

**IN THE COURT OF SH. DHARMENDER RANA,  
ADDL. SESSIONS JUDGE-02, New Delhi DISTRICT**

**In CrI. Revision No. 21/2020  
Case No. 125/2020  
CNR No. DLND-01001244-2020**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**... Petitioner**

**Versus**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**... Respondent**

Petition received on assignment : 06.02.2020  
Arguments on petition concluded : 03.09.2021  
Date fixed for pronouncement : 13.09.2021  
Date of pronouncement : 13.09.2021

**ORDER**

1. By way of the instant order, I propose to dispose of the present petition filed on behalf of [REDACTED] (hereinafter referred to as 'Petitioner') impugning the order dated 08.01.2020 passed by the Ld. MM (NI)-02 New Delhi District, Patiala House Courts, New Delhi in CC N. 41917/2016 filed u/s 21 of Domestic Violence Act, 2005, whereby the Ld. Trial Court dismissed the application of the petitioner praying for grant of visitation rights to her minor son.

[REDACTED]  
[REDACTED]

2. Briefly stated:- Embroiled in a matrimonial dispute with the Respondent [REDACTED], petitioner herein has filed a complaint against the respondent u/s 12/18/19/20/21/22 & 23 of The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'D.V. Act'). In the said petition, vide order dated 08.01.2020 Ld. Trial Court denied the petitioner any visitation rights to visit her minor son. Aggrieved by the said order, the petitioner has now filed the instant revision petition assailing the above-said order dated 08.01.2020.

3. Notice of the revision petition was served upon respondent [REDACTED] [REDACTED]. However, respondent has opted not to file any written reply. Consequently, the matter was listed for arguments. However, instead of addressing any oral arguments. Both the parties have filed written submissions and requested to this court to dispose off the instant revision petition based on the basis of the written submissions only.

4. The petitioner assails the impugned order on the following grounds :-

(i) It is contended that the order of Ld. MM is against law and principles of natural justice and against the welfare of minor child.

(ii) It is further pleaded on behalf of the petitioner that Ld. MM ought to have appreciated that complainant took care of the child till July, 2015 i.e. till the age of 4.5 years when he needed her most even after the atrocities done to her by all respondents and when respondent forcibly got her second child aborted after being tested a female fetus of about 3.5 months, respondent left the petitioner in her parental home indisposed. It is claimed that despite assurances, she was not permitted to enter her matrimonial home.

(iii) It is further submitted that Ld. MM failed to appreciate that the petitioner was there with the child till the age of 4.5 years and did everything for the child.

(iv) It is further submitted that Ld. MM failed to appreciate that during the last 4.5 years the minor child who is of delicate and tender age is living under the influence of respondent and his family members.

[REDACTED]  
[REDACTED]

(v) It is further submitted that the Ld.MM failed to extract the free and fair and genuine wish of the child and the Ld. MM gave only one minute to child and arrived at the conclusion and passed the impugned order against the petitioner and dismissed her application to meet the child.

(vi) It is further submitted that Ld. MM failed to take notice of welfare of the child and the child right of enjoying the love and care by both parents by denying the visitation rights to the mother.

(vii) It is further submitted that Ld. MM has erred by denying the visitation rights and dismissing the application u/s 21 of D.V. Act, petitioner only on the basis of one minute interaction with the child in the court which was totally influenced by the respondent.

5. On the contrary, respondent has opposed the present petitioner on the following grounds:-

(i) The impugned order is purely an interlocutory order and thus the present revision petition is not maintainable being hit by Section 397 (2) Cr.PC.

(ii) For past about five years, the petitioner has abandoned her minor child and that is why the court after interaction with the minor child denied her the prayed relief.

(iii) The petitioner has not come up before the court with clean hands and is attempting to sustain her claim based upon false and frivolous grounds.

Ld. Counsel for respondent has placed reliance upon the following judgments:-

***“(a)Dharampal and Ors Versus Smt. Ramshri and Ors. Judgment passed on 07.01.1993 by the Hon'ble Supreme Court of India 1993 AIR 1361, 1993 SCR (1).***

***(b)Rajeev Preenja Versus Sarika and others judgement passed on 26.02.2009 by the Hon'ble Delhi High Court Crl. M.C. No. 3089/2008.***

***(c) Chhetu Singh Versus Smt. Basantiand ors. Dated 23.01.2002 by Hon'ble Rajasthan High Court II (2002) DMC 666, RLW 2003***



**(1) Raj 114, 2002.**

**(d) Minor Anu Versus Ratan Lal Dated 26.04.1993 Rajasthan High Court II (1994) DMC 338.**

**(e) Dinesh Kumar Yadav Versus State of UP and others dated 02.08.2001 by Hon'ble Allahabad High court criminal revision no. 582 of 2016.**

**(f) Sanjeev Kumar versus Sweta Kumari Dated 05.05.2010 by Hon'ble Delhi High Court.**

**(g) B. Saha and others versus M.S. Kochar dated 27th July 1979, by Hon'ble Supreme Court of India, 1979 AIR 1841, 1980 SCR (1) 111.**

**(h) Amar Nath and others versus State of Haryana and others dated 29th July 1977, by Hon'ble Supreme Court of India 1977 AIR 2185, 1978 SCR (1) 222.**

**(i) Amit Kapoor versus Ramesh Chander and Another dated 13th September 2012, by Hon'ble Supreme Court of India, SLP (Crl. No. 1516 of 2010) Criminal Appeal No. 1407/ 2012.**

**(j) Abdul Rahman versus Prosony Bai and Another dated 20th November 2002 by Hon'ble Supreme Court of India, Appeal (Civil) 7497 of 2002.”**

6. Before testing the case of petitioner on merits, it would be apt to first resolve the issue of maintainability.

7. At the very outset, I have no hesitation in observing that the impugned order is an interlocutory order appealable under Section 29 of the D.V.Act and the same is not revisable u/s 397 Cr.PC.

Having said that, I cannot travel any further with the Counsel for the respondent that the petition ought to be disposed off solely on this technical ground. I am the considered opinion that the matter ought to be disposed off on merits rather than mere technicalities. It is the substance rather than mere form with should be the primary consideration for disposal of petitions. Consequently, acting under Section 401 (5) CrPC r/w Section 399 (2) Cr.PC, I deem it appropriate to treat the instant revision petition as an appeal under Section 29 of



the D.V. Act.

8. Having resolved the issue of maintainability, let us now deal with the merits of the instant case. Before proceeding ahead, it would be apt to re-produce herein the relevant portion of the impugned order for ready reference:-

*“One application for visitation rights of complainant to meet her son [REDACTED] is pending. Court has enquired from [REDACTED] that if he wishes to meet his mother and he stated that he is in 3<sup>rd</sup> standard and he does not wish to meet his mother. Counsel for the complainant has submitted that child has been brain washed by the respondents. Be that as it may, since mother is living separately for last 5 years and the child is not dependent upon his mother, it will not be in the interest of the child to force him to meet his mother/complainant as he has no interest in the same. Therefore, application for visitation right is dismissed”*

9. [In 'Mausami Moitra Ganguli vs. Jayant Ganguli, \(2008\) 7 SCC 673'](#) it was observed by Hon'ble Apex Court that :-

*"19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and [Wards Act, 1890 \(Section 17\)](#) or the Hindu Minority and [Guardianship Act, 1956 \(Section 13\)](#) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital fact of the welfare of the minor.*

*20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and*

[REDACTED]

*circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is there that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."*

10. Evidently, Ld. Trial Court decided against the petitioner based upon her interaction with the minor child [REDACTED] coupled with the fact that the mother is living separately for last five years and thus child is not dependent upon the petitioner.

11. In my considered opinion, a child as a matter of right is naturally entitled to love, care, support and affection of both the parents. However, unfortunately, in matrimonial disputes the natural right of a child is sacrificed upon the altars of inflated egos. The court, being *parens patriae*, is duty bound to protect the welfare and interest of a minor child, whose parents are unfortunately involved in a matrimonial dispute. The duty cast upon the courts is very sacrosanct and onerous and the issue of custody / visitation rights cannot be perfunctorily decided in haste.

In my considered opinion, a child during his growing years needs the care of both mother and father for his mental, physical and spiritual growth. Denying him the love and care of either of the parents would leave an irreparable scar upon the soul of the hapless child. It is only in exceptional circumstances, when the interaction of the child with either of the parents is injurious to his

[REDACTED]

physical or mental well being should a father or mother be denied the right of visitation or interaction with the child.

12. [In Indira Khurana v. Prem Prakash](#), 60(1995) DLT 633, Hon'ble Delhi High Court held as under:-

*"10. .... It goes without saying that when the grant of custody is concerned, ascertainment of wishes of the children, especially when they are at an age to make an intelligent preference is a relevant and germane consideration. In none of the cited cases, the question of visitation rights only was involved. In the cited cases, the Court was considering the grant of custody and while doing so, had also made provision for visitation rights. It is also significant that in these cases, visitation rights were granted to the spouse who did not have the custody. This is because there should be very strong reasons to deny visitation rights to any of the spouse. These could be cases say where the grant of visitation rights could be injurious to the mental and physical health of the children.*

*11. The Guardian Judge while exercising his judicious discretion in granting visitation rights can certainly ascertain the wishes of the children by meeting them. In fact, it would be desirable to do so. However, omission to do so in case of visitation rights cannot be fatal especially when there is sufficient material on record available otherwise, supporting grant of visitation rights. This is so in the instant case. The memorandum of understanding had been entered into on the 6th day of December, 1993. The petitioner has not pointed out anything attributable to respondent after 6.12.1993, which would render grant of visitation rights to respondent injurious to the mental and physical health of the children. The petitioner in terms of memorandum as willing to share the vacation and give visitation rights to the respondent. Moreover the expression of wishes of the children is very often conditioned by the persuasion of the party in whose exclusive custody the children have been. The Court, therefore, while ascertaining the mind of the children, has to*



*be conscious of the fact that what the children say could be the reflection of the views of the estranged spouse and induced by him/her."*

13. In a recent judgment, Hon'ble Apex Court in the matter of **Yashita Sahu Vs. State of Rajasthan (Crl. Appeal No. 127/2020, D.O.D. 20.01.2020)** has observed hereasunder.

*"19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every re-union may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights."*

14. In the case at hand, Ld. Trial Court has denied the petitioner visitation rights based upon a brief interaction with the minor child [REDACTED]. Ld. Trial Court was perhaps swayed by the fact that for past about five years, the petitioner

[REDACTED]



was living separately from her minor child. There cannot be any quarrel with the proposition that the wish of even a minor child should not be brushed aside lightly while deciding custody issues. However, the courts must dutifully remain continuously conscious of the tender age of the minor child and his limited capacity to make a rational and informed choice. The court must also not lose sight of the fact that invariably the warring spouse continuously feeds the minor child with all kinds of negative information against the opposite side, severely crippling the semi-developed mental faculties of the child to reach a rational conclusion. It is only in extreme situation, when the interaction of the child with his father or mother is deleterious to his well being, should the visitation rights be denied to the parent.

15. [In Shyam Sunder Trikha v. Sunita](#), 1997 IV AD (DELHI) 198, Hon'ble Delhi High Court held as under:-

*"..... The Court can only reiterate that the Guardian Judge, while ascertaining the mind of the child during a meeting has been conscious and cautious of the fact that what the child is saying could be reflection of the views of the estranged spouse and as induced by him/her."*

16. In the case at hand, Ld. Trial Court has not provided any reason, leave aside convincing ones, as to how and why the interaction of the petitioner would be having an adverse impact upon the interest of the child. The child is barely about 11 years old and at such tender age denying him motherly love and care would be violative of his Human Rights. Though, it can be argued that since the petitioner is living away from her child for past about five years and child is not dependent upon her, therefore, her interaction with the child would cause some complications for every affected individual. However, the subtle distinction between 'compulsion' or 'choice' cannot be altogether obliterated. In the case at hand, the parties are reported to be residing separately and both the parties have their own version regarding the cause of separation. However, the fact remains that FIR No. 55/2015 was registered in Gurgaon, against the respondent at the behest of the petitioner. It is claimed that the respondent remained in jail in that



case for about 15 days. Now, under such acrimonious circumstances petitioner could not be expected to reside with her estranged spouse alongwith the minor child under the same roof.

17. Hon'ble Supreme Court in [Vivek Singh vs. Romani Singh](#), (2017) 3 SCC 231, while examining the legality of the order of the Hon'ble High Court had observed that role of the mother in the development of a child's personality can never be doubted. The company of the mother is the most natural thing for a child and neither the father nor any other person can give the same kind of love, affection, care and sympathy to a child as that of a mother. Hon'ble Supreme Court concluded that the observations of the Hon'ble High Court applied with greater force when the matter before the Court was where the girl child was 8 years old. In the considered view of the Hon'ble Supreme Court, in order to ensure that the child achieved stability and maturity and is able to deal with complex emotions, it was necessary that she be in the company of the mother as well.

18. Further, Hon'ble Supreme Court in the case of [Ruchi Majoo vs. Sanjeev Majoo](#) (2011) 6 SCC 479, clearly held that one parent should not insulate the minor from the parental touch and influence of the other parent as co-parenting is imperative for healthy growth of the minor and development of his personality. It is important that the minor has the care and guidance of both the parents at the formative and impressionable stage of life. The ratio of the judgement is that the role of neither of the parents can be undermined in upbringing and grooming the child to face the realities of life. As the Hon'ble Court observed, visitation rights of the non-custodian parent will enable the child and the parent to stay in touch and share moments of joy, learning and happiness with each other.

19. In these circumstances, I fail to convince myself with the cryptic order of Ld. Trial Court as to how denial of visitation rights to the petitioner would be salubrious to the interest of the minor child. As a cumulative effect of the aforesaid discussions, I am of the considered opinion that the Ld. Trial Court has erred in denying the visitation rights to the petitioner. The impugned order is hereby set aside. Ld. Trial Court is accordingly requested to work out the

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modalities while granting the visitation rights to the petitioner. The criminal revision accordingly stands allowed.

20. Trial Court Record be sent back with the copy of this order.

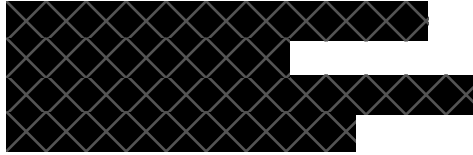
21. Copy of this order be also given dasti to the petitioner and the instant order be uploaded on the court website.

22. File be consigned to Record Room after due compliance.

**Announced in the open court  
On 13.09.2021**

**(Dharmender Rana)  
ASJ-02/NDD/PHC/ND**





13.09.2021

Present: None.

Vide separate order of even date, the present is allowed.

Copy of this order be sent to the Ld. Trial Court as necessary information.

Copy of this order be given dasti to all the concerned.

File of revision petition be consigned to Record Room.

**(Dharmender Rana)**  
**ASJ-02/NDD/PHC/ND**  
**13.09.2021**

