



2026:AHC-LKO:22276

**HIGH COURT OF JUDICATURE AT ALLAHABAD  
LUCKNOW**

**HABEAS CORPUS WRIT PETITION No. - 439 of 2025**

Vivian Mishra (Minor) Thru. Natural  
Guardian Mother Smt. Shweta Mishra And  
Another .....Petitioner(s)

Versus

State Of U.P. Thru. Prin. Secy. Deptt.  
Home Lko. And 5 Others .....Respondent(s)

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|---------------------------|---|---------------------------------------------------------------------|
| Counsel for Petitioner(s) | : | Rajeev Mishra, Mool<br>Shankar Mishra                               |
| Counsel for Respondent(s) | : | G.A., Dharmendra Kumar,<br>Neetesh Kumar Pandey,<br>Nikhil Malhotra |

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**Court No. - 14**

**HON'BLE SUBHASH VIDYARTHI, J.**

1. Heard Sri Rajeev Mishra, the learned counsel for the petitioners, Sri Mayank Sinha, the learned AGA for the State of U.P. and Sri Nikhil Malhotra, the learned counsel for the opposite parties no. 5 & 6.

2. The alleged detainee Master Vivian Mishra and Ms. Shreenika Mishra have been produced by opposite party no. 5- Sri Vijay Kant Mishra and the Court has interacted with the children.

3. The instant writ petition has been filed on behalf of the alleged detainee Master Vivian Mishra aged about 12 years and Ms. Shreenika Mishra aged about 5 years through their mother Smt. Shweta Mishra, alleging that the father of the children- opposite party no. 5- Sri Vijay Kant Mishra has illegally detained the children with him at New Delhi.

4. As per the pleadings made in the writ petition, the mother of

the children is residing at her parents' home at Ayodhya. Although the dates have not been disclosed in the writ petition, in the list of dates and events it has been stated that the parents of the children got married on 15.02.2012, the son Master Vivian Mishra was born on 08.06.2013 and Ms. Shreenika Mishra was born on 08.06.2020. The parties were residing with their children in Lucknow. In the month of February, 2024, the opposite party no. 5 shifted his business to Ayodhya and the children were admitted to a school at Ayodhya in April, 2025. Thereafter, the father of the child took their children to Delhi on 11.06.2025 and since then the children are living with their father at New Delhi.

5. The children have stated that they are studying at a school in New Delhi since July, 2025, they are residing with their father comfortably and happily.

6. The learned counsel for the petitioner has submitted that the girl child is aged merely 5 years and, therefore, it will be in the interest and welfare of the daughter that she be put in the custody of the mother.

7. The custody of children is a complex issue which is to be decided keeping in view the welfare of the children. Welfare of the children can only be decided after giving an opportunity to the parties to lead evidence.

8. In **Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari:** (2019) 7 SCC 42 the Hon'ble Supreme Court considered various precedents on the point and held that: -

*"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is*

*ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.*

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

9. The aforesaid view has been followed and reiterated in ***Nirmala v. Kulwant Singh***: (2024) 10 SCC 595, in which the Hon'ble Supreme Court held that:

*"27. ...no hard-and-fast rule can be laid down insofar as the maintainability of a habeas corpus petition in the matters of custody of a minor child is concerned. As to whether the writ court should exercise its extraordinary jurisdiction under*

*Article 226 of the Constitution of India or not will depend on the facts and circumstances of each case."*

10. In ***Nirmala v. Kulwant Singh*** (supra), the Hon<sup>ble</sup> Supreme Court further held that: -

*"29. It can thus be clearly seen that according to the case of the respondent father himself, in the peculiar facts and circumstances of the case, a family environment was required for the child especially from the grandparents and that he had placed the custody of the minor child with the appellant grandmother for taking his care. It can thus clearly be seen that it is not a case that the appellant grandmother had illegally kept the custody of the minor child. It is the respondent father who had placed the custody of the minor child with the appellant grandmother.*

*30. We are of the considered view that in the peculiar facts and circumstances of the case, the High Court ought not to have entertained the habeas corpus petition under Article 226 of the Constitution of India. Since a detailed enquiry including the welfare of the minor child and his preference would have been involved, such an exercise could be done only in a proceeding under the provisions of the Guardians and Wards Act, 1890.*

*31. In any case, we are of the view that compelling a minor child at the tender age of 7 years to withdraw from the custody of his grandparents with whom he has been living for the last about 5 years may cause psychological disturbances."*

11. The learned counsel for the petitioner has submitted that the opposite party no. 5 has filed a regular suit.

12. In the counter affidavit filed by the opposite party no. 5 it has inter alia been stated that the opposite party no. 5 has filed HMA Petition No. 1170/2025 in the Court of Principal Judge,

Family Court, Rohini District Courts, New Delhi under Section 13 of the Hindu Marriage Act, 1955.

13. The learned counsel for the petitioners stated that the petitioners have filed a transfer application before the Supreme Court in which an interim order has been passed on 18.07.2025 staying proceedings of the divorce suit.

14. In view of the foregoing discussion, I am of the view that the children are residing with their father since a considerable period, they are attending their school and they have stated that they are living with their father comfortably and happily, the children cannot be said to be in illegal confinement warranting any interference by this Court in a writ petition seeking issuance of a writ of habeas corpus. The entitlement of custody of children can only be decided in a regular suit by giving opportunity to the parties to lead evidence.

15. Accordingly, the writ petition is **dismissed** leaving it open for the parties to get the issue of custody of children decided by the appropriate Court.

**March 30, 2026**

Pradeep/-

**(Subhash Vidyarthi,J.)**