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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On: 21st March, 2016

Judgment Pronounced On: 8th July, 2016

W.P.(CRL).247/2016

ANAND RAGHAVAN

..... Petitioner

Through : Mr. Prabhjit Jauhar with Ms. Aakriti
Dawar, Advocates

versus

STATE OF DELHI & ANR

..... Respondents

Through : Mr. Rahul Mehra, Standing Counsel
with Mr. Amrit Singh, Advocate for
the State along with SI Amit Sharma,
P.S. Sarita Vihar.
Ms. Malvika Rajkotia with Ms. Arpita
Rai, Advocates for respondent no.2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

1. Petitioner has filed the present writ petition under Article 226 of the Constitution of India. Petitioner seeks issuance of a writ in the nature of *habeas corpus* for production of his minor daughter Nethra who has been illegally and unlawfully removed from the custody of the petitioner from the United Kingdom(UK).
2. Petitioner is the father and the natural guardian of Nethra who is six years of age. As per the petition, the petitioner is a UK citizen and holds a British Passport. The petitioner came to UK in the year 2003 as a student and since 2005 he has been working in UK. Petitioner married respondent no.2 on 30.11.2006 through a registered marriage and a formal wedding ceremony took place on 22.01.2007. Petitioner and respondent no.2 thereafter travelled to UK on 30.01.2007 with the

intention to live in the UK permanently. Respondent no.2 was granted permanent residency and indefinite leave to remain in UK on 05.05.2010. The petitioner claims that respondent no.2 is a Masters in Communication, has a vast work experience in India and had a regular employment in UK from March, 2008 to June, 2010 with Media Reach Advertising Company, UK. During her employment in UK, respondent no.2 was earning more than 25,000 pounds per annum.

3. The child was born as per the wishes of petitioner and respondent no.2 in India on 07.08.2009. The petitioner was not present at the time of Nethra's birth but came to India on 12.08.2009 and spent three weeks in India. The petitioner again came back to India in December, 2009 and it was planned that both the petitioner and respondent no.2 shall return to UK together the next month. However, shortly before the departure, the respondent no.2 decided to remain in India for a further period of two months. The petitioner returned to England in early January, 2010 for his work reasons. The petitioner again traveled to India in March 2010 and accompanied Nethra and respondent No.2 to England in the same month. Although the relationship was largely harmonious, the petitioner noticed almost immediately that the attitude of respondent No.2 towards the petitioner had changed and respondent no.2 seemed distant towards the petitioner. On 08.08.2010, the respondent no.2 booked a ticket for her and her minor child Nethra to travel to India on 28.08.2010. Respondent no.2 gave no sign about when she would return to England. This was around the time of Nethra's first birthday, a very auspicious occasion which is by tradition always celebrated at the home of child's father. The respondent no.2, on the other hand, made arrangements to celebrate Nethra's first birth in Delhi with her family rather than with petitioner in London and after much persuasion

and after her father's intervention, the petitioner was permitted to celebrate this birthday with Nethra in the UK but the respondent No.2 told the petitioner that she would never allow petitioner to take Nethra to visit his parents in future. As per the petitioner, the petitioner's family members have not seen Nethra since December, 2009.

4. It is also the case of the petitioner that the petitioner asked the respondent no.2 many times to return to England for the sake of the minor child so that the minor child would have a stable upbringing with both the parents being there to look after the welfare and well being of the minor child. As a result, the respondent No.2 alongwith the minor child came to UK in December, 2011 and decided to admit the minor child in a proper school in UK so as to educate the child in UK. The said decision was taken jointly by the petitioner and the respondent no.2 for the betterment and providing good education to the minor daughter in UK. Again around in the month of January, 2012, the minor child started attending nursery school in the UK and continued attending the nursery until starting regular school at the age of 4 years in September 2013 at Oxford High School. The respondent no.2 during this time remained totally committed towards the schooling of the minor child in UK and only had breaks in India during school holidays. The minor child remained very regular in the school at UK and participated in all the activities in the school in UK.
5. The petitioner claims that for six to nine months after the return in December, 2011, the relationship was good but, thereafter the respondent No.2 persistently subjected the petitioner to emotional and, occasionally, physical abuse while the parties were permanently residing in UK. The respondent No.2 would make fun of the petitioner's father's blindness repeatedly and made highly offensive and

derogatory remarks about petitioner's family which the petitioner found deeply upsetting. The petitioner and respondent No.2 were able to work together to find a good school and agreed that the child should attend Oxford High School. The said decision was taken jointly by both the parents for the benefit of the child as Oxford High School which as per the petitioner is among the top schools in the UK and is consistently ranked in the country's top five or top ten schools. The petitioner claims paying annual school fees of approximately GBP 10,000 per year (Ten Thousand Pounds only per year) in the form of three payments a year for three terms (Autumn, Spring and Summer Terms).

6. As per the petition, in December, 2012 the minor child Nethra became a British citizen with the consent of respondent no.2. In the year 2013, the couple moved to a new property in Aylesbury which was duly purchased on mortgage in the name of the petitioner and the same was also done after taking consent from the respondent no.2 as both the parties alongwith the minor child intended to remain permanently in the UK. Therefore, such immovable property was acquired by the petitioner keeping in view the joint decision of the parties. The respondent no.2 also acquired a driving licence in UK with test certificate being No. 349154891 and the respondent no.2 obtained a full driving licence in the month of December, 2012. It is the case of the petitioner that during the summer of 2014 the respondent no.2 used petitioner's credit card to book tickets to come to India for herself and minor child Nethra for a period of two months. The petitioner knew nothing about the trip until the day of her departure at a breakfast when Nethra asked respondent no.2 what time the taxi would be arriving to take them to the airport. The petitioner was shocked that she had made the arrangement without the knowledge of the petitioner again, but at the end the petitioner

agreed to give them a lift to the airport and the couple left for the respondent no.2's holiday amicably at the airport. During their holiday the petitioner was in daily contact with minor child Nethra on the telephone.

7. As per the petition, the minor child Nethra was diagnosed with cardiomyopathy about fifteen months ago after she was hospitalised in UK following a bout of vomiting. During tests conducted in UK, it was discovered that she had an irregular heartbeat and there is no cure or treatment for this condition. The minor child has to take aspirin on a daily basis and have an annual check-up at the John Radcliffe Hospital in Oxford in UK, the last of which happened in January, 2015 and the next one was due in January, 2016 which the minor child has missed due to her detention in India by the respondent no. 2. The hospital in the UK, John Radcliffe Hospital, contacted the couple to ask the respondent no.2 and the petitioner to undertake genetic testing in July, 2015, but this has gone no further.
8. Counsel for the petitioner submits that the petitioner is committed to the successful treatment of the child's heart condition and in his regular research has established that one of UK's leading children's hospitals, Great Ormond Street Hospital, has found a cure for one of the children with the same ailment. As per the petitioner, the minor child is fully absorbed in the UK health system and she is registered at her local National Health Service (Haddenham Medical Centre, Stanbridge Road, Haddenham HP17 8JX, UK) and has her regular dental checks at the local dental centre. As per the petitioner the minor child has been well-settled in her school in the UK during September 2013 to July 2015.
9. As per the petition, on 02.07.2015, the respondent No.2 travelled to India with the minor child Nethra without the knowledge or consent of

the petitioner. When the petitioner was leaving the office at 11.30 p.m. that night on 02.07.2015, the respondent no.2 sent the petitioner an email which stated that respondent no.2 and child Nethra had left the UK and were going to live in India with her parents. The petitioner later came to know that respondent no.2 had booked tickets at least before 6th or 7th June when the petitioner had overheard her talking about her travel tickets during a call to her sister. On 06.07.2015, the respondent no.2 sent an email to Nethra's school in UK stating that she had gone to India due to "family medical reasons." There was no indication in that email that she planned to remain in India permanently. During the period between July to October, 2015, the respondent no.2 spoke to the petitioner only three times despite the petitioner making numerous calls to her to find out when she would be returning. The petitioner sent several e-mails to the respondent no.2 pleading with her to return with Nethra and offering to pay for their flights home but she did not respond to any of them. The petitioner last spoke to Nethra on 5th September, 2015. Until then, the minor child used to send pictures and short e-mails to the petitioner using the e-mail account of respondent no.2, but the same was stopped since 05.09.2015. The petitioner's phone calls to the minor child since 05.09.2015 have been completely ignored and his efforts to speak with the minor child during Diwali went in vain. Thus, an effort has been made to completely cut off the petitioner's links with the minor child in order to make the child forget her fond relationship with her father, which is clearly detrimental to the welfare and development of the minor child.

10. Again on 02.09.2015 (the day before the start of the term), the respondent no.2 emailed the school at UK again to say that Nethra would be returning to school on 14th September and attributed the delay

due to "extremely pressing family issues". The respondent no.2 wrote again to the Oxford High Junior School, UK on 14th September to say that Nethra would be absent for a further period of 7 to 10 days as "family circumstances have not improved". In this period, the Head of Oxford High School issued a letter dated 19th October, 2015 expressing concern about the minor child's absence and also indicating that the rest of her peer group in the school "remember her warmly" and that they "are missing her". Unfortunately, on 23.11.2015, the petitioner learnt from Oxford High School that the respondent no.2 had emailed them on 18.11.2015 stating that Nethra would not be returning to England citing Nethra's "well-being, health and safety" as her reason for remaining in India. This e-mail was not copied to the petitioner by the respondent no.2 but was forwarded to the petitioner by the Oxford High School.

11. It is the case of the petitioner that the petitioner decided, as a last ditch attempt to save their relationship, and travelled to India in December, 2015 to see if he could persuade the respondent No.2 to return to England. The petitioner discovered that shortly before the petitioner's arrival the respondent No.2 had filed a false police complaint with the "Crime Against Women Cell", Shrinivaspuri, New Delhi presumably accusing the petitioner of domestic abuse. This was clearly an attempt to intimidate the petitioner. The petitioner neither abused the respondent no.2 either in India or the UK. The respondent no.2 never reported of any perpetration of physical or domestic violence to police in England, knowing that false reports will go nowhere in that country. Realising that respondent no.2 had no intention of returning to the UK, the petitioner came back on 31.12.2015 to UK and sought legal advice. Although the minor child Nethra has a multiple-entry Indian visa which is valid until 2017, she is only permitted to stay for a six-month period

at any time. The minor child has therefore overstayed on her visa since 3rd January, 2016. The petitioner previously delayed initiating court proceedings in the hope that respondent no.2 would return to England. The petitioner was concerned that if he initiated proceedings the respondent no.2 would immediately take steps to divorce him. The petitioner wishes to avoid a divorce at all costs as the petitioner is of the opinion that the same would be detrimental for the welfare and upbringing of the minor child Nethra.

12. Since the respondent no. 2 refused to bring the minor child back to the jurisdiction of England and Wales, the petitioner was left with no option but to file a petition before the High Court of Justice, Family Division, London on 08.01.2016 for obtaining a wardship order and also sought the relief that the minor child should be brought back to the jurisdiction of England and Wales. The High Court of Justice Family Division, UK vide order dated 08.01.2016 noted that the minor child was wrongfully removed from England since July, 2015 and has been wrongfully retained in India since then. The UK Court directed that the minor child Nethra shall remain a ward of the UK Court during her minority or until further orders. It was also observed by the UK Court that the Courts at England and Wales have the jurisdiction in matters of parental responsibility over the child being habitually resident of England and Wales and further directed that the respondent No.2 shall cause the return of the minor child to England and Wales not later than 22.01.2016. The said order dated 08.01.2016 passed by the UK Court was served personally upon the respondent no.2 on 13.01.2016 and the respondent no.2 duly signed the covering letter addressed by the solicitors of the petitioner at UK acknowledging the receipt of the UK Court order and statement of the petitioner filed before the UK Court.

The petitioner by the same order dated 08.01.2016 was also directed by the UK High Court Family Division to purchase the tickets for the respondent no.2 and the minor child for causing their return from India to England. The petitioner addressed an email dated 15.01.2016 to the respondent no.2 offering to furnish the air tickets to enable the respondent no.2 and the minor child to come back to UK. The petitioner also called upon the respondent no.2 to intimate the date and the time of her travel to UK before 22.01.2016 so that necessary arrangements can be made by the petitioner for the booking of the air tickets. Even after the receipt of the email dated 15.01.2016, the respondent no.2 has not given any response or her assent for the petitioner to buy the tickets and as such has expressed her intentions not to return to UK in compliance of the order dated 08.01.2016 passed by the UK High Court.

13. It is the case of the petitioner that admittedly the minor child is a habitual resident of UK, and is a UK citizen and has been unlawfully retained by the respondent no. 2 in India. In the facts of the present case it has been prayed that a direction be passed for the minor child to be produced and repatriated back to the jurisdiction of England and Wales which is the court having most intimate contact with the issue of the custody of the child.
14. Mr. Jauhar submits that the detention of the child in India at Delhi is unlawful and contrary to the order passed by the competent court of jurisdiction, *i.e.*, the High Court Family Division, UK. The child, a permanent resident of UK and being a citizen of UK, the respondent no.2 is liable to comply with the order of the UK Court. He further submits that the custody of the minor child with the respondent no.2 who is a permanent resident of UK holding British Passport on the face

of it is unlawful and contrary to the mandate of the order dated 08.01.2016 passed by the High Court, Family Division, UK. Respondent No.2 has been directed by a court of competent jurisdiction at UK to return the said minor child who is a permanent resident of UK and a citizen of UK to the jurisdiction of High Court, Family Division, UK and as such the said order is duly binding upon the Respondent no.2 and till the time the said order is not set aside, varied/modified, the said minor child shall continue to be in unlawful custody of the Respondent no.2 and as such this Hon'ble Court ought to exercise its jurisdiction by passing a writ of *habeas corpus* with the directions to return the minor child to the jurisdiction of England and Wales.

15. Mr. Jahuar submits that the minor child has been brought up in UK from the time she was born in 2009 and her upbringing has been in UK in the custody of father and respondent no.2 mother. Thus, the family environment of the minor child is that of UK as she had been brought up in UK and is well settled, happy and comfortable in UK and has also adopted to the local culture of UK. The minor child had also made friends and was very happy in the environment at UK and has thus developed roots in the said society in UK. Thus, the illegal retention of the minor child by the respondent no.2 in India will cause adverse consequences to her overall development and her well being. It must be noted that the minor child is a patient of cardiomyopathy and having regular medical treatment and checkups in UK. It is in the best interest of the child to live in a pollution and smog free environment, on the contrary, the child is being forced captive in Delhi which is not her natural habitual place of residence and clearly not in the best interests of the child's health. Mr. Jauhar submits that the removal of the minor child from UK and maliciousness transplantation to an alien and hostile

environment will result in imminent and long lasting mental and psychological harm and trauma to the minor child. He submits that it is in the best interest of the minor child Nethra that she be reverted back to the jurisdiction of UK, the place where the minor child has been residing since her birth and brought up and the same is the place of her habitual residence since birth.

16. Mr. Jauhar further submits that both the petitioner as well as the respondent no.2 have set up their matrimonial home in UK where both the husband and wife as a couple have been residing in UK since January, 2007 and the petitioner has been in UK since 2003 and working for gain in UK since the year 2005. As such, the Petitioner being a UK citizen and respondent No.2 being a permanent resident of UK have domiciled in UK and have been permanently residing in UK for the last eight years approximately. The respondent no.2 is a Masters in Communication and besides having vast work experience in India was having a regular employment in UK from March, 2008 to June, 2010 with Media Reach Advertising Company in the UK. The respondent No.2 while in UK was gainfully employed and was earning about more than 25,000 pounds per annum. Therefore, it would be the UK Court which shall have the jurisdiction in the matter to decide about the welfare and the custody issue pertaining to the minor Child Nethra since even prior to the solemnization of the marriage, the petitioner had been residing there. He submits that the present case is not one where the respondent no.2 wife is uneducated lady who has married and just gone to a foreign country where she has been unable to settle down. Both the parties are well educated. It is pertinent to note that the respondent no.2 is permanently settled in UK and even has bank account/deposit of more than seven years to show that she is very well

settled in the UK. The allegations and counter allegations of the parties in respect of their personal conduct have all transpired and happened in UK and all the evidence regarding the same is also available in UK and thus, it is only those Courts in UK that the interests of parties as well as of the minor Child would be effectively adjudicated upon and properly taken care of. He submits that once the court in UK has directed that the minor child Nethra be returned to the jurisdiction of UK, the retention of the said child in India would be unlawful by the respondent no. 2. The petitioner without prejudice to his rights and contents has also offered to pay 1000 pounds as maintenance to the respondent no.2 in case respondent no.2 is willing to come back to the UK with the minor child.

17. Mr. Jauhar contends that in the present case the respondent no. 2 is trying to oust the jurisdiction of a competent Court in UK by seeking to abstain from those proceedings and this Hon'ble Court ought to direct the respondent no.2 to produce the minor Child before the UK Court keeping in mind the principles of comity of courts which have been duly upheld by the Hon'ble Supreme Court of India, recently in the case of *Arathi Bandi v. Bandi Jagadrakshaka Rao*, reported at (2013) 15 SCC 790.
18. Applying the ratio *dicidendi* of the said case to the facts of the present case, Mr. Jauhar submits that it is clear that the principle of Comity of Courts as well as the welfare of the minor child have to be considered and the minor child may be repatriated back to Court in UK since that is the court having competent jurisdiction in the matter. Mr.Jauhar has relied upon a decision rendered by the Supreme Court of India in the case of *Surya Vadanam v. State of Tamil Nadu & Ors.*, reported at (2015) 5 SCC 450.

19. Mr. Jauhar contends that in the present case the Courts at UK are already seized of the matter and have passed the order directing that the minor Child be returned to the jurisdiction of UK. The UK Court, in the present case, is closest to the issue involving the custody of the minor child who, admittedly, is a permanent resident of UK and a citizen of UK and from the inception of her birth has been staying and residing within the jurisdiction of the said Court. He submits that even while considering the interest and welfare of the minor child which is of paramount importance, due respect ought to be given to the order of the UK Court as the UK Court is closet to the issue involving the custody of the minor child. He contends that all the relevant evidence with regard to the allegations being made by both the parties would be necessary while considering the aspect of the custody of the minor child and the same having been available in UK only, UK Court would be competent courts having jurisdiction in the matter and as such the order of the UK Court in the present case ought to be given due weightage and respect to be in consonance with the principles of Comity of Courts specially when the parties have set up their matrimonial home for more than eight years in UK and minor child since her birth had been residing in UK. He submits that the Supreme Court in the case of ***Smt. Surinder Kaur Sandhu v. Harban Singh Sandhu & Anr.***, reported at (1984) 3 SCC 698, held as under:

“10.The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstances as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such

circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses (see *International Shoe Company v. State of Washington* which was not a matrimonial case but which is regarded as the fountainhead of the subsequent development of jurisdictional issues like the one involved in the instant case). It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy.”

20. Mr. Jauhar contends that the facts of the present case are totally akin to a recent decision of a three Judges Bench of the Supreme Court of India in the case of *V. Ravi Chandran (Dr.)(2) v. Union of India & Ors.*, reported at (2010) 1 SCC 174, wherein the Supreme Court of India had the occasion to deal with the illegal removal of the minor child being a US citizen by his own mother. The Supreme Court was pleased to issue a writ in the nature of *habeas corpus* directing the mother to take the child to the jurisdiction of US courts, failing which the custody would be handed over to the petitioner-father and the Supreme Court was

pleased to approve the judgments delivered in the case of **Surinder Kaur** (supra) and also in the case of *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw & Anr.*, reported at (1987) 1 SCC 42, wherein it has been held as under:

“9. In *Re H. (infants)* [(1966) 1 All ER 886] the Court of Appeal in England had occasion to consider a somewhat similar question. That case concerned the abduction to England of two minor boys who were American citizens. The father was a natural born American citizen and the mother, though of Scottish origin, had been resident for 20 years in the United States of America. They were divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the two boys to the mother with liberal access to the father. By an amendment made in that order in December 1964, a provision was incorporated that the boys should reside at all times in the State of New York and should at all times be under the control and jurisdiction of the State of New York. In March, 1965, the mother removed the boys to England, without having obtained the approval of the New York Court and without having consulted the father; she purchased a house in England with the intention of remaining there permanently and of cutting off all contacts with the father. She ignored an order made in June, 1965, by the Supreme Court of New York State to return the boys there. On a motion of notice given by the father in the Chancery Division of the Court in England, the trial Judge Cross, J., directed that since the children were American children and the American court was the proper court to decide the issue of custody, and as it was the duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing, the court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America. In the appeal filed against the said judgment in the Court of Appeal, Willmer, L.J. while dismissing the appeal

extracted with approval the following passage from the judgment of Cross, J. [(1965) 3 All ER at p.912. (Ed.: Source of the Second quoted para could not be traced.)]:

“The sudden and unauthorized removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing.

The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interest of wards generally, and a Judge should as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child.”

10. With respect we are in complete agreement with the aforesaid enunciation of the principles of law to be applied by the courts in situations such as this.”

The three Judges Bench of the Supreme Court has upheld the enunciation of law as propounded by the earlier Benches of the Hon’ble Supreme Court and as such it would be in the interests of the minor child that he be returned to the jurisdiction of the courts at UK which would be in her paramount interest and welfare.

21. Mr. Jauhar contends that in the facts and circumstances of the present case, no elaborate inquiry into the custody of the minor Child in India is required to be gone into and the respondent no.2 ought to be relegated to the procedure before the appropriate forum, *i.e.*, UK Court. He submits that admittedly, the minor child is a permanent resident of UK and brought up in UK and has spent her initial years in UK and is natural habitant of UK. As a matter of fact, keeping in view the welfare

and happiness of the minor child and in her best interest it would be appropriate that the minor child be directed to go to UK. Moreover, the custody issue concerning the minor child cannot be gone into by the Courts in India and it would be in accordance with the principles of Comity of Courts as well as on account of the fact the Courts in UK have the closest connection with the parties and minor child ought to be directed to be returned back to UK from where she has been unlawfully removed and it would be in the best interest of the minor child to enable the parties to establish their case before the courts in the native State of the child, *i.e.*, UK for modification of the existing custody orders.

22. Mr. Jauhar further submits in the present case the very retention of the minor child in India would be harmful to his interest and well being and the present petition for return of the minor child to the jurisdiction of UK Court is being made promptly and without any delay after the time when the minor child has been illegally and unlawfully removed from the jurisdiction of the UK Court. The return of the minor child is also in the best interest of the child as any delay may result in the minor child developing roots in the country to which she has been removed.
23. Mr. Jauhar also contends that it is no longer *res-integra* that in matters relating to matrimony and the custody, law of the place which has closest connection with the well being of the spouses and welfare of the off springs of marriage must govern the said disputes. He contends that recently a Division Bench of this Court in the case of ***Aviral Mittal v. State & Anr***, reported at 163(2009) DLT 627(DB) has upheld the validity of the order of the U.K. Courts and relegated the mother and the minor children to UK Courts while exercising their jurisdiction under Article 226 of the Constitution of India by issuing a writ of

habeas corpus. In the said judgment the Division Bench has held that once the High Court of U.K. and Wales had directed the child to be produced in UK, the retention of the child in India would be unlawful though not illegal at the inception. The said judgment of the Division Bench of this Court has been duly approved by the Supreme Court in the case of **Shilpa Aggarwal (Ms) v. Aviral Mittal & Anr**, reported at (2010) 1 SCC 591, and the doctrine of comity of Courts as well as the jurisdiction of the English Court which had the most intimate contact with the issue in question to decide the custody has also been duly upheld by the Supreme Court. The aforesaid decisions in the case of **Aviral Mittal** (supra) are directly applicable to the facts of the present case and pursuant to the orders passed by UK Court dated 08.01.2016, the retention of the minor child in India by the respondent no.2 is unlawful and the minor child is liable to be returned to UK.

24. Per contra, Ms. Rajkotia submits that the petition deserves to be dismissed in view of material concealment and the petitioner taking advantage of his own wrongs. The petitioner has deliberately concealed information with a view to prejudice this Court. The petitioner has concealed the entire communication between counsels of the parties in 2010-2011. The petitioner failed to mention that the marriage was always strained and contrary to the allegation, it was the respondent no.2 who tried several times to work towards the relationship and after the child Nethra was born for the sake of the minor daughter Nethra, however, the petitioner never changed his behavior and continued to physically and mentally abuse her and was even abusive towards her parents. The Petitioner did not disclose these vital facts even to the UK court and obtained an *ex parte* order with regard to the return of the child to UK jurisdiction by suppression of such material facts.

25. Ms. Rajkotia submits that the present petition is misuse and abuse of the process of law. The respondent no.2 and his parental family since the start of marriage have treated the petitioner with cruelty that resulted in the failure of marriage. The fact that the marriage failed is writ large in the petition. The present petition does not arise out of any love and affection for the child but to cause harassment to the respondent No. 2 in retaliation to her filing Section 498-A IPC complaint with the police in Delhi where she has been residing with her parents since July, 2015.
26. Ms. Rajkotia contends that the respondent no.2 had to leave the UK on account of emotional and physical cruelties and also financial deprivation. The crux of the matter is that the petitioner wants to abandon the respondent No.2 and her minor daughter. The respondent No.2 had already initiated appropriate legal proceedings pleading detailed facts against the petitioner and his parents for recovery of her stridhan and earnings which are in their custody and control. The respondent no.2 has throughout the marriage been used by the petitioner to extract money from her family. The family of respondent no.2 has always accommodated the requests hoping that the marriage would work at some point, which never happened. More importantly keeping in view the principle of welfare of the child, it cannot possibly be disputed that a six years old girl child under any circumstances must be with her mother.
27. Ms. Rajkotia submits that the writ is not maintainable as the petitioner has not come to court with clean hands and deliberately not disclosed that the child Nethra along with the respondent No. 2 were in India, only because of continuous cruelties meted out to her. The petitioner used to physically beat her and mentally torture the respondent no.2 and under these circumstances it was no longer possible for her to remain in

the company of the petitioner. The respondent no.2/mother is a citizen of India and was forced to return to India as she had no support or family in the UK who could help her in the crisis that she and her daughter were facing from the petitioner.

28. Ms. Rajkotia submits that the respondent No.2 is an Indian citizen, presently living in Delhi. Nethra was born in New Delhi at Indraprastha Apollo Hospital but currently holding a British passport as a dependant of the Petitioner, who got her the UK citizenship in December, 2012 without the consent of the mother. She submits that in the nine years of marriage, the respondent no.2 has remained in India for more than 3 years. After the birth of the child, the respondent No.2 has lived in India for about 3 years. The petitioner forced her to go to her parental house for the delivery of child and forced her father to bear expenses of the post delivery hospitalization. Within six months of her return to UK in 2010, she returned to Delhi as she could not cope with the daily torture of the petitioner. She eventually returned on the promise of good behavior by the petitioner. However, on reaching UK, the petitioner was back to his old ways.
29. Ms. Rajkotia contends that the respondent No.2 returned to India on 03.07.2015 as it was no longer possible for her to live in mentally and physically degrading condition with the petitioner. She filed her complaint before Crime against Women Cell at Srinivaspuri, New Delhi on 16.12.2015 in India of which petitioner and his family has been served and they were directed to appear before the CAW Cell on 31.12.2015. The petitioner then in counterblast filed a custody petition in the High Court of Justice Family Division in UK on 08.01.2016 after the complaint was filed on 16.12.2015 by the respondent No.2 and now he has obtained an *ex parte* order which is arbitrary, illogical and

contrary to all Indian laws to which the respondent No.2 is amenable.

30. Ms. Rajkotia contends that the respondent no.2 and the child have no family/relatives or support system in the UK and have the closest nexus with India and particularly Delhi where her parents are residing. She cannot risk returning to the UK and defending her case where she has no relatives; no place to live and no money to live on with the constant threat of abuse to her and her child. Needless to mention that the petitioner/husband has filed the case after the jurisdiction of the Delhi Court was invoked by the respondent No.2/wife.
31. Ms. Rajkotia further contends that the petitioner has no love and affection for the child. Over the years when the parties lived together, he never took care of the child. From waking up the child and till the time she went to sleep, all her chores were done by the answering respondent. From bathing her to changing her nappies and feeding her, to taking her for a walk, to playing with her; every task relating to the child was done by the respondent no.2. So much so, that the petitioner was not with the respondent No.2 even when the child was born. He came after the birth of the child and stayed only for about 7 to 8 days and returned to his parents' town in Chennai. He spent no time with the mother or the child.
32. Ms. Rajkotia in the preliminary objections submits that the marriage of the respondent No.2 was solemnised with the petitioner on 30.11.2006 at the temple at Chennai as per Hindu Rites and customs and was registered before SDM Court Chennai under Hindu Marriage Act on 30.11.2006. On 22.01.2007 a traditional ceremony took place according to Hindu rites and ceremonies. She contends that the respondent No.2 and the petitioner left for UK and shifted at the petitioner's owned residence in Watford. The petitioner was working as a Management

Consultant with Diamond Cluster and subsequently changed to Roland Berger in UK. The respondent No.2 also started working at Media Reach Advertising Company in March, 2008. The respondent No. 2 went to UK in the hope of starting her married life happily but the petitioner to her shock would always misbehave with her and ill treat her. He was very rude and miserly with money with her. While he would just give expenses enough for running the household but would buy expensive gadgets such as a video camera, car etc. for his married sister. She submits that in UK, the petitioner treated the respondent No.2 like an unpaid maid than a wife. She was supposed to take care of all the house chores and cooking and the petitioner never helped her in the household chores or cooking nor allowed her to have domestic help. If food was not ready on time, the petitioner would get angry and scold her. The respondent No.2 was given money only for household expenses that she had to account for. He hid his income and finances completely from the start till date.

33. Ms. Rajkotia further contends that in the eight years of marriage the respondent No.2 lived with just food to sustain, no money in hand, no investments, shared/individual assets. There is no savings even for their daughter or a little jewellery bought once a year as an investment. Affordability was not in question, as the petitioner comfortably earns more than thrice (salary as last known in 2015, above 175,000-180,000 pounds per year) the UK national yearly average salary which is 25,000-30,000 Pounds. The petitioner had given a supplementary card to the respondent No.2 with a limit of 700 pounds and it was essentially used for shopping groceries/household items.
34. Ms. Rajkotia submits that in June 2007, the parties visited India. As it was the Respondent No.2's first visit from the UK after marriage, she

bought little reasonable gifts for everyone in their family. The minute respondent No.2 showed petitioner the shopping, he was mad with rage and shouted at her as to why she had wasted money on gifts. When the couple reached Chennai, the respondent No.2 was not welcomed. The petitioner's mother passed comments about the respondent No.2/her family saying that everybody's parents give costly gifts, jewellery every time they/their daughter visit their in-laws and bitterly criticised her for not doing so. The petitioner's father also used to pass denigrating remarks about her family for dowry during her stay in Chennai. The respondent No.2's maternal uncle used to come to see her at the petitioner's house. The petitioner's mother would completely ignore her and respondent No.2's other guests to belittle them; she would not extend any basic hospitality. She submits that on 04.06.2008, the respondent No.2's parents along with her 5 years old nephew visited her in London. The respondent No.2 had to plead with the petitioner to write them a sponsor letter for a visit. They had a very cold reception from the petitioner. Throughout their stay the petitioner never even had a meal with them or takes them out anywhere. He severely reprimanded her young nephew for petty things.

35. She further contends that in March 2008, the respondent No.2 got a job in an advertising company in London. The respondent No.2's mother, a chronic cardiac patient, developed a fast pulse. So the respondent No.2 called A & E (Accident and Emergency). When the ambulance staff arrived, the petitioner clearly told them that she was a visitor to avoid any expenses. With no support in a new country and shuttling between the hospital and home, the petitioner would order her to come home to clean the mattress wetted by her nephew. In December 2012, the petitioner got his UK citizenship. The petitioner got UK citizenship for

Nethra as a dependant without the consent of the respondent No.2. The respondent No.2 could not get the citizenship because of her insufficient stay in the country.

36. Ms. Rajkotia contends that the petitioner never involved himself in the activities of the child, refused to take care of her and everything was left upon the respondent No.2. Even when the child fell, the petitioner remained indifferent. He was indifferent towards her health. Hardly took her out and was not sensitive to her feelings, emotions and wants. She submits that some of the incidents are related in the complaint to show his attitude towards their only child. The minor daughter was admitted in school in September, 2013. The respondent No.2 was solely looking after her daughter. The petitioner never involved himself in looking after the child or taking or bringing her from the school. The respondent No.2 would make four trips a day, to and fro school, covering 65-70 miles a day; was suppose to do all household chores without any domestic help. The respondent No.2 was living like a bonded slave. The respondent No.2 was not allowed to invite anyone to the house. She was left completely isolated socially, from her family and friends.
37. Ms. Rajkotia further contends that sometime in February 2014, the petitioner was abusing the respondent No.2/her family, upon telling him to refrain from doing so, he got aggressive, pointed finger at her and was physically intimidating. The respondent No.2 told him that she will not tolerate his abuse anymore and would certainly report it to the police if he didn't stop it. The petitioner got very angry; he dragged the respondent No.2 from the corridor, pinned her down on the stairs, strangled and hit her badly. He also warned her as how dare she can threaten him of calling the police. The respondent No.2 had bruises all

over her body and face. She tried her best to push him away in self defense but could not as she wasn't physically stronger. On every occasion of assault which were countless, he used the filthiest of language such as "prostitute, daughter of a prostitute, family of sewers, bitch, daughter of a bastard/rascal etc." and has left her with bruises, shock for days together, still she would carry on as "normal" for the sake of her daughter.

38. Ms. Rajkotia contends that in October 2014, Nethra got sick at school and the respondent No.2 was informed of the same and she rushed to the school from where the child was taken to the Hospital. The petitioner was also informed of the same. When the respondent no.2 informed the Petitioner about her condition, he was asking her whether he was required to come to the hospital instead of rushing to see his child. Nethra was in the hospital for about two days, treated for a stomach infection with intravenous drugs. The petitioner would only come to visit the daughter late in the night like a visitor. Upon discharge she was told that Nethra had a cardiac murmur and to follow it up with a Doctor. The petitioner rebuked saying that a Cardiologist consultation was not necessary at the cost of missing school. However, the respondent No.2 chose to not be dismissive about Nethra's health. After a Pediatric Cardiologist's examination, it was detected that Nethra has a cardiac disorder (abnormal heart muscle structure- Cardiomyopathy), due to which she would need periodical reviews. Subsequently, the respondent No.2 would take Nethra alone for her medical checks except for once. The petitioner's ugly true self became evident in public too. In January, 2015 at a pantomime, over a trivial matter of waiting for a minute to put on Nethra's winter coat while exiting, the petitioner got impatient and furious. He pushed, swore,

stepped over the respondent No.2 and left. Unable to tolerate his rowdy behaviour anymore, the respondent No.2 took Nethra and came home in a separate cab. He misbehaved and tried to obstruct the cab driver from leaving as well. Nethra's evening outing was spoilt, for whose sake she went and put up with such a monstrous person.

39. Ms. Rajkotia also contends that upon reaching home, the Petitioner looked mentally unstable and the respondent No.2 and her daughter were really scared. Despite Nethra's medical condition he would not think twice and terrify the child with his behaviour. He would take her away into custody by force, leaving her crying and helpless. She submits that in February 2015, at an entertainment park, indifferent to Nethra's cardiac disorder, to impress her, the petitioner compelled her to go for some fast rides. But Nethra herself wasn't comfortable and did not go for them. This shows how callous and careless the petitioner is towards Nethra's well being.
40. Various instances have been detailed by respondent no.2 to show the ill temper of the petitioner and his abusive nature, use of foul language against respondent no.2 and her family. She submits that the respondent No.2 and her minor daughter have suffered enough and repeated abuse, so finally on 02.07.2015, the respondent No.2 decided to leave UK with Nethra. The respondent No.2 left without informing the petitioner as he would not have let them escape his clutches of abuse, slavery and violence. It is relevant to state that any further stay in UK would have resulted in a high threat to their safety. After reaching Delhi, the respondent no.2 informed the petitioner by email on 03.07.2015 and she conveyed her decision that she will continue to stay in New Delhi and also said that he and his parents were free to visit Nethra in Delhi. The Petitioner called her constantly and abused her and

her family. He further threatened and said that upon her return to London, he would teach her a lesson of a lifetime. She submits that because of this constant threat, the respondent No.2 filed a complaint before CAW Cell on 16.12.2015 and the notice was issued to the petitioner and his parents for appearance on 31.12.2015. But none appeared.

41. Ms. Rajkotia further submits that as a counter to the complaint, the petitioner filed the petition for custody of Nethra before the High Court of Justice Family Division, UK on 08.01.2016. Based on the false representation of the petitioner, without issuing notice to the respondent No.2 the Royal Courts of Justice, Strand, London directed the respondent No.2 to return Nethra to the jurisdiction of England and Wales by 22.01.2016 and to attend the hearing on the 29.01.2016 at the Royal Courts of Justice.
42. Ms. Rajkotia submits that the judgments sought to be relied upon by the petitioner are not applicable to the facts of the present case as the respondent no.2 had no choice to live in UK and in order to protect herself and the child and to avoid domestic violence, respondent no.2 decided to leave UK with the child. She submits that interest of the child is of paramount importance. The respondent no.2 has no means financially to live in UK or contesting the matter, neither she has any emotional support of family members. Additionally, the child has health issues which can be well looked after in Delhi and private hospitalization and proper medical treatment would be available in India. She also submits that out of the six years, the child has been three years in India and she had social and cultural roots rather in India. She submits that a complaint was made by her in CAW Cell on 16.12.2015, but the petitioner obtained an *ex parte* order on 08.01.2016.

She relies a certificate issued by Fortis Escorts Heart Institute in support of her argument regarding the medical treatment of her daughter.

43. She submits that the judgments rendered by the Apex Court between the years 1984 to 1998 would show that the children were returned to the mothers having been removed by the fathers and the judgments were passed keeping in mind the welfare of the child and not Commity of Courts. In the case of *Sarita Sharma v. Sushil Sharma*, 2000(3) SCC 14, although the wife was contesting the matter abroad, in utter defiance came to India but still the action of the mother in that case was protected in the welfare of the child. She further submits that having regard to the nature of dispute which has arisen between the parties and the various instances detailed by her in the petition with regard to the domestic violence, abusive, intimidating gestures, an inquiry should be held into question of the custody of the child in the domestic violence court which is in India as was decided by the Supreme Court in the case of *V.Ravi Chandran (Dr.) (2) v. Union of India & Ors.*, reported at (2010) 1 SCC 174.
44. In rejoinder, Mr. Jauhar submits that the child remained in India not for three years but for twenty three months till the date of the filing of the petition. Although the child was born in India, but is a citizen of the UK. The allegations of domestic violence are totally false. The child was permanent resident of UK since 2010. She joined school in 2012. The petitioner has admitted her to a private school and paying 3200 pounds per month, has provided a car to respondent no.2 while he travels by trains for one hour to go to work. The petitioner has not relied upon the the State health services but has used the service of private health services.
45. In short, the counsel for the parties have submitted as under:-

46. It is the submission of Mr.Jauhar, learned counsel for the petitioner, that the parties had decided to make United Kingdom their home, the child has been brought up in the United Kingdom, she was going to regular school in the United Kingdom and getting all the medical facilities in the United Kingdom. Additionally, the petitioner has approached UK High Court earlier in point of time and order dated 8.1.2016 has been passed directing respondent no.2 to return the said minor child to the jurisdiction of the High Court of Justice, Family Division, UK.
47. It is also the case of the petitioner that keeping in view the principles of comity of courts the child must be returned to the competent court of jurisdiction. It has also strongly been urged that the most intimate contact of the child is with the Courts at UK.
48. Per contra, it has been argued by Ms.Rajkotia, learned counsel appearing on behalf of respondent no.2 that the marriage between the petitioner and respondent no.2 has always been strained and despite all efforts made by respondent no.2, the petitioner never changed his behaviour and continued to physically and mentally abuse her and he was even abusive towards her parents. It has also been argued that the petitioner did not disclose these vital facts to the Courts at UK and obtained an *ex parte* order with regard to return of the child to the UK jurisdiction by suppression of material facts. It has also been submitted that respondent no.2 was treated with cruelty, which resulted in failure of marriage and the present petition by the petitioner has been filed in retaliation to respondent's no.2 filing a complaint against the petitioner under Section 498A IPC. It is also submitted that on account of being physically beaten and mentally tortured it was no longer possible for respondent on.2 to remain in the company of petitioner and she was forced to return to India in the absence of any support or family in the

UK. It is also claimed that out of nine years' of marriage, respondent no.2 has remained in India for more than three years and even after the birth of her daughter she has been staying in India and despite promises made by the petitioner of good behaviour he has not changed.

49. Ms.Rajkotia further submits that respondent no.2 has filed a complaint before the Crime Against Women Cell on 16.12.2015 in India and the petitioner and his family members were directed to appear on 31.12.1990 and as a counterblast the custody petition has been filed by the petitioner in the High Court of Justice, Family Division, UK.
50. Another argument raised by Ms.Rajkotia is that respondent no.2 and her child had no family support system in the UK. Respondent no.2 has close nexus in Delhi where her parents are residing and thus she cannot risk returning to the UK for defending her case where she has no relatives, no place to live, no money to live on and constant threat of abuse to her and her child.
51. It has also been contended by Ms.Rajkotia that the petitioner has no love for the minor child and respondent no.2 has been looking after the child. Respondent no.2 has also accused the petitioner of being rude and a miser, who never provided her enough money despite the fact that the petitioner is well placed. It has also been submitted that the petitioner has been very indifferent towards the health of the minor child, who got sick at school in October, 2014, when the child was taken to the hospital. The Doctors had informed the petitioner and respondent no.2 that the child had a cardiac murmur and upon examination by a Paediatrics Cardialogist, it was detected that the child had a cardiac disorder (abnormal heart muscle structure cardiomyopathy) due to which she needs periodical reviews. It is, thus, contended that the child cannot be removed from the jurisdiction of this Court as the child is

under the medical supervision of eminent Doctors in Delhi and such treatment is neither available nor can be provided to the child in the United Kingdom.

52. Relying on the various judgments, Ms.Rajkotia submitted that the interest of the child is of paramount importance and the child only be looked after in Delhi where private hospitalization and proper medical treatment would be available. The child has been in India for three years and has social and cultural roots in India. It has also been argued that between 1984-1998 judgments rendered by the Supreme Court would show that the children were returned to the mothers. All the judgments were passed keeping in view the welfare of the child.
53. We have heard the learned counsel for the parties and considered their rival submissions. We may also note that we had referred the matter for mediation, but mediation has been unsuccessful.
54. The first submission of learned counsel for the petitioner is that the parties had set up their matrimonial home in the United Kingdom and are, thus, subject to jurisdiction of the United Kingdom. We find force in this submission made by learned counsel for the petitioner for the reason that the marriage between the petitioner and respondent no.2 was solemnized on 30.11.2006. The couple travelled to UK on 30.01.2007. Baby child Nethra was born in India on 07.08.2009. The parties travelled back to UK on 14.03.2010. Respondent no.2 was granted a permanent residency of UK and indefinite leave to remain in UK on 05.05.2010. The respondent no.2 also sought regular employment in UK between March, 2008 to June, 2010 which fact is also not denied by the respondent no.2. It has also not been denied by respondent no.2 that during her employment in UK, she was earning 25,000 pounds per annum. The pleadings also suggest that the parties have had a rather

rocky marriage. There are allegations and counter allegations against each other, but since the time the couple travelled to UK on 31.01.2007 the pleadings and documents placed on record and the facts detailed above would show that the couple had every intention to make UK their home. This is also evident from the fact that despite the child was born in India, the couple decided to make their daughter a British citizen in December, 2012. The application form also bears the signature of respondent no.2. The respondent no.2 had also obtained permanent residency and indefinite leave to remain in UK on 05.05.2010. The petitioner is also a British citizen. The respondent no.2 is a well educated lady. She had sought regular employment in UK with Media Reach Advertising Company, UK and worked between the period March, 2008 to June, 2010 with the salary of 25,000 pounds per annum. Documents and pleadings placed on record also show that despite the ups and downs in the relationship, the minor child started attending nursery school in UK from January, 2012 onwards and continued the nursery school till the start at the regular age of four in the year 2014 and she joined Oxford High School in UK. The petitioner was paying approximately 10,000 pounds during the academic year as her school fee. The petitioner has also purchased a property although in his name for the benefit of his family. The respondent no.2 has also acquired a driving licence in UK with test certificate bearing no.349154891 and in December, 2012 she obtained her licence.

55. Upon reading of the pleadings, the following facts emerge, which show that the petitioner and respondent no.2 had an intention to live in the United Kingdom permanently:

- Petitioner has been working for gain in the United Kingdom since the year 2005;

- Marriage between the petitioner and respondent no.2 was solemnized on 30.11.2006.
- A formal wedding ceremony took place on 22.1.2007.
- The petitioner and respondent no.2 travelled to U.K. on 30.1.2007.
- Respondent no.2 had a regular employment in the United Kingdom from March, 2008, to June, 2010, with Media Reach Advertising Company United Kingdom and was earning more than 25000 pounds per annum.
- The minor child was admitted to a school in U.K. She attended nursery school initially and thereafter attended regular school at the age of four years (from September, 2013, to July, 2015) at Oxford High School, which is amongst the top school in the United Kingdom with an annual school fee of approximately GBP 10000 Pounds a year.
- Despite being born in India parties decided, in December, 2012, that the minor child become a British citizen with the consent of respondent no.2.
- In the year 2013, a property was purchased on mortgage in the name of the petitioner.
- Respondent no.2 acquired a driving license in the United Kingdom with Test Certificate No.349154891 in December, 2012.
- The petitioner claimed that the child is fully absorbed in the United Kingdom Health Scheme and is registered at her local National Health Service, Haddenham Medical Centre, Stanbridge Road, Haddenham HP17 8JX, UK.

56. The petitioner has also relied upon various judgments including **Surya**

Vadanan v State of Tamil Nadu and Ors., reported at (2015) 5 SCC 450; *Arathi Bandi v. Bandi Jagadrakshaka Rao and Ors.*, reported at (2013) 15 SCC 790; *Shilpa Aggarwal(Ms) v. Aviral Mittal & Anr.*, reported at (2010) 1 SCC 591; *Aviral Mittal v. State & Anr.*, reported at 163 (2009) DLT 627 (DB) and *V.Ravi Chandran (Dr.) (2) v. Union of India & Ors.*, reported at (2010) 1 SCC 174 in support support of his submissions.

57. Having regard to the aforesaid factors, it is clear that the minor child has been brought up in the United Kingdom from the time she was born in the year 2009 in India and she has been brought up by both, the petitioner and respondent no.2, in the United Kingdom. The petitioner is a UK citizen and holds a British passport. The child is a permanent resident of UK being a citizen of UK and it can be said that the child has developed roots in the society in the United Kingdom. Respondent no.2 is also a permanent resident of UK. Respondent no.2 is a Masters in Communication, she has had a work experience in India and had a regular employment in the United Kingdom from March, 2008, to June, 2010.
58. The petitioner had approached the High Court of Justice, Family Division, London, on 8.1.2016 for obtaining a wardship order and also sought a relief that the minor child should be brought back to the jurisdiction of England and Wales.
59. Order dated 8.1.2016 reads as under:

“Order made by His Honour Judge Richards sitting as a Deputy High Court Judge sitting at the Royal Courts of Justice, Strand, London WC2A 2LL in chambers on 8 January 2016

*IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981*

The Child is NEHTRA ANAND (a girl, born 7/8/09)

AFTER HEARING Counsel Paul Hopher, on behalf of the applicant father

AFTER consideration of the documents lodged by the applicant.

IMPORTANT WARNING TO NITHYA ANAND RAGHAVAN

If you NITHYA ANAND RAGHAVAN disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

If any other person who knows of this order and does anything which helps or permits you NITHYA ANAND RAGHAVAN to breach the terms of this order they may be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

You have the following legal rights:

(a) to seek legal advice. This right does not entitle you to disobey any part of this order until you have sought legal advice;

(b) to require the applicant's solicitors, namely Dawson Cornwell, 15 Red Lion Square, London WC1R 4QT, tel 020 7242 2556 to provide you with a copy of any application form(s), statement(s), note of the hearing;

(C) to apply, whether by counsel or solicitor or in person, to Judge of the Family Court assigned to hear urgent applications at the Royal Courts of Justice, Strand, London, if practicable after giving notice to the applicant's solicitors and to the court, for an order discharging or varying any part of this order. This right does not entitle you to disobey any part of this order until your application has been heard;

(d) if you do not speak or understand English adequately, to

have an interpreter present in court at public expense in order to assist you at the hearing of any application relating to this order

The parties

*1. The Applicant is **ANAND RAGHAVAN** represented by dawson Cornwell Solicitors*

*The Respondent is **NITHYA ANAND RAGHAVAN***

Recitals

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

3. The Judge read the following documents:

a. Position statement

b. C67 application and C1A form

c. Statement of Anand Raghavan with exhibits dated 8.01.2016.

4. The court was satisfied on a provisional basis of the evidence filed that

*a. **NETHRA ANAND (a girl born on 7/8/09)** was on 2 July 2015 habitually resident in the jurisdiction of England and Wales.*

*b. **NETHRA ANAND (a girl born on 7/8/09)** was wrongfully removed from England on 2 July, 2015 and been wrongfully retained in India since.*

c. The courts of England and Wales have jurisdiction in matters of parental responsibility over the child pursuant to Articles 8 and 10 of BIIR.

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

Undertakings to the court by the solicitor for the applicant

6. *The solicitors for the applicant undertake;*

a. *To issue these proceedings forthwith and in any event by no later than 4pm 11 January 2016;*

b. *To pay the ex parte application fee forthwith and in any event by no later than 4pm 11 January 2016;*

AND NOW THEREFORE THIS HONOURABLE COURT RESPECTFULLY REQUESTS:

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

IT IS ORDERED THAT:

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

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

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

11. *The applicant's solicitor shall fax copies of this order to the Office of the Head of International Family Justice at the Royal Courts of Justice, the Strand, London WC2A 2 LL (DX4550 Strand RCJ; fax 02079476408); and (if appropriate) to the Head of the Consular Division, Foreign and Commonwealth Office Spring Gardens London SW1A 2PA, Tel: 02070080212, Fax 020 7008 0152.*

12. *The matter shall be listed for directions at 10.30 am on 29 January 2016 at the Royal Courts of Justice, the Strand, London Wc2A 2 LL, with a time estimate of 30 minutes, when the court shall consider what further orders shall be made. The Court may consider making declarations in the terms of paragraph 4 above.*

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

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

15. *Costs reserved.*

Dated this 8 January 2016."

60. A perusal of the order dated 8.1.2016 would show that the High Court of Justice, Family Division, UK, had noted that the minor child was wrongfully removed from England since July, 2015, and had been wrongfully retained in India since then. The UK Court had directed that the minor child would remain a ward of the UK Court during the minority or until further orders. It has also been ruled that the Courts at England and Wales would have jurisdiction in matters of parental

responsibility over the child being habitual resident of England and Wales and directed respondent no.2 to return the child to England and Wales not later than 22.1.2016. The order dated 8.1.2016 stands duly served upon respondent no.2 on 13.1.2016. By the order dated 8.1.2016, the High Court of Justice, Family Division, UK had also directed the petitioner to purchase the tickets for respondent no.2 and the minor child for causing their return from India to England. The petitioner claims to have addressed an email dated 15.1.2016 to respondent no.2 offering to furnish air tickets to enable respondent no.2 and the minor child to come back to UK. This offer had been reiterated by the petitioner during the course of hearing as well. In fact, Mr.Johar, counsel for the petitioner, stated on instructions that the petitioner is even willing to provide an accommodation near the school of the child once respondent no.2 and the minor child reach the United Kingdom.

61. In the case of **Arathi Bandi** (supra) it was held as under:

- “(1) It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong doing.*
- (2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry 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.*
- (3) Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.”*

62. Further in the case of **Surya Vadanan** (supra), it was held as under:

*“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** 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.”*

63. In the case of **Surinder Kaur Sandhu v. Harbax Singh Sandhu**, reported at AIR 1984 SC 1224, more particularly paras 8 to 10, it has been observed by the Apex Court as under:

“[8] Some of these circumstances mentioned by the learned Judge are not beside the point but, their comparative assessment is difficult to accept as made. For example, the 'traumatic experience of a conviction on a criminal charge' is not a factor in favour of the father, especially when his conduct following immediately upon his release on probation shows that the experience has not chastened him. On the whole, we are unable to agree that the welfare of the boy requires that he should live with his father or with the grand-parents. The father is a man without a character who offered solicitation to the commission of his wife's murder. The wife obtained an order of probation for him but, he abused her magnanimity by running away with the boy soon after the probationary period was over. Even in that act, he displayed a singular lack of respect for law by obtaining a duplicate passport for the boy on an untrue representation that the original passport was lost. The original passport was, to his knowledge, in the keeping, of his wife. In this background, we do not regard the affluence of the husband's parents to be a circumstance of such overwhelming

importance as to tilt the balance in favour of the father on the question of what is truly for the welfare of the minor. At any rate, we are unable to agree that it will be less for the welfare of the minor if he lived with his mother. He was whisked away from her and the question is whether, there are any circumstances to support the view that the new environment in which he is wrongfully brought is more conducive to his welfare. He is about 8 years of age and the loving care of the mother ought not to be denied to him. The father is made of coarse stuff. The mother earns an income of £100 a week, which is certainly not large by English standards, but is not so low as not to enable her to take reasonable care of the boy.

[9] Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. As the matters are presented to us today, the boy, from his own point of view, ought to be in the custody of the mother.

[10] We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the off springs of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by

removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the Courts of that state to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See International Shoe Company v. State of Washington, 90 L. Ed. 95 which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy.”

64. Further in the case of ***Elizabeth Dinshaw v. Arvand M. Dinshaw***, reported at 1987 (1) SCC 42, more particularly at paras 8 and 9, it has been held as under:

“[8] Whenever a question arises before Court pertaining to the custody of a minor child, 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. We have twice interviewed Dustan in our Chambers and talked with him. We found him to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an American citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in school there. In our considered opinion it will be in the best interests and welfare of Dustan that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent Court in that country. We are also satisfied that the Petitioner who is the mother is full of genuine love and affection for the child and she can be safely trusted to look after him, educate him and attend in every possible way to his proper up-bringing.

The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of his origin in the United States of America. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child to some school in Pune. The conduct of the father has not been such as to confidence in us that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present.

[9] In Re H. (infants) (1966) 1 All ER 886 the Court of Appeal in England had occasion to consider a somewhat similar question. That case concerned the abduction to England of two minor boys who were American citizens. The father was a natural-born American citizen and the mother, though of Scottish origin, had been resident for 20 years in the United States of America. They are divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the two boys to the mother with liberal access to the father. By an amendment made in that order in December, 1964, a provision was incorporated that the boys should reside at all times in the State of New York and should at all times be under the control and jurisdiction of the State of New York. In March, 1965, the mother removed the boys to England, without having obtained the approval of the New York Court, and without having consulted the father; she purchased a house in England with the intention of remaining there permanently and of cutting off all contacts with the father. She ignored an order made in June, 1965, by the Supreme Court of New York State to return the boys there. On a motion on notice given by the father in the Chancery Division of the Court in England, the trial Judge Cross, J. directed that since the children were American children and the American Court was the proper Court to decide the issue of custody, and as it was the duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing, the Court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America. In the appeal filed against the said judgment in the Court of Appeal, Willmer L.J. while dismissing the appeal extracted with

approval the following passage from the judgment of Cross, J.:-

The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing.

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The Courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."

65. In the case of ***Marggarate Maria Pulparampil Nee Feldman v. Chacko Pulparampil***, reported at 1970 AIR (Ker) 1, more particularly para 20, it has been held as under:

"[20] In using the writ of habeas corpus for the custody of infants the jurisdiction exercised by the court in deciding whether the custody should be entrusted with one or other of the contesting parties depends not on the legal right of one of those parties to the custody of the child but as to whether in the best interests and welfare of the child the custody should be entrusted with one or the other. This is clear from the following passages from the American Jurisprudence, Volume 25, pages 202, 203, 204 and 205:

"Habeas corpus is a proper remedy to obtain the discharge of an infant from a detention which is illegal and to determine controversies concerning the right to the custody of the infant, at least under the conditions requisite to the issuance of the writ generally. Where the writ is availed of for the latter purpose, the proceeding

partakes of the incidents of a suit in equity and is considered to be one in rem, the child being the res."

"The writ of habeas corpus is a proper remedy on the part of one parent to recover a child from the other parent, either before or after the parents have been legally separated or divorced. Since the welfare of the child is the primary consideration in making an award for the custody of it, such an award may be made in a habeas corpus proceeding without reference to where the domicil of the parents may be, and the fact that the infant was brought within the jurisdiction in violation of an order of the court of another State does not preclude the exercise of jurisdiction in a habeas corpus proceeding to make an order in respect of its custody, at least to the extent of determining whether changes in circumstances following the rendition of the foreign order require, in view of the best interests of the child, a new order for the custody of the child, and whether the interests of the child can be served best by leaving further proceedings to the foreign court that acted first in the matter of its custody."

"It should be observed that as a general rule, where the writ is prosecuted for the purpose of determining the right to the custody of a child, the inquiry extends far beyond the issues that ordinarily are involved in a habeas corpus proceeding. The controversy does not involve the question of personal freedom, because an infant, for humane and obvious reasons, is presumed to be in the custody of someone until it has attained its majority. The court, in passing upon the writ in a case involving the custody of a child, deals with a matter of an equitable nature; it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided not upon the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the cases of an adult, but on the court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence a court is In no case bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after a careful consideration of the facts, leave it in such custody as the

welfare of the child at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to due consideration."

66. In the case of **Kuldeep Sidhu v. Chanan Singh**, reported at 1989 AIR (P&H) 103, more particularly paras 17 and 18, it has been held as under:

"[17] It is in the fitness of things too that the children should go back to the country whose citizens they are and the dispute regarding their custody be finally settled by the Courts there. In the meanwhile the petitioner has in her favour an order of the competent Court in Canada granting her custody of the children. This order must be honoured and respected, as observed by M. M. Punchhi, J. in Marilyn Anita Dhillon Gilmore v. Margaret Nijjar ILR (1984) 1 P & H 1 : AIR 1983 SCC 217 as under :--

"Courts all over the world frown on the attitude of parents running away from their legal obligations. The prevailing view in Private International Law is that the Courts all over the world should, other thing being equal, set its pace against the conduct of unilateral movement of children and they should be careful not to do anything to encourage this tendency. The predominant view also is that a Judge should pay regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so, would inflict serious harm on the child...."

A similar view was expressed by the Supreme Court in Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu, AIR 1984 SC 1224, where it was observed, "the modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has (sic) intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as

to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping."

[18] *In dealing with somewhat similar situation as has arisen in the present case, namely of an order having been passed by the competent Court in the United States granting custody of the minor to the mother and the father in disobedience of it bringing the child to India, the Supreme-Court in Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw, - : AIR 1987 SC 3, expressly approved the judgment of the Court of Appeal in England in Re H. (Infants) (1966) 1 All ER 886, Willmer, LJ there observed :--*

"The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by this wrongdoing.

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The Courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally and a judge should as I see it, pay regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."

67. In ***Re H. (Infants)***, 1965 H. No.2428], it has been held as under:

"These children are American children and their home has always been in the United States. The action of their mother in bringing them in the United States. The action of their mother in bringing them to this country in March without their father's consent or any order of the American court, in the hope that she might be able to set up a home here and in effect cut them off from their father entirely, was to my mind most reprehensible. I

do not myself attach much importance to the fact that she involved her husband and her lawyers in an unwitting deception of the New York courts. A woman who is not herself a lawyer cannot perhaps be expected to view that as a serious offence. But, however badly Mr.H. treated Mrs. I. –and I am prepared for present purposes to assume that he had treated her badly – Mr. H. loved his children and they loved him, and Mrs. I. knew perfectly well that if she removed them to England, she would cut them off from him for good. Indeed, she made no bones of it that her object was to cut him off from them for good. The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and, as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. Now for this court to go into the merits of this case will inevitably result in a great advantage to the mother and a great disadvantage to the father. With the best will in the world –and in this case there is not likely to be much good will –a wardship case of this sort, with masses of evidence from abroad, will not come on for many months. By then, Mr. I. will have uprooted himself from America and settled in England, the children will have taken root here, and there may well be evidence of English child psychiatrists to the effect, that it would be bad for them to go back to America. All this may make it very hard indeed for an English judge perhaps a year hence to order the return of the child to America.

Therefore, since the American court is the proper court to decide this case, and the father would suffer a grave injustice if the English court assumed the task of deciding it, I would have thought, speaking always apart from authority, that the court should send the children back to American courts, unless that course was fraught with danger for them. As I have said, though I have formed no view whatever as to the respective merits of the parents, I am satisfied that there will be no such danger even if the children have to travel and stay with their father.”

68. In a recent decision rendered by the Supreme Court of India in the case of *Surya Vadanan v. State of Tamil Nadu & Ors.*, (2015) 5 SCC 450, the entire law has been discussed. To appreciate the law laid down in

the case of *Surya Vadan* (supra), it would be useful to notice some of the facts of the said case. The petitioner in the aforesaid matter approached the Supreme Court of India upon refusal of the Madras High Court to issue a writ of *habeas corpus* for the production of the children. The appellant had sought their production to enable him to take the children with him to the UK since they were wards of the court in the UK to enable the foreign court to decide the issue of their foreign custody. The Supreme Court held that the High Court was in error in declining to issue the writ of *habeas corpus*. The parties were married in Chennai. The husband was resident and citizen of the UK at the time of marriage while his wife was a resident and citizen of India. Soon after marriage, she had joined her husband. Both acquired British citizenship and were working for gain in the UK. Both the children were born in the UK. Since the couple were having matrimonial problem, the wife left UK and came to India along with two children. Thereafter, she filed a petition for divorce under the Hindu Marriage Act. An application for custody of the children was also filed, but no orders were passed on the application. After the husband came to know of the same, the husband decided to initiate legal action in the High Court of Justice in U.K. The High Court of Justice in UK passed an order making the children as wards of the court till the time the order was vacated or varied and the wife was directed to return the children to the jurisdiction of the foreign court. The Madras High Court had taken a decision as we are being persuaded to by the learned counsel for the respondent no.2 that the welfare of the children and not the legal right of either parties were of paramount importance. The Madras High Court took the view that since custody of the children was with the wife, she was the legal guardian and it could not be said that the

custody was illegal. The Supreme Court of India rejected the arguments of the wife and allowed the petition.

69. After discussing five recent and important judgments passed by the Supreme Court of India being (1) *Sarita Sharma v. Sushil Sharma*, (2000) 3 SCC 14; (2) *Shilpa Aggarwal v. Aviral Mittal*, (2010) 1 SCC 591; (3) *V. Ravi Chandran(2) v. Union of India*, (2010) 1 SCC 174; (4) *Ruchi Majoo v. Sanjeev Majoo*, (2011) 6 SCC 479 and (5) *Arathi Bandi v. Bandi Jagadrakshaka Rao*, (2013) 15 SCC 790, the Supreme Court allowed the petition.
70. The submission made by Ms. Rajkotia that respondent no.2 had filed a complaint under Section 498A IPC prior to the petitioner approaching the Court in UK is without any substance and no benefit can accrue to respondent no.2 on this count.
71. It is not in dispute that respondent no.2 has neither prior to the passing of the order by the High Court of Justice, Family Division, U.K., nor prior thereto approached any competent Court of jurisdiction in India to seek custody of the minor child. Even otherwise, the law is well-settled that since the first effective order or direction has been passed by the foreign Court, the principle of comity of courts would tilt the balance in favour of that court rather than the Family Court. Although, in this case, as noticed hereinabove respondent no.2 has not even approached the Family Courts in India.
72. We also find that the child has spent most of her time in UK, she had joined nursery school and now in the High School studied in one of the best private institutions and thus, the interest of the child would lie in the UK.
73. There is no quarrel to the proposition urged by learned counsel for respondent no.2 that the best interest and welfare of the child are of

paramount importance.

74. The Supreme Court in the case of *Surya Vadan* (supra) also held that upon review of the five decisions there was complete unanimity that the best interest and welfare of the child are of paramount importance. The Supreme Court also held while considering the best interest and welfare of the child principle of comity of courts must also be considered. The Supreme Court also took into account the important relevant factor that is the ‘**most intimate contact doctrine**’ and the ‘**closest concern doctrine**’. It was further held that it would not be appropriate that a domestic court having much less intimate contact with a child as against a foreign court should take upon itself the onerous task of determining the best interest and welfare of the child. In this backdrop, the Court also held that the principle of ‘comity of courts’ should be jettisoned, except for compelling reasons. We may note that in the opening line of para 47, the Supreme Court referred to the five judgments in foregoing para 49 reproduced hereinabove. It would be useful to refer to paras 47 to 56 of the judgment in the case of *Surya Vadan* (supra), which read as under:

“47. From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance. However, it should be clearly understood that this is the final goal or the final objective to be achieved - it is not the beginning of the exercise but the end.

48. Therefore, we are concerned with two principles in a case such as the present. They are (i) The principle of comity of courts and (ii) The principle of the best interests and the welfare of the child. These principles have been referred to "contrasting principles of law"[32] 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 take 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 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 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.[33] 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.

51. 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.

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

53. There may be a case, as has happened in the present appeal, where one parent invokes the jurisdiction of a court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another court and obtains a substantive order in his or her favour before the first court. In such an event, due respect and weight ought to be given to the

substantive order passed by the second court since that interim or interlocutory order was passed prior in point of time. As mentioned above, this situation has arisen in the present appeal - Mayura had initiated divorce proceedings in India before the custody proceedings were initiated by Surya in the U.K. but the foreign court passed a substantive order on the custody issue before the domestic court. This situation also arose in Ruchi Majoo where Ruchi Majoo had invoked the jurisdiction of the domestic court before Rajiv Majoo but in fact Rajiv Majoo obtained a substantive order from the foreign court before the domestic court. While the substantive order of the foreign court in Ruchi Majoo was accorded due respect and weight but for reasons not related to the principle of comity of courts and on merits, custody of the child was handed over to Ruchi Majoo, notwithstanding the first strike principle.

54. As has been held in Arathi Bandi a violation of an interim or an interlocutory order passed by a court of competent jurisdiction ought to be viewed strictly if the rule of law is to be maintained. No litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because he or she is of the opinion that that order is incorrect - that has to be judged by a superior court or by another court having jurisdiction to do so. It is in this context that the observations of this court in Sarita Sharma and Ruchi Majoo have to be appreciated. If as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence. Extrapolating this to the courts in our country, it is common knowledge that in cases of matrimonial differences in our country, quite often more than one Family Court has jurisdiction over the subject matter in issue. In such a situation, can a litigant say that he or she will obey the interim or interlocutory order of a particular Family Court and not that of another? Similarly, can one Family Court hold that an interim or an interlocutory order of another Family Court on the same subject matter may be ignored in the best interests and welfare of the child? We think not. An interim or an interlocutory is precisely what it is - interim or interlocutory - and is always subject to modification or vacation by the court that passes that interim or interlocutory order. There is no

finality attached to an interim or an interlocutory order. We may add a word of caution here - merely because a parent has violated an order of a foreign court does not mean that that parent should be penalized for it. The conduct of the parent may certainly be taken into account for passing a final order, but that ought not to have a penalizing result.

55. Finally, this court has accepted the view[34] that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court.

56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

- (a) The nature and effect of the interim or interlocutory order passed by the foreign court.*
- (b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.*
- (c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country.[35] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.*
- (d) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed*

firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.”

75. The Supreme Court in the case of ***Surya Vadanan v. State of Tamil Nadu & Ors.***, (supra), more particularly paras 46 and 60, held as under:

“46. The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very good reasons not to do so.

60. It would have been another matter altogether if the Family Court had passed an effective or substantial order or direction prior to 13th November, 2012 then, in our view, the foreign court would have had to consider exercising self-restraint and abstaining from disregarding the direction or order of the Family Court by applying the principle of comity of courts. However, since the first effective order or direction was passed by the foreign court, in our opinion, principle of comity of courts would tilt the balance in favour of that court rather than the Family Court. We are assuming that the Family Court was a court of competent jurisdiction although we must mention that according to Surya, the Family Court has no jurisdiction over the matter of the custody of the two children of the couple since they are both British citizens and are ordinarily residents of the U.K. However, it is not necessary for us to go into this issue to decide this because even on first principles, we are of the view that the orders or directions passed by the foreign court must have primacy on the facts of the case, over the Family Court in Coimbatore. No specific or meaningful reason has been given to us to ignore or bypass the direction or order of the foreign court.”

(emphasis added)

76. We find that the present case is fully covered by the decision rendered by the Supreme Court in the case of *Surya Vadan* (supra). We may also note that by the order dated 8.1.2016 the High Court of Justice, Family Division, U.K., has ordered that the girl child shall remain a ward of that Court during her minority or until further orders. In effect that order has attained finality. It has also been ordered that the mother should return the child to England and Wales not later than 22.1.2016. The matter was listed for directions on 29.1.2016 when the Court was to consider what further orders were to be passed. As noticed in para 59 foregoing the High Court of Justice, Family Division, U.K., also directed the petitioner to purchase the tickets for respondent no.2 and the minor child for causing their return from India to England. The said offer was reiterated by the petitioner in the Court and in fact Mr. Jauhar had made a statement on instructions that the petitioner is willing to provide an accommodation near the school of the child once the minor reaches the United Kingdom in addition to the tickets.
77. Having regard to the above fact, we are of the view that respondent no.2 will not suffer any financial hardship relating to travel as also her stay in the United Kingdom till such time she approaches the High Court of Justice, Family Division, U.K., for variation of the order.
78. No special or compelling reasons have been urged before us, for us to ignore the principles of comity of courts. We must respect the orders passed by the foreign court especially when there are no justifiable reasons. Since, the child has remained in the United Kingdom since birth upto July, 2015, it can safely be said that the child is accustomed and has adapted himself to the social and cultural milieu different from that of India. [Also see *Smt. Surinder Kaur Sandhu v. Harbax Singh*

Sandhu & Anr., (1984) 3 SCC 698].

79. In the case of *V. Ravi Chandran(Dr.)(2) v. Union of India*, (2010) 1 SCC 174, it was held that merely because a child had been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue and it would be in accordance with principles of comity of courts to return the child back to the appellate court from which he or she has been removed.
80. Ms.Rajkotia had highlighted before us that respondent no.2 has been a victim of domestic violence and the petitioner used to beat and mentally torture respondent no.2. Thus, under these circumstances, it was no longer possible for respondent no.2 to remain in the company of the petitioner. Respondent no.2 also claims that the petitioner besides being a very rude person is also a miser and has treated respondent no.2 like an unpaid maid. Ms.Rajkotia also submits that respondent no.2 has filed a complaint against the petitioner and his family members in India before the Crime Against Women Cell at Shrinivas Puri, Delhi, on 18.12.2015 and as a counter blast the petitioner filed a custody petition in the High Court of Justice, Family Division, U.K., on 8.1.2016, and, thus, the Courts at Delhi would have jurisdiction to not only decide the complaint made by respondent no.2 under the Domestic Violence Act but also with regard to the custody of the child. We find no force in this submission.
81. While the allegations of Domestic Violence Act have been refuted by the counsel for the petitioner, it may be noted that during the entire period of stay of the petitioner and respondent no.2 in the United Kingdom not a single complaint was made by respondent no.2 to the Police and the allegations sought to be raised are false and frivolous.
82. The petitioner and respondent no.2 had decided to make UK their home

is also evident from the fact that their child is the UK citizen, the petitioner is a UK citizen, the respondent no.2 has a permanent residency of UK and all the alleged acts of domestic violence, if any, pertain to the period of their stay in UK, this Court would have no jurisdiction to decide the dispute between the parties.

83. As far as the allegations of respondent no.2 are concerned that respondent no.2 has been tortured, she has been a victim of domestic abuse and she has been treated with cruelty and mental torture, we find that except for a bald statement so made there is not a single document, which has been placed on record or any assertion made that at any point of time respondent no.2 had made a complaint to the local Police or to any other body. Even otherwise, this by itself cannot be a ground in order to hand over the custody of the child to the father after the passing of the order by a competent court of jurisdiction. It may also be noted that this issue of domestic violence can only be decided by the Courts where the domestic violence is alleged to have taken place as all the witnesses, if any, would be in the United Kingdom.
84. As far as the plea of respondent no.2 that the child is suffering from cardiac disorder (abnormal heart muscle structure-Cardiomyopathy) and only medical treatment can be provided in Delhi is concerned, the same is without any force. There is force in the statement made by the learned counsel for the petitioner that on account of medical reasons, United Kingdom would be the place to provide better medical facilities for the child where not only she is fully covered but also the petitioner has the resources to approach the private hospitals. It has also been submitted that during the test conducted in UK, it was discovered that the child had an irregular heart beat, there is no cure or treatment for this condition except that the child has to take aspirin on a daily basis and

has an annual check-up at the John Radcliffe Hospital in Oxford in UK. In view of the fact that the petition itself discloses that the petitioner has not relied upon State health services but has used the services of private health services, the submission of learned counsel for respondent no.1 is without any force. Thus, to say that the medical aid can only be provided to the child at Delhi is not acceptable.

85. For the reasons stated hereinabove, we allow the writ petition and direct respondent no.2 to produce the child and comply with orders passed by the High Court of Justice Family Division, Principal Registry, UK dated 08.01.2016 within three weeks from today or in the alternative respondent no.2 shall hand over the custody of the child to the petitioner within three weeks from today. The petitioner shall be bound by the statement made by him through his counsel that he would arrange for accommodation near the school of the child and also pay for the boarding, lodging of respondent no.2 and the minor child and also bear the travel expenses.

86. The writ petition is accordingly allowed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

JULY 8, 2016

pst/msr