

Misc (Act VIII) Case No.65 of 2019

Order No.10
18.01.2021

Both parties are present with Learned Lawyers by filing haziras.

Application filed on 13.01.2020 by Jayashree @ Jagati Biswas (Ghosh) under captioned Order 39, Rule 4 CP Code supported with affidavit with application filed on 03.12.2019 by the petitioner are taken up for hearing.

Heard both sides.

Petitioner is the father and the respondent is the mother of child Arya Biswas born on 04.11.201 and aged 6 years on 03.12.2019 the date of filing of the original application.

This is an application praying for vacation or discharge of exparte order. The date of exparte order has not been mentioned either in the prayer or in the body of the application filed under Order 39, Rule 4 CP Code. Learned Lawyer submits that prayer relates to Order No.5 dated 07.01.2020.

This case has been registered on an application under Section 7 of Guardians and Wards Act, 1890 praying for appointing the petitioner as guardian of his minor son.

I find that on an application filed on 03.12.2019 under Section 12 of Guardians and Wards Act, 1890, this Court on 07.01.2020 made an exparte order after notice allowing the interim custody of the minor child to the petitioner with direction that he submits report regarding the wellbeing both physical and mental development of the minor weekly to the Court positively. The respondent was also at liberty to visit the minor as and when she desires. The petitioner was also at liberty to execute the order through OC, Nakashipara PS if so required. The respondent was at liberty to contest the ad interim petition by the next date by filing written objection to that effect. No ad interim petition survived.

Law does not provide for changing the custody of the minor child from either of the parties at the interim stage without evidence. The minor was in the custody of his mother the respondent herein. An order for change of custody without recording evidence and deciding whose custody would serve best the welfare of the child cannot possibly be made. The paramount consideration in

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effecting change custody is the welfare of the child. The order does not adjudicate the issue of welfare of the child.

The application filed under Order 39, Rule 4 CP Code is treated as an application for recalling the Order dated 07.01.2020. It is difficult for the respondent to comply with the order. The petitioner has been given custody of the child and the respondent visitation rights. The child was not directed to be produced. The respondent was required to be directed to produce the child to enable the petitioner father to see his child and exercise his right of visitation.

In the interest of justice in order to enable the respondent to effectual defend the application, it is necessary that order of ex parte dated 07.01.2020 be set aside/recalled.

Hence **Ordered:** the Order dated 07.01.2020 is set aside and recalled and the application under Section 12 of the Guardians and Wards Act, 1890 is now taken up for hearing on notice to the other side.

The application under Section 12 of the Guardians and Wards Act, 1890 is taken up for hearing after notice in presence of both parties.

Heard Learned Lawyers of both sides.

Male child was born on 04.11.2013 and is now 7 plus years. Father, as one of the two guardians with mother, is entitled to visitation rights.

Learned Lawyer for the respondent/mother suggests that the respondent/mother of the child agrees to produce the child in Court on any date of the week as may be ordered for the father to exercise his visitation rights.

I am inclined to allow the visitation rights to the father/petitioner.

Hence **Ordered:** the application under Section 12 of the Guardians and Wards Act, 1890 filed on 03.12.2019 is allowed.

Father/petitioner shall exercise visitation right on every First and Third Saturday of the month from 1:00 P.M. to 4:00 P.M. in the Courtroom. Respondent/mother is accordingly directed to produce the child on every First and Third Saturday of the month from 1:00 P.M. to 4:00 P.M. in the Courtroom till further orders.

If there is any difficulty either in production of the child by the mother or in coming to the Court on those days by the petitioner to exercise the visitation right, they shall convey such difficulty to their Learned Lawyers who shall convey such difficulty to the other side through his/her lawyer so that no inconvenience is caused.

To **19.02.2021** for hearing.

Dictated & Corrected by me

Sd/- Shri D.C. Kar

District Judge, Nadia

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District Judge, Nadia