AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPCRL No. 91 of 2025
CNR No. ODHC010487172025

Sambit Kumar …. **Petitioner**

-Versus-

State of Odisha and others …. **Opposite Parties**

Advocates appeared in this case:

For Petitioner : Ms. Shivani Luthra Lohia,
Mr. Abhas Mohanty &
Ms. Ishita Soni, Advocates

For Opposite Parties : Mr. Sanjay Rath, AGA
(for O.P.1)

Mr. Budhadev Routray, Senior Advocate with Mr. J. Biswal, Advocate (for O.P.2)

Mr. Prafulla Kumar Rath, Senior Advocate with Mr. A. Behera, Advocate (for O.Ps. 3 to 5)

Ms. A. Dash, Advocate, Special Officer

CORAM:

HON' BLE THE CHIEF JUSTICE
AND
HON'BLE MR. JUSTICE CHITTARANJAN DASH

J U D G M E N T

Date of Hearing : 24th August, 2026
Date of Judgment : 10th November, 2026

HARISH TANDON, CJ.

1. A piquant situation has been arisen in the instant writ petition in the nature of *Habeas Corpus* filed at the behest of the father of a minor child against the wife-opposite party no.2 and the maternal grandparents and aunt on the strength of a Foreign Judgment/ Order directing the custody to be handed over to the petitioner *qua* a decree for divorce granted under Section 13 B of the Hindu Marriage Act, 1955, wherein the custody of the minor child was directed to remain with opposite party no.2-wife.

2. The undisputed facts unfurled from the record are adumbrated to determine the issues/ points raised by the respective contesting parties. The petitioner and the opposite party no.2 were married according to the Hindu Rituals and Rites on 7th February, 2007 at Bhubaneswar. Subsequently, they shifted to USA in pursuit of their better future and after gainful employment thereat jointly purchased a house in Frederick, Maryland, USA on 10th March, 2020. The minor child, a baby boy, is born on 7th April, 2021 in USA, which would be evident from the birth certificate issued by the competent authority thereat. Subsequently, they were granted lawful permanent residency (Green Card) on 22nd July, 2022 and a logical inference which can be drawn from the aforesaid fact

that they intended to permanently reside in USA. Subsequently, they developed a matrimonial discord because of the differences in their opinion and perception, which persisted for a long time, leading to a conscious decision to separate themselves from each other as the wife, opposite party no.2 decided to shift to another residence at Maryland. Since such differences persisted and went beyond the possibility of any repair, they visited the country of their origin, India and decided to dissolve the marriage by mutual consent. An application under Section 13 B of the Hindu Marriage Act, 1955 was filed on 19th December, 2024 before the Family Court, Bhubaneswar giving rise to registration of C.P. No. 848 of 2024. The aforesaid petition for dissolution of marriage on mutual consent was filed under Section 13 B of the said Act, which ordains a cooling period of six months, the 2nd motion was moved after expiry of the said cooling period and ultimately, the marriage was dissolved by a decree of divorce on 16th January, 2025 with clear stipulation that the custody of the miner child shall remain with the wife, the opposite party no.2 and the petitioner was given a visitation right to meet and interact with the minor child as and when he so desires. Despite having agreed and accepted the decree of divorce by mutual consent and custody being ordered to be retained with the

opposite party no.2-wife, the petitioner moved to register the Indian Order before the Circuit Court for Frederick County, wherein a notice was issued to the opposite party no.2-wife as "Notice of Registration of Foreign Child Custody Determination" on 12th May, 2025. Despite the service of notice of registration, the opposite party no.2-wife conveyed her intention not to contest the said proceeding pertaining to Registration of the Indian Order with the rider that she is open to review any proposed schedule including when the child goes to India and in the event of disagreement should proceed to contest. The Draft Co-Parenting plan was served upon her, which she did not agree and ultimately she came back to India along with the child. The opposite party no.2 was served with the order in the form of emergency relieve order for return of the minor child and his sole custody was directed to be remained with the petitioner.

3. The instant writ petition in the nature of *Habeas Corpus* came to be filed subsequently to the order passed by the Circuit Court for Frederick County, USA alleging that the custody remains unlawful and illegal after the said order was passed by the country of foreign origin.

4. On the backdrop of the aforesaid undisputed facts, the writ in the nature of *Habeas Corpus* is filed by the petitioner alleging the custody

of the minor child to be unlawful and illegal after the order is passed by the Foreign Court wherein a preliminary objection was raised as to the maintainability of the writ petition of such nature. The notice of the writ petition was issued upon the contesting opposite parties and after the service is effected, they were represented by their respective counsels with an intent to defend the said writ petition. Though the plea of demur remained open to be decided at a later point of time, the Court exercised the *parens patriae* jurisdiction and issued orders from time to time as and when the petitioner visits India to meet and interact with the minor boy.

5. The intention of the Court for directing the visitation of the petitioner with the minor boy is reflected in the various orders passed in the instant proceeding with categorical observation that the boy at times may act as a catalyst to resuscitate the matrimonial relationship of the parents. At times, the child may create a bridge between the parents who always cares for the well-being of their child and keeping the same paramount may reunite. There is not a single incident recorded during the interaction except the fringe issues because of the tearing of the fabric of the matrimonial relationship by a decree of divorce and the child was always found cheerful with the petitioner.

6. So far as the custody related laws applicable in the country are concerned, the Courts while considering the said aspect gives primacy to the welfare of the child. It is no gain saying that the Courts should not uproot the child from his settled position as it not only casts a negative impact, but at times may aggravate the psychological issues. We are not unmindful of the fact that the parents are the best persons for the well-being of their child and their contribution in upbringing plays a significant role in becoming the best person in life. The welfare of the child being a paramount consideration in any custody matter, the Courts make endeavour to ascertain the same which cannot be squeezed in straight jacket formula as it depends upon the variety of the facts and circumstances as the human behavior largely varies. The anatomy of the human body is complex, but the human behavior is more complicated. The boy of five years of age is central to the issue of custody between the warring parents. It is well accepted notion that once the parents are fallen apart, the child is the worst sufferer and the judicial experience gained by passage of time has shown that the children are used as pawns to settle their personal egos, emotions and above all pitted against each of the parents.

7. At least in the instant matter we must record that the child as of now has not developed any adverse emotion against the petitioner during the visitation period and the role of the opposite party no.2-wife can also be appreciated that she volunteers to allow the petitioner to visit the minor boy and he spends time with him during his visit to India.

8. Having considered the aforesaid aspect, the first and foremost point which we feel to deliberate upon is the scope and the jurisdiction exercised by the High Court under Article 226 of the Constitution of India when a writ in the nature of *Habeas Corpus* is filed.

9. The point of maintainability of writ in the nature of *Habeas Corpus* are often taken when the recourse under Article 226 of the Constitution of India is resorted to and the Courts of the country including the Supreme Court had occasion to deal with such plea of demur and expounded the law on such aspect. The same issue was raised when a writ of a similar nature was filed and Supreme Court had to take a call on such point in ***Yashita Sahu v. State of Rajasthan and others***, reported in ***(2020) 3 SCC 67***. The facts emerged from the said case is worth to be recapitulated because of the closest parity. In the said case, the parties were married in India and went back to USA as the

husband was already working thereat. A female baby was born therein and, therefore, is a citizen of the said country. The relationship between the husband and wife got strained and the wife applied for an emergency protection order to the Norfolk Juvenile and Domestic Relations District Court for protection of her daughter and an *ex parte* preliminary protection order was passed against the husband. Subsequently, the wife instituted a petition in the same Court seeking sole custody of the minor child and also prayed for monetary support to her and the daughter. On the basis of an agreement reached between the parties, an order was passed directing the father to continue paying rent and utilities at the marital residence and also support the mother in all respect. The visitation right was also given to the father and the share parenting order was also passed. The wife left USA with the child and the husband after coming to know moved a motion for emergency relief before the said Norfolk Court wherein an *ex parte* order was passed in favour of the husband granting sole legal and physical custody of the child to him. The warrant was also issued against the wife for violating the order of the said Court and on the strength thereof, the husband filed a petition for issuance of a writ of *Habeas Corpus* before the Rajasthan High Court for production of the minor child. The High Court directed

the wife to return to USA along with the minor daughter and submit to the jurisdiction of the said Court. The wife challenged the said order before the Supreme Court and a plea of maintainability of the writ of *Habeas Corpus* was raised. The apex Court held that there is no jurisdictional error in issuing the writ of Habeas Corpus even if the child is in custody of another parent, as such extra ordinary jurisdiction is exercised by the writ Courts in the best interest of the child in the following:

> *"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , Nithya Anand Raghavan v. State (NCT of Delhi) [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] and Lahari Sakhamuri v. Sobhan Kodali [Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] among others. In all these cases, the writ petitions were entertained. Therefore,*

we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable."

10. In ***Rohith Thammana Gouda v. State of Karnataka and others***, reported in ***2022 SCC OnLine SC 937,*** a writ of *Habeas Corpus* was sought for the production of the minor son and his custody to the petitioner, who is a father, which was rejected by the High Court. The challenge was made to the Supreme Court wherein the apex Court held that so far as the question of jurisdiction is concerned, it does not invite a deep survey on the various authorities as it would suffice to decide the said issue on the principle laid down in ***V. Ravi Chandran (2) Union of India***, reported in ***(2010) 1 SCC 174*** that the actual role of the High Courts in the matter involving claim of custody of the minor, the principle of *parens patriae* jurisdiction is to be borne in mind and, therefore, the writ of *Habeas Corpus qua* a minor is maintainable and the High Court may direct the return of the child or decline to change the custody of the child depending upon the attending facts and circumstances.

11. In ***Abhinav Gyan, through his Power of Attorney Holder Mr. Abhimanyu Singh v. State of Maharashtra, through Police Station***

Incharge and Another, reported in 2022 SCC OnLine Bom 2958, the Division Bench of Bombay High Court taking note of the various decisions of the Supreme Court entertained the *Habeas Corpus* writ petition and directed the return of the minor child to the jurisdiction of the US Court.

12. In a subsequent judgment rendered by the Supreme Court in ***Somprabha Rana and others v. The State of Madhya Pradeshh and others***, reported in 2024 INSC 664, the apex Court set aside the judgment of the High Court by which the custody was directed in favour of the father being a natural guardian and relegated the parties to the substantial proceedings under the Guardians and Wards Act, 1890 as such appropriate Court is otherwise equipped to decide the issue of the child custody and the guardianship.

13. In a decision rendered by the Division Bench of this Court (one of us is the author) in ***Shashikanta Majhi v. State of Odisha and others*** (WPCRL No. 10 of 2026 decided on 23rd February, 2026) it is held in unequivocal terms that the writ petition in the nature of *Habeas Corus* is maintainable not only for production of the minor child, but for the purpose of the custody, and the same is to be decided on the basis of the facts involved in each case. The first and foremost endeavour is the

Court should undertake the welfare of the child and in the event the custody is found with the statutory authority who is otherwise competent to decide the best interest of the child, the party should be relegated to the said forum. It would not be proper for the High Court to exercise the extra ordinary jurisdiction and pass an order nullifying the order passed by the statutory authority.

14. All the decisions which have been cited by the respective parties as succinctly narrated hereinabove echoed in unison that the writ in the nature of *Habeas Corpus* is maintainable not only for production of the minor child, but also for the custody as the Court enjoins the *parens patriae* jurisdiction. However the exercise of such jurisdiction should not be done in routine manner, but on the basis of the special facts or the circumstances involved therein. What should weigh to the Court is the welfare of the child as a paramount consideration. In the event any Foreign Court is in *seisin* of the matter and the orders are passed on the custody of the child, ordinarily the comity of Courts is to be adhered to unless it causes a greater harm to the minor child.

15. The concept of close contact or close concern touching upon the well-being and welfare of the child is also one of the factors to be borne in mind emanating from the judgment of the Apex Court in ***Surya***

Vadanan v. State of Tamil Nadu and others, reported in (2015) 5 SCC 450 in the following:

> *"46. The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very good reasons not to do so.*
>
> *48. Therefore, we are concerned with two principles in a case such as the present. They are:*
>
> *(i) the principle of comity of courts; and*
>
> *(ii) the principle of the best interests and the welfare of the child.*
>
> *These principles have been referred to as "contrasting principles of law" [Shilpa Aggarwal v. Aviral Mittal, (2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192] but they are not "contrasting" in the sense of one being the opposite of the other but they are*

contrasting in the sense of being different principles that need to be applied in the facts of a given case.

49. What then are some of the key circumstances and factors to be taken into consideration for reaching this final goal or final objective? First, it must be appreciated that the "most intimate contact" doctrine and the "closest concern" doctrine of Surinder Kaur Sandhu [Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698 : 1984 SCC (Cri) 464] are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. This is a factor that must be kept in mind.

50. Second, there is no reason why the principle of "comity of courts" should be jettisoned, except for special and compelling reasons. This is more so in a

case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case). In McKee [McKee v. McKee, 1951 AC 352 : (1951) 1 All ER 942 (PC)] which has been referred to in several decisions of this Court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court—the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure. ["13.When foreign judgment not conclusive.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—(a) where it has not been pronounced by a court of competent jurisdiction;(b) where it has not been given on the merits of the case;(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;(d) where the proceedings in which the judgment was obtained are opposed to natural justice;(e) where it has been obtained by fraud;(f) where it sustains a

claim founded on a breach of any law in force in India."] In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so accepted by this Court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue as a matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court."

16. The principles of the comity of Court has been uniformly applied in catena of the cases rendered by the apex Court, more particularly, when the child is a citizen of another country and the orders are passed bearing in mind that the child should remain in a country of which he is a citizen being the well suited place and once the foreign Court has assumed the jurisdiction and passed order except for some competing circumstances that it would harm the child or cause injury to him, the parties should explore the remedy before the said Court.

17. Reverting back to the facts of the instant case, admittedly the parties are Green Card holders, i.e. permanent residency certificate and

were also in gainful employment thereat. The record further reveals that the wife left USA along with the minor son and started residing within the jurisdiction of this Court. The wife was working in a USA company from her parental house within the jurisdiction of the Court and even filed the Income Tax Returns as the income was generated within the State of America. The child travelled to this country with the USA Passport and in course of the hearing it was brought to the notice of this Court that the same is required to be renewed and unless the child is permitted to appear before the competent authority it might impact him in future. Though *ex parte* order is passed by the Circuit Court for Frederick County for custody of the child, but it is a well nigh principle that the Custody Orders are always regarded as temporary one. The wife will get an opportunity to approach the said Court, which is in *seisin* of the matter and ventilate all the grievance which in our opinion shall be decided by the said Court on the well settled principles accepted across the globe that the welfare is a paramount consideration.

18. We, therefore, allow the writ petition filed by the husband directing the wife to travel USA along with the minor child within three months from the date of the order. The wife will cooperate the husband in renewing the passport of the minor son, if the same has expired in the

meantime and no hindrance shall be caused in this regard. The travel expenditure of the wife and the minor son shall be borne by the petitioner to return to the place where they were residing lastly. The husband shall also take on rent an apartment within the jurisdiction of the Foreign Court, who passed an order of the custody of the minor son and shall initially bear the rent and other expenses. Pending the final order of custody to be passed by the Foreign Court, the husband shall get the minor son admitted in the school and shall also bear the expenditure.

19. The proceeding is accordingly disposed of.

I agree.

(Chittaranjan Dash)
Judge

(Harish Tandon)
Chief Justice

Arun Mishra

Signature Not Verified
Digitally Signed
Signed by: ARUN KUMAR MISHRA
Designation: ADR-cum-Addl. Principal Secretary
Reason: Authentication
Location: High Court of Orissa, Cuttack
Date: 11-Nov-2026 17:38:34