

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ MAT.APP.(F.C.) 3/2017 and CM APPL. 896-897/2017, 899/2017

Reserved on: 29.08.2017

Date of decision: 19.09.2017

IN THE MATTER OF:

JASMEET KAUR

..... Appellant

Through: Mr. Jayant Bhatt, Advocate with
Mr. Vipin Kumar and Ms. Jyoti Sharma,
Advocates

versus

NAVTEJ SINGH

..... Respondent

Through: Mr. Anil Malhotra, Advocate with
Mr. Ranjit Malhotra and Mr. Rajat Bhalla,
Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE DEEPA SHARMA

HIMA KOHLI, J.

1. The present appeal arises out of an order dated 26.12.2016, passed by the learned Family Court, allowing an application filed by the respondent/husband under Order VII Rule 11 CPC, for dismissal of a petition filed by the appellant/wife under Sections 7, 9, 11 and 25 of the Guardians and Wards Act, 1890 (herein after referred to as '**the G&W Act**') read with Section 6(a) of the Hindu Minority and Guardianship Act, 1956.
2. The facts giving rise to the present appeal are as follows. In the year 1994, the respondent had shifted from India to USA when he was about

14-15 years old. Similarly, the appellant/wife had shifted to USA in the year 1998, when she was about 17 years old. Both the parties had met each other while in USA, where they had completed their higher education and went on to acquire professional degrees in dentistry. The parties first got married in USA on 22.08.2006. Subsequently, on coming to India, their marriage was solemnised in New Delhi on 23.12.2007, according to the Sikh rites and customs. Both the parties are US nationals and running a professional dental practice in partnership in Norwalk, Connecticut, USA. Their first child, Ms. Ishnoor Kaur was born in USA on 27.08.2012 and is a U.S. passport holder.

3. It is the version of the appellant/wife that some disputes and differences had arisen between the parties in the end of the year 2012, on account of the unwarranted and deviant behaviour of the respondent/husband. Things took a turn when the appellant arrived in New Delhi alongwith the minor daughter on 26.01.2016, to attend her brother's wedding. The appellant and her daughter were scheduled to return to USA on 04.03.2016, on a pre-booked return flight alongwith the respondent, who was to join her later on. The respondent came down to Delhi alongwith his parents to attend the wedding of the appellant's brother on 16.02.2016. However, after the marriage functions got over, the appellant refused to accompany the respondent with the minor child back to USA and instead, elected to remain with her parents in Delhi. As a result, the respondent returned alone to USA on 05.03.2016. The appellant has averred in her petition that when she arrived in India, on going through a pregnancy test, she had discovered that she was expecting a second child. On her sharing the said news with the respondent on his coming down to India, he had tried to force her to return with him to USA, but she had declined to do so on the

ground that the doctor had advised her that the pregnancy was a high risk one.

4. The seriatim of events reveals that in June, 2016, the respondent proceeded to institute a case against the appellant in the US County Court at Stamford, Connecticut, for obtaining the custody of their older daughter. In August-September, 2016, the respondent returned to India and approached the appellant and her family members, to persuade her to accompany him back to the USA. The appellant claims that at that time, the respondent had failed to reveal to her that he had already filed a petition for the custody of their daughter. The second child, a baby boy, Master Paramvir was born in Delhi on 12.09.2016. On 09.11.2016, the appellant filed a guardianship petition before the Family Court, Tis Hazari, praying inter alia for the permanent custody of both the minor children. Within one week therefrom, on 17.11.2016, the District Court in USA had passed the first order, granting temporary custody of both the children to the respondent/husband, with supervised visitation rights to the appellant. Further, the appellant was directed to return to USA and bring back both the children with her.

5. In December, 2016, an application under Order VII Rule 11 CPC came to be filed by the respondent before the Family Court, seeking rejection of the appellant's guardianship petition. The respondent has averred in the said application that though he had not been served with the summons, he was entering appearance on the basis of a soft copy of the petition sent by the appellant's counsel through an e-mail dated 15.11.2016. The plea taken for seeking rejection of the guardianship petition was that the Family Court does not have the jurisdiction to entertain the said petition in view of Section 9 of the G&W Act, that contemplates that an application

with respect to the guardianship of a minor shall be made *“to the District Court having jurisdiction in the place where the minor ordinarily resides”* and in the present case, the place of ordinary residence of the minor children is USA and not India. Further, the respondent submitted that merely because the appellant had brought their minor daughter to India in January, 2016 or that their second child was born in India, cannot vest jurisdiction on the Family Courts in India, when both the parents are US nationals, who are permanently residing in USA and their daughter was born in USA. It was submitted that even though the second child was born in India, he cannot acquire Indian citizenship automatically, as neither of his parents are citizens of India, as prescribed under Section 3 of the Citizenship Act, 1955.

6. After hearing counsels for the parties, the learned Family Court allowed the application filed by the respondent under Order VII Rule 11 CPC with the following reasoning:-

“13. It was argued that Jasmeet Kaur has IOC Card but so far she has not filed any document to show that she has applied for relinquishing the US Citizenship and acquiring the Indian citizenship for self and her daughter Ishnoor. Simply by residing here since January, 2016 onwards in the given facts and circumstances, it cannot confer jurisdiction upon this court to proceed with the case. More so in the present petition, Jaspreet Kaur has herself mentioned that both kids are presently residing with her at Delhi albeit in jurisdiction clause she has stated that she is an overseas citizen of India and is ordinarily residing with jurisdiction of this court. Getting Aadhar Card made in her favour, does not confer her all the rights available to citizen of India.

14. The major occurrences between the parties happened during their cohabitation at USA. Jasmeet Kaur alleges Navtej Singh having extra marital relationship with one of his co-

worker at his part time place of work and availing escorts/prostitute serves there which is stated to be prejudicial and against the interest of Ishnoor in case he is given the custody of the kids by the court. These are all questions of facts and triable issues. The couple and daughter Ishnoor being ordinarily residing in US since marriage of the couple there and Master Paramvir being entitled to US citizenship both his parents being the US citizens, the best part of evidence being available in the US and keeping in view the principles of comity of nation and best interest of child, the custody order by US court having been passed already in the custody case filed by Navtej prior to present petition, this court lacks the jurisdiction to proceed with the case. Moreover, Jasmeet Kaur has not approached the court with clean hands as discussed above. She concealed the marriage of the couple solemnized in 2006 and projected that marriage took place in India in 2007.

15. It is also not the case of Jasmeet Kaur that she is not in a position to engage in legal proceedings in US Court. She has all along since 2000 onwards stayed, studied and worked in US and is having 50% share in her professional work place in Navtej Singh who is also a dentist there. The ramifications of financial matters between the parties can be better appreciated by the US Court as well as relevant evidence can be led and proved there conveniently then before Indian Court. Both the parties being US citizens at the time of filing of custody petition by Navtej Singh in June, 2016 much prior to the present case, the US Law is applicable to them in custody and other relief sought by Navtej Singh."

7. Aggrieved by the aforesaid order, the appellant filed the present appeal on 07.01.2017 and same was listed in court on 10.01.2017. While adjourning the matter to 12.01.2017, counsel for the respondent was directed to instruct the respondent in USA as also his attorneys to ensure that no precipitative action is taken by them in the hearing fixed before the US

Court on 11.01.2017. On 12.01.2017, notice was issued in the present appeal and the pending applications and as an interim measure, directions were issued that the custody of the two minor children, one of whom is an infant, would remain with the appellant and if the respondent desires to meet the children, the appellant would facilitate such a meeting at her residence.

8. Just for the sake of completing the narration of facts, it is necessary to note that thereafter, an order dated 25.01.2017 was passed by the Superior Court, Judicial District at Stamford, Connecticut, USA, directing as follows:-

“This action, by a custody application (#101.00) and an application for emergency custody orders (#102.00), came to this Court on June 20, 2016, and thence to later times when the Plaintiff-Father and his counsel appeared and were at issue, as on file, and thence to the present time when the Plaintiff-Father appeared to prosecute the claim for custody of the parties’ minor children.

The Plaintiff-Father appeared with his counsel for a hearing on his application for emergency orders of custody on November, 17, 2016. The Court issued temporary custody orders on that date. The Defendant-Mother did not appear at the hearing. A final hearing date was set at that time for January 11, 2017.

On January 11, 2017, the Plaintiff-Father and his counsel appeared and requested that the hearing be continued two weeks until January 25, 2017. That continuance was granted. The Defendant-Mother did not appear on that court date.

The Plaintiff-Father appeared with his counsel for the continued hearing on Plaintiff-Father’s claim for custody of the parties’ minor children on January 25, 2017. The Defendant-Mother did not appear at the hearing.

COURT ORDERS

1. *There are two children, issue of this marriage, to wit:*

Ishnoor Kaur, born August 27, 2012; and Paramvir Kaur,

born September 12, 2016.

2. The Court finds that there has been compliance with the requirements of the Convention [the Hague Convention of 15 November, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters], and compliance with the circumstances that can be followed if there is no acknowledgement by certificate from the Central Indian Agency [the Indian Central Authority].

3. The Court finds that there is overwhelming evidence that the Defendant-Mother has actual notice of the case, and of this hearing, and has chosen to ignore it.

4. The Court finds that the Plaintiff-Father has complied with the requirements of service of process in reference to this custody proceeding.

5. The Court finds that the Plaintiff-Father has made every effort to serve the Defendant-Mother notice of the January 25, 2017 hearing, and that the Defendant-Mother had actual notice of these proceedings.

6. The Court finds that it has subject matter jurisdiction and that the children's home state is Connecticut.

7. The Court orders the following :

a. The Defendant-Mother shall immediately return to the State of Connecticut, bringing both children with her.

b. Sole, legal and physical custody of both minor children is awarded immediately to the Plaintiff-Father, with supervised visitation to the Defendant-Mother.

c. Counsel for the Plaintiff-Father shall email the Defendant-Mother and her counsel in India in order to give notice to the Defendant-Mother of the information contained in "Plaintiff's Proposed Findings of Fact and Orders for January 25, 2017 Hearing" (Plaintiff's Exhibit 6) from paragraph number two through paragraph number six of the Plaintiff-Father's Proposed Orders. Those paragraphs two through six

are not ordered by the Court at this time. The Court wants to give the Defendant-Mother an opportunity when she returns to the State of Connecticut with the children to present her position and discuss what the custodial arrangement should be and any objections she has to its being requested by the Plaintiff-Father.

d. For the future, orders shall be served upon the Defendant-Mother and her attorney by email.

The Court further states that it wants the Defendant-Mother to know that it will give her a chance to be heard and when she does appear in this Court, she will get due process and justice. The Court states that is going to deal fairly with the Defendant-Mother and the Plaintiff-Father when it has the evidence before it from both parties.”

9. After the present appeal was filed by the appellant, the respondent filed a writ petition in this court under Article 226 of the Constitution of India, registered as W.P.(CRL) 725/2017, seeking relief in the nature of habeas corpus, for recovering the custody of his children from the appellant. Vide order dated 10.04.2016, the said petition was directed to be listed alongwith the present appeal.

10. Before hearing arguments in the present appeal, having regard to the fact that the future of two minor children of very tender age is at stake, efforts were made by us to facilitate a settlement between the parties so that the tussle between the spouses for claiming custody of the children, could be given a quietus. On 17.07.2017, to allay the apprehension of the appellant/wife as expressed in court that if she would agree to return to USA with the children, she could find herself homeless and without any sustenance for herself and the children, Mr. Malhotra, learned counsel for the respondent/husband had sought time to obtain instructions from his client and the matter was adjourned to 25.07.2017.

11. On 25.07.2017, learned counsel for the respondent/husband had stated that his client was ready and willing to file an affidavit undertaking inter alia that he shall provide the appellant and their children, the same rented accommodation, where they were earlier residing and bear all living expenses and provide a part time help. The respondent was also willing to move out of the said accommodation. To back the said submission, learned counsel had handed over an affidavit sworn by the respondent/husband in USA on 20.07.2017, giving an undertaking on the above lines. A copy of the said affidavit was furnished to Mr. Jayant Bhatt, learned counsel for the appellant with directions to obtain necessary instructions from his client. In the post lunch session, the appellant had expressed her unwillingness to return to USA or appear before the U.S. court on the ground that if she would do so, the respondent would seek permanent custody of the children and entangle her in complaints filed by him before other authorities.

12. In view of the above stand, learned counsel for the respondent had again sought time to obtain instructions on the aspect of the physical custody of the children and the matter was adjourned to the very next day, i.e., 26.07.2017. On 26.07.2017, learned counsel for the respondent handed over a statement forwarded by his client from USA, specifically stating therein that he will not separate either of the children from the appellant at any time and only share a parenting plan that would be worked out with her consent, in the best interest of the children. The respondent had also clarified that he had not initiated any criminal proceedings against the appellant before any agency/court in the USA and besides the case filed by him for the custody of the children, he has not filed any other court proceedings. The said affidavit alongwith the documents enclosed therewith were taken on record. Counsel

for the appellant sought a pass over to enable the appellant to examine the said affidavit. On the second call, the appellant reiterated her stand that she was unwilling to return to USA with her children, under any circumstances. As a result, the matter was set down for hearing arguments on merits.

13. The gravamen of the arguments addressed by Mr. Jayant Bhatt, learned counsel for the appellant is that while examining an application under Order VII Rule 11 CPC, the Family Court was only required to scrutinize the guardianship petition filed by the appellant and in view of the specific averments made in paras 8 and 9, wherein it has been stated that both the children and the appellant are ordinarily residents of India, the said application filed by the respondent, ought to have been dismissed outright. It was canvassed that the Family Court overlooked the fact that the minor son, Master Paramvir has never resided in USA and in all his infant life, lived in India and on attaining majority, he would have an option of applying for citizenship either in USA or in India, as he may choose but as of now, he cannot be treated as a US citizen; that the question as to where the children ordinarily reside as contemplated under Section 9 of the G&W Act, is not a question of law, but of facts, which would entail a detailed and elaborate enquiry and the matter ought not to have been adjudicated by the learned Family Court in such a summary manner; that the impugned order has not taken into consideration, the welfare of the children which is of paramount consideration; that the principles of law laid down by the Supreme Court in the case of Ruchi Majoo vs. Sanjeev Majoo reported as **AIR 2011 SC 1952** have not been followed by the learned Family Court. Learned counsel had cited the decision of the Division Bench of this Court in the case of Chandan Mishra vs Union Of India & Ors. reported as **2017(3) JCC 1685**, to urge

that the Family Court ought to have conducted an elaborate enquiry to ascertain the welfare of the minor children, which it has miserably failed to do before passing the impugned order.

14. Per contra, Mr. Malhotra, learned counsel for the respondent has supported the impugned judgment and submitted that at the time of filing the guardianship petition, the appellant has deliberately withheld material information, only to mislead the Family Court. He referred to Section 9 of the G&W Act to emphasize that the said provision permits that an application with respect to the guardianship of a minor can be made to the District Court having jurisdiction in the place, where the “*minor ordinarily resides*”, but to overcome the bar placed in the said provision, the appellant has purposely stated in para 1 of the petition that “*both the above named children are presently residing with their mother at D-81, Ajay Enclave, Tilak Nagar, Delhi-110018, i.e. within the jurisdiction of this court.*” Further, in para 8 of the petition, the appellant has wrongly averred that the Family Court has the jurisdiction to entertain the petition “*as the petitioner is an overseas citizen of India and is ordinarily residing within the jurisdiction of this Hon’ble Court and further intends to stay in India.*”

15. Learned counsel for the respondent highlighted how the older child was stealthily and surreptitiously removed by the appellant from USA and brought to New Delhi and argued that when the undisputed position is that both parents are US nationals and permanently residing there, it cannot be said that the children are residents of New Delhi merely on the strength of the appellant temporarily shifting them/removing them from their permanent place of residence at USA to New Delhi. He contended that neither of the

parties have ever resided together in New Delhi and nor do they have a matrimonial home in New Delhi and therefore, the learned Family Court had every reason to hold that the appellant's petition is barred under Section 9 of the G&W Act.

16. It was further stated by learned counsel for the respondent that the appellant has been surreptitiously keeping a track on the proceedings for custody initiated by the respondent before the concerned court in USA, through her cousin residing there, who had engaged a lawyer to watch the said proceedings, without entering appearance; that despite having knowledge of the order dated 17.11.2016, passed by the US court granting temporary custody of both the children to the respondent, with supervised visitation rights to the appellant and further, directing her to return to USA with the children, the appellant did not make compliances and instead, filed the present misconceived guardianship petition and that too before a court, which is not conferred with the jurisdiction to entertain the same. Learned counsel also referred to several documents that he had filed before the learned Family Court alongwith the application under Order VII Rule 11 CPC, to demonstrate that both the parties and their children are permanent residents of USA. The said documents include their US marriage certificate, lease documents of their residential property, US driving licenses, US income tax returns, US dental license of the appellant, US birth certificate and medical records of Ms. Ishnoor Kaur.

17. To fortify his submission that temporary shifting or removal of the children by the appellant cannot confer jurisdiction in the Family Court in

Delhi, learned counsel for the respondent has cited the following decisions:-

- (i) Amrit Pal Singh vs. Jasmit Kaur; **AIR 2006 Delhi 213**
- (ii) Paul Mohinder Guhan vs. Selina Guhan; **130 (2006) DLT 524**
- (iii) Mukand Swarup vs. Manisha Jain; **2009(159) DLT 118**
- (iv) Ruchi Majoo vs. Sanjeev Majoo; **AIR 2011 SC 1952**

18. We have given our careful consideration to the rival arguments advanced by the learned counsels for the parties and examined the documents placed on record.

19. To examine the maintainability of the guardianship application before the competent Court vested with jurisdiction, one must first refer to Section 9 of the G&W Act, which states as follows:-

“9. Court having jurisdiction to entertain application:-

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides, or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.” (emphasis added)

20. Thus, the requirement of Section 9 is that for an application with

respect to the guardianship being maintainable before the District Court, it is a prerequisite that the minor must ordinarily reside within the jurisdiction of the said Court.

21. The expression “ordinarily resident” used in Section 9 of the G&W Act has a connotation that signifies something more than a temporary residence. The said expression must be given its natural and literal meaning. On this aspect, we need not travel beyond the authoritative decision of the Supreme Court in the case of Ruchi Majoo (supra), where one of the questions that had fallen for determination was the legal validity of the judgment of the High Court impugned therein, dismissing a petition filed by the mother for the custody of the minor child on the ground that the courts at Delhi were not vested with the jurisdiction to entertain the same. In the said context, the Supreme Court had first examined the definition of the words, ‘ordinarily’ and ‘resides’ in Black’s Law Dictionary and Websters Dictionary and based on a conspectus of case law on the interpretation of the expression coined by joining two words, in the cases of Annie Basant vs. Narayaniah (reported as **AIR 1914 PC 41**), Jagir Kaur and Anr. vs. Jaswant Singh (reported as **AIR 1963 SC 1521**), Kuldip Nayar and Ors. vs. Union of India and Ors. (reported as **2006 (7) SCC 1**), Bhagyalakshmi and Anr. vs. K.N. Narayana Rao (reported as **AIR 1983 Mad 9**), Aparna Banerjee vs. Tapan Banerjee (reported as **AIR 1986 P&H 113**), Ram Sarup vs. Chimman Lal and Ors. (reported as **AIR 1952 All 79**), Vimla Devi vs. Maya Devi and Ors. (reported as **AIR 1981 Raj. 211**) and In Re: Giovanni Marco Muzzu and Ors. (reported as **AIR 1983 Bom. 242**), had ultimately opined that the question whether one is ordinarily residing at a given place, is dependent on the intention of the parties to make that place ones’ ordinary

place of abode.

22. It will be profitable to refer to the following observations made by the Supreme Court in the captioned case, on the aspect of determination of jurisdiction of the court, in cases filed under Section 9 of the G&W Act:-

“40. In cases arising out of proceedings under the Guardians and Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There is thus a significant difference between the jurisdictional facts relevant to the exercise of powers by a writ court on the one hand and a court under the Guardian and Wards Act on the other. Having said that we must make it clear that no matter a court is exercising powers under the Guardian and Wards Act it can choose to hold a summary enquiry into the matter and pass appropriate orders provided it is otherwise competent to entertain a petition for custody of the minor under Section 9(1) of the Act. This is clear from the decision of this Court in Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112, which arose out of proceedings under the Guardian and Wards Act. The following passage is in this regard apposite:

"30. We may here state that this Court in Elizabeth Dinshaw v. Arvand M. Dinshaw (1987) 1 SCC 42 while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts - which were independently considered - it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (infants), In re (1966) 1 All ER 886 which case, as pointed out by us above has been explained in L (Minors) In re (1974) 1 All ER 913, as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in McKee

v. McKee (1951) 1 All ER 942 and J v. C (1969) 1 All ER 788 and the distinction between summary and elaborate inquiries as stated in L. (infants), In re (1974) 1 All ER 913 are today well settled in UK, Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 - even assuming that the earlier orders passed in India do not operate as constructive res judicata."

***41. It does not require much persuasion for us to hold that the issue whether the court should hold a summary or a detailed enquiry would arise only if the court finds that it has the jurisdiction to entertain the matter. If the answer to the question touching jurisdiction is in the negative the logical result has to be an order of dismissal of the proceedings or return of the application for presentation before the court competent to entertain the same. A court that has no jurisdiction to entertain a petition for custody cannot pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a court in that country. The party aggrieved of such removal, may seek any other remedy legally open to it. But no redress to such a party will be permissible before the Court who finds that it has no jurisdiction to entertain the proceedings."*(emphasis added)**

23. It clearly emerges from the above discussion that once the answer to the question relating to jurisdiction is not in the affirmative, then, the inevident conclusion is that such a proceeding must terminate forthwith and the guardianship petition has to be returned for being presented before the competent court vested with the jurisdiction to entertain the same.

24. Where the minor ordinarily resides, is a question of fact and therefore, the factual aspects of the controversy raised in the present case must be

delved into. In the instant case, to decide as to whether the Family Court in Delhi has the jurisdiction to entertain the guardianship petition filed by the appellant, it is necessary to examine the averments made in the pleadings. In her petition under the G&W Act, the appellant herein has stated as follows:-

“1. That both the above named children are presently residing with their mother at D-81, Ajay Enclave, Tilak Nagar, Delhi-110018, i.e., within the jurisdiction of this court.

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XXX

3 (xiv) That Petitioner had genuine apprehension about her own safety and the safety of her daughter while in U.S.A. The Petitioner got a window of opportunity to get respite from all the physical, mental and emotional abuse in January 2016 by coming to her parental home in Delhi when her brother's marriage was fixed for February, 2016 to permanently settle down in India. While in India for her brother's marriage in January, 2016, the Petitioner took a pregnancy test and came to know that she was expecting the second child and when the news was given to the Respondent, the latter coerced the Petitioner to fly with him back to U.S.A. against the doctor's advice despite being aware of the factum that the pregnancy was a high risk one and involved a lot of complications.

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XXX

3 (xviii) That, thus the Petitioner has been living separately from the Respondent along with children since January 2016 and does not want to return to the Respondent's house in U.S.A., and wants to stay in India, fearing not only for her own safety but also for the safety of her children. The Petitioner has also enrolled her daughter Ishnoor in a play school in Delhi in a nearby locality so that she may socialize with the children of her age and an foundation for her schooling may be laid as already stated.

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8. That this Hon'ble Court has the necessary jurisdiction to entertain the present Petition as the Petitioner is an overseas citizen of India and is ordinarily residing within the jurisdiction of this Hon'ble Court and further intends to stay in India. ...”

25. Several allegations have been levelled in the petition with regard to the acts of cruelty on the part of the respondent *qua* the appellant and the minor children and the hostile environment to which he had subjected the appellant and her infant daughter, while in USA. The sequence of events that brought the appellant to India in January, 2016 have already been narrated above and we do not propose to repeat them. It has also emerged from the records that the conception of the second child of the parties had taken place on the US soil and when the appellant had visited India alongwith her daughter in January, 2016 to attend her brother's marriage, she had stayed back and on taking a pregnancy test, it was confirmed that she was expecting a second child. The very fact that the appellant gave birth to Master Paramvir in the first week of September, 2016 leaves no manner of doubt that she had conceived the child while still in USA.

26. As brought forth from the facts of the instant case, both the appellant and the respondent had shifted to USA much before they had got married; they had completed their higher education in USA; they had acquired their professional qualification in dentistry in USA; they had acquired US citizenship; the marriage of the parties had taken place first in USA on 22.08.2006; they have been running a professional dental practice in partnership at USA; Baby Ishnoor, the first child of the parties was born in

USA on 27.08.2012 and their second child, Master Paramvir was conceived in USA. In the light of the above facts, it is very difficult to appreciate how the appellant could have approached the Family Court at Delhi, claiming that it is vested with the jurisdiction to entertain the guardianship petition.

27. Apparently, it was on account of the designedly vague and cryptic averments made by the appellant in the guardianship petition, in an attempt to confer jurisdiction on the courts in Delhi, that the said petition was entertained in the first place. The same is evident from a bare reading of the guardianship petition, where the appellant has omitted to mention that she and her husband are US nationals and had first got married in USA on 22.08.2006. Instead, the petition starts by referring to the fact that the marriage of the parties was solemnised at Delhi on 23.12.2007. What has been sought to be projected by the appellant is that after the marriage of the parties, they had both moved to USA and were working as dentists there, which is factually incorrect. Without revealing the fact that their first child was born in USA and is a US citizen and their second offspring was conceived in USA, a bald averment has been made in para 1 of the petition that both the children are presently residing with their mother at Delhi, within the jurisdiction of the concerned Family Court. Similarly, in para 8 of the petition, which deals with the jurisdictional aspect, a deliberately ambiguous averment has been made that the appellant is an overseas citizen of India and is ordinarily residing within the jurisdiction of the Court and further intends to stay in India. The documents filed by the respondent alongwith his application under Order VII Rule 11 CPC have remained uncontroverted. The said documents amply demonstrate that both the parties are US nationals and so is their first born child; they are income tax

assesseees in USA; they had set up their matrimonial home and a joint dental practice in USA.

28. In cases like the present one, where the custody of children is involved, the law of the place, which has the closest concern with the wellbeing of the spouses and the welfare of their offsprings, must govern the parties. Merely because the appellant decided to visit India alongwith her minor daughter, to attend the marriage of her brother and then made up her mind to stay back, cannot be a ground to deprive the US court of its jurisdiction to decide upon the matter of custody of the children. From the fact that the appellant had travelled from USA to Delhi alongwith her daughter, on a round air ticket, it is evident that she was to return to USA after attending the marriage of her brother. It was only on landing in Delhi that the appellant decided not to go back to USA and instead, extended her stay in Delhi under the pretext that being pregnant, she had been medically advised not to travel. But that alone cannot confer jurisdiction on the Family Courts at Delhi, for the reason that the expression “ordinarily resides” is not interchangeable with the expression, “resident at the time of the application”. Quite clearly, both the parents and the first born child are ordinarily residing in USA. Merely because the appellant had removed her daughter from USA in January, 2016, travelled to India and then decided to prolong her stay in Delhi, cannot oust the jurisdiction of the US courts.

29. The argument advanced by the learned counsel for the appellant that the guardianship petition is maintainable in Delhi because Master Paramvir was born in India and on his attaining majority, he will still have the option of acquiring either US citizenship or Indian citizenship, as he may deem fit, is untenable and liable to be rejected. Section 3(1) of the Citizenship Act,

1955, which determines as to who shall be a citizen of India by birth, makes it abundantly clear that after commencement of the said enactment, only those persons, who are born in India, where both his parents are citizens of India or one of the parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth. Section 301 of the U.S. Immigration and Nationality Act states that a child born outside of the U.S.A., acquires citizenship at birth if both the parents are U.S. citizens. This being the legal position, the appellant having given birth to Master Paramvir in Delhi, will not be a determinative factor in declaring him as a citizen of India by birth, when admittedly, both the appellant and the respondent though persons of Indian origin, have acquired US nationality. Pertinently, no steps have been taken by the appellant for the past one year eight months to surrender U.S. citizenship and acquire Indian citizenship. Even otherwise, if the said argument is accepted, it will be greatly disadvantageous to the infant for the reason that the issue of his nationality will be kept in a limbo, till he attains majority and takes a call. In all that duration, he will continue to remain Stateless, a position that is absolutely unacceptable. It would also be in utter violation of the fundamental rights of the child, who would be deprived of his right to travel freely abroad, for the next several years, in the absence of a passport declaring his nationality.

30. The decision in the case of Sondur Gopal vs. Sondur Rajini reported as **(2013) 3 SCC 553**, cited by learned counsel to urge that India being the place of birth of Master Paramvir, it would have to be treated as his place of domicile, would not be of any assistance to the appellant. In the said case, the Supreme Court was called upon to decide the issue of place of domicile

in respect of the respondent/wife therein, who had prayed for a decree of judicial separation under Section 10 of the Hindu Marriage Act and for the custody of the minor children and the appellant/husband had questioned the maintainability of the said petition on the ground that both the spouses were original citizens of India but had acquired citizenship of Sweden and later on moved to Australia, while still being the citizens of Sweden. In the said context, the Supreme Court had classified domiciles under three heads, viz., domicile of origin, domicile by operation of law and domicile of choice and held that domicile of origin is not necessarily the place of birth and that the birth of a child at a place during temporary absence of the parents from their domicile, will not make the said place as the domicile of the child. It was held that the domicile of origin prevails until not only another domicile is acquired, but it must be with the manifest intention of abandoning the domicile of origin. In fact, the decision in the case of Sondur Gopal (supra) supports the stand of the respondent that the appellant having conceived the second offspring in USA, where she ordinarily resides and then having travelled to and extended her stay in Delhi, where the said child was delivered, will not make it the domicile of the child, particularly when both the parents, though of Indian origin, have elected to acquire US citizenship and made USA their domicile of choice.

31. The decision in the case of Ruchi Majoo (supra) also puts paid to the argument advanced by learned counsel for the appellant that a detailed and full fledged enquiry was required before the Family Court decided the application filed by the respondent under Order VII Rule 11 CPC. The Supreme Court has clarified in the captioned case that once the court arrives at a conclusion that it does not have the jurisdiction to entertain a petition for

custody, then it should not hold any enquiry, summary or otherwise, except for directing return of the petition for being presented before the competent court. On such a determination, any steps taken by the Family Court to conduct an enquiry in the matter, would have run contrary to the mandate of the Supreme Court in the said decision.

32. We may also advert to the Hague Convention of 25.10.1980, which deals with the “Civil Aspects of International Child Abduction” and the Convention of 19.10.1996, which deals with the “Jurisdiction, Applicable law of recognition, Enforcement and Co-operation in respect of parental responsibility and Measures for the protection of children in International situations”. As on 02.08.2017, 98 countries are parties to the 1980 Convention and as on 4.9.2017, 46 countries are parties to the 1996 Convention. India is not yet a signatory to either of the Conventions. The said Conventions have declared that in cases of child removal/abduction by one parent, the courts of the country where the child has his/her habitual residence, are best placed to make long-term decisions relating to the child’s future welfare. It would be apposite to refer to Article 3 of the 1980 Convention, which declares removal/retention of a child to be wrongful where “(a) *it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.....*”

33. India may not be a signatory to the aforesaid Hague Conventions, but the underlying salutary principles enunciated therein were adopted by the

Supreme Court in the case of Surinder Kaur v. Harbax Singh reported as (1984) 3 SCC 698, wherein it was observed as below:-

*“10.The modern theory of Conflict of Laws recognizes 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.... 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 wellbeing of the spouses and the welfare of the offspring 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 (1945), 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.”* (emphasis added)

34. As far as non-Convention countries like India are concerned or in circumstances, where the removal of the child relates to a period prior to the adoption of the Conventions, in the case of Dhanwanti Joshi vs. Madhav Unde reported as (1998) 1 SCC 112, the Supreme Court had clarified the

law that the Court in the country to which the child is removed, will consider the question on merits, bearing the welfare of the child as of paramount importance and it shall consider the order of the foreign court as only a factor to be taken into consideration, as stated in McKee vs. McKee reported as **1951 AC 352**, unless the court thinks it fit to exercise summary jurisdiction in the interest of the child keeping in view that the child's prompt return, is in his welfare.

35. The view taken in the case of Dhanwanti Joshi (supra) has been approved as good law by the Supreme Court in a recent decision in the case of Nithya Anand Raghavan vs. State (NCT of Delhi) reported as **AIR 2017 SC 3137**, wherein it was emphasised that the predominant criterion of the best interest and welfare of the minor outweighs or offsets the principle of comity of courts and a pre-existing order of a foreign court can be reckoned only as one of the factors to be taken into consideration, the child's welfare being the overriding consideration.

36. At the cost of repetition, we may state that the parties in the case at hand are both highly educated professionals, who are well placed in life. They had elected to leave the Indian shores and travel to USA as adolescents, much before their marriage had taken place. They made a life in USA, acquired professional degrees there, met each other and formalized their matrimonial alliance in that country. They elected to set up a joint dental practice and their matrimonial abode in USA and rear their offspring in that environment. Thus, in every which way, the conduct of the appellant and the respondent amply demonstrates that they had abandoned their domicile of origin. Simply because a marital discord took place between the appellant and the respondent later on, which made her flee from USA and

seek refuge with her parents in India, alongwith her children, cannot be a ground for her to claim permanent custody of the children within the legal system of this country. The expression, “ordinarily resides” clearly conveys a place of permanent abode of the minor children, which in this case, is USA and there is no manner of doubt that they are not ordinarily residing in Delhi, as contemplated in Section 9 of the G&W Act.

37. In our opinion, the conclusion arrived at in the impugned judgment is amply backed by valid reasoning and is inconsonance with the law on the subject. The learned Family Court has correctly analysed and appreciated the facts of the case and we are in agreement with the view taken that the US law is applicable to the parties for the relief of custody of the children and the courts in India lack the jurisdiction to entertain the case. Accordingly, the impugned judgment is upheld and the present appeal is dismissed as meritless alongwith the pending applications, while leaving the parties to bear their own expenses.

HIMA KOHLI, J

DEEPA SHARMA, J

SEPTEMBER 19, 2017

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