

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 37577 of 2021

Debabrata Das

....

Petitioner

Mr. Mahes Das, Advocate

-versus-

Manasi Rout @ Das and another

....

Opp. Parties

Mr. Biyotkesh Mohanty, Advocate

(For Opposite Party No.1)

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

05.04.2022

Order No.

3.
 1. This matter is taken up through hybrid mode.
 2. Petitioner in this writ petition seeks to assail the order dated 16th November, 2021 (Annexure-1) passed in CP No.3 of 2021, whereby learned Judge, Family Court, Sambalpur directed the present Petitioner to hand over safe custody of the child (Opposite Party No.2) to Opposite party No.1, her mother on due acknowledgement. At the same time, learned Judge, Family Court also directed both parties to file appropriate proceeding for safe custody of Opposite Party No.2 (for short, 'the child') for her welfare and future security.
 3. Mr. Das, learned counsel submits that Opposite Party No.1 is the legally married wife of the Petitioner. There is a marital discord between the parties for which Civil Proceeding No.3 of 2021 is pending before learned Judge, Family Court, Sambalpur under Section 18(2) read with Section 23 of the Hindu Adoptions and Maintenance Act, 1956 (for short, 'the

Act'). During pendency of the said proceeding, Opposite Parties filed an application under Section 151 CPC on 2nd November, 2021 praying *inter alia* to hand over the custody of the child to Opposite Party No.1.

3.1 It is further submitted that during pendency of CP No.3 of 2021, the Opposite Party No.1 filed FIR before Mahila PS, Sambalpur alleging that the Petitioner had forcibly taken away the child from her custody. The matter was referred to the Child Welfare Committee, Sambalpur (for short, 'CWC') and CWC Case No.319 of 2021 was initiated. The CWC, after due deliberation with the parents (Petitioner and Opposite Party No.1) as well as interacting with the child, vide its order dated 30th October, 2021, directed that the child should stay with her father. The said order was passed taking into consideration the marital discord between the parties as well as the wish of the child to stay with her father. Although the order passed in CWC Case No.319 of 2021 is appealable under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, 'J.J.Act'), but no appeal whatsoever was filed by Opposite Party No.1 assailing the said order dated 30th October, 2021 passed in said CWC Case. On the other hand, they filed the aforesaid petition (IA No.23 of 2021) under Section 151 CPC, in which the impugned order under Annexure-1 has been passed.

3.2 It is his submission that learned Judge, Family Court, Sambalpur, while adjudicating the matter, did not at all take into consideration the order passed by the CWC in CWC Case No.319 of 2021, which is competent to determine the custody of the child under the provisions of the J.J. Act. In that view of

the matter, the impugned order is not sustainable. It is further contended that there is no cause of action on the part of Opposite Party No.1 to file such an interim application in a petition filed under Section 18(2) read with Section 23 of the Act. As such, the impugned order is illegal and without jurisdiction and is liable to be set aside.

4. Mr. Mohanty, learned counsel for Opposite Party No.1 refuted the submissions of Mr. Das, learned counsel for the Petitioner. It is his contention that during pendency of marital dispute, the CWC had no jurisdiction to entertain such an application and give custody of the girl child to her father. The child is grown up and for her psychological and emotional support, her custody should be given to her mother-Opposite Party No.1. In support of his contention, Mr. Mohanty placed reliance upon the ratio decided by the High Court of Delhi in the case of ***Geetanjali Dogra Vs. State and others***, reported in ***2019 SCC Online Del 10009*** and a decision of the High Court of Madhya Pradesh in W.P. No.25356 of 2018 disposed of on 3rd February, 2022 and submitted that it is not the legal right of the parents but welfare of the child, which is prime and paramount consideration for determining her custody. It has been taken into consideration by the learned Judge, Family Court, Sambalpur, while adjudicating the matter. Since the CWC had no jurisdiction to consider the issue of custody of child, learned Judge, Family Court has committed no error in not considering such an order. On the other hand, learned Judge, Family Court, Sambalpur taking into consideration the rival contentions of the parties and materials available on record has passed a reasoned order. It is further submitted that

Miscellaneous Guardianship Misc. Case No.1 of 2022 has already been filed by the Opposite Party No.1 for custody of the child under Section 25 of the Guardians and Wards Act, 1890 which is pending before the learned Judge, Family Court, Sambalpur. At this stage, this Court should be slow to interfere with the impugned order while exercising its power under Article 227 of the Constitution. In that view of the matter, Mr. Mohanty, learned counsel for Opposite Party No.1 prays for dismissal of the writ petition.

5. Upon hearing learned counsel for the parties, it is apparent that there is a marital discord between the Petitioner and Opposite Party No.1, but that should not in any manner affect the welfare of the child, which is prime and paramount for consideration. It is not in dispute that CP No.3 of 2021 filed under Hindu Adoptions and Maintenance Act, 1956 is pending before learned Judge, Family Court, Sambalpur. On an FIR lodged by Opposite Party No.1 alleging that the Petitioner forcibly took away the child from the custody of Opposite Party No.1, the matter was referred to the CWC and CWC Case No.319 of 2021 was initiated. Upon deliberation with the parents, namely, the Petitioner as well as Opposite Party No.1 and interacting with the child, the CWC vide its order dated 30th October, 2021, directed the child should be kept with the father, the Petitioner. The said order has been passed primarily taking into consideration the statement of the child to the effect that her mother-Opposite Party No.1 is not taking proper care of her for which she could not appear in the online examination during COVID and that she wants to stay with her father. This material aspect was not taken into consideration by the learned Judge,

Family Court, Sambalpur, while adjudicating the matter. Although learned Judge, Family Court has discussed the law on the point of custody of the child, but failed to indicate as to how it is applicable to the facts and circumstances of the instant case. It is also observed that the Opposite Party No. without availing the statutory remedy by filing an appeal under Section 101 of the JJ Act against the order passed in CWC Case No. 319 of 2021, filed an application under Section 151 CPC claiming custody of the child, which is not maintainable. In that view of the matter, the impugned order under Annexure-1 is not sustainable and is accordingly set aside.

6. Since Mr. Mohanty, learned counsel for the Petitioner submitted that pursuant to the direction in the impugned order, the Opposite Party No.1 has already filed Guardians Misc. Case No.1 of 2022 under Section 25 of the Guardians and Wards Act, 1890, which is pending for consideration before learned Judge, Family Court, Sambalpur, this Court is of the considered opinion that the child should remain in the custody of her father (the Petitioner) till arrangements, if any made by learned Judge, Family Court, Sambalpur in the Guardians Misc. Case No.1 of 2022 pending before him.

7. With the aforesaid observation, the writ petition is allowed.

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge