

Present :- **Sri Bikash Lama,**

Addl. Dist.& Sessions Judge,

2nd. Court, Barasat, North 24
Parganas.

(J.O.Code: WB00935)

Order dated 05.10.2024

“ The marriage is an art and it should be updated everyday.”

Rabindranath Tagore.

The marriage under the Hindu law is a sacred union of souls, not a contract, performed to attain moksha. It is an indissoluble union between two adults knowing and understanding their rights, duties and liabilities as husband and wife.

However, the transformation of society has brought about serious changes in the mind set of the individual affecting the very concept of marriage.

The statistics make it crystal clear that the marriages are being broken down irretrievably due to the incompatibility of husband and wife. We have forgotten the art of updating the marriage everyday to suit the transformation of society thereby leading to dissolution of marriage. Unfortunately, we concentrate more on updating gadgets rather than updating our relationship.

The petitioner has laid the foundation of original misc. Case on the ground of bitter relationship between the petitioner/ husband and opposite party/wife leading to their separation.

The petitioner/husband alleges that the opposite party/wife created problem and chaos in the family from the beginning of the marriage without any reasonable justification. The opposite party/wife also increased mental and physical torture upon the petitioner and there was also no change in her attitude even after the birth of a son. The opposite party/ wife also started forcing the petitioner/husband to sever tie with his parents.

The petitioner/husband has gone through lot of mental and physical trauma due to abuse by the opposite party/wife which has also affected the child a lot. Since the opposite party/wife has withdrawn from the society of the petitioner/husband without valid reasons and also caused cruelty upon him consequence thereof the petitioner filed the application for dissolution

of marriage against the opposite party/wife before the court of Additional District and Sessions Judge II cum Addition Metropolitan Sessions Judge cum PRL family court ,Madchal,Malkajgiri district at Kukatpally and obtained exparte decree on 29th. day of March'2023.

The opposite party has been residing at her parental house situated at 262 B,Bangur Avenue,Block A,Kolkata-55 and she has also taken the minor child with her and the petitioner/husband has not been allowed to meet or communicate with minor son.

The comfortable life of minor son in the company of the petitioner/husband has been denied by the act of the opposite party and the minor son has been totally neglected by the opposite party affecting his overall well-being .

Therefore, the petitioner/ husband has prayed for permanent custody of minor son with other incidental relief.

The opposite party/ wife appeared and contested the main misc. case by filing written objection challenging each and every contention set forth in the application for permanent custody of the minor son.

And during the pendency of main application for permanent custody, the petitioner/husband has filed the instant application for handing over interim custody of the minor son till the disposal of main application for permanent custody of the child. The said application was presented by the petitioner/husband on 28th. day of August'2024.

The opposite party/wife also contested the application for interim custody of minor son by filing written objection on 11th. Day of September'2024.

The matter was heard at length on 11.09.2024. The Ld. advocate for petitioner/father has referred the following decisions to substantiate his contention with regard to his application for interim custody-

- 1. Civil Appeal No. 5099 of 2007(S.C),and**
- 2. SLP © No.(s) 28466 of 2023.**

On the contrary,the Ld. advocate for O.P/wife also referred the following decisions to counter the claim of the petitioner-

- (1) (2010) 2 WBLR(SC) 345,**
- (2) 2015(2) ICC 522,**
- (3) III (2015) DMC 773(DB) (Ker),and**
- (4) I(2009) DMC 523(SC)**

The application for interim custody of minor son has been based on the grounds as set forth in the main application for permanent custody of

minor son. The application for interim custody of minor son is found to be the replica of main application.

The main contention of the petitioner/husband is that his right to meet and have conversation with his son has been infringed by the opposite party/ wife without having any lawful ground to do so. Moreover, the petitioner/husband has claimed that well-being and welfare of the minor son have been seriously affected due to physical and mental distances between father and son and prays for handing over the interim custody of minor son to him during the pendency of main application for permanent custody for overall development of the child.

On the flip side, the opposite party/ wife brought forward a contradictory contention and contested the application for interim custody of the child and thereby denied and disputed each and every allegation as set forth in the application for interim custody. She has also countered the allegation of mental and physical torture upon the petitioner/husband by her and alleged that it was the petitioner/husband who subjected her to physical and mental cruelty. It has also been alleged by the opposite party/wife that her jewellery were also taken away by her in-laws.

The main allegation levelled against the petitioner/husband is that he is an alcoholic, womanizer and has flirtatious behaviour with every other women and was into physical relationship with many girls/women and took them to hotel rooms to satisfy his sexual desire.

It has further been alleged by the Opposite party/wife the petitioner/husband has tight work schedule having no leisure time to spend with his son. Furthermore, he is short tempered and arrogant and as such the minor son is very scared with him. The petitioner/father also used to beat him up without any reason. The petitioner/husband an irresponsible person roaming around with his girlfriend in the city of joy ignoring his own biological son. The petitioner/husband does not have time to spend festivals with the opposite party/ wife and son.

The petitioner/husband, since from the date of intentionally and deliberately withdrawn from society of opposite party and minor son, has not performing his fatherly obligations, duties, liabilities and even failed to maintain the minor son by fulfilling his necessities of life. Therefore, the opposite party/wife has prayed for rejection of application for interim custody of minor son with cost.

The opposite party/wife has not issued any statement with regard to ex parte decree obtained by petitioner/husband on the basis of which their marriage was dissolved. Admittedly, the marital tie between the parties has been severed.

The issue to be decided by the court in child custody matter, be it interim or final, is not the reasons of matrimonial discord between the parties rather it should strictly confined to the welfare of the child in question. Therefore, the welfare of the child is the paramount consideration. The petitioner/husband has failed to substantiate any fact with regard to neglect or irresponsible act on the part of the opposite party/wife in taking care of minor son at this stage. Therefore, he has miserably failed to brought on record of the necessity for transfer of custody of the child in interim form.

On the other hand, there is serious allegation of irresponsible and immoral act levelled against the petitioner/husband by the opposite party. The main misc. Case has been filed by the petitioner/husband for the custody of minor son. The prayer for interim custody of minor son as prayed for by the petitioner/husband is interlinked with the main prayer for custody of the child. The handing over interim custody of minor son to the petitioner/husband at this stage would definitely invite multiplicity of proceeding and it would amount to prejudging the vital issue of child custody beforehand. The present place of stay of the child can not be disturbed at this stage without reasonable cause as there is serious apprehension of disturbance of peace of mind of the child in question and also giving rise to escalation of further trouble between the parties.

Having considered the claim and counter claim of respective parties, submission made on their behalf by their respective advocates, the decisions referred herein-above by Ld. advocates for respective parties and also giving thoughtful consideration with regard to impact of change of place of residence which would be caused by order of interim custody and prejudging of issue beforehand, I am to hold that the application for interim custody of the minor son, as sought for by the petitioner/husband, is devoid of merit at this stage and same deserves rejection.

Hence, the application for interim custody of minor son filed by the petitioner/husband dated 28.08.2024 stands rejected on contest.

The Ld. advocate for the petitioner, at the midst of the hearing, had prayed for grant of any other appropriate relief to the petitioner and contended that the visitation right of the petitioner must be upheld for the ends of justice.

The Ld. advocate for the opposite party/wife objected the very submission of Ld. advocate for the petitioner and contended that the court should grant relief in accordance with the prayer made in the application and as such it is not permissible for the court to grant relief beyond pleading.

The power to grant or deny relief beyond pleading is a pivotal issue. However, the court is not restricted to grant relief which is otherwise

appropriate to grant as per law. The application for interim relief also includes the prayer for grant of any other appropriate relief. Any other relief must have wider interpretation. It must include any other relief, not specifically prayed for, but can be granted in accordance with law keeping in mind of absolute necessity created by the circumstances.

The right of visitation of a father is an absolute right which can not be curtailed in any manner. The father has a role to play in over all growth of the minor. And for this the child is required to spend quality time with the father. The matrimonial discord and other relevant factors should not stand in the way of father's right of visitation. Why should a minor child be deprived of love and affection of his father when there is absolute necessity for his overall growth as human being.

We all know that all emotions, in modern day society, is heading south. Its not music to the ears. Every child should be wrapped in cotton wool. Therefore, the court must take an active measure to ensure that no child is deprived of his/her legitimate right to share emotions with his/her father.

The cherry on the cake is the decision of Hon'ble Apex Court reported in **2016(4) ICC 12 (SC)**.

The Hon'ble Apex has been pleased to observed as follows-

“ whatever the background of the case, it can not be so acrimonious so as to deny the right of the father to see his daughter. Therefore, we direct the respondent to produce the child in family court.”

The principle flowing out of above referred judgment is that the court must keep aside the background of the case, the reasons of conflict between the parents and other attending factors while dealing with visitation right of the father or mother. The background of the case should not stand in the way of right of father or mother to see his or her child.

Having regard to submission of Ld. advocates for respective parties and also placing reliance on the decision of Hon'ble Apex Court reported in **2016(4) ICC 12 (SC)**, I am inclined to allow the prayer for visitation as verbally prayed for by the father by placing reliance on the prayer for other relief as sought for in the said application.

The petitioner/husband is given the right of visitation on every scheduled date fixed by the court on every month and he is also given the right to have conversation/ video conference with the child with the aid of technology twice in every month preferably on second and forth Sundays at 5 p.m. or at any suitable timing as per the convenience of the child and parties concerned preferably for 5 to 10 minutes.

The opposite party/wife is directed to cause production of the child for meeting with the petitioner/husband in physical mode on each and every dates scheduled by the court.

However, the production of child in court, where there is every possibility of infringement of right of privacy of the child and concerned parties due to presence of other litigants, would be inappropriate for which District Legal Services Authority, North 24 Parganas at Barasat is required to be pressed in to service.

Hence, the Ld. Secretary, DLSA, North 24 Parganasat Barasat is requested to provide a separate room for the parents of the child including child in question keeping in mind the necessity for protection of privacy of the parties to the proceeding as well as child in question.

Accordingly, the opposite Party/wife is directed to inform the court with regard to arrival of the child in court premises without physical production of the child inside the court room at 11.30 am on every scheduled dates and thereafter the child and his parents will be escorted by court staff to the office of DLSA, North 24 Parganasat, Barasat for strict compliance of the order of this court with regard to visitation right of the petitioner/father.

The visitation right of the petitioner/father shall start sharply at 12.00 noon to 2.00 p.m. in presence of the opposite party/wife at the place especially provided by Ld. Secretary, DLSA, North 24 Parganasat, Barasat for aforesaid purpose.

The Ld. Secretary, DLSA, North 24 Parganasat, Barasat is also requested to depute a ***Para Legal Volunteer*** for supervising the whole process so as to prevent any kind of untoward incident.

Fix **12.11.2024** for appearance, production of child and hearing of misc. case.

Let a copy of this order be transmitted to the office of DLSA, North 24 Parganasat, Barasat for her kind information and taking further necessary action on her part.

D/C. By me

Sd/- B. Lama

Sd/- B. Lama

Additional District Judge,

2nd Court, Barasat, North 24-Pgs.

Additional District Judge, 2nd Court, Barasat, North 24-Pgs.

