

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CIVIL MISCELLANEOUS JURISDICTION No.330 of 2018**

... .. Petitioner/s

Versus

... .. Respondent/s

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**Appearance :**

For the Petitioner/s : Mr. Niraj Kumar, Advocate  
For the Respondent/s : Mr. Binod Kumar, Advocate

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**CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA  
CAV JUDGMENT**

**Date : 15-05-2023**

Heard the parties.

2. This Civil Miscellaneous Application has been filed under Article 227 of the Constitution of India for setting aside the order dated 31.01.2017 passed by the learned Principal Judge, Family Court, Patna in Matrimonial Case No. 930 of 2015 whereby petitioner / husband has been directed to hand over the custody of the minor child to the respondent / wife.

3. The brief facts of this case are that the petitioner and respondent are husband and wife. Their marriage was solemnized on 15.12.2010 according to Hindu Rites and Customs at Patna. Out of the aforesaid wedlock a female child was born on 07.02.2012. Matrimonial relations between the petitioner (husband) and respondent (wife) were not cordial and



disputes and differences having developed between the parties and the marriage had broken down so both the parties decided to dissolve the marriage by decree of divorce and filed a joint petition under Section 13-B of Hindu Marriage Act, 1955 on 21.08.2015, before the Court of learned Principal Judge, Family Court, Patna. The parties have agreed that the husband will pay Rs. 5 lacs to his wife as full and final settlement and the minor girl will remain with her father. On 05.03.2016, as per their agreement the petitioner paid Rs. 5 lacs to respondent / wife and the minor child was handed over in the custody of the petitioner / husband. On that day, the parties were examined and the case was fixed for judgment on 01.04.2016.

4. Thereafter, on 21.03.2016, the respondent filed a petition to make some provision in decree, if passed, to the extend that the custody of the minor daughter shall be given to the respondent / wife which was opposed by the petitioner / husband. On 11.04.2016, the petitioner filed reply to the petition stating that the respondent after receiving the money starting harassing the petitioner and his family members and the petitioner wanted the money refunded with interest. On 02.08.2016, the respondent wife filed a petition praying to withdraw her consent of mutual divorce and wanted to live with



her husband. On 23.12.2016, petitioner filed a petition with a prayer to return back his entire money. On 21.01.2017, the respondent filed reply stating that she is ready to refund the money with the condition that the custody of the daughter should be in her possession. The learned Principal Judge, Family Court, Patna vide the impugned order dated 31.01.2017, observed that before passing order on petition dated 02.08.2016 with respect to withdrawal of the consent by the respondent wife, it is desirable that the respondent-wife be directed to return the permanent alimony amounting to Rs. 5 lacs taken by her to the petitioner-husband and it is also desirable that petitioner-husband hand over the custody of the minor child to respondent-wife and accordingly, directed the respondent to refund Rs. 5 lacs to the petitioner and petitioner was directed to hand over the custody of the minor child to the respondent / wife.

5. Learned counsel for the petitioner has submitted that the learned court below directed the minor child to be hand over to respondent / wife without considering the welfare of child and also without considering that petitioner who is father of the child is natural guardian, and the petitioner and his family members have great love and affection towards the child. It is further submitted that petitioner and his family members are



looking after the school going child who is growing well under their guardianship. Further, he has submitted that the direction to hand over the minor child to the respondent-wife, who used to change her mind, is not in the interest of child to live with her particularly when the minor child is living since long with the father.

6. On the other hand learned counsel for the respondent submits that it is in the interest of minor child to live with her mother in view of the changed circumstances. Since the mediation between the parties failed and the petitioner himself demanded to return the paid amount, he and his family members are not taking care of minor child, it is in the interest of justice that the child be returned back to her mother. He has further submitted that despite the Court order the petitioner failed to bring the child so that she can meet her mother. The petitioner has managed to keep custody of the child and not hand over despite the order of the Court and he cannot be a beneficiary of his own wrongs.

7. In the present case, the minor child is now aged about 11 years, the impugned order was passed on 31.01.2017 i.e. more than 6 years ago, accordingly the circumstances are materially changed. It is better to interact / consult with the child



also by the court at this stage regarding her preference for the parents she wants to stay and before passing the order of custody consider other factors also with respect to the best interest of the child.

8. It is well settled that the first and paramount consideration in child custody is the welfare and interest of child and not the right of the parents. The custody of child shall be handed over to the person who fosters the minor child with care, love and affection. The custodial parent becomes the primary care giver responsible for emotional, medical and educational needs of the child, while the non-custodial parent retains the right to meet the child. Overall development of child, who is the nation's future, is in the public interest. In the custody battles between the parents, the major sufferers are their children. While parents seek divorce by mutual consent they may decide the issue of child custody, however, if the same is not mutually decided then it shall be decided by the Court considering the welfare of child.

9. Under Section 26 of the Hindu Marriage Act, 1956, the Court has been empowered to pass any order or make any arrangement in respect of custody, maintenance and education of children during the pendency of the proceedings or



after any decree is passed under the Act. The orders made under this section can be varied, suspended or revoked from time to time. The object of this section is to make just and proper provision for the welfare of minor child.

10. A child is not a chattel nor is he / she an article of personal property to be shared, parents are expected to give preference to child's welfare over own legal rights. The court is required to exercise *parens patriae* (guardian of child) jurisdiction and compel the parties to do something which is in the best interest of the child.

11. The custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.

12. Since the matter is pending before the court below, no observation of this court on the merit of the case or conduct of the parties is required.

13. Earlier there was agreement between the parties with respect to permanent alimony and custody of minor child but now the parties are not mutually agreed on those conditions. In the changed circumstances, the trial court is required to



consider all the aspect of the case and for decision on custody of minor child, welfare of child is prime consideration. Accordingly, the impugned order is set aside.

14. This Miscellaneous Application is disposed of with the direction that the learned trial court shall pass the fresh order on the petitions of the parties including on interim custody of the child in accordance with law.

15. The learned court below is also directed to dispose of the Matrimonial Case expeditiously and both the parties are also directed to cooperate in early disposal of the said Matrimonial Case.

**(Sunil Dutta Mishra, J)**

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