

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.681 OF 2020

Delna Khambatta,
American Citizen, Aged about 50 yrs.,
Having her address at
365, Glinnis Road,
Northfield, Vermont 05663, U.S.A. Petitioner

Vs.

1. State of Maharashtra
Through the Public Prosecutor
2. Senior Police Inspector,
Tardeo Police Station,
M.P. Mills Compound Road,
Janata Nagar, Tardeo,
Mumbai- 400 034
3. Dr. Rustum Sam Boyce,
Villa Hormuzd, 8A, Carmicheal Road,
Mumbai - 400 026 Respondents

Mr. Amir Arsiwala a/w Mr. Siddhikesh Ghosalkar and Ms.
Radhika Motiani for Petitioner.

Mrs. S.D. Shinde, APP for Respondent-State.

Mr. Anoshak Daver a/w Seth, M.S. Bhodhanwalla a/w Mr.
Sheroy M. Bodhanwalla, Ms. Sakshi Sharma i/by M/s
Bodhanwalla & Co. for Respondent No. 3.

**CORAM : S.S. SHINDE AND
MANISH PITALE, JJ.**

**JUDGMENT RESERVED ON : 18.02.2021
JUDGMENT PRONOUNCED ON : 24.03.2021**

JUDGMENT (PER MANISH PITALE, J.)

1. The Petitioner has filed this petition seeking a writ of habeas corpus for a direction to her husband, Respondent No. 3, to produce their daughters before this Court, with a further direction to hand over custody of the daughters to her. The Petitioner claims that the Respondent No. 3 illegally took away the daughters from shared custody as granted by a competent court in the United States of America, thereby rendering their custody with Respondent No.3 as illegal and in defiance of the order of the competent Court. The Respondent No.3 has opposed such claims. Both sides rely upon various judgments of the Supreme Court of India in support of their respective stands.

2. The facts leading to filing of the present Writ Petition are that on 04.12.2001, the Petitioner and

Respondent No.3 got married at Ahmedabad in Gujarat, as per Parsi Zoroastrian rights and customs. They have two daughters who are now 17 years and 15 years age respectively. All four were living in the United States of America (USA) when on 09.08.2017, the Petitioner filed a suit for divorce before the Superior Court at Vermont, USA, along with interim applications. On being served with summons, the Respondent No.3 filed a motion before the said Court at Vermont, USA, for dismissal on the ground of jurisdiction, claiming that the parties were governed by the provisions of the Parsi Marriage and Divorce Act, 1936 (hereinafter referred to as the Act of 1936), as per the provisions of which Courts of India were competent to exercise jurisdiction.

3. On 18.10.2017, Respondent No.3 filed divorce petition against the Petitioner, bearing Parsi Matrimonial Suit No. 2 of 2017 before the District Court at Surat. This was under the aforesaid Act of 1936. On 17.02.2018, the Respondent No.3 filed an application seeking an anti-suit injunction against the Petitioner to restrain her from

proceeding in the matter before the Court at Vermont, USA. On 13.03.2018, the Court at Vermont USA dismissed the aforesaid motion filed by Respondent No.3 challenging jurisdiction of the Court at Vermont. On 07.04.2018, the Petitioner filed an application before the District Court at Surat challenging jurisdiction of the said Court to adjudicate matrimonial disputes between the parties. On 17.04.2018, the District Court at Surat passed an order allowing the aforesaid application of Respondent No.3, thereby granting anti-suit injunction against the Petitioner from pursuing proceedings filed before the Court at Vermont and from filing or pursuing any application or proceeding before the said Court. The Petitioner was also directed to place a copy of the said order before the Court at Vermont. The District Court at Surat dismissed the application filed by the Petitioner challenging its jurisdiction.

4. Between April and June 2018, the Petitioner continued to press the proceedings before the Court at Vermont USA, while Respondent No.3 placed copy of the

aforesaid order dated 17.04.2018 passed by the District Court at Surat. The Respondent No.3 filed an application for initiation of contempt proceedings against the Petitioner before the District Court at Surat as she continued to press the proceedings before the Court at Vermont USA. The said application is still pending. In the meanwhile, the Petitioner had filed an appeal from order before the High Court at Gujarat to challenge the aforesaid order dated 17.04.2018 passed by the District Court at Surat, but the same was dismissed as not maintainable with liberty to file appropriate proceedings. The Petitioner then filed Special Civil Application before the High Court. In this backdrop, on 04.10.2018, the Petitioner filed Writ Petition (Civil) No. 1335 of 2018 before the Supreme Court of India challenging the vires of certain Sections of the Act of 1936.

5. On 14.11.2018, the Court at Vermont USA passed an order granting shared parental rights and responsibilities to the Petitioner and Respondent No.3. This was a consent order, stating the manner in which the parties would have

such shared custody of the daughters. On 19.11.2018, the Supreme Court of India passed an order observing that pendency of proceedings will not come in the way of the parties to explore the possibilities of settlement or continuing the proceedings before the Court in USA. On 07.05.2019, the Gujarat High Court refused to adjourn the proceedings pending before the District Court at Surat sine die in view of pendency of the writ petition filed by the Petitioner before the Supreme Court of India. The Gujarat High Court also disposed of the Special Civil Application filed by the Petitioner. On 10.07.2019, the Supreme Court of India recorded that the parties would attempt to settle their disputes through mediation and that they agreed that till then the adversarial proceedings would be kept in abeyance.

6. At this stage, in the month of July 2019, the Respondent No.3 indicated that he desired to travel to India with both daughters in the month of August. As per the order of shared custody passed by the Court at Vermont USA, the Respondent No.3 forwarded his travel itinerary to the

Petitioner, according to which he was to travel with both the daughters from Boston to Mumbai on 05.08.2019 and return back to Boston with the daughters on 18.08.2019. It is an admitted position that the Respondent No.3 and the daughters did not return to Boston as per the said travel plan and they have continued to reside in India till date.

7. At this stage, the Respondent No.3 filed an application before the Court at Vermont USA, seeking modification of the order of shared custody passed by the said Court on 14.11.2018. Along with this motion, handwritten letters allegedly written by the daughters were also placed before the said Court, wherein they stated that they desired to relocate to India with their father i.e. respondent No.3. On 28.08.2019, the Court at Vermont USA rejected the aforesaid motion filed on behalf of Respondent No.3. On 29.08.2019, the independent attorney appointed by the said Court for the daughters, filed a motion to allow them to testify as regards evidence of alleged abuse at the hands of the Petitioner. On 03.09.2019, the Supreme Court of India passed an order

recording the subsequent development of the daughters being brought to India and their alleged reluctance to go back. It was also recorded that the issue regarding alleged violation of orders of the Court at Vermont, USA, would be attended to by the said Court and it was also recorded that any proceedings initiated by the Petitioner would be subject to the right of the Respondent No.3 to raise objection of jurisdiction of the Court at Vermont USA, in view of the existing statutory provision.

8. In view of the Respondent No.3 failing to bring back the daughters to the USA, the Court at Vermont, USA, by order dated 07.11.2019 found the Respondent No. 3 to be in contempt of the orders of the said Court and directed that to purge the contempt, Respondent No. 3 shall return the daughters to Vermont as soon as possible and not later than 12.11.2019 by 5 p.m. It is relevant that on 11.10.2019, the Court had also issued an arrest warrant against the Respondent No. 3. In this backdrop, on 03.12.2019, the Court at Vermont USA, passed an order awarding sole legal and

physical parental rights and responsibilities of the daughters to the Petitioner. On 09.12.2019, the said Court passed a further order recording that the Respondent No.3 may purge the contempt by returning the daughters to Vermont. The Court also directed the Respondent No.3 to pay \$ 1000 per day from 03.9.2019 to the Petitioner as compensatory relief.

9. In the meanwhile, by order dated 19.11.2019, Supreme Court of India referred the matter for attempting settlement to the Supreme Court Mediation Centre, observing that insofar as the proceedings pending before the Court at Vermont USA were concerned, they would take their own course. Thereafter, by order dated 24.01.2020, the Supreme Court of India appointed Justice S. J. Vazifdar (former judge of this High Court and retired Chief Justice of the Punjab and Haryana High Court) as mediator.

10. At this stage, the Petitioner filed the present writ petition before this Court, wherein on 06.02.2020, notice was issued for final disposal. On 03.03.2020, this Court recorded

the fact that the Supreme Court of India noted that the proceedings in the present petition filed before this Court would be kept in abeyance in view of the pending mediation between the parties. Accordingly, the hearing of this petition was deferred. On 26.10.2020, the Supreme Court of India passed an order recording that report was received from the mediator Justice S.J. Vazifdar stating that despite his best efforts, settlement between the parties was not possible. In this situation, the Supreme Court of India admitted the said writ petition filed by the Petitioner challenging certain provisions of the Act of 1936. It was also recorded that the proceedings pending before this Court and the Court at Surat could continue in accordance with law. Accordingly, the present writ petition was taken up for consideration on merits.

11. In view of the multiple proceedings initiated by the rival parties against each other before the Supreme Court of India, High Court at Gujarat, District Court, Surat, the Court at Vermont U.S.A. and now the present Writ Petition before this Court, as also the slew of orders passed in these proceedings,

the contentions raised on behalf of the parties are detailed and vehement. Learned Counsel appearing for the Petitioner as well as the Respondent No.3 have referred to and relied upon series of judgments of the Supreme Court of India and they have sought to interpret the judgments in support of their respective contentions. The concepts of comity of Courts, conduct of parties and the interest and welfare of the children are brought into focus by the rival parties, in order to support their claims. Hence, a brief reference to the contentions raised on behalf of rival parties is necessary, in order to consider the position of law and then to apply the same to the facts of the present case.

12. Mr. Amir Arsiwala, learned counsel appearing for the Petitioner made the following submissions:

- (a) The Respondent No.3 by his conduct, has demonstrated scant respect for rule of law and he defiantly flouted orders of the Court at Vermont, USA in proceedings where he had participated. It is submitted that the very act

of the Respondent No. 3 in taking away the daughters from the jurisdiction of the Court at Vermont USA and in the face of a consent order of shared custody, to which he was a party, shows that the Respondent No. 3 cannot be trusted as a person interested in what can be held to be in the best interest of the daughters.

- (b) The Respondent No.3 had submitted to the jurisdiction of the Court at Vermont, USA, when the consent order was drawn and shared custody was granted to the Petitioner and Respondent No.3. The action of the Respondent No.3 in defiantly violating the terms of the said consent order amounted to contempt of the Court at Vermont, USA. The said Court had passed an order holding Respondent No.3 in contempt and the Courts of this country ought to respect the orders and directions given by the Court at Vermont, USA,

by applying the principle of comity of Courts. This would necessarily require a direction against the Respondent No.3 to return the daughters back to the jurisdiction of the Court at Vermont, USA and to join the proceedings before the said Court. The Respondent No.3 ought not to be permitted to take advantage of his own wrong. The learned counsel for the Petitioner relied upon judgement of Supreme Court of India in **Surya Vadanani Vs. State of Tamil Nadu & Ors. [(2015) 5 SCC 450]**, in support of the said proposition.

- (c) A perusal of the series of orders passed by the Supreme Court of India in the writ petition filed by the Petitioner challenging certain provisions of the Act of 1936, would show that it was repeatedly observed that the Court at Vermont, USA had jurisdiction and that the proceedings before the said Court would run their own

Course. This was an indication that it was only the Court at Vermont, USA, which had jurisdiction to decide as to what was in the best interest of the children i.e. the daughters herein.

- (d) Although the series of judgments of the Supreme Court of India in such matters has given paramount importance to the best interest of the children, the relevant factors in such cases are the place where children have lived for a long time thereby indicating that the Court in whose jurisdiction the children have so lived is best suited to decide the aspect of best interest of the children. A perusal of orders passed by the Court at Vermont, USA, would also show that the said Court was very much alive to the said aspect of best interest of children and that therefore, the children need to be brought back to the jurisdiction of the

said Court for a just and proper decision on the said aspect of the matter. The learned counsel for the Petitioner relied upon judgement of Supreme Court of India in **Nilanjan Bhattacharya Vs. State of Karnataka [(2020) SCC Online 928]**, in support of this proposition.

- (e) The Respondent No.3 is not justified in relying upon letters allegedly written by the daughters expressing their willingness to live only with their father, i.e. Respondent No.3 because there is every possibility of tutoring of the daughters by Respondent No.3, particularly because they are totally dependent on Respondent No. 3 for every aspect of their life while residing in India. In other words, it is submitted that the Respondent No.3 has an unreasonably high influence over the thought

process of the daughters and that this aspect needs to be taken into consideration by this Court.

- (f) A proper interpretation of the judgments of the Supreme Court of India in such cases would show that the facts of the present case justify the prayers made on behalf of the Petitioner and that the petition deserves to be allowed.

13. On the other hand, Mr. Anoshak Daver, learned counsel appearing for Respondent No. 3 submitted as follows:

- (a) A proper interpretation of the orders passed by the Court at Vermont U.S.A. and the stand taken by the Respondent No.3 before the said Court would show that the Respondent No.3 did not submit to the jurisdiction of the aforesaid Court. An objection to the jurisdiction of the said Court was raised in the first instance by the Respondent No.3 and whatever

proceedings were attended to on behalf of the Respondent No. 3 in the said Court, were without prejudice to the objection of jurisdiction.

- (b) In view of the fact that India is not a signatory to the Hague Convention of 1980 on Civil Aspects of International Child Abduction, law of India applies in such cases, where there is a controversy raised amongst parents with regard to custody of children, in the backdrop of matrimonial disputes. Once this position is accepted, it becomes clear that the law laid down by the Supreme Court of India in a series of judgments applies, which protects the right of the parents who bring their children into this country to continue with their custody so long as it is demonstrated that such custody is in the best interest of the children. The learned counsel for Respondent No.3 relied upon

judgement of Supreme Court of India in **Nithya Anand Raghavan Vs. State (NCT of Delhi) & Anr. [(2017) 8 SCC 454]**, in support of this proposition.

- (c) It has been authoritatively held and reiterated in judgments delivered by the Supreme Court of India that the principle of best interest of the children shall trump all other principles, including the principle of comity of Courts even when an order is passed by a foreign Court in respect of custody of such children. Thus, as long as Respondent No.3 is able to demonstrate that it is in the best interest of the daughters that they continue to reside with him in India, the contentions raised on behalf of the Petitioner cannot be accepted. The daughters in the present case are not minors of very young age, who cannot form any intelligent opinion about subject matters. The elder

daughter is 17 years old and the younger one is 15 years old. They have placed letters on record before the Court at Vermont, U.S.A., as also affidavits before the Supreme Court of India, clearly stating that they wish to live with Respondent No.3 i.e. their father and they have indicated abuse suffered by them at the hands of the Petitioner. In fact, the daughters were ready to lead evidence before the Court at Vermont, U.S.A. on the said aspect of the matter. Considering such material on record, this Court cannot ignore the opinion of the daughters, particularly when they expressed their desire to live with Respondent No.3 even before this Court. The learned counsel for Respondent No.3 relied upon judgement of Supreme Court of India in **Nithya Anand Raghavan (supra)** and **Prateek Gupta Vs. Shilpi Gupta & Ors. [(2018) 2 SCC 309]**, in support of this proposition.

- (d) The Respondent No. 3 is not averse to the Petitioner having visitation rights so that she can continue her association with the daughters. But, forcing the daughters to go back to the U.S.A. would not be in their interest at all and it would not be in the interest of justice.
- (e) The Petitioner herself had violated the orders passed by District Court at Surat in the suit filed by Respondent No.3 and she continued with the proceedings before the Court at Vermont, U.S.A., despite the anti-suit injunction granted by District Court at Surat. Although, the Petitioner has challenged the vires of certain provisions of the Act of 1936, which grants exclusive jurisdiction regarding matrimonial disputes between Parsis to specific Courts, so long as the said provisions remain on the statute, they are binding on the Petitioner.

Therefore, there is no substance in the allegation levelled against the Respondent No.3 that he had defied the orders passed by foreign Court i.e. Court at Vermont, U.S.A., particularly when he had raised the objection of jurisdiction at the outset.

(f) Keeping the paramount consideration of best interest of the children in mind, this Court ought to dismiss the Writ Petition.

14. Mrs. S.D. Shinde, learned A.P.P. appeared for Respondent Nos. 1 and 2. Since this is essentially a contested litigation between the Petitioner and the Respondent No. 3, the learned A.P.P. submitted that this Court may pass appropriate orders, in the interest of justice.

15. Before we consider rival submissions made on behalf of the contesting parties, it is necessary to refer to the position of law as it emerges from the judgments of the Supreme Court of India in such matters. The learned counsel

appearing for the rival parties, referred to and sought to interpret the following judgments of the Supreme Court of India:

Sr. No.	Particulars	Citation
1.	Gohar Begam Vs, Suggi Alias Nazma Begam & Ors.	(1960) 1 SCR 597
2.	Elizabeth Dinshaw Vs. Arvand M. Dinshaw & Anr.	(1987) 1 SCC 42
3.	Sarita Sharma Vs. Sushil Sharma	(2000) 3 SCC 14
4.	V. Ravi Chandran Vs. Union of India & Ors.	(2010) 1 SCC 174
5.	Ruchi Majoo Vs. Sajeev Majoo	(2011) 6 SCC 479
6.	Arathi Bandi Vs. Bandi Jagadrakshaka Rao & Ors.	(2013) 15 SCC 790
7.	Surya Vadanani Vs. State of Tamil Nadu & Ors.	(2015) 5 SCC 450
8.	Nithya Anand Raghavan Vs. State (NCT of Delhi) & Anr.	(2017) 8 SCC 454
9.	Prateek Gupta Vs. Shilpi Gupta & Ors.	(2018) 2 SCC 309
10.	Lahari Sakhamuri Vs. Sobhan Kodali	(2019) 7 SCC 311
11.	Yashita Sahu Vs. State of Rajasthan & Ors.	(2020) 3 SCC 67
12.	Nilanjan Bhattacharya Vs. State of Karnataka	(2020) SCC Online 928

16. A perusal of the aforesaid judgments shows that the Petitioner is indeed entitled to maintain the present writ petition seeking a writ of habeas corpus and for consequential directions. This is evident from the position of law clarified by the Supreme Court of India right from the judgment in the case of **Gohar Begam Vs, Suggi Alias Nazma Begam & Ors.** (supra) and followed thereafter. The learned counsel for the Respondent No.3 did not raise any serious objection with regard to the maintainability of the present writ petition at the behest of the Petitioner, in view of the settled position of law. But, the principle of comity of Courts, paramount importance of the best interest of the child, the nature of enquiry either summary or elaborate required to be conducted in the facts of the present case, desire of the children to live with a particular parent and the doctrine of intimate contact and closest concern assume great importance while deciding such cases. These principles have been referred to and interplay between them has been appreciated, in the aforesaid judgments of Supreme Court of India, in the light of facts of individual cases.

17. In the case of ***Nithya Anand Raghavan Vs. State (NCT of Delhi) & Anr.***(supra), a Bench of three Hon'ble Judges of the Supreme Court of India took into consideration all the aforesaid principles and their application, so as to lay down as to what needs to be considered by the Court while considering the competing claims made by the parents of children for their custody in the backdrop of acrimonious matrimonial disputes. Having considered series of judgments delivered till that point of time in such cases, the Supreme Court of India held as follows:

“42. 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. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native state."

18. It is relevant that the Supreme Court of India made a reference to the Hague Convention of 1980 on Civil Aspects of International Child Abduction and in that context held as follows:

“40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on “Civil Aspects of International Child Abduction”. As regards the non-convention countries, the law is that the Court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign Court as only a factor to be taken into consideration, unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the Court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child’s welfare to return to

his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the Court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign Court by directing return of the child. Be it noted that in exceptional cases the Court can still refuse to issue direction to return the child to the native state and more particularly inspite of a pre-existing order of the foreign Court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the Courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign Court if any as only one of the factors and not get fixated therewith. In either situation - be it a summary inquiry or an elaborate inquiry - the welfare of the child is of paramount consideration. Thus, while examining the issue the Courts in India are

free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition.”

19. This position of law was followed and reiterated by a Bench of two Hon’ble Judges of the Supreme Court of India in the case of ***Prateek Gupta Vs. Shilpi Gupta & Ors.*** (supra). It was held in the said judgment as follows:

“49. The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of “intimate contact and closest concern” notwithstanding. Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding

the issue of custody and repatriation of the child, it is no longer *res integra* that the ever overriding determinant would be the welfare and interest of the child. In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgeably subservient thereto. Though in the process of adjudication of the issue of repatriation, a court can elect to adopt a summary inquiry and order immediate restoration of the child to its native country, if the applicant/parent is prompt and alert in his/her initiative and the existing circumstances *ex facie* justify such course again in the overwhelming exigency of the welfare of the child, such a course could be approvable in law, if an effortless discernment of the relevant factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological, social, cultural existence, thus exposing it to visible, continuing and irreparable detrimental and nihilistic attenuations. On the other hand, if the

applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold.”

20. Even in recent pronouncements of the Supreme Court of India in the case of ***Yashita Sahu Vs. State of Rajasthan & Ors.*** (supra) and ***Nilanjan Bhattacharya Vs. State of Karnataka*** (supra), the Supreme Court of India gave primary consideration to welfare of the child. On facts of these cases, the Supreme Court of India directed the children to be sent back to the foreign country from where they had been brought to India, reaching findings to the effect that it was in the best interest of the children that they are so sent back. Therefore, it becomes clear that in so far as the law applicable in such cases in India is concerned, the Court has

conclude on the facts and circumstances of each case as to what would be in the best interest of the children. It is significant that in both the said cases, the Court found that a summary inquiry was warranted as the children had been recently brought to India and they deserved to be sent back in their interest. We are of the opinion that the facts in the present case are distinguishable, as the daughters arrived in India as far back as in August, 2018.

21. The rival contentions of the parties need to be considered in the backdrop of the said position of law. The admitted position on facts in the present case is that the children i.e. two daughters of the Petitioner and Respondent No.3 have lived during growing up years in the U.S.A. They came to India in August, 2018, when the Respondent No.3 brought them ostensibly for about two weeks during their holidays. It is an admitted position that the daughters have continued to reside in India from August, 2018 till date and that they are undergoing schooling in India since the time of their arrival.

22. Although the daughters are minors, considering the fact that the elder daughter would soon attain the age of majority i.e. 18 years and the younger daughter is more than 15 years old, both of them do have the capacity to form their own intelligent opinions. This fact is significant in the present case because this Court is not called upon to deal with a situation where the children are minors of such young age that they cannot be expected to have the capacity to form their own opinions. The risk of tutoring would abate with the age of children nearing the age of majority. When we interacted with both daughters, they were emphatic that they desired to live with their father i.e. Respondent No.3 in India. The Supreme Court of India has laid down in the above quoted judgment in the case of ***Nithya Anand Raghavan Vs. State (NCT of Delhi)*** (supra) that the Courts in India are free to decline the relief of return of child brought within its jurisdiction, if the child is quite mature and objects to its return.

23. The daughters also hinted at the nature of relationship that they had with the Petitioner i.e. their mother and how they are apprehensive about living in her company. This is in tune with what they stated in letters addressed to the Court at Vermont, U.S.A. as also affidavits filed before the Supreme Court of India. The contents of such affidavits being sworn by children, who have not attained the age of majority may not be considered relevant in law, nonetheless the daughters did express their apprehensions when we interacted with them.

24. We do not propose to make any comments on such apprehensions or whether such apprehensions are based on any concrete material, but the opinion expressed by the daughters in the facts of the present case is of some relevance.

25. It is reasonable to expect that the Court having intimate contact with the children, considering the number of years they have lived in jurisdiction of such Court, would be

appropriately placed to appreciate closest concern of such children. But, it cannot be said that this aspect would rule out the jurisdiction of this Court to reach a finding as regards best interests of the daughters.

26. The best interests of children include their ordinary comfort, contentment, health, education, physical moral and intellectual development and ethical upbringing, so as to ensure that they grow up as well-rounded individuals. The economic capacity and financial well-being of the parents also assumes significance. It is also required to be ascertained if any kind of physical, mental or psychological harm may fall upon the children if they are directed to be sent back to a particular parent. Thus, finding on the best interest of children involves various aspects, which need to be determined with sensitivity and human touch.

27. As noted above, in the judgments rendered by the Supreme Court of India in such cases, the concept of best interest of children has been given paramount importance

over and above all other concepts, including the concept of comity of Courts. It is also significant that when the children can be said to have developed roots in the country where they have been brought, it becomes a relevant factor for determining as to what would be in their interest.

28. Applying the aforesaid principles to the facts of the present case, it becomes clear that the contentions raised on behalf of the Petitioner against Respondent No.3 on the basis of his defiance towards orders passed by the Court at Vermont, U.S.A., pale into insignificance. It is also relevant that even though the Respondent No. 3 was party to the consent order regarding shared custody passed by the Court at Vermont, U.S.A., he had indeed raised objection as regards jurisdiction of the said Court at the outset. Even if his objection was rejected and orders were passed by the Court at Vermont, U.S.A., only for that reason this Court cannot ignore as to what would be in the best interest of the children i.e. daughters herein.

29. Equally, the Petitioner had also suffered adverse orders passed by the District Court at Surat in the suit filed by Respondent No. 3, as per the provisions of Act of 1936. There were orders passed against the Petitioner injunctioning her from proceeding with the matter in the Court at Vermont, U.S.A. and yet not only did she continue with the proceedings but she insisted on repeated adverse orders being passed against Respondent No.3. In such acrimonious matrimonial disputes, it is found that the children are victims of circumstances. In such a situation, this Court needs to exercise its *parens patriae* jurisdiction to ascertain as to what would be in the best interest of such children, who are indeed victims of circumstances.

30. The facts of present case show that the daughters were ready to lead evidence before the Court at Vermont, U.S.A. as regards alleged abuse that they had suffered at the hands of the Petitioner. Such an application was indeed made on their behalf by the attorney appointed for them in those proceedings. This is recorded in the proceedings before the

said Court. The daughters clearly expressed their desire before us to continue to stay with their father i.e. Respondent No. 3 in India, despite the fact that they have lived for substantial part of their life in the U.S.A. Although the desire of the daughters cannot be the clinching factor in the present case, it is certainly relevant, particularly when the daughters are nearing the age of majority. The desire of the daughters to continue to live with their father in India cannot be completely ignored when this Court is called upon to decide as to what would be in their best interest. There is no dispute about the fact that they are undergoing education in a proper school and there are no doubts raised about the financial capacity of their father to take care of their requirements.

31. In this backdrop, as noted above, the emphasis placed on behalf of the Petitioner on the defiant attitude of Respondent No. 3 in the face of the adverse orders passed by the Court at Vermont, U.S.A., cannot take case of the Petitioner any further. The learned counsel appearing for the Petitioner has attempted to demonstrate, by placing much

emphasis on judgments of the Supreme Court of India, in the cases of **Yashita Sahu Vs. State of Rajasthan** (supra) and **Nilanjan Bhattacharya Vs. State of Karnataka** (supra), which according to him could be said to be closer on facts to the instant case, that in those cases the Supreme Court of India directed that the children be sent back to the parent in foreign jurisdiction. We are of the opinion that facts of each case differ and no straight jacket formula can be applied in such cases. In the case of **Yashita Sahu Vs. State of Rajasthan** (supra), the child was only 3 ½ years old and in the case of **Nilanjan Bhattacharya Vs. State of Karnataka** (supra) the child was only about 4 years old. Besides, in those cases the petitioner before the Court invoking writ jurisdiction had immediately instituted the proceedings and, in the facts and circumstances of those cases, the Court found it fit to conduct only a summary inquiry. Thus, the said judgements are clearly distinguishable on facts, as the daughters in the present case are 17 years and 15 years old, capable of forming intelligent opinion about matters and they have been in India since August 2018.

32. We are of the opinion that even though the Petitioner is the mother of the children in the present case, that alone cannot be a factor for passing an order in her favour. The daughters have been in India now for better part of three years and one of the daughters would soon be attaining the age of majority. Taking an overall view of the facts of the present case, we are of the opinion that it would be in the best interest of the daughters of the Petitioner and Respondent No. 3, that the prayers made on behalf of the Petitioner in this Writ Petition are not granted. In the light of the discussion in the foregoing paragraphs, we are unable to persuade ourselves to hold that the daughters are in improper or illegal custody of respondent no.3. There can be no doubt about the fact that this opinion, which we have expressed, cannot have any effect on the right that the Petitioner may assert as regards custody of the daughters in appropriate proceedings, which would have to be decided in accordance with law. Hence, we are of the opinion that the Writ Petition deserves to be dismissed. But there can be no doubt about the fact that being their mother, the Petitioner certainly has

every right to continue to associate with them, for which she is entitled to visitation rights.

33. Therefore, it is held that the Petitioner shall have visitation rights to meet and associate with her daughters. To facilitate this, the Respondent No. 3 is directed to ensure that when the Petitioner desires to visit India to meet the daughters, he shall extend full co-operation for the same, including arranging for stay of the Petitioner in India for at least a period of two weeks during her visit and facilitating her meeting with the daughters, so that association between the mother and daughters continues unabated. The Petitioner and Respondent No.3 may mutually agree upon further details of such visitation rights of the Petitioner, including interaction between the petitioner and daughters through video conferencing during school holidays at mutually convenient timings. Till such mutual agreement is arrived at the petitioner shall be granted access to the daughters through video conferencing on Saturday and Sunday between 7 PM to 8 PM IST.

34. The Writ Petition stands dismissed with the aforesaid directions. Needless to say, the observations made hereinabove are restricted to the present proceedings only and they will have no bearing on other proceedings pending between the parties.

(MANISH PITALE, J.)

(S.S. SHINDE, J.)