

MHAH130003572023



CIVIL M.A.No.26/2023.

Nitin Dashrath Mungse

Vs.

Sau.Shital Nitin Mungse

ORDER BELOW EXH.05

(Passed On :- 09-10-2023)

1. The petitioner and the respondent have love affair and performed their marriage on 19.11.2017. Out of their conjugal life, they have blessed with a child namely, Avdhut who is now made as if a subject matter of this case. The father/petitioner is seeking custody of the child from his wife and also seeking visiting rights with his child at least once in a week. As an interim relief, he has filed application below Exh.05 thereby seeking visiting rights with his child at least once in a week.

2. The minor child Avdhut is born on 06.02.2020 and thus he is of **3 years 3 months** as on the date of filing of this main petition.

3. The admitted facts in the present case are that the marriage between parties is solemnized initially on 07.06.2027 without consent and involvement of their parents at Aalandi Dist. Pune and later on at village Najik Chincholi Tq. Newasa at parents village of the respondent wife on 19/11/2017. They have begotten a child namely Avdhut on 06.02.2020. Presently, the child resides with his mother at village Najik Chincholi. The respondent is a graduate woman in medical field in BAMS faculty. is running her own dispensary or clinic at village Kukana. The respondent

and the petitioner got separated from each other since 09/06/2022, whatever be the reason behind it. Who is at fault behind said separation, is a question of fact. It is also admitted fact that the respondent wife has filed a complaint under section 498A of IPC against her husband at Chakan police station, Pune on 09.06.2023, and she has also filed a complaint under Protection of Women from Domestic Violence Act vide Criminal Application No.40/2022 in the Ld. Magistrate Court at Newasa. In that proceedings, the petitioner husband has filed application for seeking directions to get visiting rights with his child (as in the present application) and the Ld. Magistrate Court has passed an order on 31/01/2023 that petitioner(husband) shall be permitted to meet his child once in a week on a specified day and for that purpose, the husband petitioner shall deposit an amount of Rs.1000/- per visit. The respondent wife has also filed maintenance proceeding u/s 125 of Code of Criminal Procedure vide Cri.M.A. no.73/2022 in the said Magistrate Court.

Petitioners Case:

4. As per the case of father of child, the respondent is angry, arrogant, adamant and haughty woman who is habitual of living luxurious life. She was doing a job in "Jiva Ayurvedic hospital at Pune before marriage and they both fallen in love and therefore, they have performed marriage on 07.06.2017 without obtaining consent of their parents at Aalandi, Dist. Pune. After marriage, the respondent was doing a job in a hospital at Bhosari Dist. Pune and that time, the respondent was working as a driver. After birth of Avdhut, the disputes between couple started on the ground that the respondent was insisting to start up her own hospital whereas the petitioner used to tell her that their child is in need of mother's company. On such differences, and particularly because their child always suffers from illness, there were quarrel between the couple. When their child was admitted in Jupiter Hospital, K.M. Hospital, Pune it is

only the petitioner who taken his care whereas the respondent never bothered about it. The relations between parties got strained more and more as the period goes on. The respondent wife started insisting to open her hospital at Nevasa phata and started demanding some property and the funds for that purpose to the father of petitioner.

5. The parents, brother and other relatives of the respondent also started to interfere in their life and due to that their disputes exploded at it's height than ever and relations got spoiled. On that count, the respondent has left the society of the petitioner on 09/06/2022 along with the minor child and started residing at her parents house at Najik Chincholi. There she has started her own hospital at village Kukana which is 30 km away from her village and she started earning huge income from her hospital. But at the same time, she cannot spare any time for her son and therefore, she is not in a position to take care of minor Avdhut. In such circumstances, she has filed matrimonial proceedings at Chakan police station as well as in the Magistrate Court of Nevasa as stated above. In spite of the directions of the Court to permit the father to meet with his child once in a week, the respondent never followed the orders of the Court and she never remain present in the Court along with her child. Therefore, the respondent is deprived of his right to meet his child and also losing his parental love.

6. It is his further case that the minor son is in need of father's love and the petitioner is also having tremendous and enormous love with his son. When the respondent wife was busy in her medical field by forgetting her duty as a mother, it is the petitioner who taken every care of the minor child and therefore lovely relationships are developed between father and son. It is alleged that the respondent never made it possible to meet the petitioner with his son after they got separated and even she

never permitted to make communication with child on phone also. It is further alleged that the wife is busy in her medical profession whereas her parents are busy in agriculture work and at the same time, the father of respondent wife is habitual of drinking liquor and the petitioner once found that the father of respondent took the minor Avdhut with him at liquor shop. If such type of instances are continued, the future of the minor son and his culture would be very danger. There are no school facilities at village Najik chincholi. The petitioner resides in a comparatively big city and he is having full time to take care of his child. The respondent wife is using her child as a shield in Court litigation. Therefore, it would be very dangerous and insecure to keep the minor in the custody of his mother. The petitioner being a natural guardian and capable to secure and safeguard the welfare of the child, he is definitely entitled for custody of the child as per provisions of Hindu Guardian and Wards Act. Till the decision of the main application, this application for seeking custody of the child is filed.

The Respondent's Case:

7. The respondent wife has admitted certain facts as stated above but otherwise she has categorically and strongly opposed the contents of the application filed by her husband. According to her, their parents have performed the marriage of respondent with the petitioner at village Najik Chincholi in a very celebration mode and they have incurred so many expenses by offering gold ornaments in the marriage. After marriage, the petitioner and his parents have given a proper treatment to the respondent just for 2 months. The petitioner is running a medical shop of drugs in partnership. He is having bad vices. He used to drink liquor. He used to extend physical and mental harassment to the respondent. He also insist her to leave her job because of less income and instead, he asked her to do job in his medical shop. She was not ready for that.

Thereafter, the petitioner started demanding an amount of rupees 5 lakhs to invest in his medical shop. Her parents have given cash amount of rupees 3 lakhs to him but he started demanding more amount and in failure to fulfill it, he used to beat her mercilessly. It is further alleged that the petitioner has kept illicit relationship with a woman working in the house of the couple at Pune. On that count, he used to beat the respondent whenever she objected for the same. When the respondent had come to her parents house after delivery of child, during that period also the petitioner has continued in adulterous relationship with said woman. Even thereafter, she went to reside with the petitioner at Bhosari Dist. Pune but the petitioner not left adulterous relations with said woman and used to assault the respondent whenever she used to object it. Her life was in danger in the company of the petitioner and therefore, she has made a complaint on helpline number of police station and in response thereto, Chakan police have approached her and thereafter, she has made complaint to police station Chakan under section 498A of IPC.

8. The petitioner on some occasions came to the village of parents of respondent and there he has assaulted her. Therefore, she has made complaint in the Court which is pending now. It is alleged that the petitioner as a father never fulfilled his obligations and duties towards minor son. He never purchased clothes, toys for him but on the contrary, he was in illicit relations with a labour woman and he assaulted the respondent as well as minor son many a times. Once, he has tried to throw his son from the terrace which shows that he is having no love and kind towards his son whatsoever. None of his family members ever came to village Najik Chincholi to meet minor son. On the contrary, the petitioner has made his father to institute a civil suit bearing RCS No.695/2022 thereby seeking directions to restrain the respondent and her minor son to enter in a house which is located at Newasa phata Tq.

Newasa. It shows that the petitioner is very selfish and more interested in the property and to make deprive the respondent and her son from said property. In the proceedings filed by the respondent, it is stated by the petitioner that he is not in a position to provide any separate maintenance to his wife and the child due to insufficient source of income. It shows that he is incapable of maintaining his son and to take care as a father. At present, the petitioner is residing at Pune and continued his illicit relations with said woman. As such, he is not competent to give proper attention towards the needs of minor child. On the contrary, the respondent being a doctor and earning sufficient amount of money and residing with her parents is very much able and competent to provide everything to cater the educational needs of child and to give healthy atmosphere for him. It is therefore in the interest of minor child that his custody shall not be given to the petitioner. At the same time, the petitioner is not entitled to meet his son as requested in this application of interim relief because he has not complied with the directions of the Ld. Magistrate Court by depositing the requisite amount in the Court. Therefore, this application for interim relief is liable to be rejected with costs.

Submissions:

9. Ld. Advocate for petitioner submitted that the respondent wife is arrogant and she is not ready to bring the child with her in the Court of Ld. Magistrate as per the directions given in the said proceedings. She is involved in the medical profession as a doctor and therefore, she do not have any time to give attention towards the upliftment and betterment of the child. The petitioner being natural guardian of the child is entitled to meet the minor son. Therefore, application may kindly be allowed.

10. On the other hand, Ld. Advocate for respondent argued that the ultimate prayer which is sought by the petitioner husband regarding

custody of the child is not worth to be granted because the child is below 5 years and in such cases, the law provides for passing order of custody of the child in favour of mother. Therefore, when final relief itself cannot be granted in favour of the petitioner, he is not entitled for any sort of interim relief. He has further drawn my attention towards proceedings filed under Domestic Violence Act, pending in the Court of Ld. Magistrate, Newasa to point out that the petitioner husband has never deposited a single rupees as per the directions of the Court so as to comply with his 'visiting rights' with the child. He also pointed out that in the proceedings, the petitioner husband admitted that he is not having sufficient source of income to provide separate maintenance to wife or the son. Considering totality of the circumstances, he prayed for dismissal of the application.

11. In support of his submissions he relied upon the case of ***Nirali Mehta versus Surendra Kumar Surana and another*** reported in ***2013 SCC online Bom 269***. The question arise for consideration before the Hon'ble Bombay High Court was that grandparents of the minor child i.e. father's parents have claimed custody and access of the minor child in spite of having the mother and father of the child alive and in that premise, the Hon'ble High Court held that *no interim relief can be granted when the final relief cannot be granted to an individual. This cannot be also allowed to happen upon sublime equitable principle that none can do indirectly what he cannot do directly*. On the same line of principles, the Ld. Adv. Temak for respondents have relied upon following two decisions of Higher Courts wherein it is held that *the Court has no jurisdiction to grant by way of interim relief what could never be granted in the main suit itself*.

- i) **Prem Chand Vs Manak Chand ; 1997 Supreme (Raj) 104**
- ii) **Mohd. Hashim Banday Vs Ghulam Mohiuddin Banday ; OWP no.393/2019 dt. 19.04.2019 of J & K High Court.**

12. After considering submissions of both sides following points arise for my determination. I have recorded my findings against it for the reasons stated below-

Sr.No.	Points	Findings
1)	Whether petitioner is entitled for visiting rights with his child ?	No.
2)	What order?	Application is rejected.

REASONS

POINTS NO. 1 & 2 :

13. I have gone through the contents of application as well as the documents filed by the respective parties. At the very outset, it is required to be noted that the main application is filed for custody of the child by the natural guardian. As per provisions of Section 6 the Hindu Minority and Guardianship Act, *the natural guardian of a Hindu Minor, in respect of minor's person as well as in respect of minor's property, in case of a boy or unmarried girl is the father, and after him, the mother provided that the custody a minor who has not completed the age of five years shall ordinarily be with the mother.* Thus, as per Section 6 of said Act, mother is supposed to have custody of the minor till its age up to five years. No doubt, the plane reading of said provision demonstrate that where the child is below five years of age, the custody of a minor "shall ordinarily" be with the mother. The words '*shall ordinarily*' denotes that there is no absolute bar to seek the custody of a minor child below age of five years by a father. It depends upon peculiar facts and circumstances of each case. Therefore at this juncture, I am not in a position to subscribe the submission of Ld. Advocate for respondent -wife that the petitioner is not entitled to get final relief in any circumstances. Therefore, *without touching to the merit of the case*, I find it just to consider the question

about interim relief regarding 'visiting rights' of the father with his minor son.

14. Being a natural guardian, the father may be entitled to meet his child. Of course, it can not be sought, as a matter of right, but the Court is under obligation to see whether that would be in the interest or welfare of the child or nor. At the same time, the parents are under obligation and responsibilities to see that the safety and the interest of the child shall not be hampered in any manner while seeking any such claim in respect of custody and access to the child. At the same time, it is material to be noted that the petitioner husband has already sought the similar relief before the Ld. Magistrate in the proceedings under Domestic Violence Act, and in fact, he succeed to obtain such relief. The only difference is that the Ld. Magistrate in stead of permitting the father of child to meet the child 'once in a week' has granted permission to meet him 'on the every date of proceeding' before the Court of Ld. Magistrate. It is informed to me and rather agreed by both parties that said order is never challenged before the Higher Court. That being the position, the question arise as to why the petitioner husband is seeking similar relief before this Court by taking recourse of provisions of Hindu Minorities and Guardianship Act. It is also a matter of record that the petitioner husband has never deposited the amount of Rs.1000/- in the Court of Ld. Magistrate or even to the respondent wife to comply with the order of Ld. Magistrate. Thus, without making compliance of the said order, the petitioner has approached this Court to get similar relief which would not be proper. It is his allegations that the respondent wife never brought the child in the Court as per the order of Court. At the same time, the respondent wife alleges that the petitioner husband has not deposited the money in compliance of the said order, and that's why order of Ld. Magistrate is not complied with. It is for the petitioner husband to get

executed the said order of the Ld. Magistrate by taking every step within his reach. However in stead of depositing money, he has filed this application after lapse of four months in this Court. Even as on today, the order of the Ld. Magistrate not appears to have been complied with by the petitioner husband. When the petitioner is having availed relief of visiting rights with the child from a Court of law, in my opinion he cannot obtain similar relief from the another Court by taking recourse of distinct provisions of law. In that view of the matter, I am of the considered opinion that petitioner is not entitled for the relief of visiting rights as claimed. Without touching to the merits of the main petition, I have recorded my findings as to point No.1 & 2 in negative and pass the following order.

ORDER

1. Application below Exh.5 in Civil M.A. No.26/2023 is hereby rejected.

Date :- **09-10-2023.**
Place:- Newasa

[S.P.Deshmukh]
District Judge-2, **Newasa.**
Dist.Ahmednagar

CERTIFICATE

Dictated on : 09/10/2023
Transcribed on : 10/10/2023
checked on : 10/10/2023
Signed on : 10/10/2023

I affirm that the contents of this PDF file are word to word as per original Judgment/order.

Name of Steno : Sau.S.S.Apte
Name of Court : District Judge-2 & A.S.J., Newasa
Date : 10/10/2023

Sd/-
Stenographer (Grade-I)Newasa