

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPCRL No.49 of 2022

Papuni Behera

.....

Petitioner

Mr. N. Panda, Adv.

-Versus-

State of Odisha & Others

.....

Opp. Parties

Mrs. S. Patnaik, AGA

**CORAM:
JUSTICE S. TALAPATRA
JUSTICE M.S. SAHOO**

**ORDER
26.07.2022**

Order No.

07.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).
2. Heard Mr. N. Panda, learned counsel appearing for the petitioner.
3. By means of this petition, the petitioner has urged this Court to restore the victim, whose name has been withheld in order to protect her identity, from the custody of the Opp. Parties, in particular, from the custody of the Children Home namely, Basundhara and allow the victim to stay with her *husband* i.e. the petitioner.
4. Two pertinent questions which fall for our consideration in this writ petition are (1) whether the petitioner is a minor or she has

attained majority or marriageable age and (2) whether the petitioner is entitled to claim the relief as referred before.

5. Mr. N. Panda, learned counsel appearing for the petitioner has in order to place the proof of age as produced the deposition of the victim given in G.R. Case No.33 of 2020 in the Court of the Sessions Judge, Cuttack.

6. We have carefully gone through that deposition, a certified copy of which has been produced before us.

7. In the description, as recorded by the said Sessions Court, the victim told her age to be 15 years but in the cross-examination the victim has stated as follows:

“The marriage between myself and the accused was held at Kapilash temple. No relative of ours were present in that marriage ceremony. My relatives were not aware of the said marriage. It is a fact that I was already more than 18 years of age at the time of my marriage with the accused Papuni Behera. I married the accused out of my own volition and willingness. I was leading happy conjugal life with the accused till my rescue. It is a fact that the FIR by my father in this case is false and at the behest of my step mother. I am willing to go with the accused as he is my husband.”

8. This is the solitary proof of marriage of the petitioner with the victim. No other evidence has been produced before us in support of age of the victim.

9. In the wake of this development in this case, the State has filed a comprehensive affidavit on 25.07.2022, after supplying a copy to the counsel of the petitioner. Along with the said affidavit, the certificate issued by the Head Master, Raghunath Debata Govt. High School, Brahmapura, dated 21.12.2020, Annexure-B/3 to the said affidavit has been filed. In that certificate, the said Head Master has recorded the date of birth of the victim as 03.02.2007.

10. Based on the said certificate, the State has stated that the victim is still a minor. As per the Certificate of Birth, issued by the Registrar, Births and Deaths, Bhubaneswar Municipal Corporation, victim is still minor.

11. The status report clearly claims that there is no tangible evidence of marriage between the victim and the petitioner. However, the petitioner has been implicated for committing of offence punishable under Section 363/366/376(3)/376(2) (n) of the IPC and Section 6 of POCSO Act in Banki P.S. Case No.307 of 2020 and in the said case, the police has filed the charge-sheet against the petitioner, as it is evident from the paragraph 7 of the affidavit filed by the State.

12. In the affidavit, it has also been asserted that when the victim's statement was recorded under Section 164 of the Cr.P.C, in connection with the above case, she had stated her age to be 14 years. The statement under Section 164 of the Cr.P.C was recorded on 15.03.2021.

13 In the affidavit, the State has revealed that victim refused to stay with her parents, when the police rescued her from the confine of the petitioner. For this purpose, an elaborate statement has been made in Para-11 of the affidavit filed by the State on 25.07.2022. This said Para-11 is reproduced hereunder:

“That it is submitted that during course of investigation of Banki P.S. Case No.307 dt.13.11.20, the victim Liza @ Kalyani Ghader was rescued on 10.03.2021 and accused Papuni Behera was apprehended with her. Statement of the Victim Liza @ Kalyani Ghadei was recorded U/s.164 Cr.P.C, on 15.03.21. The learned Special Court passed orders to produce the victim before C.W.C, Cuttack and accordingly she was produced in presence of her parents where her parents were reluctant to take their daughter and as per direction, victim Liza @ Kalyani Ghadei was handed over to the Co-ordinator, Child line on 15.03.2021. Banki P.S. Case No.307/20 turned to U/s.363/366/376(3)/373(2)(n) IPC/ 6 POCSO Act and accused Papuni Behera was also forwarded in this case. Subsequently after due counseling, her parent took her zima on 04.05.21. During stay at Berhampura, she further fled away from her house without knowledge of

her parents. However, her father Complainant Kanhu Ch. Ghadei able to trace her on 03.07.2021 and produced at Police Station for her safe custody. Victim alleged that her present mother is her step mother and she was not pulling well with her and victim stated that she will not want to stay in her house. As victim Liza refused to go with her father, she was presented before the CWC, Cuttack and sent to Basundhara Cuttack on the same day. Further, as per order of CWC, she was transferred to Children Home, Cuttack on 26.10.2021.”

14. It transpires from the said averment of the State that now, the victim is in the custody of the Children Home and she has been living there since, 26.10.2021. In this perspective facts, only question remains to be answered by this Court is whether the petitioner can urge the relief as prayed in this petition.

15. Prime facie, we are convinced that the victim is a minor girl and her custody cannot be claimed by anyone else but her parents. The petitioner has claimed to have married the victim but except the cross-examination part of the said deposition of the victim, there is no other document to establish the marriage. Such statement cannot substitute the proof of the legal marriage. We are constrained to observe that we do not find any proof of legal marriage. As such, we have not inclined to pass any order, directing any authority to allow the victim to go with the petitioner, at this stage. But the situation

would have been different, if the victim had attained the majority or the marriageable age and she had chosen to live with the petitioner.

16. That apart, Mr. Panda, learned counsel, in order to contend the maintainability of the Habeas Corpus petition, by the petitioner, has relied on a decision of the Apex Court in **Mohd. Ikram Hussain v. State of Uttar Pradesh** reported in **AIR 1964 SC 1625**. In the referred Judgment, the Apex Court has, inter alia, observed that the writ of Habeas Corpus is Testinum remedia and the power can only be exercised in a clear case. It is, of course, singularly inappropriate in cases where the petitioner is himself charged with a criminal offence in respect of the very person for whose custody he demands the writ.

17. In the present case, the petitioner has been charge-sheeted by the police for committing offence of rape etc. against to the victim. Thus, we are bound to observe that this Court cannot entertain any relief as prayed by the petitioner.

18. Accordingly, this petition stands dismissed.

(S. Talapatra)
Judge

(M.S. Sahoo)
Judge



