

**HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI**

W.P.NO.36945 OF 2017

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

Vide the present petition, the petitioner/husband seeks direction thereby directing the respondents No.1 to 4 to produce minor children Arthin Kodali (DOB – 14.03.2012) and Neysa Sakhmuri Kodali (DOB – 13.10.2014) of the petitioner, who are permanent residents and born citizens of US before this Court from the illegal custody of 5th respondent/wife, and cause return of said minor children, to the jurisdiction of the US in compliance with order dated 22.05.2017 passed by the Court of Common Pleas of Lehigh County, Pennsylvania, Civil Division, USA to enable the minor children to go back to USA and if they fails to do so within the fixed time period, the 5th respondent be directed to immediately handover the custody of the said minor children to the petitioner to enable him to take minor children back to the jurisdiction of US Court.

2. The brief facts of the case are that :

The petitioner is the husband of 5th respondent who came to the US on 1st July 2005 and started his residency in Internal Medicine at The Western Pennsylvania Hospital, Pittsburgh, which was to continue for three years i.e. till June 2008. The 5th respondent went to US in the year 2004 for her higher studies and she completed Masters Degree in 2006, and thereafter she secured employment with Cytori Therapeutics, San Diego, California, USA in January 2007. The petitioner and 5th respondent got married on

14th March 2008 in Hyderabad while she was working as a Research Associate at Cytori Therapeutics in San Diego, California. At the time of marriage, the petitioner was completing his residency in Internal Medicine. At that time, the parties after marriage were living at 7070 Forward Ave, Apr.308, Pittsburgh, PA 15217, USA i.e., the matrimonial home. After the 5th respondent moved to Pittsburgh, she found another job as a Research Associate at Precision Therapeutics in Pittsburgh, Pennsylvania, USA and worked there till July 2011. For all intents and purposes, after marriage, the matrimonial home of the parties was in Pennsylvania, USA and parties never had any matrimonial home or cohabited as husband and wife at Hyderabad.

3. As stated in the present petition that, the petitioner completed his fellowship in Internal Medicine at The Western Pennsylvania Hospital, Pittsburgh, Pennsylvania on 30th June 2008. He started his 3 year fellowship in Cardiovascular Diseases, at the above mentioned hospital and completed it on 30th June 2011. The petitioner joined St.Luke's University Health Network, Bethlehem, Pennsylvania on 1st July 2011 as a Non-invasive Cardiologist as the employer was willing to sponsor a Permanent Resident Card/Green Card for the petitioner. The respondent quit her job in July 2011 since her employer refused to sponsor a Permanent Resident card/Green card. Therefore, the parties stayed at a rented home at 5227 Chandler Way, Orefield, Pennsylvania USA from July 2011 to January 2016.

4. Minor son Arthin Kodali was born to the parties at Lehigh County, Pennsylvania, USA on 14.3.2012 and has a US passport

dated 04.06.2012. The parties on 15.11.2012 secured United States of America Permanent Resident card/Green card from the US citizenship and Immigration Services, as it was always the intention of both parties to reside in USA. The minor son Arthin Kodali was enrolled at Datzyk Montessori School, 3300 Broadway, Allentown, Pennsylvania USA, from September 2014 to 2017. The petitioner and 5th respondent together also registered and enrolled Arthin Kodali at the same school for the 2017-2018 academic year. In February 2014, when 5th respondent, who was in India at that time realized that she was pregnant with Nysa Kodali, she still chose to come back to US to deliver Neysa in the US so that Neysa would get all the advantages of US citizenship as well as excellent health care and education. Minor daughter Neysa Sakhamuri Kodali was born on 13.10.2014 at Lehigh County, Pennsylvania, USA and has a US passport dated 10.12.2014. Thereafter, the parties bought a house at 2085 Bellflower Lane, Center Valley, Pennsylvania, USA on 29.01.2016 in their joint names and started residing in it. Minor daughter Neysa Kodali was enrolled at Datzyk Montessori School, Pennsylvania USA in December, 2016. The petitioner and 5th respondent together also got registered and enrolled Neysa Kodali at the same school for the 2017-2018 academic year.

5. It is further stated in the present petition that the 5th respondent filed a petition for divorce dated 20.12.2016 in the Court of Common Pleas of Lehigh County Pennsylvania, USA under the Divorce Code of Pennsylvania USA, seeking Divorce, Equitable Distribution of marital property, Primary Physical and shared legal

Custody of the minor children Arthin Kodali and Neysa Sakhamuri Kodali, Alimony Pendente Lite, Counsel Fees & costs. In the divorce petition, the 5th respondent made the following averments showing permanent residence in USA for both parties securing children's custody.

"3. Both petitioner and respondent have been bona fide residents in the Commonwealth for at least six (6) months immediately previous to the filing of the Complaint."

"9. Said minor children presently reside with both parents at 2085 Bellflower Lane, Center Valley, Pennsylvania."

"COUNT III – CUSTODY

15. The best interests of the said minor children require that plaintiff be awarded primary physical and shared legal custody of the parties' two (2) minor children.
16. Plaintiff seeks primary physical and shared legal custody of the following children:

Child's Name	present address	Age
Arthin Kodali	2085 Bellflower Lane, Center Valley, PA.	5
Nesya Sakhamuri Kodali	2085 Bellflower Lane, Center Valley, PA.	2
17. The children were not born out of wedlock,
18. The children are presently in the custody of the Plaintiff and Defendant, who reside at 2085 Bellflower Lane, Center Valley, Pennsylvania 18034.
19. During the past five (5) years, the said minor children resided with the following person(s) at the following addresses and for the following periods of time:
 - a) with Plaintiff and Defendant at 5227 Chandler Way, Orefield, Lehigh County, Pennsylvania, 18069 from July, 2011 through January 2016; and
 - b) With plaintiff and Defendant at 2085 Bellflower Lane, Center Valley, Lehigh County, Pennsylvania 18034, from January 29th 2016 to March 23rd 2017.

20. The Mother of the children is Lahari Sakhamuri currently residing at 2085 Bellflower Lane, Center Valley, Lehigh County, Pennsylvania. She is married.
21. The father of the children is Sobhan Kodali currently residing at 2085 Bellflower Lane, Center Valley, Lehigh County, Pennsylvania. He is married.
22. The relationship of Plaintiff to the children is that of Mother. The plaintiff currently resides with the following person(s):
Sobhan Kodali Husband
Arthin Kodali Son
Nesya Sakhamuri Kodali Daughter
23. The relationship of Defendant to the children is that of Father. The Defendant currently resides with the following persons(s):
Lahari Sakhamuri Wife
Arthin Kodali Son
Nesya Sakhamuri Kodali Daughter
24. Plaintiff has not participated as a party or witness, or in another capacity, in other litigation concerning the custody of the said minor children in this or any other court.
25. The plaintiff has no information of any custody proceeding concerning the said minor children pending in a court of this Commonwealth or any other state.
26. The plaintiff does not know of any person not a party to the proceedings who has physical custody of the said minor children or claims to have custody or visitation rights with respect to the said minor children.
27. The best interest and permanent welfare of the said minor children will be served by granting the relief requested because plaintiff is the parent most capable of providing a safe, stable, loving home for the minor children.
28. Plaintiff has attached the Criminal Record/Abuse History Verification for required pursuant to PA 1915.3-2. WHEREFORE, Plaintiff requests your Honorable Court to award Plaintiff primary Physical custody and shared legal custody of the said minor children.”

6. The notice on the above US Divorce complaint of the 5th respondent was issued on 22.12.2016 to the petitioner by the

aforesaid Court for child custody conference on 28.01.2017 and the same was rescheduled to 21.03.2017. The matter is still pending for adjudication. The Court of Common Pleas of Lehigh County, Pennsylvania USA ordered for conference on 03.02.2017 before Domestic Relation Section of the US Court for determination of spousal support. Subsequently, on 16.02.2017, the conference was rescheduled to 31.03.2017 and again rescheduled to 12.05.2017 since the respondent was not in the USA at that time. Both parties on 21.03.2017 appeared at a custody conference before Ms Teresa Rensendz, Custody Hearing Officer of the US Court. As the parties did not reach to an agreement at the conference, a hearing was scheduled for 25th May 2017. The matter initiated by the 5th respondent for Divorce and Custody is still pending in the US Court. However, the 5th respondent on 23.03.2017 along with minor children named above flew to Hyderabad from USA on the family emergency of the passing away of her grandmother for mourning and for consoling her mother at Hyderabad. The 5th respondent and her children were slated to return on 24.04.2017 and their tickets were also booked, but the 5th respondent refused to come back. The petitioner made repeated attempts, but failed to convince her. The 5th respondent as she has always been filing her USA income Taxes since 2006 also filed on 10.04.2017 Federal, State and local taxes in the United States with the Internal Revenue Service of the USA. In the said tax statements, the petitioner and 5th respondent claimed Arthin Kodali and Neysa Sakhamuri Kodali as dependents and beneficiaries for

tax rebates. Thus, it establishes that permanent residence of the petitioner, 5th respondent and minor children is in the USA.

7. Learned counsel appearing on behalf of the petitioner submits that 2 days after filing the above taxes in USA, the 5th respondent on 12.04.2017 filed GWOP No.433 of 2017 before the Additional Family Court, Hyderabad under Sections 7 and 10 of the Guardianships & Wards Act along with I.A. under Order 39 Rule 1 and 2 of CPC for seeking appointment, custody and declaration as guardian of minor children with a further interim prayer that the 5th respondent be granted interim custody and the petitioner be restrained from forcefully taking custody of the minor children from Hyderabad. As such, the guardianship petition was filed in Hyderabad within 20 days of the 5th respondent and minor children coming to Hyderabad from USA. Thus, it establishes that the stay of minor children in Hyderabad was for only 20 days when the guardianship petition was filed. Also 5th respondent's Indian Petition and restraint order were obtained ex parte without the participation, knowledge or representation of the petitioner. Hence, the petitioner has challenged the said ex parte orders and jurisdiction of the Family Court at Hyderabad by filing FCA No.372 of 2017 and FCA No. 373 of 2017 before this Court.

8. However, the petitioner on 28.04.2017 has also received a letter dated 13.04.2017 by registered post along with the copy of the petition GWOP No.433 of 2017 from M Koteswara Rao, Advocate, Counsel for the 5th respondent at Hyderabad. However, no court notice or summon was sent with the petition and no service as per Hague process was effected on the petitioner in USA.

The petitioner, being aggrieved by the inter-parental abduction committed by the 5th respondent, was constrained to move an emergency petition dated 26.04.2017 before the Pennsylvania Court, USA. Accordingly, date of hearing at the Court of Common Pleas of Lehigh was set for 10.05.2017. Attorney Mary J.B. Eidelman & Associates, Pennsylvania USA i.e. US Attorneys for the 5th respondent requested for postponement of the date of hearing and the hearing was conducted on 22.05.2017. On the aforesaid date, the Court of Common Pleas of Lehigh County, Pennsylvania Civil Division in File No 2016- FC- 1641 in pursuance of an emergency petition passed the following order and the same is reproduced as under:

“ORDER : AND NOW, this 22nd day of May, 2017, upon consideration of the Emergency petition for relief requesting an Interim Order of Custody filed April 26, 2017, by Defendant and hearing conducted on May 22, 2017, attended by the Defendant/petitioner, Sobhan Kodali represented by his legal counsel, Mark B. Dischell, Esquire and Plaintiff/5th respondent, Lahari Sakhamuri having failed to appear for said hearing, but represented by her legal counsel, Mary J.B Eidelman, Esquire;

IT IS HEREBY ORDERED that :

- 1. Lehigh county, Pennsylvania, United States of America shall remain the sole home county, home state and country of the parties' minor children, Arthin Kodali born March 14, 2012 and Neysa Sakhamuri Kodali, born October 13, 2014;*

2. *This court shall have sole continuing jurisdiction of this custody matter which was filed by the Plaintiff, Lahari Sakhamuri, on December 21, 2016.*
3. *Pending further order of court, father is granted temporary physical custody of the children;*
4. *Mother shall return the children to Lehigh County, Pennsylvania, United States of America, to the Father's custody no later than June 2, 2017.*
5. *Until the children's return, Father shall have telephone and video chat contact with the children each day;*
6. *Upon her return to this jurisdiction, Mother shall not be permitted to travel out of the commonwealth of Pennsylvania with the minor children without further order of court.*
7. *The passports of the children shall be held in escrow by the parties' counsel or another mutually agreeable person;*
8. *Should the Mother fail to return the children to Father by June 2, 2017, Mother shall pay to Father \$1,000.00 each day she does not return the children;*
9. *IN the event Mother does not return the children to the Father by June 2, 2017, Father and/or any of his designees being his Father, Jayaramesh Kodali his Mother, VijayaBharathi; his cousin, Chaitanya Kadiyala, shall be permitted to retrieve the children from Mother in India and bring them to Lehigh County, Pennsylvania, United States of America.*
10. *Until such time as Mother returns the Children to the United States, she shall be precluded from seeking child support on behalf of the children;*
11. *A certified copy of this order shall be sent to the American Consulate in India and shall be registered with appropriate court/jurisdiction in Hyderabad, India;*

12. *Within thirty (30) days of this Order, Mother shall pay Father \$10,000.00 as partial payment towards counsel fees incurred by Father in this matter. A final determination on the amount of counsel fees to be paid by Mother to Father will be made by the Court after subsequent hearing which may be requested by either party.”*

9. Learned counsel for the petitioner submitted that the aforesaid court made certain observations and commented that :

“I conclude that this bears a similarity to situations where there is a removal, a relocation rather, of children either without a court or consent of all parents. IN this case, this is what the mother did. She filed here in Lehigh County, in the Commonwealth of Pennsylvania, United States of America, and then for whatever reasons that she was going through the process and in the middle of the process after having the custody, conference, she leaves, goes to India, doesn’t tell the father, the obvious intention on her part which was to leave the United States, go to India and file in the Country of India hoping to find a better forum for her position with respect to the children. It’s a clear case of forum shopping. It undermines the stability, I think, of the family, the stability of our laws, the stability of our procedures. We believe here in America we have a fair court system giving each side an opportunity to present their case to consider the matter carefully and to render decisions where the parents are unable, unwilling or not so disposed to do that. So, going to another jurisdiction, filing there, it was obvious from the mother’s intention that she did not intend to come back when the bereavement period was over of her grandmother, who had passed away suddenly, but instead to stay in India and file various actions in India clearly with the intention to foreclose the ability of the father, even to come to India to bring the children back to the United States by filing the dowry action against him. Apparently, the mother thinks this to be clever. The mother thinks this to be something that will work. I hope it doesn’t because it undermines completely the whole concept that

what we are striving for here is the benefit of the children and not the jockeying of position by parents hoping to get a better situation or a better outcome as they determine what the outcome is that they want.”

10. Learned counsel for the petitioner further submitted that it is clear from the aforesaid and undisputable facts that the most competent court to adjudicate upon any marital as well as custody issues inter se between the parties is the Court of the Common Pleas of Lehigh County, Pennsylvania Civil Division, as the 5th respondent and the petitioner are permanent residents of USA and are domiciled there. The matrimonial home of the parties from 2008 has been in the USA and both 5th respondent and the petitioner have been in US since 2004 and 2005 respectively. Both the minor children born in the US and are natural born US citizens. Both the parties were working in the USA and the permanent and ordinary residence of the parties as well as of the minor children is in Pennsylvania, USA.

11. Learned counsel further submitted that 5th respondent has illegally abducted the minor children from joint custody, love, care and protection of the petitioner and the 5th respondent has filed false, frivolous litigations in India and also filed a petition for custody and guardianship before the Additional Family Court at Hyderabad seeking restraint order against the petitioner from taking away the minor children from the jurisdiction of the Indian courts. The 5th respondent in order to seek orders in her favour intentionally misled the Family Court, Hyderabad by averring absolutely false and incorrect facts and statements and also by

concealing the material facts. While stating that the minor children are OCI card holders, the 5th respondent concealed the fact that both minor children are citizens of USA and also concealed the fact that the both minor children were already being educated at Datzyk Montessori School, 3300 Broadway, Allentown, Pennsylvania and that both petitioner and 5th respondent together were also registered and enrolled both minor children for the aforesaid same school for the 2017-2018 academic year also. The 5th respondent obtained an order dated 12.04.2017 from the Family Court restraining the petitioner from taking away the minor children from the jurisdiction of the Family Court.

12. Learned counsel further submits that the said restraint order does not come in the way of order passed by US Court since US court is the most competent court to decide and adjudicate upon the issue of welfare and custody of the minor children. Further more, Guardians & Wards Act, 1890 is not applicable to the minor children since the minor children are not ordinarily residents of India or Hyderabad and have never been domiciled in India. The stay of the children for mere 20 days in Hyderabad can not confer jurisdiction on the Family Court, Hyderabad to pass any order regarding the care and custody or restraint order qua the minor children. In fact the interim order dated 12.04.2017 passed by the Family Court, Hyderabad is a nullity in the eyes of law and cannot come in the way of this Court in exercising its summary jurisdiction as the return of the minor children to US would be in the interest and welfare of the minor children. The order, if any, of the Family Court, Hyderabad being nullity has to be totally ignored

and the Principle of Welfare of the minor child shall have primacy in the matter. The children being accustomed to the surroundings in US are liable to be returned to US and no harm would be caused physically or psychologically, in case the children are returned back to the jurisdiction of US.

13. Learned counsel for the petitioner submitted that the similar issue came before Delhi High Court in W.P. (CRL) No.374 of 2017 and Crl.M.A.No.2007 of 2017, wherein held as under:

“47. Before we proceed to decide the case keeping in view the facts and circumstances thereof, it would be appropriate to examine how the Courts have dealt with such like situations, from time to time, where one of the parents has brought with him, or her, the minor child- who is a citizen of and domiciled in a foreign country, to India, and the other parent has petitioned the Court in India to seek custody of the minor child and/or his/her return to the foreign country. We will deal with the aforesaid cases in chronology.

Surinder Kaur Sandhu Vs. Harbax Singh Sandhu & Another(1984) 3 SCC 698)

48. In this case the husband, Harbax Singh Sandhu and wife, Surinder Kaur Sandhu got married in Faridkot, Punjab according to Sikh rites and soon after their marriage moved to England. Both of them were Indian citizens living as foreigners in England. They had a baby boy within one year of their marriage. Eventually, the relationship between the parties got sour to such an extent, that the husband attempted to cause his wife's murder. He was convicted and sentenced for his said conduct, but on his wife's intervention – was let out on probation. After his release on probation, he removed their child from England and brought him to India. The wife, on the day of removal itself, procured an order under which the boy became the Ward of the Court. She came to

India and filed a petition under Section 97 Cr.P.C., before the Judicial Magistrate I Class. However, the petition was dismissed on the Court's agreement with the husband's reliance on Section 6 of Hindu Minority and Guardianship Act, 1956, and on acceptance of his contention that the father is the natural guardian. She subsequently obtained an order from the foreign Court, directing the child to be handed over into the custody of the mother. Armed with this order, the mother/wife came back to India and filed a writ petition in the High Court of Punjab and Haryana seeking production and custody of the child.

50. The Supreme Court applied, firstly, the principle of 'welfare of the child' and, secondly, of the Comity of Courts, in deciding the appeal. It did not agree with the High Court that the welfare of the child was with the father – a man who had offered solicitation for the commission of his wife's murder. The father had, even after his wife's magnanimous intervention of letting him out on probation, abused her said gesture by running away with the child. He had also procured a duplicate passport by an untrue representation that the original passport was lost, while the same was with his wife. In these circumstances, the court observed that the mother's custody was in the child's best interest. The Court, *inter alia*, observed:

“8.**On the whole, we are unable to agree that the welfare of the boy requires that he should live with his father or with the grandparents.** The father is a man without a character who offered solicitation to the commission of his wife's murder. The wife obtained an order of probation for him but, he abused her magnanimity by running away with the boy soon after the probationary period was over. Even in that act, he displayed a singular lack of respect for law by obtaining a duplicate passport for the boy on an untrue representation that the original passport was lost. The original passport was, to his knowledge, in the keeping of his wife. **In this background, we do not regard the affluence of the husband's parents to be a circumstance of such overwhelming importance as to tilt the balance in favour of**

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

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

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

to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the Courts of that state to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See *International Shoe Company v. State of Washington*, 90 (L Ed 95 (1945) : 326 US 310, which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case). It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy.” (emphasis supplied)

127. We may also take note of some of the provisions of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20.11.1989, which was ratified by the Government of India on 11.12.1992. The Preamble to the said Convention sets out the basis on which the same has been framed. The relevant paragraphs from the said Preamble, which are relevant, read as follows:

“Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

x x x x x x x x x x x

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”,

x x x x x x x x x x x

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,”

128. Article 3 (1) &(2) of this Convention read as follows:

“Article 3

- 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.**
- 2. State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”**

129. Article 5 of this Convention reads as follows:

Article 5

“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons **legally responsible**

for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

130. Article 6(1) of this Convention reads:

Article 6

1. States Parties recognize that every child has the inherent right to life.”

131. The inherent right to life, in our view, is wide enough to be understood as the right to a family life, i.e., with the parents and immediate family of the child.

132. Articles 7 & 8 of the Convention reads as follows:

Article 7

1. **The child shall be** registered immediately after birth **and shall have the right from birth** to a name, the right to acquire a nationality and as far as possible , **the right to know and be cared for by his or her parents.**
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. **States Parties undertake to respect the right of the child** to preserve his or her identity, including nationality, name and **family relations as recognized by law** without unlawful interference.
2. Where **a child is illegally deprived of some or all of the elements of his or her identity, States Parties**

shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

133. Article 9 (1) & (3) of the Convention read as follows:

Article 9

- 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will,** except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.

x x x x x x x x x x

- 2. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis,** except if it is contrary to the child’s best interests.”

134. Article 10 of the Convention reads as follows:

Article 10

- 1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse*

consequences for the applicants and for the members of their family.

2. **A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents.** Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (order public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.”

135. Article 18 of the Convention reads as follows:

Article 18

1. **States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.** The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of the child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to

benefit from child-care services and facilities for which they are eligible.”

136. *Article 20 of the Convention reads as follows:*

Article 20

1. **A child temporarily or permanently deprived of his or her family environment,** *or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*
2. *States Parties shall in accordance with their national laws ensure alternative care for such a child*
3. *Such care should include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background”*

137. *We may also refer to a Resolution passed by the Government of India and issued by the Ministry of Human Resource Development vide Resolution No.6-15/98-C.W., dated 09.02.2004 framing the “National Charter for Children, 2003”. The said Charter has been framed by the Government of India “to reiterate its commitment to the cause of the children in order to see that no child remains hungry, illiterate or sick”. The Preamble to the said Charter, inter alia, reads:*

“Whereas we affirm that the best interest of children must be protected through combined action of the State, civil society, communities and families in their obligations in fulfilling children's basic needs.”

Whereas we also affirm that while State, Society, Community and Family have obligations towards children, these must be viewed in the context of intrinsic and attendant duties of children, and inculcating in children a sound sense of values directed towards preserving and strengthening the Family, Society and the Nation.

x x x x x x x x x x

*underlying this Charter is **our intent to secure for every child its inherent right to be a child and enjoy a healthy and happy childhood**, to address the root causes that negate the healthy growth and development of children, and to awaken the conscience for the community in the wider societal context to protect children from all forms of abuse, while strengthening the family, society and the Nation.”*

138. Thus, best welfare of the child, normally, would lie in living with both his/her parents in a happy, loving and caring environment, where the parents contribute to the upbringing of the child in all spheres of life, and the child receives emotional, social, physical and material support – to name a few. In a vitiated marriage, unfortunately, there is bound to be impairment of some of the inputs which are, ideally, essential for the best interest of the child. Then the challenge posed before the Court would be determine and arrive at an arrangement, which offers the best possible solution in the facts and circumstances of a given case, to achieve the best interest of the child.

139. in the light of the aforesaid, we are more than convinced that respondent No.2 should, in the best interest of the minor child M, return to USA along with the child, so that she can be in her natural environment; receive the love, care an attention of her father as well – apart from her grandparents, resume her school and be with her teachers and peers. Pertinently, respondent No.2 is able-bodied, educated, accustomed to living

in Chicago, USA, was gainfully employed and had an income before she came to India in December 2016 and, thus, she should not have any difficulty in finding her feet in USA. She knows the systems prevalent in that country, and adjustment for her in that environment would certainly not be an issue. Accordingly, we direct respondent no.2 to return to USA with the minor child M. However, this direction is conditional on the conditions laid down hereinafter.

140. *Respondent No.2 has raised certain issues which need to be addressed, so that when she returns to USA, she and the minor child do not find themselves to be in a hostile or disadvantageous environment. There can be no doubt that the return of respondent No.2 with the minor child should be at the expense of the petitioner; their initial stay in Chicago, USA, should also be entirely funded and taken care of by the petitioner by providing a separate furnished accommodation (with all basic amenities & facilities such as water, electricity, internet connection etc.,) for the two of them in the vicinity of the matrimonial home of the parties, wherein they have lived till December 2016. thus, it should be the obligation of the petitioner to provide reasonable accommodation sufficient to cater to the needs of respondent no.2 and the minor child. Since respondent No.2 came to India in December 2016 and would, therefore, not have retained her job, the petitioner should also meet all the expenses of respondent No.2 and the minor child, including the expenses towards their food, clothing and shelter, at least for the initial period of six months, or till such time as respondent No.2 finds a suitable job for herself. Even after respondent NO.2 were to find a job, it should be the responsibility of the petitioner to meet the expenses of the minor daughter M, including the expenses towards her schooling, other extra-curricular activities, transportation, Attendant/ Nanny and the like, which even earlier were being borne by the petitioner. The petitioner should also arrange a*

vehicle, so that respondent no.2 is able to move around to attend to her chores and responsibilities.

141. *Considering that the petitioner had initiated proceedings in USA and the respondent No.2 has been asked to appear before the Court to defend those proceedings, the petitioner should also meet the legal expenses that respondent nO.2 may incur, till the time she is not able to find a suitable job for herself. However, if respondent No.2 is entitled to legal aid/assurance from the State, to the extent the legal aid is provided to her, the legal expenses may not be borne by the petitioner.*
142. *The petitioner should also undertake that after the return of the minor child M with respondent No.2 to USA, the custody of M shall remain with respondent No.2 and that he shall not take the minor child out of the said custody by use of force. He should also undertake that after respondent No.2 lands in Chicago, USA, the visitation and custody rights qua the parties, as may be determined by the competent Court in USA, shall be honoured.*
143. *Respondent No.2 has also expressed apprehension that the petitioner would seek to enforce the terms of the Pre-Nuptial Agreement entered into between the parties. Since the said agreement has been entered into in India, its validity has to be tested as per the Indian law. Respondent no.2 has already initiated suit for declaration and permanent injunction to challenge the said Pre-Nuptial Agreement dated 22.10.2010. We have perused the said agreement and we are of the view the petitioner should not be permitted to enforce the terms of this agreement in USA, at least till the said suit preferred by the respondent no.2 is decided. The petitioner should, therefore, give an undertaking to this Court, not to rely upon or enforce the said Pre-Nuptial Agreement to the detriment of respondent no.2 in any proceedings either in USA, or in India. The undertaking shall remain in force till the decision in the*

suit for declaration and injunction filed by respondent No.2 challenging validity of the Pre-Nuptial Agreement. This undertaking shall, however, not come in the way of the petitioner while defending the said suit of the respondent No.2.

144. *With the aforesaid arrangements and directions, in our view, respondent No.2 can possibly have no objection to return to USA with M. The comfort that we have sought to provide to respondent No.2, as aforesaid, is to enable her to have a soft landing when she reaches the shores of USA, so that the initial period of at least six months is taken care of for her, during which period she could find her feet and live on her own, or under an arrangement as may be determined by the competent Courts in USA during this period. At this stage, we are not inclined to direct that the custody of M be given to the petitioner so that he takes her back to USA. M is a small child less than 4 years of age, and that too, is a female child. Though she may be attached to the petitioner-her father, she is bound to need her mother-respondent no.2 more. In our view, once M returns to USA with her mother, i.e. respondent No.2, orders for custody or co-parenting should be obtained by the parties from the competent Courts in USA. Moreover, it would be for the Courts in USA to eventually rule on the aspect concerning the financial obligations and responsibilities of the parties towards each other and towards the minor child M-for upbringing the minor child-M independent of any directions issued by this Court in this regard.*

145. *The petitioner is directed to file his affidavit of undertaking in terms of paras 140 to 144 above within ten days with advance copy to the respondents. The matter be listed on 01.12.2017 for our perusal of the affidavit of undertaking, and for passing of final orders.*

14. On the other hand, in the counter-affidavit filed by the 5th respondent, it is stated that she did not have plans to permanently remaining in India while coming back from USA as the situation was only to be of moral support to her mother on account of sudden demise of her grandmother. She only accompanied her mother with the children and intended to go back but sought for extension of stay in India and requested the petitioner to keep the ticket open so as to enable her and the children to return to USA as per their convenience. But it is the petitioner who has threatened and intimidated to take away the children and due to these threats, she had to invoke the jurisdiction of the Judge, Family Court at Hyderabad in April 2017 within whose jurisdiction the children were residing. It is further stated that even though the children are citizens of USA, as a mother and natural guardian, and in their best interest, she can decide for them as to where they can settle and educate the children as the welfare of the minor children is of paramount consideration for her rather than US citizenship. The children are of just 5½ years and 3 years plus old respectively and they are happy in India and are attending to school and participating in various school activities.

15. Learned counsel appearing on behalf of the 5th respondent submitted that even prior to going to USA in December 2016, Master Arthin Kodali was studying in school at Hyderabad, and as such, it is incorrect to say that the children are acclimatized themselves to the environment and culture in USA and that the 5th respondent have uprooted by taking them and forcibly kept them in

India. Learned counsel further submitted that the petitioner who has moved the emergency petition and obtained orders against 5th respondent at USA and the 5th respondent only responded against the adverse allegations. But the Court at USA passed adverse ex parte orders against 5th respondent in her absence and has no merit to pass, and as such, she is unable to even go to USA. The 5th respondent even withdrawn the counsel who was representing her at USA.

16. Learned counsel further submits that the 5th respondent was born in India. Her parents are settled in India. She is not in alien country and that children are staying with their mother. Therefore, under any stretch of imagination, it cannot be said that the children are in illegal custody of the 5th respondent. In USA, other than the petitioner, no one is there to look after the children. He has to depend upon others to look after the children. Therefore, this Court has to consider the welfare of the children which is paramount importance in this case. Uprooting the children from the custody of the 5th **respondent will not surviving primacy because of their** tender age.

17. The learned counsel further submitted that it is not in dispute that the 5th respondent filed divorce petition, custody petition and property partition petition and thereafter she came to India and thereafter she never participated in those proceedings. The order was passed by the Court at USA in her absence on persuasion of the petitioner, who filed emergency petition before the said Court. In the proceedings before USA Courts, the 5th respondent has not made any allegation of domestic or of any

atrocities, assault etc., against the petitioner, for the reason, the US Court has different systems of dealing with divorce, custody and other cases, whereas, Indian Courts have totally different procedures. Therefore, the fact that the 5th respondent did not make any allegations against the petitioner in the proceedings filed by her at the USA Courts, that does not mean she was comfortable with petitioner; otherwise there was no occasion to file divorce petitions and other proceedings against the petitioner at US Courts. There was no compatible and possibility to reconcile the matter with the petitioner. Therefore, the 5th respondent is quite competent to look after the minor children and see their welfare. Moreover, the cases relied upon by the petitioner are of no relevance in the present facts and circumstances of the case and, moreover, the case decided by High Court of Delhi is pending adjudication before the Supreme Court.

18. Learned counsel for the 5th respondent submitted that, in a decision, reported in **Arvind Gopal Krishna Chawda Vs. State of Telangana and others**¹, a Division Bench of this Court has held that custody of child removed by parents from Foreign Court to India and order passed by the Foreign Court of competent jurisdiction in relation to custody of minor child would not by itself be a decisive factor for High Court to hold in favour of party to dispute who secured such order and once the final order of custody was passed by the American Court, it is for the petitioner to take recourse to appropriate proceedings in terms of Indian Law for securing execution thereof. Such an exercise cannot be

¹ 2017 (1) ALD Page 679

undertaken by this Court in exercise of writ jurisdiction and more particularly, by way of the procedural writ of Habeas Corpus.

19. Learned counsel has relied upon a decision reported in **Nitya Anand Raghvan Vs. State (NCT of Delhi)**² the Supreme Court has held that so far as the non-Convention countries i.e., the countries which are not segregated to a convention are concerned, the law is that the Court in the country to which the child is removed will consider the question must bear in mind the welfare of the child as of paramount importance and consider the order of foreign court as only a factor to be taken into consideration, thus the petition deserves to be dismissed.

20. We have heard the learned counsel for the parties and perused the material on record.

21. The 5th respondent filed a divorce petition in Court of Common Pleas of Lehigh County, Pennsylvania, Civil Division, USA seeking Divorce, Equitable Distribution of marital property, Primary Physical and shared legal custody of the minor children, Alimony Pendent Lite, Counsel fees and costs. In the said divorce petition, the 5th respondent made the following averments showing permanent residence in the USA for both parties and securing children's custody and also admitted that the minor children were residing in US:

“3. Both petitioner and respondent have been bona fide residents in the Common wealth for at least six (06) months immediately previous to the filing of the Complaint.”

² 2017 SCC online SC 694

“9. Said minor children presently reside with both parents at 2085 Bellflower Lane, Center Valley, Pennsylvania.”

COUNT III – CUSTODY

“15. The best interests of the said minor children require that plaintiff be awarded primary physical and shared legal custody of the parties’ two (02) minor children.”

“16. Plaintiff seeks primary physical and shared legal custody of the following children.”

22. It was further stated in the divorce petition that the children are presently in the custody of the petitioner and 5th respondent, who reside at 2085 Bellflower Lane, Center Valley, Pennsylvania 18034. Thus, the 5th respondent herself invoked the jurisdiction of the US Courts seeking the divorce and shared custody of the minor children from the US Court. Moreover, the 5th respondent admitted in the Annexure annexed to the divorce petition that no kind of domestic violence and abuse was ever subjected upon her or upon the minor children by the petitioner/father.

23. The petitioner booked to and fro tickets for the 5th respondent and the minor children and also to his own mother-in-law who was staying together in the matrimonial home in US. The 5th respondent and children were slated to return on 24.04.2017 as per the return tickets, but the 5th respondent refused to come back, in spite of repeated requests on the part of the petitioner. In addition to above, the 5th respondent on 10.04.2017 even filed her income tax returns in the US which is annexed as Annexure P-34. Instead the 5th respondent filed a Guardianship petition being GW

(OP) No.433 of 2017 before the Family Court and obtained ex parte order dated 12.04.2017 by concealing the material facts from the Family Court vide which the petitioner as well as the 5th respondent were restrained from removing the minor children from the jurisdiction of Hyderabad.

24. It is not in dispute that the minor children from the inception of their birth till their removal on 23.03.2017 were staying in the US and the same was admitted fact both in the Guardianship petition filed by the 5th respondent and also the Divorce petition filed by her in US. US Court after hearing the learned counsel for the petitioner as well as learned counsel for the 5th respondent passed a detailed order dated 25.05.2017 as noted above directing that the only Court in Common Pleas of Lehigh County, Pennsylvania, Civil Division, USA shall have the sole continuing jurisdiction regarding the custody of the minor children. Accordingly, 5th respondent was directed to return the children to the Common Pleas of Lehigh County, Pennsylvania, Civil Division, USA not later than by June 2, 2017.

25. In fact the 5th respondent herself invoked the jurisdiction of USA and now cannot abstain from complying with the order of the said Court. In case, the 5th respondent is aggrieved by the order dated 22.05.2017 passed by US court, the 5th respondent can take recourse to assail the Court of US court in Higher Forum.

26. It is pertinent to mention here that the Court of Common Pleas of Lehigh County while passing the order dated 22.05.2017, commented as under:

“I conclude that this bears a similarity to situations where there is a removal, a relocation rather, of children either without a court or consent of all parents. In this case, this is what the mother did. She filed here in Lehigh County, in the Commonwealth of Pennsylvania, United States of America, and then for whatever reasons that she was going through the process and in the middle of the process after having the custody conference, she leaves, goes to India, doesn't tell the father, the obvious intention on her part which was to leave the United States, go to India and file in the Country of India hoping to find a better forum for her position with respect to the children. It's clear case of foreign shopping. It undermines the stability, I think, of the family, the stability of our laws, the stability of our procedures. We believe here in America we have a fair court system giving each side an opportunity to present their case to consider the matter carefully and to render decisions where the parents are unable, unwilling or not so disposed to do that. So, going to another jurisdiction, filing there, it was obvious from the mother's intention that she did not intend to come back when the bereavement period was over for her grandmother, who had passed away suddenly, but instead to stay in India and file various actions in India clearly with the intention to foreclose the ability of the father, even to come to India to bring the children back to the United States by filing the dowry action against him. Apparently, the mother thinks this to be clever. The mother thinks this to be something that will work. I hope it doesn't because it undermines completely the whole concept that what we are striving for here is the benefit of the children and not the jockeying of position by parents hoping to get a better situation or a better outcome as they determine what the outcome is that they want.”

27. Since the 5th respondent failed to return the children to the jurisdiction of the US Court in spite of passing of the order dated 22.05.2017, the petitioner was constrained to file the present Habeas Corpus writ petition and prayed that the minor children be repatriated back to US in compliance with the US Court order. The

petitioner along with this petition also annexed the school records of the minor children to show that the children were studying in schools in the USA. The petitioner has also filed the transcripts of the US Court orders. Wherein the Hon'ble Court while commenting upon the welfare of the children to the 5th respondent's US attorney (Ms.Mary Eidelman) observed as under:

“What I am attempting to do here and Ms Eidelman if you would, give a sense of it to your client the next time you speak with her, is to get her to come voluntarily back to this jurisdiction, to get her to come to Pennsylvania and to have this matter adjudicated as we adjudicate hundreds of these matters throughout the course of a year as it relates to children. Putting the children in a situation where they are going from one country to another, a great distance apart, splitting families as well all know ultimately leads to maybe a temporary victory as it relates to parents feelings of what is successful, but usually leads to a final defeat as to the benefit and welfare of the children. I know I am speaking to the choir, I know you bear no responsibility for the actions of the mother in doing this and I know in my heart of hearts you probably advised the mother to do exactly what I have suggested that you now tell the mother, being the Court sentiment, as what to do with this by returning to the United States by June 2nd, I think to a large extent this matter can be put behind the parties and the benefit of the children can continue to be paramount. Failing to do that, will Mr Dischell warns may result in a projected legal battle, spending a lot of money, a lot of time, a lot of confusion in the minds of the children and ultimately a result that probably neither parent would want to have happen all to the detriment of their own children. So, having said that, again, I think my Order is clear. I want it to be enforced and to the extent the parties, can among themselves, work out something that would be great, but failing to do that this is going to be the Order, I will give a copy to Mr. Dischell to file it and we go from here. Okay. Thank you.”

28. The aforesaid observations of the US Court, clearly show that principle of welfare of the children had been taken into consideration by the US Court in passing the order and the same also reiterates that both the parents are necessary for the proper upbringing of the children.

29. No doubt, 5th respondent is a green card holder and the petitioner is also a green card holder and the mother of the petitioner has a multiple entry Visa and is currently also in the US and as such both the grand parents are there to help take care of the minor children.

30. It is important to note here that **Nitya Anand Raghvan's** case (Supra), the Hon'ble Supreme Court held as under:

"49. We once again reiterate that the exposition in the case of Dhanwanti Joshi (supra) is a good law and has been quoted with approval by a three-judge bench of this Court in V. Ravi Chandran (supra). We approve the view taken in Dhanwanti Joshi (supra), inter alia in paragraph 3 that so far as non-convention countries are concerned, the law is that the Court in the country to which the child is removed while considering the question must bear in mind 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. The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, 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 be exercised only if the court to which the child has been removed is moved promptly and quickly. The

overriding consideration must be the interests and welfare of the child.”

31. From the facts mentioned above of the present case, it is clear that both parties i.e., the petitioner and the 5th respondent were settled in the US much prior to their marriage and were highly qualified and the 5th respondent had moved to and even employed in the US much prior to the petitioner. The parties cohabited and worked for gain in the US and both the minor children were born in the US on 14.03.2012 and 13.10.2014 and have US citizenship, having US passports. From their birth, the minor children are settled in the environment in the US and have made friends and were acclimatized to the social and cultural milieu in the US. In the Guardianship petition, the 5th respondent admitted that she went to US in the year 2004 for higher studies and completed her Masters in 2006 and secured employment in San Diego California in January 2007 and since then she has been residing in the US. Moreover, in her counter-affidavit filed before the Family Court, the 5th respondent has admitted to having initiated a divorce and custody proceedings in the US and has admitted a under:

“I have initiated process for divorce and sought for custody of children before the Court of Common Pleas of Lehigh County, Pennsylvania, Civil Division, USA, I never pursued the case and took it forward as it was still at the threshold and nascent stage i.e., at the stage of counseling on 21.3.2017 and the matter was adjourned to 25.5.2017 as mentioned in page no.6 of the petition. I submit that both myself and the petitioner were living under the same roof in the same house and at that point of time I came to know the sudden demise of my maternal grandmother and as such due to the exigency I had to come to India along with children and I had explained the same to the petitioner and

in fact he himself arranged for the Tickets for us to flight to India on 23.3.2017 and initially I had no plans to stay back in India but subsequent developments have forced me to remain in India and seek relief before this Hon'ble Court."

32. Further, the 5th respondent has also stated on oath as under:

"It is incorrect to state that I have informed the petitioner that I would not be returning to USA, in fact I have informed him that I will not be able to travel to USA on 24.4.2017 due to the prevailing circumstances and requested him to keep the tickets open so as to enable me to travel back to USA along with the minor children."

33. In view of the facts recorded above, the 5th respondent had not return to the USA not due to perpetration of any violence. During her entire stay for more than 9 years while married to the petitioner at the US, there was not a single complaint. As such the welfare of the principle is very much alive in the facts of the present case and there is no evidence on record to even remotely suggest that any harm shall be caused in case the minor children are returned to the US. In fact, the 5th respondent by her unilateral decision to return to India cannot deprive the minor children in terms of the love, attention, care and facilities, amenities, upbringing and environment to which they were accustomed to while in the US. No doubt, the minor children have not taken a decision to remain in India away from their father and their school and their peers. By her decision, the 5th respondent has clearly deprived the minor children firstly the love, affection, they are entitled to receive from their father i.e., the petitioner. There can

be no substitute for their natural father and father is equally important for a healthy upbringing of the minor children just as the 5th respondent.

34. Some of the provisions of the Conventions on the Rights of Child adopted by the General Assembly of the United Nations on 20.11.1989, which was ratified by the Government of India on 11.12.1992 are, as under:

Article 3 (1) &(2) of this Convention read as follows:

“Article 3

- 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.**
- 2. State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”**

Articles 7 & 8 of the Convention reads as follows:

Article 7

- 1). The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible , the right to know and be cared for by his or her parents.**
- 2). States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.**

Article 8

1. **States Parties undertake to respect the right of the child** to preserve his or her identity, including nationality, name and **family relations as recognized by law** without unlawful interference.
2. Where **a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection**, with a view to re-establishing speedily his or her identity.”

Article 9 (1) & (3) of the Convention read as follows:

Article 9

1. **States Parties shall ensure that a child shall not be separated from his or her parents against their will**, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

x x x x x x x x x x x

2. **States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis**, except if it is contrary to the child's best interests.”

Article 10 of the Convention reads as follows:

Article 10

- 1) *In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States*

Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

- 2) ***A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents.*** Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (order public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.”

Article 18 of the Convention reads as follows:

Article 18

1. ***States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.*** The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of the child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.”

35. In addition to rights of child, though India is not signatory to the Hague Convention of 1980, still the order passed by any Court has to be respected. If any person, like 5th respondent, starts violating the Court order, sanctity of the Legal Institution will be in jeopardy.

36. In view of the above discussion and the legal position, we are of the considered opinion that it would be in the best interest of the minor children to return to the US so that they can enjoy there in the natural environment, receive the love, care and attention of their father and paternal grandparents, resume their school and be with their teachers, peers and friends.

37. Accordingly, we hereby direct the 5th respondent to return the children to the petitioner in India within four (04) weeks from the date of receipt of a copy of this order. Failing which, the Consulate General of the US at Hyderabad shall take the custody and handover the custody of the children to the petitioner in India or in the US by making their comfortable journey to US.

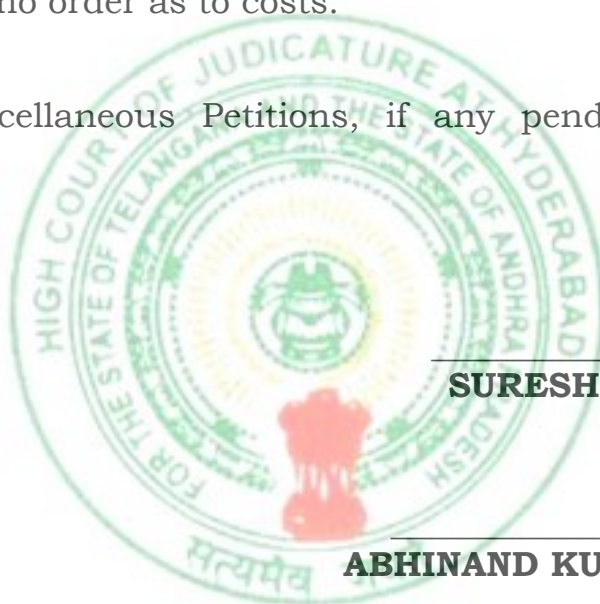
38. The 5th respondent is also highly educated and was gainfully employed in the US for number of years. Accordingly, we hereby grant liberty to the 5th respondent, whenever she feels to visit the children in US, the petitioner shall make all arrangements i.e., travel, comfortable stay at US and other expenses till the US Court pass directions in the petitions filed by the 5th respondent or she become the gainful in any country, whichever is earlier.

39. As undertaken by the petitioner that, we direct the petitioner that he shall not insist upon costs and fine imposed by the Court of US upon the 5th respondent.

40. We also direct the petitioner that if children are in India and 5th respondent happens to be in India, the children shall remain with 5th respondent. He shall give all access to 5th respondent to chat with the children on whatsapp and video conference etc.

41. With the above directions, this Writ Petition is allowed. There shall be no order as to costs.

Miscellaneous Petitions, if any pending, shall stand closed.



SURESH KUMAR KAIT,J.

ABHINAND KUMAR SHAVILI,J.

Date: 08-02-2018

Copy to : The Consulate General of U.S.A at Hyderabad.

(b/o)

Gvl