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**(2014) 01 OHC CK 0006**  
**In the Orissa High Court**  
**Case No : W.P. (CRL) No. 665 of 2013**

Swapna Satpathy

APPELLANT

Vs

State of Orissa

RESPONDENT

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**Date of Decision :** 22-01-2014

**Acts Referred:**

Hindu Marriage Act, 1955 — Section 26

**Citation :** (2014) 118 CLT 170 : (2014) 2 ILR 59 : (2014) 1 OLR 999 Suppl.

**Hon'ble Judges :** M.M. Das, J; Akshaya Kumar Rath, J

**Bench :** Division Bench

**Final Decision :** Disposed Off

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## Judgement

M.M. Das, J.—This Writ Petition has been filed by the wife as the Petitioner for issuance of writ of habeas corpus for recovering the son of the Petitioner from the custody of the Opp. Party No. 4 - husband allegedly under wrongly confinement. The Opp. Party No. 4 - husband raised a question of maintainability of the Writ Petition. Mr. P.K. Ray, Learned Counsel for the Petitioner - wife relied upon the decisions of the Allahabad High Court in Habeas Corpus Writ Petitions in the cases of Baby Kavya Awasthi & another v. State of U.P. & others, (Civil Misc. Habeas Corpus Writ Petition No. 10996 of 2013 decided on 22.3.2013) & Smt. Sunita Malik v. Dharam Veer Singh Malik & another, (Habeas Corpus Writ Petition No. 2641 of 1990 decided on 1.8.1991), where the Allahabad High Court negated the preliminary objection with regard to maintainability of a writ of habeas corpus qua the provisions made in the Guardians & Wards Act, 1890 (for short, "the Act") by holding that if proceedings under the Act is initiated by the mother, for the custody of her minor daughter aged about two years, the proceedings & the appeal thereunder will take long time to finally decide the immediate issue of custody &, therefore, the said remedy under the Act cannot be said to be an adequate remedy nor can it be said to be an efficacious remedy.

2. The Hon'ble Supreme Court in the case of Gaurav Nagpal Vs. Sumedha Nagpal, also laid down that though the provisions of the special statutes which

govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction.

3. Mr. Panda, Learned Counsel appearing on behalf of the Opp. Parties 4 to 8, however, submitted that the Petitioner earlier took recourse to Section 26 of the Hindu Marriage Act for custody of the breast fed child before the Judge, Family Court, who granted the custody of the child in favour of the Petitioner (mother) against which the Opp. Party No. 4 - husband preferred MATA No. 11 of 2013 & this Court finding that an application u/s 26 of the Hindu Marriage Act cannot be maintained when no proceeding is pending under the said Hindu Marriage Act, reversed the said order of the Judge, Family Court &, thereafter, the child is in custody of the Opp. Party No. 4 - husband (father). Mr. Panda further submitted that taking the child from his father's custody will adversely affect the sentiments & upbringing of the child. He also submitted that if the custody of the child is given to the Petitioner - wife, she will not be able to look after the upbringing of the child as she is not cable of doing so.

4. The brother of the Petitioner - wife has filed an affidavit with regard to the financial status of his sister (Petitioner) wherein it has been stated that the brother is supporting his sister by paying Rs. 10,000/- per month as the Opp. Party - husband is not paying the maintenance & they will take all care of the Petitioner as well as the child if the child is left in the custody of the Petitioner - wife. The Petitioner herself has filed an affidavit that she has started earning now after securing a new employment in a charitable trust group of schools & she would have sufficient means to maintain the child which would include all expenses of the child. She has further stated that she is living with her parents, brother & sister-in-law & apart from her own income, her parents, who own a considerable amount of ancestral property, would support her. She is a qualified person having B. Tech. Degree in Civil Engineering & was financially independent till her marriage in 2011, as she was working as a Junior Engineer in an Architect Studio in Bhubaneswar for three years until she was compelled by her husband & in-laws to quit the job. From her affidavit, it is also revealed that her brother is also a Civil Engineer, currently working as a Deputy Manager, Bhusan Steel Ltd. Dhenkanal & his sister-in-law is also a B. Tech. Degree Holder in I.T. & is now working. Her elder sister is a school teacher & her younger sister is also qualified having acquired M.B.A. degree & is a H.R. employee.

5. This Court, therefore, finding that the writ of habeas corpus would be maintainable, more so, in view of the decision of the Hon<sup>ble</sup> Supreme Court in the case of Gaurav Nagpal (supra) that English Law in this aspect is also applicable to India & the Hon<sup>ble</sup> Supreme Court has quoted the Halsbury's Law of England to the effect that where in any proceedings before any Court, the custody or upbringing of the minor is in question, then in deciding that question, the Court must have regard to the minor's welfare as the first & paramount consideration, this Court is of the view that in this Writ Petition for habeas

corpus, the Court is required to examine & find out the welfare of the child by taking the same as the paramount consideration.

6. As quoted by the Hon<sup>ble</sup> Supreme Court in the case of Gaurav Nagpal (supra), in Habeas Corpus, Vol. I, page 581, Bailey states as follows:-

"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; & yet the interests of the child may imperatively demand the denial of the father's right & its continuance with the mother. The tender age & 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 & 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 & holier feeling than the most liberal allowance of nurses' wages could possibly stimulate".

7. This Court has no hesitation in examining the matter with regard to the welfare of the child while deciding as to who should have the child's custody. This being a writ of Habeas Corpus, we would like to further state that in such a proceeding for determining the custody of the child, the Court is required to exercise its inherent & equitable power & exert the force of the State as *parens patriae* for the protection of its infant ward &, thus, the very nature of this proceeding & scope of enquiry & the result sought to be achieved call for the exercise of the jurisdiction of this Court as a Court of equity. The Court is not required, in such situation to test the legality of a confinement or restraint as contemplated in case of writ of habeas corpus, the primary purpose of exercising such jurisdiction being to exercise its judicial discretion for determining what is best for the welfare of the child even though the special Statute may prescribe that the father is the legal guardian of the child.

8. To determine the above question appropriately, we state the facts involved in the case in gist. The marriage between the Petitioner & the Opp. Party No. 4 took place on 24.2.2011. It was an arranged marriage on negotiation between both the families. After marriage, the Petitioner stayed in her matrimonial home at Bhubaneswar. The male child was born out of their wedlock, to the Petitioner on 30.11.2011. They resided together until July, 2012 with the elder brother of Opp. Party No. 4 - husband &, thereafter, they remained in separate rented premises. The parties are living separately from 24.10.2012. The Petitioner - wife filed an application u/s 26 of the Hindu Marriage Act, 1955 along with an application for interim relief before the Learned Judge, Family Court, Bhubaneswar seeking custody of the minor child. The Learned Judge, Family Court issued a direction to the Opp. Party No. 4-husband to deliver the child to the custody of the Petitioner-wife within fifteen days from the date of the said order. The said order was

challenged before this Court in MATA No. 11 of 2013. This Court finding that there is no proceeding pending, as contemplated u/s 26 of the Hindu Marriage Act, disposed of the said MATA holding that the application u/s 26 of the Hindu Marriage Act was not maintainable.

9. It is alleged by the Petitioner-wife that immediately after this Court passed the aforesaid order, the Opp. Party No. 4- husband forcibly took the custody of the child for which the present Writ Petition has been filed.

10. Keeping the settled position of law in view that the welfare & interest of the child is the paramount consideration for taking a decision with regard to the custody of the child, we find that the child is aged about three years, who can be appropriately said to be an infant. Now considering that the three years old child will be deprived of his mother's care & vigilance, which is considered to be indispensable in this age for proper physical & mental growth of the child & further considering that there cannot be any mother's substitute for a child, who is always watchful over the cradle & of the active moments of her offspring, coupled with the fact that the mother, i.e., the Petitioner, who is residing with her parents is in an atmosphere, where all the family members are well educated & are earning, we are of the view that the welfare & interest of the child would be best served if the custody of the child is given to the Petitioner - mother with certain conditions.

11. We, therefore, direct the Opp. Party No. 4 - husband to give the custody of the child to the Petitioner-wife within a fortnight hence by leaving the child with her mother at her residence where she is residing now subject to the condition that the Opp. Party No. 4 father will have a visiting right to visit his son once in every month at the house where the mother (Petitioner) is residing. The Opp. Party No. 4 father shall be permitted to stay with their son continuously for at least not less than two hours during his visit with prior intimation to the Petitioner wife. However, failing to comply with this order, the Opp. Party No. 4 husband shall be directed to produce the child before this Court & the Petitioner - wife shall be also directed to remain present to take the custody of the child. With the aforesaid direction, the Writ Petition is disposed of.