**HON'BLE SRI JUSTICE SURESH KUMAR KAIT**
**AND**
**HON'BLE SRI JUSTICE P. KESHAVA RAO**

**W.P.No.23275 OF 2017**

**O R D E R:**
*(per Hon'ble Sri Justice Suresh Kumar Kait)*

Vide the present petition, the petitioner seeks direction thereby to issue writ of Habeas Corpus or any appropriate writ or writs, orders or directions, directing the respondents No.1 & 2 for production of minor children viz., Vishal Rana Paidi and Dheerja Rao Paidi before this Court and consequently give custody of the children to the petitioner and also pass further orders as are deem fit and proper in the circumstances of the case.

2. The brief facts of the case are that :

The petitioner was married to 3rd respondent on 17th March, 2002 as per Hindu traditions and customs. After marriage, the petitioner has moved the 3rd respondent to the Bloomington, Illinois, United States of America (USA), where he is working. The petitioner and the 3rd respondent are blessed with two sons, by name, Vishal Rana Paidi, who is born on 8th June 2005 and Dheeraj Rao Paidi, who is born on 21st May 2008. Later on, the petitioner has started a software company in the USA and thereafter along with money owned by him in the USA, he started a subsidiary company in India. The 3rd respondent, who joined the petitioner after marriage, initially did not work, but in pursuit of gaining financial freedom and manage her own income, she insisted for doing a job. On many occasions, the petitioner requested the 3rd respondent to take of his business, but she was not interested. The petitioner is the only child of his parents and as the father of the petitioner was not keeping good health and the mother was not well educated and worldly wise, he is dependant on the father of the 3rd respondent for taking up investments in India with the monies earned by him in the USA and invested in several projects, i.e., purchasing lands, buildings and in real estate business in Visakhapatnam, Vijayawada, Hyderabad and Chennai etc. Taking advantage of the said aspect, the father of the 3rd respondent registered all the properties in his name or in his wife's name or in the names of his henchmen. The petitioner was kept in dark taking advantage of the absence of the petitioner in India. Even in the software company and the real estate company which were floated by the petitioner in India, the father and mother of the 3rd respondent were made Directors. From the day of marriage till 2013, things were manageale. In the year 2013, the petitioner requested the father of 3rd respondent to transfer all the properties purchased by him by constituting a Family Trust with petitioner, his wife i.e., 3rd respondent herein, as trustees and both the sons of the petitioner as beneficiaries. The father of the 3rd respondent could not taste it well and hatched a plan to get rid of the petitioner and to get all the properties for themselves. The 3rd respondent in connivance with her father also played against the petitioner to somehow cause loss to the petitioner. The 3rd respondent went to the extent of filing of false case of Domestic Violence against the petitioner on 19th December 2014, wherein the petitioner was arrested, and the Court at Erwin Town, passed an interim order of protection against the petitioner until a formal court hearing, which was scheduled for 4th February 2015. The petitioner tried to mediate the matter with the 3rd respondent through common family members and friends, but the 3rd respondent continued to avoid appearing for trials at the Court. Accordingly, impeding the trial proceedings at the Erwin Town court, 3rd respondent did not allow the petitioner to see the children for several months. On the other hand, despite knowing that the petitioner could be arrested in the USA for violating the interim order of protection, the father of the 3rd respondent continued to demand the petitioner to come to India along with 3rd respondent and the children, so he could settle the property matters and transfer the same to the petitioner and 3rd respondent. When the petitioner was not allowed by 3rd respondent to see his children and the 3rd respondent denied to appear for trials and hatching plans to impede the trial proceedings at the Erwin Town Court, he was constrained to move to the Family court of Steuben County in the State of New York by filing a petition on 19th February 2015 for visitation rights of the children/custody vide file No.18128, so he could get the interim order of protection vacated by the court allowing him to travel to India with 3rd respondent and the children. The criminal case and the interim order of protection were dismissed by the Erwin Town Court on 6th May 2005.

3. As stated in the present petition that the 3rd respondent could not prove the Domestic Violence case against the petitioner as it was a false case filed by her. Sensing that, the legal proceedings in the courts in the New York i.e., Domestic Violence case initiated by 3rd respondent against the petitioner and the custody/visitation proceedings initiated by the petitioner against the 3rd respondent would go against her, she abruptly absconded from the USA on 1st March, 2015 and illegally removed the children from their home State of New York and illegally taken the custody of children and landed in India while the trial proceedings were pending before the respective courts in the USA. This action on the part of the 3rd respondent was unethical tactics and adopted cruel methods to hamper the relationship of the father with the children. After arriving in India on 1st March, 2015, the 3rd respondent participated in the trial by phone conference upon notice issued by the Family court of Steuben County in the State of New York and later on represented by an attorney in the USA. The judge of Family Court of Steuben County on several occasions warned the 3rd respondent to foster a healthy relationship between the children and the

father, but the 3rd respondent intentionally neglected and purposefully disobeyed the Court orders and unlawfully moved the children from the USA distancing the father from the children. The children of the petitioner i.e., Vishal Rana Paidi and Dheeraj Rao Paidi are unlawfully detained by the 3rd respondent in India and the 3rd respondent seriously violated the directions issued by the competent Family court in the USA and knowingly committed a felony of international parental child abduction, which is considered a serious offence by the courts in the USA.

4. In the counter-affidavit filed by the 3rd respondent, it is stated that in the month of March 2015, her mother was supposed to undergo a knee replacement surgery at Vijayawada, for which, she required some attendant support. Under those circumstances, she was required to travel to India for the purpose of helping her mother, and in fact, her mother's surgery was also planned subject to her travel. Accordingly, she planned travel schedule and procured her tickets, transfer documents etc. However, just a day before the date of her journey, the petitioner got served on her the papers relating to the child custody case filed by the petitioner, which took her by total shock and surprise. Under those circumstances, she had to write an explanatory letter to the American court. By the time, when she came to India, there is no order passed by the American court, in violation of which, she brought the children to India. The 3rd

respondent's trip to India along with her children was not a sudden or overnight decision or stealthy malafide act of withdrawing to that country. Therefore, the contention of the petitioner that the minor children are in the illegal custody of the 3rd respondent is wholly meritless and a self-serving statement.

5. It is further stated in the counter-affidavit that the actual genesis of the entire trouble is on account of the petitioner's adamant and chauvinistic attitude apart from an insatiable lust for money, and his adulterous relationship with one lady by name Satya Deepti Namaballa. A succinct narration and insight into the facts are that from her marriage she never had a smooth and peaceful life with the petitioner on account of his aforesaid attitude. She had always been meted out with a treatment below the human dignity. She was always looked upon a money spinning machine and she had to take up jobs at distant places at the cost of her health and comfort. Adding to her woes, in the month of August 2014, a girl by name Satya Deepti Namaballa had come over to the USA for her Masters under reference from her parents, with whom, unfortunately, the petitioner developed an illicit intimacy. For the first time, in about the first week of October 2014, to her shock and dismay, she saw them in a compromising position in her home, by the time, she returned from the work. She had admitted the illicit relationship that was going on. After a lot

of unrest and torturous ordeal, she managed to relocate the said girl to a hostel in New Jersey. On 24th October 2014, after she had returned from New Jersey, the petitioner had beaten her brutally resulting in bleeding injuries on her body and the petitioner tried to drive them out of the home. However, on a second thought of legal implications, he could not venture to do so, on account of the manifest physical injuries on her body. Subsequently, the hostility at home continued on account of the petitioner's defiant continuation of interactions with the said girl over phone for unduly prolonged periods. On 19th December 2014 also the petitioner had once again beaten her. Therefore, she was forced to lodge a Domestic Violence case before the competent court in the America. Thereafter, the petitioner was arrested in that case.

6. Learned counsel appearing on behalf of the 3rd respondent submits that it would not be out of place to mention that on 10th October, 2013, overhearing the conversation of the children at school the Teacher over there had tipped off the Social Security personnel who had, in turn escalated the matter legally. Ever since, the petitioner's attitude towards the 3rd respondent and her children changed from bad to worse, resulting in increased harassment, and physical abuse of her and the minor children.

7. Learned counsel further submits that the allegations of the property transactions and the disputes that emanated on account of the said transactions etc., has nothing to do with the issue involved in this writ petition.

8. Learned counsel for the 3rd respondent submits that the decree of the foreign Court is not binding on the native courts for the reason that India is not a signatory to the Hague Convention on International Child Abduction. So much so, this petition is in the nature of proceeding for execution of the foreign decree, which is not permissible under law. So long as the 3rd respondent is in India along with the minor children, their custody with the 3rd respondent cannot be coined as illegal. The 3rd respondent has not removed the children from America in contravention or in violation of any order passed, for the reason that by the date of her travel to India, there is no order whatsoever as to the custody of the children.

9. Learned counsel for the 3rd respondent further submits that the 3rd respondent was constrained to file a police complaint under Section 498(A) and 109 IPC read with sections 3 an 4 of the Dowry Prohibition Act (D.P. Act) against the petitioner. On account of her being the complainant, the police insisted her presence till the investigation was completed and the police had addressed a letter to that effect to the American Court, where the proceedings for Domestic

Violence and the Child custody respectively were pending. In addition to above, GWOP No.500 of 2015 on the file of Family Court filed by the 3rd respondent is pending for adjudication. Thus, in view of the above circumstances, the children named above are not in the illegal custody of the 3rd respondent. Accordingly, the petition deserves to be dismissed.

10. We have heard the learned counsel for the parties in length.

11. Both the counsel appearing on behalf of the petitioner and the 3rd respondent have relied upon a case of **Nithya Anand Raghavan Versus State (NCT of Delhi) and another**[1].

12. It is not in dispute that both children of the petitioner viz., Vishal Rana Paidi and Dheeraj Rao Paidi are born in the State of New York, and from the date of their birth, they stayed in USA, except on few occasions, visiting India to meet their grand parents. It is also not in dispute that upon initiation of the custody/visitation proceedings in the Family Court of Steuben County in the State of New York, the Court issued summons to 3rd respondent and she engaged a counsel and attended the trial of said proceedings. Initially, vide order dated 20th February 2015, the Family Court mentioned above, has passed an order of appointing an attorney for the children in the said case giving paramount

[1] (2017) 8 Supreme Court Cases 454

consideration to the welfare of the children. However, the 3rd respondent abruptly absconded from the USA on 1st March 2015 with the children named above from their home State of New York in the United States of America without allowing the attorney for the children to contact the children to prevail their constitutional rights and foster a healthy relationship between the children and father, which is the petitioner herein.

13. The 3rd respondent, to stall the trial proceedings at Family Court of Steuben County, came to India and filed criminal complaint at Visakhapatnam vide Crime No.54 of 2015 under Section 498(A) IPC and Sections 3 and 4 of D.P Act and also initiated proceedings for impounding the passport of the petitioner. The Consulate General of India at New York, USA issued a notice to the petitioner. On being convinced with the explanation filed by the petitioner and upon investigating the claims made by Assistant Commissioner of Police, SHO, Women's Police Station in Visakhapatnam to impound the passport of the petitioner and finding that they are nothing but false and are invented by the Assistant Commissioner of Police only to drag the petitioner in criminal case in India and favour the father of the 3rd respondent in successfully implementing his conspiracy plans to steal the properties and wealth of the petitioner.

14. It is pertinent to mention here that the Consulate General of India at New York, USA dropped the proceedings and filed a report with the respective agency of Government of India. The 3rd respondent has initiated proceedings under the Guardian and Wards Act by filing GWOP No.500 of 2015 on the file of Family Court, Vijayawada seeking custody of the children by making allegations to impede the trial proceedings at Family Court of Steuben County. The petitioner has now filed his defence in Guardian OP regarding the maintainability of the said proceedings.

15. Similar issue came before the Supreme Court of India reported in **Nithya Anand**'s case ( supra).

16. In the above cited case, the appellant/wife had a Master's degree in communication and had worked in India prior to her marriage. The respondent No.2/husband therein had gone to the United Kingdom as a student in 2003 and working there since 2005. Admittedly, both the appellant and respondent No.2 were Indian citizens when they contracted marriage. On 30th November 2016, the appellant and respondent No.2 were married in Chennai according to Hindu rites and customs and was registered before the SDM Court, Chennai under the Hindu Marriage Act. After marriage, the parties shifted to UK in early 2007 and began living in respondent No.2's home in Watford (UK). Thereafter, disputes and differences arose between the parties. Having conceived

in and around December, 2008, the appellant/wife left the UK for Delhi in June 2009 to be with her parents. On 7th August 2009, the appellant gave birth to a girl child-Nethra, in Delhi. The respondent No.2 therein soon joined them in India. After the birth of their daughter, they went back to the UK in March 2010. Subsequently, in August 2010, the appellant and her daughter returned to India after several incidents with respondent No.2. After an exchange of legal correspondence between the parties, setting out the numerous differences which had arisen in the marriage, the appellant and her daughter eventually went back to London in December 2011, more than a year after they had come to India. In January 2012, the daughter was admitted to a nursery school in the UK and attended the same till she was old enough to attend a primary school. In September 2012, an application was filed on behalf of the daughter for grant of UK citizenship, purportedly with the consent of both the appellant and respondent No.2. The appellant however denied that she gave consent for that application. In December, 2012, the daughter was granted citizenship of the UK. Soon after in January 2013, respondent No.2 was also granted citizenship of the UK. In September 2013, the daughter who was around 4 years old at the time was admitted to a primary school in the UK and studied there till July 2015. Subsequently in July 2014, the appellant/wife returned to India owing to certain purported health problems, and also brought her daughter along with her. Both the appellant and her daughter went back to the UK around a month later i.e., on 06th September, 2014, purportedly at the insistence of respondent No.2. From late 2014 till early 2015, the daughter took ill and was eventually diagnosed with cardiac disorder, for which, she had to undergo periodical reviews. According to the appellant, she was taking care of her daughter during this period while respondent No.2 did not even bother about the daughter's condition, a claim vehemently contested by respondent No.2. On 2nd July 2015, the appellant came back to India along with her daughter because of the alleged violent behaviour of respondent No.2. On 16th December 2015, when the appellant filed a complaint with the Crime Against Women Cell (CAWC), New Delhi, then issued notice to respondent No.2 and his parents, asking them to appear before it. On the date of hearing, neither respondent No.2 nor his parents appeared before the CAWC. As a counterblast, respondent No.2 filed a custody/wardship petition on 8th January 2016 before the High Court of Justice, Family Division, UK, seeking return of his daughter to the jurisdiction of the UK Court. On this petition, the High Court of Justice passed an ex parte order *inter alia* directing the appellant to return the daughter to the UK and to attend the hearing at the Royal Courts of Justice. Thereafter, on 23rd January 2016, respondent No.2/ husband filed a Habeas corpus writ petition before the High Court of Delhi seeking to have his daughter produced before the Court. The High Court passed the judgment dated 08.07.2016 *inter alia*, directing the appellant to produce her daughter and comply with the orders passed by the UK Court or handover her daughter to respondent No.2 within three weeks from the date of the order. The High Court, while ordering that the appellant mother should return to the UK with the child and produce her before the UK Court, set out and examined the factual aspects of the case. The High Court held that the child, having lived in the UK since the time of her birth in 2009, had developed roots there. Further, the child was a permanent citizen of the UK and held a British passport. The High Court also examined the wardship order passed ex parte by the High Court of Justice, Family Division, London on 8th January 2016. In the said order, the UK Court *inter alia*, recorded that the child had been wrongfully removed from England in July 2015 and wrongly retained in India since then. The UK Court also recorded the father's willingness to bear the expenses for the transport and stay of the mother and the child to the UK. The UK Court held that it had the jurisdiction to hear the matter and directed that the child would become a ward of the Court during the minority or until further orders and that the mother would return the child to England by 22.01.2016.

17. Being aggrieved, the appellant/wife therein filed an appeal before the Supreme Court and the same was allowed

by setting aside the order dated 08.07.2016 passed by Delhi High court.

18. In case of **Nithya Anand** (supra), the Supreme Court observed that the concept of forum convenience has no place in wardship jurisdiction. The efficacy of the principle of comity of courts as applicable to India in respect of child custody matters has been succinctly delineated in several decisions of the Court.

19. In the aforesaid case, the Supreme Court referred to the Hague Convention of 1980 on "**Civil Aspects of International Child Abduction**" and observed that as of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the convention, any child below 16 years who had been "wrongfully" removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central authority. Under Article 16 of the Convention, if in the process, the issue goes before a court, the convention prohibits the court from going into the merits of the welfare of the child. Article 12 requires the child to be sent back, but if a period of more than one year has lapsed from the date of removal to the date of commencement of the proceedings before the Court, the child would still be returned unless it is demonstrated that the child is now settled in its new environment. Article 12 is subject to Article 13 and a

return could be refused if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. In England, these aspects are covered by the Child Abduction and Custody Act, 1985.

20. The Supreme Court has also referred in the aforesaid case, so far as the 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[2] unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare.

21. Regarding return of the child, a country which was not a party to the Hague Convention, 1980, the court's 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.

22. It is not in dispute that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of

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[2] `1951 AC 352 (PC)

International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. In exceptional cases the court can still refuse to issue directions to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor child has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the facts and not get fixated therewith. In either situation, be it a summary inquiry or an elaborate inquiry the welfare of the child is of paramount consideration.

23. Admittedly, in the case on hand, the elder child is born on 8th June 2005 and youngest on 21st May 2008. It is also not in dispute that before their birth, the children, the appellant and the 3rd respondent have been continuously residing in New York State and until the 3rd respondent removed the children and herself to the Country of India approximately on 1st March 2015.

24. Steuben County court vide its proceedings dated 18th September 2015, observed that :

"*under the law as it relates to these proceedings then the court prepared to find that the court is the appropriate Court to make the determination of child custody of these two children and that the information provided by the 3rd respondent in this proceeding does not constitute a sufficient basis to decline jurisdiction on an inconvenient forum basis. Further observed that the action in India would not be an action substantially in conformity with of UCCJEA, in that, the action there was commenced after approximately three months and as the* *children have not resided there for a six months period of time and the Court at Steuben County would otherwise be considered the home state, that by proceedings without -- if that court were to proceed, it would not be in substantial conformity with the jurisdiction requirements under the UCCJEA."*

25. The said Court reminded vide its order dated 21st August 2015 that the court will set the matter down again for trail -– if the 3rd respondent fails to appear, the court would be prepared to go forward in her absence. Despite, 3rd respondent did not appear before the said Court and finally custody of the children was granted in favour of the petitioner. Consequently, 3rd respondent herein is directed to handover children to the petitioner.

26. It is pertinent to mention here that the domestic violence proceedings filed against the petitioner before USA Court was dismissed on the ground that the respondent failed to establish her case against the petitioner.

27. It is not in dispute that the 3rd respondent is aware of the fact that there is no other proceeding pending against the petitioner in USA Court. She was also well aware about the proceedings regarding the custody of the children is going to decide against her. She abruptly left the country of USA and came to India. Though we do not appreciate this conduct of the 3rd respondent that she has not attended or not

responded the proceedings of the Court at USA, however as per the settled law, the Courts have to see the welfare of the children. The first child is born in 2005 and second child is born in 2008 and till 1st March 2015 they remained in USA. Thus, the maximum period, they spent of their life is in USA. It would be difficult for these children to get adjusted in a different atmosphere, different culture, different language and different life style of this country.

28. It is pertinent to mention here that while granting the sole legal and physical custody of the children to the petitioner, visitation to the mother was also granted by U.S Court and observed that visitation to the mother to be established by agreement of the parties should be returned to USA or at a minimum to have telephone or internet communication with the children. She would have right to petition the court, the court to establish a different visitation schedule. But the custody of the children granted in favour of the petitioner.

29. It is not in dispute that the criminal proceedings filed against the petitioner has already been dismissed vide order dated 18.09.2015 passed by U.S. Court mentioned above.

30. It is pertinent to mention here that no criminal proceedings are pending against 3rd respondent in U.S Court. Whereas, admitted case of 3rd respondent is that Criminal

Case under Section 498(A) and 109 IPC read with Sections 3 & 4 of D.P.Act is registered against the petitioner at Vijayawada on a complaint made by 3rd respondent. In addition to above, 3rd respondent has written to the Government of India, to withdraw the passport of petitioner. 3rd respondent has also filed case vide GWOP No.500 of 2015 for custody of the children. In such eventuality, if the petitioner comes to India to participate in children custody case mentioned above, he will be arrested. But, if released on bail it will be difficulty for him to go back to U.S.A. pending criminal trial in India.

31. Though, India is not signatory to the Hague Convention of 1980 as discussed above, still the order passed by any Court has to be respected. If any person, like, 3rd respondent starts violating the Court order, sanctity of the Legal Institution will be in jeopardise.

32. It is not out of place to mention here that the children are born in U.S.A, holding U.S. passport, thus, citizens of that Country. The 3rd respondent has filed case for custody of children vide GWOP No.500 of 2015 in the Court at Vijayawada, despite the fact that the children are ordinarily residents of U.S not of Vijayawada, India. In case of **Jasmeet Kaur v. Navtej Singh**[3], decided on September 19, 2017 in MAT. App. (F.C.) 3/2017, High Court of Delhi, while

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[3] 2017 SCC Online Del 10593

discussing the case of **Ruchi Majoo v. Sanjeev Majoo**[4] and **Dhanwanti Joshi v. Madhav Unde**[5] has held that as per Section 9 of the Guardian and Wards Act, 1890, the courts in India have no jurisdiction to entertain the child custody petition if child is not ordinarily resident of India, as in the case in hand. The same view has been taken by this Court in FCA No.372 of 2017 on 08.02.2018.

33. In view of above discussion and legal position, we are of the considered opinion that the children are in illegal custody of 3rd respondent.

34. Accordingly, we hereby direct the 3rd respondent to handover children to the Consulate General (USA) at Hyderabad within four (04) weeks from the date of receipt of this judgment, failing which, the Consulate General shall take custody of the children. We also direct above mentioned Consulate General to make arrangements for return of safe journey of the children to U.S.A. The children shall be handed over to the petitioner in U.S.A or in India.

35. We hereby make it clear that if 3rd respondent wants to visit the children at U.S.A., as per the visitation rights granted by the court at U.S., the petitioner shall make her comfortable stay at U.S. and shall also bear travel expenses.

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[4] (2011) 6 SCC 479
[5] (1998) 1 SCC 112

36. We further make it clear that if 3rd respondent wants to initiate any legal proceedings against the petitioner, the legal expenses shall be decided by the Court concerned at U.S.A., as per the U.S. laws.

37. In view of the above, the Writ Petition is allowed. There shall be no order as to costs.

Miscenllaneous Petitions, if any pending, shall stand closed.

**SURESH KUMAR KAIT,J.**

**P. KESHAVA RAO,J.**

Date : 09 -02 -2018

**<u>Copy to :</u>**

The Consulate General (USA) at Hyderabad.

(B/o)
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