

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPCRL No.66 of 2022

Koushalya Das* *Petitioner

Mr. P.K. Das, Advocate

-versus-

***State of Odisha and* *Opp. Parties*
others**

*Mr. A.K. Sharma,
Addl. Government Advocate*

**CORAM:
JUSTICE S.K. SAHOO
JUSTICE MURAHARI SRI RAMAN**

ORDER

07.06.2022

Order No.

01. This matter is taken up through Hybrid arrangement (video conferencing/physical mode).

Heard learned counsel for the petitioner as well as learned Addl. Government Advocate for the State of Odisha.

This Writ Petition which is in the nature of Habeas Corpus has been filed by the petitioner Koushalya Das, who is the mother of a minor child, for his custody, now with opposite party no.5 Ashish Kumar Das, the father of the minor child, who is also the husband of the petitioner.

In the case of **Tejaswini Gaud and others**
-Vrs.- Shekhar Jagdish Prasad Tewari and others

reported in (2019) 7 Supreme Court Cases 42

considering the maintainability of habeas corpus in such type of cases, the Hon'ble Supreme Court held as follows:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ Court has jurisdiction.

16. In Veena Kapoor, the issue of custody of child was between the natural guardians who were not living together. Veena, the mother of the child, filed the habeas corpus petition seeking custody of the child from her husband alleging that her husband was having illegal custody of the one and a half

year old child. The Supreme Court directed the District Judge concerned to take down evidence, adduced by the parties, and send a report to the Supreme Court on the question whether considering the interest of the minor child, its mother should be given its custody.

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.

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."

In view of the ratio laid down in the aforesaid case and in the factual scenario, when the alternative efficacious remedy is available, we are not inclined to entertain the writ petition which is in the nature of habeas corpus. However, the petitioner is at liberty to seek appropriate remedy before appropriate forum in accordance with law.

Accordingly, the writ petition is disposed of.

Urgent certified copy of this order be granted on proper application.

