it appears in Section 6(a) (supra), it means "in the absence of", the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be Section 6 of the HMG Act, without causing any violence to the language of Section 6(a) (supra).“

13. Shri Manu Khare, Advocate while responding to the alleged compromise/settlement dated 17.11.2020, as well as the alleged Will dated 10.07.2020, submitted that as far as the compromise/settlement dated 17.11.2020 is concerned, the same is a forged document as the signatures were obtained on a blank paper under the pretext that the same are required for the claim towards the insurance policy of the husband; and submitted that even otherwise the said compromise dated 17.11.2020 was never produced by the opposite party or proved as per law.

14. This Court in its opinion does not consider the compromise dated 17.11.2020 to be of much relevance as the paramount consideration is the "welfare of the child" and not the competing claim of the either of the parties and likewise the alleged Will dated 10.07.2020 which was also not produced in original by the defendants, is not of much help to the respondent. Needless to state that the original of the same was neither produced by the Opposite Parties nor proved as per law.

15. At this juncture, it may also be noted that a compromise cannot be regarding the claim as a natural guardian, over the custody of a child or one of the natural guardian setting out a Will with respect to their child

in favour of another member of the family, by way of exclusion of the rights of the mother as a natural guardian.

16. Shri Rakesh Pandey, learned Senior Counsel has also vehemently urged that since the birth, the child is living with the grandmother and is now reasonably settled in the environment and uprooting the child from the said environment will not be conducive and handing over the custody of the child to the mother, would not be in the welfare of the child.

17. It is evident from the record that soon after the death of the appellant's husband, the custody was not with the mother and without wasting much time she has also initiated proceedings for the custody. Though a competing claim has been set up by the grandmother, trying to suggest that the mother has abandoned the child but there is no delay on the part of the appellant to initiate the legal proceedings, once having been deprived of the custody of her own child.

18. In view of the fact that the child was denied access to his own mother, and the mother was also deprived of her right to spend time with her child, placing reliance on the statement of the child where he is referring to his uncle and aunts, as father and mother respectively or his opinion to stay with the grandmother, also have to be examined in the light of the aforesaid facts.

19. The 'nature' is said to have given a special coherence between a mother and a child and when the two are separated, especially when the child is of a tender age and restrained to meet his/her mother, it is not short of a deprivation of a natural right, to know his own parents.

20. The fact that the child was living with his grandmother or his extended family and on being interviewed he had expressed his desire to remain in custody of the said person, cannot be of much consequence; and this Court as well as the Apex Court on numerous occasions when the lis pertains to the custody of a minor child, had declined to interview the child, expressing that the capacity to give an 'intelligent preference', is lacking in these circumstances. This Court gainfully refers to the

judgment in the case of **Ms. Nasrin Begam and Another Vs. Prof. Mohd. Sajjad and another**³.

21. For ready reference paragraphs 15 and 16 are reproduced below:

“15. It is evident from the record that the child was denied access to her own parents. She has been deprived of her right to know her own parents and spend time with them. Though, there cannot be a doubt to the fact that the child was brought up by the respondents as their own daughter and she would call them as 'Abbu' and 'Ammi', but restraining a child to meet her parents, to our mind, is nothing but denial of her birth/natural right to know her own self. As the child is living with the respondents since when she was three and a half months old and barely got the chance to know her parents, interviewing her or knowing her wishes would have served no useful purpose as the child would want to remain in the custody of the persons with whom she is residing at present and who she knows as her own parents. We may record that for this reason and for other reasons for the discussion made hereinafter, we did not accept the prayer made by the learned counsel for the respondent to summon the child to ascertain her wishes.

16. Further, this situation takes us to the observations made by the Apex Court in the case of Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, 1983 (1) SCR 49 wherein the Apex Court while declining to interview the minor child had noted that it was satisfied in the facts of that case that the minor child was not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. In the facts of that case, the parents of the child were litigating and the court while dealing with the said case had noted that any child who is placed in such an unfortunate position can hardly have the capacity to express an intelligent preference which may require the court's consideration to decide what should be the course to be adopted for the child's welfare. It was observed that mature thinking is indeed necessary in such a situation to decide as to what will enure to her benefit and welfare. The relevant observations of the Apex Court in the said decision as noted in paragraph No. '81' of Nil Ratan Kundu (supra) are required to be noted hereinunder:—

"81. Considering the facts of the case, however, the Court refused to undertake that exercise and stated; "In the facts and circumstances of this case we are however, not inclined to interview the minor daughter, as we are satisfied in the present case that the minor is not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. We have earlier set out in extenso the various orders passed by the various learned Judges of the Bombay High Court after

interviewing the minor and the learned Judges have recorded their impressions in their judgments and orders. The impressions as recorded by the learned Judges of the Bombay High Court, go to indicate that the minor has expressed different kinds of wishes at different times under different conditions. It also appears from the report of the Social Welfare Expert that these interviews cast a gloom on the sensitive mind of the tender girl and caused a lot of strain and depression on her. Torn between her love for both her parents and the acrimonious dispute between them resulting in the minor being dragged from court to court, we can well appreciate that the sensitive mind of the minor girl is bound to be sadly affected. Though the girl is quite bright and intelligent as recorded by the learned Judges of the Bombay High Court in their orders after their interviews with the girl who is of a tender age and is placed in a very delicate and embarrassing situation because of the unfortunate relationship and litigation between her parents for both of whom she has great deal of affection, she is not in a position to express any intelligent preference which will be conducive to her interest and welfare. Mature thinking is indeed necessary in such a situation to decide as to what will enure to her benefit and welfare. Any child who is placed in such an unfortunate position, can hardly have the capacity to express an intelligent preference which may require the Court's consideration to decide what should be the course to be adopted for the child's welfare. The letters addressed by the daughter to her mother from Panchgani and also a letter addressed by her to her aunt (father's sister) also go to show that the minor cannot understand her own mind properly and cannot form any firm desire. We feel that sending for the minor and interviewing her in the present case will not only not serve any useful purpose but will have the effect of creating further depression and demoralisation in her mind".

(emphasis supplied)"

22. Welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian, child's ordinary comfort, contentment, health, education etc. and in determining the welfare of the child the Court cannot take a pedantic approach. Merely because certain relatives have taken care of the child, cannot be a justification for taking the child out of the custody of his mother, who has a preferential right being a natural guardian, and especially when the child is not in a position to give an intelligent preference; and therefor when the child was produced before this Court, though under the

directions, this Court had declined to interact with the child as the emotions attached at the moment, should not come in the way of justice by obfuscating the real object i.e. to determine the welfare of the child.

23. The child's decision or an expression to stay with the relatives who has been taking care of him for the last few years can be a natural reaction in a given case; but however since he has never seen his mother or was not allowed to spend time with her, the said preference, as he was separated from his mother immediately after the death of his father and was living with his grandparents, in the opinion of the Court while considering the said background, it cannot be said that the grandmother has a better claim over the natural guardian, i.e., the mother.

24. This Court though was inclined to refer to the independent financial status of the grandmother, and that she completely depends upon her two other sons; but however the paramount consideration being connected with the welfare of the child and that the mother has also brought on record certain documents demonstrating that she is having sufficient immovable assets/properties and earnings, to nurture her minor son and manage his future prospects, the Court finds that the financial dependability is well balanced between the parties, and the same does not require any further scrutiny, since it is not a mitigating factor, for either parties.

25. The appellant has also specifically submitted that her mother has handed over her immovable and movable financial assets for the purposes of nurture and care of her son; and Power of Attorney executed by her mother in her favour on 25.06.2026 is also part of the record; however, we also do not propose to go into the said factual assertions but suffice to say that the mother cannot be denied custody, merely on her financial dependency or earning alone.

26. The next question which deserves consideration before determining the custody is a factor that now since the child had admittedly lived with

his grandmother for over five years, will it be suited at this stage to handover the custody to his mother or not?

27. In the aforesaid scenario, the welfare of the child having been considered with the natural mother as opposed to the contesting claim of the grandmother, in the backdrop of the fact of the child was not allowed any access to his mother in the past five years, this Court finds with the passage of time, the child must have developed certain bonding with his other relatives including the grandmother; but having considered, that the child is of such a tender age and is therefor not in a position to give an intelligent preference; and Court having also denied to interact with the child for the said reasons ensuring that while deciding upon the welfare of the child, the emotions attached to such an interview may not affect its decision, this Court finds that though initially some problems may arise when the child is handed over to the mother but with the passage of time, the child will settle down in the atmosphere, with the love and care of the mother.

28. The aforesaid view is also supported by the decision in the case of **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**⁴.

29. For ready reference paragraphs 34 to 37 are reproduced below:

“34. As observed in Rosy Jacob [Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840] earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, contentment, health, education, etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither

4. (2019) 7 SCC 42

abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.

36. The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only 1½ years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the Court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. 1½ years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.

37. Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralised with the passage of time. However, till the child is settled down in the atmosphere of the first respondent father's house, Appellants 2 and 3 shall have access to the child initially for a period of three months for the entire day i.e. 8.00 a.m. to 6.00 p.m. at the residence of the first respondent. The first respondent shall ensure the comfort of Appellants 2 and 3 during such time of their stay in his house. After three months, Appellants 2 and 3 shall visit the child at the first respondent's house from 10.00 a.m. to 4.00 p.m. on Saturdays and Sundays. After the child completes four years, Appellants 2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11.00 a.m. to 5.00 p.m. and shall hand over the custody of the child back to the first respondent father before 5.00 p.m. For any further modification of the visitation rights, either parties are at liberty to approach the High Court.”

30. In view of the aforesaid, the Court is of the considered view that the welfare of the minor child who is of a tender age of six years, having been deprived of any access to his mother, cannot be decided on a statement being recorded, as also the possibility of tutoring etc. cannot be ruled out; apart from the fact that the child is of a tender age of six years, he cannot give an intelligent preference or to make a judgment towards his emotional and physical welfare; and as such between the competing claim of a natural guardian, i.e., the mother in this case and that of other relatives, i.e., the grandmother, who herself is of old age and shall be dependent on her sons, this Court is of the view that the welfare of the child shall be best suited by handing over the custody to his natural mother, who has shown resilience towards her claim of the custody of a minor child without wasting any time and is still contesting before this Court. The financial well beings of the parties is also having found to be balancing, the same cannot be a factor in the facts of the present case to adjudicate upon the custody.

31. However, now coming to the transitional phase and in view of the various decisions referred to herein above, this Court is of the view that the custody of the child may be handed over to his natural guardian, i.e., the mother, forthwith and though some problems may initially occur, but in our considered view the same shall be neutralized with the passage of time. However, this Court finds that till such time, the child can be said to be settled in that atmosphere with her mother, the opposite party, i.e., the grandmother shall have access to the child for an entire day, i.e., from 8 AM to 6 PM, at the residence of the appellant and it shall be expected from the appellant to provide a healthy and happy atmosphere at her home during such visits, every week. Accordingly, the opposite party shall have one complete day with the child every week for the next six months (The said day may be decided mutually); and this Court hopes that the difference between the two families gets eradicated within the said period; and even thereafter the grandmother shall have the right to visit the appellant's residence on every second weekend (Saturday or Sunday for another 6 months), unless with mutual agreement, the said

meetings can also takes place beyond the time frame provided herein above, so that the welfare of the child remains intact and he has the benefit of growing up with love and affection of both the families.

32. However, the opposite party after a period of one year, in case required, may approach this Court for further modification of the visitation rights.

33. In view of the aforesaid, the impugned judgment dated 21.07.2026 is hereby set aside and the mother is granted the custody of the child forthwith, subject to the visitation rights as indicated herein above; and consequentially the counter-claim of the Opposite Party, stands rejected.

34. With the aforesaid observation/directions, the present appeal stands allowed.

(Siddharth Nandan,J.) (Saral Srivastava,J.)

October 12, 2026
S.Prakash