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THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.4792 of 2024

(In the matter of an application under Section 482 of the Code of Criminal Procedure, 1973)

Sumatimani Sau & another

Petitioners

-Versus-

State of Odisha & others

Opposite Parties

For the Petitioners : Mr. Prasanna Kumar Parhi, Advocate

For the Opp. Parties : Ms. Sarita Maharana
Additional Standing Counsel
(For the Opp. Party No.1)

CORAM:

THE HONOURABLE SHRI JUSTICE SIBO SANKAR MISHRA

Date of Hearing: 16.01.2025 : Date of Judgment: 29.01.2025

S.S. Mishra, J. Heard Mr. Prasanna Kumar Parhi, learned counsel for the petitioners and Ms. Sarita Maharana, learned Additional Standing Counsel for the State.



2. In this petition, the petitioners are seeking quashing of the order dated 01.08.2024 passed by the learned J.M.F.C., Balasore in connection with Balasore Town P.S. Case No.125 of 2024 corresponding to C.T. Case No.318 of 2024, whereby the application moved by the petitioners for delivery of the custody of their daughter to them has been turned down.

3. The petitioners are accused in connection with Balasore Town P.S. Case No.125 of 2024 corresponding to C.T. Case No.318 of 2024 registered for the alleged commission of the offences punishable under Sections 451/363 of the IPC pending in the Court of the learned J.M.F.C., Balasore.

4. The allegation against the petitioners is that, the complainant reported at the local P.S. *inter alia*, alleging that on 02.04.2024, he had admitted his new born baby at the Special Care Unit, Balasore Headquarter Hospital and during the treatment on 04.04.2024 in the afternoon, someone had taken his son from the hospital bed. Hence, the F.I.R.

5. The investigation of the case revealed that, the petitioners have kidnapped the baby boy from the hospital by abandoning their own daughter. The



abandoned biological daughter of the petitioners has been given to the custody of the respondent agency. The petitioners are being prosecuted for the offence as alleged in the F.I.R. mentioned above.

6. Both the petitioners have been admitted to bail and they are facing the trial for the offences they are charge-sheeted for. At this stage, they moved an application before the Court below seeking delivery of the custody of their daughter to them, which has been turned down by the learned trial Court by the impugned order, *inter alia*, observing as under:

“I have perused the case record along with other connected relevant documents viz. The FIR, The Charge-sheet, 161 Statement of the witnesses, the case diary, seizure list, order of the S.D.J.M., Balasore on dtd. 15.04.2024 and other documents related to this case. On perusal it is found that this case was instituted on the basis of written report given by one Susanta Barik. As per his information on dtd. 02.04.2024 when he had admitted his infant child (of age 8 days) in the New Born Special Care Unit, O&G Department at DHH, Balasore, on dtd. 04.04.2024 at about 12:00 noon, his child was stolen from that Unit. Also as per the allegation of the prosecution, the accused namely, Sumatimani Sau with an urge to have a male child, left her new born baby daughter on the bed of the informant and kidnapped the



male child of the informant. The accused kept the male child of the informant with her till 05.04.2024, after which the male child was recovered from the possession of the accused from her house.

After receiving the information the IO in this case started investigation and during his investigation he found that the present accused petitioners were actively involved in this case. After completion of his investigation he submitted charge sheet to the Court, in which the names of the present accused petitioners are mentioned as the prime accused persons. Upon further perusal it is known that on dtd. 12.04.2024 one of the accused namely, Sumatimani Sahu, who is the biological mother of the female girl child presented a prisoner's petition before the S.D.J.M., Balasore to hand over the female girl child to her but the same was rejected by that Court in a well reasoned order and the custody of the said female girl child was handed over to the CWC, Balasore. At that time the accused petitioner was in jail. Now she has been granted bail by the Hon'ble High Court in BLAPL No. 6427 of 2024 on dtd. 16.07.2204. She was released on bail by this Court as per the above order of the Hon'ble Court on dtd. 20.07.2024. After that she along with her husband, who is also the co-accused in this case has filed this petition to get the custody of her female girl child.



It is learnt from the case record that the identification of the female child is nowhere mentioned in the record and the custody of the child is nowhere connected with this case. Regarding the welfare and custody of the child this Court is of the considered view that this Court lacks the jurisdiction to entertain this petition. So the petitioners are at liberty to approach appropriate forum for redressal of their grievance. Accordingly, the petition filed by the accused petitioners stands dismissed.”

The petitioners are aggrieved by the said order and have assailed the same in the present petition.

7. The notice was issued to the opposite parties. The custody of the child is under the opposite party Nos.7 and 8. The said opposite parties were directed to be served through the I.I.C., Balasore. The service is sufficient. They have sent a letter dated 10.01.2025 to the Registry of this Court rather than appearing in the Court, *inter alia*, stating as under:

“In inviting reference to the subject cited, I want to state you that one girl child namely Nancy, CWC No.83/2024, was received from SNCU, DHH, Balasore as per kind instruction of DCPO, Balasore letter no. 230/DCPU dated 16.04.2024 and she is staying in our Specialised Adoption Agency, UBBS, Balasore



as per kind order of Child Welfare Committee, Balasore.

Therefore, Manager, SAA, UBBS, Balasore has followed official instructions of the senior authorities and has no intervention in decision making regarding the child.

Submitted for kind perusal and necessary order.”

8. The girl child has been handed over to the opposite party Nos.7 & 8 by the Child Welfare Committee by the order dated 19.04.2024, which reads thus:

“Today at about 12.30 P.M. Swapneswar Hembram, Counselor UBBS, Balasore produced one unknown new born girl child named as (Nancy) age not known. He also submit his production report in prescribe format in FORM 17 along with the discharge card of SNCU of DHH, Balasore. From the discharge card it shows that the child is admitted on 04/04/2024 and discharge date 19/04/2024. He also submits the letter No.2391 dated 12.04.2024 of DMO-cum-Superintendent of DHH, Balasore as the child fit for discharge.

From the fact and circumstance parents/legal guardian are not appear to take the unknown child so as an interim measure the child is a CNCP and belongs to category



abandoned one. Hence the CWC, Bench decided to restore the child in SAA, UBBS, Balasore for her care and protection will further order.

As the child is unknown to one claimant present before the committee till now, so the child need to be legally free for adoption. The DCPO, Balasore instructed to conduct an inquiry under what circumstances the child was admitted in the DHH, Balasore by whom on the dated 04.04.2024 and also registered SDE No. at local police station.

It is further requested, as the child is abandoned one, so it is felt necessary to publish the photograph of the child in at least two daily leading widely circulated newspaper (Odia & English) for tracing the biological or legal guardian if any as per Adoption regulation guideline 2022.”

9. The petitioners have approached this Court by challenging the impugned order dated 01.08.2024 passed by the learned J.M.F.C., Balasore, *inter alia*, praying that, they being the biological parents of the child in subject, his custody should be given to them.

10. The petitioners have contended that they are the biological mother and father of the newborn baby girl. Therefore, they have not given any consent for giving the



girl child on adoption. There is no dispute raised by any of the parties at the Bar doubting the parenthood of the petitioners in so far as the girl child is concerned.

11. Mr. Parhi, learned counsel for the petitioners has relied upon Section 30 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and submitted that the biological parents of a child of 9 months is automatically entitled for the custody even in the fact situation of the present case. Emphasis is supplied to Section 30 (vi) of the Act, which reads as under:

“ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child’s individual care plan and passing necessary directions to parents or guardians or fit persons or children’s homes or fit facility in this regard.”

He has submitted that the infant of 9 months is depending upon the breast feeding of the biological mother. Therefore, depriving the infant from the breast feeding is in direct violation of her rights enshrined under Article-21 of the Constitution of India. Mr. Parhi referred to the case of **L. Chandran VS Venkatalakshmi And Anr (AIR1981AP1)** wherein it has been held by the Learned Andhra Pradesh High Court that:



“Child is a person within the meaning of Article 21 of the Constitution. It has, therefore, a right to its life as guaranteed by Article 21 of the Constitution. The word 'life should be understood in this context as expansively as it has been understood in other contexts as comprehending more than mere animal existence.”

Thus, the right to life as guaranteed under Article 21 includes the right of the minor child to be cared for, nurtured, and brought up in a loving and protective environment. The denial of custodial rights to the biological parents violates the constitutional rights of the child and the parents as well. Moreover, there is no evidence to suggest any incapacity or unfitness of the petitioners to provide a safe and nurturing environment. The welfare of the child would be best served by granting custody to the petitioners, ensuring her holistic development in the care of her biological parents. Mr. Parhi has further submitted that paramount consideration is the right and welfare of the child. Mr. Parhi contended that the biological parents of the child who alleged to have abandoned the child and kidnapped the new born baby boy would be established in the trial.



Till the trial is concluded, the right of the infant baby girl should not be taken away. He has submitted that in the facts and circumstances of the case, the custody of the child should be restored to the biological parents. He has also relied upon Section 40 of the Act, 2015, which reads as under:

“40. Restoration of child in need of care and protection- (1) *The restoration and protection of a child shall be the prime objective of any Children’s Home, Specialised Adoption Agency or open shelter.*

(2) The Children’s Home, Specialised Adoption or an open shelter, as the case may be, shall take such steps as are considered necessary for the restoration and protection of a child deprived of his family environment temporarily or permanently where such child is under their care and protection.

(3) The Committee shall have the powers to restore any child in need of care and protection to his parents, guardian or fit person, as the case may be, after determining the suitability of the parents or guardian or fit person to take care of the child, and give them suitable directions.”

Explanation.- For the purposes of this section, “restoration and protection of a child” means restoration to –

(a) parents;



- (b) adoptive parents;
- (c) foster parents;
- (d) guardian; or
- (e) fit person.

[(4) The Committee shall submit a quarterly report regarding restored, dead and runaway children to the State Government and the District Magistrate in such form as may be prescribed.]”

The reading of the provision makes it clear that the natural or biological parents of the child have the superior right of custody over others.

It has been further contended by Mr. Parhi that in any proceeding before any Court, the custody or upbringing of a minor is in question, then, in deciding the factor, the Court must regard is the minor’s welfare as the first and paramount consideration. He has relied upon Halsbury's Laws of England, Fourth Edition, Vol. 24, para 511 at page 217, to substantiate his arguments, which reads as under:

"Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view



the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father.”

12. Ms. Sarita Maharana, learned Additional Standing Counsel for the State, on the contrary, submitted that, due process of the Juvenile Justice Act has been followed and the child has been given to the custody of Child Care Center. The learned trial Court has rightly appreciated the fact scenario of the present case. Taking into consideration the conduct of the accused persons and the safety of the girl child, the learned trial Court has rightly rejected the application of the petitioners.

13. I have taken into consideration the entire facts scenario of the case and law operating in the field. This Court is of the opinion that, the arguments advanced by Mr. Parhi, learned counsel deserves merit. So as to protect the right of the girl child, who is an infant and the breast-feeding baby, takes supremacy over all other incidental issues pertaining to the case. It is apt to rely on the judgment of the Karnataka High Court in this context. In ***Husna Banu v. State of Karnataka [2021 SCC OnLine Kar 15717]***, the Karnataka High Court has held



that breastfeeding is an inalienable right of lactating mother, protected as a facet of the right to life under Article 21 of the Constitution. It has held as under:

"In the light of domestic law and the international law as briefly discussed above, breastfeeding needs to be recognized as an inalienable right of lactating mother; similarly, the right of the suckling infant for being breastfed too, has to be assimilated with mother's right; arguably, it is a case of concurrent rights; this important attribute of motherhood, is protected under the umbrella of Fundamental Rights guaranteed under Article 21 of the Constitution of India; it is unfortunate that this pretty child for no fault remained unbreastfed, its lactating mother having had no access to it till now; in a civilized society such things should never happen," .

Further, Section 3(ix) of the Juvenile Justice (Care and Protection of Children) Act, 2015 also recognizes the above principle of paramount interest of the child, which mandated as under:

"All decisions regarding the child shall be based on the primary consideration, that they are in the best



interest of the child and to help the child to develop full potential".

In one of the similar cases the Punjab & Haryana High Court emphasized the biological mother's *indefeasible* right to ask for interim relief in the form of interim restoration of custody of the minor boy so that the suckling infant will get the befitting nourishment needed for his physiological, emotional, and, psychological growth. Ref: ***Kamlesh Rani v. State of Punjab and Ors (2022)***.

14. This Court is of the view that the right of the child precedes over the guilt of the parents. The inalienable rights of the infant child supersedes all the attending adverse circumstances alleged against the biological parents of the baby. Notwithstanding the pendency of the criminal proceeding, the petitioners are entitled to claim of custody of the infant being biological parents under the “tender years doctrine”. Custody of the infant child often tends favour the mother. The endless affection of the mother for her child develops right from the womb, her ability to care and love for the child should not be subjected to probe. An incorrect decision out of societal stigma shall not create of shadow of doubt about mother’s affection for her child. The circumstances under which the



infant female child got engulfed in the controversy led to the shifting her custody from her mother assumes relevancy to be adverted to, at this stage. Deep rooted social malady to have a tendency of preference of a male child over a female child is the real cause of dispute. The facts of this case bring to light the deeply entrance societal biases that prioritise male child over female child often driven by patriarchal and cultural practices that favours male lineage for inheritance, ritual and property right. The alleged action of the petitioners abandoning their biological daughter in favour of a male child reflects this regressive mindset. However, the Courts must exercise caution in allowing such societal prejudices to overshadow the fundamental right and welfare of the child.

While the circumstances surrounding the abandonment of the female child are grave, it is equally important to recognize the maternal instinct and the natural bond between a mother and her child.

The Courts in the catena of judgments have consistently held that the welfare of the child is paramount importance and takes precedence over all other considerations including allegations of wrong doings against the parents. The “tender years doctrine” mandates



the custody of a young child especially an infant should be ordinarily be awarded to the biological mother as she is better positioned to provide the care, nurturing and emotional support necessary for the child's holistic development.

At this stage, the Court cannot overlook the welfare and best interests of the infant girl child which must supersede all societal prejudices and parental guilt.

15. Having said that, this Court is also alive to the fact that the safety and well-being of the child needs to be periodically monitored, hence the following directives are necessitated.

- Regular inspections shall be conducted by members of the Child Welfare Committee to ensure the safety and protection of the child.
- Continuous evaluations of the child's physical health and general well-being by the Child Welfare Committee shall be done.
- Petitioners shall cooperate with the CWC and comply the conditions imposed by the Child Welfare Committee.
- CWC may facilitate therapy and provide support to petitioners parents as it falls within its mandate to



ensure the welfare of the child and address the underlying issues that may impact child's upbringing.

- Assessment of parental behaviour towards the child, taking into consideration their previous conduct of abandonment and neglect may be kept in mind to impose necessary condition.

It is open for the CWC to move before the trial Court to recall order of the custody of the child in the event the welfare and protection of the child is found to be compromised at any point of time.

16. The opposite party Nos.7, 8 & 9 are directed to restore the custody of the girl child to the petitioners who are the biological parents within three days subject to any conditions as enumerated in the preceding paragraph in addition to any other condition deemed fit and proper in the facts and circumstances of the case.

17. Accordingly, the CRLMC is allowed.

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(S.S. Mishra)
Judge

The High Court of Orissa, Cuttack
 The 29th January, 2025/Subhasis Mohanty, Personal Assistant

Signature Not Verified

Digitally Signed
 Signed by: SUBHASIS MOHANTY
 Designation: Personal Assistant
 Reason: Authentication
 Location: High Court of Orissa, Cuttack.
 Date: 30-Jan-2025 19:30:26

