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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved On: 2nd February, 2017
Judgment Pronounced On: 8th May, 2017

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W.P. (CRL) 1088/2015

CHANDAN MISHRA

.... Petitioner

Through : Mr.Sanjeev Sahay, Mr.M.R. Ranjan
and Mr.Aditya Vardhan Sharma, Advs.

versus

UNION OF INDIA & ORS.

.... Respondents

Through : Mr.Anil Soni, CGSC for R-1/UIO
Mr.Rajesh Mahajan, ASC with
Mr.Peeyush Bhatia, Advs for R-2 and 3
along with SI Rajender, P.S. Malviya
Nagar
Mr.Mohit Kumar Shah and
Mr.Manjesh Kumar Jha, Advs. for R-
4/Radhika Sinha

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J.

1. Petitioner has filed the present writ petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure seeking a writ in the nature of *habeas corpus* for production of his minor son Archit Mukund Mishra and for returning him to the jurisdiction of California, United States (USA).
2. The case of the petitioner as set out in the writ petition is that the marriage between the petitioner and respondent no.4 was solemnized on 20.04.2008 and started living together in California, USA from May, 2008. The respondent no.4 was a trained dental surgeon and sought admission in a dental school to practice in the USA. She repeatedly sat

for entrance examinations, but was unable to secure admission owing to low scores. This led to a change in her behaviour as she became abusive and used to blame the petitioner for scoring poorly in her exam. Thereafter, respondent no.4 became pregnant in September, 2008 and gave birth to Archit (hereinafter referred to as the '*minor child*') on 22.04.2009 by caesarean section. As per the petition, since respondent no.4 was recuperating from her surgery, the sister of the petitioner joined the couple and she along with the petitioner used to take care of the minor child and housework.

3. It is the case of the petitioner that even after recovering, the respondent no.4 neglected the welfare of the minor child and focussed only on preparing for her entrance exams. The welfare of the minor child was looked after by the petitioner and his mother. When the respondent no.4 gave her second attempt at the entrance exams of dental school in July, 2009, she scored even worse than before which led to her behaviour deteriorating and she started taking out her anger on the minor child on several occasions.
4. As per the petition in May-June, 2010, the respondent no.4 insisted that she wanted to travel to India for her cousin's wedding. Since the minor child did not have a passport, the respondent no.4 started pressurizing the petitioner to arrange for one. Due to the erratic behaviour of the respondent no.4 and concerned for the welfare of the child, the petitioner succumbed to her demands. The respondent no.4 then unilaterally booked tickets for herself and the minor child to travel to India representing to the petitioner that she intended to return in January, 2011.
5. Thereafter, the respondent no.4 left California on 26.10.2010 along with the minor child, but did not return in January, 2011; on the

contrary, she extended her ticket without the knowledge of the petitioner. The petitioner insisted that she adhere to her promise of returning to the US, but the respondent no.4 did not pay heed to such requests. Thereafter, the respondent no.4 stopped answering the phone calls of the petitioner and completely cut-off the petitioner from the minor child.

6. It is the case of the petitioner that the respondent no.4 attempted to sever all ties between the petitioner and his son. The petitioner made frantic efforts to get in touch with the child. On one such attempt, he informed the parents of respondent no.4 that he intended to come to India and spend time with the minor child during summer vacations; but the father of the respondent no.4 threatened him that incase the petitioner came to India, false cases will be lodged against him and his parents. As per the petition, the respondent no.4 also did not arrange a single webcam session as promised by her under the pretext of a slow internet connection.
7. Constrained by the actions of the respondent no.4, the petitioner filed a petition seeking the custody of his son under the ambit of legal separation petition before the Sunnyvale Superior Court (hereinafter the '*Foreign Court*') in April 2011 titled *Chandan Mishra v. Radhika Sinha*, 611FL006064. He also sought a direction to the respondent no.4 to return to USA immediately. It is the case of the petitioner that he was unable to serve the summons issued by the Foreign Court as the respondent no.4 kept jumping between cities. During this time, the respondent no.4 and her parents had closed all lines of communication and any attempt by the petitioner or his parents to approach them were met with threats and abuses.
8. As per the petition, around January 2012, the petitioner managed to get

in touch with the respondent no.4 and her parents. At this juncture, the respondent no.4 started insisting that she wanted to return to US. The petitioner claims that he could no longer endorse the visa of the respondent no.4 as he had filed for legal separation and custody; at the same time the respondent no.4 was fully competent to get a visa after approaching the US Consulate in India. However, the respondent no.4 intentionally did not return to the USA and kept making false allegations against the petitioner.

9. During this time, the petitioner repeatedly suggested that he be allowed to meet the minor child in a third country where the respondent no.4 would have no visa issues; but his requests were turned down and the respondent no.4 and her family contended that the petitioner would be allowed to meet the child only if the custody proceedings before the Foreign Court are withdrawn. The respondent no.4 also kept changing cities between Bhagalpur, Patna, Chennai and Mumbai and concealed the exact location and whereabouts of the minor child.
10. As per the petition, the respondent no.4 by her email dated 24.04.2013 finally agreed to take the minor child to a third country to meet with the petitioner but later resiled from her commitment. Subsequently on 30.05.2013, the respondent no.4 filed her written response before the Foreign Court and informed the petitioner that she does not want the petitioner and the child to meet but instead wants the law to take its own course.
11. The Foreign Court, vide its order dated 13.06.2013, granted the petitioner full custody of the minor child and ordered the respondent no.4 to return the child to the petitioner within 10 days; however, the respondent no.4 refused to comply with the same.
12. As per the petition, during this period the respondent no.4 would

occasionally allow the petitioner to talk to the minor child over the telephone; but on many occasions, she would cut the call in the middle of the conversation. Even during their conversations on Skype, the respondent no.4 would cut the call in the middle of the conversation whenever the petitioner would try to ask the child about the details of his school.

13. It is the case of the petitioner that during a Skype conversation with the child on 06.08.2014, the respondent no.4 was dropping him off to school. During this conversation, the petitioner saw the sign of Delhi Metro construction in the background and the minor child wearing the uniform of Ryan International School. The petitioner claims to have learnt about the school of the minor child and their residence from this conversation. The petitioner, thereafter, by an email dated 09.10.2014, requested the respondent no.4 to grant him access to his son; however, the respondent no.4 immediately severed all access of the petitioner to the minor child.
14. As per the petition, the petitioner sent a complaint via email to the Commissioner of Police on 12.12.2014 seeking his assistance to locate the minor child. Thereafter, the present petition has been filed on 07.05.2015.
15. On the other hand, the respondent no.4 has filed a detailed counter affidavit. It is her case that after the solemnization of the marriage, the relation between the couple was always turbulent and the petitioner used to physically assault the respondent no.4. While residing at Sunnyvale, California, the respondent no.4 was not even provided with a mobile phone and the petitioner used to pick up quarrels on the issue of talking on phone.
16. As per the counter affidavit, the respondent no.4 gave birth to the minor

child on 22.04.2009 by caesarean section, however, the petitioner neither called his mother nor sister who was residing in New Jersey, as alleged in the petition. The respondent no.4 was also restrained from spending any money even though her parents had transferred substantial sums in the account of the petitioner. It was only later that the mother of the petitioner joined the parties in their matrimonial home, but then respondent no.4 was made to do all the housework single-handedly; all the while facing sarcastic remarks and abuses from her mother-in-law. The respondent no.4 was tortured and harassed by the petitioner and his mother after the birth of her son.

17. It is the case of the respondent no.4 that she was forced to give a second attempt to the entrance exam despite the fact that she was inadequately prepared. When the respondent no.4 appeared for her entrance exam, the petitioner locked all the books which led to her scoring even lower than before. The mother of the petitioner neither took care of the child nor bestowed any love upon him. Further, the behaviour of the petitioner was also harsh towards the child.
18. After the birth of the minor child, the respondent no.4 wished to travel to India to take blessings of her parents, however, no heed was paid to by the petitioner. On the contrary, the petitioner and his parents started pressurizing the respondent no.4 to leave the child in USA and go back to India to prepare for her exams. On account of the adverse situation, the respondent no.4 found it difficult to prepare for her exams and as such, requested that she be permitted to go to India along with the minor child to enable her to prepare. After much persuasion, the petitioner and his family agreed to apply for a passport of the minor child as also a six-month visa. In the meantime, the parents of the petitioner joined the parties in USA in August, 2010.

19. It is the case of the respondent no.4 that the petitioner and his mother conspired to throw out the respondent no.4 from USA and keep back the child. The minor child was forcefully sent to a daycare to enable him to learn to live independently, but the child could not adjust and was withdrawn.
20. As per the counter affidavit, the parents of respondent no.4 arranged her air tickets to India with return tickets for the month of January, 2011. This was done with the consent and knowledge of the petitioner and his family. Accordingly, on 25.10.2010, respondent no.4 was dropped at the airport by the petitioner and the petitioner handed over US \$100 after withdrawing the same from a nearby ATM. While the respondent no.4 was in India, the petitioner used to avoid calling her and did not even try to make any contact with the minor child.
21. The respondent no.4 claims to have learnt the plan of the petitioner and his parents when her time to return came inasmuch as she was prevented by the petitioner and his father to return back to USA by refusing to furnish the requisite visa papers despite several requests. Initially, the respondent no.4 extended her flight tickets till 25.10.2011; but as the petitioner failed to provide the requisite documents to enable her to get a visa, forcing her to cancel the tickets. Owing to her being prevented to return to US, the respondent no.4 was also unable to appear for her exams scheduled for 23.04.2011. To substantiate her submissions, the respondent no.4 has placed on record emails sent by her to the petitioner. At the same time, the petitioner started coercing the respondent no.4 to drop the minor child to the home of his parents at Bokaro; however, considering the fact that the two year old minor child could not be left anywhere without his mother, the respondent no.4 refused.

22. As per the counter affidavit, the petitioner or his parents seldom received phone calls of respondent no.4 or her parents. Few meetings took place between the parents of the respondent no.4 and the petitioner between 2011 to 2013 to resolve the issue, but failed to make any headway. All attempts thereafter by the parents of the respondent no.4 were met by abuses and reprimands. Meanwhile, father of the petitioner expressed his view of performing the *mundan* ceremony of the minor child at Deoghar Temple. Accordingly, the *mundan* ceremony took place on 12.03.2012 in the presence of the parents of the petitioner, but the petitioner desisted from participating in the ceremony. However, at the end of the ceremony, the mother of the petitioner disclosed her mind that there would not be any compromise.
23. As to the residence of the respondent no.4, it is stated in the counter affidavit that after the respondent no.4 came to India in the month of October, 2010, she went to Bhagalpur, i.e. the residence of her parents, for a brief period and then came to Patna where her parents also have a house and started living there. Since the chances of a compromise were foreclosed, the respondent no.4 filed an application under Section 7 of the Guardians and Wards Act, 1890, being Guardianship Case No.27/2012 before the Family Court, Patna (hereinafter the '*Indian Court*') *inter alia* praying that she be declared as the guardian of the minor child and protection from the child being removed from her custody and taken to USA. At the same time, the respondent no.4 also filed an application under S.22 of the Special Marriage Act, 1954 seeking restitution of conjugal rights.
24. The respondent no.4, thereafter, in the second half of 2012 decided to take admission in K.J. Somaya College, Bombay in MBA (F) Course. The minor child was admitted to Pyramids Kids School in the month of

August, 2012 and later admitted in Ryan International School at Bombay in the month of March, 2013. After completion of her MBA Course in the month of April, 2014, the respondent no.4 and the minor child moved to Delhi where the respondent no.4 got a job and the minor child was admitted to Pre-primary class in the Delhi Branch of Ryan International School. The respondent no.4 and the minor child have ever since resided in Delhi.

25. When the present petition came up for hearing on 17.07.2015, the parties were referred to the Mediation and Conciliation Centre of this Court, but no settlement could be arrived at. Accordingly, we proceed to decide the petition on its merits.

SUBMISSIONS OF THE PETITIONER

26. Mr.Sahay, learned counsel for the petitioner, has submitted as under:

- 26.1 It is submitted that the petitioner herein has been residing in the United States since 1998 and got married to respondent no.4 on 20.04.2008. The respondent no.4 is an Indian citizen and while the petition was pending, the petitioner has acquired a Green Card (permanent residence permit) of the US. The minor child was born in the USA and is a US citizen. On 26.10.2010, the respondent no.4 came to India with the minor child holding a return ticket. Learned counsel submits that though the petitioner had filed a petition seeking custody in the year 2011, the summons could only be served in the year 2013 as the respondent no.4 repeatedly kept changing her residence. The petitioner only learnt of the whereabouts of the respondent no.4 and the minor child on 06.08.2014 during a Skype conversation. Mr.Sahay submits that Indian Courts have repeatedly respected on *ex parte* orders of Foreign Courts. He also submits that there is no need for this Court to

venture into an elaborate enquiry and may simply allow the petition, enabling the parties to contest the matter on merits before the Foreign Court. Mr.Sahay relies upon the decisions in *Anand Raghavan v. State of Delhi & Anr.*, 231 (2016) DLT 596 (paragraph 59); and *Shilpa Aggarwal v. Aviral Mittal and Anr.*, (2010) 1 SCC 591 (paragraph 4).

26.2 The first contention of Mr.Sahay is that the respondent no.4 having submitted to the jurisdiction of the Foreign Court cannot be allowed to disregard its order at this stage. It is submitted that the respondent no.4 could not be served as her whereabouts were unknown and as she shifted 5 times in a short time interval. Therefore, the petitioner was forced into carrying out publication of the summons of the Foreign Court and only then the respondent no.4 surfaced and filed her written response. Learned counsel submits that by filing the written response before the Foreign Court, the respondent no.4 has unequivocally submitted to the jurisdiction of the Foreign Court. Relying upon the judgment in *Shilpi Gupta v. Union of India & Ors.*, MANU/DE/1014/2016 (paragraph 36), counsel submits that where the orders have been passed on endorsement of an objection by the respondent, the courts have relied on such orders.

26.3 Learned counsel next submits that it would be in the best interests of the minor child if he is returned to his father/petitioner. Mr.Sahay submits that there is no allegation of adverse influence of the petitioner upon the minor child nor any ground has been made out to show that the return of the child to the USA would be detrimental to the interests of the minor child. He contends that the minor child has not developed roots in India as the respondent no.4, admittedly, was living the life of a vagabond shifting between 5 cities being Patna, Bhagalpur, Bombay, Delhi and Chennai. The only reason the petitioner was unable to come

to India to visit the minor child was owing to the threats of the respondent no.4 and her family members of implicating him in false cases. Otherwise the conduct of the petitioner clearly shows that the welfare of the child would be ensured if he is sent back to the USA with the petitioner. He relies upon *Surya Vadanan v. State of Tamil Nadu & Ors.*, (2015) 5 SCC 450 (paragraphs 31 and 58) and *Shilpa Aggarwal (Supra)* (paragraph 21) to submit that in the present proceedings, the welfare of the child is of paramount importance. He submits that the petitioner has made all efforts to meet the child for five years, while the respondent no.4 has created numerous obstacles in order to hinder full interaction between the petitioner and the minor child. He submits that the respondent no.4 is treating the minor child as a chattel and denying the petitioner opportunities of meeting him which is clearly against the welfare and the overall development of the child.

- 26.4 Mr.Sahay, learned counsel for the petition, submits that the principle of ‘first strike’ is also in favour of the petitioner herein. The petitioner was the first to move the appropriate court of jurisdiction at the United States to seek custody of the minor child. The Foreign Court was the first to pass an order granting interim custody to the petitioner herein. He substantiates his contention by placing reliance on paragraph 56 of *Surya Vadanan (Supra)*. He submits that no effective order has been passed by the Indian Court. Mr.Sahay also states that though the petition for restitution of conjugal rights has been served on the petitioner, the application under the Guardians and Wards Act has not even been served. It has also been submitted that the filing of the guardianship petition at Patna should not be taken into account as the same has been filed at a place where the child does not reside and even otherwise, the Indian Court has no jurisdiction to entertain the petition.

- 26.5 The learned counsel for the petitioner next contends that the Foreign Court has the most intimate contact with the issues arising in this case as (1) the minor child is a citizen of the United States; (2) he was illegally removed from the USA and brought to India; (3) the petitioner has the capacity to fund the higher education of the minor child; (4) the child has a bright future in the USA; and (5) the petitioner himself having studied from IIT and Wharton is best suited to guide and advice the minor child. Learned counsel relying upon the decisions in *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and Anr.*, AIR 1984 SC 1224: (1984) 3 SCC 698 (paragraph 10); *V. Ravichandran (Dr.) (2) v. Union of India and Others*, (2010) 1 SCC 174 (paragraph 16) and *Surya Vadan* (Supra) (paragraph 53 and 68) submits that the Foreign Court has correctly exercised its jurisdiction in the present matter.
- 26.6 The next submission of Mr.Sahay is that the Principle of 'Comity of Courts' should be factored in by this Court and the order of the Foreign Court should be honoured. Counsel substantiates his arguments by relying upon the judgments in *Shilpa Aggarwal* (Supra) (paragraph 27) and *Surya Vadan* (Supra) (paragraph 54 and 55). He also submits that the order of the Foreign Court is merely an interim order and nothing prevents the respondent no.4 from going there and contesting the matter.

SUBMISSIONS OF THE RESPONDENT NO.4

27. *Per contra* learned counsel for the respondent no.4 has sought to belie all the submissions of Mr.Sahay and submitted on the following lines:
- 27.1 Mr.Shah submits that most of the allegations levelled against the respondent no.4 are false and baseless. He submits that it was infact the petitioner who had abandoned his wife and the minor child to fend

for themselves. Learned counsel has drawn the attention of the Court to emails placed on record to show that the respondent no.4 was always ready and willing to return to USA on the return tickets booked for January, 2011. It was the petitioner who failed to provide the requisite information and documents to enable the respondent no.4 to extend her US visa which led the respondent no.4 to extend her return tickets and subsequently left with no choice to cancel them. It is submitted that except the US \$100 handed over at the airport while the respondent no.4 and the minor child were departing, not a single penny or any sort of monetary support has been extended by the petitioner either for the respondent no.4 or the minor child.

27.2 In response to the contention that the respondent no.4 had submitted to the jurisdiction of the Foreign Court by filing her written response, learned counsel states that the reply was sent from India explaining the situation of the respondent no.4 and without any appearance on behalf of the respondent no.4, the same can by no means be treated as submission to the jurisdiction of the Foreign Court. The reply is merely a narration of facts. Infact in the written response, the respondent no.4 has stated that petitioner has prevented her to travel to USA and is not providing visa papers. Further in paragraph 4.3 she has stated that she has been prevented to visit the petitioner with the child. In paragraph 5 it has been stated that the petitioner has deliberately disregarded his duties and failed to enable her to obtain a visa for USA. Respondent no.4 had also shown her keenness for restitution of conjugal rights.

27.3 Even otherwise, the respondent no.4 submits that the order of the Foreign Court would not be enforceable in India as being in contravention of the mandate of Section 13 of the Code of Civil Procedure, 1908 (briefly the '*Code*'). Mr.Shah, learned counsel for the

respondent no.4 submits that the Foreign Court has completely ignored the principles of natural justice while passing order dated 13.06.2013. The order is clearly and evidently *ex parte* in nature as the respondent no.4 was never given an opportunity to be heard nor the response filed by her was considered. Any order, decree or judgment passed that is ignoring the principles of natural justice cannot be considered to have delivered justice in any manner and such an order passed without compliance of the principles of natural justice is not a valid order and consequently, unenforceable in India in view of Section 13 (d) of the Code. Further, the order of the Foreign Court is not an order on merits since the said order nowhere reflects that the court has gone through and considered the case of the respondent no.4, hence, the said order cannot be enforced in India in view of Section 13 (b) of the Code. Additionally, India is not a signatory to The Hague Convention on Child Abduction; therefore, the order of the Foreign Court cannot be enforced in India. The order specifically mentions that the order can be enforced only in countries that are signatories to The Hague Convention on Child Abduction.

- 27.4 Learned counsel submits that the order of the Foreign Court being interim in nature has no bearing on the present *lis* as allowing the present writ petition would virtually be a finality. The petitioner is not keen on facilitating the visa process for the respondent no.4 to travel to USA; thus, it would be near to impossible for her to travel to USA to present her case before the Foreign Court. As on date, the respondent no.4 is the wife of the petitioner and therefore, she will need his facilitation in order to get a valid visa to travel to USA.
- 27.5 Mr.Shah submits that the submission of the learned counsel for the petitioner that the respondent no.4 was leading the life of a vagabond is

misplaced. Respondent no.4 has never jumped from one city to another, as alleged, with a view to keep the petitioner in dark about her address; on the contrary the petitioner was regularly informed about the whereabouts of respondent no.4. Respondent no.4 had upon return from USA gone to Bhagalpur, Bihar where her parents were working as Lecturers; and then, after few months, she shifted to Patna seeking better career prospects, where her parents also have a house. She stayed in Patna from January, 2011 to July, 2012. Thereafter, upon getting admission in the masters course, she had shifted to Mumbai in August, 2012; and then after completing the MBA course, came to Delhi in April, 2014; where she continues to reside till date. In respect of Chennai, Mr.Shah submits that the sister of the respondent no.4 resides there and the respondent no.4 had gone to meet her for a short while. Learned counsel has drawn the attention of this Court to the written response filed before the Foreign Court to show that the address of her college has clearly been mentioned. Any submission of Mr.Sahay that the petitioner was unaware of the whereabouts of the respondent no.4 is clearly contradictory to the record and a patently false and misleading averment has been made in the writ petition. Learned counsel submits that it is the petitioner who has kept the respondent no.4 in the dark about his whereabouts and not the other way around. He submits that even the address mentioned in the present petition is false, inasmuch as, when the summons from the Indian Court were sent at the said address, the same was returned back with a noting that the said address belongs to a post office. Learned counsel has also drawn attention of this Court to an email filed by the petitioner dated 20.08.2014, wherein even after the order of the court, the petitioner has refused to provide his travel plans.

- 27.6 It is next contended that it is a well settled law that the doctrine of most intimate contact & the doctrine of closest concern will prevail over the principles of First Strike and Comity of Courts. He submits that even though the petitioner was the first to approach a court of law and get a favourable order in his favour, but since the child has been within the jurisdiction of this Court for a considerable time and is well-settled in India, such considerations will take precedence. Mr.Shah relies upon the judgments in the cases of ***Ruchi Majoo v. Sanjeev Majoo*, (2011) 6 SCC 479** (paragraphs 54, 55, 63, 64 and 65); ***Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112** (paragraphs 3, 4, 18, 29 to 35, 32 and 33); ***Surya Vadanani* (Supra)** (paragraphs 55, 56 and 64); and ***Smt. Surinder Kaur Sandhu* (Supra)** (paragraph 10).
- 27.7 Mr.Shah submits that it is well-settled law that the well-being of the child is of paramount importance and the court has to consider as to which country would best serve the interest and welfare of the minor child. Reliance is placed on ***Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw*, AIR 1987 SC 3** (paragraph 8); ***Ruchi Majoo* (Supra)**; and ***V. Ravichandran (2)* (Supra)** (paragraphs 29, 32 and 34). Moreover, it is the court within whose jurisdiction the child is which will have the most intimate contact with the issues and consequently, will have jurisdiction to decide as to whether the child has to be sent out of India or the child has to stay in India, without being influenced by the order of the foreign court. The child in question has been with the respondent no.4 all throughout and it is the respondent no.4 who has single-handedly raised and nurtured the minor child. At this stage, separating the child from the mother and taking him to a completely different environment, which would be alien if not hostile, would adversely affect the psychology of the minor child and would be detrimental to

his growth. The minor child has adapted to this lifestyle and is living in a healthy environment where he is taken care of constantly. Learned counsel submits that the minor child is well adjusted to the atmosphere, has become accustomed to the day to day routine of life, is doing well in academics as well as in extra curriculum activities and has got his routes embedded in India, hence, separating him from his mother and forcefully sending him to USA will have an adverse effect on the mental and physical well-being of the minor child.

28. In his rejoinder arguments, Mr.Sahay, learned counsel for the petitioner has sought to rebut the contentions of the respondent no.4 by submitting on the following lines:

28.1 Learned counsel submits that the present writ petition is maintainable as the Supreme Court as well as this Court has repeatedly allowed *habeas corpus* petitions based upon interim orders of foreign courts. He contends that the order of the Foreign Court conforms to Section 13 of the Code as it (1) has been passed by a court of competent jurisdiction; (2) is based upon the merits of the case; (3) the Foreign Court has taken a correct view of International Law; (4) complies with principles of natural justice; (5) is not obtained by fraud; and (6) does not sustain a claim on a breach of any law in force in India. In response to the submissions that the order of the Foreign Court was passed without affording an opportunity to the respondent no.4 to present her case, it is submitted that the respondent no.4 was issued summons by the Foreign Court. Pursuant thereto a written response was filed by the respondent no.4. Respondent no.4 was granted opportunity to present her case in person or through phone/video-conference. It has been submitted that the US embassies and consulates routinely approve visas of litigants looking to attend court proceedings in the US. Thus, the

proceedings by the Foreign Court were in consonance with the principles of natural justice as respondent no.4 was provided ample opportunity by the court to defend her case. Mr.Sahay has also drawn the attention of this Court to Section 3012 of the California Family Code, which reads as under:

“3012. (a) If a party’s deportation or detention by the United States Immigration and Customs Enforcement of the Department of Homeland Security will have a material effect on his or her ability, or anticipated ability, to appear in person at a child custody proceeding, the court shall, upon motion of the party, allow the party to present testimony and evidence and participate in mandatory child custody mediation by electronic means, including, but not limited to, telephone, video teleconferencing, or other electronic means that provide remote access to the hearing, to the extent that this technology is reasonably available to the court and protects the due process rights of all parties.

(b) This section does not authorize the use of electronic recording for the purpose of taking the official record of these proceedings.”

(Emphasis Supplied)

28.2 Closely connected to the previous submission, is the contention of Mr.Sahay that it was never the intent of the respondent no.4 to return to the US. The petitioner never denied her the visa to the USA and it was her voluntary decision to separate the minor child from the father. He reiterated his contention that the respondent no.4 is treating the minor child like chattel and thus, is not acting in the interest of the welfare of the child.

28.3 Mr.Sahay submits that neither ***Dhanwanti Joshi (Supra)*** nor ***Ruchi Majoo (Supra)*** have any bearing on the present matter as both the cases were not of *habeas corpus* petitions. He further submits that in the present case, it was the petitioner who approached the competent

court of law in the first instance and obtained a favourable order and therefore, the present petition should be allowed. He fortifies his argument by relying upon paragraphs 36, 50, 51 and 52 of the judgment in *Surya Vadan*an (Supra).

29. We have heard the learned counsel for the parties and carefully considered their rival contentions.
30. Prior to dealing with the rival contentions of the parties, we deem it appropriate to analyse the judicial precedents upon the subject.
31. In the often-cited judgment of the Supreme Court in *Smt. Surinder Kaur Sandhu* (Supra), the parties got married in 1975 and were living in England, where the child was born. The father/respondent therein had previously offered solicitation for the commission of his wife's murder and had been sentenced to a term of three years for the offence. Interestingly, the wife/appellant therein had been magnanimous and secured the probation order of her husband. While the husband was out of jail, he abused his freedom and brought the minor child of about 8 years of age to India. The mother after obtaining a favourable custody order from the High Court of Justice (Family Division), filed a writ petition before the High Court seeking the production and custody of the minor child. The High Court dismissed the petition and the mother approached the Supreme Court. The Division Bench of the Supreme Court set-aside the order of the High Court after considering the welfare of the child and the principle of 'most intimate contact'. Chandrachud C.J., giving the opinion for the bench, observed 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 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 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. ...”

(Emphasis Supplied)

32. The Supreme Court in *Mrs. Elizabeth Dinshaw (Supra)* was faced with the unsavoury situation wherein one of the spouses had brought the child to India in contravention of an order of the competent foreign court. The spouses before the Court were divorced and the custody of the child had been granted to the mother/petitioner therein. The father, who was granted visitation rights to the child, took advantage of one such visit and brought the child to India. This was done in contravention of a direction of the foreign court that if the father wished to travel outside of US, he shall seek the permission of the court. The mother filed a petition before the Apex Court seeking the issuance of the writ of *habeas corpus* for production of the child and handing over his custody as per the order of the foreign court. The court observed that:

“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 the parties but on the sole

and predominant criterion of what would best serve the interest and welfare of the minor.”

33. Even though the word used is ‘sole’, it is clear that the Supreme Court did not reject or intend to reject other principles at play [See ***Surya Vadanan (Supra)*** (footnote 11)]. The Court first ascertained welfare of the child and came to the conclusion that the child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environment prevailing in the place of his origin, i.e. United States. The Court, relying upon the judgment in ***In Re H. (infants)***, (1966) 1 All ER 886, went on to hold that “*it was the duty of the 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 held that it will be in the best interests of the minor that he is sent back to the US with the mother, the Court ultimately repatriated the child.
34. The factual matrix of ***Dhanwanti Joshi (Supra)*** is quite chequered to say the least, as the spouses therein were involved in multiple litigations against each other. Both parties had been fighting tooth and nail for the custody of their child. Though the Supreme Court was dealing with two appeals, we are only concerned with the one pertaining to the custody of the child. The mother/appellant therein had won the first two rounds of litigation, i.e. a *habeas corpus* petition before the Bombay High Court in 1986 and another proceeding under S.13 of the Guardians and Wards Act, which had gone upto the Supreme Court. Thereafter, a second round of custody proceedings was initiated by the respondent father taking advantage of an observation in the order of the Supreme Court. In the second round, the father succeeded before the Family Court and the High Court. This led

to the mother filing an appeal before the Supreme Court. The Apex Court reiterated the paramount consideration of the welfare of the child and went on to hold that any court in which the child has been removed could conduct (1) a summary enquiry or (2) an elaborate enquiry. The relevant portion of the order reads as under:

29. ...In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land and removed to another country where, maybe, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, — for these are all acts which could psychologically disturb the child. Again the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed. In that event, the unauthorised removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the removal and

independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. (See Rayden & Jackson, 15th Edn., 1988, pp. 1477-79; Bromley, Family law, 7th Edn., 1987.) In R. (minors) (wardship : jurisdiction), Re [(1981 2 FLR 416 (CA))] it has been firmly held that the concept of forum conveniens has no place in wardship jurisdiction.

30. ... Be that as it may, the general principles laid down in McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942] and J v. C [1970 AC 668 : (1969) 1 All ER 788 : (1969) 2 WLR 540] and the distinction between summary and elaborate inquiries as stated in L. (infants), Re [(1974) 1 All ER 913, CA] 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.

...

33. So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is 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 consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942] unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in L., Re[(1974) 1 All ER 913, CA] . As recently as 1996-1997, it has been held in P (A minor) (Child Abduction: Non-Convention Country), Re [(1996) 3 FCR 233, CA] : by Ward, L.J. [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence — which was not a party to the Hague Convention, 1980, — the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also A (A minor) (Abduction: Non-Convention Country) [Re, The Times 3-7-97 by Ward, L.J. (CA) (quoted in Current Law,

August 1997, p. 13]. This answers the contention relating to removal of the child from USA.”

(Emphasis Supplied)

35. Ultimately, the Supreme Court after considering the fact that the minor child had lived with his mother in India for 12 years, went ahead with an elaborate enquiry and held that the welfare of the child outweighed the fact that the child had been removed in contravention of an order of a foreign court.
36. We may note another aspect considered in ***Dhanwanti Joshi (Supra)***. The Supreme Court noticed that the Family Court and the High Court had based their decisions on the “*sole circumstance regarding the financial capacity of the father to give better education to the boy in USA.*” This reasoning did not find favour with the Division Bench of the Supreme Court, which opined as under:

“22. We shall next consider the point which solely appealed to the Family Court and the High Court in the present proceedings namely that the respondent is financially well off and can take care of the child better and give him superior education in USA. Lindley, L.J. in McGrath (infants), Re[(1893) 1 Ch 143 : 62 LJ Ch 208] Ch at p. 148 stated that:

“... the welfare of the child is not to be measured by money alone nor by physical comfort only. The word ‘welfare’ must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”

23. As to the “secondary” nature of material considerations, Hardy Boys, J. of the New Zealand Court said in Walker v. Walker & Harrison [1981 New Ze Recent Law 257] (cited by British Law Commission, Working Paper No. 96, para 6.10):

“Welfare is an all-encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that

good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents.”

24. From the above, it is clear that the High Court in the case before us was clearly in error in giving sole or more importance to the superior financial capacity of the husband as stated by him in his evidence. Assuming that his financial capacity is superior to that of his wife, that in our opinion cannot be the sole ground for disturbing the child from his mother's custody. As of today, the child is getting good education and is doing well in his studies. The proposal of an immediate American education which the father is prepared to finance cannot, in our opinion, be a sufficient ground for shifting the child to the father's custody, ignoring the fact that for the last more than 12 years, the child has been in the mother's custody. ...”

(Emphasis Supplied)

37. A Full Bench of the Supreme Court in **V. Ravi Chandran (Supra)** was once again confronted with a matter in which mother had brought the child to India in clear violation of a consent order of the Family Court of the State of New York. The New York Court had taken strong notice of such transgression and immediately granted sole custody to the father. The father/petitioner had approached the Supreme Court by filing a petition seeking the writ of *habeas corpus*. The Apex Court once again discussed the law as to when an elaborate enquiry is warranted and when the courts are justified in holding a summary enquiry. R.M. Lodha, J., giving the opinion for the bench, concluded as under:

“29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their

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

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in *McKee v. McKee* [1951 AC 352 : (1951) 1 All ER 942 (PC)] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in *L (Minors)*, *In re* [(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] and the said view has been approved by this Court in *Dhanwanti Joshi* [(1998) 1 SCC 112]. Similar view taken by the Court of Appeal in *H. (Infants)*, *In re* [(1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)] has been approved by this Court in *Elizabeth Dinshaw* [(1987) 1 SCC 42 : 1987 SCC (Cri) 13].”

(Emphasis Supplied)

38. The Full Bench went on to hold that an elaborate enquiry was not

warranted in the case, in view of the fact that the order of the foreign court which was violated, was a consent order; the courts were moved promptly by the father; the mother was repeatedly changing cities which was sole reason for delay of two years and it further restrained the child from developing roots in India. The court adhered to the principle of comity of courts and directed the child to be returned to his native jurisdiction.

39. The mother (appellant before the Supreme Court) in *Shilpa Aggarwal (Supra)* had brought the minor child to India from the United Kingdom with an intent to return, but she cancelled her tickets just two days prior to the scheduled return. Prior to the incident, the spouses were residing in the UK and had set-up their matrimonial home there. The father promptly moved before the foreign court and obtained an interim order in his favour. The father filed a petition seeking the writ of *habeas corpus* before this Court, which directed the mother to return to the jurisdiction of the foreign court and join the proceedings there. The mother preferred an appeal before the Supreme Court, which found itself between two ‘contrasting principles’, i.e. the interest of the child and the principle of ‘comity of courts’. The Apex Court concurred with the decision of the High Court that it was the foreign court which was closest to the issue owing to the fact that the parties had set-up their matrimonial home there, both the parties were working there, the minor child held a British passport, the parents had acquired permanent residence status and that the foreign court had taken into consideration the welfare of the child. It also took note of the fact that the order of the foreign court was merely an interim order directing the mother to return to its jurisdiction; it did not even separate the child from the mother until a final decision was taken with regard to the custody.

Taking these factors into consideration, the Court directed the parties to return to the United Kingdom.

40. The spouses engrossed in litigation in ***Ruchi Majoo (Supra)***, who were staying in US and had parted ways while on a vacation in India. The father/respondent went back to US, while the mother/appellant remained in India. Both Indian and foreign court exercised jurisdiction in custody petitions and passed contradictory orders. In this background, the order of the Indian Guardian Court was challenged by the father before this Court, which quashed the proceedings before the Indian Guardian Court on the sole ground that it lacked jurisdiction in the matter. The mother appealed to the Supreme Court. Three questions were framed by the Court; we are only concerned with the second, i.e. “*whether the High Court was right in declining exercise of jurisdiction on the principle of comity of courts.*” The Court reiterated the principle that the welfare of the minor was of paramount importance and the order of the foreign court was to be taken only as an input. The relevant paragraphs read as under:

47. Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Civil Procedure, 1908 as amended by the Amendment Acts of 1999 and 2002. The duty of a court exercising its parens patriae jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however,

mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision. Judicial pronouncements on the subject are not on virgin ground. A long line of decisions of the Court has settled the approach to be adopted in such matters. The plentitude of pronouncements also leaves a cleavage in the opinions on certain aspects that need to be settled authoritatively in an appropriate case.

...
57. We do not propose to burden this judgment by referring to a long line of other decisions which have been delivered on the subject, for they do not in our opinion state the law differently from what has been stated in the decisions already referred to by us. What, however, needs to be stated for the sake of a clear understanding of the legal position is that the cases to which we have drawn attention, as indeed any other case raising the question of jurisdiction of the court to determine mutual rights and obligations of the parties, including the question whether a court otherwise competent to entertain the proceedings concerning the custody of the minor, ought to hold a summary or a detailed enquiry into the matter and whether it ought to decline jurisdiction on the principle of comity of nations or the test of the closest contact evolved by this Court in Surinder Kaur Sandhu v. Harbax Singh Sandhu[(1984) 3 SCC 698 : 1984 SCC (Cri) 464] have arisen either out of writ proceedings filed by the aggrieved party in the High Court or this Court or out of proceedings under the Guardians and Wards Act. The decisions rendered by this Court in Elizabeth Dinshaw v. Arvand M. Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Cri) 13] , Sarita Sharma case [(2000) 3 SCC 14 : 2000 SCC (Cri) 568] , V. Ravi Chandran case [(2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] and Shilpa Aggarwal case [(2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192] arose out of proceedings in the nature of habeas corpus. The rest had their origin in custody proceedings launched under the Guardians and Wards Act.

58. Proceedings in the nature of habeas corpus are summary in nature, where the legality of the detention of the alleged detenu is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon

a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views the rival claims, if any, to such custody.

59. The Court may also direct repatriation of the minor child to the country from where he/she may have been removed by a parent or other person; as was directed by this Court in Ravi Chandran [(2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] and Shilpa Aggarwal [(2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192] cases or refuse to do so as was the position in Sarita Sharma case [(2000) 3 SCC 14 : 2000 SCC (Cri) 568] . What is important is that so long as the alleged detenu is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenu is within its territorial jurisdiction.

63. ... What needs to be examined is whether the High Court was right in relying upon the principle of comity of courts and dismissing the application. Our answer is in the negative. The reasons are not far to seek. The first and foremost of them being that “comity of courts” principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. The decisions of this Court in Dhanwanti Joshi [(1998) 1 SCC 112] , and Sarita Sharma [(2000) 3 SCC 14 : 2000 SCC (Cri) 568] cases clearly support that proposition.”

(Emphasis Supplied)

41. The Court went on to hold that the interest of the minor would be better

served if he continued in the custody of the mother. While coming to this decision, the factors playing in the mind of the Court were that there was no violation of the foreign order; the child had been studying in an Indian school for nearly three years and was well settled; the only real concern of the father was that the child be educated in US and not his actual custody.

42. In *Arathi Bandi v. Bandi Jagadrakshaka Rao*, (2013) 15 SCC 790, the Supreme Court once again reiterated the principle that the courts may deny relief to a person who comes to India in defiance of orders of the foreign court. Interestingly, the mother had not even complied with the orders of the High Court which led to the High Court issuing non-bailing warrants against the mother. The Supreme Court declined to intervene and further held that it was the duty of the 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 wrongdoing.
43. The Supreme Court has reiterated the principles at play in such matters recently in the case of *Surya Vadanana (Supra)*. The father therein had approached the Apex Court aggrieved by the refusal by the Madras High Court to issue a writ of *habeas corpus* to order the return of his two minor daughters to the UK. Both the minor daughters were British citizens and the mother had also acquired British citizenship after marriage. The mother had brought the daughters along with her to India and surreptitiously initiated divorce proceedings, though no effective orders were passed therein. The father promptly moved before the High Court of Justice in UK, which made the children wards of the court and directed the mother to return the children to its jurisdiction. It is pertinent to note that the interim order of the foreign court merely directed the children to be returned to its jurisdiction, but

did not decide the issue of interim custody, which was to remain with the mother. Since the mother did not return to UK, the father filed a writ petition before the Madras High Court, which dismissed the petition. The Division Bench of the Supreme Court, after considering the recent pronouncements, concluded as under:

- (i) That the interest and the welfare of the child are of paramount importance.
- (ii) The major contrasting principles before the Court are the principle of 'comity of courts' and the best interest and the welfare of the minor.
- (iii) The 'most intimate contact' doctrine and the 'closest concern' doctrine are alive and the domestic court should not take upon itself the onerous task of ascertaining the welfare of the minor child when the foreign court may have the most intimate contact and closest concern with the child. In such circumstances, the foreign court would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child had been brought up.
- (iv) The principle of 'comity of courts' should not be jettisoned except for special and compelling reasons. Interim or interlocutory order of a foreign court may be ignored in very few situations.
- (v) If the jurisdiction of the foreign court is not in doubt, the 'first strike' principle would be applicable, i.e. due weight is to be given to an order prior in point of time.
- (vi) Defiance of an interim or interlocutory order should be viewed strictly as the same will have widespread deleterious effects upon the authority of the courts. This is so owing to the nature of the

order itself, as it is subject to modification or vacation by the court that passes the order, i.e. there is no finality attached to the order.

(vii) The courts may choose to have a summary enquiry without going into the merits of the dispute and repatriate the child or may conduct an elaborate enquiry into the welfare and the best interests of the child. If there is a pre-existing order of the foreign court, the domestic court may conduct an elaborate enquiry only for special reasons taking into consideration the nature and effect of the foreign court; existence of special reasons; repatriation should not cause any moral or physical or social or cultural or psychological harm to the child nor should any legal harm come upon the parent; and finally the alacrity with which the foreign court was moved.

44. Considering the above factors, the Apex Court found that the foreign court had the most intimate contact with the children; the mother had taken no serious efforts in obtaining an order in India; the principle of 'first strike' was in favour of the father/appellant; the order of the foreign court was only interim or interlocutory; and that no prejudice would be caused to the children or to the mother in subjecting them to the jurisdiction of the foreign court. Consequently, the Supreme Court refused to conduct an elaborate enquiry into the matter as it found that it would be in the best interests of the children that such an enquiry was undertaken by the foreign court.
45. We may also note two decisions of a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in **Anand Raghavan (Supra)** and **Shilpi Gupta (Supra)**. In the former, the spouses had after marriage made their marital home in UK; had taken up vocations

there; the child was born there and even the mother had taken permanent residency. The mother came to India with the minor child and severed all contact with the father/petitioner therein. The father had approached this Court seeking a writ of *habeas corpus* after obtaining a custody order from the foreign court. This court finding that there were no special reasons for ignoring the concept of ‘comity of courts’ and that the foreign court had the most intimate contact and the closest concern with the issues directed the repatriation of the child. At the same time, the Court found that the best interest of the child would be in her repatriation. We may also note that the mother has preferred a petition by special leave before the Supreme Court [SLP (Crl.) 5751/2016] and the judgment has been reserved in the same.

46. Similarly in *Shilpi Gupta (Supra)*, this Court repatriated the son, who had been brought to India by the father, to the jurisdiction of the US finding no reason to jettison the principle of ‘comity of courts’ and that the foreign court had the most intimate contact and the closest concern with the issues. The factual matrix therein was also similar to *Anand Raghavan (Supra)* as the spouses had made the US their home, both were employed there and both the children were also foreign citizens having been brought up there. This judgment has also been challenged before the Supreme Court in SLP (Crl.) 3743/2016 and the judgment has been reserved.
47. From the foregoing discussion, it is clear that while deciding matters wherein the question of the custody of a minor child is involved and one spouse is armed with an order of the foreign court, the court must consider numerous factors and may not blindly adhere to the order of the foreign court. The first aspect to be considered is whether the domestic court has the jurisdiction to entertain the matter, which in the

case of a petition seeking the writ of *habeas corpus* arises as soon as it is found that the minor is within its jurisdiction.

48. Thereafter, it is settled law that the interests and welfare of the child are of paramount importance. Then the courts must ascertain as to whether an elaborate enquiry into the welfare of the minor is called for or to repatriate the minor and the spouses to contest before the foreign court. If there is already an order of the foreign court, the enquiry may only be conducted for special and compelling reasons as stated in ***Surya Vadan*** (**Supra**) (paragraph 56). We also note that the Indian Courts have taken a strong stand against removal of minor in violation of court order, that is to say, when the child was removed from the jurisdiction of a foreign court, there was already an existing order (interim or otherwise) of a foreign court. In such circumstances, the Courts must ensure that the violator of the law should not advantage by such violation [See ***Mrs. Elizabeth Dinshaw*** (**Supra**) and ***Arathi Bandi*** (**Supra**)].
49. The next principle at play is the ‘most intimate contact’ doctrine and ‘closest concern’ doctrine. These doctrines are components of the modern theory of Conflict of Laws, in as much as, a court which has the most closest concern and most intimate contact with the issues arising in the case, may fruitfully exercise its jurisdiction in the case. The other court, which is far distant from the issues, may not take upon itself the onerous task of ascertaining the welfare of the child. This self-restraint by the court, less connected with the issues, would be in the best interests of the minor himself.
50. In cases where both the parents have initiated proceedings in their respective countries, the principle of ‘first strike’ comes into the fray provided the jurisdiction of the Foreign Court is not in doubt. The

substantive order which was passed prior in point of time should be given due respect and weight over the subsequent order.

51. The nature of the foreign order should also be taken into consideration. The Courts have taken a lenient view in matters wherein the foreign order was an interim order merely directing the spouse, who had come to India, to return to its jurisdiction. This is because the question of interim custody also remains open to be contested once both the parties appear before the foreign court.
52. Moreover, if the Indian Court based on the facts of the case has come to the conclusion that an elaborate enquiry is called for taking into the order of the foreign court as only one of the inputs for the same, the Court is duty-bound to consider the interests and welfare of the minor child.
53. Accordingly, the present petition is also to be decided upon the touchstone of the foregoing principles. Upon considering the rival contentions of the parties and going through the pleading and documents filed by the parties, the following facts emerge:
 - 53.1 The petitioner and the respondent no.4 got married on 20.04.2008 and since May, 2008 resided in California, USA. The respondent no.4 acquired H4 visa, being the dependent family member of the petitioner herein. The marriage of the parties was quite turbulent to say the least. The minor child was born on 22.04.2009 and is a natural born US citizen.
 - 53.2 While in USA, the respondent no.4 appeared in the entrance exams for the dental course on two occasions but was unable to secure admission to any institute.
 - 53.3 On 25.10.2010 or 26.10.2010, the respondent no.4 along with the minor child came to India while holding return tickets for the month of

January, 2011. It was the petitioner who dropped the respondent no.4 and the child to the airport and handed her US \$100 after withdrawing the same from a nearby ATM. While in India, the H4 visa of the respondent no.4 expired. Consequently, the respondent no.4 started requesting the petitioner to send the requisite documents to get her visa extended, but the petitioner ignored all such requests. Owing to this factor, the respondent no.4 was unable to return to the USA in the month of January, 2011. The respondent no.4 kept extending her tickets in the hope that the visa will be sponsored by the petitioner but as the petitioner did not send the necessary documents for her visa, she was left with no option but to cancel the same. The respondent no.4 also claims to have filled the form for her third attempt at the entrance exams scheduled on 23.04.2011, which she missed as she was unable to travel to the US. We deem it appropriate to reproduce the emails placed on record, which read as under:

Email dated 01.04.2011 sent by the respondent no.4 to the petitioner:

“chandan,

I have been making calls on your cell phone since the last two days and you are avoiding it.i even left voice message on your phone.

Today is 1st of april and my ticket is for the 13th of april 2011 to US .i have informed you about this much before. My exams are scheduled for the 23rd of april(i took the date only after you agreed with the date). my ticket is valid only till the 25th of april.

i came to india to prepare for exams with everybody's permission. tension in the family was brewing up regarding my NBDE exams and u are well aware of it.

just let me know what is your stand on my coming back to usa and also regarding my exam.

hope you will reply to this email.

radhika”

(Emphasis Supplied)

Email dated 08.04.2011 sent by the respondent no.4 to the petitioner:

*“chandan
why do u stop taking the call and how is it going to resolve
issues.
neither are you sending archits birth certificate nor are you
sending your papers so that i can schedule an interview and get
my visa re-stamped.
instead u are resorting to immature act of bringing this issue in
public.
can u just reply as why are you delaying in sending the papers.*

radhika”

(Emphasis Supplied)

Email dated 10.04.2011 sent by the respondent no.4 to the petitioner:

*“you are not taking the call . you didn't even send any papers. r
u in CA? at least respond to the email.
i have been calling the home phone also. r u somewhere else.*

radhika”

(Emphasis Supplied)

Email dated 05.09.2011 sent by the respondent no.4 to the petitioner:

*“chandan,

when will u send the papers so that i can get my H4 visa re-
stamped?*

radhika”

(Emphasis Supplied)

Email dated 20.10.2011 sent by the respondent no.4 to the airlines:

“Hi,

*This is to inform you that due to visa constraints I would like to
cancel my ticket to SFO bearing reference number MD3W5L.*

*Thanks,
Radhika”*

(Emphasis Supplied)

Reply email dated 20.10.2011 sent by the airlines to the respondent no.4:

“Dear Ms Sinha

This is with reference to your email below.

Please advise if you want us to release the booking held for 24 Oct 11.

Refund would need to be processed by your ticketing agent in US.

Appreciate your quick revert.

Thanks and regards

*Shampa
SIA Kolkata”*

Reply sent on the same date by the respondent no.4 to the airlines:

“Yeah kindly release the booking. As said in the previous mail I don't have a visa to travel at this point of time. I will check for refund when I reach US later.

*Thanks,
Radhika”*

(Emphasis Supplied)

53.4 The foregoing emails clearly show that it was the intention of the respondent no.4 to return to the USA all the while and was prevented only owing to the denial by the petitioner to sponsor her visa.

53.5 Not only did the petitioner not respond to the Emails sent by his wife/respondent no.4, the petitioner also showed no interest in the return of his minor son. The Emails also reflect the fact that the petitioner was not interested to interact with his minor son which is evident from the fact that despite the respondent no.4 pleading to her

husband to respond, the petitioner maintained cold silence and was busy consulting lawyers in the USA.

53.6 Meanwhile in April 2011, the petitioner initiated proceedings before the Foreign Court seeking the custody of the minor child. He was unable to serve the respondent no.4 allegedly owing to the fact that she kept changing her residence. When the respondent no.4 returned to India, she initially lived with her parents in Bhagalpur; later she moved to Patna from January, 2011 to July, 2012. She briefly went to Chennai to live with her sister. Since by this juncture, the respondent no.4 had decided to move on with her life, she took admissions in K.J. Somaya College, Bombay in MBA (F) Course and accordingly, shifted to Mumbai in August, 2012. The minor child was admitted in a Pre-school in Mumbai and later in Ryan International School, Mumbai. After finishing her studies, she shifted to Delhi in April, 2014 along with the minor child. The minor child has since been admitted to Ryan International School, Delhi.

53.7 It has been the stand of the respondent no.4 that the petitioner was kept aware about the whereabouts of the minor child. This submission seems to be true as it has been admitted that the parents of the petitioner attended the *mundan* ceremony of the minor child held on 12.03.2012 at Deoghar Temple. The petitioner has also innocuously placed an email conversation with the respondent no.4 on 14.05.2012 on record with his rejoinder affidavit, wherein the respondent no.4 had clearly informed the petitioner that she was currently in Thoraipakkam area in Chennai and any communications to her can be sent to her parents' residence. All the while, the respondent no.4 did not sever access between the petitioner and the minor child as, admittedly, between July 2013-August 2014, the petitioner was in touch with the

child on Skype and telephone.

- 53.8 The respondent no.4 has also initiated proceedings before the Family Court, Patna seeking restitution of conjugal rights as well as a petition *inter alia* with a prayer to be declared the sole guardian of the minor child. Ironically, it is the case of the respondent no.4 that she was unable to serve the petitioner as he never disclosed his whereabouts. Communications have also been placed on record to show that the respondent no.4 kept asking for the residential address of the petitioner to no avail. No effective orders have been passed by the Indian Court till date.
- 53.9 The respondent no.4 also filed a written response before the Foreign Court on 30.05.2013 highlighting her plight that she had been denied documents to enable her to travel to the USA and that arrangements could be made for both the mother and child to return together. On 13.06.2013, the Foreign Court ordered that the child be returned to the USA and granted the custody to the petitioner herein with supervised visitation rights to the respondent no.4. We also note that none of the submissions made by the respondent no.4 in her written response have been considered by the Foreign Court.
- 53.10 The petitioner claims to have been requesting the respondent no.4 to comply with the order ever since, but the respondent no.4 refused to comply with the same. It is claimed that it was only on 06.08.2014 that the petitioner learnt about the whereabouts of the respondent no.4 and the minor child. He sent a complaint to the Commissioner of Police, Delhi on 12.12.2014 and later initiated the present proceedings on 07.05.2015.
54. From the foregoing, it is patent that it was the petitioner who was the first to approach a court of law seeking the custody of the minor child

and secure a favourable order. We also note that the order of the Foreign Court is an interim order subject to variations. No doubt the principles of 'comity of court' and 'first strike' weigh in favour the petitioner, but we find certain special reasons for not repatriating the child.

55. Though the order of the Foreign Court is interim in nature and subject to variation; but effectively, the order has sealed the fate of the respondent no.4. Without a visa to travel to the USA, it would be impossible for the respondent no.4 to return. Any attempt might lead to her being separated from her child, who she has brought up single-handedly from 2010 onwards if not from birth, and at the same time face detention being an illegal immigrant. This would cause serious legal harm upon her. We may also note that the child has never stayed away from his mother and atleast since 2010 been taken care of by her.
56. The present proceedings reveal certain unpleasant facts which would incline us towards the need for an elaborate enquiry. The pleadings and the documents on record reveal that it was the petitioner who deserted the respondent no.4 in India. The respondent no.4 was all along interested in returning to the US, but was unable to do so owing to the refusal of the petitioner to provide her with the requisite documents to renew her visa. The petitioner, all the while, attempted to ensure the return of the minor child to the USA and isolate the respondent no.4 in India. There seems to be credence in the submission of Mr.Shah that the petitioner was acting upon a unholy plan to isolate the respondent no.4 in India and keep the minor child with himself. It is clear that it was the petitioner who did not act in the best interests of the child and dealt with him like a ball to be bounced around between the mother and the father.

57. It seems the petitioner was uninterested during the crucial years of the development of the child when the mother/respondent no.4 had single handedly taken care of the child in the absence and cold silence from the end of the father/petitioner who did not even respond to the Email and telephone calls from the respondent no.4. The dismal attitude and the lack of interest of the petitioner in his own child is writ large on the fact that he did not even attend the *mundan* ceremony of the child, which is an important ceremony in the life of any child, even though his parents were present. The only explanation forthcoming for his conspicuous absence is his fear that coming to India would lead to him being falsely implicated in a criminal case. This is clearly an afterthought as the conduct of the respondent no.4 would betray any apprehensions which might have harboured in the mind of the petitioner. The respondent no.4, who has brought up the child alone initially with no source of income and without claiming maintenance in India, has not initiated any criminal proceedings till date and has also made an application under S.22 of the Special Marriage Act, 1954 seeking restitution of conjugal rights.
58. *Prima facie* we feel that incase the petitioner had love and concern for his son, he would have voluntarily provided financial support but, on the contrary, it seems that he was least concerned with the upbringing of the child; who was brought up by his wife/respondent no.4 with the help of her parents, both of whom are teachers. Love and concern for the welfare of the child seem to have suddenly sprung up in the mind of the petitioner.
59. The petitioner even failed to approach the courts with any alacrity raising serious doubt upon his sincerity. Admittedly, the Foreign Court had passed the custody order on 13.06.2013, while the petitioner had

approached the authorities in India in December, 2014 and this Court in May, 2015. The only explanation for such delay is that until the Skype conversation on 06.08.2014, the petitioner did not know the whereabouts of the respondent no.4 and the child. This same did not hinder his capacity to move to the Supreme Court seeking a pan-India search. Additionally, the written response filed by respondent no. 4 before the Foreign Court clearly states that the respondent no.4 was residing at Tilaknagar, Mumbai.

60. Learned counsel for the petitioner had contended that the respondent no.4 had submitted to the jurisdiction of the Foreign Court by filing her written response; but we are unable to accept this submission. Upon going through the response, it is patent that the same cannot be said to be a submission to the jurisdiction of the Foreign Court as the respondent no.4 had merely highlighted her precarious position and requested the assistance of the Foreign Court to participate in the proceedings. Admittedly, she was unable to participate in the proceedings, which led to the passing of the order dated 13.06.2013. Thus, the filing of the response can, by no means, be said to be a submission to the jurisdiction of the Foreign Court.
61. Thus, we proceed to analyse where the welfare of the child lies. The child is settled in India since 2010. We have also gone through the academic and co-curricular record of the minor child. The records show that good care is being taken care of the minor child. Quality education is being provided to the child and has adjusted to the lifestyle in India. He has been learning tennis, karate, football and cricket. Thus, we are of the opinion that *prima facie* it appears that the child has developed roots in India.
62. To handover the custody of the child, who has spent the past 6 years in

the care of the mother/respondent no.4, to the petitioner to be taken to a foreign land with no familiar face, unfamiliar surroundings, culture, festivals would do much harm to the child and in our view, would not be in the interest of the welfare of the child. Further to send the child to the land where his mother cannot even enter in the absence of a visa, which was denied by the petitioner himself would not only be cruel to the child, but also to the mother/respondent no.4. Any contest in a foreign court between the petitioner, who holds a Green Card (permanent residence permit), secured job and backing of family and friends in addition to being armed with the order of the Foreign Court, on one hand; and the respondent no.4 without a visa, job, funds, security and familial support on the other hand would inevitably tilt the scales of justice unfairly on one side placing her on an unequal footing.

63. The child has been in India for a considerable period of time and was less than 2 years of age when he was brought to India. He has had all his education in India and turned 8 on 22.04.2009. He is well taken care of by the respondent no.4, without any support from the petitioner. Thus, it is clear that the domestic courts in India would have much closer concern and intimate contact with the minor child and the issues arising than the US Courts.
64. Even the contentions of Mr.Sahay as to the welfare of the child circle around the financial capacity of the petitioner and brighter prospects of the minor child in the USA. It cannot be forgotten that 'welfare' is an all-encompassing term, it cannot be measured by financial means or superior education alone. Such specious arguments have already been rejected by the Supreme Court in ***Dhanwanti Joshi (Supra)*** and ***Ruchi Majoo (Supra)***. We also find that the submission of Mr.Sahay that the said judgments do not come to the aid of the respondent no.4 is

misplaced as, even though both the judgments were not petitions of *habeas corpus*, the same does not reduce the precedential value of the same as to the factors to be considered for ascertaining the welfare of the minor child.

65. In the light of all these circumstances, repatriation of the minor child pursuant to a summary enquiry does not seem feasible in the interest of the welfare of the minor child. An elaborate enquiry is called for. At this juncture, we are faced by two alternatives: first, to conduct an elaborate enquiry ourselves and second, to relegate the parties to the Family Court. Though there is no legal bar in conducting the enquiry by this Court in a petition seeking the writ of *habeas corpus*, at the same time, this Court might not be the best forum to ascertain the welfare of the minor, which would be better adjudged by a Family Court. We have already held that the principle of ‘comity of courts’ does not seem to be a viable option to be exercised at this juncture and *prima facie* the welfare of the child would be better served if he continued in the custody of the respondent no.4/mother, especially when it was the petitioner who has repeatedly acted contrary to the best interests of the minor.
66. Thus, having regard to the best interests and welfare of the child, the present writ petition is dismissed. The minor child shall continue to remain in the custody of the mother. An elaborate enquiry is called for, which can be best conducted by a Family Court. Accordingly, the parties are at liberty to get the question of guardianship and custody decided before a competent family court within India pursuant to an elaborate enquiry to ascertain where the welfare of the minor would be best served.
67. The writ petition is dismissed with costs. The legal fee of the counsel

for the respondent no.4 is fixed at Rs.25,000/- to be paid by the petitioner within 4 weeks.

68. Further, both parties are directed to disclose their present addresses by filing an affidavit within 2 weeks.

G.S.SISTANI, J.

MAY 8th, 2017
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VINOD GOEL, J.