

16.02.2024
SI No.4
Court No.8
(gc)

WPA (H) 2 of 2024

**Akanksha Choudhary @
Akanksha Manishkumar Brahambatt
Vs.
The State of West Bengal & Ors.**

Sk. Toslim Ali

.....for the Petitioner.

Mr. Somnath Vatsa,

Mr. Aditya Mondal,

Ms. Susmita Saha,

Mr. Subhadip Pal,

...for the Respondent No.9.

1. The private respondent/husband/father of the minor has filed an application for recalling of our order dated 15th January, 2024. The ground for recalling appears to be that the recording of the assurance of the learned Counsel for the private respondent No.9 that the said respondent husband would fulfil and discharge all duties and obligations in terms of the settlement agreement has not been correctly recorded. It is now being argued that all it was intended to be conveyed was an assurance on behalf of the husband about his participation in the proceeding for mutual divorce under Section 13B of the Hindu Marriage Act.
2. We are unable to accept the said submission as we have a definite

recollection that both the husband and the wife had agreed before us that they would discharge their respective duties and obligations in terms of the proposed settlement forming part of the petition filed for mutual divorce. However, whether the Family Court before whom the proceeding is pending would ultimately allow the petition is a matter for the said Court to decide.

3. Learned Counsel appearing on behalf of the husband on instruction has submitted that the custody clause mentioned in the settlement forming part of the 13B petition is no more acceptable to the husband and the private respondent would apply for variation of such terms.
4. It is thus clear now from the submission made on behalf of the husband that the husband is not willing to give custody of the child to the writ petitioner in terms of the settlement agreement duly signed by the parties in which it was mutually agreed that the custody of the child would be with the mother. In fact, the mother is the natural guardian till five years of the minor female child in terms of Section 6(a) of the Hindu Minority and Guardianship Act,

1956 although it is argued that the legislature has used the word “ordinarily” in the said Section 6(a) of the 1956 Act possibly overlooking the fact that the word “ordinarily” was prefixed by the verb “shall” and existence of an extraordinary circumstances only can deny the mother of the custody of a female child till the female child attains five years. It is not in dispute that the child was in the custody of the mother at least from August, 2023 till 25th December, 2023 and thereafter the private respondent left for Ahmedabad from Assam by flight with her daughter and the writ petitioner returned to her house at Kona Bazar. Since then the father is the custody of the minor daughter. In the complaint to the Police Commissioner, Howrah City Police on 1st September, 2023, the writ petitioner has stated that the minor daughter is a breast feeding child.

5. For the present, we are not anticipating dismissal of the petition under Section 13B and in the event 13B application is ultimately allowed, it may bring hiatus to all the issues. In the event the settlement agreement which also mentions custody of the child is not finally resolved in the said

proceeding, it would be open for the writ petitioner to seek custody of the child in accordance with law as we are not inclined to enter into the merits of the custody of the child in view of pendency of the application under Section 13(B) of the Hindu Marriage Act.

6. We would request the Family Court, Ahmedabad to dispose of the application for mutual divorce at the earliest so that the custody issue can also be resolved. In the event, the said issue is not finally resolved it would be open for the parties to take appropriate steps in accordance with law.
7. We do not find any perjury committed by the wife. It seems that in this proceeding the child has been treated as a pawn. We would expect responsible behaviour from the parents.
8. In view of the aforesaid, the application for recalling being CAN 1 of 2024 and the application under Section 340 of the Code of Criminal Procedure being CAN 2 of 2024 stand dismissed.
9. The habeas corpus petition being WPA(H) 2 of 2024 is disposed of with the aforesaid observation.

10.However, there shall be no order as to costs.

11.Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Uday Kumar, J.)

(Soumen Sen, J.)