

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRWP-1057-2019

Date of Decision : 19.06.2020

Sonia Dhawan

....Petitioner

Versus

State of Haryana and others

....Respondents

CORAM : HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Sukhvinder Singh Nara, Advocate
for the petitioner.

Mr. Apoorv Garg, DAG, Haryana
for respondent No. 1-State.

Mr. P.S. Jammu, Advocate
for respondents No. 2 to 5.

ARUN KUMAR TYAGI, J.

1. The petitioner has filed the present petition under Article 226/227 of the Constitution of India through her brother and special power of attorney Rajnish Dhawan, for issuance of a writ in the nature of Habeas Corpus directing respondent No.1 for effecting the release of detainee Aarvi Ranga minor son of the petitioner from illegal custody of respondents No. 2 to 5.

2. Briefly stated, the petition has been filed on the averments that marriage of the petitioner was solemnized with respondent No. 2 on 04.12.2009 at Panchkula as per Hindu rites and ceremonies. At the time of marriage respondent No. 2 was residing in Australia. The petitioner joined respondent No. 2 in Australia on 13.07.2010 and a son named Aarvi Ranga was born out of the wedlock on 12.03.2011. The petitioner was subjected to cruelty by respondent No.2 in connection with demand of dowry. On

11.09.2019 the petitioner and minor son Aarvi Ranga had to travel with respondent No. 2 to India under his pressure. When they reached Kurukshetra, respondent No. 2 threatened the petitioner and forcibly took the custody of minor son Aarvi Ranga with the help of other respondents. The petitioner apprehended danger to her life and went back to Australia on the next day. After two days respondent No. 2 also reached Australia abandoning the minor son Aarvi Ranga in India. Respondent No. 2 also got the school leaving letter of minor son Aarvi Ranga from the school in Australia on 16.09.2019. Respondent No. 2 visited the house where the petitioner and respondent No.2 were living together and took his clothes, articles and documents and shifted to some unknown place in Australia. The petitioner tried to contact respondent No. 2 through whatsapp, facebook and common friends but to no avail. The petitioner contacted respondents No. 3 to 5 and asked them about her son who initially agreed to send her son to Australia but subsequently refused. Respondents No.3 to 5 threatened the petitioner and did not allow her to speak to her son despite repeated phone calls, whatsapp and facebook messages. The petitioner approached many lawyers in Australia who advised her to approach courts in India. The petitioner had apprehension of danger to her life in India and requested her brother to lodge complaint in the police station. Her brother made complaint dated 01.11.2019 to the Superintendent of Police, Kurukshetra. The detinue Aarvi Ranga is in illegal custody of respondents No. 3 to 5. The petitioner is a permanent resident of Australia currently employed in Australia and wants to keep her son with her in Australia. The son of the petitioner has been kept in India against its will and her consent which violates their right to life and personal liberty as guaranteed under Article 21 of the Constitution of India.

Her son detenu-Aarvi Ranga was born in Australia, spent his childhood there, has Australian friends and likes to study and live in Australia. He was getting education in Australia which was better as compared to India and he can do many more things in Australia only. He never lived in India and has no social circle here. Respondent No. 2 did not care for the ordinary comfort, contentment, health, education, intellectual development and favourable surroundings of the child in Australia and abandoned him in India. The actions of the respondents No.2 to 5 are violative of the provisions of the Human Rights Act, 1993, the Juvenile Justice (Care and Protection of Children) Act, 2015 and the International Conventions and Covenants such as 'Universal Declaration of Human Rights', 'UN Declaration of the Rights of the Child' and 'UN Convention of the Rights of the Child' to which India is signatory. The petitioner is of the view that let the petitioner and respondent No. 2 have joint custody of their son, get him back to Australia and get the matter decided in Australian Court. It would be in the best interest of minor Aarvi Ranga to repatriate him to Australia. The petitioner has accordingly prayed for issuance of a writ in the nature of Habeas Corpus directing restoration of the custody of the minor son of the petitioner to her by ordering its repatriation to Australia.

3. Vide order dated 16.11.2019 notice of motion (rule nisi) was issued.

4. In response thereto respondent No.1 filed status report by way of affidavit of Sh. Munish Sehgal, HPS, Deputy Superintendent of Police, Ambala. In his affidavit, Sh. Munish Sehgal, HPS, Deputy Superintendent of Police, Ambala has submitted that ASI Ajit Pal was instructed to enquire into the matter and report immediately. On 19.12.2019, ASI Ajit reached at

the house of respondents No. 2 to 5 situated in the area of the New Sharda Nagar, Rattangarh, Ambala City, joined respondent No. 3 in the enquiry and recorded her statement who stated that she has two sons and a daughter. Her elder son Chand Ram alongwith his family is residing with her and her younger son Rakesh Kumar alongwith his wife Sonia Dhawan and son Aarvi Ranga is residing in Sydney (Australia) for the last 10 years. The relations between her son and daughter in law Sonia were strained. On 11.09.2019 her son Rakesh and daughter in law Sonia and grandson Aarvi Ranga reached at Kurukshetra at the house of mother of Sonia in the evening hours and her son Rakesh Kumar and grandson Aarvi Ranga reached at her house at Ambala. On the next day in the morning, she alongwith her son Rakesh Kumar, her grandson Aarvi Ranaga, her son Chand Ram and daughter in law Binder Kaur reached in Kurukshetra at the house of mother of Sonia where mother of Sonia told them that Sonia has gone to Chandigarh. They waited upto evening and thereafter they returned. After two days they came to know that her daughter in law Sonia has returned to Australia on 12.09.2019. On 14.09.2019 her son Rakesh Kumar also went back after leaving his son with them. Her grandson Aarvi Ranga is studying in 2nd Class in St. Joseph School, Ambala City. The above statement of Smt. Sunehari Devi (respondent No. 3) was duly endorsed by her son Chand Ram (respondent No. 4) and Binder wife of Chand Ram (respondent No. 5). Thereafter, on the same day, ASI Ajit Pal joined Jaspal Singh son of Kartar Singh resident of 73, New Sharda Nagar, Rattan Garh, Ambala City and Raj Bala wife of Jagmal Singh resident of 76, New Sharda Nagar, Rattan Garh, Ambala City who verified the facts by getting their joint statement recorded. The enquiry officer also met the child and

enquired from him about any difficulty while staying at Ambala for the last three months but the child was feeling happy and did not make any complaint of any kind.

5. Respondents No. 2 to 5 appeared through their Counsel and Respondent No. 2 and respondents No. 3 to 5 respectively filed separate replies to the petition.

6. In his reply respondent No. 2 has taken preliminary objections as to the petitioner having concealed material facts and the present criminal writ petition being not maintainable as only the petition under the Hindu Minority and Guardianship Act, 1956 (for short 'the 1956 Act') or the Guardian and Wards Act, 1890 (for short 'the 1890 Act') is maintainable for seeking custody of the minor child. In his reply on merits, respondent No. 2 has denied having treated the petitioner with any cruelty in connection with demand of dowry and pleaded that the petitioner was having love affair with one Sushil Chaudhary and due to break up with Sushil Chaudhary the petitioner tried to commit suicide by cutting her vein of the arm. The Australian police got the petitioner admitted in the hospital for treatment. After the above said incident respondent No. 2 alongwith the petitioner and minor son Aarvi Ranga returned to India to resolve the dispute. The petitioner returned to Australia on 11.09.2019 and left the minor child with respondent No. 2 and had foregone her right of its custody. Subsequently, respondent No. 2 handed over the custody of his minor son Aarvi Ranga to his mother respondent No. 3 who is real grandmother of the minor child and is in a position to look after and take care of the minor child. Presently, minor child Aarvi Ranga is studying in 2nd Class in St. Joseph School, Ambala City. Respondent No. 2 has also endorsed the custody of the minor

child to his mother by way of writing of guardianship dated 19.11.2019. The custody of the minor child is with respondents No. 3 to 5 who are not strangers but are close relatives of the minor child. The minor child is being looked after properly and he is getting good atmosphere of study and nutritious diet. The petitioner who is having love affair with one Sushil Chaudhary is not in a position to look after the minor child. The petitioner is unemployed and has no residence and no income for better education and better maintenance of minor child. Therefore, the petition may be dismissed.

7. In their reply respondents No. 3 to 5 have taken similar preliminary objections as to the petitioner having concealed material facts and the present criminal writ petition being not maintainable and have in their reply on merits taken pleas with similar factual averments as taken by respondent No. 2 and referred to above. Respondents No. 3 to 5 have pleaded that the petitioner is not in a position to look after the minor child. The petitioner never contacted them and there was no question of using abusive language and there were no talks on mobile phone.

8. The petitioner filed counter affidavit dated 08.01.2020 denying the allegations as to her affair with any one and submitted that altercation took place between her and respondent No. 2 due to her objection to sending of money by respondent No. 2 to respondent No. 4 and during manhandling she suffered a cut at her left wrist with the cutter respondent No. 2 was having but for fear of losing his status of permanent resident in Australia respondent No. 2 asked her to tell fake story to the police. The petitioner also denied writing dated 11.02.2014 and abandoning of the child by her. The petitioner has further affirmed that respondent No. 3 being old aged lady dependent on respondents No. 4 and 5 and respondents No. 4 and

5 both being employed and their son and daughter being college going students cannot look after the minor son of the petitioner. Respondent No. 2 had no authority to hand over the custody of minor child to respondent No. 3 without her consent and the GPA of Guardianship executed in this regard cannot be considered as testamentary custody. As per his working hours respondent No. 2 has to work till late night, indulges in gambling and is indebted to the Banks in Australia and cannot look after the minor son. The minor child at the age of 8 years is not in a position to make any independent opinion. Respondents No. 3 to 5 are tutoring the minor child against the petitioner. The petitioner has accordingly reiterated her prayer for repatriation of the detainee to Australia.

9. Vide order dated 16.01.2020 the petitioner-mother and respondent No. 2-father of the detainee-Aarvi Ranga were directed to file their affidavits regarding the following aspects :

- 1) their educational background, present employment, salary, working hours and residential accommodation in Australia ;
- 2) their other sources of income, if any, moveable/immovable properties and residential accommodation in India ; and
- 3) proposed schooling, treatment etc. of the detainee and particulars regarding custody and care of the detainee during their working hours, if custody is handed over to them.

Respondent No. 2-father of the detainee-Aarvi Ranga was also directed to give additional information in the affidavit regarding following points :-

- 1) Whether respondent No. 2 intends to take detainee with him to Australia or he wants to leave his custody with his mother-respondent No. 3 ;

- 2) Who are other family members living with respondent No. 3 mother of respondent No. 2, their educational background and present profession/occupation, other sources of income and residential accommodation ; and
- 3) proposed schooling, treatment etc. of the detainee in India.

10. In compliance with the above said order, petitioner has filed affidavits dated 18.01.2020 and 20.01.2020 and respondent No. 2 has filed affidavit dated 20.01.2020.

11. The petitioner in her affidavits dated 18.01.2020 and additional affidavit dated 20.01.2020 and respondent No. 2 in his additional affidavit dated 20.01.2020 have sworn to the following facts :-

Educational background, present employment, salary, working hours and residential accommodation in Australia.

The petitioner had graduated from Kurukshetra University in the year 2007 and did two years vocational course in English Stenography from ITI, Panchkula in the year 2004. She is presently employed as stable hand with High Street Racing, Sydney, Australia and works 38 hours per week ordinarily but may also do overtime and receives Australian dollars (for short 'AUD') 3500-4000 (approximately) i.e. Rs. 1,75,000-2,00,000/- per month. Presently she is working from 4.30 am to 9.00 am. but her working hours are flexible and in case she gets the custody of her son she can change her working hours as per the convenience of her son which fact has been confirmed by her employer by e-mail. She lives in a rented accommodation shared with Indian family of Mrs. Kamla Tanwar and Mr. Bhojraj Singh. In her affidavit dated 20.01.2020 the petitioner has stated that her employer has allowed her to opt for working hours from 8 am to 2.30 pm.

Respondent No. 2 is B.A. 2nd year pass, he had done English Stenography 1 year course, 2 year ITI diploma in Turner trade +1 year apprenticeship, 1 year computer course, English for vocational Education in Australia, Certificate-III in Hospitality from Carrick Institute of Education, Sydney, Australia, 1 year advance diploma of hospitality management and diploma of Business management in Australia. He has more than 10 years of experience as Manager cum Head Chef in a restaurant and is presently working there. He works four days a week in two shifts from 10.00am to 03.00 pm and 05.00 pm to 09.30 pm. His annual income is AUD 1280 per week/AUD 66560 (Rs. 33,28,000/-) per annum. He is also earning about AUD 1000 per week/AUD 52000 (Rs. 26 lacs approximately) annually by driving Uber Car during off days. His total annual income is about AUD 1,18,560 (Rs. 59,28,000/-). He lives in a two bed room set on rent of AUD 120 per week in Australia on sharing basis.

Other sources of income, if any, moveable/immovable properties and residential accommodation in India

The petitioner is owner of two Bedroom Flat in Maya Garden city, Ambala Chandigarh National Highway, Zirakpur, the market value of which is Rs. 50,00,000/- approximately and has monthly income of Rs. 15,000/- as rent from the same. Her father had died and left a three storey house at Sector – 7, HUDA, Kurukshetra, in which she has share alongwith her two brothers and mother but she does not want to claim any share in the same. She has a bank balance of Rs. 5,50,000/- approximately in her Savings Account in State Bank of India, Sector-14, Panchkula.

Respondent No. 2 has claimed that he has a flat in Maya Garden City, Zirakpur which is having value of more than Rs. 50 lacs. The said flat

was purchased by the petitioner with funds sent by him. He has joint family in India having 220 sq. yards plot covered area 2500 sq ft., 3 bed rooms, kitchen, lobby, 3 bathrooms, drawing room, store and parking area. He has Bank balance of about AUD 22,000 (Rs 11 Lakh). He also has a Super Invention AUD amounting to AUD 38,885 (Rs. 20,00,000/- approximatey) which is like a provident fund. He is having insurance of AUD 3 lac (Rs. 1.5 crore). He is having 50 gms gold and has Mazda-3 Luxary Car in Australia.

Proposed schooling, treatment etc. of the detenue and particulars regarding custody and care of the detenue during their working hours, if custody is handed over to them.

The petitioner has sworn in her affidavit dated 18.01.2020 that the child was earlier studying in 3rd Standard at Rosehill Public School, Sydney and it will be admitted in the same school and is likely to be promoted to 4th Standard. The school is on a five minutes walking distance from her residence. The child had started speaking at the age of four and half years and she used to take him to Speech Therapist in Australia. Recently, it was taking speech therapy from Speech Pathologist at Priority Harris Park, NSW, Australia. It is not being provided any such treatment in India. The petitioner is a permanent resident of Australia and would be eligible to apply for Australian Citizenship in Feburary, 2020. Since she is in separation, she can live with her son as a single mother and without even working in Australia she can receive weekly social security amount from the Government of Australia as per the policy for the single mothers. The child of the petitioner is already receiving AUD 133 per week alongwith AUD 5000 per year as per the scheme of the Australian Government. The medical, health and education of the deponent and her son are covered by the Australian Government. Due to the petitioner being a single mother, the

petitioner and her son can live a comfortable life, even without working, with amount payable as per the policy of Australian Government. Her employer has changed her working hours from 08.00 am to 02.30 pm. She has no extra martial affair. The petitioner can provide a better and comfortable lifestyle in Australia than the respondents No. 2 to 5. The petitioner was taking care of the ordinary comfort, health, contentment, education and intellectual devlopment of the child as evidenced by the photographs annexed. The petitioner is sharing accommodation in Australia with Indian family of Mrs. Kamla Tanwar and Mr. Bhojraj Singh who also have seven year old son Yuvraj, who is studying in the same school where her son was studying. She will keep her son with her and adjust her working hours as per the convenience of her child. The school timings of the child are from 9.00 am to 3.00 pm. with option of pre school from 7 am. She will pick up her son alongwith the son of her housemate family at 3.00 pm and look after the son of her housemate family in the evening and they have also agreed to drop the son of the petitioner with their son at 9.00 am and look after her son in the morning.

Respondent No. 2 has sworn in his affidavit dated 20.01.2020 that he will provide schooling to the child in Crows Nest Public School in Sydney, Australia which is reputeded school and is near to his accommodation. Medical treatment is free in Australia and he undertakes to provide best schooling and treatment of the child in Australia as well as in India. He is residing in a joint family in India in Ambala City alongwith his mother who is taking care and properly looking after the child. He has four other members in his joint family namely Sh. Chand Ram who is Mechanical Engineer in BEL, Panchkula and earns Rs. 1,20,000/- per

month, Binder Kaur who is MPHWS in Govt. Hospital, Ambala and earns about Rs. 80,000/- per month, Nitika who is a student and Ankush Rana who is B.Tech in Computer Science. His son Aarvi Rana is currently studying in 2nd Class in St. Joseph School, Ambala. He intends to settle with the child in India in joint Hindu Family for the better future of the child. He undertakes to provide best education, best home environment and best medical treatment in India.

12. The petitioner has claimed in her additional affidavit dated 20.01.2020 that her husband respondent No. 2 is under debt of various financial institutions which is evident from recovery letters dated 18.11.2019, 22.11.2019 and 25.11.2019 issued by the recovery agencies of financial institutions and he is not in a position to maintain the child and care for his contentment and ordinary comfort.

13. Respondent No. 2 has averred in his affidavit dated 20.01.2020 that the child Aarvi Rana does not intend to join the society of its mother as the petitioner met with her paramour in the presence of the child at her house as told by the child. The petitioner is not in a position to keep the child as she has no permanent job, good income as well as living standard. The petitioner has given wrong information that the child is getting AUD 133 per week from the Australian Government. The child can get AUD 69.44 for two weeks and in case both parents are working the above said benefit is not applicable to the child.

14. I have heard learned Counsel for the parties and gone through the relevant record and judicial precedents relied upon by them.

15. Sh. Sukhvinder Singh Nara, learned Counsel for the petitioner has argued that marriage of the petitioner with respondent No.2 took place on

04.12.2009. Respondent No.2 was residing in Australia since before his marriage. The petitioner joined respondent No. 2 in Australia on 13.07.2010. The detainee Aarvi Ranga was born and brought up in Australia and studying in Class 3rd standard and was to be promoted in due course in 4th standard. The petitioner along with detainee came to Kurukshetra, India on 11.09.2010 with respondent No.2 under his pressure. Respondent No.2 forcibly took custody of the detainee from her on 11.09.2019. The petitioner returned to Australia on 12.09.2019 while respondent No.2 also returned to Australia on 15.09.2019 by illegally handing over the custody of the detainee to his mother. The petitioner filed present petition on 08.11.2019 through her brother. The power of attorney was executed by respondent No.2 in favour of respondent No.3 only after filing of the present petition. Respondent No.2 is natural guardian of the child but he has abandoned the child and illegally handed over its custody to his mother. The child is at present in custody of respondents No.3 to 5 who have no legal right to its custody. Respondent No.3 is an old lady aged about 70 years, a house wife and is wholly dependent on remittances by respondent No.2. Respondents No.4 and 5 are both working and both of their children are college going. The detainee cannot be properly looked after by them. The petitioner being bio-logial mother and legal guardian after father, is entitled to custody of the detainee. The petitioner is working in High Street Racing, Sydney, Australia as a stable hand and is earning AUD3500-4000 per month. Her working hours are flexible as acknowledged by her employer and have been changed to 8.00 am to 2.30 pm. The petitioner is sharing residential accomodation with an Indian family whose son is also studing in the same school in which the detainee was studying. After her working hours the petitioner will pick

up the detainee and son of her house-mate Indian family, which is sharing the accommodation with her, from the school at 3.00 pm and will take care of son of her house-mate Indian family till evening while the Indian family will take her son to the school along with their son at 9.00 am and will take care of her son in the morning on reciprocal basis. Respondent No.2 treated the petitioner with cruelty in connection with the dowry demands and made false allegations of extra marital affairs to save his skin. Respondent No.2 has taken loan and committed defaults due to which recovery notices have been issued to him. Respondent No.2 indulges in gambling and is alcoholic. Respondent No.2 cannot look after and maintain the child with him in Australia also due to his onerous duty hours. The detainee-Aarvi Ranga was born in Australia, spent his childhood there, has Australian friends and likes to study and live in Australia. He was getting education in Australia which was better as compared to India and he can do many more things in Australia only. He never lived in India and has no social circle here. As per Section 6 of the 1956 Act respondent No.2, being father is his natural guardian but he has abandoned the custody of the detainee. Respondents No.3 to 5 have no authority to retain the custody of the child and their refusal to hand over its custody to the petitioner amounts to illegal detention of the child. The action of respondents No. 2 to 5 is also against the human rights of the petitioner and her son, and violates the provisions of the Human Rights Act, 1993. Respondents No. 2 to 5 have also violated the provisions of The Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'the 2015 Act'). The minor child has been abandoned by respondent no. 2 and he is "Child in need of Care and Protection" as defined under section 2 (14)(a) of the 2015 Act. Respondents No. 2 to 5 are not the

'fit person' as defined under Section 2(28) of the 2015 Act. The minor son of the petitioner has the right to be re-united with its family at the earliest and to be restored to the same socio economic and cultural status that he was in before coming to India under the principle of repatriation and restoration under Section 3(xiii) of the 2015 Act. Further, under the principle of 'Family responsibility' as defined under Section 3(v) of the 2015 Act the primary responsibility of care, nurture and protection of the detainee is that of its biological family. The petitioner being biological parent is ready to fulfill these responsibilities which respondent No. 2 has failed to fulfill. The action of respondent No. 2 also violates the provisions of the International Conventions and Covenants, such as 'Universal Declaration of Human Rights', 'UN Declaration of the Rights of the Child' and 'UN Convention on the Rights of the Child' to which India is signatory. The provisions of the 1956 Act and 1890 Act cannot be invoked for grant of custody as the minor child is not the ordinary resident of India within the meaning of Section 9 of the 1890 Act. Therefore, the petitioner has no other remedy except to approach this Court for issuance of writ of habeas corpus. Custody of respondents No. 2 to 5 over the detainee is wholly illegal and therefore, custody of the detainee may be handed over to the petitioner for his repatriation to Australia. In support of his arguments, learned Counsel for the petitioner has placed reliance on judgments in ***Criminal Appeal No.127 of 2020 titled Yashita Sahu Vs. State of Rajasthan and others decided by Hon'ble Supreme Court on 20.01.2020; Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others : 2019(3) RCR (Civil) 104 (SC) ; Gaurav Nagpal Vs. Sumedha Nagpal : 2009 (1) SCC (Civil) 1 (SC); Lahari Sakhamuri Vs. Sobhan Kodali : 2019(5) RCR (Civil) 281 (SC);***

Nirali Mehta Vs. Surendrakumar Surana and another : 2013(8) RCR (Civil) 2166 (Bombay HC) and Divya J. Nair Vs. S.K. Sreekanth : 2019(196) AIC 831 (Kerala HC).

16. On the other hand learned Counsel for respondents No. 2 to 5 has argued that only the petition under the Hindu Minority and Guardianship Act, 1956 or the Guardian and Wards Act, 1890 is maintainable for seeking custody of the minor child. Criminal writ petition for issuance of writ of habeas corpus is not maintainable. Therefore, the petitioner may be asked to approach the Family Court at Ambala. Learned Counsel for respondents No. 2 to 5 has further argued that respondent No.2 did not maltreat the petitioner and commit any act of cruelty in connection with any demand of dowry and the petitioner has made false allegations in this regard. The petitioner was having love affair with one Sushil Chaudhary and due to break-up with him tried to commit suicide by cutting vein of her left arm. The Australian police got her admitted in hospital for treatment. After that accident, respondent No.2 returned to India along with the petitioner and the minor son. The petitioner handed over custody of the minor son to him and returned to Australia. Custody of the minor child was not taken forcibly and was handed over by the petitioner herself who had forgone her rights for custody of her minor child. The petitioner had abandoned the child by returning alone to Australia. Respondent No.2 entrusted custody of the minor son to his mother respondent No.3 grand-mother of the minor child and returned to Australia. Respondent No.2 has also executed GPA of guardianship in favour of respondent No.3. Respondents No.3 to 5 are not strangers and are members of his Joint Hindu Family and close relatives of the minor child.

Respondent No.2 was living in Joint Hindu Family and had gone to

Australia for earning his livelihood. Respondent No.2 intends to settle in Joint Hindu Family in India for better future of the minor child. Presently minor child is studying in second class in St. Joseph School, Ambala City and living in good environment and getting nutritious diet. The petitioner is living with Sushil Chaudhary in live in relationship. The petitioner cannot properly look after and maintain the minor child due to her odd working hours of her employment under the High Street Racing, Sydney, Australia. After lockdown, the petitioner is getting unemployment allowance from the Australian Government and is not having sufficient income to maintain the child. Repatriation of the child to Australia and handing over its custody to the petitioner will not be in the best of interest and welfare of the child. Therefore, the petition may be dismissed. In support of his arguments learned Counsel for respondents No.2 to 5 has placed reliance on judgments in ***Jitender Arora and others Vs. Sukriti Arora and others : 2017 (2) RCR (Civil) 54 (SC); and Nithya Anand Raghavan Vs. State of NCT of Delhi and another (SC) : 2017 (3) RCR (Civil) 798 (SC); LPA No.3716 of 2018 titled Reetu Verma Vs. State of Haryana and others decided on 23.05.2019 (P&HHC); CRWP-959-2018 (O&M) titled Reetu Verma Vs. State of Haryana and others decided on 29.11.2018 (P&HHC); CRWP-540-2018 (O&M) titled Amandeep Bains Vs. State of Punjab and others decided on 24.09.2018 (P&HHC); Mandy Jane Collins Vs. James Michael Collins and others : 2006(3) RCR (Civil) 232 (Bombay High Court); Muthian Sivathanu Vs. The Home Secretary, Government of Tamil Nadu and others : 2014 (38) RCR (Criminal) 219 (Madras High Court) and Chandan Mishra Vs. Union of India and others : 2017 (AIR) CC 3185 (Delhi High Court).***

17. Learned State Counsel has submitted that the parties may be directed to approach the Family Court at Ambala for determining the question of guardianship and custody of the minor and the petition may be dismissed.

18. Now, it is well settled that writ of habeas corpus can be issued for restoration of custody of a minor to the guardian wrongfully deprived of it.

19. In **Criminal Appeal No. 127 of 2020 SLP (crl.) No. 7390 of 2019 titled Yashita Sahu Vs. State of Rajasthan and others** decided on 20.01.2020 Hon'ble Supreme Court observed as under:-

“9. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw vs. Arvand M. Dinshaw & Ors. (1987) 1 SCC 42, Nithya Anand Raghavan vs. State (NCT of Delhi) & Anr. (2017) 8 SCC 454 and Lahari Sakhamuri vs. Sobhan Kodali (2019) 7 SCC 311 among others. In all these cases the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.”

20. In **Tejaswini Gaud and Ors. Vs. Shekhar Jagdish Prasad Tewari and others : 2019 (3) R.C.R. (Civil) 104**, Hon'ble Supreme Court observed as under:-

“13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium

through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.”

21. However, exercise of extra ordinary writ jurisdiction to issue writ of habeas corpus in such cases is not solely dependent on and does not necessarily follow merely determination of illegality of detention and is based on the paramount consideraion of welfare of the minor child irrespective of legal rights of the parents.

22. In ***Howarth Vs. Northcott : 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758*** it was observed that in habeas corpus proceedings to determine child custody, the jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its infant ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. It was further observed that the employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the

welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate. It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; **but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.**

23. In *Gaurav Nagpal Vs. Sumedha Nagpal : 2008(4) R.C.R.(Civil)* 928 Hon'ble Supreme Court referred to these observations made in *Howarth Vs. Northcott : 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758* and held that the legal position in India follows the above doctrine.

24. In *Elizabeth Dinshaw Vs. Arvand M. Dinshaw & Ors.(1987) 1 SCC 42* Hon'ble Supreme Court observed as under:-

“8. Whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.....”

25. In *Ruchi Majoo Vs. Sanjeev Majoo : 2011(3) R.C.R. (Civil)* 122) Hon'ble Supreme Court observed as under:-

“Proceedings in the nature of habeas corpus are summary in nature, where the legality of the detention of the alleged detenu is examined on the basis of affidavits placed by the parties but nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction.”

26. Where the parties are Hindus, the 1956 Act lays down the principles on which custody disputes are to be decided. As per Section 6 of the 1956 Act, natural guardian of a Hindu Minor in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) is the father, in the case of a boy

or an unmarried girl and after him, the mother. Father continues to be a natural guardian, unless he has ceased to be a Hindu or renounced the world. Section 13 (1) of the 1956 Act stipulates that in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. Section 13(2) of the 1956 Act stipulates that no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor. Section 7 of the 1890 Act empowers the Court to make order as to guardianship. Section 17 (1) of the 1890 Act provides that in appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of said section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. Section 17 (2) of the 1890 Act stipulates that in considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. Section 17 (3) of the 1890 Act mandates that if the minor is old enough to form an intelligent preference, the Court may consider that preference.

27. Under Section 6 of the 1956 Act the father is a natural guardian of a minor child and therefore has a preferential right to claim its custody **but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party.** Section 6 of the 1956 Act cannot supersede the dominant

consideration as to what is conducive to the welfare of the minor child. (See **Surinder Kaur Sandhu (Smt.) Vs. Harbax Singh Sandhu, (1984) 3 SCC 698, Elizabeth Dinshaw (Mrs.) Vs. Arvand M. Dinshaw, (1987) 1 SCC 42 and Chandrakala Menon (Mrs.) Vs. Vipin Menon (Capt.), 1993 (2) RCR (Criminal) 5 : (1993) 2 SCC 6.**) The children are not mere chattels : nor are they mere play-things for their parents as observed by Hon'ble Supreme Court in **Rosy Jacob Vs. Jacob A. Chakramakkal, (1973) 1 SCC 840.** It is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the Court. It is the welfare of the minor and the minor alone which is the paramount consideration. (See **Saraswathibai Shripad Vs. Shripad Vasanji : AIR 1941 Bombay 103**). Keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live. (See **Goverdhan Lal Vs. Gajendra Kumar, AIR 2002 Raj 148**). Custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience. (See **M.K. Hari Govindan Vs. A.R. Rajaram, AIR 2003 Mad 315**).

28. It is not merely the comparative financial capacity of the parent seeking custody which matters. In **McGrath, (1893) 1 Ch 143, Lindley, L.J.** Observed as under :-

"The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical wellbeing. Nor can the tie of affection be disregarded."

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

"Welfare is an all-encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents."

30. In **Gaurav Nagpal Vs. Sumedha Nagpal : 2008(4) R.C.R.(Civil)**

928 Hon'ble Supreme Court observed as under:-

"42.The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others."

43. The word 'welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases."

31. In **Nil Ratan Kundu Vs. Abhijit Kundu 2008(3) RCR (Civil) 936**

: (2008) 9 SCC 413 Hon'ble Supreme Court observed as under:-

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal

provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

32. In number of cases filed under Article 32 of the Constitution of India or appeals filed challenging correctness of the order passed by the High Court in exercise of jurisdiction under Article 226 of the Constitution of India, Hon'ble Supreme Court has dealt with the question of issuance of writ of habeas corpus for repatriation of the minor children, who had been removed from the foreign countries and brought to India, to the country from where they had been removed. Hon'ble Supreme Court has taken the view that the High Court may invoke the extraordinary jurisdiction to determine the validity of the detention keeping in mind the paramount consideration of the welfare of the child and even the order of the foreign court must yield to the welfare of the child. The Court may direct repatriation of the minor child to the country from where he/she may have been removed by a parent or other person; as was directed by Hon'ble Supreme Court in **Dr. V. Ravi Chandran Vs. Union of India, (SC) 2009(4) R.C.R. (Civil) 961** and **Shilpa Aggarwal Vs. Aviral Mittal and another (SC) 2010(1) R.C.R.(Civil) 231 : (2010) 1 SCC 591** cases or refuse to do so as was the position in **Sarita Sharma Vs. Sushil Sharma**

2000 (2) R.C.R.(Civil) 367 : (2000) 3 SCC 14.

33. In **Nithya Anand Raghavan Vs. State of NCT of Delhi, (SC)**

2017(3) R.C.R.(Civil) 798 : 2017(8) SCC 454 Hon'ble Supreme Court

reiterated as under:-

26. The consistent view of this court is that if the child has been brought within India, the Courts in India may conduct (a) summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the Court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the Court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign Court. In an elaborate inquiry, the Court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign Court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the Court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently.”

34. In such matters the High Court has two alternatives: first, repatriation of the minor child pursuant to a summary enquiry and second to conduct an elaborate enquiry regarding the welfare of the minor child. The High Court may conduct the enquiry itself or relegate the parties to the Family Court/Guardian Court. Though there is no legal bar in conducting of the enquiry by the High Court in a petition seeking the writ of habeas corpus but at the same time, High Court may not be the best forum to ascertain the welfare of the minor, which can be better adjudged by a Family Court/Guardian Court on the basis of evidence produced by the parties.

35. In **Dr. V. Ravi Chandran Vs. Union of India (SC) 2009(4)**

R.C.R. (Civil) 961 it was held that should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to **consider the**

welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents.

36. The question of the custody of minor children, as observed by Hon'ble Supreme Court in **Lahari Sakhamuri Vs. Sobhan Kodali 2019 AIR (SC) 2881:2019 (7) SCC 311**, raises delicate issues considered by the Courts to be difficult for adjudication particularly where the parents are non-resident Indians. As observed by Hon'ble Supreme Court in **Vivek Singh Vs. Romani Singh : 2017 (1) RCR (Civil) 1063**, in cases of this nature, where a child feels tormented because of the strained relations between her parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. No doubt, paramount consideration is the welfare of the child. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts.

37. In the present case marriage of the petitioner with respondent No.2 took place on 04.12.2009. The petitioner joined respondent No.2 in Australia on 13.07.2010. Detenue Aarvi Ranga was born in Australia on 12.03.2011. Detenue Aarvi Ranga was studying in 3rd standard in Rosehill Public School, NSW, Australia and was to be promoted in due course in 4th standard. The petitioner and respondent No.2 along with the detenue came to Kurukshetra, India on 11.09.2010. The petitioner returned to Australia on 12.09.2019 while respondent No.2 returned to Australia on 15.09.2019 by entrusting the custody of the detenue to its grand mother-respondent No.3.

The petitioner filed present petition on 08.11.2019 through her brother as her special Power of Attorney. Power of Attorney dated 19.11.2019 was executed by respondent No.2 in favour of his mother respondent No.3 entrusting custody of the detainee to her. The petitioner and respondent No.2 are claimed to be permanent residents of Australia. In her affidavit dated 18.01.2020 the petitioner has sworn that the petitioner intends to apply for Australian citizenship when she becomes eligible to do so in February 2020 while in his affidavit dated 20.01.2020 respondent No.2 has affirmed that respondent No.2 was living in joint Hindu Family at Ambala and intends to return and settle in India in joint Hindu Family for the better future of his minor son. Under Section 6 of the 1956 Act respondent No.2 is natural guardian and therefore has a preferential right to claim the custody of his son but Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child and custody of the minor child can be ordered to be given to the petitioner if it is so required for the welfare of the minor child. The petitioner has sought custody of the detainee mainly on the ground of respondent No.2 having returned to Australia by abandoning the minor child and illegally handing over custody of the minor child to his mother respondent No.3 but the petitioner is alleged to have consented vide writing dated 11.02.2014 that custody of the minor child shall be with respondent No.2. The child came to India with the petitioner and respondent No.2 and was not un-authorisedly removed to India. The petitioner returned to Australia on 12.09.2019 by handing over custody of the minor child to respondent No.2 and leaving the minor child in India. Admittedly, the petitioner and respondent No.2 are now living separate in Australia. There are serious allegations against the

petitioner that the petitioner was having love affair with one Sushil Chaudhary and attempted to commit suicide by cutting vein of her left arm on which she was got admitted in hospital for treatment by Australian police. In support of these allegations respondent No.2 has produced copies of (i) writing dated 11.02.2014 wherein she allegedly confessed that she had an affair and had cheated her husband respondent No.2 and agreed that custody of the minor son shall remain with respondent No.2 and (ii) discharge summary dated 10.09.2019 which recites that the petitioner had been got admitted in Westmead Hospital Emergency Department by the Police with cut on her left wrist which was opined to be superficial and also records that the occurrence had taken place due to situational crisis in view of reaction of her husband respondent No.2 to disclosure by the petitioner of her affair with some one. The recitals in the discharge summary are claimed to be based on the history given by the petitioner to the attending doctor. In his affidavit dated 20.01.2020 respondent No.2 has sworn that the petitioner is having illicit relations with Sushil Chaudhary and living with him in live in relation-ship and the address given by the petitioner in the memo of parties i.e. 3/31 Bowden Street, Harris Park NSW 2150 Sydney, Australia is also that of the residential accommodation of Sushil Chaudhary. Allegations of extra marital affair have been denied by the petitioner in her counter affidavit dated 08.01.2020. The petitioner has made serious allegations of maltreatment of the petitioner by respondent No.2 in connection with demand of dowry but the petitioner has not produced copy of any complaint made by her to any authority before removal of the child to India. The questions as to affair of the petitioner and her live in relationship and handing over of custody of the minor by her to respondent No.2 due to

this reason require adjudication on the basis of detailed enquiry by recording evidence of the parties.

38. Vide order dated 16.01.2020, the petitioner and respondent No.2 were directed to file affidavits regarding their educational background, employment, income, their residential accommodation and moveable/immoveable properties etc. and in compliance of the same they have filed their affidavits. In her affidavit the petitioner has stated that she is presently employed as stable hand with High Street Racing, Sydney, Australia and is receiving AUD 3500-4000 (approximately) (Rs. 1,75,000-2,00,000/-) per month. However, as per email dated 18.01.2020 sent by William Freedman the petitioner was working with Freedman Brothers for the past three months i.e. after her return to Australia on 12.09.2019. The petitioner has not given any particulars of her employment prior to that date and there is no material as to continuous nature of present employment. In her affidavit the petitioner has submitted that she has rental income of Rs.15,000/- per month and savings of Rs. 5,50,000/- but the above said amounts cannot prima facie be said to be sufficient to meet cost of living in Australia for long. In view of spread of Covid-19 and consequent lockdown and other restrictions, the parties were directed to intimate any change brought out by the same affecting their employment and income but they claimed there was no change. However, at the time of arguments while learned Counsel for the petitioner has asserted that there was no change learned Counsel for respondent No.2 has claimed that due to restrictions imposed to prevent spread of covid-19 the petitioner is getting unemployment allowance from the Australian Government. The petitioner has claimed that being in separation, she can live with her son as a single

mother and without even working in Australia she can receive weekly social security amount from the Government of Australia as per the policy for the single mothers and the petitioner and the child can live comfortably even without her working any where. The question of her financial capacity to maintain the child requires adjudication on the basis of evidence to be produced and prima facie in the absence of requisite documentary evidence the petitioner can not be presumed at this stage to have such financial capacity to satisfy the financial stability and security aspects of welfare of the minor.

39. The petitioner has affirmed in her affidavit dated 18.01.2020 that she lives in rented accommodation on sharing basis with an Indian family of Mrs. Kamla Tanwar and Mr. Bhojraj Singh who also have seven year old son named Yuvraj, who is studying in the same school where her son was studying. At present she is working from 4.30 am to 9.00 am. but her working hours are flexible as confirmed by her employer and have been changed to 8 am to 2.30 pm. The school timings of the child are from 9.00 am to 3.00 pm. with option for pre school at 7 am. She will pick up her son alongwith the son of her housemate family at 3.00 pm and they have also agreed to drop the son of the petitioner with their son at 9.00 am. Since the petitioner shall look after the son of their housemate family, they have also agreed to reciprocate the same. In support of these averments the petitioner has annexed copies of (i) e-mail dated 18.01.2020 Annexure P-5 received from her employer William Freedman that her working hours are 8am-2.30pm Monday-Saturday and her working hours are flexible due to the nature of race course stables being open from 4 am until 2.30 pm and (ii) e-mail dated 17.01.2020 Annexure P-6 received from Bhojraj Singh that his

family is sharing the accommodation with the petitioner who picks up his son aged 7 years, studying in the same school in which minor Aarvi Ranga was studying, from the school at 3pm and looks after him till his return from work at 6pm and if the petitioner brings her son to Australia they will look after him for morning time and drop him to the school with his son and his wife can look after Aarvi Ranga when the petitioner is not available in the house. However, in view of her working hours, the petitioner will depend on her house-mate Indian family for looking after the child in the morning, making the child ready for the school and dropping the child at the school. Further, on any school holiday falling on her working days, during her working hours different from school hours and while going out alone for any official/social gathering, shopping etc. after her working hours, the petitioner will have to leave the minor alone or in custody of the house-mate Indian family in case of their availability. Prima facie, the petitioner can not single handedly properly look after and take care of the petitioner. Questions also arise as to stability/viability of such arrangements for long duration and as to objectivity of the same being in the best interest and for the security and welfare of the minor requiring adjudication on the basis of evidence to be produced in this regard.

40. So far as respondent No.2 is concerned, in case respondent No.2 gets the child admitted to Crows Nest Public School in Sydney, Australia which is near to his accomodation, respondent No.2 will also not be able to look after the minor child during the period of his working hours which are very onerous and till late night. However, the questions as to respondent No.2 being indebted and alcoholic can not be determined in present proceedings on the basis of affidavits and have to be decided on the basis of

relevant evidence in detailed enquiry.

41. It may be observed here that respondent No.3 is grand-mother and respondents No.4 and 5 are paternal uncle and aunt of the minor child and cannot be said to be total strangers as they are members of joint Hindu family to which respondent No.2 belongs. Respondent No.2 intends to return and settle in India with joint Hindu family. Even though respondent No.3 is aged about 70 years but she is not proved to be suffering from any major ailment affecting her ability to look after and take care of the minor child. Even though respondent No.3 is a house-wife and does not have her own source of income but respondent No.2 will be legally bound and has undertaken to make remittances of the requisite amounts to her. Generally speaking, there seems to be nothing objectionable in law to entrustment of custody of a child by single parent living in separation and having such custody to Principal of the School/Warden of the hostel in case of admission of such child in such school with hostel facilities. Respondent No.2 has executed GPA of guardianship dated 19.11.2019 in favour of respondent No.3. Prima facie in view thereof, custody of the minor child with respondent No.3 as member of Joint Hindu Family under the authority of respondent No.2 can not be said to be wholly illegal. However, the questions as to legal permissibility and validity of GPA of Guardianship dated 19.11.2019 and as to entrustment of custody of the child to respondent No.3 being in best of interest and welfare of the child also require adjudication on merits on the basis of evidence. Observations in *Nirali Mehta Vs. Surendrakumar Surana and another : 2013(8) RCR (Civil) 2166* (relied upon by learned Counsel for the petitioner) where parents of the husband who had given up custody of the child were held not entitled to

take its custody from his wife are not applicable to the facts of present case and are not of any help to the petitioner at this stage.

42. No doubt, detinue Aarvi Ranga, who is now aged 9 years, was born and brought up in Australia but in view of the fact that both his parents are Indian it cannot be said to have been removed from its native land to foreign country where his native language is not spoken, or to have been divorced from the social customs and contacts to which he had been accustomed. Aarvi Ranga, who was studying in 3rd standard in Rosehill Public School in NSW, Australia, seems to have been admitted in 2nd standard in St. Joseph School, Ambala City, India due to the fact that admittedly Aarvi Ranga did not attend nursery classes in Australia. Education of Aarvi Ranga cannot be said to have been completely interrupted and Aarvi Ranga cannot be said to have been subjected to a foreign system of education inferior to that of education system of Australia. Prima facie there cannot be said to be any psychological disturbance to Aarvi Ranga. Aarvi Ranga was being provided treatment in Australia as mentioned by the petitioner in her affidavit. Similar medical treatment can be provided to Aarvi Ranga in India and Aarvi Ranga cannot be said to suffer from any disadvantage in the matter of medical treatment. In the course of hearing of the petition, this Court interacted with Aarvi Ranga, who stated that he wanted to live with his grand-mother. In **Kirtikumar Maheshankar Joshi Vs. Pradipkumar Karunashanker Joshi, 1993(1) R.C.R.(Criminal) 529 : (1992) 3 SCC 573**, the father of the children was facing charge under Section 498A IPC for maltreatment of his wife who died unnatural death and the children expressed their willingness to remain with their maternal uncle who was looking after them very well and

expressed their desire not to go with their father. Hon'ble Supreme Court found the children intelligent enough to understand their well-being and in the circumstances of the case, handed over their custody to the maternal uncle instead of their father. In the present case prima facie, Aarvi Ranga being aged about 9 years cannot be said to be wholly incapable of making intelligent preference and wishes of the minor child can be taken in to account. However, the question of best of his interest and welfare ought to be decided on the basis of entire relevant evidence to be produced by the parties.

43. The questions as to whether the petitioner is having any affair with Sushil Chaudhary and is living with him in live in relationship; whether the petitioner handed over custody of the child to respondent No. 2 and had given up her claim to custody of the child; Whether GPA of guardianship dated 19.11.2019 executed by respondent No.2 in favour of respondent No.3 is legally permissible/valid; whether the petitioner is gainfully employed post lockdown imposed to prevent spread of Covid 19 and having sufficient means to maintain the minor child; whether the arrangements to be made by the petitioner with her employer and with house-mate family are sufficient for proper look after/care of the child; whether the child is intelligent enough to understand his well-being and his preference must be accepted in the matter of his custody and whether handing over of custody of the child to the petitioner for repatriation will be in the best interest of the child and for his welfare or the child should be allowed to live in Joint Hindu Family under custody of respondent No.3 in view of affidavit of respondent No.2 that he intends to return and settle in his Joint Hindu Family can not be decided by this Court on the basis of

affidavits of the parties and require adjudication by the Family Court/Guardian Court at Ambala on the basis of detailed enquiry by recording evidence of the parties. The contention of learned Counsel for the petitioner that the Family Court/Guardian Court in India has no jurisdiction as the child can not be said to ordinarily reside in India is not legally sustainable as subsequent to removal to India the child has been got admitted in school and has been residing at Ambala for reasonably long period, even before filing of the present petition. Observations in ***Divya J. Nair Vs. S.K. Sreekanth : 2019(196) AIC 831*** (relied upon by learned Counsel for the petitioner) restricted to the question of jurisdiction of one of the two Courts within whose jurisdiction the litigating parents were claiming jurisdiction have no applicability to the facts of present case.

44. In ***Tejaswini Gaud and Ors. Vs. Shekhar Jagdish Prasad Tewari and others : 2019 (3) R.C.R. (Civil) 104***, Hon'ble Supreme Court observed as under:-

“19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act, 1890 and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.”

45. In ***Sarita Sharma Vs. Sushil Sharma 2000 (2) R.C.R.(Civil)***

367 : (2000) 3 SCC 14, the tussle over the custody of two minor children

was between their separated mother and father. The Family Court of USA while passing the decree of divorce gave custody rights to the father. When the mother flew to India with the children, the father approached the High Court by filing a habeas corpus petition. The High Court directed the mother to handover the custody to the father. On appeal to it, Hon'ble Supreme Court observed that the High Court, instead of allowing the habeas corpus petition, should have directed the parties to initiate appropriate proceedings wherein a thorough enquiry into the interest of children could be made.

46. Prima facie on the basis of the material including affidavits of the petitioner and respondent No. 2 filed before this Court and the summary enquiry made and facts and circumstances of the case discernible from the same and preference expressed by detinue Aarvi Ranga, who is aged about 9 years, I am of the considered view that the facts and circumstances of the case do not warrant issuance of a writ in the nature of habeas corpus by this Court in exercise of its extra ordinary jurisdiction for repatriation of detinue Aarvi Ranga to Australia by handing over its custody to the petitioner and it is in the welfare of the minor child that respondent No.3 be allowed to continue to have its custody subject to order of the Family Court/Guardian Court at Ambala, where the minor child is now ordinarily residing and that the petitioner be accordingly directed to approach the Family Court/Guardian Court at Ambala for adjudication of the question of entrustment of custody of the child to the petitioner for its repatriation to Australia.

47. Before parting with the case, it may also be noticed that the important aspects of visitation and contact rights of the petitioner presently deprived of the custody of the child also deserve consideration.

48. In ***Criminal Appeal No.127 of 2020 titled Yashita Sahu Vs. State of Rajasthan and others decided on 20.01.2020*** Hon'ble Supreme Court has observed as under :-

“18. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.

19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

22. In addition to ‘Visitation Rights’, ‘Contact rights’ are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, email or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no

difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.”

49. In view of the above discussion, the petition is dismissed with direction to the petitioner to approach the Family Court/Guardian Court at Ambala for adjudication of the question of entrustment of custody of the child to the petitioner for its repatriation to Australia. In view of the nature of the matter, the Family Court/Guardian Court at Ambala is directed to decide the petition, if any so filed, expeditiously preferably within six months. Till such decision respondents No. 2 to 5 are directed to allow the petitioner to talk to the Child through video calling facilities such as Whats App, Skype etc., on every Tuesday and Thursday at 8.00 pm and on Sunday/holidays at 05.00 pm or any other time mutually agreed to between them and if the petitioner visits India or the child visits Australia, the petitioner shall be permitted custody of the child from 5.00 pm on Saturday till 5.00 pm on Sunday.

50. Nothing in this order shall be treated as expression of any opinion on merits of the case so as to bind or influence the Family Court/Guardian Court at Ambala in adjudication of the petition, if any so filed by the petitioner.

(ARUN KUMAR TYAGI)
JUDGE

19.06.2020

Kavneet Singh

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No