

SANJU PANDA, J.

W.P.(C) NO.3961 OF 2010 (Decided on 24.11.2010)

SOUMYA SMITA SAHOO

..... Petitioner.

.Vrs.

**MAJOR SUSHEET KUMAR NAYAK
& ORS.**

..... Opp.Parties.

HINDU MARRIAGE ACT, 1955 (ACT NO. 25 OF 1955) – SEC.26.

For Petitioner - M/s. H.M.Dhal, B.B.Swain, A.Kanungo.
For Opp.Parties - M/s. Ashok Kumar Mohapatra,
A.K.Mohapatra & N.C.Rout.

S.PANDA, J. In this writ petition, the petitioner has challenged the order dated 18.2.2010 passed by the learned District Judge, Khurda at Bhubaneswar, in Interim Application No.42 of 2010 arising out of Guardian (P) No.41 of 2010 refusing to grant Interim custody of the child to the petitioner who is the mother.

2. The facts, as narrated in the writ petition, are as follows :

The petitioner and opposite party no.1 were married on 26.11.2002 at Bhubaneswar. Out of the wedlock a daughter, namely, Sanah Satrusal was born on 25.06.2005. Opposite party no.1 is working in the Indian Army. The petitioner is an MBA. As dissension cropped up between the parties, they decided to get their marriage dissolved by mutual consent. Accordingly, an application under Section 13-B of the Hindu Marriage Act was presented before the Judge, Family Court, Hyderabad which was registered as O.P.No.937 of 2008. As per the terms and conditions, the decree of divorce was granted by the Judge, Family Court, Hyderabad on 23.03.2009. It was settled by the parties that the daughter, who was then aged about 3 ½ years, shall remain in the care and custody of the father and the mother shall exercise her visitation rights over the child at any time at her convenient. The wife agreed not to make any claim including permanent alimony or maintenance against each other in future. While the matter stood thus, opposite party no.1 married for the second time on 02.12.2009. He is staying with his newly wedded wife Raina Pathak, daughter of Col. N.B.Pathak. The child is no more in the care and custody of opposite party no.1; rather opposite party no.1 has left her with his parents at Bhubaneswar. After knowing the said fact, the petitioner moved the court below in the month of February, 2010 for custody of the child, her future education and well being. In the said application, she stated that the parents of opposite party no.1 are aged about 60 years and since the child is below 5 years, she should remain with her. Along with the said application, she filed Interim Application No.42 of 2010 for interim custody of the child. Due to urgency, she also filed an application for ex parte hearing of the matter. However, the learned District Judge by the impugned order directed opposite party no.1 not to remove the child from the territorial

jurisdiction of the Bhubaneswar court as the petitioner apprehended that the child may be shifted from the jurisdiction of the Bhubaneswar Court since opposite party no.1 is staying at Punjab.

3. Learned counsel for the petitioner submitted that without considering the welfare of the child, the court below rejected I.A No.42 of 2010 for interim custody of the child. Therefore, the petitioner has filed this writ petition to interfere with the impugned order.

4. Pursuant to the notice issued by this Court on 11.03.2010, the opposite parties appeared. Keeping the interest of the child in mind in order to make the assessment of her attachment towards the mother as well as the opposite parties, this Court decided to inter-act with the child. Accordingly, opposite parties 2 and 3, who are the grand-parents of the child produced her on 29.3.2010 before this Court. After personally interacting with the child and taking into consideration the objection raised by opposite party no.1, this Court gave interim custody of the child to the mother for a period of 7 days from the said date. After 7 days, pursuant to the Court's direction, the child was again produced before the Court and much against the submissions made on the previous date of hearing of the matter, this Court observed that the child was very happy and she preferred her mother's company as the bonding between them was greater than the grand-parents'. This Court taking note of the condition of the child, extended the interim order till 21st May, 2010. On the said date, the case was adjourned to 21st June, 2010 and the interim arrangement has been continuing.

5. During the course of hearing of the matter on 21st June, 2010, learned counsel appearing for the opposite parties submitted that the main application is pending before the learned District Judge. Therefore, the interim order passed by this Court should be vacated and the learned District Judge should hear the matter on merits.

5.1 Learned counsel for the petitioner submitted that since the child is below 5 years and opposite party no.1 has already married for the second time, the custody of the child is to be continued with the mother-the present petitioner and the court below may hear the application on merits.

6. Considering the submissions of the parties and that the matter relates to the custody of the child, this Court is concerned about the welfare of the child which is the paramount consideration.

7. The child admittedly is below 5 years when she appeared before this Court. In course of the personal interaction with the child, she appeared to be quite intelligent and was able to express her feelings. She being less than 5 years of age, is in a very formative and impressionable stage of her life. The welfare of the child is of paramount importance in matter relating to child custody. The welfare of the child has a primacy even over statutory provisions as held by the apex Court in the case of *Bikram Bharua v. Salini Bhala* reported in (2010) 4 SCC 409.

8. This Court, remembering above factual aspect and the principle of law that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stage of her life and keeping in mind the needs of the child and her welfare, grants the custody of the child- Sanah Satrusal to her mother-the petitioner.

With the above direction, the writ petition is disposed of.

Writ petition disposed of.

