

*Before Arun Kumar Tyagi, J.*

**KIRAN V. BHASKAR—Petitioner**

*versus*

**STATE OF HARYANA AND OTHERS —Respondents**

**CRWP No. 3440 of 2020**

August 31, 2021

*Constitution of India, 1950—Arts.226 and 227— Writ petition— Custody of minor child —Habeas corpus petition — Maintainability — Considerations for custody —Order of foreign court granting custody to one parent, effect of —Repatriation of the minor — On facts, Marriage between the parties solemnized in the USA, and child was born there — Minor diagnosed with kidney ailment — Was flown to India with mother/respondent for surgery with petitioner/father's consent – Consent for stay outside USA was up to 26.09.2019 — After the surgery respondent failed to return to the USA with the minor child in violation of the travel consent — Meanwhile, Circuit Court of Arkansas, USA, by an ex-parte order awarded primary custody and control of the minor to the petitioner — Held, a writ of habeas corpus can be issued for restoration of minor's custody to the guardian wrongfully deprived of it — The matters of child custody are decided not on legal rights of parties but on the sole consideration of what would best serve interest and welfare of the minor — Child welfare is not to be measured by money or mere physical comfort — Moral and religious welfare of the child must be considered with physical wellbeing — Further held, the foreign court order is a factor to be reckoned, but is not determinative of the question of repatriation of the minor child — This question also to be decided on the test of best interest and welfare of the child — Petition allowed, holding that for welfare and best interest of the minor he be returned to the USA — The question of appointing a guardian/handing over custody to either of the parents is to be left for adjudication by the court of competent jurisdiction in the USA.*

*Held that* whenever a question arises pertaining to the custody of a minor child whether before Family Court/Guardian Judge on a petition for custody of the minor child under the Guardians and Wards Act, 1890, Hindu Minority and Guardianship Act, 1956 etc. or before High Court or Supreme Court on a habeas corpus petition, the matter is

to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.

(Para 17)

*Further held that* the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical wellbeing. Nor can the tie of affection be disregarded. (Per Lindley, L.J. in McGrath, (1893) 1 Ch 143). 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.

(Para 18)

*Further held that* India is not signatory to the Hague Convention on Civil Aspects of Inter-national Child Abduction, 1980 or the Hague Convention on Parental Responsibility and Protection of Children, 1996. In number of cases filed under Article 32 of the Constitution of India or appeals filed challenging correctness of the order passed by the High Court in exercise of jurisdiction under Article 226 of the Constitution of India, Hon'ble Supreme Court has dealt with the question of issuance of writ of habeas corpus for repatriation of the minor children, who had been removed from the foreign countries and brought to India, to the country from where they had been removed. Hon'ble Supreme Court has taken the view that the High Court may invoke the extraordinary jurisdiction to determine the validity of the detention keeping in mind the paramount consideration of the welfare of the child and even the order of the foreign court must yield to the welfare of the child.

(Para 23)

*Further held that* the fact that there is a pre existing order of the foreign Court in favour of the petitioner is a factor to be reckoned in favour of the petitioner but the same is not determinative of the question of repatriation of the minor child for permitting the same which question has to be decided on the test of best of interest and

welfare of the minor child.

(Para 26)

*Further held that* in view of the totality of the facts and circumstances of the present case and on the basis of the summary inquiry, I am of the considered view that it will be for the welfare and in best of interest of the minor child that order be passed for return of the minor child to USA, from where he was removed and it will be appropriate that the question of appointment of guardian/handing over custody of the minor child to either of the parents is left for adjudication by the Court of competent jurisdiction in USA on the basis of paramount consideration of welfare and best of the interest of the child.

(Para 53)

Shadan Farasat, Advocate with Arjun Sheoran, Advocate and Neha Sonawane, Advocate, *for the petitioner.*

Munish Dadwal, Asstt. A.G., Haryana, for respondent No.1-State.

Satish Tamta, Sr. Advocate with Animesh Sharma, Advocate and Vikramaditya Bhaskar, Advocate, for respondents No.2 to 4.

Anil Malhotra, Advocate as Amicus Curiae.

### **ARUN KUMAR TYAGI, J.**

(The case has been taken up for pronouncement of judgment through video conferencing.)

(1) The petitioner has filed the present petition under Articles 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (herein after referred as 'the Cr.P.C.') for issuance of a writ in the nature of habeas corpus directing the respondents to ensure the release of minor child-Aaditya Kiran (herein after referred as 'minor child'), minor son of the petitioner (aged about four years at the time of filing of the present petition) from illegal custody of respondents No.2 to 4 and hand over his custody to the petitioner. The petitioner also sought interim relief that respondent No.1 be directed to ensure that respondents No.2 and 4 allow and facilitate the petitioner to communicate with his son over phone and video call on a daily basis, at a time convenient to both the petitioner and his son.

**Repatriation claim of the petitioner-father of the minor child.**

(2) Briefly stated, the petitioner has averred in the petition that the petitioner, who is Post Graduate in Computer Science, is currently employed as a Senior Software Engineer in Walmart Labs, Bentonville, United States of America (herein after referred as 'USA'). The petitioner is a permanent resident of Benton Country, Arkansas, USA.

(2.1) The petitioner solemnized marriage with respondent No.2 on 13.01.2011 in New York City, USA. Minor child-Aaditya Kiran was born on 21.01.2016 in Bentonville, Arkansas, USA and is a citizen of USA. The petitioner purchased house in Centerton, Arkansas, USA for settlement of the family. Minor child was admitted for pre-schooling in 'Bright Beginnings' in Bentonville, Arkansas, USA.

(2.2) As per report dated 31.01.2019 of Mana Medical Associates, minor child was diagnosed with a congenital condition called hydronephrosis which affects the kidneys which required correction by surgery. Due to non-availability of dates for surgery in Arkansas, the petitioner and respondent No.2 decided for a surgery to be done in India by Dr. Anurag Krishna at Max Hospital, Saket, New Delhi.

(2.3) In view of increasing number of cases of International Parental Child Abduction consent of the petitioner was necessary for his son to travel with respondent No.2 alone. The petitioner gave consent for the same and signed the international travel consent form dated 04.02.2019 for stay outside USA only up to 26.09.2019. Respondent No.2 along with minor child came to India on 05.02.2019 and was to return to USA on 26.09.2019 for which date the return tickets were booked. The petitioner had also paid the requisite expenses for meeting the expenses of surgery and stay in India.

(2.4) The surgery took place on 14.03.2019. The petitioner joined respondent No.2 and minor child in March, 2019 but went back to USA for attending his job. The petitioner remained in regular communication with respondent No.2 and minor child till July, 2019 when respondent No.2 ceased regular communication with respondent No.2 and also ceased providing updates about the health and progress of minor child and did not allow the petitioner to interact with the minor child.

(2.5) Respondent No.2 failed to return to USA along with minor child on 26.09.2019 in violation of the travel consent given by the petitioner. Respondent No.2 claimed that she was staying back with the minor child for further medical follow-ups but did not respond to his

request to provide details regarding minor child's medical condition. Due to concerns arising from his inability to communicate with respondent No.2, the petitioner made independent enquiries and came to know that respondent No.2 is engaging in excessive alcohol use and was having extra marital affair and respondent No.2 was living in separate apartment in Ivory Towers, Gurugram where she left the minor child to the care of a maid whole day. Respondent No.2 had found employment in the Venkateshwar Hospital, Dwarka, Delhi.

(2.6) The petitioner sought assistance of the U.S. Embassy which conducted a welfare visit to the residence of parents of respondent No.2 on 17.12.2019 and the report of the visit showed that respondent No.2 had made several misleading statements. The officials of the U.S. Embassy also sent photograph of a certificate dated 17.09.2019 purportedly signed by the doctor who had conducted the surgery. The petitioner submitted his detailed reply to the report vide e-mail dated 14.01.2020. Vide e-mail dated 25.12.2019 respondent No.2 demanded amount of Rs.10,00,000/- as reimbursement of expenses already incurred by her father but did not mention about her return with the minor child to USA.

(2.7) The petitioner filed petition dated 30.01.2020 for separate maintenance before the Circuit Court of Benton County, Arkansas seeking primary care, custody and control of the child on account of wrongful detention of the minor child outside USA. The above-said Court passed ex-parte order dated 03.02.2020 holding that the above-said Court had jurisdiction over the parties and subject matter and was the proper venue for adjudication of the claim of custody and awarded primary care, custody and control of the child to the petitioner and directed respondent No.2 to hand-over minor child to the petitioner immediately noting that the alienation of the father from the son would be harmful to the wellbeing of the son. The order was delivered on 24.02.2020. The minor child is being kept away from the petitioner, who is the legal guardian, by respondent No.2 who is willfully disobeying order of the US Court.

**No reply filed by respondent No.1-State of Haryana**

(3) No reply to the petition has been filed by respondent No.1-State of Haryana.

**Rival claim of respondent No.2-mother and respondents No.3 and 4-maternal grandparents of the minor child.**

(4) The petition has been contested by respondents No.2 to 4 in

terms of reply dated 12.07.2020. In the reply respondents No.2 to 4 have submitted that the petitioner has not disclosed that the minor child has undergone a serious medical surgery and he has not fully recovered. The surgery has only been performed on the right kidney whereas surgery of left kidney was also required but due to young age of the minor child his left kidney has not been operated on. The same is being closely monitored by the entire team of doctors in India. The minor child requires regular follow ups and constant monitoring which can only be done by respondent No.2 as she is thoroughly updated about the problem and is constantly in touch with the doctors of the minor child. The standard medical care and ease of availability of medical advice is better in India. No early dates were being given in USA for the urgent surgery of the minor child and he had to be rushed to India. Given the current scenario it would be extremely difficult to get even decent medical care facility in USA. The fact that the family of respondent No.2 has doctors is extremely beneficial. Respondent No.4, mother of respondent No.2, with whom the minor child resides is a doctor. Her brother is also a known doctor and stays close to respondents No.2 to 4. The brother of respondent No.2 is also a doctor. It is in the interest of the minor child to stay in Gurugram, India.

(4.1) The minor child is living in happy household, surrounded with loving family and friends, as is evidenced from the US Embassy report. In USA, the petitioner hardly had any family and friends and the minor child was devoid of the company that he needed for proper growth and development. The minor child has friends in Delhi and Gurgaon. He has a wonderful opportunity to celebrate a variety of poojas and festivals in India which could never have been done in USA. He goes every day to the temple at his maternal grandparents home where he stays. He has strong roots in India. He has travelled with respondent No.2 more to India and had extended stays in India. The minor child was previously enrolled in a pre-school in 2018 and then in 2019 and now nursery school in 2020 with the prior consent of the petitioner. The petitioner and respondent No.2 had all along been planning that respondent No.2 and minor child would be shifting to India. The minor child has attended pre-schools in India in 2018 and now would be going to nursery at Shri Ram School, Gurugram, India as decided between the petitioner and respondent No.2 much before.

(4.2) The petitioner has subjected respondent No.2 to mental torture, dowry harassment and domestic violence and abused constantly coaxing her for funds to be invested in land. Petitioner became so

violent once that respondent No.2 had to call the Women's Shelter in Arkansas, USA on 02.11.2018. The petitioner wrongly arrayed respondents No.3 and 4 as party to the petition to pressurise respondent No.2 not to demand back the funds given to him. Travel consent clearly stated that any change to the travel plan shall be discussed and consented by both the parents and the same did not give the petitioner complete authority over the minor child. The petitioner has admitted both in writing and orally that he was diagnosed to have suicidal tendencies which continue to remain unaddressed. The same would have a serious adverse impact on the minor child.

(4.3) All the expenses from her marriage till date and also expenses of surgery of minor child were born by respondents No.3 and 4. The petitioner has not even bothered to have the decency to take care of his own expenses and his own air tickets had also been taken care of by respondents No.3 and 4. The petitioner has consistently demanded and has been paid money by respondents No.3 and 4 for purchasing property in India with a view to settle in India. The money and expenditure incurred by respondents No.3 and 4 has not been repaid to them by the petitioner.

(4.4) The petitioner always tried to keep the minor child away from his grandparents. Even after surgery of the minor child on 14.03.2019, the petitioner or his mother did not visit him and no concern was shown for his well being. The petitioner has cast aspersions on character of respondent No.2 which lead to irrevocable break down of a sacrosanct relationship.

(4.5) Respondents No.2 to 4 have also taken preliminary objections that the writ petition is a gross abuse of the judicial process and the writ petition does not lie for the custody of minor child as no right has been infringed. Indian Courts have jurisdiction to deal with custodial disputes of minor child even if a foreign Court has passed an order in favour of either of the parents. The minor child is in legal custody of respondent No.2 with consent of the petitioner. The writ petition has been filed with considerable delay.

(4.6) The ex-parte interim order has been passed by the Court in USA in violation of principles of natural justice, without hearing respondent No.2. Respondent No.2 is yet to receive official summons from the Court in USA and will contest the matter there. In any case, an ex-parte interim order of custody in violation of principles of natural justice is not the kind of order envisaged by the comity of Courts doctrine. Under Section 6(a) of the Hindu Minority and Guardianship

Act, 1956, respondent No.2 is natural guardian of the minor child, who is four and half years old.

(4.7) In their written statement respondents No.2 to 4 have also given brief history of events including Indian wedding of the petitioner and respondent No.2 on 08.08.2011 in Gurugram and taking of loan by the petitioner from respondents No.3 and 4 for purchase of land etc. and strained relations between the petitioner and respondent No.2.

(4.8) In their written statement/reply on merits respondents No.2 to 4 have submitted that the petitioner is not entitled to invoke the extra-ordinary jurisdiction of this Court. The petitioner is H-1B visa holder and does not have citizenship of USA. There is no certainty that petitioner will get permanent citizenship. Respondent No.2 is natural guardian of minor child till the age of five years. The minor child has been residing in India with the consent of the petitioner who himself wanted minor child and respondent No.2 to go back to India and settle there so that he could save more money and buy land. In his e-mail dated 04.09.2019 the petitioner had clearly written that “we decided this sacrifice of being away is a must for you to start your physical therapy career”. In WhatsApp message dated 11.01.2019 the petitioner wrote “go to India, work your ass off, make money, and we will build a wonderful house”. In his email dated 26.10.2019 the petitioner had admitted that “you recommended that after couple of months of staying with your parents, you will move to an apartment, so I can come visit you guys whenever – that never happened.” In his WhatsApp message dated 11.07.2019 the petitioner has clearly stated that he wanted respondent No.2 to go to India and work. The allegations of excessive use of alcohol and extra marital affair are baseless and without any proof.

(4.9) In January, 2019 the minor child was diagnosed with Hydronephrosis. It was only after coming to Delhi that numerous diagnostic tests were got done (like DTPA, MCU and Ultrasounds) and it was found that the minor son suffered from Uretero-Pelvic Junction Obstruction (UPJ) which in his case was a congenital problem since he has 'Horse shoe Kidneys' which caused Hydronephrosis. The petitioner travelled to Bangalore, India from USA to conclude a land deal and then came to visit Delhi for the minor child's surgery. He reached one day before the minor son was to be admitted in the hospital for the surgery. After the surgery he stayed for a few days and again left for Bangalore and later again re-visited Delhi before he finally left for USA via Bangalore. The petitioner left no money with respondent No.2 before



leaving for USA. Till date, the petitioner has not taken any financial responsibility of respondent No.2 and the minor child as all their expenses have been borne by respondents No.3 and 4. All the expenses of international as well as domestic travel of respondent No.3 and her minor child were borne by respondent No.3. Respondents No.2 to 4 accordingly prayed for dismissal of the petition.

(5) The petitioner has filed rejoinder to the reply filed by respondents No.2 to 4 reiterating his claim.

(6) I have heard arguments addressed by Mr. Shadan Farasat Advocate assisted by Mr. Arjun Sheoran, Advocate and Ms Neha Sonawane, learned Counsel for the petitioner, Mr. Munish Dadwal, Asstt. A.G., Haryana for respondent No.1-State and Mr. Satish Tamta, Sr. Advocate with Mr. Animesh Sharma, Advocate and Mr. Vikramaditya Bhaskar, learned Counsel for respondents No.2 to 4 and Mr. Anil Malhotra, learned Amicus Curiae and have gone through the relevant record.

### **Submissions by learned Counsel for the parties.**

(7) Mr. Shadan Farasat, learned Counsel for the petitioner has made the following submissions:-

### **Factual Background**

(7.1) The petitioner and respondent No. 2 were married in New York, USA on 13.01.2011.

(7.2) The minor child was born in Benton County, Arkansas, USA on 21.01.2016. The petitioner's son is a citizen of the U.S.A by birth, and holds a U.S.A. passport which is valid up to 13.10.2021.

(7.3) The petitioner's son was diagnosed with hydronephrosis, a kidney condition that required correction by surgery, in January, 2019.

(7.4) Due to unavailability of surgery slots in the U.S.A., the petitioner and the respondent No. 2 decided to have the surgery conducted in India by Dr. Anurag Krishna at Max Hospital Saket. Accordingly, an international travel consent form was executed between the petitioner and respondent No. 2, permitting the child to travel with respondent No.2 to India between the dates of 05.02.2019 and 26.09.2019. The travel consent expressly mentions that "any changes to this plan shall be discussed and consented upon by both parents".

(7.5) The minor child travelled to India with respondent No.2 on

05.02.2019, in terms of the travel consent. He underwent corrective surgery on 14.03.2019 at Max Hospital, Saket, for which the petitioner flew down to India. Subsequently, after the surgery, the petitioner returned to the U.S.A. to rejoin work.

(7.6) The child recovered from the surgery, and is doing well. This is recorded in the certificate dated 17.09.2019 of the surgeon Dr. Anurag Krishna. Consequently, there remains no medical exigency necessitating the child's continued stay in India.

(7.7) Respondent No.2 violated the international travel consent by not returning the minor child to the USA by 26.09.2019 (the mutually agreed upon date). Since then, she has detained him in her illegal custody in India despite repeated entreaties by the petitioner to return to the U.S.A.

(7.8) The petitioner filed a petition for separate maintenance dated 30.01.2020 before the Circuit Court of Benton County, Arkansas (the appropriate jurisdictional court) seeking primary care, control and custody of his minor child on account of his wrongful detention outside the U.S.A.

(7.9) The jurisdictional foreign court i.e. the Circuit Court of Benton County, Arkansas passed an order dated 03.02.2020 awarding primary care, custody and control of the minor child to the petitioner, and directing respondent No.2 to return the child to the petitioner immediately, pending further orders. This is an interim order and is not a final determination of the child's custody. The order specifically notes that the matter shall be taken up at the request of either party.

(7.10) The petitioner served a copy of the order dated 03.02.2020 passed by the jurisdictional foreign court via email to respondent No.2, as well as in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, 1965.

(7.11) Subsequently, due to respondent No. 2 continuing to detain the minor child in her illegal custody in India, in the teeth of the order dated 03.02.2020 passed by the jurisdictional foreign court i.e. the Circuit Court of Benton County, Arkansas, the petitioner has preferred the present writ petition.

### **Scope of inquiry**

(7.12) It is settled law in international parental child custody cases that where a foreign court is seized of the custody issue and the child has not spent a very long time in India, the role of the Indian court

is limited to making a summary inquiry to examine if any harm will be caused upon return of the child to the native country in terms of the orders of the jurisdictional foreign court. No detailed analysis of who should be granted custody need be carried out as that is the function of the jurisdictional foreign court.

(7.13) In the present case, there is no specific pleading by respondents No. 2-4 that the petitioner is a bad father. The factual matrix shows that the minor child was brought to India for a surgery and subsequent recuperation for a limited period of time (05.02.2019-26.09.2019). Despite this, the child has not been returned to the USA, even though he has recovered and there is no medical exigency requiring his continued stay in India.

(7.14) The jurisdictional foreign court i.e. the Circuit Court of Benton County, Arkansas is seized of the custody dispute between the petitioner and respondent No.2, and has passed an order dated 03.02.2020, directing that the child be returned to India. The order is in the nature of an interim order and leaves it open for respondent No.2 to agitate her cause, including the question of custody of the minor child, before the jurisdictional foreign court.

(7.15) Consequently, this Court may direct the return of the child to his native country USA on the same terms outlined by the Hon'ble Supreme Court in *Nilanjan Bhattacharya versus The Station House Officer Koramagla and others*<sup>1</sup> as well as this Hon'ble Court in *CRWP-7400-2020 titled as Parminder Kaur Brar versus State of Punjab and others decided on 17.12.2020*.

#### **Baseless claims by respondents No. 2 to 4**

(7.16) The claim that the child is not fully healthy and requires a second surgery is plainly false, as is evident from the certificate dated 17.09.2019 of the child's surgeon Dr. Anurag Krishna. The petitioner has also spoken to Dr. Anurag Krishna who has stated that there is nothing preventing the child from returning to the USA. The same has been affirmed by the petitioner on affidavit.

(7.17) Respondent No.2 has relied on certain out of context Whatsapp extracts to level false allegation that the petitioner is suicidal. The allegation is clearly belied by the petitioner's detailed psychological evaluation report dated 21.10.2020 which concludes that "[the Petitioner] is free of any neurophysiological problems and he has

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<sup>1</sup> 2020 (2) DMC 220

no diagnosable mental health problems at this time. He is free of depression, anxiety and reports no suicidal ideations”.

(7.18) The US Embassy Welfare Report clearly mentions that the welfare report is not a child custody evaluation and further qualifies it by saying that the visiting consular officer is not trained in child protection or social work as mentioned in the disclaimer.

(7.19) The petitioner also has requisite skills to care for his child in the USA, and has put the same on affidavit. He also has the option to work from home permanently, enabling him to care for the child full time when required. Further, the petitioner’s mother Smt. Usha Hanumantharaya has a valid US visa till 23.02.2024 and has expressed her willingness to care for the minor child to this Hon’ble Court, which was also a relevant factor in the judgment of the Hon’ble Supreme Court in *Nilanjan Bhattacharya* (*supra*).

(7.20) The child is a U.S. citizen; the jurisdictional foreign court in Benton County, Arkansas is already seized of custody proceedings. No proceedings are pending in India in respect of the child’s custody. The test that the child will suffer harm if returned to his native jurisdiction is not satisfied. Consequently, this Hon’ble Court may direct the repatriation of the minor child to the USA on the same terms as in *Nilanjan Bhattacharya* (*supra*) and in *Parminder Kaur Brar* (*supra*), pursuant to exercise of summary jurisdiction.

(7.21) In support of his arguments, learned Counsel for the petitioner has placed reliance on the observations in *Nilanjan Bhattacharya versus State of Karnataka and ors*<sup>2</sup>, *Nilanjan Bhattacharya versus The Station House Officer Koramagla and ors*<sup>3</sup> *CRWP-7400-2020 titled as 'Parminder Kaur Brar versus State of Punjab and others' decided on 17.12.2020*; *Yashita Sahu versus State of Rajasthan*<sup>4</sup>, *Surya Vadanam versus State of Tamil Nadu*<sup>5</sup>, *Dr. V. Ravi Chandran versus Union of India*<sup>6</sup>, *Lahari Sakhamuri versus Sobhan Kodali*<sup>7</sup>, *Sandeep Kaur Dhillon versus State of Punjab*<sup>8</sup> and

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<sup>2</sup> 2020(4) RCR (Civil) 660

<sup>3</sup> 2020 (2) DMC 220

<sup>4</sup> 2020 (3) SCC 67

<sup>5</sup> 2015 (5) SCC 450

<sup>6</sup> 2020 (1) SCC 147

<sup>7</sup> 2019 (7) SCC 311

<sup>8</sup> AIR 2016 (NOC 707) 328

***Mrs. Elizabeth Dinshaw versus Arvand M. Dinshaw and another***<sup>9</sup>.

(8) Mr. Munish Dadwal, Asstt. A.G., Haryana learned State Counsel has submitted that respondent No.1-State of Haryana will abide by the orders passed by this Court.

(9) Mr. Satish Tamta, Learned Senior Counsel for respondents No.2 to 4 has made the following submissions:-

(9.1) The petitioner has not approached the Court with clean hands and has also not approached the Court at USA with clean hands. Certain facts that highlight the conduct of petitioner have been concealed by him. The manipulative nature of petitioner is evident, at one end he has filed the present case saying that the minor child has been abducted, whereas it is more than clear from his statements that he was aware and in fact wanted respondent No.2 and minor child to reside with respondents No.3 and 4 at their home, which would help respondent No.2 to start work so that more money could flow into their accounts.

(9.2) The custody case in USA was filed immediately after respondent No.2 e-mailed the petitioner requesting him to return the money to respondent No.3, taken for land purchase, the email was sent on 14.01.2020 and the case was filed on 30.01.2020. The petitioner has assumed on the basis of a consent given by both the petitioner and respondent No.2, that he is the best/better guardian to the minor child. From a bare perusal of documents placed by the petitioner, it becomes evidently clear for what purpose respondent No.2 was sent to India and with the minor child.

**Medical condition of the minor child.**

(9.3) The travel to India of respondent No.2 with her minor child pre-planned after the diagnosis of medical condition of minor child known as Hydronephrosis on 31.01.2019 at USA.

(9.4) The minor child's one kidney was operated on 14.03.2019 at Max Hospital Saket, Delhi.

(9.5) Though there is slight improvement seen in the last report on 31.01.2020, there can be no lapses as that could be extremely fatal for the life of the minor child as he cannot be left alone as he may consume excessive water thereby worsening his condition. It would not be possible to provide such extreme medical care and supervision in

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<sup>9</sup> 1987 (1) SCC 42

USA.

**Petitioner's vision of settling in India.**

(9.6) Ingraining of the minor child to be completely fixed to his Indian roots was one of the reasons why the petitioner took the decision to send respondent No.2 and their minor child to India for permanent settlement. The engagement and wedding all took place in India as per Hindu customs and traditions. Even the minor child's first birthday was celebrated in India.

(9.7) Disconnection of the minor child from his roots was a cause of immense concern to the petitioner. He was not satisfied with the level of education imparted in American schools. It was made clear in recorded counselling session dated 24.01.2019 that petitioner desired that his child should study in India.

(9.8) Respondent No.2 on the instructions of the petitioner had earlier also travelled to India with the minor child in 2017 and 2018, with the sole aim of permanently settling in India. In 2018 the minor child was also enrolled in preschool in India as per the wishes of the Petitioner. It was the petitioner who himself selected the preschool "Pallavan" while he was here in Indian in April, 2019 and accordingly respondent No.3 made the payment for admission.

(9.9) Petitioner consistently purchased more and more land in India, specially in Bangalore, his home town as he constantly wished to settle back in India. In every possible conversation of his with the Respondent No.2 he made sure to push her to ask respondent No.3 for funds to purchase land.

(9.10) The emphasis of Indian way of life is stated clearly by the petitioner in his additional affidavit dated 15.06.2020 filed before this Court.

(9.11) Planning of travel and settling in India was a joint decision taken by both the parties, in fact the petitioner was the person pushing respondent No.2 to start working in India which has been captured in a WhatsApp conversation dated 11.01.2019 between the parties.

(9.12) Due to the financial difficulty being faced by the petitioner he had time and again pushed respondent No.2 to go to India and settle there and start working.

**Temperamental/suicidal nature of the petitioner.**

(9.13) The petitioner has temperamental issues and gets angry over small things, his temper can completely go out of control resulting in respondent No.2 fearing for her life and that of her minor child, once such incident had even forced her to call women's shelter while in USA, on 05.11.2018, which she had informed to her brother and uncle immediately via email.

(9.14) Respondent No.2 was constantly living in fear while with the Petitioner. On one or the other pretext he would keep on reminding her of his suicidal tendencies. The same was constantly used a weapon to mentally torture respondent No.2. Multiple times has the same been written in black and white by the petitioner including email dated 22.09.2015 and WhatsApp conversation dated 30.06.2018.

(9.15) Various other issues which are hacking/bugging/placing of hidden cameras inside the house when they were living together in USA scare the respondent No.2 as to the extent the petitioner can go to cause harm to her and their child.

**Petitioner setting up moles inside the house of respondent No.2 to get information and falsely frame her.**

(9.16) The calculating nature of petitioner is evident from the fact that he has constantly tried to disrupt their marriage by his own acts and deeds. He has no interest whatsoever in the minor child. Even before there were any issues between the parties, the petitioner in a clandestine manner engaged with old house help of respondents No.3 and 4, gave her a phone and amount of Rs.10,000/- who concocted stories about respondent No.2 being a characterless women having multiple affairs with different men. The petitioner also engaged private detectives to keep track of her every move and shot pictures of random people stating that she is having affairs with all these men.

(9.17) The overall wellbeing of the child is clearly in the hands of respondent No.2 which is in the best interest of the minor child as has been ascertained by the US Embassy, Delhi when they visited the minor child as the Petitioner had complained that the minor child was being held captive by the respondents No.2 to 4. A detailed report was given by them stating that the minor child is a happy, healthy and smart child who is being taken care by respondents No.2 to 4 jointly. The physical and mental wellbeing of the minor child has been assessed by a foreign agency which has stated him to be in safe hands and being looked after well. The minor child is currently enrolled at Shri Ram

School, Aravali, Gurugram, one of the best schools in India. The decision to enrol the child in the school in India was always of the petitioner as he believes that India education system is the best in the world, as he himself was educated in India.

(9.18) The mere fact that the petitioner nor any of his family members have visited the minor child till date, after the minor child's surgery and even after the Court had stated in order dated 17.06.2020 that the petitioner is free to come and meet the child, take him out and stay with him. Respondent No.2 had even stated that the petitioner can come and stay with them at respondent No.3 and respondent No.4 house. Still till date no effort has been made by the petitioner or his family members to meet the minor child, not even once. This shows the level of interest of the petitioner or of his family to be involved in the upbringing of the minor child and clearly shows the true intent of the petitioner which is to harass respondent No.2.

Learned Counsel for respondents No.2 to 4 has accordingly prayed for dismissal of the petition.

(9.19) In support of his arguments, learned Counsel for respondents No.2 to 4 has placed reliance on the observations in *Nithya Anand Raghavan versus State (NCT of Delhi)*<sup>10</sup>; *Kanika Goel versus State (NCT of Delhi)*<sup>11</sup>; *Veena Kapoor versus Varinder Kumar Kapoor*<sup>12</sup>; *Prateek Gupta versus Shilpi Gupta*<sup>13</sup>; *Roxann Sharma versus Arun Sharma*<sup>14</sup>; *Lahari Sakhamuri versus Sobhan Kadali*<sup>15</sup>; *Ruchi Majoo versus Sanjeev Majoo*<sup>16</sup> and *Yashita Sahu versus State of Rajasthan*<sup>17</sup>.

### **Report of the Amicus Curiae**

(10) Mr. Anil Malhotra, learned Counsel appointed as amicus curiae has submitted that on 14.07.2020, this Hon'ble Court had granted time to him to interact with the parties in order to arrive at some logical conclusion. In pursuance thereof, he has interacted with

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<sup>10</sup> 2017 (8) SCC 454

<sup>11</sup> 2018 (9) SCC 578

<sup>12</sup> 1981 (3) SCC 92

<sup>13</sup> 2018(2) SCC 309

<sup>14</sup> 2015 (8) SCC 318

<sup>15</sup> 2019(7) SCC 311

<sup>16</sup> 2011 (6) SCC 473

<sup>17</sup> 2020 (3) SCC 67



the petitioner and respondent No.2 separately on phone/whats-app calls on a number of occasions from 15.07.2020 to 07.08.2020. After interacting with the petitioner and respondent No.2 to ascertain their view points and hear their respective stands, it transpires that no mutually acceptable stand or neutral position can be arrived at which is agreeable to both sides. Hence, despite best efforts and lengthy conversations by him, no conclusion acceptable to both sides has been arrived at in the best interest and welfare of the child.

(11) For rendering assistance to this Court, learned Amicus Curiae has submitted report on inter-parental child custody issues and position of foreign court orders in Indian law giving all possible aspects and position of law in this regard. The relevant part of the said report reads as under:-

“As per the prevalent position now, irrespective of any foreign Court Order/agreement/ arrangement between parties, it shall be open for the Indian Courts to again independently determine the welfare of the child, in its best interest, and there will be no automatic Order or direction of return to the home country of the foreign child. In this process, the principle of Comity of Courts may have discretionary application and the doctrine of jurisdiction of closest contact to determine ultimate welfare of the child will apply. This is the latest position of law.

Since, there is no statute in India defining, recognising or identifying inter-parental child removal, especially in the international context, the Indian Courts over a period of time have been adjudicating matters, on the basis of individual facts and circumstances, to decide as to what relief should be granted to the parties. Hence, there is a variation of decisions and there is no consistent viewpoint. The welfare of the child principle being the paramount consideration, there is a tendency among Indian Courts to digress from a consistent approach and accordingly, precedents may be distinguished or differed, depending on the factual matrix and circumstances which may differ from case to case. Thus, the jurisprudence in child abduction law varies.

The evolving mirror Order jurisprudence in child custody matters in India, wherein the US Court passed mirror Order directions to comply with the judgment of the Delhi High

Court, can be a possible way forward to establish a precedent for the return of children to their homes of foreign jurisdictions. Subject to the welfare and best interest of the child determination by a High Court, the mirror Order formula, evolved by judicial mechanisms through the far-sighted wisdom of the Indian Courts, to ensure the best interests and welfare of the children, as well as to provide them a family life with love, care and the affection of both parents, can be cited as a possible method, for the return of children to foreign jurisdictions, until a law on the subject is enacted, and some adjudicatory legal resolution process is evolved by any prospective law.

The concept of single parent custody in preference to joint/shared parenting is not in the best interest and welfare of the child. The definition of the best interest of the child has been expounded by the Supreme Court in *Lahari Sakhamuri* to mean that "...it cannot remain the love and care of the primary care giver, i.e., the mother in case of the infant or the child who is only a few years old. The definition of "best interest of the child" is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identify, social wellbeing and physical, emotional and intellectual development." Hence, co-parenting, shared or joint custody by any mutually agreeable parenting plan is in the best interest and welfare of the minor child so that he receives the love, care, attention, parenting, besides monetary and other support of both parents."

(12) In *CRWP No.7400 of 2020 titled as Parminder Kaur Brar versus State of Punjab and others decided on 17.12.2020* this Court, while noticing that the petition for issuance of habeas corpus for custody of child or repatriation of child in case of inter country child removal involves difficult questions, observed as under:-

"The question of the custody of child, as observed by Hon'ble Supreme Court in *Lahari Sakhamuri Vs. Sobhan Kodali : 2019 (7) SCC 311*, raises delicate issues considered by the Courts to be difficult for adjudication particularly where the parents are non-resident Indians. As observed by Hon'ble Supreme Court in *Vivek Singh Vs. Romani Singh :*

**2017 (1) RCR (Civil) 1063**, in cases of this nature while a child, who ideally needs the company of both the parents, feels tormented because of the strained relations between the parents, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. The children are not mere chattels : nor are they mere play-things for their parents as observed by Hon'ble Supreme Court in **Rosy Jacob Vs. Jacob A. Chakramakkal : (1973) 1 SCC 840** and in deciding the question of their custody paramount consideration is their welfare. 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.”

(13) In the present case also the facts and circumstances are no less puzzling to make difficult for this Court to weigh the conflicting parameters and decide on which side the balance tilts.

### **Question of maintainability of the habeas corpus petition**

(14) Now, it is well settled that writ of habeas corpus can be issued for restoration of custody of a minor to the guardian wrongfully deprived of it. (See **Gohar Begam versus Suggi alias Nazma Begam**<sup>18</sup>; **Manju Tiwari versus Rajendra Tiwarix**<sup>19</sup>; **Syed Saleemuddin versus Dr. Rukhsana**<sup>20</sup> and **Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others**<sup>21</sup>.)

(15) In **Crl. Appeal No.127 of 2020 SLP (crl.) No.7390 of 2019 titled Yashita Sahu versus State of Rajasthan and others decided on 20.01.2020** while referring to its judgments in **Elizabeth Dinshaw versus Arvand M. Dinshaw & Ors.**<sup>22</sup>; **Nithya Anand Raghavan versus State (NCT of Delhi) & Anr.**<sup>23</sup> and **Lahari Sakhamuri versus Sobhan Kodali**<sup>24</sup> Hon'ble Supreme Court rejected the contention that a writ of habeas corpus is not maintainable if the child is in the custody of another parent and held that the court can invoke its extraordinary writ jurisdiction for the best interest of the child.

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<sup>18</sup> (1960) 1 SCC 597

<sup>19</sup> (1960) 1 SCC 597

<sup>20</sup> 2001(2) R.C.R.(Crl.) 591

<sup>21</sup> (SC) : 2019(3) R.C.R. (Civil) 104

<sup>22</sup> (1987) 1 SCC 42

<sup>23</sup> (2017) 8 SCC 454

<sup>24</sup> (2019) 7 SCC 311

**Not the legal rights of the parties but the best of the interest and welfare of the child are the paramount consideration**

(16) Exercise of extra ordinary writ jurisdiction to issue writ of habeas corpus in such cases is not solely dependent on and does not necessarily follow merely determination of illegality of detention and is based on the paramount consideration of welfare of the minor child irrespective of legal rights of the parents. In *Howarth versus Northcott*<sup>25</sup> it was observed that in habeas corpus proceedings to determine child custody, 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 infant 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. It was further observed that 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. It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child. In *Gaurav Nagpal versus Sumedha Nagpal*<sup>26</sup> Hon'ble Supreme Court referred to these observations made in *Howarth versus Northcott* (*supra*) and held that the legal position in India follows the above doctrine.

(17) Whenever a question arises pertaining to the custody of a minor child whether before Family Court/Guardian Judge on a petition for custody of the minor child under the Guardians and Wards Act, 1890, Hindu Minority and Guardianship Act, 1956 etc. or before High Court or Supreme Court on a habeas corpus petition, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. (See *Elizabeth Dinshaw Vs. Arvand M.*

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<sup>25</sup> 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758

<sup>26</sup> 2008(4) R.C.R.(Civil) 928

*Dinshaw & Ors.*(1987) 1 SCC 42 and *Syed Saleemuddin Vs. Dr. Rukhsana* : 2001(2) R.C.R.(Criminal) 591).

### **Determination of best of interest and welfare of child**

(18) The welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical wellbeing. Nor can the tie of affection be disregarded. (Per Lindley, L.J. in *McGrath*<sup>27</sup>. 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. (Per Hardy Boys, J. in *Walker versus Walker & Harrison*<sup>28</sup>.)

(19) In *Gaurav Nagpal versus Sumedha Nagpal*<sup>29</sup> Hon'ble Supreme Court observed as under:-

“42. ....The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

43. 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

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<sup>27</sup> (1893) 1 Ch 143)

<sup>28</sup> (1981) New Zealand Recent Law 257

<sup>29</sup> 2008(4) R.C.R.(Civil) 928

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.”

(20) Hon'ble Supreme Court in *Nil Ratan Kundu versus Abhijit Kundu*<sup>30</sup> set out the principles governing the custody of minor children in paragraph 52 as follows:-

**“Principles governing custody of minor children**

56. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and wellbeing of the child. In selecting a guardian, the court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.”

(21) In *Lahari Sakhamuri versus Sobhan Kadali*<sup>31</sup> Hon'ble Supreme Court observed as under:-

“43. The expression "best interest of child" which is always

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<sup>30</sup> 2008(3) RCR (Civil) 936

<sup>31</sup> 2019(7) SCC 311

kept to be of paramount consideration is indeed wide in its connotation and it cannot remain the love and care of the primary care giver, i.e., the mother in case of the infant or the child who is only a few years old. The definition of "best interest of the child" is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identify, social well-being and physical, emotional and intellectual development".

49. The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.

(22) In *Civil Appeal No.3559 of 2020 titled as Smriti Madan Kansagra versus Perry Kansagra decided on 28.10.2020*, Hon'ble Supreme Court observed as under:-

“11.3. To decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child.”

### **Inter country child removal and issue of repatriation**

(23) India is not signatory to the Hague Convention on Civil Aspects of Inter-national Child Abduction, 1980 or the Hague Convention on Parental Responsibility and Protection of Children, 1996. In number of cases filed under Article 32 of the Constitution of India or appeals filed challenging correctness of the order passed by the High Court in exercise of jurisdiction under Article 226 of the Constitution of India, Hon'ble Supreme Court has dealt with the

question of issuance of writ of habeas corpus for repatriation of the minor children, who had been removed from the foreign countries and brought to India, to the country from where they had been removed. Hon'ble Supreme Court has taken the view that the High Court may invoke the extraordinary jurisdiction to determine the validity of the detention keeping in mind the paramount consideration of the welfare of the child and even the order of the foreign court must yield to the welfare of the child.

**The proceedings in USA Court and the order passed by the USA Court**

(24) In the present case the petitioner approached the Circuit Court of Benton County, Arkansas, USA and the said Court passed the following order dated 03.02.2020 :-

“Now on the 3<sup>rd</sup> day of February, 2020, this matter comes before the Court and the Court, being well and sufficiently advised finds and orders as follows:

1. The Court has jurisdiction over the parties and subject matter and venue is proper herein.
2. Defendant has removed the parties' minor child to India and remained there without the consent of plaintiff.
3. Defendant has alienated the child from plaintiff, which is harmful to the child's well being.
4. Plaintiff is awarded primary care, custody and control of the minor child, Aaditya Kiran pending further orders of the Court.
5. Defendant shall return Aaditya Kiran to plaintiff immediately.
6. Hearing will be scheduled promptly upon request by either party.”

(25) Admittedly, the minor child is a U.S. Citizen. The jurisdictional foreign court in Benton County, Arkansas is already seized of custody proceedings. No proceedings are pending in India either for dissolution of marriage of the petitioner and respondent No.2 or in respect of the custody of the minor child.

(26) The fact that there is a pre existing order of the foreign Court in favour of the petitioner is a factor to be reckoned in favour of



the petitioner but the same is not determinative of the question of repatriation of the minor child for permitting the same which question has to be decided on the test of best of interest and welfare of the minor child.

(27) In *Lahari Sakhamuri versus Sobhan Kodali (supra)*, Hon'ble Supreme Court observed that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, 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.

**Whether to conduct summary inquiry or elaborate enquiry.**

(28) In *Nithya Anand Raghavan versus State of NCT of Delhi*<sup>32</sup> Hon'ble Supreme Court reiterated the law as under:-

“24..... The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its 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

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<sup>32</sup> (SC) : 2017(3) R.C.R.(Civil) 798

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 preexisting 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.

26. The consistent view of this court is that if the child has been brought within India, the Courts in India may conduct (a) summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the Court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the Court to decline the relief of return of the child to the country from where he/she was removed irrespective of a preexisting order of return of the child by a foreign Court. In an elaborate inquiry, the Court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign Court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the Court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently."

(29) In *Prateek Gupta versus Shilpi Gupta and others*<sup>33</sup> following its earlier judgment in *Nithya Anand Raghavan versus State of NCT of Delhi* (*supra*), Hon'ble Supreme Court held as follows:-

“32. The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of "intimate contact and closest concern" notwithstanding. Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer *res integra* that the ever overriding determinant would be the welfare and interest of the child. In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgeably subservient thereto. Though in the process of adjudication of the issue of repatriation, a court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the applicant/parent is prompt and alert in his/her initiative and the existing circumstances *ex facie* justify such course again in the overwhelming exigency of the welfare of the child, such a course could be approvable in law, if an effortless discernment of the relevant factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological, social, cultural existence, thus exposing it to visible, continuing and irreparable detrimental and nihilistic attentuations. On the other hand, if the applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold”.

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<sup>33</sup> (2018) 2 SCC 209

**The relief in the present case**

(30) In the present case, the question of issuance of writ of habeas corpus in exercise of jurisdiction under Article 226 of the Constitution of India directing or declining return of the minor child to the native country, has to be decided, not on the basis of legal rights of the parties, but on the basis as to whether paramount consideration of the welfare and best interest of the minor child lies in return to USA or continued stay in India. In determining the said question this Court has the option to resort to a summary inquiry or an elaborate inquiry and the option has to be exercised and the said question has to be decided by taking into account the totality of the facts and circumstances and judging the same on paramount consideration of the welfare and best interest of the minor child. On taking into account the totality of the facts and circumstances and judging the same on paramount consideration of the welfare and best interest of the minor child, I am of the considered view that the questions involved deserve to be decided by recourse to summary inquiry and the facts and circumstances of the case do not warrant or mandate resort to an elaborate enquiry.

(31) In the present case the minor child, born on 21.01.2016, now aged about five and half years, is citizen of USA by birth. The minor child was living with both of them in USA. The minor child has spent period of more than three years in USA and two and half years in India out of five and half years. Neither the period of three years spent by the minor child in USA nor the period of two and half years spent by the minor child in India in his formative initial years can be said to have resulted in his complete integration with the social, physical, psychological, cultural and academic environment of USA or India. The petitioner is seeking his repatriation to USA while respondent No.2 is urging for allowing his continued stayed in India and the grounds asserted and controverted in this regard may be adjudicated upon.

**Medical condition of minor-Aaditya Kiran**

(32) Admittedly, in the present case minor child-Aaditya Kiran was diagnosed as a case of bilateral hydronephrosis nephrosis mild on the left and moderate to severe on the right as mentioned in report dated 31.01.2019 of **mana Medical Associates**. His condition required correction by surgery.

(33) Due to unavailability of surgery slots in the U.S.A., the petitioner and respondent No. 2 decided to have the surgery conducted in India by Dr. Anurag Krishna at Max Hospital Saket. Admittedly, respondent No.2 could not travel alone with minor child. Accordingly,

international travel consent form was executed between the petitioner and respondent No.2, permitting the child to travel with respondent No.2 to India between the dates of 05.02.2019 and 26.09.2019.

(34) Minor child travelled to India with respondent No. 2 on 05.02.2019, in terms of the travel consent. He underwent corrective surgery on 14.03.2019 at Max Hospital, Saket. Dr. Anurag Krishna issued certificate that minor-Aaditya Kiran, who had a horseshoe kidney with bilateral hydronephrosis and right side pelvic ureteric junction obstruction, underwent Rt. pyeloplasty on 14.03.2021. He saw him during follow up on 12.07.2019 and he is doing well he needs to be reviewed 6-7 months post surgery along with a fresh Ultrasound and Renal Scan.

(35) A perusal of report dated 31.01.2020 of Mahajan Imaging Centre DTPA shows that in the above said report the impression was recorded as under:-

“Horseshow kidney with functioning parenchyma connecting the two moieties.

Non-obstructed right moiety showing residual hydronephrosis with mildly impaired cortical function.

Partially obstructed left moiety with preserved cortical function.

Compared to the previous DTPA scan done on 13.02.2019, improvement in cortical function and drainage pattern of the right moiety is noted.”

(36) Respondent No.2 has claimed that though there is slight improvement seen in the last report on 31.01.2020, there can be no lapses as that could be extremely fatal for the life of the minor child as he cannot be left alone as he may consume excessive water thereby worsening his condition. It would not be possible to provide such extreme medical care and supervision in USA, the same reason why a call was taken to get the medical surgery of the minor child done in India. Respondent No.2 has also claimed that respondent No.4, mother of respondent No.2, with whom the minor child resides is a doctor. Her brother is also a known doctor and stays close to respondents No.2 to 4. The brother of respondent No.2 is also a doctor. It is in the interest of the minor child to stay in Gurugram, India.

(37) However, respondent No.2 has not produced any further medical report or medical treatment record to show that the minor child

requires any further regular medical/surgical treatment apart from usual periodical review which it will not be difficult to arrange for even in the USA without involving any unnecessary delay of any kind. The petitioner has sworn that he had spoken to Dr. Anurag Krishna who had stated that there was nothing to prevent the minor child from returning to USA. Therefore, repatriation of minor child to USA will not be harmful to him on account of his medical condition or discontinuity of his medical/surgical treatment in India and his continued stay in India is not necessary on account of his alleged bad medical condition for his future medical/surgical treatment, if so required and therefore, the fact that grandmother and her brother and maternal uncle of the minor child are doctors is not of much significance to tilt the balance in favour of respondent No.2.

### **Petitioner's vision of settling in India**

(38) Respondent No.2 has claimed that the petitioner wanted ingraining of the minor child to be completely fixed in Indian roots and desired that his child should study in India. Respondent No.2 on instructions of the petitioner had earlier visited India in the year 2017 and 2018 with the sole aim permanently settle in India. In 2018 the minor child was enrolled in pre school in India as per wishes of the petitioner. In April, 2019 the petitioner selected pre school 'Pallavan' for the minor child. The petitioner purchased land in Bangalore for settling back in India and pushed respondent No.2 to ask respondent No.3 for funds to purchase land. The petitioner wanted respondent No.2 to start working in India and to make money for building a wonderful house as mentioned in WhatsApp message dated 11.01.2019.

(39) Even though e-mails and whatsApp messages have been relied upon by respondent No.2 but admittedly, the petitioner is permanent resident of Benton Country, Arkansas, USA and is currently employed as a Senior Software Engineer in Walmart Labs, Bentonville, USA. The petitioner has sufficient financial resources to maintain respondent No.2 and the minor child. The petitioner had purchased house in Centerton, Arkansas, USA for settlement which negates the claim of respondent No.2 as to the petitioner being desirous of immediately permanently settling in India. The fact that the petitioner asked respondent No.2 to arrange funds for purchase of land and purchased land in Bangalore does not show his plan in the immediate future to shift and permanently settle in India. On the other hand, the claim of the petitioner of his vision of continuing to live in USA is

supported by international travel consent form requiring return of respondent No.2 and minor child on 26.09.2019 agreed and consented to by respondent No.2. Any change to the travel plan was subject to discussion and consent of both the parties. No change in the travel plan was so discussed and consented to by both the parties. Respondent No.2 could not have travelled to India with the minor child alone without the petitioner had there been no such travel consent. Respondent No.2 having travelled thereunder to India but having failed to return in terms thereof cannot be allowed to take advantage of her wrong and must return to USA with the minor child as per her legal and equitable obligation to do so.

### **Temperamental suicidal nature of the petitioner**

(40) Respondent No.2 has claimed that the petitioner has temperamental issues and gets angry over small things, his temper can completely go out of control resulting in respondent No.2 fearing for her life and that of her minor child, once such incident had even forced her to call women's shelter while in USA on 05.11.2018 regarding which she had informed her brother and uncle immediately via email. Respondent No.2 was constantly living in fear with the petitioner as on one or the other pretext, he kept on reminding her of his suicidal tendencies. The same was constantly used a weapon to mentally torture the Respondent No.2 which was also mentioned in email dated 22.09.2015 and WhatsApp conversation dated 30.06.2018. Various other issues of hacking/bugging/placing of hidden cameras inside the house when they were living together in USA also scared respondent No.2 that the petitioner can go to any extent to cause harm to her and minor child.

(41) However, respondent No.2 has not produced any complaint made to any authority in the USA. Respondent No.2 has not initiated any proceedings for dissolution of her marriage with petitioner on the grounds of mental and physical cruelty. Tendency to commit suicide, which has the factual background mentioned and consequent emotional trauma, cannot be said to involve any tendency to cause harm to others. The petitioner has produced his psychological evaluation report dated 21.10.2020 given by Centre for Psychology which concluded that the petitioner is free of any neurophysiological problems and he has no diagnosable mental health problems at this time. He is free of depression, anxiety and reports no suicidal ideations.

(42) Consequently, there is no cogent and reliable material to hold that in view of mental health and suicidal tendency of the

petitioner, repatriation of minor child to USA will not in the best of his interest and welfare.

**Relevance of report of U.S. Embassy regarding welfare of the child**

(43) Respondent No.2 has claimed that the overall wellbeing of the child is clearly in the hands of respondent No.2 which is in the best interest of the minor child as has been ascertained by the US Embassy, Delhi when they visited the minor child as the petitioner had complained that the minor child was being held captive by respondents No.2 to 4. A detailed welfare report was given by them stating that the minor child is a happy, healthy and smart child who is being taken care by respondents No.2 to 4 jointly. The physical and mental wellbeing of the minor child has been assessed by a foreign agency which has stated him to be in safe hands and being looked after well.

(44) On the other hand, petitioner has asserted that the welfare visit report clearly mentioned that the visit is not a child custody evaluation and further qualified it by saying that the Visiting Consular Officer is not trained in child protection or social work as mentioned in the disclaimer.

(45) A perusal of the disclaimer to report dated 17.12.2019 shows that the Vienna Convention on Consular Relations authorizes US Embassy and/or Consulate General personnel to visit U.S. citizens to ascertain their whereabouts and general welfare. In cases involving minor children, consular personnel must have the permission of the child's local parent or guardian to conduct a visit. The consular officer, who is generally not trained in child protection, social work or other similar disciplines, writes a report of his or her observations. This report is not a child custody evaluation.

(46) In view of the above referred disclaimer, welfare report dated 17.12.2019 cannot be said to be child custody evaluation. Further the report is based on interaction with respondent No.2 and minor child in the presence of respondents No.3 and 4 and is based on personal observations by the visitors who were not trained in child protection, social work or other similar disciplines. Therefore, the welfare report prepared by US Embassy visitors is not of any significance in deciding the question of welfare of the minor child.

**Giving of personal care and attention to the minor child.**

(47) Respondent No.2 has claimed that it would not be possible to provide such personal care and supervision to the minor child in



USA as is being given to him by respondents No.2 to 4 in India.

(48) However, a perusal of the welfare report dated 17.12.2019 of Visiting Consular of US Embassy shows that respondent No.2 told the Visiting Consular that her aunt picks up minor child from school and brings him home each day and stays with him throughout the day while the mother and grand-parents are at work. The minor child has a domestic helper who takes care of his needs and plays with him. It is evident from the report that even respondent No.2 and her parents are not giving whole day personal care and attention to the minor child.

(49) The petitioner has filed affidavit dated 15.06.2020 that the petitioner also has requisite skills to care for his child in the USA. The petitioner has also the option to work from home permanently, enabling him to care for the child full time when required. Further, the Petitioner's mother Smt. Usha Hanumantharayya has a valid US visa till 23.02.2024 and has expressed her willingness to take care of the minor child to this Court.

(50) In these facts and circumstances, there is no reasonable ground to believe that the minor child cannot be given due personal care and attention in USA and therefore, repatriation of the minor child cannot be declined on the ground of lack of requisite personal care and attention to the minor child in USA.

**Petitioner setting up moles inside the house of the respondent No.2 to get information and falsely frame her.**

(51) Respondent No.2 has made detailed averments of her mental and physical cruelty and making of false accusation of extra marital affair by the petitioner with detailed allegations regarding installation of cameras, surveillance through maid servants, engagements of private detectives etc. but the petitioner has not filed any petition for dissolution of her marriage on the ground of mental or physical cruelty and did not make any complaint to the police or the Court in India or USA. These averments are required to be adjudicated upon on petition for dissolution of marriage or custody of the minor child. Respondent No.2 must prove the grounds of her entitlement to custody of the minor child before the US Court which had jurisdiction regarding the same and before which the proceedings are pending now particularly when respondent No.2 did not file any proceedings in India for dissolution of her marriage with the petitioner and also for custody of the minor child.

(52) The minor child has been living in India for a period of

about two and half years which also included the period of about one and half years of lock-down/restrictions/social distancing due to pandemic of Covid-19. Stay of the minor child in India has been far too short a period to facilitate his acclimatization and integration to social, physical, psychological, cultural and academic environment of India. The minor child if repatriated to USA will not be subjected to entirely foreign, system of education divorced from the social circles. No doubt, there is likelihood of the minor child being psychologically disturbed due to his separation from respondent No.2-his mother, who is the primary care giver to him and under whose care he has remained since his birth but his mother (respondent No.2) has already wrongfully deprived him of the love and affection of his father with whom also the minor child lived since his birth till removal to India. The forced company of his maternal grandparents (respondents No.3 and 4) and other relatives away from his father cannot be said to be conducive to his physical and psychological well-being. The minor child being citizen of USA will have better future prospects on return to USA. Unless the minor child is immediately repatriated to USA, his inherent potentialities and faculties would suffer an immeasurable setback. Natural process of grooming in the environment of his native country-USA is indispensable for comprehensive and conducive development of his mental and physical faculties. There are compelling reasons to direct return of the minor child to USA as prayed for by the petitioner and such return is not shown to be harmful to the minor child in any manner. Continuance of the minor child in India will interfere with and will be harmful to his overall growth and grooming and will be prejudicial to his interest and future prospectus. There is no material to suggest that return of the minor child to USA would result in psychological physical or cultural harm to him. There cannot be said to be any undue and unreasonable delay in filing of the present petition so as to disentitle the petitioner to the relief claimed.

(53) In view of the totality of the facts and circumstances of the present case and on the basis of the summary inquiry, I am of the considered view that it will be for the welfare and in best of interest of the minor child that order be passed for return of the minor child to USA, from where he was removed and it will be appropriate that the question of appointment of guardian/handing over custody of the minor child to either of the parents is left for adjudication by the Court of competent jurisdiction in USA on the basis of paramount consideration of welfare and best of the interest of the child.

(54) In these above discussed facts and circumstances of the case, observations in *Nithya Anand Raghavan versus State (NCT of Delhi)*<sup>34</sup>; *Kanika Goel versus State (NCT of Delhi)*<sup>35</sup>; *Veena Kapoor versus Varinder Kumar Kapoor*<sup>36</sup>; *Prateek Gupta versus Shilpi Gupta*<sup>37</sup>; *Roxann Sharma versus Arun Sharma*<sup>38</sup>; *Lahari Sakhamuri versus Sobhan Kadali*<sup>39</sup>; *Ruchi Majoo versus Sanjeev Majoo*<sup>40</sup> and *Yashita Sahu versus State of Rajasthan*<sup>41</sup> relied upon by learned Counsel for respondents No.2 to 4 are not of any help to respondents No.2 to 4.

(55) In view of the above discussion the writ petition is allowed with the following directions:-

(i) respondent No.2 is directed to return to USA along with minor child on or before 30.09.2021;

(ii) in case respondent No.2 opts to return to USA, the petitioner shall bear the travel and incidental expenses of respondent No.2 and the minor child for return to and also the expenses for their stay in USA till decision of the custody petition and the petitioner shall not initiate any criminal/contempt proceedings against respondent No.2 for inter country removal of the minor child;

(iii) if respondent No.2 fails to comply with aforesaid direction, respondent No.2 shall hand over custody of the minor child and his passport to the petitioner on 01.10.2021 or on such other date as may be agreed to by the petitioner;

(iv) in case respondent No.2 fails to hand over custody of the minor child and her passport to the petitioner on 01.10.2021 or on such other date as may be agreed to by the petitioner, respondent No.1 shall take over the custody and passport of the minor child from respondent No.2 and hand over custody and passport of the minor child to the

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<sup>34</sup> 2017 (8) SCC 454

<sup>35</sup> 2018 (9) SCC 578

<sup>36</sup> 1981 (3) SCC 92

<sup>37</sup> 2018(2) SCC 309

<sup>38</sup> 2015 (8) SCC 318

<sup>39</sup> 2019(7) SCC 311

<sup>40</sup> 2011 (6) SCC 473

<sup>41</sup> 2020 (3) SCC 67

petitioner on such date as may be agreed to by the petitioner;

(v) on custody of the minor child and his passport being handed over to the petitioner, the petitioner shall be entitled to take the minor child to USA;

(vi) in case passport of the minor child is not handed over to the petitioner or respondent No.1 by respondent No.2 on the ground of loss/damage etc., the petitioner shall be entitled to get the duplicate passport issued from the concerned authority; and

(vii) on such return of the minor child to USA, either of the parties shall be at liberty to revive the proceedings before US Court for appropriate orders regarding appointment of guardian and grant of custody of the minor child.

(56) In *Criminal Appeal No.127 of 2020 titled Yashita Sahu versus State of Rajasthan and others decided on 20.01.2020*, Hon'ble Supreme Court has observed as under :-

“18. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.

19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient

visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

22. In addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, email or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each."

(57) In view of the observations in *Yashika Sahu's case (supra)* it is ordered that till filing of any such application by either of the parties for revival of the proceedings before the US Court and passing of any interim/final order by the US Court of competent jurisdiction on the same, respondent No.2 shall be entitled to visit the child and have his temporary custody from 10:00 a.m. to 5:00 p.m. on every Sunday or as agreed upon between the petitioner and respondent No.2 if respondent No.2 returns to and stays in USA or make video calls to the minor child for about half an hour on every day in between 5:00 p.m. to 6:00 p.m. (US time) or as agreed upon between the petitioner and

respondent No.2 in case respondent No.2 does not return to and stay in USA and in such an eventuality, the petitioner shall bring the minor child to India to meet respondent No.2 and his maternal grand parents/other relatives once in a year.

(58) However, nothing in this order shall prevent the parties from adopting any joint parenting plan as agreed to by the parties for welfare of the minor child such as by arranging admission of the minor child in some school with hostel facility and by visiting her during holidays and taking her custody during vacation as may be permitted by the school authorities. It is also further clarified that the observations in the present order have been made for the purpose of disposal of the present writ petition and shall not bind any Court or authority in disposal of any other case involving question of custody or welfare of the child.

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*Tribhuvan Dahiya*