THE HIGH COURT OF ORISSA, CUTTACK

No. OJWAS-SCM-0004-2024/6505 (30) **Dated**25/04/2024

From;

Pratap Kumar Patra,
Registrar General

To

The District & Sessions Judge,..... (All)

Sub.: **Forwarding of judgment dated 11th March, 2024 passed in Criminal Appeal No. 1730 of 2024 (Devu G Nair Vrs. The State of Kerala & Ors.) arising out of S.L.P. (Crl.) No. 1891 of 2023 by Hon'ble the Supreme Court of India regarding guidelines for the Courts dealing with habeas corpus petitions**

Sir/ Madam,

I am to say that Hon'ble the Supreme Court of India while considering a petition for writ of habeas corpus in their judgment dated 11th March, 2024 passed in Criminal Appeal No. 1730 of 2024 (Devu G Nair Vrs. The State of Kerala & Ors.) arising out of SLP (Crl.) No. 1891 of 2023 has been pleased to formulate guidelines for the Courts dealing with habeas corpus petitions and in petitions seeking protection from family or police interference to secure the fundamental rights and dignity of intimate partners, and members of the LGBTQ+ communities in illegal detention.

I am, therefore directed to forward herewith a copy of the aforementioned judgment for your kind information and request you to circulate the same among all the Judicial Officers working under your jurisdiction for their information.

Yours faithfully,

PRATAP KUMAR PATRA
Digitally signed by PRATAP KUMAR PATRA
Date: 2024.04.25 15:26:59 +05'30'

REGISTRAR GENERAL

Encl.: As above.

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

24000906

Criminal Appeal No 1730 of 2024
Special Leave Petition (Criminal) No 1891 of 2023

Devu G Nair ... Appellant

Versus

The State of Kerala & Ors. ... Respondents

Certified to be true copy
Assistant Registrar (Judl.)
2/4/2024
Supreme Court of India

JUDGMENT

Dr Dhananjaya Y Chandrachud, CJI

1. Leave Granted.

2. These proceedings under Article 136 of the Constitution arose from the interim orders of the Kerala High Court dated 13 January 2023 and 02 February 2023 in a petition seeking a writ of habeas corpus.

3. The appellant and the 'corpus' ('X' for convenience of reference) are both female According to the appellant, they were in an intimate relationship. The petition seeking a writ of habeas corpus was instituted on the ground that the 'X' was being forcibly kept by her parents in their custody whereas she wished to remain with the appellant. On 13 January 2023, at the stage of admission, the Kerala High Court ordered the Secretary of the jurisdictional District Legal Services Authority[1] to visit the fourth and fifth respondents who are the parents of 'X', and record her statement to ascertain if she was under illegal detention. The High Court further directed that in the event that 'X' is in illegal detention, the Station Head Officer of the jurisdictional Police Station must ensure that 'X' is produced before the Secretary, DLSA to facilitate an interaction with the High Court through a video conferencing session. The parents of 'X' were allowed to join and remain present during the video conferencing session.

4. On 31 January 2023, the High Court directed the production of 'X' before the Secretary, DLSA on 2 February 2023 to facilitate an interaction with the High Court. After an interaction with 'X', the High Court proceeded to direct 'X' to undergo a counselling session with a psychologist attached to a counselling centre.

5. Faced with the above grievance, this Court on 6 February 2023 issued notice and

[1] DLSA

issued interim directions. The parents of 'X' were directed to produce her before the Family Court at Kollam by 05:00 pm on 8 February 2023. Further, the Principal Judge of the Family Court was directed to arrange for an interview of 'X' with Ms Saleena V G Nair, a Member of the e-Committee of the Supreme Court who was, at that point in time, on deputation. Ms Nair is in the judicial service of the State of Kerala.

6. The interview was directed to be arranged in consultation with the Principal Judge of the Family Court and Ms Nair was directed to interact with 'X' and submit a report after ascertaining her wishes on whether she is voluntarily residing with her parents or is kept under illegal detention.

7. The Principal Judge of the Family Court has submitted a report on the modalities which were followed.

8. Ms Saleena V G Nair has also submitted a comprehensive report dealing with her interaction with 'X'. The report by Ms Nair indicates that sufficient time was granted to 'X' to express her intent and desire and she was given a break in the course of the recording of her statement so as to reflect on what she had stated.

9. 'X' is a major and has completed her Masters degree in Arts. She has stated that she intends to become a lecturer and is focused on her career. She has stated that

she is in possession of a mobile phone and is free to move wherever she desires. Moreover, she has stated that she is living with her parents out of her own volition. While she has stated that the appellant is an "intimate friend", she has stated that she does not wish to marry any person or live with any person for the time being.

10. There is no reason for this Court to disbelieve the report which has been prepared by a senior Judicial Officer after duly ascertaining the wishes of 'X'.

11. Consequently, we are not inclined to entertain the Special Leave Petition on the ultimate outcome before the High Court.

12. However, we would wish to address a note of caution. Learned counsel for the appellant has submitted that in such matters, the High Court has been passing orders directing the counselling of persons similarly situated as 'X' and there is an apprehension that the counselling should not turn out into a means to overcome the will of the corpus particularly in regard to their sexual orientation.

13. The High Courts must duly bear this facet in mind. Ascertaining the wishes of a person is one thing but it would be completely inappropriate to attempt to overcome the identity and sexual orientation of an individual by a process of purported counselling. Judges must eschew the tendency to substitute their own subjective values for the values which are protected by the Constitution.

14. Directions for counseling or parental care have a deterrent effect on members of the LGBTQ+ community. Courts must bear in mind that the concept of 'family' is not limited to natal family but also encompasses a person's chosen family. This is true for all persons. However, it has gained heightened significance for LGBTQ+ persons on account of the violence and lack of safety that they may experience at the hands of their natal family. When faced with humiliation, indignity, and even violence, people look to their partner and friends who become their chosen family. These chosen families often outlast natal families as a source of immeasurable support, love, mutual aid, and social respect.

15. The importance of a chosen family is sometimes lost to the traditional assumption that the natal family is respectful of a person's choices and freedoms. Courts must not wittingly or unwittingly become allies in this misunderstanding, more so in cases involving habeas corpus petition, petitions for protection of the person, or in missing persons' complaints. Since a direction for counselling has been given by the High Court, which we are inclined to set aside, it is imperative that clear guidelines be formulated for the courts dealing with habeas corpus petitions and in petitions seeking protection from family or police interference.

16. Guidelines for the courts in dealing with habeas corpus petitions or petitions for police protection are formulated below:

    a. Habeas corpus petitions and petitions for protection filed by a partner, friend or

a natal family member must be given a priority in listing and hearing before the court. A court must avoid adjourning the matter, or delays in the disposal of the case;

b. In evaluating the locus standi of a partner or friend, the court must not make a roving enquiry into the precise nature of the relationship between the appellant and the person;

c. The effort must be to create an environment conducive for a free and uncoerced dialogue to ascertain the wishes of the corpus;

d. The court must ensure that the corpus is produced before the court and given the opportunity to interact with the judges in-person in chambers to ensure the privacy and safety of the detained or missing person. The court must conduct in-camera proceedings. The recording of the statement must be transcribed and the recording must be secured to ensure that it is not accessible to any other party;

e. The court must ensure that the wishes of the detained person is not unduly influenced by the Court, or the police, or the natal family during the course of the proceedings. In particular, the court must ensure that the individuals(s) alleged to be detaining the individual against their volition are not present in

the same environment as the detained or missing person. Similarly, in petitions seeking police protection from the natal family of the parties, the family must not be placed in the same environment as the petitioners;

f. Upon securing the environment and inviting the detained or missing person in chambers, the court must make active efforts to put the detained or missing person at ease. The preferred name and pronouns of the detained or missing person may be asked. The person must be given a comfortable seating, access to drinking water and washroom. They must be allowed to take periodic breaks to collect themselves. The judge must adopt a friendly and compassionate demeanor and make all efforts to defuse any tension or discomfort. Courts must ensure that the detained or missing person faces no obstacles in being able to express their wishes to the court;

g. A court while dealing with the detained or missing person may ascertain the age of the detained or missing person. However, the minority of the detained or missing person must not be used, at the threshold, to dismiss a habeas corpus petition against illegal detention by a natal family;

h. The judges must showcase sincere empathy and compassion for the case of the detained or missing person. Social morality laden with homophobic or transphobic views or any personal predilection of the judge or sympathy for the

natal family must be eschewed. The court must ensure that the law is followed in ascertaining the free will of the detained or missing person;

i. If a detained or missing person expresses their wish to not go back to the alleged detainer or the natal family, then the person must be released immediately without any further delay;

j. The court must acknowledge that some intimate partners may face social stigma and a neutral stand of the law would be detrimental to the fundamental freedoms of the appellant. Therefore, a court while dealing with a petition for police protection by intimate partners on the grounds that they are of the same sex, transgender, inter-faith or inter-caste couple must grant an ad-interim measure, such as immediately granting police protection to the petitioners, before establishing the threshold requirement of being at grave risk of violence and abuse. The protection granted to intimate partners must be with a view to maintain their privacy and dignity;

k. The Court shall not pass any directions for counselling or parental care when the corpus is produced before the Court. The role of the Court is limited to ascertaining the will of the person. The Court must not adopt counselling as a means of changing the mind of the appellant, or the detained/missing person;

l. The Judge during the interaction with the corpus to ascertain their views must not attempt to change or influence the admission of the sexual orientation or gender identity of the appellant or the corpus. The court must act swiftly against any queerphobic, transphobic, or otherwise derogatory conduct or remark by the alleged detainers, court staff, or lawyers; and

m. Sexual orientation and gender identity fall in a core zone of privacy of an individual. These identities are a matter of self-identification and no stigma or moral judgment must be imposed when dealing with cases involving parties from the LGBTQ+ community. Courts must exercise caution in passing any direction or making any comment which may be perceived as pejorative.

17. The above guidelines must be followed in letter and spirit as a mandatory minimum measure to secure the fundamental rights and dignity of intimate partners, and members of the LGBTQ+ communities in illegal detention. The court must advert to these guidelines and their precise adherence in the judgment dealing with habeas corpus petitions or petition for police protection by intimate partners.

18. Insofar as the present facts are concerned, the Criminal Appeal is disposed of in view of the report of the Judicial Officer.

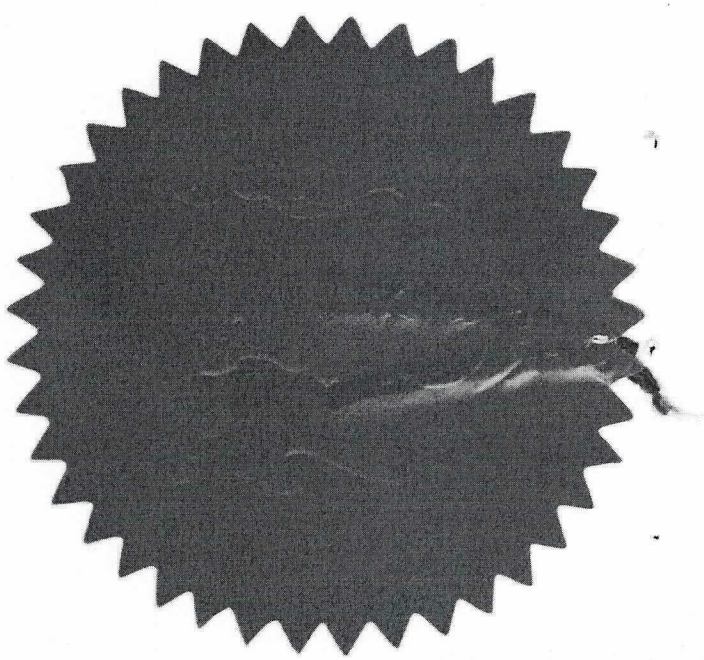
19. Pending applications, if any, stand disposed of.

.....CJI.
[Dr Dhananjaya Y Chandrachud]

.....J.
[J B Pardiwala]

.....J.
[Manoj Misra]

New Delhi;
March 11, 2024
GKA



SWORN BEFORE ME IN MY PRESENCE