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IN THE HIGH COURT OF ORISSA, CUTTACK

W.P.(C) No.10091 of 2025

(In the matter of an application under
Articles 226 & 227 of the Constitution of India)

[redacted] ..... Petitioner

-Versus-

[redacted] &
another ..... Opposite Parties

Advocate for the parties

For Petitioner : Mrs. Suman Modi, Advocate

For Opp. Party No.1 : Mr. Kirtan Dang, Advocate

For Opp. Party No.2 : None

CORAM: JUSTICE SANJAY KUMAR MISHRA

Date of Hearing: 12.08.2025 Date of Judgment: 10.10.2025

S.K. Mishra, J. The writ petition has been preferred assailing the order dated 24.03.2025 passed by the learned Judge, Family Court, Cuttack in I.A. No. 117 of 2024 (arising out of C.P. No.543 of 2024), vide which the Petitioner's prayer for visitation right with his minor son, namely, [redacted], who is aged about 7 years, stood rejected.

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2. The undisputed background of the present lis is that the Petitioner and the Opposite Party No. 1, [redacted] got married on 09.07.2011, lived together for around five years, and then separated due to temperamental differences. The Opposite Party No.1 instituted MAT Case No.94 of 2023 under section 13(1)(i-a)&(i-b) of the Hindu Marriage Act, 1955, shortly, 'the Act, 1955', before the learned Judge, Family Court, Bargarh. The said case was decreed ex parte against the Petitioner, dissolving the marriage. Thereafter the Opposite Party No.1 remarried one [redacted], an elderly person having three children from his first marriage, out of which one got married.

3. It is the case of the Petitioner that the parties had agreed that their daughter [redacted]ould remain in the custody of the Opposite Party No.1 and their son [redacted]ould remain in the exclusive custody of the Petitioner, with mutual visitation right of children for both the parents.

4. On 05.02.2024, after the Petitioner dropped his son at the Cambridge School, Cuttack, the child

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reportedly fell ill and was taken away by the Opposite Party No.1 along with her second husband, on being intimated by the School authorities. Since then, she has allegedly not allowed the Petitioner to meet or communicate with the child, [redacted] i.e, the Opposite Party No. 2. Hence, FIR was lodged before the I.I.C., Cantonment Police Station, representation was given to the DCP, Cuttack and 1CC Case No. 35 of 2024 was also instituted by the Petitioner, but with no tangible result.

5. Finding no other way out, the Petitioner filed an application under Section 6 of the Hindu Minority and Guardianship Act, 1956, shortly, 'the Act, 1956', for custody of his son before the learned Judge, Family Court, Cuttack, which was registered as C.P. No.543 of 2024. I.A. No.117 of 2024 was also moved along with the said C.P. for visitation/communication with his son. However, the learned Judge, Family Court, Cuttack rejected the said I.A. citing the absence of suitable neutral venue and apprehension of untoward incidents. The operative portion of the impugned order dated

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24.03.2025 passed in I.A. No.117 of 2024 (arising out of C.P. No.543 of 2024), being relevant, is extracted below.

> "***The petitioner has not mentioned the place of visit and the manner to meet his son. Though the son and daughter both are with the OP No.1 but he is interested only to see his son. The evidence of this case has not yet commenced. There is possibility of untoward incident, if the petitioner will be allowed to visit the child in the present scenario in absence of any convenient place of visit and the manner of communication with his son.*** *Though the child took birth out of the relation between the husband and wife and the child is not only of the OP or the petitioner, but the allegations made by the OP are serious in nature and the welfare and development of the child at this stage is crucial. Thus, taking into account the above facts and circumstances of this case, the petition filed by the petitioner at this stage is not maintainable, as such the same stands rejected."*
>
> (***Emphasis supplied***)

6. Learned Counsel for the Petitioner, drawing attention of this Court to the plaint in C.P. No.543 of 2024 so also the report of the Counsellor dated 21.12.2024, submitted that though it was decided between the Petitioner and the Opposite Party No.1 that the daughter will stay with Opposite Party No.1, whereas the son will stay with the Petitioner and both of them will have visitation right to meet their children, but the Opposite Party No.1 took away the Opposite Party No.2,

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the minor son, forcefully from Cambridge School and thereafter, she is not allowing the Petitioner to meet his son, despite such mutual understanding. That apart, during conciliation/mediation, she neither cooperated with the Counsellor nor attended the counselling for which, the Counsellor was being constrained to give a detailed report on 21.12.2024, which forms part of the proceeding before the Court below.

7. Learned Counsel for the Petitioner further submitted that, the Counsellor's report well indicates that the present Petitioner, who is also the Petitioner before the Court below, is desirous to take the custody of his two kids, namely, 'Shivay & Shanvi" from the custody of Opposite Party No.1 and being the father of the children, he is capable to take the custody of his children and maintain them for a prosperous life. However, in view of the mutual understanding between the parties that the son will stay with the Petitioner and the daughter will stay with Opposite Party No.1, having visitation rights of both of them, the Petitioner did not file any application for custody of the daughter. Yet, the learned Court below,

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while rejecting the application for visitation, erroneously gave an observation that the Petitioner is only interested to see his son.

8. Learned Counsel for the Petitioner further submitted that the visitation right is an important right of the parents to see the children born out of their wedlock. The Opposite Party No.1 managed to get a decree of divorce in MAT Case No.94 of 2023 from the Court of learned Judge, Family Court, Bargarh ex-parte against the Petitioner. Immediately thereafter, she remarried an elderly person, who is around 56 years having three children. But the Petitioner is still unmarried and is desperate to meet his children, including the son, who was staying with him as per the mutual understanding. She further submitted that the said fact regarding mutual understanding was never disputed by the Opposite Party No.1. Rather, admittedly, she took away the Opposite Party No.2 son from the school on the plea of his sickness and keeping with her the minor son on the plea of taking his care. The learned Court below, during pendency of the trial in C.P. No.543 of 2024,

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ought to have allowed the application of the Petitioner for visitation so also communication with the Opposite Party No.2 son, instead of rejecting the said application on the plea that the Petitioner has not mentioned the place of visit and manner to meet his son and he is only interested to see his son. She further submitted that the observation regarding possibility of untoward incident, if the Petitioner will be allowed to visit the child in absence of convenient place of visit, is baseless in absence of any material on record to substantiate such observation/ finding.

9. Learned Counsel for the Petitioner further submitted that the learned Court below ought to have found out convenient days in a month, time and place of visit, in consultation with the parties to the said lis so also their respective Counsels, who represent them in C.P. No.543 of 2024, instead of rejecting the application of the Petitioner on the ground that there was no mention in the said petition regarding place of visit and manner of meeting his son.

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10. Per contra, learned Counsel for the Opposite Party No.1 submitted that there is no infirmity in the impugned order passed by the learned Court below. Such an application for visitation so also communication with the son filed by the Petitioner, being premature, was rightly rejected by the learned Court below.

11. It is worthwhile to mention here that this Court, vide order dated 16.05.2025, as an interim measure, permitted the Petitioner to make calls/WhatsApp calls once in a day to the Opposite Party No.1, if he intends to talk to his son (Opposite Party No.2). That apart, vide order dated 05.08.2025, both the parties were directed to remain present before this Court along with Opposite Party No.2 son on 12.08.2025, ordering therein that the matter will be taken up in Chamber at 2.00 P.M.

12. Thereafter, the Petitioner filed an Affidavit on 07.08.2025 indicating therein that the Opposite Party No.1 only acted in terms of the direction given by this Court for ten days. Thereafter, the Opposite Party No.2, though wanted to talk to the Petitioner, but he had to act

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as per the instruction of the person, who was behind the screen. Thereafter, he did not respond. It was also alleged in the said Affidavit that the voice recording of the Opposite Party No.2 has been stored in a pen drive, wherein he disclosed that he wants the company of the Petitioner. On the very same day an Affidavit was also filed by the Opposite Party No.1 indicating therein that as per the direction given by this Court on 16.05.2025, she is allowing the Opposite Party No.2 to talk with the Petitioner on call so also through WhatsApp video calling.

13. On 12.08.2025, this Court interacted with [redacted] (Opposite Party No.2) alone in Chamber. The Opposite Party No.2 [redacted], while entering into the Chamber of the Court, was weeping. However, after lot of counselling by the Court[redacted] became calm. On being asked about the reason, surprisingly, Shivay replied in hindi saying **"Bahar jo Uncle khade huein he unse dar lagta hai".** By that time, this Court had no occasion to see or know as to who was standing outside the Chamber. On being further asked, what is the name of the said person, the Opposite

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Party No.2 said his name to be [redacted] the present Petitioner. On being further asked as to what is his father's name, surprisingly, Shivaya answered that "Ashok Lodha" is his father, who is the second husband of the Opposite Party No.1.

14. After such interaction with the minor son, both the Petitioner and the Opposite Party No.1 were called to the Chamber. Only then, this Court came to know that the Opposite Party No.2[redacted]as intending to say before this Court that he is allegedly afraid of his natural father, that too addressing him as 'Uncle', which is almost unbelievable and seems to be outcome of being tutored by Opposite Party No-1. There after, both the Petitioner and the Opposite Party No-1 started making allegations and counter allegations against each other before this Court. The Petitioner submitted that he had no occasion to contest the application for divorce. He only came to know about such decree of divorce in MAT Case No.94 of 2023 much after passing of the said ex-parte judgment. As per the mutual understanding, he has a right to keep Shivay with him.

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But the Opposite Party No.1 has taken away him forcefully.

15. On a prima facie consideration, admitted facts on record, including the Counsellor's Report, so also the admitted fact that the Petitioner has kept himself away from remarriage so also custody of both the children is at present with their mother, who is married to an elderly person, who is already having three children, this Court is of the view that the refusal of visitation right to the natural father by the learned Judge, Family Court, Cuttack vide the impugned order appears to be unjust and contrary to the settled position of law.

16. In a recent judgment dated 14.05.2025, passed in W.P.(C) No.28784 of 2019 (***Manjusha Singhania Vs. Nimish Singhania***), the coordinate Bench held as follows:

> *"5. Admittedly, the husband-OP has filed MAT Case No.19 of 2016 against the Petitioner No.1-wife for seeking divorce and in such MAT Case, the OP-husband has filed I.A. No.127 of 2017 seeking custody of the child, but the learned trial court admittedly by an order passed on 16.12.2017 has directed for its disposal along with the original MAT Case.* ***Be that as it may, the visitation right is an important right of either of the parents to see the children born out of their wedlock. It is not in dispute that the father in this case has no***

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access to the child, but he has definitely right to see his son provided the same is in the paramount interest of the child, who has right to the affection of both of his parents. It is also equally important that the child is entitled to love & affection, protection & guidance of both the parents and their family. While deciding any matters relating to the custody or visitation right of the child, the paramount consideration is the welfare of the child and if the welfare of the child so demands, the technical objection cannot come in the way, but while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration, however, the Court is required to decide the issue on the basis of what is in the best interest of the child*. The child is always the victim in the custody battles and in the fight of egos and acrimonies between two spouses, but the childhood of such child is the worse sufferer and such childhood is spoiled due to the alter egos of the spouses.*

6. It is a matter of fact that the child especially of tender years requires love, affection, company, protection and guidance of both the parents and these are not only the requirement of the child, but also are his/her basic human rights and need. Further, the child should not be denied with proper care and affection, merely because his/her parents are at war with each other. The child is not an inanimate object which can be tossed from one parent to other. ***This Court is of the considered opinion that excepting the extreme circumstance, one parent should not be denied to contact or visit his/her child and the cogent reasons must be assigned while refusing visitation right of either of the spouses to their child****."*

(Emphasis supplied)

17. Further, the Supreme Court in ***Yashita Sahu Vs. State of Rajasthan,*** reported in (2020) 3 SCC 67, held as follows:

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"22. *A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents.* ***Even if the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights****.*

23. *The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.*

24. ***Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only.*** *In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long*

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> *weekends, breaks and holidays. In cases like the present one, where the parents are in two different continents, effort should be made to give maximum visitation rights to the parent who is denied custody.*
>
> ***(Emphasis supplied)***

18. Since visitation right is an important right of either of the parents to see the children born out of their wedlock and while deciding the welfare of the child, it is not the view of one spouse alone, which has to be taken into consideration, this Court is of the view that the Court is required to decide the issue of visitation on the basis of what is in the best interest of the child. This Court is of the further view that the impugned order passed by the learned Judge, Family Court, Cuttack deserves interference.

19. Accordingly, the impugned order dated 24.03.2025 passed in I.A. No.117 of 2024, arising out of C.P. No.543 of 2024, is set aside. The matter is remitted back to the learned Judge, Family Court, Cuttack to pass appropriate order afresh in consultation with the parties so also their respective Counsels, who represent them in the proceeding in C.P. No.543 of 2024, to decide the place, frequency and time of visit so also the manner the

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Petitioner should meet with his son till disposal of C.P. No.543 of 2024 and other terms and conditions, as would be deem just and proper, to maintain decorum and to avoid untoward incident during such meeting of the Petitioner with his son. Learned Court below shall also put appropriate condition enabling the Petitioner to be in touch with Opposite Party No.2 telephonically or through WhatsApp communication during pendency of the C.P. No.543 of 2024. Appropriate order, in terms of the observation made above, shall be passed within three weeks hence. Till then the interim arrangement made by this Court regarding telephonic/WhatsApp Call shall continue as before.

20. With the aforesaid observation and direction, the writ petition stands allowed and disposed of. No order as to costs.

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S.K. MISHRA, J.

Orissa High Court, Cuttack
The 10th October, 2025/Prasant