

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT: HYDERABAD**

CORAM:

*** HON'BLE SRI JUSTICE K. LAKSHMAN**

AND

HON'BLE SMT. JUSTICE P. SREE SUDHA

+ WRIT PETITION No.10657 OF 2023

% Delivered on: 02-08-2023

Between:

Santosh Raj Dulam

.. Petitioner

Vs.

\$ The State of Telangana, rep by its Principal
Secretary for Home, Hyderabad & others

.. Respondents

! For Petitioner

: Mr. Imran Khan, Lr.Sr.Counsel
Representing Mr.Pramod Kumar,
Lr. Counsel

^ For Respondent No.1 to 4
For Respondent No.5

: Spl.Govt.Pleader
: Mr. H.Venugopal, Ld.Sr.Counsel
Rep.Mr.Ravi Kumar Vadlakonda

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> Head Note

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? Cases Referred

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| 1. (2019) 7 SCC 42 | 11. (2010) 1 SCC 501 |
| 2. (1923) AC 603, | 12. MANU/SC/0762/2017 |
| 3. AIR 1964 SC 1625 | 13. (2018) 4 SCC 295 |
| 4. 1973 (2)SCC 674 | 14. AIR 1987 HP 34 |
| 5. 2022 SCC OnLine SC 885 | 15. (2010) 1 SCC 501 |
| 6. (2011) 6 SCC 479 | 16. (2009) 1 SCC 42 |
| 7. (1998) 1 SCC 112 | 17. ((2018) 9 SCC 578 |
| 8. (1951) 1 All.E.R. 1942 | 18. (2019) 7 SCC 311 |
| 9. (2000) 3 SCC 14 | 19. (2021) 12 SCC 376 |
| 10. (2010) 1 SCC 174 | 20. (2020) 3 SCC 67, |
| | 21. (1987) 1 SCC 42 |

HON'BLE SRI JUSTICE K. LAKSHMAN
AND
HON'BLE SMT. JUSTICE P. SREE SUDHA
WRIT PETITION No.10657 OF 2023

ORDER: (Per Hon'ble Sri Justice K. Lakshman)

Heard Mr. Imran Khan, learned Senior Counsel, representing Mr.Pramod Kumar, learned counsel for the petitioner, learned Special Government Pleader for respondent Nos.1 to 4, and Mr. H. Venugopal, learned Senior Counsel, representing Mr.Ravi Kumar Vadlakonda, learned counsel for 5th respondent.

2. This writ petition is filed to direct respondent Nos.2 to 4 to produce his minor son Divith Dulam, a US citizen by birth, holding US Passport bearing No.643488993, currently residing at Hanumakonda, from the illegal custody of respondent No.5 before the Court and give custody of the minor child to him along with his passport, visa papers and other travel documents to comply with the orders dated 27.01.2021 and 22.09.2022 in Case No.20-3-01808-06 *inter alia* modification orders of custody passed by the Superior Court of the State of Washington in and for Clark County.

CONTENTIONS OF THE PETITIONER:-

3. The petitioner got married 5th respondent on 07.11.2015 at Mayuri Gardens, Hanamakonda. Even prior to marriage, both of them were working in USA. It is an arranged marriage. After marriage, they left to USA. They blessed with baby child in USA on 22.02.2019. Thereafter, disputes arose between them. The petitioner filed a petition seeking judicial separation in October, 2020 before the Superior Court of the State of Washington and for Clark County being Case No.20.03.01808-06. In the said petition, it was stated that both the petitioner and 5th respondent are staying separately from 26.09.2020.

4. Vide order dated 27.01.2021, the Superior Court at USA on hearing the arguments of the petitioner drawn up a temporary parenting plan giving the custody of the minor child to both the petitioner and 5th respondent as per the schedule stated in the order. According to the petitioner, 5th respondent contested the said order vehemently. The Superior Court of the State of Washington, USA also gave child support order and maintenance allowance to minor child order on the same day i.e. on 27.01.2021 directing the petitioner to pay monthly allowance of Rs.USD 805 per month for the necessities

of the minor child. The said Court basing on the report of the child custody evaluator vide order dated 22.09.2022 modified its earlier order of parenting plan by amending the parental custody of minor child. Vide the said order, the petitioner was given custody of 5 days and the remaining days to respondent No.5 without there being a cooling period. On the request made by 5th respondent for international travel, the said Court also passed an order dated 22.09.2022 permitting 5th respondent and the minor child to travel India for a period of 45 days. Thus, there is categorical direction to 5th respondent wherein she is bound to return to USA before expiry of 45 days of their travel to India.

5. 5th respondent travelled to India with minor child on 22.09.2022 and was duty bound to return to USA on or before 04.11.2022 i.e. after expiry of 45 days. She failed to return to USA within the aforesaid period and therefore, the said Court issued show cause notice to 5th respondent directing her to appear. The same was not complied by her. The said proceedings are contempt proceedings.

6. According to the petitioner, 5th respondent, instead of returning to USA, filed a petition vide GWOP No.521 of 2022 and also a complaint against him in WPS, Warangal, City Division,

Warangal, and the same was registered as Cr.No.268 of 2022 for the offences under Sections 498-A and 506 of IPC and Sections 3 and 4 of the Dowry Prohibition Act. At the instance of the said police, LOC was also issued against him. On completion of investigation, the Investigating Officer laid charge sheet against the petitioner and the same was taken on file vide S.C.No.329 of 2023. Therefore, according to the petitioner, 5th respondent despite giving unequivocal consent to the adjudication of the child custody before the Superior Court of the State of Washington, USA, did not return to USA and that she abducted the child. Thus, she has violated the order passed by the said Court. She has played fraud on the said Court and also the Courts in India. It is further contends that the GWOP No.521 of 2022 is without jurisdiction. The minor child is suffering with medical issues. He underwent three surgeries. Therefore, doctor should perform surgery and to monitor health condition of the minor child is must. The minor child was born in USA and well settled and comfortable till his return to India till 22.09.2022 and he is adapted to the environment in USA. Minor child has also developed roots in USA as he was engaged in Montessori School and adjusted to the people and environment around him. The illegal detention of the minor child by 5th respondent in India

will cause adverse consequences for his overall development and well being. Thus, according to the petitioner, 5th respondent has the custody of the minor child illegally.

CONTENTIONS OF RESPONDENT No.5:-

7. Whereas, 5th respondent filed counter denying the allegations made by the petitioner. According to her, their marriage was performed in India and therefore, Court at USA has no jurisdiction and it has passed orders *ex parte*. The said Court did not consider the civil aspects and consequences. The petitioner started harassing her and was staying with his girl friend by name Manikanti Ajjarapu. She has explained the harassment meted out by the petitioner in paragraph No.12 of the counter affidavit. The petitioner started insisting 5th respondent to agree for amicable divorce for which 5th respondent failed to accept and therefore, the petitioner harassed her. She came to India to see her mother who is not well. She lost her father. Therefore, according to her, she has not violated any order passed by the Superior Court, USA and she is taking care of minor child. She has not blocked her child for father at all and the child is communicating with his father through video Calls. She came to India along with minor child with American Court approval due to her father's death. Due to delay

in visa process and current economical situations in US, she lost job. She stayed in USA on work visa. Without job and visa, she cannot go back to USA. Whereas, the petitioner is USA Green Card holder and can stay in USA and India. The petitioner causing many troubles to her and making false allegations and blackmailing her in several ways. Both the petitioner and his parents are threatening 5th respondent and minor child and demanding to agree for mutual divorce. She never agreed for judicial separation and divorce in USA. With the said contentions, she sought to dismiss the present petition.

FINDINGS OF THE COURT:-

8. The aforesaid facts would reveal that minor child Divith Dulam was born in USA. Disputes arose between the petitioner respondent No.5. Admittedly, petitioner moved to Superior Court of Washington at USA and the said Court passed orders dated 27.01.2021 and 22.09.2022. Both the said orders are relevant and the same are extracted below:-

Dated 27.01.2021

A "The child is scheduled to live with Shailaja Chintha, except when the child is scheduled to live with Santosh Dulam on:

OTHER: Petitioner shall have visitation with the child for up to 4 overnights every 10 days (there will be at least 10 days

in between visits). Visitation shall take place where the child is located. Petitioner shall have his residential time from 6pm on Thursday to 6pm on Monday every other week."

Dated: 22.09.2022

The Child is scheduled to live with Shailaja Chintla, except when the child is scheduled to live with Santosh Dulam on:

OTHER: Petitioner shall have residential time from pick up from daycare/school on Thursday until mother picks up the child from daycare/school on Monday. When there is no school/daycare the receiving parent shall pick up from the other parents' home at 6.00 p.m. When there is Petitioner will also have residential time on the Thursday off week from Thursday at 6.00 pm to Friday at 6.00 p.m.

Concerning Respondent's Motion for International Travel:

- a. Respondent will provide Petitioner with specific dates of her travel prior to leaving for India and will provide Father with an itinerary as soon as the flight is booked, as well as the address that she will staying and contact information. The child's trip shall not exceed forty-five days.
- b. Father we receive makeup time for any visitation Temporary Parenting Plan missed while the child is in India (including the newly adopted Thursday overnight). The parties are encouraged to work out makeup time. If they are unable to agree, Mother shall receive at least four days of visitation, every ten days while makeup time is occurring.
- c. If the child has remained in India for more than forty five days, Father may travel to India and arrange to return the child home. Father's airfare will be split pro rata, Any visitation under the Temporary Parenting Plan missed by Mother will count towards Father's time. d.....

e. Father will have unhampered access to contacting the child while travelling and will receive no few than two video visits per week"

9. According to the petitioner, 5th respondent has violated the said order dated 22.09.2022 and detained the minor child illegally.

10. Though India is not a signatory to Hague Convention, Indian Civil Courts have to honour order passed by the Superior Court of Washington, USA. Mr. Imran Khan, learned Senior Counsel appearing for the petitioner and Sri H.Venugopal, learned Senior Counsel appearing for 5th respondent relied upon several judgments rendered by the Apex Court on the custody of the minor child born in foreign country and also maintainability of GWOP filed by wife in India.

11. Perusal of the said judgments relied upon by the parties would reveal that the issue of custody of minor child born in foreign country is no longer *res integra*. The lis involved in the present writ petition gives rise to consider the following questions of law:-

1. *Whether the principles of best interest of the child and welfare of the child override the principles of judicial custody and first strike?*

2. *Whether the matters related to custody of minor child fall within the scope of writ of Habeas Corpus?*
3. *Whether the GWOP is maintainable when the child is not an Indian citizen?*

12. With regard to the maintainability of the writ of *Habeas Corpus*, it is relevant to note that in **Tejaswini Gaud vs Shekhar Jagdish Prasad Tewari**¹, the Apex Court had an occasion to deal with the maintainability of the writ of *Habeas Corpus* with regard to the child custody born outside India. Referring to the principle laid down by it in several judgments, the Apex Court held as follows:

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

13. In **P.Ramanatha Aiyar's Law Lexicon (1997 Edition)**, it is stated as follows:-

¹ (2019) 7 SCC 42

“ The ancient prerogative writ of Habeas Corpus takes its name from the two mandatory words Habeas. Corpus, which it contains at the time when it, in common with all forms of legal process, was framed in Latin. The general purpose of these writs, as their name indicates, was to obtain the production of an individual.”.

14. In **Secretary of State for Home Affairs Vs. O’Brain**², it has been observed that it is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the 33rd year of Edward –I. It has through the ages been jealously maintained by the Courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege.

15. Referring to principle laid down by it, in **Mohammad Vikram Hussain Vs. State of Uttar Pradesh**³ and **Kanu Sanyal Vs. District Magistrate, Darjeeling**⁴ and other judgments, Apex Court in **Rajeshwari Chandrasekhar Ganesh Vs. State of Tamil**

² (1923) AC 603,

³ AIR 1964 SC 1625

⁴ 1973 (2)SCC 674

Nadu⁵ held that in child custody matters where it is alleged illegal custody of the child, writ of Habeas Corpus is maintainable. It further held that in a matter relating to a claim for custody of a child, the principal issue which should be taken into consideration is as to whether from the facts of the case, it can be stated that the custody of the child is illegal.

16. Thus, according to this Court, the present writ of *Habeas Corpus* filed by the petitioner alleging illegal detention of the minor child by 5th respondent is maintainable.

17. In **Ruchi Majoo Vs. Sanjeev Majoo**⁶, the Apex Court considering 11 years old minor born in USA alleged to have been detained illegally, held that the proceedings in the nature of *Habeas Corpus* are summary in nature, where the legality of the detention of the alleged *detenu* is examined on the basis of affidavit placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its *parens patriae* jurisdiction. A High Court may,

⁵ 2022 SCC OnLine SC 885

⁶ (2011) 6 SCC 479

therefore, invoke its extra ordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the court views the rival claims, if any, to such custody.

18. It was further held that 'comity of courts' principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so, where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. With the said findings, the Apex Court held that the repatriation of the minor to the USA, on the principle of 'comity of courts' does not appear to be an acceptable option worthy of being exercised at that stage. Dismissal of the application for custody in disregard of the attendant circumstances referred to above was not in the view of the Apex Court, a proper exercise of discretion by the High Court. Interest of the minor shall be better served if he continued in the custody of his mother.

19. In **Dhanwanti Joshi Vs. Madhav Unde**⁷, the Apex Court considered the following points:-

- (1) Could the Family Court and High Court have ignored the orders passed in favour of the appellant in the Habeas Corpus Case on 15.4.86 and the exparte order in the Guardian & Wards Act case dated 23.11.87 and the orders of refusal of the High Court or Supreme Court in 1990 to set aside the latter orders and could the respondent file a fresh case in the Family Court in 1993 to claim custody, and if so is whether there is proof of changed circumstances between 1990 and 1993 or 1997 warranting the shifting of custody to the respondent-father, and whether the capacity of the respondent to give education to the child in USA could alone be sufficient ground to shift custody?
- (2) Do the fact relating to the appellant bringing away the child to India in 1984 contrary to an order of the US Court or not producing the child in the Bombay High Court have any bearing on the decision of the Courts in India while deciding about the paramount welfare of the child in 1993 or 1997?
- (3) In case the respondent is not entitled to permanent custody, is he entitled to temporary custody or visitation rights.

Referring to the principle laid down in **Mckee Vs. Mckee**⁸, the Apex Court held as follows:-

..... In that case, the parties, who were American citizens, were married in USA in 1933 and lived there till Dec, 1946. But they had separated in Dec. 1940. On 17.12.1941, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of

⁷ (1998) 1 SCC 112

⁸ (1951) 1 All.E.R. 1942

the mother. At that stage, the father took away the child to Canada. In habeas corpus proceedings by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada, once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of the permanent consideration and the order of a foreign Court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign Court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child. The order of the foreign Court in US would yield to the welfare of the child. 'Comity of Courts demanded not its enforcement, but its grave consideration'. This case arising from Canada which lays down the law for Canada and U.K. has been consistently followed in latter cases. This view was reiterated by the House of Lords in *J v. C* (1970 AC 668). This is the law also in USA (see 24 American Jurisprudence, para 1001) and Australia. (See *Khamis v. Khamis* ((1978) 4 Fam. L.R 410 (Full Court (Aus))).

20. The Apex Court also considered the fact that India is not a signatory to the Hague convention, 1980 on 'Civil Aspects of International Child Abduction' held that so far as non-convention countries are concerned, or where the removal relating to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on

merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. It was held that the Courts overall consideration must be the child welfare. There is nothing for the Judge to apply the provisions of Article 13 of the Convention by ordering child's return unless grave risk is established. With the said findings, the Apex Court rejected the contention of the respondent/husband therein and held that the order passed by the Bombay High Court for protection is contrary to the orders of the US Courts.

21. It is relevant to note that the Apex Court reiterated the said principle in **Ruchi Majoo** (supra).

22. In **Sarita Sharma Vs. Sushil Sharma**⁹, the Apex Court while dealing with the appeal filed against the order in writ petition of Habeas Corpus filed before the High Court in respect of two minor children aged 7 and 3 years respectively, held that the children are in illegal custody of the mother, the High Court allowed the petition and directed the mother to restore the custody of two children to husband who was in turn permitted to move the child to USA without any hindrance.

⁹, (2000) 3 SCC 14

23. In the said case one of the contentions urged was that the removal of child from USA to India, against the order granted to the father of the custody of the minor children, passed by the Court in USA though a relevant factor, cannot override the consideration of the welfare of the minor children and allowed the appeal setting aside the judgment of the High Court. Considering the fact that the husband was staying with his mother aged about 80 years and there was no one else in the family to look after the child, the Apex Court held that it is not proper to give the custody of the child to the father who was addicted to consume excessive alcohol.

24. In **V. Ravi Chandran Vs. Union of India**¹⁰, the Apex Court while dealing with the case of custody of a child removed by a parent from one country to another in contravention to the orders of the court where the parties had set up their matrimonial home, held that the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to

¹⁰ (2010) 1 SCC 174

child's welfare be investigated in a court in his own country. If the court is of a view that an elaborate enquiry is necessary, the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

25. The Apex Court also took the same in **Shilpa Aggarwal vs Aviral Mittal**¹¹.

26. In **Nithya Anand Raghavan vs. State of NCT of Delhi**¹², a three Judge Bench of Apex Court considering the principle laid down by it in **Dhanwanti Joshi and V.Ravi Chandran** (supra) and held in paragraph No.40, 42, 46, 47 and 48 as follows:-

40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". 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 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

¹¹ (2010) 1 SCC 501

¹² MANU/SC/0762/2017

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 inspite 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 and objects to its return. We are in respectful agreement with the aforementioned exposition.

42. The consistent view of this court is that if the child has been brought within India, the Courts in India may conduct (a) summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the Court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the Court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign Court. In an elaborate inquiry, the Court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign Court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the Court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle

of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native state.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the Court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign Court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign Court or to 16 113 (2004) Delhi Law Time 823 resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.

48.. The next question to be considered by the High Court would be whether an order passed by the foreign court, directing the mother to produce the child before it, would render the custody of the minor unlawful? Indubitably, merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se. As in the present case, the order passed by the High Court of Justice, Family Division London on 8 th January, 2016 for obtaining a Wardship order reads thus:

“Order made by His Honour Judge Richards sitting as a Deputy High Court Judge sitting at the Royal Courts of Justice, Strand, London WC2A 2LL in chambers on 8 January, 2016 IN THE MATTER OF THE CHILDREN ACT 1989 AND IN THE MATTER OF THE SENIOR COURTS ACT 1981 The Child is Nethra Anand (a girl, born 7/8/09) AFTER HEARING Counsel paul Hephher, on behalf of the applicant father AFTER consideration of the documents lodged by the applicant.

IMPORTANT WARNING TO NITHYA ANAND RAGHAVAN If you NITHYA ANAND RAGHAVAN disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized. If any other person who knows of this order and does anything which helps or permits you NITHYA ANAND RAGHAVAN to breach the terms of this order they may be held to be in contempt of court and may be imprisoned, fined or have their assets seized. You have the following legal rights:

- a) to seek legal advice. This right does not entitle you to disobey any part to this order until you have sought legal advice;
- b) to require the applicant’s solicitors, namely Dawson Cornwell, 15 Red Lion Square, London WC1R 4QT, tel 020 7242 2556 to provide you with a copy of any application form(s), statement(s), note of the hearing;
- c) to apply, whether by counsel or solicitor or in person, to Judge of the Family Court assigned to hearing urgent applications at the Royal Courts of Justice, Strand, London, if practicable after giving notice to the applicant’s solicitors and to the court, for an order discharging or varying any part of this order. This right does not entitle you to disobey any part of this order until your application has been heard;
- d) if you do not speak or understand English adequately, to have an interpreter present in court at public expense in order to assist you at the hearing of any application relating to this order The parties

1. The Applicant is ANAND RAGHAVAN represented by Dawson Cornwell Solicitors The Respondent is NITHYA ANAND RAGHAVAN Recitals

2. This order was made at a hearing without notice to the respondent. The reason why the order was made without notice to the respondent is because she left England and Wales on or about 2 July 2015 and notice may lead her to take steps to defeat the purpose of the application and fail to return the child.

3. The Judge read the following documents:

a. Position statement b. C67 application and C1A form c. Statement of Anand Raghavan with exhibits dated 8.01.2016.

4. The court was satisfied on a provisional basis of the evidence filed that a. NETHRA ANAND (a girl born on 7/8/09) was on 2 July 2015 habitually resident in the jurisdiction of England and Wales.

b. NETHRA ANAND (a girl born on 7/8/09) was wrongfully removed from England on 2 July, 2015 and been wrongfully retained in India since. c. The courts of England and Wales have jurisdiction in matters of parental responsibility over the child pursuant to Articles 8 and 10 of BIIR.

5. The Father has agreed to pay for the cost of the flights for the Mother and child in returning from India to England. He will either purchase the tickets for the Mother and child himself, or put her in funds, or invite her to purchase the tickets on his credit card, as she may wish, in order for her to purchase the tickets herself. Undertakings to the court by the solicitor for the applicant

6. The solicitors for the applicant undertake; a. To issue these proceedings forthwith and in any event by no later than 4 pm 11 January 2016;

b. To pay the ex parte application fee forthwith and in any event by no later than 4 pm 11 January 2016; AND NOW THEREFORE THIS HONOURABLE COURT RESPECTFULLY REQUESTS:

7. Any person not within the jurisdiction of this Court who is in a position to do so to co-operate in assisting and securing the immediate return to England and Wales of the Ward NETHRA ANAND (a girl born on 7/8/09) IT IS ORDERED THAT:

8. NETHRA ANAND (a girl born on 7/8/09) is and shall remain a Ward of this Court during the minority or until further order.

9. The respondent mother shall return or cause the return of NETHRA ANAND (a girl born on 7/8/09) forthwith to England and Wales, and in any event no later than 23.59 on 22 January 2016.

10. Every person within the jurisdiction of this Honourable Court who is in a position to do so shall co-operate in assisting and securing the immediate return to England and Wales of NETHRA ANAND (a girl born on 7/8/09) a ward of this Court.

11. The applicant's solicitor shall fax copies of this order to the Office of the Head of International, Family Justice at the Royal Courts of Justice, the Strand, London WC2A 2LL (DX4550 Strand RCJ: fax 02079476408); and (if appropriate) to the Head of the Consular Division, Foreign and Commonwealth Office Spring Gardens London SW1A 2PA, Tel: 02070080212, Fax 02070080152.

12. The matter shall be listed for directions at 10:30 am on 29 January 2016 at the Royal Courts of Justice, the Strand, London Wc2A 2LL, with a time estimate of 30 minutes, when the court shall consider what further orders shall be made. The Court may consider making declarations in the terms of paragraph 4 above.

13. The respondent mother shall attend at the hearing listed pursuant to the preceding paragraph, together with solicitors or counsel if so instructed. She shall file and serve by 4 pm 27 January, 2016 a short statement responding to the application.

14. This order may be served on the respondent, outside of the jurisdiction of England and Wales as may be required, by way of fax, email or personally in order for the court to deem that it constitutes good service.

15. Costs reserved.

27. In paragraph No.51, the Apex Court held that for considering the factum of interests of the child, the court must take into account all the attending circumstances and totality of the situation. That will have to be decided on case to case basis.

28. The Apex Court reiterated that the exposition in **Dhanwanti Joshi** (supra) is a good law and has been quoted with approval by three Judge Bench of Apex Court in **V. Ravi Chandran** (supra). The Apex Court approved the view taken in **Dhanwanti Joshi** (supra), *inter alia* in paragraph No.33 held that so far as non-convention

countries are concerned, or where the removal related to a period before adopting the convention, the law is that the Court to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. The summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land and removed to another country where, may, be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, - for these are all acts which could psychologically disturb the child. Again the summary jurisdiction is exercised only if the Court to which the child has been removed is moved promptly and quickly. The paramount consideration must be the interest of the child.

29. The same view was also taken by the Apex Court in **Jasmeet Kaur vs Navtej Singh**¹³.

¹³ (2018) 4 SCC 295

30. In **Tejaswini Gaud** (supra), the Apex Court held that the court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

31. In **Kamla Devi v. State of H.P.**¹⁴ it was held that in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human statutes nor by strict rules of evidence or procedure not by precedents. In selecting proper guardian of an minor, the paramount consideration should be the welfare and well being of the child. In selecting a guardian, the Court is exercising *parens patriae* jurisdiction and is expected, may bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above,

¹⁴ AIR 1987 HP 34

physical comforts, moral and ethical values cannot be ignored. They are equally, even more important, essential and indispensable considerations.

32. In **Shilpa Aggarwal vs Aviral Mittal**¹⁵, the minor girl is of 3½ years. The appellant therein also obtained employment in U.K. and both the Respondent No.1 and the appellant therein acquired the status of permanent residents of U.K. prior to the birth of the child. Being born in the United Kingdom, the child acquired British citizenship and was the holder of a British passport, although, her parents continued to hold Indian passports. The UK Court has not passed any order to separate the child from the mother until final decision was taken with regard to custody of the child. Therefore, the Apex Court considering the facts and circumstances of the said case and also in the interest of the minor child held that it is proper to return the child to UK by applying doctrine of comity of Courts. The said decision was rendered after summary enquiry of facts of that case. It was further held that the predominant criteria is the best interest and welfare of the minor child.

¹⁵ (2010) 1 SCC 501

33. In **Gaurav Nagpal vs Sumedha Nagpal**¹⁶, the Apex Court as follows:-

The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word "welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well being. Nor can the tie of affection be disregarded.

34. **Mrs. Kanika Goel vs The State Of Delhi**¹⁷, Apex Court held that the doctrine of intimate contact and closest concern are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom etc. with the portent of mutilative bearing on the process of overall growth and grooming. It further held that the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the

¹⁶ (2009) 1 SCC 42

¹⁷ ((2018) 9 SCC 578

threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful.

35. Mr. Imran Khan, learned Senior Counsel placed reliance on the judgments of the Apex Court in **Lahari Sakhamuri Vs. Sobhan Kodali**¹⁸ and **Nilanjan Bhattacharya Vs. State of Karnataka**¹⁹. The Apex Court in **Lahari Sakhamuri** (supra), considered the admission in the declaration form annexed to the application that no mode of domestic violence or abuse was ever subjected upon her or upon the minor children by husband. The respondent had purchased to and fro tickets of the appellant /wife therein and of minor children as also of his mother in law who was staying together in their matrimonial home, US with return tickets of 24th April, 2017 but after coming to India on 23rd March, 2017, because of the alleged death of her

¹⁸ (2019) 7 SCC 311

¹⁹ (2021) 12 SCC 376

maternal grandmother, the appellant therein refused to return back and was advised to file a Guardianship Petition before the Family Court, Hyderabad on 12 the April, 2017 and took the *ex parte* order concealing the material facts from the Family Court that such a petition is pending in USA filed at her instance and there was an order passed on 21st December, 2016 restraining both the parties not to change residence of the children which would affect the other parties ability to exercise custodial rights. However, it was held that the best interest of the children being of paramount importance will be served if they return to USA and enjoy their natural environment with love, care and attention of their parents including grandparents and to resume their school and be with their teachers and peers. The Apex Court also considered the order passed by the USA Court seeking divorce, equitable distribution of marital property, primary physical and shared legal custody of the minor children.

36. Apex Court considered the following as the crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parents:-

1. Maturity and judgment,
2. Mental stability,

3. Ability to provide access to schools,
4. Moral character,
5. Ability to provide continuing involvement in the community,
6. Financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parents as an individual.

37. In **Yashitha Sahoo Vs. State of Rajasthan**²⁰, the Apex Court held that the doctrine of Comity of Courts is a very healthy doctrine. If Courts in different jurisdictions do not respect the orders passed by each other, it will lead to contradictory orders being passed in different jurisdictions. No hard and fast guidelines can be laid down in this regard and each case has to be decided on its own facts. While considering welfare of the child as paramount consideration, Apex Court further held that the child is the victim in custody battles. In this fight of egos and increased acrimonious battles and litigations between two spouses, the parents who otherwise loved a child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. Therefore, the Court must be very vary of what is said by each of the spouses. A child, especially a child

²⁰ (2020) 3 SCC 67,

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.

38. It was further held that while consideration visitation rights, courts shall consider that a child has 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.

39. In **Elizabeth Dinshaw Vs. Arvind M. Dilshaw**²¹ where father brought the child secretly to India from USA in violation of the orders passed by Court at USA, Apex Court held that writ of Habeas Corpus is maintainable, mother is entitled to child's custody with liberty to take the child to USA, father may, if he so desires, tender unconditional apology before the American Court for contempt and seek permission for restoration of visitation rights.

40. In **Nilanjan Bhattacharya** (supra), considering the age of the minor child is 4 years and the wife has not shown any particular inclination to retain the child with her in India, the appellant has provided extensive details of his association with the child and the steps which he has taken since the birth of the child to be associated with the upbringing of the child. The husband would share on the video conferencing platform, the videos which the appellant has of his

²¹ (1987) 1 SCC 42

association with numerous activities of the child. On consolation of the said aspects, the Apex Court also considered where a child has been removed from their native country to India, it has held that it would be in the best interests of the child to return to their native country if the child has not developed roots in India and no harm would be caused to the child on such return.

Principle of Comity:-

Comity refers to courts of one state or jurisdiction respecting the laws and judicial decisions of other jurisdiction whether state, federal or international not as a matter of obligation but out of deference and mutual respect. It is referred to as Judicial comity or Comity of Courts.

Principle of First Strike:-

The principle of first strike means that due respect and weight must be given to a substantive order prior in point of to a substantive order passed by another Court (foreign domestic), provided that the jurisdiction of the Foreign Court is not doubted.

Doctrine of Intimate contact and closest concern:-

It indicates that the court in whose jurisdiction, the child has been living for many years is the court **that has the closest contact with the child and therefore is the place where the issues of child custody and ancillary issues should be determined.**

Principle of best interest of a child:-

It indicates that the best interest of a child shall be taken as a primary consideration when different Interests are under consideration. This principle should be implemented when any decision is affecting a child. If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.

41. The sum and substance of the aforesaid judgments is as follows:-

- i. Proceedings in writ of *Habeas Corpus* are summary in nature.

- ii. Writ of Habeas Corpus is maintainable in child custody matters.
- iii. Welfare of minor is the paramount consideration while deciding matters with regard to child custody and it will prevail over Principle of Comity, Principle of First Strike.
- iv. Since the proceedings in writ of Habeas Corpus are summary in nature, the same have to be decided basing on the affidavits filed by the parties.
- v. Each case has to be examined basing on its own facts and circumstances and on case to case basis.

42. Habeas Corpus proceedings is not to justify or examine the legality of the custody. The Habeas corpus proceedings is a medium through which custody of child is addressed to the discretion of the Court. Habeas Corpus is a prerogative writ which is an extra ordinary remedy and the writ is issued where in the circumstances of a particular case ordinary remedy provided by the law is either invaluable or is ineffective, otherwise a writ will not be issued in a child custody matters. The power of High Court in granting writ is qualified only in cases where the detention of minor is to a person who is not entitled to his legal custody. In view of the pronouncement

issue in question in Supreme Court and High Courts, the child custody matters, writ of Habeas Corpus is maintainable where it is approved that the detention of a minor child or parents and others is illegal without any authority of law.

43. In the aforesaid cases, the Apex Court has taken a view that the High Court may invoke extra ordinary jurisdiction to determine the legality of the detention, however, the Court has taken a view that the order of foreign Court must yield to the welfare of the child. The High Court has to decide the Habeas Corpus petition by conducting summary proceedings basing on the affidavits filed by the parties. The High Court has to examine each case basing on its own facts and circumstances and case to case basis. Finally High Court has to decide whether the custody is lawful or not.

44. As stated supra, writ of Habeas Corpus is prerogative writ and is an extraordinary remedy. It is a writ of right not a writ of course and may be granted only when the reasonable or probable cause has been shown.

45. In the light of the aforesaid legal position, coming to the facts of the case, as discussed supra, the petitioner himself moved to Superior Court of Washington, USA by way of filing a petition

seeking judicial separation. The Said Court passed the aforesaid two orders dated 27.01.2021 and 22.09.2022. Vide order Dated 22.09.2022, the said Court permitted the minor child and 5th respondent to leave India for 45 days. If the child has remained in India for more than forty five days, father may travel to India and arrange to return the child home. Father's airfare will be split pro-rata. Any visitation under the temporary parenting plan missed by mother will count towards father's makeup time. Father will have unhampered access to contracting the child while travelling and will receive no few than two video visits per week.

46. According to the 5th respondent, she could not travel to USA due to death of her father and ill-health of her mother. She lost her job and in view of the proceedings initiated by the petitioner and she is not in a position to go to USA. Therefore, under compelling circumstances, she has filed GWOP No.521 of 2021 and also lodged a complaint against the petitioner therein for the offences punishable under Section 498-A and 506 of IPC and Sections 3 and 4 of the Dowry Prohibition Act. The Investigating Officer on completion of investigation laid charge sheet against the petitioner and the said case is pending.

47. She has made serious allegations against the petitioner herein that he is maintaining close relation with his friend i.e. Manikanti Ajjarapu. According to her, the petitioner harassed her both mentally and physically by maintaining close relation with his girl friend. Though there are specific allegations made by the petitioner in the counter affidavit, the petitioner filed reply stating that the petitioner herein has not made the said allegations before the Superior Court at USA but for the first time she is making the said allegations in the counter. He has also further stated that the allegations made by 5th respondent with regard to his girl friend are false allegations and the said aspects are not necessary in the present case. There is no specific denial with regard to the allegations made by the 5th respondent in the reply affidavit.

48. There is no dispute that the minor child is suffering with certain health issues i.e. Hypospadias and Lymphatic Malformation. He underwent three surgeries. The said fact is not disputed. Even according to the 5th respondent, there are specialized doctors in Warangal where she is residing. Even she can get treatment of the minor child in Hyderabad.

49. It is relevant to note that the petitioner's parents are in Hyderabad. He is a working person in USA. He has no other support in USA. The minor child is only 4 years. Therefore, welfare of the minor child is paramount consideration while deciding this writ of Habeas Corpus with regard to child custody.

50. In the present case, giving custody of the minor child to the petitioner to enable him to take the minor boy to USA is not proper. Whereas, 5th respondent is staying with her mother. Minor child did not create roots in USA. On the other hand, he has rooted in India. However, 5th respondent has already filed the aforesaid GWOP No.521 of 2021 and the petitioner herein has filed a petition under Order VII Rule 11 of CPC stating that the said petition is not maintainable. It is relevant to note that the Apex Court, other courts and this Court vide order dated 23.06.2023 in FCA No.225 of 2019 held that the GWOP filed by mother or father in respect of child born in foreign is maintainable considering the aspect of 'ordinary residence'. However, the said aspect will be decided by the Court concerned in the aforesaid application.

51. The aforesaid stated facts would reveal that petitioner herein has already initiated in view of the contempt proceedings, 5th

respondent is not in a position to go to USA. However, she has stated in the counter that due to the prevailing circumstances, she has lost job and she has to take care of her mother and she is not in a position to go to USA.

52. In view of the aforesaid facts and legal position, we are of the considered view that the minor child is not in illegal custody of 5th respondent as alleged by the petitioner. He has already initiated contempt proceedings against 5th respondent alleging violation of order dated 22.09.2022 of the Superior Court of Washington, USA. In the counter filed by 5th respondent, she has specifically contended that she never blocked the child from the father at all and child is communicating with his father through video calls. She is also submitted call history to the said effect.

53. In view of the aforesaid discussion, this writ petition is disposed of holding that :-

- i. Minor child namely Divith Dulam is not in illegal custody of 5th respondent as alleged by the petitioner. Therefore, production of the minor child before this Court handing over to the petitioner does not arise.

- ii. Liberty is granted to the petitioner and 5th respondent to take all the pleas and contentions which they have taken in the present writ petition in GWOP No.521 of 2021.
- iii. Liberty is also granted to the petitioner to seek visitation rights in GWOP No.521 of 2021.
- iv. 5th respondent shall permit the petitioner to communicate with the minor child i.e. Divith Dulam without creating any hurdle to the petitioner.

As a sequel, the miscellaneous petitions, if any, pending in the writ petition shall stand closed.

JUSTICE K. LAKSHMAN

JUSTICE P. SREE SUDHA

Date:02.08.2023.

Note: L.R.Copy to be marked.

b/o. vvr