
(2015) 08 OHC CK 0025

In the Orissa High Court

Case No : W.P.(Crl.) No. 665 of 2013 and M.C. Nos. 75 and 131 of 2014

Swapna Satpathy

APPELLANT

Vs

State of Odisha and Others

RESPONDENT

Date of Decision : 17-08-2015

Acts Referred:

Constitution of India, 1950 — Article 132, 137, 226, 32
Dowry Prohibition Act, 1961 — Section 4
Guardians and Wards Act, 1890 — Section 25, 6
Hindu Marriage Act, 1955 — Section 13(1)(i)(a), 26
Penal Code, 1860 (IPC) — Section 294, 323, 34, 498-A, 506

Citation : (2015) 2 ILR Ori 710

Hon'ble Judges : I. Mahanty and Dr. Durga Prasanna Choudhury, JJ.

Bench : Division Bench

Advocate : P.K. Ray and N. Dash, for the Appellant; D. Panda, D.P. Dhal, C.R. Panda and R. Panda, for the Respondent

Final Decision : Disposed Off

Judgement

Dr. Durga Prasanna Choudhury, J.—The aforesaid Misc. Cases were heard together as they arise out of the W.P.(Crl.) No. 665 of 2013 disposed of by this Court vide order dated 22.1.2014.

FACTS :

The writ petitioner-wife-Swapna Satpathy @ Upadha is the opposite party and the writ-opposite party-husband-Sanjay Kumar Satpathy is the petitioner in Misc. Case No. 75 of 2014 and the wife is petitioner and husband is the opposite party in Misc. Case No. 131 of 2014.

2. The factual backdrop of the case of the husband-Sanjay is that wife-Swapna has married writ-opposite party-Sanjay Kumar Satpathy. Out of their wed-lock, a son was born. The couple left the rented house of the father of husband-Sanjay at plot No. 94, Madhusudan Nagar, Unit-IV, Bhubaneswar and resided separately at Plot No. 154, Soubhagya Nagar, Bhubaneswar in July, 2012. On 23/24.9.2012,

it is alleged that wife-Swapna left the husband leaving behind the minor child after quarreling with him.

On 3.11.2012 wife-Swapna filed Bhubaneswar Mahila P.S. Case No. 451 of 2012 under sections 498-A /294 /323 /506 /34 IPC and section 4 of the Dowry Prohibition Act (hereinafter called "DP Act") against the husband-Sanjay and his relatives. F.I.R. was registered and investigation proceeded. It is the further case of husband-Sanjay that Civil Petition No. 453 of 2012 was filed by the wife-Swapna under section 26 of Hindu Marriage Act, 1955 in the court of learned Judge, Family Court, Bhubaneswar and also one I.A. No. 122 of 2012 was filed in that court seeking interim custody of the minor child. In that case, summon was issued but reasons best known to the wife-Swapna, husband-Sanjay was set ex parte in Civil Petition No. 453 of 2012 and I.A. No. 122 of 2012 was disposed of vide order dated 24.11.2012 passed by learned Judge, Family Court, Bhubaneswar therein purportedly directing interim custody of the child to be given to the mother (wife-Swapna).

3. Challenging the said order, the husband-Sanjay filed W.P.(C) No. 2276 of 2012 before this Court on 27.2.2012. In the meantime on 12.2.2012 the wife-Swapna filed another F.I.R. under sections 506 /509 IPC vide Kharavelanagar P.S. Case No. 297 of 2012 against husband-Sanjay. On 13.12.2012 in the earlier Mahila P.S. Case, husband-Sanjay was arrested. On 15.12.2012 another criminal case was filed by the wife-Swapna against husband-Sanjay in Pipili P.S. registered as Pipili P.S. Case No. 491 of 2012. On 25.12.2012 husband-Sanjay was released on bail by the order of the learned Sessions Judge, Bhubaneswar. It is the further case of the petitioner that on 7.2.2013 the husband-Sanjaya got stay of operation of the order of the learned Judge, Family Court, Bhubaneswar giving interim custody of the minor child. In spite of that, on 13.2.2013 ex parte decree was passed in C.P. No. 453 of 2012 by the learned Judge, Family Court, Bhubaneswar as the husband-Sanjay has already been set ex parte on 23.11.2012. Against such ex parte final order passed by the learned Judge, Family Court, Bhubaneswar, husband-Sanjay preferred MATA No. 11 of 2013 in this Court. On the other hand, wife-Swapna filed Execution Petition No. 5 of 2013 before the learned Judge, Family Court, Bhubaneswar for execution of the ex parte decree. On 22.3.2013, MATA No. 11 of 2013 was allowed by this Court on contest. The order passed in C.P. No. 453 of 2012 was set aside and the execution proceeding, E.P. No. 5 of 2013 was dropped.

4. It is a peculiar story which did not stop there. It is further averred that on 26.3.2013 after disposal of MATA No. 11 of 2013, wife-Swapna filed petition under section 13(1)(i)(a) of the Hindu Marriage Act before the learned Judge, Family Court, Bhubaneswar being CP. No. 150 of 2013 seeking judicial separation. In the same proceeding also filed I.A. No. 54 of 2013 on 15.4.2013 seeking custody of the child on the ground that she being the mother, is the best person to protect the interest of the child. It is alleged by the husband-Sanjay that suppressing material facts, wife-Swapna produced order of the learned

Judge, Family Court, Bhubaneswar with the assistance of police, forcibly took away the minor child from the house of the husband-Sanjay. The mother of husband-Sanjay accompanied the child to the Kharavela Nagar P.S. On production of this Court's order in MATA No. 11 of 2013 which was suppressed by wife-Swapna, Police left the child to the custody of husband-Sanjay. In spite of filing the C.P. No. 150 of 2013 before the learned Judge, Family Court, Bhubaneswar, on 13.5.2013 W.P. (Crl) No. 665 of 2013 was filed by her seeking habeas corpus to produce the child in the custody of wife-Swapna. It is alleged inter alia, by the husband-Sanjay vide M.C. No. 75 of 2014 that the final order in the writ petition was passed without giving proper opportunity to him of being heard about the status and salary of the wife-Swapna who can not protect the best interest of the child. That order was purportedly passed on 22.1.2014 by this Court. So he being the petitioner, has approached this Court to recall the judgment dated 22.1.2014 passed in W.P.(Crl) No. 665 of 2013. On the other hand, the wife-Swapna filed M.C. No. 131 of 2014 praying to implement the order dated 22.1.2014 passed in W.P.(Crl) No. 665 of 2013. The husband-Sanjay contested the Misc. Case No. 131 of 2014 on the ground that such order being not passed on contest, should not be implemented and requires fresh adjudication.

5. The case of the wife-Swapna is that she is the legally married wife of the husband-Sanjay and they are blessed with a male child being born to them on 30.11.2011. After birth of the child, there was disturbance between the husband and wife due to unwanted demands by the husband-Sanjay. Therefore, she was forced to leave his house on 23.10.2012 night. After some days, she went with her family members to the house of husband-Sanjay to bring her child back but husband-Sanjay and his family members assaulted and drove her away. She lodged F.I.R. at the Bhubaneswar Mahila P.S. vide P.S. Case No. 451 of 2012. Thereafter she also moved the learned Judge, family Court, Bhubaneswar for the custody of the child. After getting the order from the learned Judge, Family Court, Bhubaneswar, through the help of police officials of Kharavela Nagar P.S. got the custody of the child. It is further alleged, inter alia, by the wife-Swapna that on 8.5.2013 the police officials of Kharavela Nagar P.S. asked the wife-Swapna to appear before the P.S. with the child because of the order of this Court and in presence of the police officials of Kharavela Nagar P.S. and Government Advocate, the child was forcibly delivered to the custody of husband-Sanjay from the custody of wife-Swapna. It is averred in the writ petition that the child being in need of the mother's care and she can protect the absolute interest of the child, should be left to her custody. So she filed writ of habeas corpus before this Court to get the custody of the child. It is the further case of the wife-Swapna that on 22.1.2014 this Court passed order directing the husband-Sanjay to deliver the custody of the child within a fortnight to his mother-Swapna but father-Sanjay got the visiting right to visit his son once in every month for a period of two hours at the house where Swapna is residing. Since the order of this Court is not complied with by husband-Sanjay, wife-

Swapna filed Misc. Case No. 131 of 2014 to implement "the order of this Court and at the same time, raised objection to the petition in Misc. Case No. 75 of 2014 filed by husband-Sanjay.

SUBMISSIONS

6. Learned counsel for the husband-Sanjay submitted that the order dated 22.1.2014 passed by this Court in W.P.(Crl) No. 665 of 2013 is not an order on merit inasmuch as no sufficient opportunity was afforded to the petitioner in this case to ventilate his grievance before this Court. He further submitted that without any rhyme or reason, wife-Swapna left her matrimonial home leaving behind the male child in the custody of husband-Sanjay and filed false case against the husband-Sanjay before the Kharavelanagar P.S. He further submitted that the child was forcibly removed by the police at the instance of wife but after intervention on time, by virtue of the order dated 22.3.2013 passed in MATA No. 11 of 2013, the paternal grandmother of the child got custody of the child and the child was never in the custody of wife-Swapna. He further submitted that wife-Swapna filed C.P. No. 150 of 2013 before the learned Judge, Family Court, Bhubaneswar on 26.3.2013 purportedly under section 13(1)(i)(a) of the Hindu Marriage Act for decree of judicial separation and she also filed I.A. No. 541 of 2013 for the custody of the child, but she could not get the custody of the child. On the other hand, she filed the impugned writ petition before this Court claiming custody of the child. According to him, she has suppressed the material fact about the filing of the petition for the custody of the child before the appropriate court and tried to snatch away the order dated 22.1.2014 of this Court in W.P.(Crl) No. 665 of 2013. He further submitted that on 24.7.2013 hearing was concluded, the parties filed their respective notes of submission and the judgment was reserved. But on 26.9.2013, before passing final order, this Court asked the wife-Swapna petitioner in W.P.(Crl) No. 665 of 2013 to file an affidavit mentioning therein the present status of her family with regard to the educational qualification of the members of the family as well as their financial status by 30.9.2013 after serving copy thereof on the learned counsel for the husband-opposite parties. The opposite parties were directed to file reply to the said affidavit by 3.10.2013, if they want. Again the matter was fixed to 3.10.2013 for hearing in the chamber of Hon'ble senior member of the Bench. By 3.10.2013 affidavit was filed but lawyers went on strike. He further submitted that no copy of the affidavit was served on them and the husband-Sanjay did not get opportunity to file counter-affidavit. Finally the judgment was passed on 22.1.2014 directing husband-Sanjay to deliver the child to the custody of the wife-Swapna and allowed the visiting rights of husband-Sanjay. He further stated that since opportunity was not availed by the husband-Sanjay to file counter to the affidavit of wife-Swapna with regard to the educational qualification of the members of the family as well as their financial status, the judgment being passed only relying on the affidavit filed by wife-Swapna, there is absolute violation of natural justice by the Court requiring to recall the same as the said order dated 22.1.2014 tantamounts to ex parte order, even though it was passed

showing purportedly on contest.

7. Mr. Panda, learned counsel for the husband-Sanjay submitted that in the decision in A.R. Antulay Vs. R.S. Nayak and Another, Their Lordships observed at paragraphs 37, 38 & 39 in the following manner:

"37. The second question that arises here is if such a wrong direction has been given by this Court can such a direction inter partes be challenged subsequently. This is really a value perspective judgment.

38. In Kiran Singh and Others Vs. Chaman Paswan and Others, , Venkatarama Ayyar, J. observed that the fundamental principle is well established that a decree passed by a court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

39. This question has been well put if we may say so, in the decision of this Court in Shri M.L. Sethi Vs. Shri R.P. Kapur, where Mathew, J. observed that the jurisdiction was verbal coat of many colours and referred to the decision in Anisminic Ltd. v. Foreign Compensation Commission, (1969) 2 AC 147 where the majority of the House of Lords dealt with the assimilation of the concepts of "lack" and "excess" of jurisdiction or, in other words, the extent to which we have moved away from the traditional concept of jurisdiction. The effect of the dicta was to reduce the difference between jurisdictional error and error of law within jurisdiction almost to a vanishing point. What is a wrong decision on a question of limitation, he posed referring to an article of Professor H.W.R. Wade, "Constitutional and Administrative Aspects of the Anismanic case" and concluded: "it is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or decree embodying the decision a nullity liable to collateral attack and there is no yardstick to determine the magnitude of the error other than the opinion of the Court."

(Emphasis supplied)

8. He submitted that the fundamental principle has been established that a decree passed by a court without jurisdiction, is a nullity and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings.

9. He also relied upon the decision in Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., and submits that the plea of fraud could not be ignored by the commissioning in the said case which needs to be reminded that the authorities, be that constitutional, statutory or administrative, possessed the power to recall their judgments or orders if they are obtained by fraud as the fraud and justice

can never dwell together. It is, therefore, submitted by Mr. Panda, learned counsel for the husband-Sanjay that the order dated 22.1.2014 being obtained by the petitioner suppressing fact of filing of the case before the learned Judge, Family Court, Bhubaneswar vide C.P. No. 150 of 2013 and by not giving chance to the husband-Sanjay to place counter to the affidavit of the wife-Swapna with regard to the educational qualification of the members of the family as well as their financial status, for the best interest of the child, which amounts to playing fraud on the court, the said order dated 22.1.2014 has to be recalled by the Court. He submitted to allow the Misc. Case No. 75 of 2014 by recalling the order dated 22.1.2014 passed by this Court in the aforesaid writ and at the same time to dismiss the writ petition being devoid of merit as the writ petitioner-wife has not come in clean hand seeking equity from the Court.

10. Mr. Panda, learned counsel for the husband-Sanjay further submits that the law with regard to the custody of the child has been well dealt in the decision reported in Syed Saleemuddin Vs. Dr. Rukhsana and Others, . He drew our attention to paragraph-11 of the judgment where it has been discussed that an application seeking a writ of habeas corpus for custody of minor children the principal consideration for the court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. According to him, the petition for habeas corpus is not maintainable in view of the fact that already the learned Judge, Family Court is in seisin of the matter before filing of the writ petition of habeas corpus and the child is in custody of the father by the order dated 22.3.2013 passed by this Court in MATA No. 11 of 2014. So he submitted that the writ petition is otherwise not maintainable.

11. Per contra, learned counsel for the wife-Swapna submitted that the Misc. Case to recall the judgment passed in W.P.(Crl.) 665 of 2013 is not maintainable. He contended that under Article 132 of the Constitution of India, an appeal can lie to the Hon''ble Supreme Court in judgment/decreed or final order within the territory of India whether civil, criminal or other proceeding. Since the High Court has already passed the final order in the aforesaid writ petition for habeas corpus, the petition to recall the order is not maintainable and the appeal lies to the Hon''ble Supreme Court. He also drew our attention to Article 137 of the Constitution of India by contending that only Hon''ble Supreme Court has got power to review any judgment pronounced or order made by it and the order passed by this Court under Article 226 , cannot be recalled or reviewed. He further submitted that the factual aspect as narrated by the learned counsel for the husband-Sanjay are not all correct.

12. Mr. Ray, learned senior advocate for the wife-Swapna drew our attention to the decision in W.P.(Crl) No. 345 of 2010 (Jumaila v. Abdul Gafoor and others) decided on 13.4.2012 where Their Lordships of Kerala High Court have held about the principles regarding custody of the child. Relying upon such decision,

he submitted that being the mother and natural guardian of the child, the rights of the petitioner are inviolable and sacrosanct and the conduct of the husband-Sanjay and others has deprived the wife-Swapna of her motherhood. The mandate of the Constitution envisages special protection for women and children which compel to hold all efforts must be made to set at naught the attempts of persons like husband-Sanjay and their family members to deprive helpless Swapna of her child by adopting dubious method as happened in the present case. So he submitted that the order passed in the writ petition should be implemented as it has reached its finality. He also stated that the writ petition is maintainable even if the Family Court is in seisin of the matter.

POINTS FOR DISCUSSION :

13. After going through the contention of both the parties, we find following points emerge for consideration :

"(1) whether there is fraud exercised upon the court to recall the order dated 22.1.2014 passed by this Court in W.P.(Crl) No. 665 of 2013;

(2) whether there is violation of natural justice available to the husband-Sanjay;

(3) whether the writ petition is maintainable in the event of recalling the order dated 22.1.2014 passed by this Court in W.P.(Crl) No. 665 of 2013; and

(4) whether the child can be given into custody of mother-Swapna or father-Sanjay."

DISCUSSION

Point No. 1

14. W.P.(Crl) No. 665 of 2013 was instituted by the wife-Swapna on 13.5.2013 with the prayer to direct the State Government, Deputy Commissioner of Police, Bhubaneswar & Inspector-in-Charge, Kharavela Nagar Police Station (opposite parties 1 to 3) to recover the son of the petitioner from the wrongful confinement of O.Ps.4 to 8 including the husband-Sanjay to give the child to the custody of the wife-petitioner-Swapna with ancillary relief. It is revealed from the averments of the original writ petition that admittedly the child was in the custody of the mother as on 8.5.2013 pursuant to the order dated 13.2.2013 passed by the learned Family Court, Bhubaneswar in C.P. No. 453 of 2012. It is the further case of the petitioner, as revealed from the averments in the writ petition that on 8.5.2013 the child was removed from the custody of the wife-petitioner-Swapna (who is also the petitioner in M.C. No. 131 of 2014) by the husband-Sanjay with the police help of the Kharavela Nagar Police Station on an understanding that the Court has set aside the order of the learned Family Court, Bhubaneswar. There is nothing found from the petition under which order the child was removed by the police from her custody and delivered to the custody of the husband-Sanjay. On the other hand, it is revealed from the counter-affidavit of the husband-Sanjay that the order of the Family Court, Bhubaneswar was

reversed by this Court vide order dated 22.3.2013 passed in MATA No. 11 of 2013. Petitioner-wife has not submitted such fact to this Court.

15. Moreover, it is revealed from the writ petition that having no other way, she filed the writ petition in question to take custody of the child. It is revealed from the counter-affidavit of opposite party-husband that after dismissal of MATA No. 11 of 2013 she sought judicial separation, vide C.P. No. 150 of 2013 and also vide I.A. No. 54 of 2013 filed therein, seeking custody of the child. The writ petition or any other petition or affidavit filed by her do not reveal about such fact. So the petitioner suppressing the material facts about filing of the case in the Family Court, has thereafter filed the writ petition for habeas corpus seeking the custody of the child. So the suppression of material facts by the wife-petitioner as alleged by the husband-Sanjay cannot be denied.

16. The order-sheet in W.P.(Crl.) No. 665 of the 2013 need to be gone into to find out whether there is further act of the petitioner in the said writ petition to have suppressed the material fact or not. On 15.5.2013 for the first time the matter was taken up and the order was passed to serve the copies of the petition on the learned State Counsel and O.P. No. 5-mother of husband-Sanjay (O.P. No. 4) was directed to produce the child before this Court on 17.6.2013. As the record was received by the Section on 20.6.2013, the case could not be listed on 17.6.2013. However, the matter was placed before this Court on 21.6.2013 and this Court passed order directing both the parties for a conciliation between them and the case was fixed for hearing to 17.7.2013 in the chamber of Hon"ble Mr. Justice M.M. Das. The matter was put up on 17.7.2013 in the chamber of Hon"ble Mr. Justice M.M. Das and husband-Sanjay filed affidavit before this Court. However, the order-sheet dated 24.7.2013 shows that the respective parties filed their written statements, they were also heard and the judgment was reserved. On the next date, i.e. on 26.9.2013, before passing of the judgment, the Court felt that there should be an affidavit filed by the wife-Swapna mentioning therein the present status of her family members with regard to their educational qualification as well as their financial status. It was also directed therein that copy of the same be served on the opposite party and the opposite party, if wants, should file reply to the said affidavit by 3.10.2013. Subsequent orders passed by this Court before 22.1.2014, may be reproduced below for better appreciation :

"3.10.2013 Since the Lawyers have abstained from Court work, none appears for the parties.

The affidavit filed by the petitioner, pursuant to the order dated 26.9.2013 be kept on record.

Put up this matter on 22.10.2013 in the chamber at 1.40 p.m.

22.10.2013 Since the Lawyers have abstained from Court work, the petitioner appears in person.

Pursuant to the order dated 26.9.2013 an affidavit has already been filed by the petitioner.

Since the case was reserved earlier for judgment, the matter is reserved for judgment."

17. The aforesaid orders do not reveal that the copy of the affidavit pursuant to the order dated 26.9.2013, has been served by the wife-Swapna upon the husband-Sanjay and there is nothing found that any counter-affidavit by the husband-Sanjay has been filed refuting the submissions made by the wife-Swapna in her affidavit dated 26.9.2013. Though she filed affidavit on 27.9.2013 in Court, pursuant to the order dated 26.9.2013, copy of the same has not been served on the husband-Sanjay and no receipt of service of copy is also filed in record. On the other hand on 22.1.2014, judgment was passed in the writ petition directing the husband-Sanjay to handover the custody of the child to the petitioner-wife-Swapna within a fortnight, giving husband-Sanjay visiting right to visit the child. It further appears from the order-sheet that the copy of the same was communicated to the learned Family Court, Bhubaneswar as per the endorsement of office dated 4.4.2014.

18. On 21.4.2014 the aforesaid Misc. Case filed by the respective parties were listed before the Bench of Hon''ble the Chief Justice and thereafter it went on listing on the dates after dates. From the aforesaid continuation of order-sheet, it is clear that the writ petitioner-Swapna has not served copy of the affidavit containing vital facts upon the writ opposite parties 4 to 8 including the husband and in spite of the order of this Court, suppressing the material facts, which amounts to influencing the Court, obtained the order dated 22.1.2014 because the Court was under impression that the order dated 26.9.2013 has been complied with. So the conduct of the wife-Swapna suppressing the matter of serving copy of the affidavit and depriving the husband-Sanjay to file counter-affidavit to the affidavit filed by wife-Swapna, amounts to exercise fraud upon the Court to obtain the order in her favour.

19. In S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, Their Lordships have observed, a litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

20. With due respect to the said decision, in the instant case, it is reiterated that the petitioner-wife-Swapna has withheld copy of the affidavit dated 27.9.2013, defying the order of this Court, suppressing the filing of C.P. No. 150 of 2013, she is found to have played fraud on the Court.

21. In Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., Their Lordships observed at paragraph-20 in the following manner :

"By filing letter No. 2775 of 26.8.1991 along with the review petition and contending that the other letter, namely, letter No. 2776 of the even date, was never written or issued by the respondent, the appellant, in fact, raised the plea before the Commission that its judgment dated 16.11.1993, which was based on letter No. 2776, was obtained by the respondent by practicing fraud not only on the appellant but on the commission too as letter No. 2776 dated 26.8.1991 was forged by the respondent for the purpose of this case. This plea could not have been legally ignored by the Commission which needs to be reminded that the authorities, be they constitutional, statutory or administrative, (and particularly those who have to decide a lis) possess the power to recall their judgments or orders if they are obtained by fraud as fraud and justice never dwell together (*Fraus et jus nunquam cohabitant*). It has been repeatedly said that fraud and deceit defend or excuse no man (*Fraus et dolus nemini patrocinari debent*)."

22. With due respect it is found that in that case the plea of fraud exercised on the appellant and on the Commission was taken. Therefore, the Hon'ble Apex Court held that the plea is legally tenable and the Court, be constitutional, statutory or administrative, has got the inherent right to recall their judgments or orders if they are obtained by fraud as fraud and justice never dwell together. Apart from this, in *Krishna Hare Gaur Vs. Vinod Kumar Tyagi and Others* at paragraph-15 Their Lordships observed that suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est.

23. We are, therefore, of the view that since the final order in the W.P.(Crl.) No. 665 of 2013 has been obtained by playing fraud on the court as per the discussion made above, in view of aforesaid authorities, this Court has got inherent power to recall its own order obtained by fraud. The contention of Mr. Ray, learned senior advocate for the petitioner-wife that the order passed under Article 226, cannot be recalled, having reached its finality, has to be considered. Article 137 relates to the order of the Hon'ble Apex Court where they have got power to recall or review the same. There is no provision in the constitution to recall the order passed in the writ jurisdiction under Article 226. But it must be remembered that writ is a suit. Since the decree passed in the suit by playing fraud on the court as discussed above, can be recalled as decree is said to be non est, the order under Article 226 being order in suit, obtained by fraud, is also liable to be recalled. Hence there is no force on the contention of Mr. Ray, learned senior advocate for the petitioner-wife-Swapna. On the other hand, we are of the view that the order dated 22.1.2014 passed in W.P.(Crl.) No. 665 of 2013 need to be recalled because fraud has been committed by petitioner-wife-Swapna on the Court. Point No. 1 is answered accordingly.

POINT NO. 2

24. So far as point No. 2 is concerned, it is not necessary to repeat the facts of the case. But as discussed above, we found that the husband-Sanjay was deprived of filing counter-affidavit to the affidavit filed by the petitioner-wife-

Swapna with regard to the present status of her family members and their financial status so far as the maintenance of child is concerned. On going through the impugned order passed by this Court in the aforesaid writ application, it is found that the Court has given more stress on the capacity and competency of the petitioner-wife-Swapna and her family members to maintain the child. In the judgment dated 22.1.2014 passed in W.P.(Crl.) No. 665 of 2013 at paragraph-11, their Lordships have well discussed the factum of the status and capacity of earning of the petitioner-wife-Swapna and her family members and considering the same, the custody of the child was ordered to be given to the mother of opposite party No. 4-husband-Sanjay. Had there been counter-affidavit filed by the opposite party No. 4-husband-Sanjay, the discussion on this aspect must have been otherwise. On the other hand opposite party No. 4-husband-Sanjay and other opposite parties could not get opportunity to place their case. So the consideration of the writ petition filed by petitioner-wife-Swapna appear to have been made ex parte. When opposite party No. 4 including his family members are not given reasonable opportunity of being heard by filing counter or reopening the case to hear the opposite parties, it will amount to violation of natural justice as audi alteram partem which is the core value of the Constitution for a federal country like ours, remain far from satisfaction. Either way, natural justice which is a very vital issue in this case, has been violated. When there is violation of natural justice, the order dated 22.1.2014 passed by this Court in W.P.(Crl.) No. 665 of 2013 is liable to be recalled. Point No. 2 is answered accordingly.

25. In view of the aforesaid analysis, we recall the order 22.1.2014 passed by this Court in W.P.(Crl.) No. 665 of 2013.

POINT NOS. 3 & 4

26. In view of the submissions of the learned counsel for the respective parties, on the merit of the writ petition, point Nos. 3 & 4 have been formulated. Since they are inter-connected, we desire to address them together.

27. Mr. Ray, learned senior advocate for the wife-Swapna submitted that even if the remedy for custody of the child is available to the petitioner-wife by filing C.P. No. 150 of 2013 and interim application therein, the prayer of the petitioner-wife through the writ petition for habeas corpus is maintainable. On the other hand, learned counsel for the husband-Sanjay submitted that the petition for habeas corpus is not maintainable as the relief has not been sought in the appropriate forum. There is nothing to stand on the way of the Court exercising its jurisdiction in this writ for habeas corpus. It is well settled that a writ of habeas corpus is maintainable even if there is statutory remedy available to the petitioner. He further stated that in the decision in Gaurav Nagpal Vs. Sumedha Nagpal, their Lordships observed in paragraph-22 in the following manner :

"In Habeas Corpus, Vol. I, page 581, Bailey states;

The reputation of the father may be as stainless as crystal; he may not be

afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

28. Referring to the aforesaid passage, learned counsel for the petitioner submitted that as a rule in the selection of guardian of a minor, best interest of the child is paramount consideration to which the rights of the parents must sometimes yield. Learned counsel for the husband-Sanjay submitted that since the statutory provisions already have been invoked by the petitioner-wife-Swapna, at the same time, this writ petition for habeas corpus praying for the custody of the child is not maintainable. At the same time he argued by relying upon the decision in Syed Saleemuddin (supra). Our attention to paragraph-11 of the judgment was drawn where it has been discussed that in an application seeking a writ of habeas corpus for custody of minor children, the principal consideration for the court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. Referring to the above para, he submitted that there is no two opinion that the court on habeas corpus and the Family Court as well should always protect the best interest of the child and left to the custody of such guardian. On going through the above decision, we are of the view that no doubt the best interest of the child is the paramount consideration for all the courts while deciding the custody of the child.

29. In the instant case, C.P. No. 150 of 2013 and I.A. No. 54 of 2013 were filed for judicial separation and seeking custody of the child by wife-Swapna on 26.3.2013 and 15.4.2013 respectively before the learned Judge, Family Court, Bhubaneswar. Thereafter W.P.(Crl.) No. 665 of 2013 was filed seeking custody of the child by wife-Swapna on 13.5.2013. Pendency of such proceeding was not mentioned and it has been only certified that the matter out of which the writ petition arises, was never before this Hon'ble Court as per instruction supplied by the petitioner in the writ petition. Writ petition has been filed without declaring or disclosing the earlier filing of the proceedings before the Family Court, Bhubaneswar whereas, in fact, petitioner had already exercised her rights by filing C.P. No. 150 of 2013 and I.A. No. 54 of 2013 before the Family Court, Bhubaneswar. This suppression has resulted in the petitioner seeking similar remedy before two different courts. In Gaurab Nagpal (supra), there are no two

parallel proceeding filed before different courts whereas in the present case, the proceeding is pending before two courts. In view of such different facts and circumstances, the decision in Gaurab Nagpal (supra), is not applicable to the present case.

30. Be that as it may, C.P. No. 150 of 2013 and W.P.(Crl.) No. 665 of 2013 are pending for the custody of the child and the child is with the custody of the husband-Sanjay and wife-Swapna is seeking for the custody of the child. Multiplicity of the proceeding is not at all favourable for awarding even justice. Since the goal of litigation has got in common to award justice, the parallel proceeding with common object is to be discouraged. Secondly, it has to be borne in mind that in civil proceeding, evidence can be led by the respective parties to the issues raised. Witnesses can also be examined and cross-examined. Relevancy or irrelevancy of the documents are to be considered. Now in the case in hand, to avoid multiplicity of the proceeding or plurality of litigations and to allow parties to lead evidence, keeping in view the best interest and welfare of the child, C.P. No. 150 of 2013 which is already pending prior to filing of writ of habeas corpus, in our view, should be allowed to decide the common issue in question, i.e., custody of the child. Reliance is placed on a decision in Sumedha Nagpal Vs. State of Delhi and Others, where Their Lordships have observed at paragraphs 2 & 3 in the following manner :

"2. Both parties do recognize that the question of custody of the child will have to be ultimately decided in proceedings arising under Section 25 of the Guardians & Wards Act read with section 6 of the Act and while deciding such a question, welfare of the minor child is of primary consideration. Allegations and counter-allegations have been made in this case by the petitioner and Respondent 2 against each other narrating circumstances as to how the estrangement took place and how each one of them is entitled to the custody of the child. Since these are disputed facts, unless the pleadings raised by the parties are examined with reference to evidence by an appropriate forum, a proper decision in the matter cannot be taken and such a course is impossible in a summary proceeding such as writ petition under Article 32 of the Constitution.

3. Without expressing any view on the pleadings raised in this case and making it clear that it is neither appropriate nor feasible in the present case to investigate the correctness of the same and decide one way or the other, we propose to relegate the parties to work out their respective rights in an appropriate forum like the Family Court or the District Court in a proceeding arising under Section 25 of the Guardians & Wards Act read with Section 6 of the Act or for matrimonial relief."

31. With due respect to the above authorities, as the Family Court where the matrimonial proceeding is already pending, we refrain ourselves to allow relief in this writ application. In our view, the proceeding pending before the Family Court is preferred to exercise the issue in question in this writ application. Point Nos. 3 & 4 are answered accordingly.

CONCLUSION

We are, therefore, of the considered view that the best interest and welfare of the child must be adjudicated by the learned Judge, Family Court, Bhubaneswar in C.P. No. 150 of 2013 and I.A. No. 54 of 2013 arising out of the said civil proceeding on its own merit within a period of six weeks from today. Both the parties are directed to appear before the learned Judge, Family Court, Bhubaneswar on 24.8.2015 and learned Family Court, Bhubaneswar will take up the matter on a day to day basis and dispose of the matter within the time as stated above, according to law after affording reasonable opportunity to both the parties of leading evidence and being heard. Misc. Cases and the Writ Petition are disposed of accordingly.