

IN THE HIGH COURT OF ORISSA AT CUTTACK

GUAP No. 3 OF 2021

Farah Zeba

.... Petitioner

Mr. Debasish Samal, Advocate

-versus-

Shaikh Javed Sarwar

.... Opp. Party

**CORAM:
JUSTICE K.R. MOHAPATRA**

**ORDER
29.03.2022**

Order No.

01. 1. This matter is taken up through hybrid mode.
2. The Petitioner in this petition seeks to assail the order dated 29th January, 2021 passed in C.P. No.36 of 2019, whereby learned Judge, Family Court, Berhampur dismissed the petition filed by the Petitioner under Section 25 and 17 of the Guardians and Wards Act, 1890 with a prayer to declare her as the natural legal guardian of his minor son, namely, Shaikh Danish Sharwar (hereinafter referred to as ‘the child’).
3. Mr. Samal, learned counsel for the Petitioner submits that Opposite Party after dissention with the present Petitioner has remarried to one Philippine lady and is staying with her at Abudhabi. Thus, there is every livelihood that the welfare of the child may be hampered while staying with his father. It is his submission that the child was never produced before learned Judge, Family Court, Berhampur for his examination. He further submits that although the Opposite Party-husband appeared on 12th April, 2019 and filed his written statement, but

subsequently his defence was struck off on 19th August, 2019, when he did not comply with the order of the Court by producing his minor child in Court. As such, the impugned order is not sustainable and is liable to be set aside and the matter should be remitted back to the learned Judge, Family Court, Berhampur for fresh adjudication.

4. Upon hearing Mr. Samal, learned counsel for the Petitioner and on perusal of the materials available on record, it appears that learned Judge, Family Court, Berhampur while adjudicating the matter has framed as many as four issues, which are as follows:

- (i) *Whether this case is maintainable ?*
- (ii) *Whether the petitioner-wife has got cause of action to file this suit ?*
- (iii) *Whether the Petitioner-wife be declared as the natural legal guardian of the minor child and the respondent be directed to handover the custody of the said minor child to the petitioner ?*
- (iv) *Whether the petitioner-wife is entitled to any other relief(s) ?*

In support of the respective cases, the Petitioner-wife examined three witnesses out of whom P.W. 1 is the Petitioner, P.Ws. 2 and 3 are her father and mother. On the contrary, the Opposite Party-husband had not examined any witness nor relied upon any documentary evidence.

5. Learned Judge, Family Court, Berhampur, however, taking into consideration the materials available on record and discussing the provisions of law as well as case law, came to a categorical finding that the minor child is staying with

Opposite Party-husband and he is pursuing his study there at Abudhabi.

6. Law is well-settled that '*welfare of the child*' is the primary and paramount consideration and not the right of the parents, while determining the custody of child. From the materials available on record, it is manifest that the child was born on 8th June, 2015 at Abudhabi. He stayed and grew up at Abudhabi. He also pursuing his studies there. Although the Petitioner has averred that she had brought the child to Odisha, but there is no concrete evidence as to when the child was brought and number of days, the child spent in Odisha. In view of the above removal of the child from the custody of his father will certainly affect his psychological development. He may not also in adjust in a different atmosphere and situation. It will certainly be not in the welfare of the child. There is no allegation of ill-treatment or discomfort to the child staying with his father.

7. Taking into consideration the submission of learned counsel for the Petitioner and on perusal of the materials on record in detail, this Court finds that learned Judge, Family Court, Berhampur has passed a reasoned order.

8. Hence, I am not inclined to entertain this petition, which is accordingly dismissed.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge