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

+ **W.P.(Crl.) 2034/2017 & Crl.MA.No.19111/2017**

DIRSHAN VANMALI PATEL

..... Petitioner

Through: Mr.Anil Malhotra, Advocate with
Mr.Ranjit Malhotra, Mr.Rajat Bhalla, Advocates
with petitioner in person.

Versus

THE STATE GOVT OF NCT OF DELHI & ANR..... Respondents

Through: Mr.Rahul Mehra, Sr.Standing
Counsel with Mr.Tushar Sannu, Mr.Prashant
Singh, Mr.Chaitanya Gosain, Advocates for the
State along with S.I. Ashok Bhardwaj, P.S. Amar
Colony.

Mr.Prabhjit Jauhar, Advocate with Ms.Ankita
Gupta, Advocate for R-2.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE I.S. MEHTA**

ORDER
14.12.2017

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Dr. S. Muralidhar, J:

1. At the outset, Mr. Anil Malhotra, Advocate enters appearance on behalf of the Petitioner. His *vakalatnama* is taken on record.
2. This is a petition under Article 226 of the Constitution of India by a South African national seeking a writ of *habeas corpus* for the production of his minor daughter who is presently in the custody of his wife, Respondent No.2. He seeks the return of the child to South Africa.

3. The brief facts were set out in the very first order passed in this petition on 20th July, 2017 as under:

“The present petition has been filed by the petitioner under Article 226 of the Constitution of India seeking a writ of Habeas Corpus for production of his minor daughter aged 10 months, who is at present in the custody of respondent No.2, and also for her return to South Africa.

The petitioner is a citizen of South Africa. The marriage was solemnized between the petitioner and respondent No.2 on 23.06.2015 in India. Out of their wedlock, a girl child was born on 12.09.2016 in South Africa. Mr. Aggarwal, learned counsel for the petitioner submits that on the pretext of meeting her family, respondent No.2 removed the child from the lawful custody of the petitioner. Mr. Aggarwal also submits that being a citizen of South Africa, visa of the minor has expired.

Issue notice to the respondents to show-cause as to why the petition be not admitted. Learned counsel for the State accepts notice. Let notice be issued to respondent No.2, returnable on 01.08.2017.”

4. On 1st August 2017, the Court issued a number of directions in order to facilitate the conduct of mediation between the parties in a congenial atmosphere. Before setting out the said order, it is necessary to notice a few background facts from the point of view of Respondent No.2.

5. What is not in dispute between the parties is that the Petitioner and Respondent No.2 met through a website. Their marriage ceremony was performed in Gujarat on 23rd June, 2015. The marriage was registered in New Delhi on 26th June, 2015 under Section 5 of the Hindu Marriage Act, 1955 (‘HMA’). Respondent No.2 was at the time of marriage, as she is now,

residing with her parents in Lajpat Nagar, New Delhi.

6. It appears that sometime in October, 2015 Respondent No.2 went to South Africa to join the Petitioner in his house in Cape Town. A baby girl was born to the parties in Cape Town on 12th September, 2016.

7. According to the Respondent No.2, when the baby was just 12 days old, Respondent No.2 along with the baby and her parents, who were visiting, were evicted from the matrimonial home. However, this version is seriously disputed by the Petitioner. According to him, between 12th September, 2016 and 25th October 2016, Respondent No.2 along with the child and her parents continued to reside in the matrimonial home.

8. Be that as it may, what is not in dispute between the parties is that on 25th October 2016, Respondent No.2 along with her child who was at that time slightly over a month old, left Cape Town and returned to New Delhi with the consent of the Petitioner. The tickets for their air travel from Cape Town to New Delhi were admittedly purchased by the Petitioner. The Court's attention has been drawn to the visa application form and the consent provided by the Petitioner for the travel of his wife and his child to India "from 25th October, 2016 to 3rd January, 2017".

9. Within a month of arriving in India, Respondent No.2 instituted two sets of proceedings on 26th November, 2016. The first was a petition seeking divorce under Section 13 of the HMA. In the said petition, an application was also filed under Section 26 of the HMA for retention of the custody of the minor child. The second proceeding instituted by Respondent No.2

against the Petitioner was a petition under Section 12 of the Protection of Women From Domestic Violence Act, 2005 ('PWDV Act') in the Court of the Metropolitan Magistrate ('MM'), Saket. Notice was issued to the Petitioner in both sets of proceedings in November, 2016 itself. It must be noticed at this stage that while the Petitioner acknowledges having been served notice in the petition under Section 12 of the PWDV Act, he maintains that till date he has not been served with the notice in the petition and application under Sections 13 and 26 of HMA respectively pending in the Family Court, Saket. A third proceedings was instituted by Respondent No.2 against the Petitioner in the form of a criminal complaint giving rise to the registration of an FIR under Sections 498A, 406 and 377 of the IPC.

10. On his part, the Petitioner instituted divorce and custody proceedings in Cape Town in South Africa against Respondent No.2, the service of the notice of which the Respondent No.2 acknowledges. On her part, after receiving the notice of such proceedings in January 2017, Respondent No.2 approached the Family Court in Saket with a petition seeking an 'Anti-suit injunction' to restrain further proceedings in the Court in South Africa. Notice has been issued in those proceedings as well. The Petitioner confirms having been served with the said notice.

11. The Petitioner to begin with assailed the jurisdiction of the Court of learned MM to entertain the petition by Respondent No.2 under Section 12 of the PWDV Act. That application was dismissed by the learned MM. As of this date, that order of the learned MM has not been taken in appeal or revision.

12. Before the dismissal of the aforementioned application of the Petitioner by the learned MM, he filed the present petition which came up for hearing first on 20th July, 2017. It is in the above background that the following detailed order was passed by this Court on 1st August, 2017.

“This is a petition under Article 226 of the Constitution of India filed by the petitioner seeking the custody of his 10 months old daughter. Mr. Jauhar enters appearance on behalf of respondent no.2 and seeks time to file reply. However, having regard to the age of the child, who is at present with the mother, respondent no.2 herein and taking into consideration that the father is a citizen of South Africa, we are of the view that this is a fit case which should be sent for mediation. As expected, both the counsels have in principle agreed that a serious endeavour should be made to resolve the matter amicably keeping in mind the welfare of the child.

We had passed over the matter once to enable Mr. Aggarwal to seek instructions as to when it would be convenient for the petitioner to travel to India. Mr. Aggarwal has also expressed certain concerns on his travel as proceedings have been initiated by respondent no.2 under the Protection of Women from Domestic Violence Act and an FIR no.55/2017 has been registered against the petitioner and his parents. Mr. Aggarwal fears that should the petitioner visit India, there is a strong likelihood of the petitioner and his parents being harassed. Mr. Jauhar assures and undertakes to the Court that till the mediation proceedings are pending, should the petitioner enter India, the matter would not be precipitated and no steps would be taken for his arrest and he submits that the proceedings arising out of the FIR may be stayed.

Accordingly, the petition is adjourned to 11.09.2017, with the following agreed terms:

1. Both the parties are directed to remain present in Court on the next date of hearing;
2. It is agreed that when the petitioner enters India, he would communicate, through his counsel, with Mr. Jauhar to enable him to meet his child in the presence of the mother, who will ensure that the meeting is fruitful and cordial;
3. The proceedings arising out of the FIR no.55/2017 are stayed till further orders from this Court;
4. The petitioner shall deposit a sum of Rs.2.5 lakhs in the account of the respondent no.2 to be used for the welfare of the child;
5. This order of deposit is without prejudice to the rights and contentions of both the parties and subject to all legal pleas which either of the parties may raise in the appropriate court of jurisdiction;
6. Parties further agree that in the proceedings pending between them in India and South Africa, adjournments will be sought jointly to ensure that mediation proceedings are not hampered. No further pleadings will be filed. This is with a view to ensure that allegations and counter allegations may not stand in the way of an amicable resolution.

Since the order has been passed with the consent of the parties, we direct that the terms of the order would be fulfilled and complied in letter and spirit. We make it clear that any violation would be viewed strictly by this Court.

The matter would be taken up post-lunch on the next date of hearing.”

13. Thereafter, the mediation proceedings continued. The Petitioner flew down from South Africa for the last mediation proceedings which took place

on 11th and 12th December, 2017 at the Delhi High Court Mediation and Conciliation Centre. Both the parties have confirmed to the Court that the mediation proceedings have failed.

14. Mr. Anil Malhotra, learned counsel for the Petitioner, insisted that Respondent No.2 should now be asked to file a reply to the present petition and the Court should proceed to thereafter decide it on merits. In response to a query regarding the maintainability of the present petition, Mr. Malhotra referred to the decisions of the Supreme Court in *Dhanwanti Joshi v. Madhav Unde I* (1998) DMC 1 SC, *Dr. V. Ravichandran v. Union of India* (2010) 1 SCC 174, *Nithya Anand Raghavan v. State of NCT of Delhi* (2017) SCC Online 694. In addition, considerable reliance has been placed on the recent decision dated 16th November, 2017 of this Court in W.P.(Crl.) No. 374/2017 (*KG v. State of Delhi*).

15. According to Mr. Malhotra, in the present case, since the child was born in Cape Town in South Africa and is ordinarily a permanent resident of that place, it is only the Courts in South Africa that can decide 'the best interests of the child' and not a Court in India. At the same time, on the strength of the above decisions, Mr. Malhotra urges that the High Court should undertake what is termed in the decision of the Supreme Court in *Dr. V. Ravichandran v. Union of India* (*supra*) a 'summary enquiry' for the limited purpose of ordering that the child should be returned to the Petitioner in South Africa. According to him, it is the court in South Africa which will conduct the 'elaborate enquiry'. Mr Malhotra points out that the above legal position has been reiterated by the Supreme Court in *Nithya Anand*

Raghavan v. State of NCT of Delhi (supra).

16. Mr. Malhotra submits that Respondent No.2 ought to have invoked Sections 7 and 25 of the Guardians and Ward Act, 1890 ('GWA') for the custody of the child in the appropriate Court the jurisdiction of which had to be determined in terms of Section 9 GWA. According to him, such a petition would have been maintainable only if the minor child "ordinarily resided in India". He submitted that in the present case, the child cannot be said to be ordinarily residing in India but in Capetown in South Africa. He alleges that the Respondent No.2 has filed the custody application under Section 26 of the HMA only to somehow by pass the GWA.

17. According to Mr Malhotra, the Court which will undertake the aforementioned 'summary enquiry' to decide what is in the best interests of the child has to necessarily be only the High Court under Article 226 of the Constitution of India and not the Family Court whose jurisdiction the Petitioner challenges. In response to a query as to whether he has in fact instituted such a challenge, counsel for the Petitioner states that till such time the Petitioner is not actually served with a notice of the petition pending in the Family Court, Saket, he is not obliged to file an application to challenge the jurisdiction of that Court.

18. In response to the above submissions, Mr. Prabhjit Jauhar, the learned counsel for Respondent No. 2 points out that there is no question of the proceedings pending in the Family Court in Saket being without jurisdiction inasmuch as the marriage between the parties was admittedly registered

under the HMA in New Delhi. Therefore, the jurisdiction of the Family Court, Saket would straightaway be attracted under Sections 19(1) and 19 (4) of the HMA. According to him, the application under Section 26 of the HMA seeking custody of the child is maintainable in such proceedings. He submits that the question of best interest of the child for the purpose of Section 26 of the HMA has to, therefore, be decided only by the Family Court which is the Court of competent jurisdiction. While he does not dispute that the Court having the closest connection to the child should decide the issue, he maintains that it is the Family Court in Saket which is the Court of closest connection and that the child was only 12 days old when she was evicted from the matrimonial home. She could never be said to be ordinarily resident in South Africa.

19. Mr. Jauhar also seeks to distinguish the decisions cited on two principal grounds. He points out that in each of those cases, there was an order passed by a Court in country outside India in proceedings instituted by one of the spouses touching on the issue of the custody of the child which have been brought away to India, therefore, in those cases, the Court was faced with a question whether such an order would be enforceable in India and in what manner. He points out that in the present case, there is no order of the Court of South Africa as of date on the question of custody of the child.

20. The second distinguishing feature, according to Mr. Jauhar, is that in those cases, there were no parallel proceedings pending in other Courts in India on the issue of the custody of the child and, therefore, the Supreme Court or the High Court, as the case may be, was not called upon to decide

whether the Court which has to decide the best interests of the child has always to be only the High Court or it could also be a Court of valid jurisdiction like a Family Court. Mr Jauhar points out that even in *KG v. State* (*supra*) although proceedings were instituted in the Family Court, Patiala House Courts by the wife under Section 26 of the HMA, that Court dismissed those proceedings for lack of jurisdiction. Against the said dismissal, an appeal was filed which was pending when the habeas corpus petition was heard. It was since withdrawn. Therefore, in that decision too there was no issue concerning conflict of jurisdiction among domestic Courts.

21. Mr. Malhotra expressed an apprehension that the protection given to the Petitioner against arrest should continue irrespective of decision of the present petition. He added that the Petitioner otherwise has no objection to the proceedings instituted by Respondent No.2 in the Courts in Delhi continuing now that the mediation proceedings have failed.

22. Mr Jauhar, on the other hand, submitted that the protection afforded to the Petitioner by the order dated 1st August 2017 was on the specific understanding that the mediation proceedings must be facilitated. Respondent No.2, in a spirit of co-operation, agreed of her own not to proceed with the proceedings instituted by her in India against the Petitioner. This has been reflected in the order dated 1st August, 2017. Mr. Jauhar states that once the mediation proceedings have failed and the proceedings in the Courts in Delhi have to now continue, it would not be fair to expect Respondent No.2 to agree to the aforementioned plea of the Petitioner that

the protection afforded by the order dated 1st August, 2017 should continue.

23. The Court has considered the above submissions. On the question of the Court entertaining the present *habeas corpus* petition, it must be noted that as rightly pointed out by Mr. Jauhar, in every one of the cases relied upon by Mr. Malhotra for the Petitioner, an order on the question of the child's custody had been passed earlier by a foreign Court. In none of those cases, did the wife, even prior to the filing of a *habeas corpus* petition by the husband, institute proceedings in the domestic Courts. This is relevant for determining whether the 'Court' which should decide on the issue of the 'best interests of the child' has to necessarily be only the High Court which is approached by the husband in a *habeas corpus* petition or it could be even a Family Court or other Court in India where proceedings are pending between the parties.

24. In *Nithya Anand Raghavan v. State of NCT of Delhi* (*supra*), a three judge Bench of the Supreme Court explained that the Court irrespective of the order of a foreign court on the issue of custody of the child, it is the High Court in India which is approached with a *habeas corpus* petition, which had to decide the said question. It was held that "the principle of comity of Courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native state." It was held that even in the matter of the 'summary' enquiry "it is open to the Court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign Court."

25. The above decision in *Nithya Anand Raghavan v. State of NCT of*

Delhi (*supra*), negates the plea of the Petitioner in the present case that it is only the Court in South Africa which can and should decide the question of ‘best interest of the child’ since proceedings have been instituted by the husband in the Courts in South Africa and further since the child should be considered to be ordinarily resident in South Africa. It appears that after the decision in *Nithya Anand Raghavan v. State of NCT of Delhi* (*supra*), irrespective of whether the child is an ordinary resident of another country and irrespective of whether there are proceedings pending in another country and irrespective of whether orders have been passed in those proceedings, it is the Court in India which has to *per force* decide the ‘best interests of the child’ by conducting either a summary or an elaborate enquiry.

26. The next question that requires to be addressed is which is the Court which should conduct this summary enquiry? Does it invariably have to be the High Court under Article 226 of the Constitution of India or the Family Court or other Court where such issue might be pending in the proceedings between the parties?

27. The Court has carefully examined the decisions in *Dhanwanti Joshi v. Madhav Unde* (*supra*), *Dr. V. Ravichandran v. Union of India* (*supra*) and *Nithya Anand Raghavan v. State of NCT of Delhi* (*supra*). Those decisions do not offer guidance as regards the jurisdiction of the Family Court or other Court in India to decide on the above issue. In other words, none of those decisions state that once a petition for *habeas corpus* is filed in the High Court, the jurisdiction of all other Courts including the Family Court or other civil Court or criminal Court in India where proceedings between the

parties may be pending get automatically ousted as far as the issue of deciding the 'best interest of the child' is concerned. Even the decision of this Court in ***KG v. State of Delhi*** (*supra*) does not say so. This appears to be for good reason. If the proceedings are pending, as in the present case, between the parties in the Family Court and the Court of the learned MM, there is no reason why those Courts should be held to be incompetent to decide an application even if such application challenges their jurisdiction to entertain the petitions filed by one spouse against another. This Court, at this stage, is not required to express its opinion on the submissions of the learned counsel for the Petitioner that Respondent No.2 ought to have invoked only the GWA for seeking the custody of the child and not Section 26 of the HMA. If the Petitioner chooses to raise such an issue in the proceedings pending before the Family Court, it is for that Court to decide such issue in accordance with law. As of date, however, there is no occasion for this Court to oust the jurisdiction of the HMA to decide the Section 26 application pending before it only because the present *habeas corpus* petition has been filed by the husband. There is no warrant for the proposition that while deciding the application under Section 26 HMA, the Family Court cannot decide whether it has jurisdiction to entertain such an application in the facts of the given case and more particularly that it cannot decide the 'best interest of the child' while exercising such jurisdiction.

28. The Court, therefore, does not see any reason why with the pendency of the proceedings between the parties in the Family Court and the Court of the learned MM in New Delhi, this Court alone in a petition under Article 226 of the Constitution, and not those Courts, should decide the issue of best

interests of the child by undertaking a summary enquiry as contemplated by the decision of the Supreme Court in *Dr. V. Ravichandran v. Union of India* (*supra*) and *Nithya Anand Raghavan v. State of NCT of Delhi* (*supra*).

29. As regards continuing the interim protection afforded to the Petitioner by the order dated 1st August 2017, it is plain from the said order that it was meant to continue only to facilitate the mediation proceedings. With the mediation proceedings having failed, there is no occasion to continue to extend to the Petitioner the protection offered by that order. This, however, will not preclude the Petitioner from seeking any other remedy that may be available to him in accordance with law. In such proceedings, the fact that the present petition has been dismissed or that the mediation proceedings have failed, would not come in the way of the Court concerned independently taking a decision in accordance with law.

30. The petition and the pending application are dismissed. Nothing said in this judgment touching on the merits of the case is intended to influence the decision of any other Court seized of the disputes between the parties.

31. Order *dasti* under the signature of the Court Master.

S. MURALIDHAR, J.

I.S. MEHTA, J.

DECEMBER 14, 2017
'*anb*'