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THE HIGH COURT OF ORISSA AT CUTTACK

WPCRL No.160 of 2021

In the matter of an application under Article-226 of the Constitution of India, 1950.

Nesar Ahmed Khan ……. Petitioner

-Versus-

State of Orissa & Others …….. Opp. Parties

For Petitioner : Ms. S. Sahoo, Advocate.

For Opposite Parties : Mr. J. Katikia, AGA. (O.Ps. No.1 to 5)
Mr. Anshuman Ray, Advocate (O.Ps. No.6 to 11)

CORAM:

THE HONOURABLE MR JUSTICE S. TALAPATRA
THE HONOURABLE MISS JUSTICE SAVITRI RATHO

JUDGMENT
3rd April, 2023

S. Talapatra, J. By means of this writ petition, the custody of the minor namely Sumaiya Khanam has been sought to be restored in favour of the petitioner who is the natural guardian being the minor's father. It has been stated that the minor who is aged about 12 years has

been *forcibly* confined and illegally detained by the Opposite Parties No.6 to 11 since the year, 2015. However, it is admitted that the Opposite Parties No.6 to 11 are the sister of the petitioner and her daughter and son in law. It has been categorically submitted that the petitioner has been denied to meet his daughter despite series of attempts made by him.

2. The petitioner had reported the matter to the concerned police station as well as to the Child Welfare Committee (CWC) but no positive action has surfaced from those authorities. In these perspective facts, the petitioner has approached this court urging for issuance of a writ of habeas corpus, directing the Opposite Parties No.1 to 5 to produce the minor in the court and restore the custody of the minor to the petitioner.

3. The petitioner had approached the Plantsite police station on 12.09.2015 for "*removal of his minor daughter*". As the police did not take any action, the petitioner filed a complaint in the court of the Sub Divisional Judicial Magistrate, Rourkela being I.C.C. case No.765 of 2015.

4. Pursuant to the said complaint, the police was directed to register a specific case and to take up the investigation. Accordingly,

the Plantsite police station registered a case under Section 363/34 of the IPC being Plantsite PS case No.401 of 2015 (corresponding to G.R Case No.2776 of 2015). In addition, the petitioner made a representation to the Chairperson, Child Welfare Committee, Sundargarh (Annexure-3 to the writ petition) on 25.03.2016. After the case was registered, all the Opposite Parties obtained bail. In the course of investigation, the investigating officer filed an application before the Sub Divisional Judicial Magistrate, Rourkela for issuance of search warrant under Section 94 of the Cr.P.C as the investigating officer came to know that the minor child is in the custody of the Opposite Party No.6 namely, Shahnaz Khanam. It has been also reported by the investigating officer that the Opposite Party No.6 has illegally confined the minor in Phulwari Sharif at Patna. A search warrant was issued on 22.08.2016 but when the investigating officer visited that place, he found that the door was locked.

5. The police had submitted the final report on 31.08.2016 stating that the case was registered under mistake of fact as it has been revealed from the investigation that the petitioner had given the minor child to the Opposite Parties voluntarily. The petitioner did not file any protest petition as he was not aware of filing of the said report. As

consequence thereof, the Sub-Divisional Judicial Magistrate accepted the final report on 11.02.2017. The petitioner filed another complaint in the court of the Sub Divisional Judicial Magistrate, Rourkela being I.C.C Case No.120/2017. The petitioner's wife had also approached the Patna High Court by filing a writ petition being Cr.W.J.C. Case No.1232 of 2017. But the same was withdrawn on 04.08.2017 with liberty to seek remedy which might be available to her in law.

6. It has been stated that the Opposite Parties No.6 to 11 had approached this Hon'ble Court by filing a petition being CRLMC No.549 of 2019 challenging the order of cognizance taken by the Sub Divisional Judicial Magistrate, Rourkela in ICC Case No.120 of 2017. By the order dated 25.03.2019, this court was pleased to stay the further proceeding of the said I.C.C Case No.120/2017. The Opposite Parties No.6 to 11 filed criminal cases against the petitioner and his wife in Bihar allegedly to pressurize the petitioner to forego their ancestral property at Bihar, else they will never return their child.

7. It has been asserted in Para-7 of the writ petition that the Opposite Parties No.6 to 11 are in the habit of changing their residence frequently, so that they remain untraceable and continue illegal custody of the minor.

8. It has been further stated in Para-8 of the writ petition, that Opposite Parties No.6 to 11 do not have any legal right over the custody of the minor. In this regard, the petitioner has referred to the law, as declared by the apex court in **Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tewari, reported in (2019) 7 SCC 42,** where it has been held by the apex court as under:

> *"……. 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."*

9. It has been also laid down in **Tejaswini Gaud** *(supra)* as under:

> *"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."*

10. The petitioner has quite emphatically averred that he made all efforts to meet his minor daughter and to bring her back to his family but the Opposite Parties No.6 to 11 had frustrated his efforts. The

petitioner has also alleged that the proper care was not afforded to his minor daughter. The Opposite Parties No.6 to 11 have stopped the minor daughter from attending the school and she has been made to do all the house-hold works, from morning to night. Thereafter, the petitioner has averred that the petitioner and his daughter are governed under Mohamadden law and as per their custom, adoption is strictly prohibited. The petitioner has been wrongfully deprived of the custody of his daughter for years together. Hence, considering the welfare of the child, the minor is to be rescued from the illegal detention. Her custody should be restored to the petitioner being her natural guardian. It has been further stated that the Opposite Parties No.6 to 11 reside in a sensitive area of Bihar and they are close to many influential people. They disappeared when the police had visited their house for search.

11. A joint counter affidavit has been filed by the Opposite Parties No.6 to 11 through the Opposite Party No.7. In the counter affidavit the Opposite Parties No.6 to 11 have stated that the petitioner has suppressed the material facts and made unfounded allegations. According to them, the petitioner and his wife had no resources to bring up two daughters (twin daughters) since birth. It was decided by them that one daughter would be given to *"an Ashram"*. Finally, they had

placed their daughter to the custody of the Opposite Party No.6 as per the Muslim tradition known as Kafalah under which the pre-existing parent-child relation is not terminated but a new parent-child relationship is established between the child and the *adopted* parents. According to those Opposite Parties, the custody of the minor is retained by the Opposite Parties No.6 to 11 under the tradition of Kafalah.

12. To elucidate the practice of Kafalah, a part of an article published in **(2014) 14 African Human Rights Law Journal** (Annexure-R1 to the Counter Affidavit filed by the Opposite Parties No.6 to 11) is referred and reproduced below:

> *"Kinship care refers to family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature. Kinship care is premised on a broad interpretation of family to include all the people involved in caring for a child, which differs from society to society and even from family to family through a wide range of social relationships."*

13. According to the said article, Kafalah is similar to kinship care, to the extent that they both generally promote continuity in upbringing in relation to the children's cultural and religious backgrounds.

14. Both Kafalah and kinship care are thus developed to provide stability and continuity for the progressive growth and development of the child. It has been further observed that Kafalah represents the Isalamic alternative to adoption. For purpose of reference, the following paragraphs may also be reproduced hereunder:

> *"Two features of an adoption can be observed in **kafalah**: permanence and elements of a simple and/or open adoption. As already discussed, **kafalah** creates a permanent bonding relationship between the child and the caregivers and the child is integrated into the new family as though that was the case from the outset. Hence, **kafalah**, like adoption, results in the creation of a new and permanent family relationship. Additionally, as with simple and open adoptions, the child under **kafalah** maintains the legal bond (and a continuing relationship, albeit informally) with his family of origin in terms of identity, coupled with the possibility of remaining vested with a right of inheritance or support in relation to his original family's estate, if any. However, **kafalah** is distinguishable from adoption in that the process is usually not as formal and rigorous as a formal adoption. In addition, the general rule applicable to adoptions revolves around the severing of links with birth parents and, in fact, many legal systems of the world do not provide for simple adoptions."*

15. It has been asserted by the Opposite Parties No.6 to 11 that the petitioner has deliberately concealed the fact that Opposite Parties No.9 and 11, who are the *adoptive parents* of the minor girl had filed

Guardianship Case No.23 of 2016 before the court of the Principal Judge, Patna under Sections 7 and 8 of the of the Guardian and Wards Act, 1890 read with Section 7 (G) of the Family Courts Act, 1984 and Section 349 from Mulla on Mohammedan Law praying for declaration that they are the lawful guardian of the minor girl.

16. In that proceeding, the petitioner and his wife have been arrayed as the respondents No.1 and 2. Therefore, the issue of the custody according to the Opposite Parties No.6 to 11 is *sub judice.*

17. It is to be noted that no document has been produced with the counter affidavit to show that the petitioner and his wife were issued the notice from the court or they have appeared in the proceeding. Mere institution of the civil legal action does not mean that the respondents/Opposite Parties are in the know of such institution. Thereafter, a reference has been made to the writ petition filed by the petitioner in the Patna High Court. But they have admitted that the said writ petition has been withdrawn with liberty to seek remedy which might be available to the wife of the petitioner in law. Jurisprudential objection has been raised in respect of the territorial jurisdiction of this High Court on the ground that child's custody falls within the territorial limit of the Patna High Court. It has been urged that the petitioner may

be directed to participate in the proceeding being Guardianship Case No.23 of 2016 which has been instituted by the Opposite Parties No.9 and 11. Those Opposite Parties have denied the charge of negligence in taking due care as stated that utmost care of the minor is taken by them. On the contrary, the petitioner did not send a single rupee for her care. They have also controverted the averment that the petitioner was not allowed to meet his minor daughter.

18. It has been stated that the petitioner and his wife had visited the minor girl a few times and no obstruction was created in the course of visitation. In Para-(i) of the counter affidavit, Opposite Parties No.6 to 11 have asserted as follows:

> *"It is also submitted that the minor girl child does not even recognize the Petitioner and his wife as father and mother, rather she calls the Petitioner No. 9 and 11 as her mother and father which can be directly ascertained from the minor girl child."*

19. According to them, this writ petition has been instituted to avoid the proceeding being Guardianship Case No.23 of 2016, which is pending before the Principal Judge, Patna. It has been asserted, in reply to Para-3 of the writ petition that due to the petitioner's inability to take care of two daughters, the Opposite Parties No.6 to 11 had taken

responsibilities of taking care of the minor girl child. The Opposite Parties No.9 and 11 are the *adoptive parents* of the minor girl-child.

20. The police has filed the final report in Sundargarh PS Case No.401 of 2015 having recorded their observation that the petitioner and his wife had given the minor child in the care and custody of the Opposite Parties No.6 to 11 on their volition and free will. That final form has been accepted by the concerned court by its order dated 11.02.2017. In support of their contention the Opposite Parties No.6 to 11 have referred a decision of the apex court in **Asian Resurfacing of Road Agency Private Limited and Another Vs. Central Bureau of Investigation: (2018) 16 SCC 299.** The said report has been relied for purpose of demonstrating that the custody of the minor child be decided only on paramount interest of the child. They have denied that the minor child has not been attending the school regularly. They have asserted that she has been doing very well in the school. They have further submitted that in view of the pendency of the Guardianship proceeding, this court may be loath in deciding the issue of custody. With the counter affidavit, few pages of the final form submitted by the police in Sundargarh PS Case No.401/2015, have been attached. But we would like to state that there is no dispute regarding the observation made by

the investigating officer. For purpose of better reference, the penultimate passage from the said final form is extracted hereunder:

> *"From the facts and circumstances and from investigation it is came to light that the accused persons are sister, niece and nephew of the complainant. After six month of the birth of twin daughters they visited Rourkela and stayed for one month at the house of complainant. During their such stay his elder sister, niece and nephew became too keen to his child and out of love and affection proposed them to allow* ***to take one of their baby out of two for certain period since there was no small kid in their house****. Though they repeatedly persuaded giving assurance that they would take every care of the baby, the complainant had to bow down before their sentiments and allowed to take his daughter "Sumaiya Khanam" with them. Complainant Nesar Ahmand Khan given his minor child Sumaiya Khanam to his elder sister Shenaz Khanam and others with his own will. None has kidnapped the minor girl from his lawful guardianship. Discussed with IIC about the progress of investigation and as it is a case of mistake of fact under Section 363/34 IPC, pray for passing order to my Hon'ble SP, Rourkela. Received order from SP, Rourkela vide Memo No.3520/DCRBX CR, dated 31.08.2016 with a direction to return the case as FRMF under Section 363/34 IPC. Accordingly, the case was closed."*

21. The petition filed before the Principal Judge, Family Court, Patna being Guardianship Case No.23 of 2016 has been produced as Annexure 3 of the Counter Affidavit. It appears that Opposite Parties No.9 and 11 are the petitioners in the said petition filed under Sections 7 and 8 Guardian and Wards Act, 1890 read with Section 7(G) of the Family Courts Act, 1984 and also read with section 349 of Mulla on Mohammedan Law.

22. The Opposite Parties No.9 and 11 have admitted that Opposite Party No.9 is the niece of the petitioner and the Opposite Party No.11 is the husband of the said niece. The niece and the husband of the niece have filed the said Guardianship action, claiming that the wife of the petitioner, the respondent No.2 in that proceeding gave birth to twin female children on 23.02.2010 at Ranchi. The minor daughter Dania Aman Khan is the first born and the second is Asma Khanam. They have stated that owing to the financial constraints, the petitioner had given the child to Shahnaz Khanam (the Opposite Party No.6) who is the full-blood sister of the petitioner. Surprisingly, the Opposite Parties No.6 to 9 have admitted in clear terms that in *Mohammedan Law* adoption is not recognized but it is not prohibited to create filial relation.

23. They have further asserted that now-a-days a child can be adopted by a muslim, if eligible under Section 41 of the Juvenile Justice (Care and Protection of Children) Act.

24. From the reading of the petition for guardianship it has surfaced that the Opposite Parties No.9 and 11 have apprehended that the petitioner in order to usurp the properties assigned or gifted to the

minor by the Opposite Party No.6 has been claiming the custody of the minor.

25. The relief, sought in the guardianship petition, are very specific. It has been urged to declare the Opposite Parties No.9 and 11 as lawful guardians of the minor, Dania Aman Khanam @ Sumaiya Khanam also declare that the said minor girl is in the legal custody of the Opposite Parties No.9 and 11. It has not been disclosed in the counter-affidavit, what stage the guardianship petition which was filed in 2016 has reached after 7 years.

26. It is on record that by the order dated 11.02.2022 passed in in WPCRL No.160 of 2021 a copy of which is annexed as Annexure-R5 of the counter affidavit filed by the Opposite Parties No.6 to 11 the following points are framed for consideration:

> *"(i) When specific jurisdiction is vested under a special statute to decide the question of guardianship whether this Court should exercise its jurisdiction of habeas corpus?*
> *(ii) Whether this court assumes jurisdiction on the sole ground that the petitioner is residing in Odisha when the petitioner has already failed before the Patna High Court?"*

It is apparent that those issues are framed in the face of the objection raised by the Opposite Parties No.6 to 11.

27. We have heard Ms. S. Sahoo, learned counsel appearing for the petitioner and Mr. J. Katikia, learned Addl. Government Advocate appearing for the Opposite Parties No.1 to 5 and Mr. A. Ray, learned counsel appearing for the Opposite Parties No.6 to 11.

28. Ms. S. Sahoo, learned counsel has quite emphatically contended that based on the law decided by the apex court in **Tejaswini Gaud** *(supra)* that the detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for purpose of issuing writ directing restoration of the custody of the minor child.

29. According to Ms. S. Sahoo, learned counsel, the Opposite Parties No.6 to 11 have clearly admitted that position of the Muslim Personal Law. No adoption is recognized in the Muslim Law. Even the kinship relationship is not recognized for creating a new and permanent family relationship. Ms. S. Sahoo, learned counsel for the petitioner has contended that in view of the unequivocal declaration of the law as made in **Tejaswini Gaud** *(supra)* the writ court has the jurisdiction to issue the writ of habeas corpus to recover the minor from the illegal detention or illegal custody.

30. Ms. Sahoo, learned counsel has further submitted that the petitioner has never received any notice from the Judge, Family Court as referred in the counter affidavit and it would be apparent from the order dated 03.08.2016 that the Opposite Parties No.9 and 11 did not take any step for issuing the notice on the petitioner and his wife. It has been, in that context, asserted that till date no notice has been received by the petitioner. In this regard, a reference has been made to the rejoinder filed by the petitioner on 28.10.2022 where it has been categorically asserted as follows:

> *"Till date no notice has been issued to the Petitioner and the Opposite Parties have also suppressed this material fact in their Counter- Affidavit. Till date 38 dates have gone by but the Opposite Parties have not taken any steps in the matter and are now nearly taking the plea of filing of the Guardianship case to raise Preliminary Objections of Jurisdiction before this Hon'ble Court. Such is the conduct of the Opposite Parties, who have been consistently playing mischief before this Hon'ble Court and have been illegally detaining the daughter of the Petitioner for reasons known best to them."*

31. It has been also stated that the Opposite Parties No.9 and 11 are the cousin sister and brother-in-law of the child who have no authority under law of the principles of Mohammedan law to have the custody or the Guardianship of the minor child. Rule 352 of the Principles of Mohammedan Law lays down that the mother is entitled to

the custody of a female child until she has attained puberty and Rule 357 states that the Father is entitled to the custody of unmarried girl who has attained puberty.

32. Ms. Sahoo, learned counsel has in sequel submitted that *"the court is not vested with any power under the Guardians and Wards Act to appoint a guardian of the person of a minor whose father is living and is not in the opinion of the court unfit to be the guardian of the minor."*

33. Ms. Sahoo, learned counsel has further submitted that the order dated 03.01.2022 by which the writ petition filed by the wife of the petitioner in Patna High Court being CWJC No. 1232 of 2017 was disposed, reads *inter alia* as follows:

> *"After some argument learned counsel for the petitioner seeks leave to withdraw this writ application to seek remedy which would available to her in law. This application is dismissed as withdrawn with the aforesaid liberty granted to the petitioner."*

34. It has been asserted that the said order cannot create any embargo for the petitioner in instituting the present writ petition. It has been specifically alleged in the rejoinder filed by the petitioner that the Opposite Parties No.6 to 11 have completely destroyed the identity and

parentage of the child. This is the additional feature which requires to be noted by this court while determining the custody and for restoring the custody of the minor child from illegal detention of the Opposite Parties No.6 to 11. Ms. Sahoo, learned counsel has submitted that Section-3 of the Guardians and Wards Act clearly stipulates that nothing in that Act shall be construed to take away any power possessed by any High Court. Furthermore Section 19 of the said Act clearly postulate that nothing shall authorise the Court to appoint or declare guardian of the person of the minor (unmarried) whose father or mother is living and is not in the opinion of the Court unfit to be the guardian of the minor. Moreover as per Section 20 of the Guardians and Wards Act, a guardian merely stands in a fiduciary relationship to his ward and by no means, parental rights can be conferred upon the relatives of the child, when his or her own father and mother are alive.

35. According to Ms. Sahoo, learned counsel, the petitioner is the natural guardian of the child. Hence, mere filing of the petition seeking appointment as the guardian when the adoption is entirely prohibited under the *Muslim Personal Laws,* cannot obstruct this court in exercise of its jurisdiction. It has been stated by the petitioner that from bare perusal of the school records of the minor (Annexure-R7 to

the counter affidavit) it would surface that the name of the parents of the minor have been recorded as Shazia Aman and Saif Alam (the Opposite Parties No.9 and 11 respectively) who are complete strangers to the child and who have no legal authority to the custody of the child or to her parentage. It has been shown by Ms. Sahoo, learned counsel that name of the child has been changed from Sumaiya Khanam to Dania Aman Khan.

36. Some of the documents as enclosed with the counter-affidavit are, according to Ms. Sahoo, learned counsel, do not reflect the real state of affairs. Those have been created. That apart Ms. Sahoo, learned counsel has submitted that the averments of the Opposite Parties No.6 to 11 are fraught with mutually destructive contents. For illustration, Ms. Sahoo, learned counsel has referred that in one hand, the Opposite Parties No.6 to 11 have submitted that the petitioner and his wife visited the minor child few times and they are allowed to visit her without any objection, on the other hand, the minor girl, it is stated, did not recognize the petitioner as her father and the wife of the petitioner as her mother.

37. It has been contended by Ms. Sahoo, learned counsel that the minor cannot be allowed to remain in the company of the Opposite Parties No.6 to 11 as they are not entitled to retain the custody of the minor, when the petitioner, the natural and legal guardian of the minor, is completely opposed to the custody of the Opposite Parties No.6 to 11. Such keeping of the minor amounts to illegal detention by the Opposite Parties No.6 to 11. It has been quite emphatically stated that the Opposite Parties No.6 to 11 are changing their places of residence to avoid the course of law. So far the final form which was accepted by the S.D.J.M on 11.02.2017 is concerned, the petitioner has challenged the said finding by filing another complaint case being I.C.C Case No.120 of 2017. The said complaint proceeding has been stayed by this court as aforestated.

38. Ms. Sahoo, learned counsel has submitted that in order to determine the custody of a child, which is pertinent is not what is wish and desire of the child, but what is to be done in the best interest of the child. In this regard, Ms. Sahoo, learned counsel has referred to a decision of the apex court in **Rohith Thamanna Gouda vs. State of Karnataka** & **Ors.,** reported in **AIR 2022 SC 3511** where it has been held as under:

9. To answer the stated question and also on the question of jurisdiction we do not think it necessary to conduct a deep survey on the authorities. This Court in ***Nithya Anand Raghawan Vs. State (NCT of Delhi) & Anr.: (2017) 8 SCC 454****, reiterated the principle laid down in* ***V. Ravi Chandran Vs. Union of India: (2010) 1 SCC 174*** *where it has been held inter alia as follows:*

> *"In exercise of summary Jurisdiction, the court must be satisfied and of the opinion that the proceedings instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language, spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm."*

39. In **V. Ravi Chandran** *(supra)* the apex court took note of the actual role of the High Courts in the matter of examination of cases involving claim of custody of a minor based on the principle of *parens patriae* jurisdiction. Based on such consideration, it was held that even while considering Habeas Corpus writ petition qua a minor, in a given

case, the High Courts may direct for return of the child or decline to change the custody of the child taking into account the attending facts and circumstances and also the settled legal position. In **Nithya Anand Raghavan's** case the apex had also referred to the decision in **Dhanwanti Joshi Vs. Madhav Unde: (1998) 1 SCC 112** which had referred to the decision of the Privy Council in **Mckee Vs. Mckee: (1951) AC 352.** In **Mckee's** case the Privy Council held that the order of the foreign court would yield to the welfare and that the comity of courts demanded not its enforcement, but its grave consideration. Though, India is not a signatory to Hague Convention of 1980, on the Civil Aspects of International Child Abduction, the Court, virtually, imbibing the true spirit of the principle of *parens patriae* jurisdiction, went on to hold in **Nithya Anand Raghavan** *(supra)* as follows:

> *"40. ... As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as well as only a factor to be taken Into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social*

customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation be it a summary inquiry or an elaborate inquiry the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature an object to its return. We are in respectful agreement with the aforementioned exposition."

40. Ms. Sahoo, learned counsel has correctly stated while referring the said decisions of the apex court that the facts which are relevant in the case are quite different from the facts as emerged in the case of **Rohith Thammana Gowda** *(supra)*. Ms. Sahoo, learned counsel has submitted that the principle as espoused by the apex court may not be directly applicable in the present context. In respect of the jurisdiction of this court, it has been stated that *Parens Patriae*

jurisdiction is concerned with the safety of the child. Hence, they cannot be allowed to contend that this court does not have the jurisdiction. It has been emphasized by Ms. Sahoo, learned counsel that the minor child was taken out of the custody from Rourkela, which place falls within the territorial jurisdiction of the court. We may take note of what Justice Kennedy had observed in **Heller Vs. Doe: 509 U.S. 312 (1993)**:

> "*The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable to care for themselves.*"

41. High Courts and the Apex Court have applied the principles of *Parens Patriae* jurisdiction in a large number of cases in order to protect the interest of the children. This is a summary jurisdiction of the court for a very limited purpose.

42. Ms. Sahoo, learned counsel has further submitted that in **Gohar Begam Vs. Suggi Alias Nazma Begam and Others: AIR 1960 SC 93**, the apex court has clearly held the law that pendency of a case under the Guardian and Wards Act cannot take the right to approach the High Court under article 226 of the constitution.

43. In **Gohar Begam** *(supra),* it has been observed by the apex court in **Halsbury's Laws of England** [Volume-IX, Art.1201, Para-702] as follows:

> *"Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person." Section 491 is expressly concerned with the directions of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the Courts in our country have always exercised the power to direct under Section 491 in a fit case that the custody of an infant be delivered to the applicant: see* ***Rama Iyer v. Nataraja Iyer: AIR 1948 Mad.294, Zara Bibi v. Abdul Razzak****: **(1910) XII Bom. L.R. 891** and* ***Subbuswami Goundan v. Kamakshi Ammal: (1930) I.L.R. 53 Mad.72****.If the courts did not have this power, the remedy under Section 491 would in the case of infants often become infructuous.*

44. It has been further contended by the counsel for the petitioner having referred to **Ummu Sabeena Vs. State of Kerala & Ors: 2011 (13) Scale 28,** that in dealing with the writ of Habeas Corpus, such technical objections cannot be entertained by the Court.

45. According to Ms. Sahoo, learned counsel, the Opposite Parties No.9 and 11 have destroyed the identity of the minor. It has been asserted in the counter affidavit filed by the Opposite Parties No.6 to 11, that the minor child does not even recognize the petitioner and his wife

as her father and mother. Rather, she calls the Opposite Parties No.9 and 11 as her mother and father. Ms. Sahoo, learned counsel has reiterated that wish and desire of the minor is distinguishable from what would be appropriate in the best interest of the child. The duty of the court is to protect the best interest of the child.

46. The Opposite Parties No.6 to 11 have manipulated the minor against the law and in the minor's tender age (12 years), it is very easy to manipulate. Now the minor needs love and affection of the natural mother as she is nearing the age of the puberty. According to Ms. Sahoo, learned counsel, these Opposite Parties No.7 or 9 cannot the substitute for her natural mother, the petitioner's wife. The Opposite Parties No.9 and 11 already have two children and as such always there is a possibility of neglecting the care of the minor. Even they cannot also be treated as care provider in the kinship. It has been stated for the petitioner that there is no recognition of *Kafalah* in the Mohammedan Law. It is a developing doctrine of foster care. Merely because the Opposite Parties No.6 to 11 are the relatives, they took care of the child for sometime, but they have no right to retain the custody of the child. If the custody is not restored, the court would be depriving both the child and the petitioner's wife from each other's love and affection to which

they are entitled to. In this regard the observation in **Tejaswini Gaud** *(supra)* has been again referred. In Paragraphs 34 and 35 of **Tejaswini Gaud** *(supra)* the apex court has observed that the appellant being the relative took care of the child for some time and on that basis they cannot retain the custody of the child. The apex court had occasion to observe further that taking away the minor from the custody of the appellants and handing over to the custody to the mother might cause some problems initially but that will be neutralized with the passing of time.

47. Ms. Sahoo, learned counsel has continued to submit that the petitioner shall take all sorts of care of the minor. In **Usha Devi and Ors. Vs. Kailash Narain Dixit and Ors.: AIR 1978 MP 24** it has been held that the association with the persons specially relations will make a minor dear to them, but in preference to the parents, they cannot have any superior legal rights to the custody of the minor. The parents are the best persons to take care of the minor.

48. It has been held by the Madhya Pradesh High Court in **Usha Devi** (supra) that if the minor boy is kept away from his parents, he will be deprived of the parental affection and will, after some time, become stranger to them. This will not be in the interest of the minor.

49. Ms. Sahoo, learned counsel has referred to another decision of the apex court in **Gaurav Nagpal Vs. Sumedha Nagpal**: **AIR 2009 SC 557** where it has been held as follows:

> *"44. The trump card in appellants' argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep the custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.*
> *45. The conclusions arrived at and reasons indicated by the High Court to grant custody to the mother does not in our view suffer from any infirmity. It is true that taking the child out of the father's custody may cause some problems, but that is bound to be neutralized."*

50. In **Brejendra Narayan Ganguly and Ors. Vs. Chinta Haran Sarkar and Ors.: AIR 1961 MP 173,** the child was kept separate from the parents on the false plea of adoption. The Madhya Pradesh High Court ordered that the minor be restored to the custody of the parents and if necessary, warrant of arrest of the child shall be issued and immediately on arrest, the child shall be handed over to the appellants (the parents).

51. Having referred to **Bal Krishna Pandey Vs. Sanjeev Bajpayee: AIR 2004 Uttarakhand 1,** it has been contended that the minor, in that case, was staying with the grandfather and prosecuting her studies. It was contended that for welfare of the minor, the

arrangement is not to be disturbed. The grandparents were not willing to handover the custody to her father. Uttarakhand High Court has held as under:

> *"…….. face of this stark reality, inference drawn, conclusion arrived at on the first question in issue it has, without the least hesitation, to be held that the welfare of the minor will be served only when she is not kept in the custody of the appellant but her custody is restored to her loving father, the respondent."*

52. Finally, Ms. Sahoo, learned counsel appearing for the petitioner has contended that since the matter relates to issuance of writ of habeas corpus for restoring the custody of the minor child, the technical rules regarding to the territory cannot be applied. She has also emphasized that the child had been taken away from a place (Rourkela) within the territory of this High Court. The objection as regards the territorial jurisdiction, therefore, needs to be discarded.

53. Mr. A. Ray, learned counsel appearing for the Opposite Parties No.6 to 11 has submitted that the suppression of the material facts should be taken seriously and the writ petition be dismissed. That apart, it has been stated that this High Court does not have any territorial jurisdiction as no action has taken place within the territorial limit of the High Court nor the Opposite Parties No.6 to 11 are residing within the said territorial limit. Therefore, this court should not exercise its

jurisdiction for issuance of the writ of habeas corpus for restoring the custody of the minor namely Sumaiya Khanam @ Dania Aman Khan.

54. Mr. J. Katikia, learned Addl. Government Advocate appearing for the Opposite Parties No.1 to 5 has clearly stated that the court should consider the best interest of the child by waiving the technical objection regarding territorial limit of this High Court. It is well settled, according to Mr. Katikia, learned Addl. Government Advocate, that while issuing the writ of habeas corpus for restoring the custody of the minor, the paramount consideration should be the welfare of the child and the word welfare must be taken in its widest sense.

55. According to Mr. Katikia, learned Addl. Government Advocate, if any direction is issued on the Opposite Parties No.1 to 5, they would comply the said direction. Mr. Katikia, learned Addl. Government Advocate has emphatically submitted that even the statutory provision cannot supersede the paramount consideration as to what is congenial to the welfare of the minor. He has referred to **Elizabeth Dinshaw (Mrs.) Vs. Arvand M. Dinshaw: (1987) 1 SCC 42** and **Chandrakala Menon (Mrs.) Vs. Vipin Menon (Capt): (1993) 2 SCC 6.** In those reports, the apex court has enunciated the child's interest is paramount.

56. It may be noted that this court had interacted with the Opposite Parties Nos.6 to 11 in person, in presence of their engaged counsel. We have noticed that the Opposite Parties No.6 to 11 have taken good care of the minor. But the Opposite Party No.9 has candidly admitted that from her marriage with Opposite Parties No.11 she has two biological children. According to her, she *adopted* the minor from her mother (the Opposite Parties No.6, Shahnaz Khanam) who is the real sister of the petitioner. According to her, the petitioner had left the minor in the custody of Shahnaz Khanam and as such, Shahnaz Khanam has rightfully given the consent for adoption of the minor by the Opposite Parties No.9 and 11.

57. Having appreciated the submission as advanced by the counsel for the parties and also having scrutinized the records as produced in support of the averments, we find three questions which are pertinent to adjudicate the right of the petitioner in asking for a writ of habeas corpus for restoring the custody of the minor. Those are:

(i) Whether there had been any valid adoption of the minor by Opposite Parties No.9 and 11?

(ii) Whether this court has the territorial jurisdiction over the subject matter or for issuing the writ of habeas corpus?

(iii) Whether the custody of the minor girl needs to be restored in favour of the petitioner?

58. (i) Whether there had been any valid adoption of the minor by Opposite Parties No.9 and 11?

It has been admitted by the parties that there is no practice in the Mohammedan Law, similar to adoption as recognized by Roman and Hindu system. The Opposite Parties No.6 to 11 have submitted that in Section 47 of the Juvenile Justice Care and Protection of Children Act, 2000, (in short "JJ Act") there is provision for adoption. That is a secular provision. Section 41 of the JJ Act provides the detailed procedure for adoption. The primary purpose of adoption, according to the J.J Act, is rehabilitation of the children who are orphans, abandoned or surrendered in terms of prescription as laid down. That apart, stringent guidelines for adoption have been framed. Adoption is carried out through the Central Adoption Resource Agency (CARA, in short) following the procedure as laid down under sub-Section 5 of Section 41. Sub-Section 5 of Section 41 of the J.J Act provides as follows:

> *(5) No child shall be offered for adoption-*
> *(a) until two members of the Committee declare the child legally free for placement in the case of abandoned children,*
> *(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and*

(c) without his consent in the case of a child who can understand and express his consent.
(6) The Court may allow a child to be given in adoption
(a) to a person irrespective of marital status or;
(b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or
(c) to childless couples.

59. Even in the J.J Act, specific period has been stipulated for reconsideration by the parents of the surrendered children for returning the custody. It may be mentioned here that even in Muslim Personal Law (Shariat) meaning the provisions of the Quaran and the teachings and practices of Prophet Mohammad to Muslims which are now codified. Section 2 of Central Shariat Acts reads as under:

"2. Application of Personal Law to Muslims: Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).
This section enlists several subjects of personal law such as marriage, divorce, maintenance, intestate succession, etc. and mandates that these subjects be governed by Muslim Personal Law even if any custom or usage to the contrary exists. These subjects do not include "adoption", and hence, it can be said that customs or

usages relating to adoption have not been superseded by Muslim Personal Law."

60. However, under Section 3 of the said Act provision has been made to make a declaration-(1) Any person who satisfies the prescribed authority- (a) that he is a Muslim, and (b) that he is competent to contract within the meaning of Section 11 of the Indian Contract Act, 1872 and (c) that he is a resident of the territories to which this Act extends, may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of the provisions of this section, and thereafter the provisions of Section 2 shall apply to the declaration and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

61. We have not come across any such declaration by the Opposite Parties No.9 to 11 as regards the minor whom hereinafter we would refer as Sumaiya. Madras High Court in **Puthia Purayil Abdurahiman Karnavan v. Thayath Kancheentavida Avoomma**: **AIR 1956 Mad 244**: **ILR 1956 Mad 903** held that:

"If there is one thing clear on the language of S. 2 of the Central Shariat Act and Section 2 of the Madras Amending Act of 1949, it is that neither enactment purported to make the Muslim Personal Law applicable to all matters relating to Muslims. Nor did it in terms totally abrogate custom and usage in respect of matters other than those enumerated in

Sections 2 and 3 of the Central Act and Section 2 of the Local Act."

62. In **Moulvi Mohammed and Ors. vs S. Mohaboob Begum: AIR 1984 Mad 7,** Madras High Court has also observed as follows:

> *"The Shariat Act has ruled out custom or usage with reference to the enumerated subjects in Section 2 thereof und enables, the Muslim to rule out custom or usage with regard to three more subjects referred to in Section 3 (1). Adoption* ***as is not one of the enumerated subjects in Section 2****. Adoption is not necessarily inheritance or succession, although it may lead to inheritance or succession it is not the case of the petitioners that any declaration under Section 3 (1) was made by anyone concerned in the instant case so as to rule out custom or usage on the question of adoption. Hence, it cannot be stated that there could not be plea and proof of a custom relating to adoption at all in the instant case, if in fact there was and is such a custom prevailing as claimed by the respondent."*

63. In **Mst. Bibi Vs. Syed Ali: 1997 (1) RLR 757** Rajasthan High Court has held that the custom of adoption prevailed in Mahawat Muslims. Even thereafter it has been observed as under:

> *"(i) Adoption is not known to Muslim Law.*
> *(ii) By virtue of custom, Mohammedans may also have the system of adoption.*
> *(iii) A muslim who alleges that by custom he is subject of adoption must prove it. Both the factum of adoption and the custom of adoption have to be proved."*

64. In **Lakshmi Kant Pandey v. Union of India: (1984) 2 SCC 244,** it has been held by the apex court as under:

> *"It is a little difficult to appreciate why the Muslims should have opposed this Bill which merely empowered a Muslim to adopt if he so wished; it had no compulsive force requiring a Muslim to act contrary to his religious tenets: it was merely an enabling legislation and if a Muslim felt that it was contrary to his religion to adopt, he was free not to adopt."*

65. With the advent of JJ Act, the apex court had occation to examine that aspect in **Shabnam Hashmi Vs. Union of India: (2014) 4 SCC 1.** It has been held **Shabnam Hashmi** *(supra)* as follows:

> *"The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, the Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit*

> *himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date."*

66. True it is that a Muslim can adopt a surrendered child but they have to follow the stringent procedure as laid down under the JJ Act and the Rules made thereunder, but not at their whim. So generally in the Islamic countries instead of adoption the guardianship is provided to a minor who needs care and protection. As such, we hold that the claim of adoption is unsustainable in law. Hence, prima facie, there is no proof of adoption of the minor under the JJ Act or under Section 3 of the Muslim Personal Law (Shariat Act), 1937. Even there is no specific averment either in the writ petition or in the petition filed seeking guardianship of the minor in the court of the Family Judge that the minor was adopted following the procedure of the JJ Act.

67. (ii) Whether this court has the territorial jurisdiction over the subject matter or for issuing the writ of habeas corpus?

To respond this question we would like to begin with the provisions of Section 226(2) of the Constitution of India. Clause 2 of Article 226 of the Constitution of India provides that the power conferred by clause (1) to issue directions, orders or writs to any

Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. This provision has been incorporated by the Constitution 42nd Amendment which has come into effect on 01.02.1977. This expand the authority of the court even beyond its territorial jurisdiction, if the cause of action wholly or in part arises for the exercises of such power.

68. Hence, the constitutional imperative is that the High Court would exercise jurisdiction in relation to the territories of which it is the High Court. Clauses (1) and (2) of Article 226 have to be read and construed in conjunction with each other but none of them would be capable of extending jurisdiction of the court normally beyond its prescribed territorial jurisdiction. To take benefit of this enlarged jurisdiction, it would be obligatory upon a petitioner to show that any cause of action or part thereof had arisen within the territorial jurisdiction of the said court.

69. In **Hari Vishnu Kamath v. Syed Ahmed Ishaque and Ors.**, a seven Judge Bench of the Supreme Court observed that:

"Jurisdiction to issue writ is co-extensive with the territorial jurisdiction of the court."

70. The introduction of Article 226(2) has widened scope. But distinction between the provisions of Article 226(1) and Article 226(2) has to be maintained notwithstanding the above amendment.

71. While Article 226(1) empowers a High Court to issue writs to a person, authority or government within its territorial limits de hors the question where the cause of action arose, Article 226(2) enables High Courts to issue writs to persons, authorities or governments located beyond its territorial limits provided a cause of action arises (in whole or in part) within the territorial extent of the said High Court. Article 226(2) has extended the jurisdiction of the High Courts beyond their territories in cases where part of the cause of action arises within its territories. Therefore, Article 226(2) does not supplant Article 226(1).

72. In **Kusum Ingots and Alloys Ltd v. Union of India and Anr.**: **(2004) 6 SCC 254** it had been held by the apex court that when a part of the cause of action arises within one or the other High Court, it will be for the petitioner to choose his forum [**Kusum Ingots** *(supra)*, para 25]. In appropriate cases, the court may refuse to exercise its

discretionary jurisdiction by invoking the doctrine of forum conveniens [**Kusum Ingots** *(supra)*, para 30].

73. In **Clements v. Macaulay: 4 Macph. 593**, it has been held as follows:

> *"in cases in which jurisdiction is competently founded, a court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suiter comes to ask. But if the court finds that there are other courts or tribunal having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice. In that event court can apply the doctrine plea of forum non conveniens."*

74. In **House of Lords Tehrani v. Secy of State for the Home Department [2006] UKHL 47**, it has been noted thus:

> *"The doctrine of forum non conveniens is a good example of a reason, established by judicial authority, why a court should not exercise a jurisdiction that (in the strict sense) it possesses. Issues of forum non conveniens do not arise unless there are competing courts each of which has jurisdiction (in the strict sense) to deal with the subject matter of the dispute. It seems to me plain that if one of the two competing courts lacks jurisdiction (in the strict sense) a plea of forum on conveniens could never be a bar to the exercise by the other court of its jurisdiction."*

75. The doctrine of *forum non conveniens* can only be invoked where the court deciding not to exercise the jurisdiction has the jurisdiction to decide the case. The principle of *forum non conveniens* therefore falls within the discretion of the court concerned.

76. In this case the Opposite Parties No.6 to 11 participated in the proceeding and filed their counter affidavit. They raised the objection relating to the territorial jurisdiction. There is no doubt that the petitioner's child was taken away from his custody from Rourkela under District of Sundargarh, Odisha. Undisputedly, in this case, the minor child was taken to the other jurisdiction. As we find that the minor daughter of the petitioner had been taken away from Rourkela, Odisha and was not returned despite repeated demands of the petitioner, the custody has turned out to be wholly illegal, in the circumstances of the case. We can, thus, conveniently hold that a part of the cause of action arose within the territorial limit of this court. That apart, as we have already noted that when the interest of the child is concerned, the court can also exercise its *parens patriae* jurisdiction in as much as the child is incapable of representing herself.

77. While exercising the *parens patriae* jurisdiction for issuance of the writ of habeas corpus, the objections relating to territorial jurisdiction cannot have serious impact, in as much as the best interest of the minor has to be protected by the court and that should not be restricted by the technical objection.

78. When the Guardianship Proceeding is pending, whether this court can exercise its extraordinary jurisdiction to issue a writ of habeas corpus?

In **Gohar Begum** *(supra),* the apex court has categorically stated that the father being natural guardian and the appellants (the grandparents) have no authority to retain the custody of the child and the refusal to hand over the custody amounts to illegal detention and therefore, issuance of the writ of habeas corpus was the proper remedy available to the petitioner to seek the redressal.

79. We must note that the Guardianship proceeding has been initiated in the premises, that the minor has been purportedly adopted by Opposite Parties No.9 and 11. We have already observed that no court has approved or declared adoption. In absence of legal adoption, when the petitioner, being the father, has been demanding her custody, the minor has to be considered to be in the illegal detention of the Opposite Parties No.9 and 11.

80. We would, for elucidation, reproduce some more passages from **Gohar Begum** *(supra):*

> *"On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who is the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal*

> *to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants."*
>
> **[Emphasis Added]**

81. Another passage may be reproduced approvingly from **Gohar Begum** *(supra),* which reads as under:

> *"10. We further see no reason why the Appellant should have been asked to proceed under the Guardian and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under Section 491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right Under Section 491. That is well established as will appear from the cases hereinafter cited."*

82. **(iii) Whether the custody of the minor girl should be restored in favour of the petitioner?**

We have observed that in absence of adoption, the custody of the minor child is liable to be termed as illegal detention. Even the kinship relationship as has been argued is not sufficient to deprive the parents from getting the custody of their child and the *detention* of the child was sought to be justified by the pretext of adoption which does not exist in fact or in law.

We are aware that the emotional bonding that has been developed on account of the long stay of the minor namely, Sumaiya Khanam with the Opposite Parties No.6 to 11 is one of the important factors which needs to be considered by us. But having regard to the right of the petitioner and also the best interest of the child, we would hold that the custody of the minor can be restored by way of writ of habeas corpus if the custody of the child is not handed over to the petitioner by 30.06.2023 by the Opposite Parties No.6 to 11 and the Opposite Parties No.9 and 11 in particular, in whose custody the minor child is presently living.

83. While passing this direction, we are aware that taking the child out of the custody of the Opposite Parties No.9 and 11 or from the custody of Opposite Parties No.6 to 11 is may cause emotional distress to the minor, but this is bound to be neutralized with the passage of time.

84. We have considered the spectrum of issues to come to this conclusion, we must also note that the other minor of the twin sister is living with the petitioner. The petitioner has sufficient resources to take good care of the minors. Merely because the Opposite Parties No.6 to 11 took care of the child for sometime or may be for a long time, they

cannot retain the custody of the child. If the custody is not restored to the petitioner, the court will be depriving both the child and the parent.

85. We direct the Opposite Parties No.9 and 11 to handover the custody of the minor child, Sumaiya Khanam to the petitioner at his residence at Rourkela, Sundargarh. The expenses for the journey of Opposite Parties No.9 and 11 to be borne by the petitioner. We would expect that the relation between the petitioner and the Opposite Parties No.6 to 11 shall be normal. In expectation thereof, the petitioner is directed to allow the Opposite Parties No.6 to 11 to visit the minor girl at his residence whenever they propose to visit. If the confidence is restored, the petitioner may also allow the minor girl to visit them and to spend some days with them.

86. In the event of failure to comply our above direction, the petitioner shall inform the Registrar, (Judicial) of this court who will, by the authority of this order, issue the writ of habeas corpus for recovering the minor girl from the custody of the Opposite Parties No.6 and 11, particularly from the Opposite Parties No.9 and 11 and to hand over the minor child namely, Sumaiya Khanam to the custody of the petitioner. The Opposite Parties No.1 to 4 shall execute the writ of habeas corpus and hand over the minor child to the petitioner.

87. We would be failing in our duty, if we do not observe that the Opposite Parties No.1 to 4 shall take required assistance from their counterparts in the State of Bihar or any other State where the Opposite Parties No.9 to 11 will be found to have been residing with the minor.

88. In terms of the above, this writ petition stands allowed.

89. Having regard to the circumstances of this case, we do not pass any order as to costs.

90. Urgent certified copy of this order be granted as per rules.

.....
(S. Talapatra, J)

Savitri Ratho, J. I agree.

.....
(Savitri Ratho, J)

Orissa High Court, Cuttack.
The 3rd April, 2023/ R.R. Nayak, Jr. Steno.