

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04 - 08 - 2015

Coram:

THE HON'BLE SMT. JUSTICE **PUSHPA SATHYANARAYANA**

C. S. No. 129 of 2013

and

O.P. No. 285 of 2012

P.K. Srikumar ... Plaintiff

vs.

Harshitha Gopinathan ... Defendant

C.S.: Complaint filed under O.IV R.1 of O.S. Rules r/w Order VII Rule 1 CPC seeking for declaration that the order / judgment passed by the Superior Court of California, County of Orange, in case No. 11D009457 on 01.05.2012 is conclusive and binding on the defendant and enforceable within the jurisdiction of Indian Courts and for a consequential declaration that the plaintiff is the natural guardian and legal custodian of his minor son Srihari Srikumar.

O.P.: Petition filed under Section 25 of the Guardian and Wards Act 1980 and under Order XXI Rules 2 and 3 of the O.S. Rules for grant of custody of the person of the minor child, viz., Srihari born on 16.09.2008 from the respondent.

For Plaintiff : Mrs. Hema Sampath
for Mrs. P.V. Rajeswari

For Defendant : Mrs. Susanna Prabu

COMMON JUDGMENT

"The best way to make children good is to make them happy"

- Oscar Wilde

Matrimonial discords are on the rise at an alarming rate. The sanctity of marriages is under cloud, which in a great way affects the society at large. The cultural heritage of a country is greatly influenced by a pattern of behaviour of individuals and more so, in matters of matrimony. Conflict of laws and jurisdictions in the realm of private international law is a phenomenon that has assumed greater dimensions with the spread of Indian diaspora across the globe.

2. It is, no doubt, true that in a large number of matrimonial cases, one of the parties may return to the country of his or her origin for family support and shelter. It is unfortunate that in their fight more often on account of egoism, the children suffer. The child has practically no role in breaking of the marriage, but he or she suffers. The marital discord sometimes reaches a stage where the parties are unmindful of what psychological, mental and physical impact it has on children. The case at hand is a classic example where the only child Srihari,

aged 6 years, born in America and hence, a citizen of that country by birth, has become the focus of controversy. Bitter legal fights have been fought and the corridors of the courts have been travelled by the parties but in vain.

3. The petitioner / husband filed Original Petition in O.P. No. 285 of 2012 under Section 25 of the Guardian and Wards Act 1980 r/w Order XXI Rules 2 and 3 of the Original Side Rules for grant of custody of the person of the minor child, viz., Srihari, born on 16.09.2008 from the respondent / wife. He also filed suit C.S. No. 129 of 2013 for declaration that the order / judgment passed by the Superior Court of California, County of Orange in Case No. 11D009457 on 01.5.2012 is conclusive and binding on the defendant and enforceable within the jurisdiction of Indian Courts, for consequential declaration that the plaintiff P.K.Srikumar is the natural guardian of his minor son Srihari Srikumar and is the legal custodian of the minor child and for costs.

4. Resisting the Original Petition as well as the Civil Suit, the wife filed counter and written statement denying the averments made by the husband and sought for dismissal of the petition and the suit.

5. A brief reference to the factual aspects leaving out the maze of unnecessary facts would suffice:

(a) The plaintiff married the defendant on 31.8.2007.

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Even at the time of engagement in April 2007, he was a

permanent resident of United States of America and the defendant / wife had a valid H1B visa and after marriage, they were employed and settled down in USA.

(b) Out of the said wedlock, the minor Srihari Srikumar was born on 16th September 2008 in USA. After delivery, since the defendant behaved indifferently, she was given treatment for depression in USA and she completely ignored the same.

(c) On 1st November, 2009, both the plaintiff and the defendant along with their child came to India with confirmed tickets to USA on 19th November, 2009. The defendant stayed back with her parents when she had been for tonsuring of the child. But the defendant expressed her inability to return to USA because of the delay in stamping her passport at the US Embassy in India. Therefore, the plaintiff along with his parents and the minor child, left to USA on 19th November 2009.

(d) Since the defendant was non-co-operative to join him in United States for more than one and half years and even the endeavour of the plaintiff to get her Permanent Resident Status in USA went in vain, the plaintiff's father came down to India on 11th July 2011 and the plaintiff along with his mother and minor child came to India on 13.8.2011.

(e) After return to India, the plaintiff came to know that the defendant was employed in CTS, a Software Company in Chennai from April 2010 and she has not even whispered about the same to him.

(f) On 8th September, 2011, when the plaintiff started his return to USA along with his mother and minor child, on his break at Singapore, he was informed that his sister, her husband and her father-in-law were detained in the office of the Central Crime Branch (Anti-dowry Cell), Egmore, and on demand for immediate handing over of the child to the defendant, he returned to India in half-way. Even at the Airport, his mother was taken by the Police for a complaint under Section 498-A IPC and the minor child was also taken by the Police and subsequently, handed over to the defendant under threat and coercion. The Passport of the plaintiff was also seized.

(g) Since the minor child, who is a citizen of USA by birth, was forcibly taken into custody by the defendant on 9th September, 2011, the plaintiff initiated proceedings on 07.10.2011 before the Superior Court of California, County of Orange, Lamoreaux, United States of America, in Case No. 11D009457 seeking custody of the child and obtained an *ex parte* order for interim custody of the minor child on the same day regarding which notice and copies and documents were served on the defendant through the Registry of Small

Causes Court at Madras on 25.01.2012. She sent reply for the same and she was represented through counsel for hearing. Even the efforts for mediation on April 20, 2012 over phone, also became useless. In such circumstance, the Superior Court of California, County of Orange, passed an order on 01.5.2012 granting physical custody of the minor child.

(h) According to the plaintiff, since the minor child is a citizen of USA and his custody is governed by the Laws of United States of America, the said Foreign Judgment is conclusive and binding on the defendant. It is also the case of the plaintiff that it satisfies all the ingredients as contemplated under Section 13 of the Code of Civil Procedure.

6. Earlier, the plaintiff filed Application No. 1837 of 2013 seeking direction for a joint trial of the Original Petition as the Civil Suit. This Court, taking into consideration the fact that both the Civil Suit and the Original Petition are inter-connected and since matter relates to custody of minor child and in the larger interest of the child, by order dated 16.4.2013, directed for a joint trial.

the Civil Suit were taken up for hearing and they are disposed of by this common judgment.

8. On the pleadings, this Court, on 15.04.2014, had framed the following issues for trial:-

(i) Whether the plaintiff is entitled to a decree of declaration that the judgment dated 01.5.2012 in Case No. 11D009457 on the file of the Superior Court of California, County of Orange, is conclusive and binding on the defendant and enforceable within the jurisdiction of Indian Courts.

(ii) Whether the plaintiff disclosed the factum of his earlier marriage to the Court in California when obtaining the custodial order?

(iii) In the absence of such valid disclosure, whether the custodial order of the Court of California would be valid and enforceable in the Indian Courts?

(iv) Whether the suppression by the plaintiff of his first marriage would amount to a fraudulent act?

(v) Whether the plaintiff is not guilty of

suppression of material facts?

(vi) Whether the suit is maintainable in Indian Courts?

(vii) Relief and cost?

9. On the even date, this Court, formulated the following issues in the Original Petition for trial:-

(i) Whether the petitioner is entitled to the custody of the person of the minor child by name Srihari, born on 16.9.2008?

(ii) Whether the Original Petition filed through Power of Attorney is maintainable?

(iii) Whether the Original Petition of this nature is maintainable before the Indian Courts at the instance of a foreign national?

(iv) Relief and cost.

10. The plaintiff was examined as P.W.1 and the following documents, viz., Exs. P.1 to P.36 were marked.

Sl. No.	Exhibits	Date	Description of documents
1.	P.1	01.05.2012	The permanent order on the file of Superior Court of California
2.	P.2	25.01.2012	The proof of service of notice on the file of Superior Court of California
3.	P.3	02.04.2012	Original deed of power of attorney
4.	P.4		Driving licence of the defendant issued in the State of California
5.	P.5	09.10.2008	Photocopy of the certified copy of Birth Certificate of the minor child
6.	P.6 (series)	From 21 st June 2008 to 7 th August 2008	E-mail communications between the plaintiff, the defendant and her parents
7.	P.7	17.05.2009	Photocopy of the medical records of the defendant
8.	P.8	18.11.2009	Office copies of two letters signed by the defendant and addressed to the Lease Manager, Versailles on the Lake, USA
9.	P.9	05.11.2009	Photocopy of the prescription issued for the minor child Srihari
10.	P.10 (series)	14.09.2008 to 23.11.2009	Vaccination record of minor child Srihari
11.	P.11	23.03.2010	E-mail communication from the Treavel Agency
12.	P.12 (series)	16.12.2009 to 25.01.2011	E-mail communications between the plaintiff and the defendant
13.	P.13 (series)	December 2009 to August 2011	E-mail communications between the plaintiff and the defendant
14.	P.14 (series)	August and September 2011	E-mail communications between the plaintiff and the defendant
15.	P.15	11 th to 13 th August 2011	Copy of flight tickets of the plaintiff, his mother and the minor child

Sl. No.	Exhibits	Date	Description of documents
16.	P.16 (series)	09.09.2011 and 14.9.2011	Photocopies of the letters and affidavit given by the plaintiff before the Police Station
17.	P.17 (series)		Copies of application filed by the plaintiff before the Superior Court of California in Case No. 11D009457
18.	P.18	07.10.2011	Photocopy of order passed by Superior Court of California in Case No. 11D009457
19.	P.19	31.10.2011	Application for extension of the order of interim custody in Case No. 11D009457
20.	P.20	21.02.2012	Copy of the declaration and reply given by the defendant in Case No. 11D009457
21.	P.21	30.01.2011	Original extension of temporary order of custody of the minor child
22.	P.22		Photocopy of the petition filed in HMOP No. 153 of 2012
23.	P.23	08.09.2011	Certified copy of the FIR in Crime No. 390 of 2011
24.	P.24	14.02.2013	Certified copy of the application in Cr.O.P. No. 3913 of 2013
25.	P.25	13.03.2013	Order of interim stay in Cr.M.P. No. 1 of 2013 in Cr.O.P. No. 3913 of 2013 passed by this Hon'ble Court
26.	P.26	13.09.2012	Certified copy of the complaint in CC No. 5507 of 2012 on the file of Chief Metropolitan Magistrate Court, Egmore.
27.	P.27	28.12.2012	Certified copy of the order of the learned Magistrate taking on file in C.C. No. 5507 of 2012
28.	P.28	30.11.2011	Office copy of the letter
29.	P.29		Photocopy of the Passport of the minor child Srihari
30.	P.30	25.07.2008	E-mail

Sl. No.	Exhibits	Date	Description of documents
31.	P.31	05.07.2008 and 06.07.2008	E-mail communication and reply
32.	P.32	31.07.2008	E-mail
33.	P.33	11.06.2008	E-mail
34.	P.34	26.06.2009	E-mail
35.	P.35	15.07.2010	E-mail
36.	P.36		Copy of the non tourist business Visa

11. To nullify the case of the plaintiff, the defendant / wife examined herself as D.W.1 and marked Exs. D.1 to D.10, the details of which are as follows:-

Sl. No.	Exhibits	Date	Description of documents
1.	D.1	10.08.2011	E-mail
2.	D.2		Itinerary arrival of the plaintiff in September 2011
3.	D.3		Departure ticket
4.	D.4	30.01.2012	Letters for non-accepting by the California court of the communications submitted by the defendant (e-filing print out)
5.	D.5		California Family Code
6.	D.6		California Family Code Sections 50 to 155
7.	D.7	07.10.2011	Photocopy of the letter
8.	D.8	07.10.2011	Photocopy of the application to the California Court
9.	D.9	07.10.2011	Plaintiff's declaration in support of petition before the Superior Court
10.	D.10	05.10.2011	Plaintiff's declaration to the California Court

12. Heard Mrs. Hema Sampath, learned Senior Counsel representing the plaintiff / husband and Mrs. Susanna Prabu, learned counsel appearing for the defendant / wife and perused the records.

13. It appears that for both the parties, it is second marriage arranged by the elders of the family. The marriage of the plaintiff ran into troubled waters when the defendant lodged a complaint before the Anti-Dowry Cell, Egmore. The Superior Court of California, County of Orange, [hereinafter, referred to as "the Foreign Court"] granted sole legal and physical custody of the minor child on 01.05.2012. Though the defendant did not participate, in person, in the proceedings before the Foreign Court, by her reply dated 31.01.2012, she participated thereby submitting herself to the jurisdiction of the State of California.

14. At the first instance, the plaintiff, through his father, sought to take refuge before this Court by filing petition under Section 25 of the Guardian and Wards Act 1980 in A. No. 2015 of 2012 seeking a direction to the defendant /wife to permit the paternal grandparents of the minor child to visit him and to be in his company.

defendant filed a Joint Memo dated 26.4.2012 based on which this Court, by order 26.04.2012 directed for taking over the custody of the minor child Srihari at Ceebros Apartment Public Park on every Friday between 5.30 pm and 6.30 pm and every Saturday between 8.30 am and 9.30 am from 11th May 2012 until further orders.

15. Simultaneously, the father of the plaintiff also filed another Application in A. No. 2013 of 2012 for grant of interim custody of the minor child with a memo of undertaking. Considering the memo of undertaking filed by the plaintiff's father and considering the fact that the plaintiff will be in India, this Court, by order dated 14.9.2012, was inclined to grant visitation rights to the plaintiff and to have the custody of the minor Srihari daily during his brief stay in India with certain conditions and temporarily suspended the earlier order dated 26.4.2012, which is to be followed subsequent to the plaintiff's departure to USA. As against the said order, the plaintiff preferred in O.S.A. No. 364 of 2012 seeking for a further direction to permit him to take the child along with him for two days to Tirupathi on 27.9.2012 and 28.9.2012. A Division Bench of this Court, by judgment dated 25.9.2012, granted permission to the plaintiff to take the child to Tirupathi but with a condition that he should take the defendant also with the child. This Court

further directed that the plaintiff has to bear the entire expenses relating to the defendant.

16. Yet another application was filed by the plaintiff, through his Power Agent father in A. No. 3170 of 2013 seeking for direction to the defendant to hand over the custody of the minor at No. 6, 2nd Floor, Sai Raja Apartments, Old No. 9, New No. 10, 1st Main Road, Velachery, Chennai, instead of Ceebros Apartment Public Park, due to the climatic condition. In the said application, despite service of notice, the defendant did not appear. However, this Court, by order dated 25.7.2013, considering that the request of the applicant was *bona fide*, allowed the plaintiff's parents to pick up the child from the defendant's residence every Saturday at 8.30 am and to return the child back at 10.30 am on the same day, without any modification to the earlier order. Apprehending that the grant of custody of the minor Srihari may lead to taking him outside India, the defendant filed appeal in O.S.A. No. 286 of 2013 seeking to set aside the order dated 25.7.2013 along with a stay petition. A Division Bench of this Court, by interim order dated 07.8.2013, directed that the child should not be taken outside Chennai and that if the custody of the minor is taken on Saturday at 8.30 am, they should hand over the custody of the child to the defendant / wife on the same day at 10.30 am.

17. Both the Civil suit as well as the Original Petition revolve around the custody of the minor child Srihari. The plaintiff had obtained a decree for custody of the minor child before the Foreign Court in Case No. 11D009457 on 01.05.2012. The said decree is sought to be enforced within the jurisdiction of Indian Courts.

18. Before deciding the said question, the binding nature of the same on the defendant has to be decided.

19. Admittedly, the minor child is the citizen of USA and he has been issued Person of Indian Origin (PIO) Card by the migration authorities and the child is presently living with the mother in India. The contention of the defendant is that the said judgment issued by the Foreign Court is not conclusive as the same had not been passed on merits of the case. According to the defendant, the US Foreign Court had recognised mere service of notice as sufficient. When the defendant, who is a lady, resides in another country and cannot travel to USA to defend her case in the USA legal system, there is no provision made to provide the visa for the citizens of outside countries to attend any hearing or appoint an Attorney.

appearing for the plaintiff contended that the defendant has not availed the free legal aid. It is submitted by the learned counsel for the defendant that free legal aid is available only for citizen of US and the same is not available for non-citizens.

21. In this regard, it is to be pointed out that when a woman is in another country, she cannot move freely. Further, it is also pertinent to note that free legal aid is available only for the citizens of USA and not for others. Even presuming that the defendant had a valid travel document, unless she has the means to travel to the country where the litigation is filed, she cannot travel and any order passed without hearing the other side, will not be conclusive. Admittedly, the defendant could not appear before the Foreign Court because of travel and financial constraints and it was not wilful and deliberate abstention.

22. For better appreciation of the case, this Court feels that Section 13 of the Code of Civil Procedure which deals with foreign judgment, may be usefully re-produced hereunder:-

"13. When foreign judgment not conclusive.- A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except,-

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in India."

23. Learned counsel appearing for the defendant relies on Clause (b) of Section 13 CPC contending that the judgment rendered by the Foreign Court is not conclusive as the same has not been passed on merits after hearing both

parties. According to the learned counsel, the said marriage was not registered in the USA and hence, Sections

308 and 308 (5) of the Family Code of California Courts are not applicable to the same.

24. It is seen from the records that the Foreign Court had held that the marriage is valid one though performed in India and the said fact is also not disputed by the parties. Learned counsel for the respondent contended that when the marriage in terms of California Family Code is not proved, the Foreign Court cannot pass the order without considering the merits of the case. In the service of notice, the list of documents had been mentioned. Ex. P.2 is the service of notice which has been sent from the Office of Attorney of the plaintiff through the Ministry of Law and Justice, Department of Legal Affairs, India, to the defendant. The said notice was served on the defendant on 25.01.2012 through the Court of Small Causes, Chennai. After the receipt of the papers, the defendant has also sent her reply statement as per Ex. P.20.

WEB COPY

25. A perusal of Ex. P.1 which is a permanent order of custody of the minor child passed by the Foreign Court on 01.5.2012, would show that the respondent / defendant is not marked present. Only the plaintiff and his Attorney were present. Admittedly, in this case, the defendant had sent her reply statement / written statement to the Foreign

Court by post on 21.02.2012 as well as by Fax on 31.01.2012. From a perusal of Ex. P.1, it is clear that there is no discussion of the matter on merits though it indicates as if the defendant was personally present. The said interlocutory order granted only interim custody of the minor child to the plaintiff. Thereafter, the temporary order of custody was extended at the request of the plaintiff as per Ex. P.21 dated 30.01.2012 wherein it is specifically mentioned in column No. 3 that the respondent / defendant could not be served with notice as required before the hearing date. Hence, a request of re-issuance of the order was sought for by the plaintiff. Accordingly, the next date of hearing was fixed as 26.4.2012 and the interim order granted earlier by the Foreign Court regarding the custody of the minor child, was extended on 30.01.2012. The said order which is marked as Ex. P.21 is a printed form wherein the defendant is directed not to remove the minor child from the State of California.

WEB COPY

26. Looking at the factual aspect of the case, admittedly, on the relevant date of the plaintiff filing the case before the Foreign Court seeking custody of the child, the child was in India. For better understanding of the case, at the cost of repetition, the fact in this regard is narrated, in brief, hereunder:-

27. On 1st November 2009, the couple along with the child came down to India with confirmed tickets to USA on 19th November, 2009 during which time, the defendant, stayed back with her parents when she had been for tonsuring of the child. In this regard, it would be relevant to extract paragraph 13 of the Original Petition, which reads as follows:-

"The petitioner states that though he was holding return ticket to USA for the respondent also, since the respondent was waiting for the client invitation from her employer, she expressed her inability to join the petitioner during his return journey to USA. The petitioner also could not extend his stay in India, as he did not want his son to get affected with swine flu and he wanted to administer his son with swine flu and he wanted to administer his son with swine flu vaccine as soon as possible, and the same was being distributed in USA. Hence after consulting the respondent the petitioner and the minor child, along with the petitioner's parents returned back to USA as planned on 19th November, 2009. The respondent also informed the petitioner that she would return to USA as soon as her stamping is done at the US consulate in Chennai. The respondent also accompanied the petitioner, his parents and his minor child up to Chennai Airport and gave a pleasant send off to them."

28. From a bare reading of the above extracted portion, it is clear that since the defendant had expressed her inability to return to USA at that time because of the delay in stamping her Passport at the US Embassy in India, the plaintiff along with his parents and minor child, left to USA as scheduled. Thereafter, the plaintiff's father came down to India on 11th July, 2011 while the plaintiff along with his mother and child came to India on 13.8.2011. While so, again, on 8th September 2011, when the plaintiff, along with his mother and minor child left for USA, on their break at Singapore, they were informed about the detention of the plaintiff's sister and father based on the complaint lodged by the defendant, which forced them to return to India in half-way and leave the child with the defendant. As such, it is clear that the plaintiff, having left the child in India with the mother, has gone to US and obtained the *ex parte* order of custody of the child.

29. If the order under Ex. P.21 specifically restrains the respondent from removing the child from the State of California, the same is unenforceable as it is passed without consideration of the fact because admittedly, the child on the relevant date was in the custody of the mother in India. Therefore, the said order obtained by the plaintiff is bereft of any merits and the same is inexecutable.

30. While considering the binding nature of the said order passed by the Foreign Court and the executability of the same in the territories of India, the recent judgment of the Hon'ble Supreme Court in **Surya Vadanan vs. State of Tamil Nadu and others [2015 (3) CTC 438]** was pressed into service by the learned Senior Counsel for the plaintiff.

31. The said case deals with the situation in which the interim order or interlocutory order of Foreign Court may be ignored. From a perusal of the records, it is seen that though the plaintiff has invoked the jurisdiction of the Foreign Court, he has not obtained any substantive order in his favour, but it is only an interim order and as found earlier, even such interim order obtained by him, cannot be said to be valid because on the date of obtaining such order, the custody of the child was with the mother in India. Therefore, the removal of the child by the respondent from the jurisdiction of California does not arise.

32. In the instant case, admittedly, the child is a citizen of USA and is staying in India on PIO permit.

In the circumstances of the case on hand, it would be useful to refer to the observations made by Their Lordships

in paragraphs 55 and 56 of the judgment in the case cited supra, which read as follows:-

Para 55: "If an interim or an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so. No doubt we expect foreign courts to respect the orders passed by courts in India and so there is no justifiable reason why domestic courts should not reciprocate and respect orders passed by foreign courts. This issue may be looked at from another perspective. If the reluctance to grant respect to an interim or an interlocutory order is extrapolated into the domestic sphere, there may well be situations where a Family Court in one State declines to respect an interim or an interlocutory order of a Family Court in another State on the ground of best interests and welfare of the child. This may well happen in a case where a person ordinarily resident in one State gets married to another person ordinarily resident in another State and they reside with their child in a third State. In such a situation, the Family Court having the most intimate contact and the closest concern with the child (the court in the third State) may find its orders not being given due respect by a Family Court in the first or the second State. This would clearly be destructive of the equivalent of the principle of comity of courts even within the country and, what is worse, destructive of the rule of law.

Para 56: 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)."

33. As regards the comity of Courts, when there is only an interim order that has been passed by a Foreign Court, during which time admittedly, the defendant was not present as evidenced by Ex. P.1 it is to be stated that the Theory of Comity cannot bind the property out of its territory and bind persons, who are not residents therein as the Foreign law operates into forum only at the will or comity of Courts at the forum.

<https://hcservices.ecourts.gov.in/hcservices/> 34. In the present case, the plaintiff is the green card holder and his wife / defendant was on H1B1 Visa and

she had to come back to India on expiry of the same. The minor child was accorded US citizenship by birth. But on the date of cause of action, viz., custody taken by the mother, the child was in India and as such, only the Indian Laws were applicable. When the plaintiff applied for divorce before the Foreign Court and as an interim relief he had asked for custody of the minor child, it is expected on the part of him to place all the true facts before the Court, for proper adjudication of the case. In this case, the plaintiff as well as the defendant are both Indian citizens and they had travelled to USA in their individual capacity prior to their marriage. They returned to India to get married and the child was born in USA. Indisputably, the marriage was registered only in India and the same was not registered in USA as the plaintiff's status of green card was under process. In the meanwhile, the defendant / wife lost her job in USA and had to come back to India for extension of visa by which time, the husband had already become an USA citizen. Therefore, the only possible way of the defendant travelling to USA was either by a sponsor visa as dependant of the plaintiff or an employment visa in the event of her getting a placement in USA.

35. Admittedly, the visa could not be obtained by the

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defendant in 2009 as planned by them. Therefore, she could

not travel with the child back to USA. The said situation was exploited by the plaintiff and his parents and they removed the minor child from the mother and flew to USA. Thereafter, there were several exchange of mails and letters between the spouses. However, the plaintiff had contended that the defendant / wife had acute depression after delivery of the child and her behaviour was erratic. It is also admitted by the defendant that she was in depression for a short spell during which time, she was given treatment. However she was out of it as the same is normal phenomena with many of the new mothers. Otherwise, there is absolutely no evidence produced by the plaintiff to substantiate his allegation that his wife was undergoing the emotional crisis. The plaintiff had also accused his wife that his family had hired spies to create problem when he was in India and to give trouble to his sister who is also staying in Chennai. But there is no proof or evidence for the same. The further allegation of the plaintiff before the Foreign Court was that it was a case of abduction / kidnapping by force. It cannot be denied that the plaintiff and the defendant along with their minor child, travelled to India accompanied by his parents and it is also admitted by the plaintiff in his Original Petition, which has been extracted above, that his wife had accompanied them to the Airport to see them off when she could not travel for want of visa on 19th November 2009.

That being so, it is surprising how the plaintiff can file a case before the Foreign Court on the ground of abduction / kidnapping and when the child travelled with the mother, that too, accompanied by the father / plaintiff, the question of kidnapping does not arise.

36. Another important aspect of the case is that the plaintiff, in order to avoid the Police enquiry, left India with the child and therefore, he had to be summoned back to India from Singapore. After the mother / defendant took custody of the child, the plaintiff filed the case before the Foreign Court and obtained the order of custody. In other words, the defendant was restrained from removing the minor from the jurisdiction of California. Therefore, on the relevant date, the child was already out of jurisdiction of Superior Court, California.

37. Learned Senior Counsel appearing for the plaintiff vehemently contended that despite the efforts of the plaintiff to take back the defendant to USA by providing information about the job opportunities, she was not interested in joining him in USA. On the other hand, according to the learned Senior Counsel, the defendant declined all his efforts.

38. The husband / plaintiff, who is a green card

holder and sponsored his parents also to get the green card, had failed in his duty in not getting independent visa for wife, especially, when the couple had infant in hand. The plaintiff had expected the defendant to go to USA only on a business visa at the cost of depriving the minor child of the mother's comfort. The plaintiff had pleaded that the judgment of the Foreign Court which was obtained by him in the absence of the defendant is conclusive with respect to the issue of permanent custody of the child.

39. Per contra, before the Foreign Court, the plaintiff had mentioned only about the marriage between the plaintiff and the defendant and had thrown various allegations regarding her health conditions and he had alleged also about the Police complaints given by the defendant in the process of getting the custody of the child. Nowhere in the said declaration, the plaintiff had brought out the fact that he was married for the second time with the defendant as his first marriage ended up in divorce. Having suppressed the said fact, the plaintiff is guilty of *suppressio veri and suggestio falsi*.

40. Learned counsel appearing for the defendant had contended that the attitude of the plaintiff was so bad that the first marriage ended up in a divorce. Even thereafter, the plaintiff seems not to have changed his

attitude and is interested only in money making than building up the family. In support of such contention, the learned counsel relied on the E-mails marked as Ex. P.6, and Exs. P.11 to P.14.

41. Be that as it may. Admittedly, the child has been with the mother from 09.09.2011 on which date, the plaintiff alleged that he was forced to hand over the child and also the passport of the child to the defendant under threat and coercion. It was his further case that he had to obey to the same as his sister and brother-in-law were detained illegally before the Police. The order of custody was granted temporarily by the Foreign Court under Ex. P.18 on 07.10.2011. The same was further extended under Ex. P.21 on 30th January, 2012. Though the respondent had sent her written statement or reply statement through post, according to the defendant, it was sent back to her as she had addressed it directly to the Judge. However, the USA Court had noted that she appeared on 23.3.2012 which may not be correct. It is also admitted by the defendant in her cross-examination that she attended the mediation through video conferencing before the Foreign Court. The said mediation was on 20.4.2012 and thereafter, on 01.5.2012, the permanent custody order was passed in favour of the plaintiff.

42. Further more, there were several criminal complaints filed against each other by the contesting spouses. The defendant had filed complaints against the parents-in-law and also the sister-in-law. The said complaints have been filed by the defendant to bring the plaintiff to terms with respect to the custody of her child. Though the husband / plaintiff had contended that the wife despite having Non-Tourist Business Visa valid from 24.02.2011 to 24.02.2021, did not care to travel to USA to see the minor child, the defendant countenanced the same in her cross-examination stating that unless there is a valid client invitation letter with valid pay stubs, the VISA stamping will not be granted. In support of such statement, she has also filed Ex. P.36 visa. It is not disputed that such H1 extension visa are granted based on the pay cheques received by the employee from the client along with client invitation letter. Therefore, without a valid invitation from the client, the defendant could not have travelled to USA as the visa stamping could not have been done in the absence of the above said documents.

43. Expatiating her submissions, learned Senior Counsel for the plaintiff argued that the defendant, who is a mother, did not care to file any petition for custody.

It is only the petitioner who has taken all steps to bring up the child.

44. The said contention is un-understandable and only to be rejected as the defendant mother is not in a position to travel to USA in the absence of valid travel document. The husband who is duty bound to arrange for her visa, has, admittedly, expected her to travel only on business visa and not in an ordinary dependant visa. The husband also had not allowed the child to be with mother when it was hardly 18 months old. Therefore, the defendant seemed to have waited till their return, after 1-1/2 years. On seeing the child, the mother / wife never wanted to part with the child and hence, she had gone to the extreme of getting the custody of the child through Police as the plaintiff had no intention of taking her along with the child to USA. Undoubtedly, the defendant lived in USA earlier on account of her employment and she may be used to of living in USA. But that does not mean that she could travel on and off without permit. No doubt, the wife has not made any complaint against husband so as to disqualify him from having the custody of the child. It is also to be noted that the child's normal abode is USA.

45. Yet another contention raised by the learned Senior Counsel for the plaintiff is that the wife had given police complaint which is unbecoming of a normal woman, who wants to save the family.

46. A perusal of the materials placed before this Court would make anyone to come to the conclusion that only the plaintiff / father had been taking all efforts to be with the child. That is the reason he had filed the declaration before the USA Court as only the USA Court will have jurisdiction. It is also worthy to note that there was no proceeding in Indian Courts before the child left for USA. Therefore, there is no chance of any reconciliation or to avoid the unpleasant situation.

47. Above all, learned Senior Counsel appearing for the plaintiff also brought to the knowledge of this Court the consequences

of the child overstaying in India, he, being a citizen of USA by birth. According to the learned Senior Counsel, there are only very limited ways for an USA citizen to lose the citizenship which are (a) voluntary naturalization in a foreign State, (b) engaged in hostilities against USA, (c) renouncing USA citizenship formally or (d) conviction for an act of treason.

48. In this connection, it is implied that the child,

being a minor, has not impaired nor lost his citizenship in USA which he had acquired by birth. The designation as

an Overseas Citizen of India (OCI) does not impair USA citizenship. As the travel visa is given by the Indian Government, it does not impact USA citizenship.

49. From the records that are available, it is also seen that the respondent mother had filed H.M.O.P. 153 of 2012 for divorce before the Family Court, Chennai, and it is also pending. In view of the discussion above, it is seen that the plaintiff had no intention of taking the defendant along with the child as his focus was only on earning money. In his search for money, the plaintiff has forgot the value of motherhood. Nowhere it is stated by the plaintiff either in the suit or in the Original Petition or even before the proceedings in the Foreign Court that the child require both the parents.

50. The defendant / wife contends that she was deprived of the 15 months baby who was snatched away from her hands and was taken to USA where she cannot travel at her pleasure and that the child was taken to another country without the mother accompanying him. It was contended further that the neither the visa nor any money was sent by the plaintiff from the year 2009 to support her. It is significant to point out that during the relevant time, the defendant was jobless. Admittedly, the plaintiff did not sponsor the defendant as he had done in

the case of his parents. The act of the plaintiff taking away the 15 months old baby, without the consent of the mother / defendant, was illegal in terms of Section 6 of the Act, 1956.

51. Curiously, the plaintiff even after his return also, along with the child and his parents, did not inform the defendant. As such, it is clear that the attempt of the defendant / mother to see the child was thwarted by the plaintiff by moving the child to different places in order to avoid her from seeing the child.

52. Coming to the question of custody of the child, the petition, having been filed for custody after the establishment of the Family Courts Act, the custody petition must have been filed before the Family Court. No doubt, the High Court has got jurisdiction to decide the question of custody even after the constitution of the Family Courts.

53. In this regard, it is claimed by the petitioner in the Original Petition that as per the Hindu Minority and Guardianship Act, 1956, the father is the natural guardian.

54. Per contra, besides stating that from the date the child came to the custody of the mother, the father had visited India only once, learned counsel for the defendant

contended that the father / plaintiff did not have or shown any interest in the life and future of the child.

55. At this juncture, it is pertinent to make a mention that the intention of the Legislature was only to make the mother as the natural guardian at least till the child attains 5 years of age.

56. The Hindu Minority and Guardianship Act, 1956 defines "guardian" as a person having the care of the person of a minor or his property or of both his person and property. Section 6 of the Act which defines the term "natural guardian", reads as follows:-

"6. Natural guardians of a Hindu minor.--

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 joint family property), are--

(a) In the case of a boy or 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;

.....

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57. During the course of hearing, reliance was placed on the decisions of the Hon'ble Supreme Court in **V. Ravi Chandran (DR.) (2) vs. Union of India and others [(2010) 1 SCC 174]** and **Shilpa Aggarwal vs. Aviral Mittal and another [(2010) 1 SCC 591]**.

58. I have given my anxious consideration. In the above two cases also, there was a similar circumstance to the case on hand. In those cases, where the children were with the mothers in India, were directed to go to US with the mother considering the welfare of the children in the respective circumstances of the case. In the said cases, the mothers were facing threat of arrest on return to US. But appropriate directions were given to protect the mothers for violating the Court orders.

59. On the other hand, in the present case, the child who came to India was retained by the mother from 09.9.2011 till date for almost four years. The child was three years when it came to the defendant and was not going to School. Later on, the defendant has been sending the child to good schools from 2011 till date. The plaintiff / father, it is alleged, that had not cared to pay the school fees and other expenditure even once. The

defendant has been raising the child, educating him all by herself. Therefore, the above cited cases will not be applicable to the facts and circumstances of the case on hand.

60. The Hon'ble Apex Court as well as this Court, in a catena of decisions, held that whenever a question arises before a Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of the parties but on sole and predominant criterion of what would best serve the interest of the minor. It is also well settled that while the paramount consideration is the welfare and happiness of the infant, the mere desire of a parent to have his child must be subordinate and can be effective only if it coincides with the welfare of the child. That is the reason the legislature while postponing the mother as a natural guardian to the father, laid down that the custody of a minor who has not completed the age of 5 years, shall ordinarily be with the mother.

61. The conduct of the parents in relation to the child is obviously relevant in determining what is in his best interest. In the instant case, the child has been raised by the mother / defendant from 09.09.2011 and it is submitted that she had admitted him in a reputed school.

The plaintiff / father had not shared the expenses of the child for his education or maintenance so far. As a matter

of fact, after the child was taken by the defendant / mother in the year 2011, till date, the plaintiff / father had come to see his son only once. More particularly, the passport of the minor child, which is said to have expired on 11.11.2013, also has not been renewed by the plaintiff / father.

62. More reliance was placed on the judgment of this Court in **Dorothy Thomas vs. Rex Arul [2011 (5) CTC 221]**. I have gone through the said judgment, wherein, this Court (V.Ramasubramanian, J.) had an occasion to consider all the judgments of various Courts and the Hon'ble Supreme Court. However, it was brought to the knowledge of this Court that the same is under challenge in O.S.A. No. 259 of 2011 before this Court.

63. Having regard to the facts and circumstances of the case and in view of the fact that the child has been brought up by the defendant, who is none other than the mother, from the year 2011, I am of the considered opinion, that the defendant / mother would be the proper person to have the permanent custody of the child. Therefore, the judgment passed by the Foreign Court, viz., Superior Court of California, County of Orange, in Case No. 11D009457 on 01.5.2012 is not conclusive and binding on the defendant and also not enforceable against her within the jurisdiction of Indian Courts.

64. Though I have held that the plaintiff / father is not entitled to permanent custody of the child, it is necessary to consider whether he is entitled to be given visitation rights.

65. Though the said point has not been put forth before this Court, on humanitarian ground, this Court feels that the plaintiff / father shall be given liberty to visit the child in India. If he so desires, when he is in India, he could, in advance of at least four weeks, intimate in writing to his counsel with copy to the defendant / mother for which the defendant shall positively respond in writing. It is always open to the parties to move this Court for appropriate directions in this regard.

In view of the discussion supra, both the Civil Suit as well as the Original Petition are dismissed, however, subject to the visitation rights stated above. In the peculiar circumstances of the case, there shall be no order as to costs.

WEB COPY

Sd/.P.S.N.J
04.08.2015

//Certified to be a true copy//
Dated this the day of 2015.

R.s/14.08.2015

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