

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 25.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.Nos.249 and 250 of 2015
M.P.Nos.2 to 4 of 2015
and M.P.No.1 of 2015

P.K.Srikumar .. Appellant in both the Appeals

Vs.

Harshitha Gopinathan .. Respondent in both the Appeals

Prayer in O.S.A.No.249 of 2015 : Original Side Appeal under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules against the fair and decretal order, dated 04.08.2015 made in O.P.No.285 of 2012.

Prayer in O.S.A.No.250 of 2015 : Original Side Appeal under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules against the Judgment and Decree, dated 04.08.2015 made in C.S.No.129 of 2013.

For Appellant : Mrs.Hema Sampath, Senior counsel
for Mr.P.N.Swaminathan in
both the appeals

For Respondent : Mrs.Susanna Prabhu
in both the appeals

COMMON JUDGMENT

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

These two Original Side Appeals are directed against the common Judgment of the learned single Judge, dated 04.08.2015, one dismissing the Original Petition in O.P.No.285 of 2015 filed by the appellant / petitioner, seeking permanent custody of the minor child and second dismissing the suit in C.S.No.129 of 2013 filed by the appellant / plaintiff for the relief of 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 also for consequential declaration that the appellant / plaintiff is the natural guardian of his minor

son, Srihari Srikumar and is the legal custodian of the minor child.

2. The dispute revolving the minor child about his custody is between the spouses. The brief facts, which lead to this dispute between the spouses are as follows :

(i) The appellant / husband and the respondent / wife married in India on 31.08.2007. Their marriage was solemnized at Tirupathi. For both of them, it is second marriage and the same was arranged by elders of the family. The appellant / husband is a permanent resident of United States of America and the respondent / wife had a valid H1B Visa and employed in California. Both of them came to India for the purpose of marriage and after marriage, they returned to United States of India. The respondent also got employment in TOYOTA on contract in October 2007. The respondent got conceived in January 2008. The appellants parents joined them in April 2008. Seemantham was celebrated in USA on 07.08.2008 and the parents of the respondent could not attend, as they were in India. The respondent's mother came to USA on 05.09.2008. The child was born on 16.09.2008 in USA and the minor child is by birth a citizen of USA.

(ii) In October 2008, the appellant's parents left to India and in December 2008, the respondent joined a contract job with Linksys in Irvine CA. In February 2009, when the respondent's mother returned to India, the appellant's parents joined them to take care of the child. The respondent developed depression and when the situation got escalated, she was taken to St. Joseph Hospital, California on 17.05.2009. The respondent was diagnosed as "Emotional Crisis-acute". She was prescribed medicine for a few days.

(iii) The respondent applied for extension of H1B Visa in June 2009 and the same was granted till September 2012. In July 2009, the appellant and respondent jointly purchased a property in USA. On 31.07.2009, the respondent lost her job with Linksys. Only during that time, the appellant got USA citizenship. The appellant did not apply for green card for the respondent, as his lawyer advised not to sponsor for dependant visa, in view of the recession faced in US economy and the application for grant of H1B visa for respondent was in process.

(iv) In November 2009, the appellant and respondent with the child came down to India to visit the respondent's parents and also for tonsuring of the child. They came to India with a plan to return to USA on 19.11.2009 and they had confirmed ticket for the trip. They also planned her to get a new H1B visa stamping in respondent's passport at the United States Consulate in Chennai. It could not be done due to some delay in getting a client invitation letter from the respondent's employer in USA. During the stay in India, the child Srihari,

who was just one year old suffered high fever continuously for a few days. It was time when swine flu was widely spreading and the child was not vaccinated against swine flu. After consulting the respondent, the appellant and the minor child along with the appellant's parents returned back to USA as planned on 19th November 2009. The respondent informed the appellant that she would return to USA as soon as her stamping is done at the US consulate in Chennai.

(v) On 18.04.2010, the appellant asked the respondent to contact him urgently for a position in his own company, but the respondent never called the appellant back. On 03.08.200, the appellant suggested to contact the Attorney to get a permanent resident status in USA, but there was no response from the respondent.

(vi) In August 2011, the appellant came to know from some of his friends that the respondent had taken up a job in Cognizant Technologies Ltd., in India, way back in April 2010. She had suppressed the said fact from the appellant. Till first week of August 2010, communication between the spouses were normal and the respondent would speak to child over phone every week.

(vii) The appellant with his child came to India on 13.08.2011 to offer prayer in Temples. The appellant did not want to meet the respondent, when he came down to Chennai. On coming to know about the arrival of the appellant and the child in India, the respondent started creating problem in the house of the appellant's sister. In order to avoid any unpleasant situations, the appellant along with his mother and the minor child preponed his trip and started to USA on 08.09.2011 via Singapore.

(viii) The respondent having come to know about the departure of the appellant from India, lodged a criminal complaint against the appellant, his parents, his married sisters and her family members under Section 498 A IPC and the appellant's sister and her family members were illegally detained by the police from the afternoon on 09.09.2011. The appellant was informed about the same when he landed in Singapore enroute USA and he was compelled to return by the police threatening that his sister and family members would face the consequences if he failed.

(ix) The appellant rushed back to India on 09.09.2011. The passport of the appellant was seized by the police and detained for a week. The child was thus snatched away by the respondent with the help of police. The appellant on his return to USA, initiated proceedings before the Superior Court of California, County of Orange, USA on 07.10.2011 for permanent custody of the minor child. On the same date, an exparte order for interim custody was granted in favour of the appellant. As per the order of the Superior Court of

California, to show cause against the respondent, the notice of the petition with the copies of documents was duly served at Chennai on 25.01.2012. Since notice of hearing of the petition could not be served on the respondent before 30.12.2011, which was the first hearing date, after the Court ordered notice to show cause, the appellant sought extension of time of additional 90 days and the Court ordered for hearing on 30.01.2012. The said notice for the hearing on 30.01.2012 was duly served on the respondent on 25.01.2012, the respondent was granted one month's time to send her response to the petition.

(x) In response to the said notice, the respondent sent by post, her detailed reply, dated 31.01.2012, along with the declaration in the required format to the Superior Court of California. Copies of the said reply were also served on the appellant through his counsel. On 30.01.2012, the matter was set for hearing on 26.04.2012. In the meantime, the respondent was also called upon to attend the mediation on 20.04.2012 at 8 a.m. Notice of the said mediation was also duly served on the respondent and she attended the mediation telephonically. The Superior Court of California, County of Orange, passed an order on 01.05.2012, granting sole legal and physical custody of the minor child Srihari to the appellant.

(xi) The Judgment of the Superior Court of California is conclusive as to the issue of permanent custody of the minor child for the reason that the child is a citizen of United States of America and the custody is governed by the Laws of United States of America. The respondent filed Divorce O.P.No.153/2012 in the Family Court of Chennai and she also got an Overseas Citizen of India visa for the child as a mother.

3. The contention of the appellant, as per the pleadings are that the respondent having come to India along with the appellant and child had not returned to USA under the guise of getting H1B visa endorsement in USA consulate, Chennai. She did not respond properly even when the respondent endeavoured to take placement for the respondent and dependent visa. She has not cared about child for nearly about 2 years, though the one year child was taken to USA. Instead of returning to USA, the respondent got a job and joined in Cognizant Technologies Ltd., at Chennai, without even informing the appellant. In the proceedings initiated by the appellant before the Superior Court of California, for the custody of the minor child, the respondent fully participated and final order was rendered. Since the minor child is a citizen of USA by birth, jurisdiction as to the custody lies only with the competent Court of USA and the Judgment of that Court is binding upon the parties.

4. The contention of the respondent as per the pleadings are that the appellant being green card holder has not taken

steps for getting dependant visa to the respondent. Though she suffered depression for a short period, she became alright after treatment. The respondent took all efforts to get H1B visa endorsement but in vain. When the appellant along with the child came to India, she was not informed. The child was not even shown to her and coming to know about the departure all of a sudden, she had no other go except to approach the police by lodging the complaint. From September 2011, the child is with the respondent and she has put the child in a reputed school. As far as the proceeding before the Superior Court of California initiated by the appellant, the respondent had not participated in person. She had no valid visa and also financially not sound to travel and contest the litigation in USA. The appellant played fraud by suppressing his earlier marriage and divorce and got the decision from Foreign Court.

5. The learned single Judge, after analysing the evidence adduced both oral and documentary on both sides, dismissed both the suit as well as the Original Petition.

6. The learned Senior counsel appearing for the appellant argued that as per the settled proposition laid down by the Hon'ble Supreme Court, the Judgment rendered by the Superior Court of California in the present case is conclusive and only the Court in USA, has the most intimate contact with the issues concerning the minor child acquiring U.S.Citizenship by birth and therefore, the decision of the Superior Court of California is binding upon the parties. It is further repletedly argued that factually also she failed to give motherhood affection. As per the admissions of the respondent, she left the child with the appellant to USA when the child was one year old and had not taken steps to go to USA, in spite of the many communications from her husband through email and she took the child through police force when the child came with his father to India for temple visit.

7. The learned counsel for the respondent per contra argued that the Foreign Court Judgment is only a Interlocutory Order and the respondent had not participated fully and therefore, it is not binding upon the respondent. It is further countenanced that the appellant, being citizen of USA had not taken any steps to take dependant visa for the respondent and failed to inform about his temple visit to India.

8. There is no dispute that both the appellant as well as the respondent got married on 31.08.2007 in India and for both of them, it is second marriage. After marriage, they settled down in USA and they were blessed with a male child on 16.09.2008 in USA. Thus the child Srihari Srikumar is American citizen by birth. After giving birth to a child, the respondent was treated for "Emotional crisis-acute" and after medication for few days, she became alright. After that both the appellant and the respondent jointly purchased property in USA. Her H1B visa was also got renewed till September 2012.

The appellant got citizenship in June 2009. However, the respondent lost her job On 31.07.2009. The spouses with the child came down to India in November 2009. Since the respondent could not get H1B visa, endorsement in the US consulate at Chennai for want of client invitation letter from the respondent's employer, with the consent of the respondent, the appellant and the child returned to USA. After about 2 years, when the appellant came with his child, without informing the respondent, the problem started.

9. Though the respondent alleges cruelty as against the appellant, she herself admits during her cross-examination that she had not made any complaint against the appellant of any verbal abuse, physical assault or violence during her stay in USA and that though the appellant was handling the bank accounts, the respondent used to draw cash through ATM and sign on cheques.

10. It is clear from the evidence that the spouses were leading normal life in USA and those aspects are not material to decide the dispute between the parties herein. Factually it is to be seen whether there is any genuine attempt on either side to give motherhood love and affection to the child at his tender age, after taking the child back to USA in November 2009 till August 2011, though the respondent consented the appellant to take the child to USA under the guise of stamping the H1B visa on receipt of client invitation letter from the employer. The appellant states that he took all endeavours and sent email communications to the respondent to get placement in USA.

11. The respondent admits during her cross-examination that as per the document, Ex.P.4, she had a class H1B visa valid from 01.10.2009 to 12.06.2012. She also says that the appellant through his email, Ex.P.12 series on 20.05.2010 asked her to apply to position in United Health Care Group. The specific question put to the respondent during cross-examination and her answer about her attempts to see her child is thus :

"Q : Have you produced even a single document or correspondence before this Court that was made between November 2009 and September 2011, to show that you had written to your husband that you wished or longed to see your child ?

A : No."

12. It is also not the case of the respondent that she ever attempted to see her child, after he was taken to USA in November 2009, though there is pleading that she used to speak with the child every week telephonically, The defence taken by the respondent is that the appellant though a citizen of USA had not attempted to take dependant visa for the respondent and took her to USA. The answer of the appellant to this is

that in view of the recession faced in the US economy, his lawyer advised not to sponsor for dependant visa, when H1B visa was under process and the respondent also got it renewed till September 2012. The reason given by the appellant for not getting dependant visa is reasonable and acceptable.

13. It is also pertinent to note that the respondent got appointment in Cognizant Technologies Ltd., and earned Rs.70,000/- per month and the same was not even informed to the appellant. Having known the possession of green card by the appellant, the respondent never asked the appellant to take her to USA through dependant visa. Thus it is very clear that the appellant though was under the impression that the respondent would return to USA, after getting the H1B visa endorsement and endeavoured to get placement for the respondent in USA, the respondent has not taken any steps to go to USA to be with the child. When there is no concrete or justifiable reason to join with the child and the appellant, taking job in India without taking any effort to get the H1B visa endorsement, leads to infer that the respondent failed in her motherly obligation to the child.

14. When the child was brought to India in August 2011 by the appellant, he did not inform the respondent, apprehending problem from the side of the respondent as he came to know in the first week of August 2010, that the respondent was evading to return to USA and got job in Chennai even on 19.04.2010 itself. When the appellant departed from India via Singapore, he was informed at Singapore about the police complaint and hence, he came back with the child. Only for the purpose of getting the child, she lodged the police complaint and through the police she got the child from the appellant. There is no evidence as to the progress of the police complaint, after handing over the child, though the complaint was for the offence of Dowry demand and cruelty under Section 498(A) IPC. Thus it is clear that the child was taken by the respondent under duress through the police, after leaving the child to be with his father in USA for about 2 years in tender age.

15. After the forcible grabbing of the child by the respondent through police in Chennai, the appellant approached the Superior Court of California for the custody of the child, as the child being the citizen of USA by birth. The respondent sent a reply to the show cause notice of the Superior Court and also participated in the mediation telephonically. The Superior Court of California rendered its Judgment, after recording the service and participation of the respondent in the proceedings. The respondent also admits during cross-examination that she received summons from the Superior Court of California in the proceedings initiated by the appellant around early 2011:

"16. With respect to the engagement of Advocate in the Superior Court, the questions put to the respondent and her

answers are as follows:

"Q : Did the communication from the Superior Court of California, give you a list of counsels practising in that particular Court and in that particular area of expertise and also list of legal aid centres, which you could engage or approach for the purpose of pursuing your case ?

A : These details are available in their web site like any other web site.

Q : Did they also furnish the details to you ?

A : Yes."

17. The appellant filed the copy of Foreign Court Judgment as Ex.P.1. Attachment 7 is other Orders to Findings and Order After Hearing of the Superior Court of California, which reads thus:

"7. Other Orders :

A. Findings :

1) That the parties were validly married in India (Family Code 308 & 308.5);

2) That there is no requirement for the Marriage License from India to be registered in California (Family Code 308 & 308.5);

3) Petitioner has met residency requirements for this Court's jurisdiction over the marriage;

4) That the Declarations filed by Petitions in support of the Orders to show cause are true and accurate;

5) That the Respondent has been served with the following:

a) Summons (Family Law) and Petition (filed October 7, 2011);

b) Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (filed October 7, 2011);

c) Family Law Notice Re Related Case (filed on October 7, 2011);

d) Order to show cause Re Child Custody, Child Support and Attorney's Fees and Costs, which contains a Temporary Custody Order granting our client Mr.Srikumar Puthupadi Kanthadai custody of Minor Child Srihari Srikumar, date of birth 09/16/08 (filed October 7, 2011);

e) Order to Show Cause Re Child Custody, Child Support and Attorney's Fees and Costs which contains a Temporary Custody Order granting our client Mr.Srikumar Puthupadi Kanthadai custody of Minor Child Srihari

Srikumar, date of birth 09/16/08 (file October 31, 2011);

f) Order to Attend Mediation (filed October 31, 2011);

g) Income and Expense Declaration (filed October 7, 2011);

h) Blank Response - Marriage form.

i) Blank Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act;

j) Blank Responsive Declaration to Order to Show Cause or Notice of Motion form; and

k) Blank Income and Expense Declaration form.

6) Respondent acknowledged service of the above referenced documents in her written Declaration (of Respondent) and Response of Respondent which are Exhibits "K" and "M" to the "Declaration of Richard B. Blum, Esq. in support of Petitioner's Motion for Order Re: Respondent Has Been Properly Served; That Respondent has "Appeared"; and That Respondent has submitted to Jurisdiction of this Court" filed on March 22, 2012 in which Respondent responded on the merits paragraph by paragraph;

7) That Respondent HARSHITHA GOPINATHAN has appeared in this action and is subject to the in personam jurisdiction of this Court; and

8) That California is the Home State of the minor child of the parties, SRIHARI SRIKUMAR, date of birth 09-16-08.

B. ORDERS :

1) Sole Legal and Physical custody of the minor Child SRIHARI SRIKUMAR, date of birth 09-16-08 is granted to Petitioner Father SRIKUMAR PUTHUPADI KANTHADAI. The Court reserves jurisdiction as to Visitation for Respondent Mother."

18. The Superior Court of California gave a finding that respondent has appeared and that the respondent has subjected to jurisdiction of the Court and respondent responded on the merits paragraph by paragraph. Further, the finding of the Court is that the respondent Harshitha Gopinathan had appeared in the action and is subject to the in personam jurisdiction of that Court. Thus after due service and participation of the respondent, subjecting herself to the jurisdiction of the Superior Court of California by sending written response and

involved in the Mediation through telephonically. The Superior Court of California passed the orders granting sole legal and physical custody of the minor child, Srihari Srikumar to the appellant.

19. Section 13 of the Code of Civil Procedure deals with Foreign Judgment, which is extracted below:

Sec.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 recognise 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."

20. The learned counsel appearing for the respondent argued that the respondent had not appeared in person before the Superior Court of California and therefore, the order is opposed to natural justice. As already pointed out, the respondent is aware of the procedure followed in the Superior Court of California. Had she actually wanted to participate in person in the proceedings, as rightly pointed out by the learned Senior counsel appearing for the appellant, the respondent should have participated at the expenses of the appellant, as she was in possession of the valid passport. The respondent herself admits in her evidence that she sent the response after receipt of the documents from the Superior Court of California and she had also participated in the mediation over telephone. The order of the Foreign Court is very clear about the service and participation of the respondent in the proceedings. Therefore, the plea about violation of natural justice of the respondent does not hold good.

21. Another contention is that the appellant suppressed his first marriage and divorce in the proceedings. The order of the Superior Court in its finding says that the parties were validly married in India. A divorcee is entitled to marry again, as per Indian law. However, nothing has been brought to

the notice of this Court, how the suppression of that fact prejudiced the respondent in the said proceedings and how it misled the Court to pass the custody. It is also appropriate to mention that it is second marriage for the both. Therefore, the argument about suppression is also to be brushed aside.

22. Yet another argument advanced by the learned counsel for the respondent is that when the minor child was in India, the appellant initiated proceedings in the Superior Court of California, USA and got the orders and therefore, the Foreign Court is not having competent jurisdiction and only jurisdictional Court in India where the minor boy resides is the competent Court.

23. The catena of Judgments have been pressed in to service with regard to the jurisdiction of Foreign Court and Domestic Court. The following three citations are suffice to refer :

(i) In V.Ravi Chandran (Dr) (2) v. Union of India, reported in (2010) 1 SCC 174, the Hon'ble Supreme Court has held as follows :

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern

and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in *McKee v. McKee* (1951 AC 352) that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in *L (Minors), In re* ((1974) 1 WLR 250) and the said view has been approved by this Court in *Dhanwanti Joshi (Dhanwanti Joshi v. Madhav Unde)*, (1998) 1 SCC 112). Similar view taken by the Court of Appeal in *H. (Infants), In re* ((1996) 1 WLR 381) has been approved by this Court in *Elizabeth Dinshaw (Elizabeth Dinshaw v. Arvand M. Dinshaw)*, (1987) 1 SCC 42).

...

35. The facts and circumstances noticed above leave no manner of doubt that merely because the child has been brought to India by Respondent 6, the custody issue concerning minor child Adithya does not deserve to be gone into by the courts in India and it would be in accord with principles of comity as well as on facts to return the child back to the United States of America from where he has been removed and enable the parties to establish the case before the courts in the native State of the child i.e. the United States of America for modification of the existing custody orders. There is nothing on record which may even remotely suggest that it would be harmful for the child to be returned to his native country."

(ii) The Hon'ble Supreme Court in *Arathi Bandi v. Bandi Jagadrakshaka Rao*, reported in (2013) 15 SCC 790 held as follows:

"In our opinion, these observations leave no manner of doubt that no relief could be granted to the appellant in the present proceedings given her conduct in removing Anand from USA in defiance of the orders of the court of competent jurisdiction. The Court has specifically approved the modern theory of conflict of laws, which prefers the jurisdiction of the State which has the most intimate contact with the issues arising in

the case. The Court also holds that jurisdiction is not attracted "by the operation or creation of fortuitous circumstances". The Court adds a caution that to allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum shopping. The aforesaid observations are fully applicable in the facts and circumstances of this case."

(iii) The Hon'ble Supreme Court in *Surya Vadan* v. State of T.N, reported in (2015) 5 SCC 450 has held as follows :

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

- (i) the principle of comity of courts; and
- (ii) the principle of the best interests and the welfare of the child.

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

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

50. Second, there is no reason why the principle of "comity of courts" should be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case). In McKee (McKee v. McKee, 1951 AC 352) which has been referred to in several decisions of this Court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court—the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure.²¹ In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so accepted by this Court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue as a matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court."

24. Here in this case on hand, the minor child is a Citizen of USA by birth. He came to India with his parents in November 2009 and returned to USA with his father, as agreed by the mother. When the child was again brought to India for temple visit in August 2011, that is after about 2 years, the child was virtually snatched from the appellant by the respondent with the help of police. The child, being citizen of USA, the Superior Court of California is having most intimating contact and the closest concern. Even as per the principle of Comity of Courts, the order of the Superior Court of California is to be respected.

25. The learned counsel for the respondent submits that the respondent being mother, got Overseas Citizen of India visa (OCI) for the child. Detaining the child in India and obtaining OCI visa by the respondent are only fortuitous circumstances and these do not confer any jurisdiction to the Courts here.

26. The Court is bound to consider the welfare and best interests of the child as the paramount consideration and go

<https://hcservices.hcprts.gov.in/hcservices/>

into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents.

27. Even while considering the interest of the minor child, this Court is of the view that due respect is to be given to the orders of the USA Court, as the USA Court has the most intimate contact with the issue involving the custody of the minor child, who is a citizen of USA. Therefore, the argument of the learned counsel for the respondent that the Foreign Court is not having competent jurisdiction is not sustainable. Therefore, as per Section 13 of the Code of Civil Procedure, the order of the Superior Court of California is to be construed as conclusive between the appellant and the respondent as to the custody of the minor child and binding upon the parties.

28. The minor child is now aged about 7 years. Though he has been put in a reputed School in Chennai, that cannot be a ground to subject the matter under Domestic jurisdiction. It is also noteworthy that there is no possibility for reconciliation between the spouses, as the respondent moved the Family Court, Chennai for dissolution of marriage, solemnized in India.

29. Even as per Section 6 of Hindu Minority and Guardianship Act, 1956, natural guardian is the father for a minor, who has completed the age of 5 years.

30. For the aforesaid reasons and also considering the facts and circumstances of the case, the appellant / plaintiff is entitled to the declaratory reliefs as prayed for in the suit. Consequently, the O.P has to be allowed.

In fine, these Original Side Appeals are allowed. The judgment and decree dated 4.8.2015 passed in C.S.No.129 of 2013 and the order passed in O.P.No.285 of 2012, on the same day, are set aside and consequently, C.S.No.129 of 2013 is decreed as prayed for; likewise O.P.No.285 of 2012 is also allowed. The parties are directed to bear their own cost. Consequently, connected M.Ps. are closed.

tsvn

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

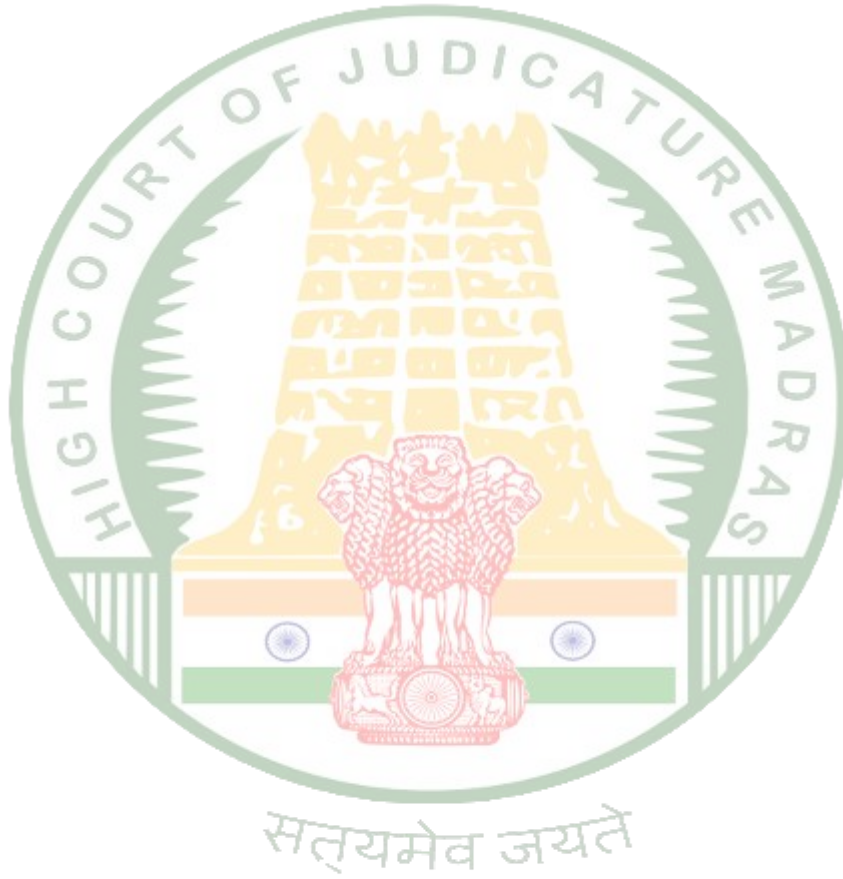
TO

THE SUB ASST. REGISTRAR,
ORIGINAL SIDE, HIGH COURT, MADRAS.

+ 3 CCS TO MR.P.N.SWAMINATHAN, ADVOCATE SR 42061, 41972 &
41973

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