

Form No. J(2)

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present: The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Subhendu Samanta

F.M.A.T 103 of 2023
IA No: CAN 1 of 2023

Kasem Molla
Vs.
Aspia Bibi and another

For the appellant : Mr. Debasis Roy
Mr. Anjan Banerjee
Heard on : 08.01.2025
Judgment on : 08.01.2025

Sabyasachi Bhattacharyya, J.:-

1. Affidavit-of-service filed in court today be kept on record. It indicates that due service of the Memorandum of Appeal and the connected application has been effected on the respondents.
2. However, none appears for the respondents at the time of call.
3. The conspectus of the appeal being very brief, the same was directed to be placed for hearing without formal preparation of paper books and/or calling for the trial court records.

4. Accordingly, the appeal and the connected application for production of additional evidence are taken up for ex parte hearing together.
5. The appellant/father sought for custody of his minor son under the Muhammadan law.
6. The said application was dismissed by the impugned order on two-fold grounds - first, that the minor son had not yet attained seven years of age, which is a prerequisite as per Section 352 of the Muhammadan law, and secondly, that no proof of second marriage of the respondent no.1/mother with the respondent no.2 could be furnished by the appellant/father.
7. In the event such proof was furnished, the same could have been an additional ground for grant of custody in favour of the appellant/father.
8. CAN 1 of 2023 is an application filed in connection with the present appeal under Order XLI Rule 27 of the Code of Civil Procedure, seeking to adduce the marriage registration certificate pertaining to the second marriage of the respondent no.1 with respondent no.2 as additional evidence.
9. We are convinced, upon perusing the averments of the said application, that sufficient cause has been shown by the appellant to explain the non-production of the document before the trial court despite the appellant having exercised due diligence.

10. Moreover, we are of the opinion that the said document is found to be absolutely necessary by this court for a proper and complete adjudication of the *lis*, thereby attracting the provisions of Order XLI Rule 27 (1) (b) of the Code of Civil Procedure as well.
11. Another facet of the matter is required to be considered here. We find from the records that the minor son of the parties was born on May 18, 2017 and by now, the minor son has crossed the age of seven years, thereby furnishing an additional ground, apart from the second marriage of the respondent no.1/wife, for the appellant to get custody of the child under Section 352 of the Muhammadan law.
12. Accordingly, CAN 1 of 2023 is allowed, thereby permitting the appellant to adduce the document annexed to the said application (being the registration certificate of the second marriage of respondent no. 1 with respondent no. 2) in original before the trial court.
13. Accordingly, FMAT 103 of 2023 is allowed, thereby setting aside Order No.10 dated January 9, 2023 passed by the learned Additional District Judge, Fifth Court at Howrah, District: Howrah in Miscellaneous Case No. 29 of 2022 and remanding the matter to the said trial court for the purpose of re-adjudication of the custody application of the appellant/father in the light of the above observations.

14. While doing so, the learned Trial Judge shall permit the appellant to prove by evidence the document sought to be produced as additional evidence (the alleged registration certificate of the second marriage of respondent no. 1 with respondent no. 2) in accordance with law and an opportunity shall also be granted to the respondents to controvert/rebut the same, if necessary by adducing further evidence. Adequate opportunity of cross-examination shall also be given to the parties.
15. That apart, the learned Trial Judge shall take into consideration the fact that the minor son of the parties has by now crossed the age of seven years, which further entitles the appellant to get custody of the son.
16. Subject to the proper proof of the marriage registration certificate relating to the second marriage of the respondent no.1 in accordance with law, the said ground shall also be taken into account by the learned Trial Judge while deciding the application for custody afresh.
17. It is expected that the learned Trial Judge shall dispose of the application for custody after remand at the earliest, preferably within six months from the date of communication of this order to the learned Trial Judge.
18. There will be no order as to cost.

19. Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Subhendu Samanta, J.)

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