

**IN THE HIGH COURT OF ORISSA AT CUTTACK****WPCRL No.10 of 2026****Shashikanta Majhi** **Petitioner****-Versus-****State of Odisha and others** **Opposite Parties****Advocates appeared in this case:**

For Petitioner : Mr. Jyoti Prakash Patra,
Advocate

For Opposite Party : Ms. Aishwarya Dash,
Nos.1 to 4 Additional Standing Counsel

For Opposite Party : Mr. Sukanta Kumar Dalai,
Nos.5 & 6 Advocate

CORAM:
HON' BLE THE CHIEF JUSTICE
AND
HON'BLE MR. JUSTICE MURAHARI SRI RAMAN

J U D G M E N T

Date of hearing and judgment: 23rd February, 2026

HARISH TANDON, CJ.-

1. The instant writ petition in the nature of habeas corpus is at the behest of the father of a minor child, who is admittedly in the custody of opposite party nos.5 and 6, being the maternal aunt and uncle, for his production and the custody to be given.



2. Undeniably, the wife of the petitioner died prematurely leaving behind the said minor child, who is five years old as on date. According to the petitioner, after the death of his wife, opposite party nos.5 and 6 were requested to reside at Chennai, where he works for gain to look after the said child. But, without any permission, the said opposite parties took the said child and returned to the State of Odisha and, therefore, the custody of the child is illegal and unlawful.

3. It would be apposite to complete the sequel of events before we embark to decide the issue relating to the reliefs claimed in the instant writ petition in the nature of habeas corpus.

4. The approach was made to the Child Welfare Committee, Balasore (CWC) alleging that the child of the petitioner is in need of care and protection and a direction was passed for physical production of the said child before the CWC. The order was assailed before this Court and ultimately the approach was made to the Apex Court in a Special Leave Petition (Criminal) Diary No.72349 of 2025. The Apex Court disposed of the said Special Leave Petition observing categorically that opposite party no.5



shall produce the child before the CWC, Balasore on 12th January, 2026 at 11.30 A.M. and such direction shall not be construed in a different manner as it is restricted to production and permission of an interaction between the child and the petitioner. The Apex Court further restrained the CWC from passing any order concerning the custody of the child as the actual custody of the child is presently with opposite party no.5 therein.

5. What can be reasonably inferred and/or logically deduced from the tenet of the said order passed by the Apex Court that the power in the jurisdiction exercised by the CWC in securing the presence of a minor child has not been interfered with. It can also be reasonably inferred that the jurisdiction exercised by the CWC was not found to be infirm or *de hors* the law. The only restraint put on the CWC was in relation to the custody order to be passed after noticing that the custody of the child is with opposite party no.5. In order to secure the custody of the minor child, the present writ petition is filed in the nature of habeas corpus and it is sought to be contended before this Court that there is no fetter and/or bar in maintaining the writ petition for custody of the minor child.



6. Learned counsel appearing for the petitioner relies upon a judgment of the Apex Court rendered in the case of *Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others*, (2019) 7 SCC 42 in support of the contention that there is no fetter on the part of the writ Court in considering the petition in the nature of habeas corpus to decide the custody issue. It is further submitted that subsequently, the Apex Court in *Gautam Kumar Das Vs. NCT of Delhi and Others*, 2024 INSC 610 = (2024)8 SCR 451 also held that the writ in the nature of Habeas Corpus is maintainable and the writ Court may go into the question of the custody of the minor child. According to the learned counsel for the petitioner, the aforesaid principles of law is further restated in a subsequent decision rendered in the case of *Vivek Kumar Chaturvedi and another Vs. State of Uttar Pradesh and others*, (2025) 4 SCC 342. It is thus submitted that there is no inhibition created into the writ Court while considering the writ petition in the nature of the habeas corpus to go into the question relating to the custody of a child and, therefore, there is no bar in granting such relief. It is lastly submitted that the petitioner being a natural guardian under Section 6 of the Hindu Minority and Guardianship



Act, 1956, is entitled to the custody of a minor child and the custody under any other person would be regarded as an illegal custody.

7. *Per contra*, learned counsel appearing for opposite party nos.5 and 6 submits that from the date of the death of the wife of the petitioner, the child remained in the custody of opposite party nos.5 and 6 and in fact they are taking care of the said child. He further submits that in a proceeding initiated before the CWC, the direction was passed to produce the child, though the challenge was made up to the Apex Court, such production was secured and the CWC directed the custody of the said child to remain with opposite party no.5, which cannot be said to be illegal. He further submits that so long the custody of the child remained with his clients, which is duly recognized in the order passed by a competent forum, it cannot be said to be illegal and/or unlawful. He, thus, submits that the forum approached by the petitioner is not competent to decide the issue relating to the custody of the child and the petitioner, therefore, has approached the wrong forum.



8. On the backdrop of the factual matrix, so unfurled and adumbrated succinctly in the preceding paragraphs, the only question arises in the instant writ petition, as to whether the writ Court while considering the writ petition in the nature of habeas corpus can pass an order for custody of a child in derogation with the other statutes covering the said object and what would be the parameters for exercise of such jurisdiction.

9. It admits no ambiguity in comprehending the scope of jurisdiction exercised by the High Court in the nature of habeas corpus that it is primarily an aim to secure the physical production of a person or a body provided the possession, the custody and the detention is found unlawful and/or illegal. The framers of the Constitution envisaged the detention of a person into a confinement or the custody without the authority of law. The moment the detention appears to be either *de hors* the law or in colorable exercise of the powers so conferred by the law, there is no prohibition having created under Article 226 of the Constitution of India or Article 32 of the Constitution of India on the High Courts and the Supreme Court respectively to direct the physical presence of the person and direct the custody to be given to a



proper person. Such being the broader principles governing the field of the habeas corpus, at times the writ petitions of such nature are filed before different Courts of the country including the Apex Court raising an issue relating to the custody of a minor child.

10. The *Tejaswini Gaud (supra)* is one of such case, which originates from the judgment and order passed by the Bombay High Court in disposing of the writ petition, where in somewhat identical situation, the custody of child remained with the maternal aunt after the death of the wife. The facts involved in the said judgment proceeds that the wife of the respondent no.1 therein was diagnosed with the Tuberculosis and was hospitalized for the treatment and ultimately succumbed to such disease. However, respondent no.1 being involved in the treatment of his wife and the child being at the natal stage, the request was made to take care of the child by the said aunt. After the death of the wife, when the child was sought to be taken by the said respondent, the said aunt refused to handover the child. On the conspectus of the aforesaid facts, the Apex Court was considering the writ petition in the nature of habeas corpus and an identical argument was advanced, as advanced in the instant case, that the father being a natural



guardian as recognized under the Hindu Minority and Guardianship Act, 1956, is entitled to the custody of the child as a matter of right. The Apex Court held that ordinarily the issue relating to the custody of a minor child, lies under the Hindu Minority and Guardianship Act, 1956 or the Guardians and Wards Act, 1890, as the case may be, and the power or the jurisdiction are exercised by the Civil Courts. It is further held where the Court is of the view that the detailed enquiry is required on the issue of the custody, the writ Court may decline to exercise the extraordinary jurisdiction and relegate the parties to the Civil Court in the following:-

“20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in



exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.”

On the exercise of the powers and the jurisdiction by the High Court in the writ of habeas corpus, the Apex Court held that normally the said proceeding is not to justify or examine the legality of the custody, but a medium to address the issue relating to the custody of a child and the same is always discretionary. Paragraph 19 of the said judgment is quoted as under:-

“19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.”

The said case was decided on the basis of a peculiarity of the fact that the father being the natural guardian himself permitted



the maternal aunt to look after the said child, as an interim measure as he has to take care of his wife, who was hospitalized and suffering from serious disease and/or ailments. Once the custody is temporarily given only for the purpose of taking care, refusal to handover the child is *per se* illegal and can be said to be unlawful.

11. In *Gautam Kumar Das (supra)*, in identical facts scenario, where on an unfortunate death of the wife due to pandemic, the father himself handed over the child to his sister-in-law to take care as an interim/stop-gap solution, but later on, the handing over of the child was declined and/or denied. Such being the special fact, the Apex Court highlighted the same in paragraph-13 of the said judgment in holding that once the custody is given temporarily, refusal to return tantamounts to unlawful and illegal detention of the child. The said paragraph-13 reads as under:-

“13. In our opinion, merely because of the unfortunate circumstances faced by the appellant as a result of which, respondent nos.5 & 6 were given the temporary custody of the minor child Sugandha Das and only because they looked after her for few years, the same cannot be a ground to deny the custody of the minor child to the appellant, who is her only natural guardian.”



Though it was held that there is no absolute bar in maintaining the writ of habeas corpus for custody of the child, it depends upon the facts of each case and, therefore, have to be applied in a pragmatic manner than in an adjunct manner. Paragraph-15 of the judgment in *Gautam Kumar Das (supra)* reads as under:-

“15. Recently, this Court, in the case of Nirmala (supra) in paragraph 16 has also observed that no hard and fast rule can be laid down insofar as the maintainability of the habeas corpus petition in the matter of custody of minor child is concerned. It has been held that as to whether the writ Court should exercise its jurisdiction under Article 226 of the Constitution of India or not will depend on the facts and circumstances of each case.”

12. In a recent decision rendered in the case *Vivek Kumar Chaturvedi (supra)*, admittedly, the child was under the custody of a grandfather after the death of the daughter-in-law. Subsequently, the father came and demanded the custody of the said child after having married subsequently and affidavit of the second wife was also filed who undertakes to take care of said child, but the High Court refused to grant the custody which led the party to approach the Supreme Court. After taking into consideration the earlier judgments rendered by the Apex Court in *Tejaswini Gaud (supra)*



and *Nirmala Vs. Kulwant Singh and others*, (2024) 10 SCC 595, the Apex Court held that the writ in the nature of habeas corpus may be maintained and custody may be granted, but on the basis of facts discerned from the record. It emerged from the said pleading that the grandparent approached the Court for seeking a maintenance for the said grandchild from the father, which led the Apex Court to arrive at the conclusion that once the grandfather has no sufficient means to take care of the said child, even if the father has married, the custody must be given to the father.

13. The cumulative effect of the aforesaid judgments leaves no ambiguity in our mind that even though the writ petition in the nature of habeas corpus is maintainable, not only for production of the minor child but for the purpose of custody, yet it has to be decided on the basis of the facts emerged from the record. The moment the Court found that the custody of a child with the person is unlawful and/or illegal *per se*, there is no fetter on the part of the writ Court to exercise such extraordinary powers in directing the custody of the child to be given to a lawful person. The entertainability of the writ petition in the nature of habeas corpus cannot be squeezed into a straightjacket formula nor to be decided



on the basis of Euclid's Theorem but depends upon the facts of each case; above all, the welfare of the child should be the paramount consideration. The moment the custody does not appear to be illegal and/or unlawful and the question which begging an answer is, whether the welfare of the child lies in uprooting him/her from the known custody to the custody of another person, it would be proper for the Court to relegate the parties to approach the Civil Courts. Once the complexities is perceived, the writ Court should not usurp the powers of the Civil Court to decide and proper course to be adopted in this regard is to remit the parties to approach the Civil Court either under the Hindu Minority and Guardianship Act, 1956 or under the Guardians and Wards Act, 1890, as the case may be.

14. On the ratio of law as culled out from the aforementioned decision, let us examine, whether the present case invites the invocation of an extraordinary jurisdiction exercised by this Court under Article 226 of the Constitution of India. Even though the petitioner is regarded as a natural guardian under Section 6 of the Hindu Minority and Guardianship Act, 1956, but it does not confer an absolute right into the custody of child as various factors, which



touches upon the welfare of the child, are to be gone into. The Civil Court exercising the *parens patriae* jurisdiction under the aforesaid Act shall take into consideration the various factors relating to the welfare of the child and, therefore, the writ Court should be slow and circumspect in exercising such extraordinary power.

15. In the instant case, the custody of the child remained with opposite party no.5 in terms of the order passed by the CWC, which is found otherwise competent to deal with the children in need of care and protection and, therefore, such order having passed by the competent authority, binds the parties so long it occupies the field of litigation. The order of the CWC for production of the child was assailed by the parties in the instant proceedings and ultimately, the Apex Court did not interfere with the order of the CWC and directed for production of the child on the specified date. Simultaneously, the restraint order was passed upon the CWC not to decide the matter of custody being conscious that the custody of the child is with opposite party no.5. Since the custody of the child remained with opposite party no.5 on the basis



of an order passed in different proceedings, it can never partake a character of unlawful and/or illegal custody.

16. We, thus, do not find any grounds warranting interference in the instant writ petition, which is hereby dismissed. As a result of disposal of the writ petition, pending Interlocutory Application(s), if any, shall stand disposed of, but in the circumstances there shall be no order as to costs.

(Harish Tandon)
Chief Justice

(M.S. Raman)
Judge

MRS/Laxmikant