REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 402 OF 2021

RAJESWARI CHANDRASEKAR GANESH ...PETITIONER(S)

VERSUS

THE STATE OF TAMIL NADU & ORS. ...RESPONDENT(S)

J U D G M E N T

J.B. PARDIWALA, J. :

1. This writ petition under Article 32 of the Constitution of India involves a contest over the custody of children born out of the wedlock between the petitioner-mother and the respondent no.2-father. The respondents nos.4 and 5 respectively are the brother and father of the respondent no.2.

2. The petitioner-mother has prayed for the following reliefs :

> *"(a) Issue an appropriate writ, order or direction in the nature Habeas Corpus to the Respondent No.1 to immediately trace and produce the minor children Lakshaya Ganesh and Bhavin Sai Ganesh before this Hon'ble Court and deliver their custody to the Petitioner Mother so as to repatriated them to the U.S. in compliance with the Order passed by the U.S. Court dated 30.07.2021.*

(b) issue a direction to the Respondent No.3/Director of CBI to trace the minor children Lakshaya Ganesh and Bhavin Sai Ganesh and to produce them before this Hon'ble Court, since the Respondent No.2 is not traceable.

(c) issue an appropriate writ, order or direction in the nature Habeas Corpus to Respondent No.2 to cooperate with anyone appointed by the Petitioner Ex-Wife to transport the minor children – Lakshaya Ganesh and Bhavin Sai Ganesh to the United States within a time frame;

(d) Pass such other order or further orders and directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice."

3. The case put up by the petitioner-mother may be summarised as under :

4. The marriage between the petitioner and the respondent no.2 was solemnized on 31st October 2008 as per the Hindu rites and rituals at Chennai, India. Within one month from the date of the marriage, the parties migrated to the Bear, Delaware, USA.

5. The respondent no.2, at the relevant point of time, was working with the Satyam Computers. Sometime in May 2009, the parties were constrained to return to Chennai, India, as the project that the respondent no.2 had been working on with the Satyam Computers got terminated on account of some internal issues in the company.

6. On 7th October 2009, the parties were blessed with a

daughter named Lakshaya Ganesh. It appears from the materials on record that sometime in January 2012, the respondent no.2 was able to secure a job in Kansas, USA. Since 2012, the parties have been residing in the USA.

7. It further appears that between April 2012 and November 2012, the respondent no.2 lost several jobs, and in such circumstances, the parties had to shift from Kansas, USA, to Boston, Massachusetts, USA. Sometime later, they shifted to Findlay, Ohio, USA. In January 2012, the minor daughter Lakshaya Ganesh started her preschool at the Owen's Day Care, Findlay, Ohio, and thereafter, was admitted to a kindergarten at the Lincoln Elementary School, Findlay, Ohio. While the minor daughter Lakshaya was studying in the kindergarten, the teachers over there noticed that Lakshaya was a gifted child, i.e. a child with a remarkable IQ level. The parties were blessed thereafter with a son named Bhavin Sai Ganesh on 20th July 2013 at the Blanchard Valley Hospital, Findlay, Ohio. The minor son Bhavin Sai Ganesh is a U.S. citizen by naturalization and holds an American passport.

8. In March 2016, the petitioner cleared her GRE and TOEFL and secured admission in the Cleveland State University Ohio, USA. The respondent no.2, on the other hand, lost yet another job.

9. It is the case of the petitioner that she started living in a room with eight other girls and her minor children. She attended the university and had to take up two jobs to feed and take care of herself and her minor children.

10. By December 2016, both the children started going to school. It is her case that she used to take care of her children in all respects. Sometime in August 2016, the respondent no.2 moved for yet another job to Milwaukee, Wisconsin, and in such circumstances, the petitioner had to stay all alone with the minor children and take care of them.

11. In May 2018, the petitioner completed her Master's in Computer and Information Science and also obtained a Graduate Certificate in Data Analytics with the GPA of 3.64. She started working with the G&S Metal Products. On the other hand, in April 2019, the respondent no.2-father managed to find a full time job in Michigan, USA.

12. It is the case of the petitioner that once the respondent no.2 was able to procure a full time job in Michigan, USA, he started conceiving ideas of taking away the minor children.

13. It is the case of the petitioner that on 1st June 2019, the respondent no.2 picked up the minor children and left for Michigan, USA, from Cleveland, Ohio, without informing the petitioner-mother.

14. It is alleged that the respondent no.2 also took away all the legal documents of the petitioner including her passport, State ID, home keys, car keys along with the documents of the minor children.

15. It is alleged that the petitioner was locked in her own house. It is also alleged that with a view to ensure that the petitioner had no recourse/redressal, the respondent no.2, before leaving for Michigan, USA, lodged a false complaint with the local police that the petitioner was mentally ill and that she had run away from a mental ward.

16. In such circumstances referred to above, the petitioner was constrained to immediately file an Emergency Motion for Temporary Custody of the minor children along with a complaint for divorce before the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio. The court concerned, vide order dated 17th June 2019, granted temporary custody of the minor children to the petitioner.

17. It is alleged that despite such order being passed by the court of Common Pleas referred to above, the respondent no.2 paid no heed to such order and continued to keep the children away without allowing them to talk with their mother.

18. It appears that the petitioner also filed for an Emergency Motion restraining the removal of the minor children from the

jurisdiction of the Ohio Court. The court concerned passed a restraint order in favour of the petitioner on the same date, i.e. 17th June 2019.

19. Sometime in July 2019, one Ms. Megan was appointed by the US Court as the *guardian-ad-litem*. However, the order granting the custody of the minor children to the petitioner was not acted upon by the respondent no.2.

20. In August 2019, the US Court directed supervised visitation and referred the parties to mental evaluation experts.

21. It is the case of the petitioner that despite the custody order dated 17th June 2019 passed in favour of her, the respondent no.2, without seeking permission of the US Court and without informing the petitioner, removed the minor children from the specialized school in Ohio to Allegan, Michigan. While doing so, the respondent no.2 did not even furnish the details of the petitioner-mother including her contact number, etc. so as to completely alienate the petitioner from her children.

22. It is the case of the petitioner that thereafter the respondent no.2 started administering threats that he would take away the children to India. As a result of such threats, the petitioner was constrained to bring the necessary facts to the notice of the Court concerned. The Court concerned directed that

the passport of both the minor children be put in the Court's custody.

23. As the respondent no.2 was not able to remove the minor children from the USA, he decided to alienate the children from the petitioner-mother by refusing her unsupervised visitation. It is alleged that the respondent no.2 prevented the children from reaching out to their mother and it was only with the intervention of the expert evaluator, namely Dr.Mark Lovinger, that the petitioner was allowed to spend time with the minor children.

24. In November 2019, both the expert evaluators, submitted their opinion, stating that the petitioner was fit to have unsupervised time with the children and there was no merit in any of the allegations levelled by the respondent no.2.

25. In February 2020, the petitioner was able to procure a new job and obtained H1B visa via sponsorship. The petitioner moved back to Findlay, Ohio, where the minor son was born and was able to secure a new apartment with good facilities for the children. However, according to the petitioner, the respondent no.2 failed to abide by the custody order dated 17th June 2019 and also failed to abide by the evaluation reports recommending unsupervised visitation to the petitioner *qua* the minor children. It is alleged that the respondent no.2 declined to bring the

children to the petitioner and allowed her to visit them only in his presence.

26. It appears that a shared parenting plan was arrived at between the parties vide order dated 12th May 2021 passed by the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio. The shared parenting means the parents share the rights and responsibilities as provided for in a plan approved by the Court as to all or some of the aspects of the physical and legal care of their children. The mother and the father together, under a shared parenting agreement, are granted custody, care and control of the minor children until further order that may be passed by the Court subject to certain terms and conditions. By virtue of the shared parenting plan referred to above, both the parties got joint custody of their children. The visitation schedule was clearly laid down in the shared parenting plan dated 12th May 2021. The parties agreed to not relocate without the consent of the other party and without the Court's permission by way of a 60 day prior notice and the passports of the children were to stay in alternation with the non-custodian parent while the children were in the custody of the other parent.

27. It appears that a separation agreement was also entered upon between the parties dated 27th July 2021. On 28th July

2021, the respondent no.2 sent an email to the US Court in the form of an intimation that he would like to take his minor children on a vacation to India and asked the petitioner-mother to keep the children for three weeks.

28. On 15th August 2021, the respondent no.2 posted a travel itinerary. The petitioner noticed that the itinerary was such that the children would miss their school by a week. The petitioner declined to accept the itinerary. The petitioner requested the respondent no.2 to go to India for his vacation, and during that period, the kids would stay with their mother.

29. It is the case of the petitioner that the respondent no.2, out of spite, called upon the local police levelling false allegations that the petitioner was causing harm to her children owing to an alleged mental illness. The local police responded to the call and after due verification arrived at the conclusion that the children were healthy and were well taken care of by the petitioner. The case was accordingly closed.

30. It appears that on 16th August 2021, the respondent no.2 lodged one another complaint with the police. The petitioner had to leave her house with the minor children so as to consult her lawyer. She requested her friend to take care of her children while she was gone. When the friend of the petitioner reached the petitioner's house, the children were nowhere to be found. In

such circumstances, the petitioner immediately called up the US police at Findlay, Ohio. At 10:00 pm., the respondent no.2 informed the petitioner that the children were in Michigan.

31. It is the case of the petitioner that on 16/17th August 2021 at 2:55 am, she received a distress call from her minor daughter Lakshaya Ganesh aged 12. The petitioner noticed that her minor daughter Lakshaya Ganesh was crying on phone. The minor daughter also informed the petitioner-mother that she was in Chicago and the father was intending to take them to India. The petitioner was shocked to hear what was informed by her daughter on phone, as the respondent no.2 was not scheduled to travel to India before 19th August 2021 as per his own itinerary. The minor daughter revealed to the petitioner-mother that the respondent no.2-father had sent an incorrect itinerary.

32. It is the case of the petitioner that the respondent no.2 clandestinely and with a view to solely removing the children from the USA and from the joint custody of the petitioner, left for India with the two minor children on 17th August 2021.

33. On 18th August 2021, being completely unaware of the respondent no.2 having left for India with the minor children, the petitioner immediately moved an Emergency Motion for restraining the respondent no.2 from removing the minor children from the USA. The Court concerned granted the order

as prayed for by the petitioner. It was after this order that, according to the petitioner, she checked with the Etihad Airways to confirm the itinerary of the respondent no.2 and found that the one submitted by the respondent no.2 was incorrect.

34. The petitioner later discovered that the respondent no.2 had already flown out with the minor children on 17th August 2021 against his own itinerary. The respondent no.2 was supposed to leave on 19th August 2021.

35. The petitioner desperately tried to get in touch with her minor daughter on phone between 16th August 2021 and 21st August 2021 but her phone was found to be switched off. On 21st August 2021, the petitioner received a call from her minor daughter pleading with the petitioner-mother to take her back to the USA.

36. The petitioner-mother consoled her minor daughter not to panic or confront the respondent no.2-father less he would harm her. The petitioner was also informed by her minor daughter that the respondent no.2 had first taken them to someone's house at Chennai and was thereafter planning to move to the house of their grandfather.

37. At this stage, we would like to reproduce the verbatim averments made by the petitioner as contained in paragraphs 25 to 28 respectively. We quote the necessary averments thus :

"25. That the Petitioner Ex-Wife has been deliberately kept away from the children since 2019 and finally when the Settlement Agreement/In-Court Agreement allowed the Petitioner Ex-Wife to enjoy the company of the minor children that the Respondent no. 2 had deprived her off, the minor children have now been abducted by the Respondent No.2 and illegally removed from the US. That the Respondent No.2 deliberately left with the legal documents of the minor children in absolute breach of the terms of the Settlement Agreement dated 30.07.2021 and switched off the minor daughter's phone to block any and every channel of communication with the Petitioner Ex-Wife. The Respondent No.2 has a manic tendency of harassing and torturing the Petitioner Ex-Wife to no extent and in this final blow has misused the children as a weapon to seek vengeance from the Petitioner Ex-Wife.

26. The minor children are currently nowhere to be found and the Petitioner's father has made all possible attempts to trace the minor children in Chennai. The Petitioner Ex-Wife's father tried to trace the minor children to the Respondent No.2's brother's house i.e. the Respondent No.3 at Tripti Apartments, Apt No.20, Marshall Enclave, 15/8 Egmore, Chennai but the guard told him that the said house had been vacated alongwith the two children. Thereafter, he also checked at the Respondent No.2's parental home i.e. the Respondent no.5's house at No.5, State Bank Colony, A.A Road, Virudhunagar, Tamil Nadu however, the children were not even found here. The Respondent No. 2 has therefore, fled the US with the minor children and has been moving around the country completely unknown to the Petitioner mother and to the complete detriment to the minor children who have been missing their school and their home in the US. The Respondent No. 2 and his family have been hand in glove in keeping the Petitioner Ex-Wife deprived of the company of the minor children. That the Petitioner's father fearing for the safety and welfare of the minor children has made a complaint to the Superintendent of Police, Collectorate Complex, Virudhunagar, Tamil Nadu on

13.09.2021 requesting him to investigate into the case of searching for the minor children who have been illegally removed from their parent nation.

27. That on 21.9,2021 in furtherance to the complaint made by the Petitioner Ex-Wife's father, the Virudhanagar Police, Chennai informed the Petitioner's father that the minor children could not be found neither at the residence of the Respondent No.4 at Tripti Apartments, Egmore, Chennai nor at the residence of the grandfather i.e. the Respondent No.5. Further now the Petitioner Ex-Wife has also found out through the Police Authorities in Ohio, USA that the Respondent No.2 is planning to shift to Maharashtra and shifted his job in Perrigo, Allegan, 'Michigan, USA to Maharashtra, India. The Petitioner is thus at a complete loss is absolutely unaware of the whereabouts of the minor children and of the Respondent no. 2.

28. The minor children are being kept away from the Petitioner Ex-Wife who has equal parental rights and responsibilities qua the minor children as laid out in Settlement Agreement dated 30.07.2021. The Respondent no. 2 Ex-Husband is willfully disobeying the Orders of the US Court by detaining the minor children somewhere in India not just contrary to the Settlement Agreement but also against the wishes and interest of the minor children who have been plucked out of their society based on the Respondent Ex-Husband's whim. The US Court is the ONLY Court having jurisdiction over the minor children as the children are permanent citizens of the USA and the minor son Bhavin Sai Ganesh is a citizen of the USA and holds an American Passport. The children's education is suffering as they were abducted from the USA mid-term and despite the Petitioner Ex-Wife's incessant efforts to make the Respondent No.2 understand the implications of his actions, the Respondent No.2 Ex-Husband has become unresponsive and untraceable alongwith the children."

38. It would not be out of place to state over here that the shared parenting plan referred to above by us in paragraph 26 ultimately came to be terminated by the Court at Ohio vide order dated 9th February 2022 at the instance of the petitioner-mother. We quote few relevant observations made by the Court at Ohio as under :

> *"33. Defendant/Father's failure to return the children from India was a clear violation of the consent order, as follows :*
>
> > *"a. Defendant/Father failed to honor Part I(C)(1) of the Shared Parenting Plan, whereby he pledged to "provide the children with an emotional environment in which the children are free to continue to love the other Parent and spend time with them."*
> >
> > *b. Defendant/Father failed to honor Part I(C)(3) of the Shared Parenting Plan, whereby he pledged to "allow the children to telephone on a reasonable basis."*
> >
> > *c. Defendant/Father failed to honor Part I(C)(4) of the Shared Parenting Plan, whereby he pledged to "communicate with the other Parent openly, honestly, and regularly to avoid misunderstandings which are harmful to the children."*
> >
> > *d. Defendant/Father failed to honor Part I(C)(7) of the Shared Parenting Plan, whereby he pledged "not to withhold time with the other Parent as a punishment to the children or the other Parent."*
> >
> > *e. Defendant/Father failed to honor Part I(C)(10)(a) of the Shared Parenting Plan,*

whereby he pledged to honor the children's rights to a continuing relationship with both parents.

f. Defendant/Father failed to honor Part I(C)(g) of the Shared Parenting Plan, whereby he pledged to honor the children's rights to "experience regular and consistent contact with both Parents and the right to know the reason for any cancellation or change of plans."

g. Defendant/Father has withheld parenting time from Plaintiff/Mother, as specified above. :

h. Defendant/Father never provided the children's passports to the Plaintiff/Mother.

34. It is in the best interests of both children to be returned immediately to the jurisdiction of the United States.

35. The children are familiar with and acclimated to the culture of the United States and have thrived while studying in schools in the United States. In addition, the minor children have friends in the United States, and are acclimated to the surroundings of the United States.

36. Defendant/Father violated the Shared Parenting Plan by failing to provide three weeks prior notice of the itinerary.

37. Defendant/Father violated the Shared Parenting Plan by failing to place the passports with Plaintiff/Mother

38. Defendant/Father took the children surreptitiously to India, a country of which the children had little familiarity.

39. One of the major components of the Shared Parenting Plan is that the Plaintiff and Defendant consistently communicate regarding the best interests

of their children. Defendant/Father has failed to communicate with Plaintiff/Mother. Plaintiff/Mother does not know where her minor children are living or if Defendant/Father ever intends to return them to the United States.

40. A change of circumstances exists in the children's situation, they being surreptitiously removed to India without notice to Plaintiff/Mother and without any plans to return.

41. It is in the children's best interest for the Shared Parenting Plan to be terminated.

42. It is in the children's best interest for Plaintiff/Mother to be named as residential parent and legal custodian.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff/Mother's Motion to Terminate the Shared Parenting Plan and Designate Plaintiff as Residential Parent and Legal Custodian (No. 444481) is GRANTED in the best interests of the minor children.

2. Plaintiff/Mother, Rajeswari Chandresekar is hereby designated as the residential parent and legal custodian of daughter Lakshaya Ganesh, DOB 10/7/2009, and son Babvinsai Ganesh, DOB 7/20/2013.

3. Defendant/Father shall make the children immediately available to communicate with Plaintiff/Mother and allow for daily communication between the children and their mother until the children are in her custody.

4. Defendant/Father shall immediately return the children's passports to Plaintiff/Mother, or in the alternative arrange for and surrender the children's passports to the Indian Court or a US Consulate in

India. Plaintiff/Mother may apply for replacement passports for the minor children without consent of Defendant/Father.

5. Defendant/Father shall incur all transportation costs for the return of the children to the United States of America, per an itinerary to be determined by Plaintiff/Mother.

6. Defendant/Father shall submit to an independent psychological evaluation at DeBalzo, Elugdin, Levine, Risen LLC, with Dr.Mark Lovinger for the determination of Defendant/Father's ability to appropriately care for and co-parent the minor children, which shall include psychological and chemical evaluation as deemed appropriate, at Defendant/Father's costs.

7. Defendant/Father's visitation with the minor children is suspended until this Court can determine if visitation is appropriate.

8. Plaintiff/Mother shall be responsible for all non-emergency medical decisions, emergency medical decisions, and educational decisions regarding the minor children.

9. For school purposes, Plaintiff/Mother's residence shall dictate school enrollment for the children.

10. This order is enforceable by any and all law enforcement agencies, including, but not limited to the Federal Bureau of Investigation, State Departments, and Immigration Authorities in both the United States of America and India.

11. This matter shall be set for further hearing upon Plaintiff/Mother's Motion to Show Cause, filed September 27, 2021 (No. 444480), and the request of Plaintiff/Mother for attorney's fees pursuant to ORC §3105.73 for the change of custody motion."

39. In such circumstances referred to above, the petitioner-mother is here before this Court with the present petition under Article 32 of the Constitution of India seeking a Writ of Habeas Corpus.

40. Vide order dated 28th September 2021, this Court issued notice to the respondents, making it returnable within two weeks.

41. On 8th December 2021, time was prayed for on behalf of the respondents nos.2, 4 and 5 respectively to file counter-affidavit. Three days' time was granted to the respondents to file their counter affidavit.

42. On 28th January 2022, this Court passed the following order :

> *"List this matter on 04.02.2022, as in the meantime, learned counsel for the respondent no.2 has expressed hope that she would be able to impress upon respondent no.2 to take appropriate measures for finding amicable solution between the parties themselves."*

43. On 28th February 2022, this Court passed the following order :

> *"The Mediator's Report does indicate that the parties were unable to arrive at an amicable settlement.*
>
> *Nevertheless, in deference to the observation made by this Court, learned counsel for the respondent(s) prays for some more time to find out some workable*

arrangement between the parties.

As the respondent(s) has shown willingness in this regard, by way of indulgence, we defer the hearing of this matter till 04.04.2022."

44. On 8th April 2022, this Court passed the following order :

"Learned counsel for respondent no.2 on instructions submits that respondent no.2 is seeking one week's more time to interact with the petitioner and try to work out amicable arrangement, if possible.

As a result, we give one more chance to respondent no.2, as prayed.

List this matter on 02.05.2022."

45. On 2nd May 2022, this Court passed the following order :

"By way of indulgence and on the insistence of learned counsel for the private respondents, we defer the hearing of this matter till 13th May 2022.

We make it amply clear that no further request for adjournment will be entertained at the instance of the private respondents on future date."

46. Thus, as the parties were not able to arrive at an amicable settlement, the matter was finally heard on 13th May 2022.

STANCE OF THE RESPONDENT NO.2 :

47. According to the respondent no.2, the present petition filed by the petitioner seeking custody of her minor children so as to repatriate them to the USA is nothing but an abuse of the

process of law and not maintainable. According to the respondent no.2, the present petition is not maintainable as India is not a signatory to the Hague Convention. The terms of the Hague Convention are not binding on the Indian parties and courts.

48. The respondent no.2 had given prior notice to the petitioner about his travel to India with children for a period of two weeks via email dated 28th July 2021. The respondent no.2 had also informed the petitioner about the travel date, i.e. 19th August 2021, via email dated 15th August 2021. The respondent no.2 had, via email dated 16th August 2021, informed the petitioner about the address where they would be staying in India. However, owing to the pandemic, there were changes in the international travel norms. The transit locations of travel, i.e. the Middle East countries, were removed from the safety green list and a stay of 14 days in a transit location was made necessary before flying to the home country. According to the respondent no.2, it is on account of such unforeseen circumstances that he had to make prompt changes in the travel plan, get the RTPCR test, etc. and then travel to India to avoid a 14 days' stopover in the Middle East, which would have caused lot of inconvenience to the children including the financial burden for three persons.

49. It is the case of the respondent no.2 that the custody of the children with him cannot be said to be unlawful in any manner. The custody of the minor children with the father can never be termed as unlawful or illegal. According to the respondent no.2, the holiday was planned with the express consent of the petitioner-mother and both the children had a talk with their mother, i.e. the petitioner, on 17th August 2021 before leaving for India. Thereafter also, the children spoke to the petitioner-mother on 22nd August 2021 on arrival in India. All throughout, the petitioner was kept informed about the whereabouts of the minor children.

50. According to the respondent no.2, this litigation is nothing but an outcome of several mental health issues on the part of the petitioner. The respondent no.2 has levelled serious allegations against the petitioner that she has been diagnosed with several mental health issues and has been on medication for several issues for treatment of depression, bipolar disorder, schizophrenia, obsessive compulsive disorder, etc. According to the respondent no.2, it is the erratic behaviour of the petitioner that has resulted in his loss of job. It is alleged that the petitioner had approached the employer of the respondent no.2, namely Perrigo, Allegan, Michigan, USA, and created a distressing seen, thereby resulting in termination of the

respondent no.2's employment with immediate effect. As the respondent no.2 is not an American citizen nor is he a Green Card holder, the loss of job means that he cannot go back to the US without the work permit.

51. It is the case of the respondent no.2 that it is the petitioner who created a situation beyond repair, which ultimately led to the cancellation of visa.

52. According to the respondent no.2, he is not in a position to go back to the US as he has no means to reach the US and start a living without a steady job. According to him, he cannot allow his children to go back to their mother, i.e. the petitioner, having regard to the alleged mental disorder of the petitioner. According to the respondent no.2, the mental illness of the petitioner may increase the risk of the minor children's emotional and developmental growth. It is the case of the respondent no.2 that both the children are very happy residing in India with their grandparents. Both the children have been admitted in a very good school at Chennai. Their education is being taken care of in the best possible manner. All other allegations levelled in the memorandum of the writ petition have been denied.

53. According to the respondent no.2, he was to return to Chicago on 2nd September with the children. He had confirmed tickets of Etihad Airways, but for the unnecessary hue and cry

raised by the petitioner, a situation was brought around by which the respondent no.2 lost his job and consequently, the work permit came to be cancelled.

54. In such circumstances, it is the case of the respondent no.2 that the present petition under Article 32 of the Constitution of India seeking a Writ of Habeas Corpus is not maintainable. It is not maintainable as the father, being the natural guardian of his children, the custody of the father cannot be termed as illegal or unlawful restrain on the minor children. In that context, no writ of Habeas Corpus can be issued. It is the case of the respondent no.2 that before a writ of Habeas Corpus can be issued, it has to be shown that there is either unlawful detention or custody or there is an imminent or serious danger to the person detained, particularly if he or she is a minor.

55. We take notice of the fact that a rejoinder has also been filed to the reply of the respondent no.2. Few additional affidavits have also been filed by the respondent no.2, by and large reiterating what has been referred to above.

SUBMISSIONS ON BEHALF OF THE PETITIONER :

56. Mr. Prabhjit Jauhar, the learned counsel appearing for the petitioner, vehemently submitted that both the children are not

residents of India. The minor daughter Lakshaya came to the USA at the age of 2 in the year 2012 and started her schooling from Findlay, Ohio, USA. She is well entrenched in the social and cultural milieu of the USA and could be said to have been plucked out of the same without ascertaining her wishes. The minor daughter Lakshaya, as on date, is 12 years of age and can well express her desires. The minor daughter is a permanent resident of the USA and has been residing, studying and socializing in the USA. The custody of the minor daughter Lakshaya with her father, i.e. the respondent no.2, could be termed as illegal as the same is against the settlement agreement dated 30th July 2021 that had been mutually arrived at by and between the parties before the US court. The respondent no.2 – father has managed to keep the custody of the children by flouting various orders passed by the US courts. He cannot be a beneficiary of his own wrongs.

57. The minor son Bhavin Sai Ganesh is an American citizen holding an American passport and, therefore, he is ordinarily a resident of the USA. The minor son Ganesh Sai is 8 years of age and has been in the USA since his birth. His custody with the respondent no.2 at Chennai could also be said to be illegal, more particularly, could be said to be in contravention of the settlement agreement dated 30th July 2021.

58. The allegations levelled by the respondent no.2 that the petitioner is suffering from various mental disorders are reckless, far from being true. If the petitioner had any mental issues and the respondent no.2 was so much concerned about the interest and welfare of his two minor children, then there was no good reason for him to go for the settlement agreement dated 30th July 2021. The respondent no.2 could be said to be in gross and blatant contempt of the various orders passed by the US court. He could be said to have kept the custody of the custody of the minor children illegally. His act has deprived the petitioner as a mother to take care of her minor children in accordance with the shared parenting plan and allocation of parental rights and responsibilities.

59. Mr. Jauhar, the learned counsel appearing for the petitioner, submitted that even with all that the respondent no.2 has done, the petitioner is still ready and willing to abide by the shared parenting plan and allocation of parental rights and responsibilities. The respondent no.2 should, at the earliest, return to the USA with both the minor children and abide by the various orders passed by the US courts, more particularly, the shared parenting plan.

60. The learned counsel would submit that the respondent no.2 should be asked to apply for a fresh visa at the earliest

pointing out to the authorities concerned that he is duty-bound in law to go back to the USA with both the minor children so as to abide by the shared parenting plan and the order that may be passed by this Court.

61. Mr. Jauhar, the learned counsel, has placed strong reliance, in support of his submissions, on the following case-law:

(1) ***Elizabeth Dinshaw v. Arvand M. Dinshaw***, (1987) 1 SCC 42;

(2) ***V. Ravi Chandran v. Union of India and others***, (2010) 1 SCC 174;

(3) ***Shilpa Aggarwal v. Aviral Mittal***, (2010) 1 SCC 591;

(4) ***Lahari Sakhamuri v. Sobhan Kodali***, (2019) 7 SCC 311;

(5) ***Surinder Kaur Sandhu v. Harbax Singh Sandhu***, (1984) 3 SCC 698.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2 :

62. Ms. Meenakshi Arora, the learned senior counsel appearing for the respondent nos. 2, 4 and 5, on the other hand, has vehemently opposed this writ petition substantially on the ground that the same seeking for a Writ of Habeas Corpus is not maintainable as the custody of the two minor children with their father, i.e. the respondent no.2, cannot be termed as illegal or

unlawful.

63. Ms. Arora would submit that both the minor children, as on date, are well-settled at Chennai. They are being taken care of in the best possible manner. They have been admitted in a very good school at Chennai. Both the minor children are now well-settled and to take them back to the USA all of a sudden will take a very heavy toll on them both; physically and mentally.

64. According to Ms. Arora, when a party is seeking a discretionary relief under Article 32 of the Constitution of India, the court must look into the *bona fide* and the overall conduct of such party.

65. The learned senior counsel would submit that it is the petitioner who has brought around a situation whereby the respondent no.2 is now not in a position to go back to the USA and start a new life. The respondent no.2 has no work permit as his employment has been terminated. It is the petitioner who is responsible for the termination of services of the respondent no.2 from the company where he was serving earlier. She would submit that, as on date, if the respondent no.2-father is asked to go back to the USA with his two minor children and if the respondent no.2 is not in a position to settle down in the USA, then he may have to come back to India. In such circumstances, it would be too dangerous to leave behind both the minor

children all alone with their mother who is suffering from various mental disorders. The argument of the learned senior counsel is that in such circumstances why should the father be deprived of his love and affection towards his own children and also supervision.

66. It is submitted that it is always open for the petitioner-mother to travel to India and spend some time with her minor children rather than insisting that both the minor children should come back to the USA.

67. The learned senior counsel submitted that it is a well-settled position of law, more particularly, after the decision of this Court in the case of ***Nithya Anand Raghavan v. State (NCT of Delhi) and another***, (2017) 8 SCC 454, that the paramount consideration in cases like the one on hand, should be the welfare of the minor child – in respect of whom the Habeas Corpus writ petition is preferred by one or the other parent. The other considerations – like comity of courts; orders passed by foreign courts having jurisdiction in the matter regarding custody of a minor child; citizenship of the parents and the child; the 'intimate connect'; the manner in which the child is brought in India, i.e. even if it is in breach of order of competent court in foreign jurisdiction, cannot override the consideration of child's welfare, since it is the responsibility of a

court, which exercises *parens patriae* jurisdiction, to ensure that the exercise of extraordinary writ jurisdiction is in the best interest of the child, and the direction to return the child to a foreign jurisdiction does not result in any physical, mental, psychological, or other harm to the child.

68. The learned senior counsel would submit that if it is not in the best interest and welfare of the minor child that he/she should return to the foreign jurisdiction, and giving of such direction would harm his/her interest in the welfare, the other considerations and principles which may persuade this Court to take a view in favour of directing the return of the minor child to the foreign court jurisdiction shall stand relegated and the court would not direct the return of the child to the place falling within the jurisdiction of the foreign court.

69. In such circumstances referred to above, Ms. Arora, the learned senior counsel appearing for the respondent nos. 2, 4 and 5 respectively prays that there being no merit in the present writ petition, the same may be rejected.

ANALYSIS :

70. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is, whether the

petitioner is entitled to any of the reliefs prayed for ?

PRINCIPLES OF LAW GOVERNING THE RIGHTS OF THE PARTIES :

71. The Guardians and Wards Act, 1890, was primarily enacted to consolidate the various Acts then in force keeping in view the personal law of diverse communities in India. It, however, did not encroach upon the jurisdiction of the Courts of Wards and did not take away any powers vested in the High Courts or the Supreme Court. A 'minor' under the Act has been defined as a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. A 'guardian' has been defined as a person having the care of the person of a minor or of his property or of both his person and property. Section 6 of the Act provides that no provision in the Act shall be construed to take away or derogate from any power to appoint a guardian of a minor's person or property, or both, which is valid by the law to which the minor is subject. Section 7 gives power to the Court that if it is satisfied that it is for the welfare of a minor that an order should be made, it may make an order appointing a guardian of his person or property, or both, or declaring a person to be such a guardian. Section 8 lays down that no order under Section 7 will be made except on the application of the person desirous of

being, or claiming to be, the guardian of the minor or any relative or friend of the minor or the Collector of the district in which the minor ordinarily resides or in which he has property or the Collector having authority with respect to the class to which the minor belongs. Section 9 deals with the territorial jurisdiction of the court. Section 10 lays down the manner in which an application is to be made and what is to be stated in the application. Section 11 provides for the procedure on admission of such an application. Section 12 gives power to the court to make interlocutory order for production of a minor and interim protection of his person and property. Section 17 enjoins upon the court to have due regard to the personal law of the minor and specially take note of the circumstances which point towards the welfare of the minor in either appointing a guardian or declaring a guardian. If the minor is old enough to form an intelligent preference, the court may be justified to consider that preference also in coming to the final conclusion. Further, no person can be appointed as a guardian against his own will.

72. The Hindu Minority and Guardianship Act, 1956 was enacted as a law complementary to the Guardians and Wards Act, 1890. This defines a 'minor' to be a person who has not completed the age of eighteen years. 'Guardian' has been defined as a person having the care of the person of a minor or of his

property or of both his person and property and includes - (i) a natural guardian, (ii) a guardian appointed by the will of the minor's father or mother, (iii) a guardian appointed or declared by a Court, and (vi) a person empowered to act as such by or under any enactment relating to any court of wards. 'Natural guardian', according to this Act, means any of the guardians mentioned in Section 6. Section 6 says that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in the joint family property) are - (a) in the case of a boy or an unmarried girl, the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Section 8 lays down that the natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate but the guardian can, in no case, bind the minor by a personal covenant. Sub-section (5) of Section 8 lays down that the Guardians and Wards Act, 1890, shall apply in certain circumstances. Section 13 of the Act lays down that in the appointment or declaration of any person as guardian of Hindu minor by a Court, the welfare of the minor

shall be the paramount consideration. Indeed sub-section (2) of Section 13 lays down that no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor. This section is complementary to Section 17 of the Guardians and Wards Act, 1890 which lays down that in appointing or declaring the guardian of a minor the Court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

73. A mere reading of the provisions of the two Acts referred to above makes it obvious that the welfare of the minor predominates to such an extent that the legal rights of the persons claiming to be the guardians or claiming to be entitled to the custody will play a very insignificant role in the determination by the court.

74. Ms. Arora does not really contest the above proposition. What she contends is that the father being the natural guardian of his two minor children, the custody of the father cannot be termed as illegal or unlawful restraint on the minor. In that context no writ of Habeas Corpus can issue. Her contention is

that before a writ of Habeas Corpus can issue, it has to be shown that there is either unlawful detention or custody or there is imminent or serious danger to the person detained, particularly if he or she is minor.

WRIT OF HABEAS CORPUS :

75. In a petition seeking a writ of Habeas Corpus 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.

76. The writ of Habeas Corpus has always been given due signification as an effective method to ensure release of the detained person from prison. In P. Ramanatha Aiyar's Law Lexicon (1997 edition), while defining 'habeas corpus', apart from other aspects, the following has been stated :

> *"The ancient prerogative writ of habeas corpus takes its name from the two mandatory words habeas. corpus, which it contained 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."*

77. In ***Secretary of State for Home Affairs v. O'Brien*** reported in (1923) AC 603 (609), 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 thirty-third 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.

78. The writ of Habeas Corpus is a prerogative writ and an extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held by this Court in ***Mohd. Ikram Hussain v. State of Uttar Pradesh and others***, AIR 1964 SC 1625 and ***Kanu Sanyal v. District Magistrate, Darjeeling***, (1973) 2 SCC 674. The observations made by a Constitution Bench in the case of ***Kanu Sanyal*** (*supra*) with regard to the nature and scope of a writ of Habeas Corpus are being extracted below :

> *"4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or*

> *to put it differently, "in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint". The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice-immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody-together with the day and cause of his being taken and detained to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf". The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C. in Cox v. Hakes (supra), "the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end."*

79. The exercise of the extraordinary jurisdiction for issuance of a writ of Habeas Corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a *prima facie* case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.

80. The object and scope of a writ of Habeas Corpus in the context of a claim relating to the custody of a minor child fell for the consideration of this Court in ***Nithya Anand Raghavan*** (*supra*) and it was held that the principal duty of the court in

such matters should be to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

81. Taking a similar view in the case of ***Syed Saleemuddin v. Dr. Rukhsana and others***, (2001) 5 SCC 247, it was held by this Court that in a Habeas Corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus :

> *"11…it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration for the court…"*

82. The question of maintainability of a Habeas Corpus petition under Article 226 of the Constitution of India for the custody of a minor was examined by this Court in ***Tejaswini***

Gaud and others v. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42, and it was held that the petition would be maintainable where the detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of Habeas Corpus can be availed in exceptional cases where the ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows :

> *"14. 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. 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.*
>
> *x x x x*
>
> *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 of 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."

83. In the case of ***Anjali Kapoor v. Rajiv Baijal***, (2009) 7 SCC 322, where the custody of a minor child was being claimed by the father being the natural parent from the maternal grandmother, the mother having died in child birth, it was held that taking proper care and attention in upbringing of the child is an important factor for granting custody of child, and on facts, the child having been brought up by the grandmother since her infancy and having developed emotional bonding, the custody of

the child was allowed to be retained by the maternal grandmother. While considering the competing rights of natural guardianships vis-a-vis the welfare of the child, the test for consideration by the Court was held to be; what would best serve the welfare and interest of the child. Referring to the earlier decisions in ***Sumedha Nagpal v. State of Delhi***, (2000) 9 SCC 745; ***Rosy Jacob v. Jacob A. Chakramakkal***, (1973) 1 SCC 840; ***Elizabeth Dinshaw v. Arvand M. Dinshaw***, *(supra)* and ***Muthuswami Chettiar v. K.M. Chinna Muthuswami Moopanar***, AIR 1935 Mad 195, it was also held that the welfare of child prevails over the legal rights of the parties while deciding the custody of minor child. The observations made in the judgment in this regard are as follows :

> *"14. The question for our consideration is, whether in the present scenario would it be proper to direct the appellant to hand over the custody of the minor child Anagh to the respondent.*
>
> *15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. (See Sumedha Nagpal vs. State of Delhi." (2000) 9 SCC 745 (SCC p. 747, paras 2 & 5).*

84. In ***Rosy Jacob v. Jacob A. Chakramakkal*** *(supra)*, this Court has observed that :

> *"7…the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors."*

85. This Court considering the welfare of the child also stated that : (SCC p. 855, para 15)

> *"15….The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society…."*

86. In ***Elizabeth Dinshaw*** (supra), this Court has observed that whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

87. The question as to how the court would determine what is best in the interest of the child was considered ***In Re: McGrath (Infants)***, [1893] 1 Ch. 143 C.A., and it was observed by Lindley L.J., as follows :

> *"…The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical*

well-being. Nor can the ties of affection be disregarded."

88. The issue as to the welfare of the child again arose ***In re "O" (An Infant)***, [1965] 1 Ch. 23 C.A., where Harman L.J., stated as follows :

> *"It is not, I think, really in dispute that in all cases the paramount consideration is the welfare of the child; but that, of course, does not mean you add up shillings and pence, or situation or prospects, or even religion. What you look at is the whole background of the child's life, and the first consideration you have to take into account when you are looking at his welfare is : who are his parents and are they ready to do their duty?"*

89. The question as to what would be the dominating factors while examining the welfare of a child was considered in ***Walker v. Walker & Harrison***, 1981 New Ze Recent Law 257 and it was observed that while the material considerations have their place, they are secondary matters. More important are stability and security, loving and understanding care and guidance, and warm and compassionate relationships which are essential for the development of the child's character, personality and talents. It was stated as follows :

> *"Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the*

stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."

90. In the context of consideration of an application by a parent seeking custody of a child through the medium of a Habeas Corpus proceeding, it has been stated in American Jurisprudence, 2nd Edn. Vol. 39 as follows :

"…An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment."

91. Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection

of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as *parens patriae*, has in promoting the best interests of the child.

92. The general principle governing the award of custody of a minor is succinctly stated in the following words in Halsbury's Laws of England, Fourth Edition, Vol. 24, Article 511 at page 217 :

> *"... Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."*

93. In the American Jurisprudence, Vol. 39, Second Edition, Para 148 at pages 280-281, the same principle is enunciated in the following words :

> *"..... a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require."*

94. In the footnote 14 at page 281, the following extracts from two American cases are set-out which also emphasise this point :

> *"The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate." Howarth v. Northcott, 152 Conn 460, 208 A 2d and 540, 17 ALR3d 758.*

PRECEDENTS ON THE SUBJECT :

95. As Mr. Jauhar, the learned counsel appearing for the petitioner, has placed strong reliance on the decision of this Court in the case of ***V. Ravi Chandran*** (*supra*), we must look into the same. This Court, in ***V. Ravi Chandran*** (*supra*), held as follows :

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the Court where the parties had set up their matrimonial home, the Court in the country to which the 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 the child's welfare be investigated in a Court in his own country. Should the Court take a view that an elaborate enquiry is necessary, obviously 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 the 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.

30. However, in a case where the Court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the Court may leave the aspects relating to the welfare of the child to be investigated by the Court in his own native country as that could be in the best interests of the child. The indication given in McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942 (PC)] that there may be cases in which it is proper for a Court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re [(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] and the said view has been approved by this Court in Dhanwanti Joshi [(1998) 1 SCC 112] . Similar view taken by the Court of Appeal in H. (Infants), In re

[(1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)] has been approved by this Court in Elizabeth Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13]".

96. This Court then proceeded to consider the issue, whether the facts of the case before it warranted an elaborate inquiry into the question of custody of the minor and should the parties be relegated to the said procedure before an appropriate forum in India. This Court concluded in its judgment that it was not necessary to relegate the parties to an elaborate procedure in India. Its reasons are found in paras 32 to 35, which read as follows :

"32. Admittedly, Adithya is an American citizen, born and brought up in the United States of America. He has spent his initial years there. The natural habitat of Adithya is in the United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interests, the parties have obtained a series of consent orders concerning his custody/parenting rights, maintenance, etc. from the competent Courts of jurisdiction in America. Initially, on 18.4.2005, a consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court whereunder the Court granted joint custody of the child to the petitioner and Respondent 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a separation agreement entered into between the parties on 28.7.2005, the consent order dated 18.4.2005 regarding custody of minor son Adithya continued.

33. In 8.9.2005 order whereby the marriage between the petitioner and Respondent 6 was dissolved by the New York State Supreme Court, again the child custody

order dated 18.4.2005 was incorporated. Then the petitioner and Respondent 6 agreed for modification of the custody order and, accordingly, the Family Court of the State of New York on 18.6.2007 ordered that the parties shall share joint legal and physical custody of the minor Adithya and, in this regard, a comprehensive arrangement in respect of the custody of the child has been made.

34. The fact that all orders concerning the custody of the minor child Adithya have been passed by the American Courts by consent of the parties shows that the objections raised by Respondent 6 in the counter-affidavit about deprivation of basic rights of the child by the petitioner in the past; failure of the petitioner to give medication to the child; denial of education to the minor child; deprivation of stable environment to the minor child; and child abuse are hollow and without any substance. The objection raised by Respondent 6 in the counter-affidavit that the American Courts which passed the order/decree had no jurisdiction and being inconsistent with Indian laws cannot be executed in India also prima facie does not seem to have any merit since despite the fact that Respondent 6 has been staying in India for more than two years, she has not pursued any legal proceeding for the sole custody of the minor Adithya or for declaration that the orders passed by the American Courts concerning the custody of minor child Adithya are null and void and without jurisdiction. Rather it transpires from the counter-affidavit that initially Respondent 6 initiated the proceedings under the Guardians and Wards Act, 1890 but later on withdrew the same.

35. The facts and circumstances noticed above leave no manner of doubt that merely because the child has been brought to India by Respondent 6, the custody issue concerning minor child Adithya does not deserve to be gone into by the Courts in India and it would be in accord with principles of comity as well as on facts to return the child back to the United States of America from where he has been removed and enable the parties to establish the case before the Courts in the native State of the child i.e. the United States of

America for modification of the existing custody orders. There is nothing on record which may even remotely suggest that it would be harmful for the child to be returned to his native country."

97. Despite the fact that the minor child Adithya had remained in India for over two years, this Court concluded that it could not be said that the he had developed his roots in India. This Court directed the respondent mother to take the child, of her own, to the USA and to report before the Family Court of the State of New York. This Court also imposed the condition on the petitioner that he shall bear all the travelling expenses of the mother and the minor child and make arrangements for their residence in the USA till further orders are passed by the competent Court. He was also directed to request the authorities that the warrants issued against the mother be dropped and he was directed not to file or pursue any criminal charge for violation by the mother of the consent order in USA.

98. In ***Surya Vadanan v. State of Tamil Nadu***, (2015) 5 SCC 450, the husband and wife both were of the Indian origin but the husband became a resident and citizen of the UK. The parties got married in India and had two daughters in the UK. The wife had acquired the British citizenship and the British passport as well. Both the parties were working for gain in the UK. The parties started having some matrimonial problems, as a result of

which the wife came back to India with her two daughters. The wife filed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 seeking divorce in the Family Court, Coimbatore. Subsequently, the husband filed a petition in the High Court of Justice in the UK for making the children wards of the Court. The High Court made the children wards of the Court during their minority, or until further orders of the Court and the wife was directed to return the children to the jurisdiction of the foreign Court. As the wife failed to obey the orders of the foreign Court, the husband filed a writ petition of Habeas Corpus seeking production of his children and their return to the UK, in the Madras High Court. The High Court dismissed the petition. This Court discussed the law on the custody of the children and observed the following :

> *"46. The principle of the comity of Courts is essentially a principle of self-restraint, applicable when a foreign Court is seized of the issue of the custody of a child prior to the domestic Court. There may be a situation where the foreign Court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic Court were to pass an effective or substantial order or direction prior in point of time then the foreign Court ought to exercise self-restraint and respect the direction or order of the domestic Court (or vice versa), unless there are very good reasons not to do so.*
>
> *47. From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance. However, it should be clearly understood*

that this is the final goal or the final objective to be achieved — it is not the beginning of the exercise but the end.

48. Therefore, we are concerned with two principles in a case such as the present. They are:

(i) the principle of comity of Courts; and

(ii) the principle of the best interests and the welfare of the child.

These principles have been referred to as "contrasting principles of law" [Shilpa Aggarwal v. Aviral Mittal, (2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192] but they are not "contrasting" in the sense of one being the opposite of the other but they are contrasting in the sense of being different principles that need to be applied in the facts of a given case.

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

x x x x

52. What are the situations in which an interim or an interlocutory order of a foreign Court may be ignored ? There are very few such situations. It is of primary importance to determine, prima facie, that the foreign Court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which the foreign Court exercises jurisdiction. If the foreign Court does have jurisdiction, the interim or interlocutory order of the foreign Court should be given due weight and respect. If the jurisdiction of the foreign Court is not in doubt, the 'first strike' principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another Court (foreign or domestic).

53. There may be a case, as has happened in the present appeal, where one parent invokes the jurisdiction of a Court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another Court and obtains a substantive order in his or her favour before the first Court. In such an event, due respect and weight ought to be given to the substantive order passed by the second Court since that interim or interlocutory order was passed prior in point of time.

x x x x

55. Finally, this Court has accepted the view [L. (Minors), In re, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign Court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign Court."

99. Thus, it is evident that while the paragraph 49 referred to above recognised the well-settled principle/doctrine of the 'most intimate contact' and the 'closest concern' doctrine, the paragraphs 47, 52 & 53 respectively emphasized the doctrine of comity of Courts and the first strike principle. Even before stating the aforesaid principles, in paragraph 47, the Court observed that there is complete unanimity that the best interests and welfare of the child are of paramount importance.

100. The Court allowed the appeal on the ground that the UK Court had passed an effective and substantial order declaring the children of the parties as wards of that Court and also that the UK Court has the most intimate contact with the welfare of the children.

101. In ***Nithya Anand Raghavan*** (*supra*), this Court struck altogether a different note and gave a new dimension. In that case, the couple married on 30.11.2006 at Chennai and shifted to the UK in the early 2007. Disputes between the spouses arose. The wife having conceived in December 2008, came to New Delhi in June 2009 and stayed with her parents and gave birth to a girl child - Nethra on 07.08.2009 at Delhi. After the husband arrived in India, the couple went back to the UK in March, 2010 and following certain unsavoury events, the wife and the daughter returned to India in August 2010. After

exchange of legal correspondence, the wife and her daughter went back to London in December, 2011, and in January 2012 the daughter was admitted in a nursery in the UK. In December, 2012, the child was granted the UK citizenship and the husband was also granted the UK citizenship in January 2013. They bought a home in the UK to which they shifted their family. In September, 2013 the child was admitted in a primary school in the UK and she was around four years old. In July, 2014 the wife returned to India along with her daughter. She again returned to the UK along with the child. Between late 2014 and early 2015 the child became ill and was diagnosed with cardiac disorder. On 02.07.2015, the wife returned to India with her daughter due to the alleged violent behaviour of her husband. On 16.12.2015, the wife filed a complaint against the husband at the CAW Cell, New Delhi, and in spite of the notices to the husband and her parents, neither of them appeared. The husband filed a custody/wardship petition on 08.01.2016 in the UK to seek return of the child. On 23.1.2016, he also filed a Habeas Corpus petition in the Delhi High Court which was allowed on 08.07.2016. The wife carried the case to this Court. This Court strongly relied upon its earlier judgment in ***Dhanwanti Joshi v. Madhav Unde***, (1998) 1 SCC 112, which in turn, referred to ***Mckee v. McKee***, 1951 AC 352 : (1951) 1 All ER

942 (PC), where the Privy Council held that the order of the foreign court would yield to the welfare of the child and that the comity of courts demanded not its enforcement, but its grave consideration. While taking note of the fact that India is not a signatory to the Hague Convention of 1980, on the "Civil Aspects of International Child Abduction", this Court, *inter alia*, held as under :

> *"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 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 and objects to its return. We are in respectful agreement with the aforementioned exposition."

102. This Court also relied upon the judgment in ***V. Ravi Chandran*** (*supra*) and *inter alia* held that the role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of *parens patriae* jurisdiction, as the minor is within the jurisdiction of the court. It has held that the High Court while dealing with the petition for issuance 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 discussed therein. It has further added 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 while considering the welfare of the child which is of paramount consideration and that the order of the foreign court must yield to the welfare of the child and 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. It has further observed that 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 resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised. This Court has disapproved paragraph 56(a) to (d) in ***Surya Vadanan*** (*supra*) which reads as follows:

> *"56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:*
>
> *(a) The nature and effect of the interim or interlocutory order passed by the foreign court.*
>
> *(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.*
>
> *(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. [Arathi Bandi v. Bandi*

Jagadrakshaka Rao, (2013) 15 SCC 790: (2014) 5 SCC (Civ) 475]. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

103. As regards (a) to (c) of paragraph 56 above, this Court termed the same as tending to drift away from the exposition in ***Dhanwanti Joshi*** (*supra*) and ***V. Ravi Chandran*** (*supra*) and with regard to clause (d), the Court disagreed with the same. For better appreciation, paragraphs 62, 63 and 66 respectively of the report are extracted herein below :

"62. As regards clauses (a) to (c) above, the same, in our view, with due respect, tend to drift away from the exposition in Dhanwanti Joshi case, which has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran case. In that, the nature of inquiry suggested therein inevitably recognises giving primacy to the order of the foreign court on the issue of custody of the minor. That has been explicitly negated in Dhanwanti Joshi case. For, whether it is a case of a summary inquiry or an elaborate inquiry, the paramount consideration is the interests and welfare of the child. Further, a pre-existing order of a foreign court can be reckoned only as one of the factor to be taken into consideration. We have elaborated on this aspect in the earlier part of this judgment.

63. As regards the fourth factor noted in clause (d) of para 56, Surya Vadanan v. State of T.N., (2015) 5 SCC 450: (2015) 3 SCC (Civ) 94], we respectfully disagree with the same. The first part gives weightage to the

"first strike" principle. As noted earlier, it is not relevant as to which party first approached the court or so to say "first strike" referred to in para 52 of the judgment. Even the analogy given in para 54 regarding extrapolating that principle to the courts in India, if an order is passed by the Indian Court is inapposite. For, the Indian Courts are strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction.

x x x x

66. The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112, in relation to non-Convention countries 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. While considering that aspect, the court may reckon the fact that the child was abducted from his or her country of habitual residence but the court's overriding consideration must be the child's welfare."

104. Finally this Court, in ***Nithya Anand Raghavan*** (*supra*), concluded as under :

"69. We once again reiterate that the exposition in Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112 is a good law and has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran. We approve the view taken in Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112, inter alia, in para 33

that so far as non-Convention countries are concerned, the law is that the court in the country to which the child is removed while considering the question must bear in mind 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 be exercised in cases where 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 be exercised only if the court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child."

105. The essence of the judgment in ***Nithya Anand Raghavan*** (*supra*) is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding the custody of the minor child, the citizenship of the parents and the child, etc. cannot override the consideration of the best interest and the welfare of the child, and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

106. As observed by this Court in ***Vivek Singh v. Romani Singh***, (2017) 3 SCC 231, in cases of this nature, where a child feels tormented because of the strained relations between her

parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. However, even in such a dilemma, the paramount consideration is the welfare of the child. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts.

FINAL ANALYSIS :

107. Keeping in mind the principles of law as explained by this Court in ***Nithya Anand Raghavan*** (*supra*), we now proceed to consider, whether it will be in the paramount interest and welfare of both the minor children to go back to the USA ? To put it in other words, whether we should direct the respondent no.2 to go back to the USA with both the minor children and abide by the shared parenting plan as ordered by the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio, or handover the custody of both the minor children to the petitioner-mother ?

108. We take notice of the following circumstances emerging from the materials on record so far as the two minor children are concerned :

(1) Both the minor children are residents of the USA.

(2) The son is a natural citizen and the daughter is a permanent resident of the USA.

(3) Both the children have been brought up in the social and cultural milieu of the USA. They are accustomed to the lifestyle, language, customs, rules and regulations, etc. of that country.

(4) The children are residents of the USA. One of whom is a natural citizen and will have better future prospects if goes back to the USA.

As observed by this Court in the case of ***Vasudha Sethi and others v. Kiran V. Bhaskar and another***, (2022) SCC OnLine SC 43, the natural process of grooming in the environment of the native country is indispensable for comprehensive development. We quote the relevant observations made by this Court in the case of ***Vivek Singh*** (*supra*) thus :

> *"*9. *We have given our utmost serious consideration to the respective submissions which a case of this nature deserves to be given. In cases of this nature, where a child feels tormented because of the strained relations between her parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. No doubt, paramount consideration is the*

welfare of the child. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts.

10. *The Hindu Minority and Guardianship Act, 1956 lays down the principles on which custody disputes are to be decided. Section 7 of this Act empowers the Court to make order as to guardianship. Section 17 enumerates the matters which need to be considered by the Court in appointing guardian and among others, enshrines the principle of welfare of the minor child. This is also stated very eloquently in Section 13 which reads as under :*

> *"13. Welfare of minor to be paramount consideration. (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.*
>
> *(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."*

11. *This Court in the case of Gaurav Nagpal v. Sumedha Nagpal stated in detail, the law relating to custody in England and America and pointed out that even in those jurisdictions, welfare of the minor child is the first and paramount consideration and in order to determine child custody, the jurisdiction exercised by the Court rests on its own inherent equality powers where the Court acts as 'Parens Patriae'. The Court further observed that various statutes give legislative recognition to the aforesaid established principles. The Court explained the expression 'welfare', occurring in Section 13 of the said Act in the following manner :*

> *"51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which*

govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.

52. The trump card in the appellant's 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 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."

12. *We understand that the aforesaid principle is aimed at serving twin objectives. In the first instance, it is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution. While the parents aim to ensure that the child is least affected by the outcome, the inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting thereby having a significantly negative repercussion in the advancement of the child. While these effects don't apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remains the objective of the parents to evade and the court's intent to circumvent. This right of the child is also based on individual dignity.*

13. *Second justification behind the 'welfare' principle is the public interest that stand served with the optimal growth of the children. It is well recognised*

that children are the supreme asset of the nation. Rightful place of the child in the sizeable fabric has been recognised in many international covenants, which are adopted in this country as well. Child-centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation. It has been emphasised by this Court also, time and again, following observations in Bandhua Mukti Morcha vs. Union of India & Ors. :

> *"4. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood — socially, economically, physically and mentally — the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development."*

14. *Same sentiments were earlier expressed in Rosy Jacob vs. Jacob A. Chakramakkal in the following words:*

> *"15. ...The children are not mere chattels : nor are they mere play-things for their parents. Absolute*

right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society..."

15. *It hardly needs to be emphasised that a proper education encompassing skill development, recreation and cultural activities has a positive impact on the child. The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation. The tools of education, environment, skill and health shape the child thereby moulding the nation with the child equipped to play his part in the different spheres aiding the public and contributing to economic progression. The growth and advancement of the child with the personal interest is accompanied by a significant public interest, which arises because of the crucial role they play in nation building.*

x x x x

17. *While coming to the conclusion that the respondent as mother was more appropriate to have the custody of the child and under the given circumstances the respondent herein was fully competent to take care of the child, the High Court proceeded with the following discussion:*

"31. The role of the mother in the development of a child's personality can never be doubted. A child gets the best protection through the mother. It is a most natural thing for any child to grow up in the company of one's mother. The company of the mother is the most natural thing for a child. Neither the father nor any other person can give the same kind of lover, affection, care and

sympathies to a child as that of a mother. The company of a mother is more valuable to a growing up female child unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The company of the mother is always in the welfare of the minor child.

32. It may be noticed that the stand of the appellant is that since August 04, 2010 she had been pursuing for the custody of her child. She had also visited the police station and approached the CAW Cell. It is also admitted position that within 22 days, i.e., on August 26, 2010 the petition for the grant of custody of child was filed by her. Had she abandoned the child of her own she would not have pursued continuously thereafter for getting the custody of the child. Even she had requested the learned Principal Judge, Family Court for interim custody of the child which was given to her in the form of visitation rights thrice in a month and she and her family had been meeting the child during that period. After filing the appeal, the appellant has been taking the interim custody of the child as is stated above. In these circumstances, it cannot be said that the appellant has not care for the child. Further, respondent is any army Officer. During the course of his service he will be also getting non- family stations and it will be difficult for him to keep the child. Further, even though as per him his parents are looking after the child but when the natural mother is there and has knocked the door of the court without any delay and has all love and affection for the child and is willing to do her duty with all love and affection and since the birth of the child she has been keeping the child. In these circumstances, she should not be deprived of her right especially considering the tender age and child being a girl child. The grandparents cannot be a substitute for natural mother. There is no substitute for mother's love in this world. The grandparents are old. Old age has its own problems. Considering the totality of facts and circumstances, the welfare of the child lies with the mother, i.e, appellant who is educated,

working and earning a good salary and after school hours has ample time to spend with the child. In these circumstances, impugned order is set aside and the request of the appellant for the grant of custody of the said child to her being natural mother is allowed and the appellant is also appointed as guardian of her child being a natural guardian/ mother."

18. *The aforesaid observations, contained in para 31 of the order of the High Court extracted above, apply with greater force today, when Saesha is 8 years' old child. She is at a crucial phase when there is a major shift in thinking ability which may help her to understand cause and effect better and think about the future. She would need regular and frequent contact with each parent as well as shielding from parental hostility. Involvement of both parents in her life and regular school attendance are absolutely essential at this age for her personality development. She would soon be able to establish her individual interests and preferences, shaped by her own individual personality as well as experience. Towards this end, it also becomes necessary for parents to exhibit model good behaviour and set healthy and positive examples as much and as often as possible. It is the age when her emotional development may be evolving at a deeper level than ever before. In order to ensure that she achieves stability and maturity in her thinking and is able to deal with complex emotions, it is necessary that she is in the company of her mother as well, for some time. This Court cannot turn a blind eye to the fact that there have been strong feelings of bitterness, betrayal, anger and distress between the appellant and the respondent, where each party feels that they are 'right' in many of their views on issues which led to separation. The intensity of negative feeling of the appellant towards the respondent would have obvious effect on the psyche of Saesha, who has remained in the company of her father, to the exclusion of her mother. The possibility of appellant's effort to get the child to give up her own positive perceptions of the other parent, i.e., the mother and change her to agree with the appellant's view point cannot be ruled out thereby diminishing the affection of Saesha towards her mother. Obviously, the*

appellant, during all this period, would not have said anything about the positive traits of the respondent. Even the matrimonial discord between the two parties would have been understood by Saesha, as perceived by the appellant. Psychologist term it as 'The Parental Alienation Syndrome'. It has at least two psychological destructive effects:

> *(i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.*
>
> *(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.*

19. *The aforesaid discussion leads us to feel that continuous company of the mother with Saesha, for some time, is absolutely essential. It may also be underlying that the notion that a child's primary need is for the care and love of its mother, where she has been its primary care giving parent, is supported by a vast body of psychological literature. Empirical studies show that mother infant "bonding" begins at the child's birth and that infants as young as two months old frequently show signs of distress when the mother is replaced by a substitute caregiver. An infant typically responds preferentially to the sound of its mother's voice by four weeks, actively demands her presence and protests her absence by eight months, and within the first year has formed a profound and enduring attachment to her. Psychological theory hypothesizes that the mother is the center of an infant's small world, his psychological homebase, and that she "must continue to be so for some years to come." Developmental psychologists believe that the quality and strength of this original*

bond largely determines the child's later capacity to fulfill her individual potential and to form attachments to other individuals and to the human community."

Thus, what has been explained by this Court as aforesaid is the doctrine of Parental Alienation Syndrome, i.e. the efforts made by one parent to get the child to give up his/her own positive perceptions of the other parent and get him/her to agree with their own viewpoint. It has two psychological destructive effects :

(1) It puts the child in the middle of a loyalty contest, which cannot possibly won by any parent;

(2) It makes the child to assess the reality, thereby requiring to blame either parent who is supposedly deprived of positive traits.

The intent of the court should be to circumvent such ill effects.

109. The minor daughter has a remarkable high IQ. She has been identified to be a gifted child. In such circumstances, both the minor children were admitted in a special school meant for children with such remarkably high IQ in the USA. Such schools in the USA are specialized in providing education to the gifted children which, ultimately, helps in the overall development of such children. The special education ultimately enhances the

potential of such children. Both the children in the present case have better prospects of getting refined education that may ultimately enhance their potential they already possess and are already accustomed to and comfortable with.

110. Both the minor children, in the case on hand, have already been enrolled in the school in the USA. Therefore, if the minor children are repatriated to the USA, they will not be subjected entirely to any foreign system of education. It is the fundamental right of the petitioner-mother to have the company of her children and not to be deprived of the same without a reasonable cause.

FACTS SUPPORTING THE STAY OF THE PETITIONER IN THE USA :

111. The petitioner is a resident of the USA and has acquired H1B visa via sponsorship and has a good job at Ranstad, USA. The petitioner is earning handsome salary and has the resources to provide for a comfortable life to her children in the USA. The petitioner is comfortably settled in the USA and is accustomed to different kind of lifestyle, culture, society, etc.

112. We take notice of the fact that the petitioner worked very hard to secure admission in the Cleveland State University and completed her studies with the GPA of more than 3, while taking care of her children. This is indicative of the fact that she is a

hard working woman and would be in a position to take good care of her minor children in accordance with the shared parenting plan.

113. It would be too much for this Court to tell the petitioner that she may periodically visit India to meet her children but the children should not be asked to go back to the USA with their father, i.e. the respondent no.2.

114. In the overall view of the matter, we have reached to the conclusion that the respondent no.2, at the earliest, should be directed to go back to the USA with both the minor children and abide by the shared parenting plan as ordered by the Court at Ohio. Although, the shared parenting plan as ordered by the Court at Ohio stood terminated at the instance of the petitioner-mother, yet the same can be revived once again by the authorities by going before the concerned court at Ohio. It is for the parties to take the necessary steps in this regard. The respondent no.2 shall immediately apply for the visa on the strength of this order. If the respondent no.2 is in a position to obtain a job in the USA on the strength of a work permit or any other document, then it is well and good. However, we are sure of one thing that it will be in the interest and welfare of both the children to go back to the USA for the purpose of their education, etc. The allegations levelled by the respondent no.2

that the petitioner suffers from some mental illness appears to be absolutely wild and reckless. Even otherwise this issue is a highly disputed question of fact.

115. We would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between the rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult.

FINAL CONCLUSION :

116. We allow this writ petition with the following directions :

(1) The respondent no.2-father shall, within one

week from today, apply to the authority concerned for visa to travel to the USA with the two minor children.

(2) The concerned authority may keep the observations made by this Court in the present judgment in mind and, in the larger interest of the two minor children, consider grant of visa to the respondent no.2-father. Once the visa is granted, the respondent no.2 shall, within one week thereafter, proceed to travel to the USA.

(3) Once the two minor children reach the USA, thereafter, it will be open for the petitioner-mother to take care of her children.

(4) We leave it open to the respondent no.2-father to chalk out his own plan.

(5) If the respondent no.2 wants to stay back in the USA, it is always open for him to do so in accordance with the law of the country. If the respondent no.2 decides to come back to India, then in such circumstances, the petitioner-mother shall make both the minor children speak to their father on-line at least once every week.

(6) In any event, if the visa is declined to the respondent no.2, then in such circumstances, the

petitioner-mother shall travel to India and pick up her two minor children and go back to the USA. In such an eventuality, the respondent no.2 and his family members are directed to fully cooperate and not create any impediment of any nature. If it comes to the notice of this Court that the respondent no.2 or any of his family members have created any impediment for the petitioner-mother, then the same shall be viewed as the contempt of this Court's order. In addition, it will be open to the petitioner-mother to contact the jurisdictional Commissioner/ Superintendent of Police, who shall thereafter ensure that the custody of the children is immediately/ forthwith handed over to the petitioner-mother and submit compliance report in that regard to this Court. In case of any impediment despite the peremptory direction, the petitioner-mother may apply for appropriate directions from this Court, if so advised.

(7) We leave it open for the parties to go back to the Court at Ohio and revive the shared parenting plan as was arrived at vide order dated 12th May 2021.

117. Before we close this matter, we would like to convey to the parties that their two minor children are watching them very

closely. Showing the children that their parents can respect each other and resolve the conflict respectfully will give them a good foundation for the conflict that may, God forbid, arise in their own lives. The parties should try to do their best to remain relaxed and focused. It is critical to maintain boundaries between the adult problems and children. It is of utmost interest to protect the innocence of children and allow them to remain children. They must not be burdened by any adult problem. Minor children do not have the coping skills or the intellectual ability to understand any issues like the financial constraints, adult relationship issues or their parents unhappiness.

118. We find the observations made by the Delhi High Court, in the case of ***K.G. v. State of Delhi and another***, dated 16.11.2017 in Writ Petition (Criminal) No. 374/2017 and Criminal Miscellaneous Application No. 2007/2017, quite commendable, that the best welfare of the child, normally, would lie in living with both his/her parents in a happy, loving and caring environment, where the parents contribute to the upbringing of the child in all spheres of life, and the child receives emotional, social, physical and material support – to name a few. In a disturbed marriage, unfortunately, there is bound to be impairment of some of the inputs which are, ideally, essential for the best interest of the child.

119. There will be no order as to costs.

120. The Registry shall notify this matter once again after a period of four weeks to report compliance of our directions.

.....J.
(A.M. KHANWILKAR)

.....J.
(J.B. PARDIWALA)

NEW DELHI;
JULY 14, 2022