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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 2259 OF 2023

Sanil Sreekumar, son of Mr. Sreekumar K.
Residing at 1, Quarry Ridge Road, Sandy Hook,
Connecticut – 06842,
United States of America.

... Petitioner

Vs.

1. The Union of India, through the
Secretary, Ministry of External Affairs,
South Block, Central Secretariat, Nirman
Bhavan, New Delhi, Delhi 110004.
2. The Secretary, Ministry of Home Affairs,
North Block, Central Secretariat, New
Delhi, Delhi 110001.
3. The Commissioner of Police, Mumbai,
Dr. D.N. Road, Police Colony, Dhobi
Talao, Lohar Chawl, Kalbadevi, Mumbai
Maharashtra – 400001.
4. The United States Consulate General,
C-49, G- Block, Bandra Kurla Complex,
Mumbai, Maharashtra 400051.
5. INTERPOL through the National
Central Bureau, the Central Bureau of
Investigation Ground Floor, Block No. 4,
Lodhi Complex, New Delhi,
Delhi 110003.

6. Supriya Nair, wife of the Petitioner,
Presently at 503, A- Wing, Dheeraj
Residency, Link Road, Opp. Oshiwara
Bus Depot, Goregaon, Mumbai,
Maharashtra 400104.
7. Muraleedharan Nair, father of
Respondents No.6, presently at 503, A-
Wing, Dheeraj Residency, Link Road,
Opp. Oshiwara Bus Depot, Goregaon,
Mumbai, Maharashtra 400104.
8. Radha Nair, mother of the Respondent
no.6, presently at 503, A-Wing, Dheeraj
Residency Link Road, Opp. Oshiwara
Bus Depot Goregaon, Mumbai,
Maharashtra 400104.
9. State of Maharashtra
Through the Government Pleader,
High Court.

Respondents

Mr. Janay Jain a/w. Mr. Udayan Mukherjee i/b. Ms. Kavita
Singh for the Petitioner.

Mr. Ansh Karnavat i/b. Mr. Jay Bhatia a/w. Mr. Siddhant Rai for
Respondent No. 6.

Mr. Nirman Sharma i/b. Mr. Jay Bhatia a/w. Mr. Vijay Pandey
for Respondent Nos. 7 and 8.

Ms. P. P. Shinde, APP for the State.

**CORAM : REVATI MOHITE DERE
& GAURI GODSE, JJ.**

RESERVED ON: 9th NOVEMBER 2023

PRONOUNCED ON: 22nd DECEMBER 2023

JUDGMENT (PER: GAURI GODSE, J.) :-

1. Rule. Rule made returnable forthwith.
2. Mr. Karnavat waives service on behalf of respondent no. 6, Mr. Sharma waives service on behalf of respondent nos. 7 and 8 and learned APP waives service on behalf of the State of Maharashtra-respondent no. 9. Since the dispute in the Writ Petition is between the petitioner and respondent no. 6, it is not necessary to hear respondent nos. 1 to 5.
3. The petition is filed, seeking a writ of Habeas Corpus directing respondent nos. 1, 2 and 3 to produce his minor daughter 'Ananya' aged about 4 and ½ years, now 5 years old, before this Court and direct respondents to facilitate the safe return of the minor daughter to the USA. Respondent no.6 is the petitioner's wife and mother of the minor daughter. Respondent nos. 7 and 8 are the parents of respondent no. 6.

Petitioner's case in brief:

4. Petitioner is an Indian Citizen by birth and presently residing in the United States of America ('USA') and is a green card holder and permanent resident of the USA. The petitioner is working as a Principal Scientist at Boehringer Ingelheim Pharmaceuticals. Petitioner and respondent no.6 got married in India at Kerala on 25th October 2014. The daughter of petitioner and respondent no.6 was born on 14th December 2018 in the USA and is thus a citizen of the USA. On 31st January 2023, respondent no.6 visited her family in Mumbai along with the daughter; though respondent no.6 was scheduled to return to the USA along with the daughter on 30th April 2023, respondent no. 6 continued to reside with her parents along with the daughter. Initially, respondent no.6 remained in contact with the petitioner, but due to the demand of a substantial sum of money made by respondent no.6 with the petitioner and as the petitioner was unable to concede her demand, respondent no.6 suspended all forms of contacts of the petitioner and the minor daughter. According to the petitioner,

there is a possibility of respondent no. 6 being brainwashed or coerced by respondent nos. 7 and 8 to extend her stay in India and illegally detain the daughter, who is an American citizen. It is the petitioner's case that for no cogent reasons, respondent no.6 has refused to take the daughter to the USA.

5. According to the petitioner, the daughter was due to be enrolled for preschool on 1st May 2023, and she was required to attend an interview in mid-May for admission to the kindergarten. However, respondent no.6 refused to take back the daughter to the USA. On 11th May 2023, the petitioner received a message on WhatsApp pertaining to a purported divorce proceeding along with a child custody petition having been filed by respondent no.6 before the Family Court at Bandra. However, the petitioner was never served with any copy of such petition. Thus, on 15th May 2023, the petitioner travelled to India in an attempt to reconcile the differences and misunderstandings, if any, with respondent no.6 and requested her to return to the USA along with their daughter. However, initially, he was even denied access to his daughter. However,

after several requests, the petitioner was allowed to meet his daughter for a very short time. On 17th May 2023, when the petitioner visited the residence of respondent no.6 to meet his daughter, he was faced with severe humiliation and was driven out of the house as he refused to concede to the oblique demands of respondent nos. 6 to 8. As respondent no. 6 refused to return to the USA along with the daughter, the petitioner was constrained to return to the USA alone as he was required to attend to his professional commitments. Since then, the petitioner has been making several efforts to mediate with respondent no.6 by requesting her to return to the USA with the daughter. However, respondent no. 6 refused to cooperate with the petitioner in any manner. Hence, the petitioner sent an email on 9th June 2023 addressed to the Ministry of External Affairs- respondent no. 1 and the Assistant Commissioner of Police, Oshiwara Division, Mumbai, informing them regarding the petitioner's plight and requesting assistance to investigate and take his minor daughter to the USA who is illegal detained in India. Since there was no response to his e-mail, the petitioner filed this petition on 26th June 2023.

Status of the petition:

6. Respondent nos. 6 to 7 appeared in the petition through their counsel. Since parties were ready to explore the possibility of an amicable settlement, the petition was adjourned for hearing and in the meantime, respondent no.6 was directed to permit the petitioner to make WhatsApp video calls to interact with the daughter. A mediator was also appointed to explore the possibility of an amicable settlement. The petitioner resides in the USA; hence, he was permitted to appear before the mediator through video conferencing. Both parties attended the mediation proceedings. However, this court was informed on 5th October 2023 that the mediation had failed. The parties continued with the interim arrangement of the petitioner interacting with the daughter through WhatsApp video calls. In the meantime, respective affidavits were filed on behalf of the parties. Since an amicable settlement did not arrive between the parties, the petition was taken up for final disposal.

Submissions on behalf of the petitioner:

7. It is submitted on behalf of the petitioner that the minor

daughter is a citizen of the USA and has been illegally detained in India by respondent no.6. The refusal on the part of respondent no.6 to return to the USA is unjustified and amounts to illegally detaining the minor daughter in India. The petitioner is a permanent resident of the USA and a green card holder. The petitioner is a Postdoctoral Fellow at the University of Berkeley and is a permanent employee of Boehringer Ingelheim Pharmaceuticals, which is one of the biggest pharmaceutical companies in the world. Respondent no.6 is also a green card holder and holds a post-graduation qualification in Nutrition and Sports Science. She has also completed a one-year course in personal training from California. After the marriage, the parties have been residing in the USA. Their minor daughter was born in the USA and is a citizen of the USA. Respondent no.6 visited her parents in India along with the daughter with a scheduled program to return to the USA. However, upon reaching India, respondent no.6 cancelled her return ticket for herself and the daughter without any reason. She refused to bring the daughter to the USA on flimsy grounds that the daughter was being raised in the Indian culture and she likes to

dress up culturally for festivals and on special occasions in India, and she is adept in reciting shlokas and has a preference for home-cooked vegetarian meals in India. Another reason given by respondent no.6 in her affidavit in reply was that the daughter shared a close relationship with her maternal grandparents, i.e. respondent nos. 7 and 8. Respondent no.6 contended that she and the daughter were vulnerable to the cold climate and that the child had a proclivity for the warmer climate. Lastly, the contention raised by respondent no. 6 was that their daughter would not get well-rounded family in the USA as the petitioner had a lack of inclination to socialise with others.

8. In response to the reasons given by respondent no.6, it was submitted on behalf of the petitioner that the daughter can always continue with the activity she likes in the USA. The daughter can speak Malayalam and celebrate all the Indian festivals in the USA, and can also recite all the shlokas and eat vegetarian food in the USA. With respect to the daughter sharing a close relationship with maternal grandparents is

concerned, it was submitted that respondent nos. 7 and 8 hold a visa to travel to the USA, and they are always free to visit their grandchild as they have already visited on many occasions in the past. It was submitted that even during the time of delivery of their daughter, the parents of respondent no.6 were residing along with them in the USA. The petitioner and respondent no.6 were permanently settled in the USA and also started a family there, and their child was born in the USA, making her a US citizen by birth. The reasons given with respect to the cold climate in the USA are not justified, as the parties were always aware of the cold climate in the USA. Moreover, the daughter never had any serious health problems in the USA. With respect to the allegations that the petitioner is an introvert and does not socialize, it is submitted that the said submission is baseless. It is submitted that the parties lived happily in the USA after their marriage, and their daughter was born after 4 years of their marriage. Hence, such reasons given by respondent no.6 are an afterthought and have no basis.

9. It was submitted on behalf of the petitioner that even during the pendency of the petition, the petitioner was always open to sorting out personal differences between the parties so that they could cohabit as a family in the best interest of the daughter. Petitioner, in his additional affidavits, has stated that he was and is always willing to continue his marriage with respondent no.6, and if required, he is willing to engage in family counselling sessions and is even ready to bear expenses for the same. The petitioner, in his affidavits, has also undertaken not to take any legal recourse which is prejudicial to respondent no. 6. The Petitioner always acted in the best interest of respondent no.6 and the daughter, and he has secured health insurance for both of them and has purchased new residence which would allow their daughter to access to the best schooling facilities in the USA.

10. It was submitted on behalf of the petitioner that one parent cannot act in an unjustified manner and illegally detain the child by ignoring the welfare of the child. In support of his submission, learned counsel for the petitioner has relied upon

the following decisions:

- i) *Abhay Sanjay Mogal V/s Neha Joshi.*¹
- ii) *Yashita Sahu V/s State of Rajasthan and Ors.*²
- iii) *Mr. Abhinav Gyan S/o. Gangeshwar Prasad Vs. State of Maharashtra and Another.*³
- iv) *Arathi Bandi v. Bandi Jagadrakshaka Rao and Ors.*⁴

By relying upon the aforesaid decisions, the learned counsel for the petitioner submitted that in the similarly situated facts, this Court, in the case of ***Abhay Mogal***, allowed the petition filed by the father of the minor son and directed his repatriation to the USA. Learned counsel particularly relied upon paragraph 48 of the said judgment, which reads as under:

“48. We have already held that there is substance in the submission of the petitioner that it will be more beneficial for Aaryan to live in the US, in as much as he being a US citizen is entitled to all the educational, social and medical benefits available there. We find that the stay of Aaryan in India for last two and half years is too short a period to facilitate his integration into the social, physical, physiological,

1 2023 SCC Online Bom 1943

2 (2020) 3 SCC 67

3 2022 SCC Online Bom 2958

4 (2013)15 SCC 790

*cultural and academic environment of India. Hence, if repatriated to the US, he will not be subjected to an entirely foreign education system. By applying the principles laid down by the Hon'ble Supreme Court in the decision of **Vasudha Sethi**, we find in the facts of the present case that Aaryan, being a citizen of the US, will have better future prospects on return to the US.....”*

11. With respect to the nationality of the daughter, learned counsel for the petitioner relied upon paragraph 28 of the decision in the case of **Yashita Sahu** which reads as under:

*“28. **Nationality of the child** - The child is a citizen of the USA by birth The child was born in a hospital in the USA and the mother did not come back to India for delivery which indicates that at that time the parents wanted the child to be a citizen of the USA. Since the child is a citizen of the USA by birth and holds a passport of that country, while deciding the issue of custody we have to take this factor into consideration.”*

12. Similarly, in the present case, Respondent No. 6 had an option to return to India for delivery. However, she opted to give birth to her child in the USA so that the child would be a

citizen of the USA. Moreover, even her parents i.e, Respondent No. 7 and 8 had flown to the USA to support Respondent No. 6 at the time of her delivery.

13. Learned counsel for the petitioner also relied upon paragraph 49 of the decision of the ***Abhay Mogal's*** case in support of his contention that the age of the daughter would not be the only factor to be taken into consideration for not permitting her repatriation to the USA. Paragraph 49 of the decision in the case of ***Abhay Mogal*** relied upon by the learned counsel for the petitioner, reads thus:-

“ 49. Except for the tender age of XXX, where he needs the care and protection of a mother, we do not see any factor in favour of the respondent. At the same time, we believe that at this tender age, XXX is entitled to have the company of both his parents. Rather, it is his basic human right to have the care and protection of both parents. Thus, the respondent is not justified in unreasonably depriving XXX of the company of his father. The respondent cannot deprive XXX of his basic human rights only because she has suddenly decided that she does not want to go back to the US, where the parties were permanently settled.”

14. Learned counsel for the petitioner further submitted that the contention of respondent no. 6 on her being entitled to the custody of the minor daughter, in view of the provisions of the Hindu Minority and Guardianship Act, 1956, would not be a ground to be considered for refusing repatriation of the daughter. In support of his submission, learned counsel for the petitioner relied upon the observation of this court in the case of ***Abhinav Gyan***, which reads thus:-

“42. We are of the opinion that the stipulation in Section 6(a) of the Act of 1956, no doubt indicates that ordinarily the custody of the minor child, less than five years of age, has to be with the mother, but, an enquiry into what would be in the best interests and welfare of the child ought not to stop at that point. In such cases where one parent takes the child away from the other and the parent taking away the child is the mother, only because the minor child happens to be less than five years, ought not to prevent the Courts from examining the facts of the case to reach a conclusion as to what would be in the best interests of the child.....

“43.....The Hon'ble Supreme Court in the said judgment in the case of Rajeswari Chandrasekar

Ganesh v State of Tamil Nadu (supra), in the context of writ of habeas corpus, has held as follows:

"91. Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute....."

15. Learned counsel for the petitioner further submitted that the conduct of respondent no.6 in admitting their minor daughter to the school in Mumbai shows the malafide intention of respondent no.6 to deprive the daughter of the company of her father and further deprive her of better educational facilities in the USA to which she is entitled to being US citizen. He submitted that the conduct of respondent no.6 in admitting the daughter to a school in Mumbai could not be a ground for refusing the repatriation of the daughter. Learned counsel submitted that a similar argument raised in the case of ***Abhinav Gyan*** was rejected by this Court by observing as under:

“69. Even today, the child is only 4 ½ years old and it cannot be said that the schooling, which he has been introduced to, at Nagpur in India, would be disturbed in such a manner that it would be against his interests to be taken to the USA. On the contrary, the child returning back to the USA with appropriate directions to ensure that both his parents are available to him, would be in the best interest and welfare of the minor child, in the facts and circumstances of the present case.”

16. Learned counsel for the petitioner submitted that the contention raised on behalf of respondent no.6 that the daughter has developed roots in India is equally baseless. He submitted that respondent no.6 had visited India along with the daughter in January 2023 with a scheduled program to return on 30th April 2023. However, respondent no.6, unilaterally cancelled the return tickets and refused to return to the USA along with the daughter without any reason. Learned counsel thus submitted that by illegally detaining the daughter in India, respondent no.6 cannot contend that in view of the short stay of the daughter in India, which was continued in view of the unilateral decision of respondent no.6, the daughter has

developed roots in India. Learned counsel for the petitioner submitted that the petitioner has acted in alacrity and taken immediate steps to repatriate the daughter. Learned counsel for the petitioner submitted that on the date of filing of the petition, the daughter had hardly resided in India for a period of five months, and thus, it cannot be said that she has developed roots in India in a short span.

17. Learned counsel submitted that this Court, in the case of *Abhay Mogal*, has considered a similar aspect where the minor child had stayed in India for a period of 2 ½ years. In support of his submission that the daughter's stay cannot be said to have developed roots in India, he relied upon the observations made in the case of *Abhay Mogal* in paragraph 42.

18. Learned counsel for the petitioner submitted that in view of the differences between the petitioner and respondent no.6, the daughter cannot be deprived of the company of the other parent. Learned counsel submitted that only because of the unreasonable and unilateral decision of respondent no.6 the daughter is deprived of the company of her father to which she

is entitled. In support of the said submission, learned counsel relied upon the observations of this court in paragraph 63 in the case of ***Abhinav Gyan***, which reads as under:

“63 We are of the opinion that only because there happened to be differences and discord between the respondent No. 2 and the petitioner, having brought the child to India, the respondent No. 2 ought not to have acted in such a manner that the petitioner lost complete contact with the minor child. The material on record does not indicate that any harm would have been caused to the minor child at the hands of the petitioner and that this was the reason for the respondent No. 2 to have completely blocked the petitioner from contact with the minor child. The essential reason for the same appears to be the differences of opinion and the discord in the matrimonial life of the parties.”

19. The learned counsel in support of the said submission that one party cannot unilaterally decide to detain a child from returning to the country of origin relied upon the decision of the Hon'ble Supreme Court in the case of ***Arathi Bandi***, he relied upon paragraph 40 of the said decision which reads as

under:

"40. The courts have taken cognizance of growing practice of children being removed from one country to another just to put pressure/influence the legal proceedings that are usually pending in these cases in relation to the irretrievable breakdown of marriage. In H. (Infants), In re [(1966) 1 WLR 381 : (1966) 1 All ER 886 (CA)], Willmer, L.J., as long back as 1961, observed as follows: (WLR p. 389B)

..... The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and, as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing."

20. The learned counsel thus submitted that respondent no.6 cannot take advantage of her own unilateral decision not to return to the USA along with the daughter. Learned counsel submitted that the conduct of respondent no.6 has deprived the daughter of the company of both parents and has deprived her of all entitlements, including better education available to her in the USA, as she is a US citizen. Based on the aforesaid

submissions, the learned counsel for the petitioner requested to issue a writ of habeas corpus for producing the daughter before this Court and issue directions to facilitate her safe return to the native country i.e. USA.

Submission on behalf of respondent no.6:

21. Learned counsel for respondent no.6 relied upon the affidavit in reply and sur-rejoinder filed on behalf of respondent no.6. He submitted that the dispute and differences between the parties are the result of a long-standing dispute. Learned counsel relied upon the relevant dates and events in support of his submission that the dispute between the parties was a long-standing dispute. Learned counsel for respondent no.6 submitted that though the visit of respondent no.6 along with the daughter in January 2023 to India was fixed with a scheduled program to return to the USA on 30th April 2023, he highlighted certain events occurred prior to November 2022, to justify the decision of respondent no. 6 of not returning to the USA.

22. It was submitted that from 14th December 2018 to 2nd May 2019, respondent nos. 7 and 8 resided in the USA to help respondent no.6 to raise the daughter. Thereafter, again, from 8th July 2019 to 19th November 2019, respondent no.8 (mother of respondent no. 6) visited the USA and stayed with the parties for 4 months to help them raise the daughter. Thereafter, from 29th November 2019 to 18th December 2019, the daughter stayed along with the petitioner and respondent no.6 and also with respondent no. 7 and 8 at Mumbai and thereafter in Kerala. Thereafter, on 24th February 2021, the daughter visited India as the grandmother of respondent no.6 was on her deathbed. It is submitted that during that time, several issues had arisen between the petitioner and respondent no.6. The Petitioner had blocked all the finances of respondent no.6 and was threatening her to return to the USA though her grandmother was on deathbed. It is further submitted that after several attempts were made to resolve the dispute and on the intervention of respondent no.7 (father of respondent no.6), the petitioner agreed to give respondent no.6 a sum of USD150 towards her monthly expenses.

23. It is submitted that the petitioner continued the harassment and thus respondent no.6 was constrained to approach 'The Centre', which is a Bilingual Bicultural Counselor Advocate in the USA, where respondent no.6 was required to seek shelter and protection in view of the violent behaviour of the petitioner. In support of this submission, learned counsel for respondent no.6 relied upon the document on page 127 annexed to the reply. The learned counsel for respondent no.6 further submitted that on 23rd January 2022, there was an altercation between the petitioner and respondent no.6, which led to a situation where she was required to lock herself in a room; however, petitioner opened the door by breaking open the lock by using a drill machine and threatened respondent no. 6. Learned counsel submitted that such conduct of the petitioner shows that he has anger issues and thus the respondent no.6 was concerned for the daughter's safety and hence has refused to return to the USA. It is not disputed that respondent no.6 and the daughter came to India on 31st January 2023 with the return tickets booked for 30th April 2023. However, it was submitted that on 12th March 2023, the

petitioner cut off the credit card, which was the only access to funds of respondent no.6 and the daughter while in India. Learned counsel submitted that this was intentionally done by the petitioner in the exercise of leverage in order to punish respondent no.6 for a conversation where he felt offended for being told that Rs. 10,000/- a month was not enough for respondent no.6 and the daughter to sustain themselves in Mumbai. It was submitted that since then, the petitioner had not sent any money to respondent no.6 or towards the expense of the daughter. Learned counsel submitted that in the conversation through WhatsApp petitioner is also seen asking respondent no.6 not to return to the USA.

24. It is thus submitted on behalf of respondent no.6 that considering the aforesaid facts and circumstances, respondent no.6 was constrained to file a divorce petition in the Family Court at Mumbai and also seek permanent custody of the daughter. Thus, it was submitted that though the return tickets were booked, respondent no.6 was unable to go to the USA as scheduled. Learned counsel further submitted that after the

divorce and custody petition was filed, the petitioner visited respondent no. 6 and the daughter in India and that petitioner was given access to the daughter during his stay in India. However, the petitioner visited the daughter only for three days during his stay. It was, thus, submitted that in the last 9 months, petitioner had access to the minor daughter for only a period of three days. Learned counsel further submitted that as directed by this Court petitioner was regularly given video access to the child.

25. The learned counsel submitted a comparative chart to show that the child would be better raised in India than in the USA and that it was in the interest and welfare of the daughter to live in India with respondent no. 6. Learned counsel submitted that respondent no.6, being the mother, is the primary care giver of the daughter and has also looked after her food and nutrition, medical requirements, school pick-ups and drops, homework, school projects, extra-curricular and co-curricular activities, for example, swimming class, outings and social exposure, interacting with families and friends. Thus, the

daughter feels secure and comfortable in the company of respondent no.6 and being a girl child of 4 ½ years, it is important that she resides with her mother during her formative years. As against this, the petitioner works long hours, i.e. 13 hours a day, and travels abroad for work from time to time for a long duration despite not having such compulsions. The petitioner, in support of his case in the affidavit in rejoinder, offered to overcome this by appointing a Nanny and reducing his visits abroad. Learned counsel submitted that for the upbringing of the daughter, appointing a Nanny is a poor substitute for a mother's care. Learned counsel submitted that the petitioner has also expressed his financial constraints; hence, it is difficult to believe that the petitioner would afford to appoint a Nanny. Learned counsel further submitted that the daughter is aged 4 ½ years and would complete 5 years in December 2023. He submits that laws in India recognize that at this age, a child should ordinarily be in the care of the mother as per section 6 of the Hindu Minority and Guardianship Act. It was thus submitted that respondent no.6 is best suited to sensitise the daughter about women-centric aspects.

26. The learned counsel submitted that the petitioner primarily studied in a boarding school, and as evidenced by WhatsApp chats, he had certain issues with respect to his own upbringing. Learned counsel submitted that even the petitioner admits that his relationship with his father is estranged. It was further submitted that the petitioner requires more time at work, while respondent no.6 was primarily responsible for raising the child during their stay in the USA. The petitioner was never confident like respondent no.6, in bringing up the daughter. Hence, the petitioner lacks the necessary knowledge or skills to raise the daughter alone. Learned counsel further submitted that the daughter resides with her mother (respondent no.6) and maternal grandparents (respondent nos. 7 and 8). The maternal grandparents have spent over 2 years with the daughter during their stay in the USA as well as during the daughter's visit to India, and thus, the daughter is attached to them as they have always been part of raising of the daughter. Learned counsel submitted that relatives and friends of respondent no.6 live close by. Thus, the daughter will always have the support of her family in these formative years, which

will always give her security and social exposure. Learned counsel further submitted that the petitioner admittedly has no relatives in the USA. The petitioner has admitted that he would be required to hire a Nanny to raise the daughter. Hence, it was submitted that the daughter would be better raised in India by respondent no. 6, and also would be surrounded by maternal grandparents, close relatives and friends.

27. With respect to the educational facilities for the daughter, the learned counsel for respondent no. 6 submits that the daughter is already admitted in Gundecha Education Academy, Mumbai, which is rated as the 6th best school in Maharashtra and the 11th best in the Country. He submitted that the record of the daughter's school indicates that she is doing very well in the present school, and it would not be in her interest to unsettle at this stage. Learned counsel further submitted that the reports about the school in the USA indicate that the school is a below-average school and children there do not meet the standards for reading abilities. The learned counsel for respondent no. 6 relied upon pages 333 to 337 of the affidavit

dated 6th November 2023 filed by respondent no. 6, in support of the contention that the school in the USA is underrated. Learned counsel for respondent no.6 thus submitted that the report about the said school in the USA belies the petitioner's stand that he shifted to a bigger residence in an area to enable the daughter to access better facilities.

28. Learned counsel for respondent no.6 submitted that the daughter is rooted in Indian culture and ethos and that she is conversant with Malayalam and Hindi language. He submitted that the daughter recites hymns such as gayatri mantra, laxmi shloka, etc. He submitted that the child prefers Indian home-cooked meals over the healthier alternative of the western food and that it is always better for the daughter's health to have Indian home-cooked meals. Learned counsel submitted that the rejoinder filed on behalf of the petitioner shows that he admits that the daughter is rooted in Indian culture and tradition and has never been disassociated from Indian roots. Learned counsel for respondent no.6 thus submitted that the daughter was too young while she was in the USA to be cognizant of her

surroundings or to settle in the American lifestyle. Hence, it is clear that the environment of India is familiar to the daughter, and she is well-settled in Indian culture. Learned counsel submitted that respondent no.6 and the daughter are prone to illness due to the climate in the USA. While in the USA, respondent no.6, on many occasions, had pointed out that the daughter, on account of the cold climate in the USA, also suffered from cyanosis in the past. Thus, even with respect to the better health of the daughter, India would be a better place for the daughter to be raised.

29. Learned counsel submitted that prior to the year 2023, respondent no.6 has often sought the intervention of family and professionals to resolve issues between the parties. Learned counsel relied upon page 309-312 of the sur-rejoinder filed by respondent no.6, to contend that the petitioner's brother has stated that the petitioner is trying to exploit the weakness of respondent no.6 that he will get wild if anyone from his family mediates and that matters will get worse between the parties if respondent no. 6 goes to the USA without finding a solution.

He further submitted that respondent no.6 had to adopt other measures to safeguard the marriage, such as attempting counselling. Respondent no. 6 also sought employment and she even undertook freelancing as a yoga teacher. He submitted that despite threats and cruelty inflicted by the petitioner, respondent no. 6 returned to the USA in the year 2021 on assurances of the petitioner. However, again in November 2021, the petitioner created compelling circumstances for respondent no. 6 to seek shelter and protection from welfare organisation. Hence, respondent no.6 instituted divorce and custody proceedings in India in the month of April 2023.

30. Learned counsel for the respondent no.6, submitted that the conduct of the petitioner lacks alacrity in filing the present proceedings. He submitted that the petition was instituted in the month of July 2023, i.e., after the delay of more than 60 days from the date of cancellation of return tickets of respondent no.6 and the daughter. He submitted that the petitioner has not offered any explanation for this delay. Learned counsel submitted that the writ petition is filed only by way of a

counterblast to the petition for divorce and custody instituted by respondent no.6. He further submitted that the petitioner had cut off respondent no.6 and the daughter's finances and at one stage even told the respondent no.6 not to return to USA. Learned counsel submitted that the petition is filed through the power of attorney holder. Learned counsel submitted that the petitioner's conduct shows that he spends extensively on himself and claims to have limited funds for the family's basic necessities. Thus, the petitioner's refusal to spend would adversely affect the child's welfare. Though the petitioner is served with divorce and custody proceedings, he has refused to appear in the proceedings in India. Learned counsel thus submitted that respondent no.6 has justifiable reasons for refusing to return to the USA.

31. Learned counsel for respondent no.6 submitted that the facts and circumstances of the case would show that the welfare of a child lies in India and that it is not safe for respondent no.6 and the daughter to return to the USA. learned counsel further submitted that the petitioner's financial restraints upon

respondent no.6 and the daughter often come at the cost of the daughter's comfort, which is clear from the petitioner's conduct. Learned counsel submitted that all the attempts made to resolve the disputes between the parties have failed. He submitted that the past conduct of the petitioner makes it impossible for respondent no.6 to trust the petitioner and that in the USA respondent no.6 would have no means to enforce directions of the Court in India and the petitioner stands in much stronger financial and social position in the USA. Respondent no.6 and the daughter would be completely helpless and insecure in the USA. Learned counsel submitted that only the Courts in India would have competent jurisdiction to decide the disputes between the parties. More so, the petitioner has not initiated any proceedings for the custody of the daughter.

32. Learned counsel, thus, submitted that the custody of the daughter is with her as a biological mother who is entitled to her custody, considering the interest of the daughter. Thus, the custody of the daughter with respondent no.6 cannot be considered illegal. He submitted that respondent no.6 was constrained to make a decision not to return to the USA, in view

of the conduct of the petitioner, and hence, it cannot be said that respondent no.6 has illegally detained the daughter in India. Learned counsel submitted that the facts and circumstances of the case, as narrated above would show that the daughter is in good care of her biological mother and maternal grandparents. He submitted that if the daughter is repatriated to the USA, she would be left with the mercy of external help in the event that the service of the Nanny is hired or the daughter would be required to stay in the child care centre. Thus, under no circumstances is it in the welfare of the daughter to live in the USA. In support of his submissions, the learned counsel for respondent no.6 has relied upon the following decisions:

*i) Joshayet Kapuar and Another Vs. Gunjan Bakshi and Others.*⁵

*ii) Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba Vs. State of West Bengal and Others.*⁶

*iii) Kanika Goel Vs. State of Delhi through Station House Officer and Another.*⁷

*iv) Nithya Anand Raghavan Vs. State (NCT of Delhi) and Another.*⁸

5 2021 SCC Online Bom 3012

6 (2021) SCC Online SC 3434

7 (2018) 9 SCC 578

8 (2017) 8 SCC 454

Submissions in rejoinder on behalf of the petitioner:

33. Learned counsel for the petitioner submitted that he came to India on 15th May 2023 as he received a divorce notice on WhatsApp. When he visited the residence of respondent no. 6 to meet her and their daughter, he faced humiliating treatment; hence, he was constrained to file a complaint at Oshiwara police station. It was submitted that immediately after respondent no.6 refused to return to the USA, he came to India to meet respondent no. 6 and their daughter to make an attempt to resolve the differences and take both of them back to the USA. However, his attempts failed and thus, within a month of his visit to India, he filed this petition and acted with alacrity. He submitted that respondent no. 6's unilateral decision of not returning to the USA is not justified and is not in the daughter's interest. He relied upon the decision of this Court, in the case of *Abhay Mogal*, to support his submissions. The learned counsel for the petitioner submitted that the principles of law laid down by the Hon'ble Supreme Court in the case of *Yashita Sahu* are squarely applicable to the present case.

34. He submitted that the Petitioner has filed an undertaking that he will provide for all the personal needs of respondent no. 6 in addition to the day-to-day expenses and all the expenses of the daughter. He has also undertaken to undergo family counselling sessions to enable the parties to sort out all the differences and provide a healthy and safe upbringing for the daughter. He submitted that in the event respondent no. 6 is not willing to return to the USA, the petitioner has undertaken to bear the air travel expenses for respondent no. 6's visit to the USA every year and also provide a sum of 1500 USD per month for two months for her stay in the USA. He has further undertaken to facilitate the daughter's travel to India during her summer breaks and on other occasions, depending upon the daughter's school schedule, so that the daughter is able to spend an uninterrupted stay with respondent no. 6 and her parents in India. He further submitted that the petitioner has pleaded in detail on how he will be able to take care of the daughter by adjusting his working hours and by taking the help of a Nanny.

35. Learned counsel for the petitioner submitted that the

petitioner was never served with any verified copy of the divorce and custody petition filed by respondent no. 6, and he was only intimated about the same through a WhatsApp message. He submitted that the allegations made by respondent no. 6 are baseless and without any proof. He submitted that the submissions made on behalf of respondent no. 6 on the troubled childhood of the petitioner were unwarranted and that it would amount to saying that no parent with a troubled childhood will get custody of his/her child. He submitted that discord between the parties cannot be a ground to deprive the child of the company of both parents. He, therefore, submitted that the daughter should not be deprived of all the facilities in the USA available to her being a citizen of the USA, and it is in the best interest of the daughter that she returns to the USA being her native country.

CONSIDERATION OF SUBMISSIONS AND FINDINGS:

36. We have considered the submissions made on behalf of both parties. It is unfortunate that due to the discord between the parties on their personal issues, their minor daughter is

suffering the most, and the daughter is not only deprived of having the company of both parents but is also deprived of her entitlement to the rights and privileges in the USA being a citizen of that country. It is a well-settled principle of law that in such cases, the role of the Court becomes crucial, and the Court is required to exercise *parent patriae* jurisdiction and compel the parties to do something that is in the best interest of the child. Hence, in such a peculiar situation, it is the Court's responsibility to enter into the role of a guardian for the child. Hence, we have considered the submissions made by both parties by keeping in mind the well-established principles of law in deciding the welfare and best interest of a minor child.

37. It is well established that the summary jurisdiction is to be exercised when the Court is moved promptly and quickly. In all the circumstances, the overriding consideration must be the interests and welfare of the child. The doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc., cannot override the

consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

38. In the case of *Abhay Mogal*, this Court, after taking into consideration all the decisions of the Hon'ble Supreme Court and this Court in the petitions filed seeking a writ of habeas corpus dealing with the issue of repatriation of minor children has held that the expression "best interest of the child", which is always kept to be of paramount consideration, is indeed wide in its connotation, and it cannot remain only the love and care of the primary caregiver, i.e. the mother in case of the infant or the child who is only a few years old and the basis for any decision taken regarding the child, is to ensure fulfilment of his/her basic rights and needs, identity, social well-being and physical, emotional and intellectual development. However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of

what is in the best interest of the child. Thus, in the present case, keeping in mind the well-settled principles of law, the questions to be decided are as under:

- A) whether the refusal on the part of respondent no. 6 to return to the USA with the daughter, as scheduled, is justified and whether such refusal will amount to illegally detaining the child in India.
- B) whether the petitioner-father is justified in seeking repatriation of the daughter to the USA.

39. In the present case, it is not disputed that the parties, after their marriage, always resided in the USA. The petitioner is a Green Card holder and a permanent resident of the USA. Respondent no. 6 had also acquired a Green Card and was residing in the USA along with the petitioner after their marriage was solemnized on 25th October 2014. Their daughter is a citizen of the USA by birth. The petitioner is highly qualified and has a secured job in the USA, and the parties have a permanent house in the USA. It is not disputed that respondent no. 6's parents resided with them in the USA intermittently to

help and support the parties during the days of pre-delivery and post-delivery of the daughter. It is also not disputed that respondent no. 6 and the daughter visited India on pre-booked return tickets to the USA.

40. The contention of respondent no. 6 is that the petitioner has anger issues and is reluctant to provide the necessary finance for her and the daughter's needs. It is not disputed that respondent no. 6 and the daughter came to India on 31st January 2023 and were scheduled to return to the USA on 30th April 2023. However, according to respondent no. 6, the petitioner stopped sending any money since March 2023, even for the daughter's expenses. Thereafter, respondent no. 6 filed a divorce and child custody petition in the Family Court in Mumbai on 26th April 2023 and decided not to return to the USA as scheduled on 30th April 2023. So basically, the main reason pleaded by respondent no. 6 for not returning to the USA as scheduled is that the petitioner stopped providing any funds for the expenses of respondent no. 6 and the daughter.

41. The petitioner has disputed receipt of any physical copy

of a verified petition filed by respondent no. 6; however, he admits to receiving an intimation letter and print of the case status of the family court case from respondent no.6's Advocate through WhatsApp on 11th May 2023. Thereafter, the petitioner visited India on 15th May 2023. It is the petitioner's case that he visited India to make an attempt to reconcile any differences or misunderstandings with respondent no. 6 and take her and the daughter back to the USA. He was allowed to meet the daughter for a short while. The petitioner has explained that as respondent no. 6 refused to return to the USA, and as the petitioner faced humiliation at her residence he was required to return to the USA due to his work commitments. The petitioner, on 9th June 2023, filed a complaint with the Ministry of External Affairs in India complaining about respondent no. 6's refusal to return to the USA and also not allowing the daughter to go back to the USA, though she is a citizen of the USA. Thereafter, the petitioner filed the present petition on 26th June 2023.

42. Respondent no. 6 has made allegations against the

petitioner that he has anger issues, and she is concerned about her and the daughter's safety in the USA. Perusal of the pleadings and documents on record shows that there are neither any serious allegations against the petitioner nor any complaint is anytime filed against the petitioner in the USA or India. To substantiate the allegation that the petitioner has anger issues, respondent no. 6 has relied on a report of a Counselor Advocate in the USA, where according to respondent no.6 she was required to seek shelter and protection in view of the violent behaviour of the petitioner. The document on page 127 of the reply is an undated report of some Counselor in the USA. The learned counsel for respondent no. 6 was unable to point out how the said report can be accepted to support the contention of respondent no. 6 that there was some violent conduct on the part of the petitioner, which was unsafe for the daughter. The said report does not mention any concern about the safety of the daughter. The said report states that on 18th November 2021, respondent no. 6 had approached the Centre for counselling and emotional support, being in an emotionally, financially abusive and toxic marriage, and that respondent no.

6 was attending counselling sessions. However, on the basis of the said report, Respondent No. 6 was unable to substantiate the allegation of any violent conduct of the petitioner, which can be a matter of concern for the daughter's safety. The learned counsel for respondent no.6 further submitted that on 23rd January 2022, there was an altercation between the petitioner and respondent no.6, which led to a situation where she was required to lock herself in a room; however, petitioner opened the door by breaking open the lock by using a drill machine and threatened respondent no. 6. Learned counsel submitted that such conduct of the petitioner shows that he has anger issues and thus the respondent no.6 was concerned for her and the child's safety and hence has refused to return to the USA. In support of the said allegation, the learned counsel for respondent no. 6 has also relied upon various WhatsApp chats between the parties and photographs of the petitioner holding a drill machine in his hand. However, there are no serious allegations against the petitioner indicating any unsafe atmosphere for the daughter. A perusal of the WhatsApp chats between the parties shows that they are arguing over petty

issues mainly concerning the finances of the parties. The entire conversation between the parties revolves around the differences between the parties concerning their finances. We do not find it necessary to examine in detail the dispute and differences between the parties regarding their finances. Nevertheless, the petitioner has shown willingness to take care of the issues between the parties, including fulfilling the financial requirements of respondent No. 6 and the daughter. In the WhatsApp conversations, the petitioner is seen being apologetic towards respondent no. 6 and her parents on certain issues, which indicates that the petitioner is willing to sort out the differences between the parties.

43. The petitioner has denied the allegations regarding anger issues by filing an affidavit. He contended that in an attempt to wreak vengeance against the petitioner, respondent no. 6 had approached the child service authorities in January 2022. However, respondent no. 6 was under the review of the child services authorities for a period of 3 to 4 weeks, and the petitioner was interviewed only once. Petitioner has relied upon

an email dated 8th February 2022 from the child services authority in the USA suggesting that the parties should engage in family counselling sessions. Thus, it does not appear that the parties were in any abusive relationship. We find substance in the submissions made by the petitioner that respondent no. 6 has raised the said contentions with the intention of creating prejudice against the petitioner.

44. On minutely examining the rival contentions of the parties, it appears that respondent no. 6 has disproportionately blown the petty differences between the parties in an attempt to justify her unilateral decision of not returning to the USA as scheduled and also not allowing the daughter to return to the USA. It is pertinent to note that immediately after respondent no.6 refused to return to the USA and also did not allow the daughter to return to the USA, the petitioner acted with alacrity and took steps to take the daughter back to the USA. On perusal of the pleadings of the parties and the WhatsApp conversations relied upon by respondent no. 6, it is seen that there are disputes and differences between the parties; however, the

petitioner has been apologetic and made attempts to reconcile the differences. The petitioner has also shown willingness to attend family counselling sessions with the intention of resolving disputes and differences so that the daughter gets a healthy and safe lifestyle.

45. It is, therefore, necessary to examine whether the disputes and differences between the parties are serious to the extent of exposing the daughter to any insecurity. A perusal of the pleadings and documents on record shows that the dispute between the parties mainly concerns financial issues. There are no serious allegations made by the parties against each other, which would indicate that the daughter would be exposed to any insecurity in the USA. The discord between the parties does not appear to be a justifiable reason on the part of respondent no. 6 to refuse to return to the USA and detain the daughter in India. Any personal discord between the parties cannot be a reason for depriving the daughter of the company of both parents. We find that respondent no. 6's decision to not return to the USA and not allow the daughter to return to the USA

amounts to depriving the daughter of having the company of both parents and depriving her of the entitlement to the rights and privileges available to her being a citizen of the USA and thus would amount to illegally detaining the daughter in India.

46. Respondent no. 6 could not show that any better educational facilities are available to the daughter in India. The report about the school in the USA shown by respondent no. 6 is no conclusive or authentic document to hold that the school to which the daughter was to be enrolled is of any low standard.

47. The contention of respondent no. 6 that the daughter is adept in reciting shlokas and is familiar with religious Hindu texts etc., and is learning the same from her maternal grandmother and that she likes home cooked Indian vegetarian food is no ground to refuse to return to the USA. The petitioner, in response to the said contention, has rightly stated that even in the USA, the daughter was used to these habits, and even the petitioner is a vegetarian and likes home-cooked food and also is able to cook. Thus, the said grounds raised by respondent n. 6 do not justify respondent no. 6's decision of not

returning to the USA.

48. The daughter has been residing in India since January 2023 and has continued to stay here only because of the unilateral decision of respondent no. 6 not to return on 30th April 2023. Hence, the extended stay of the daughter in India cannot be a good ground to contend that the daughter has bonded well with the family members of respondent no. 6, or has developed roots in India and so she will be in a better environment in India.

49. The contention of respondent no. 6 that the petitioner has long working hours, had a disturbed childhood, is an introverted person, and has an estranged relationship with his father cannot be good grounds to contend that the daughter will not get a better environment in the USA. All these contentions will not make the petitioner, a bad father. In our view, such contentions raised by respondent no. 6 smacks of vengeance and is an attempt to choose her personal discord with the petitioner as a ground to contend that it is not in the interest of the daughter to return to the USA. As against these contentions

of respondent no. 6, the petitioner has submitted that the parties share a healthy bond with respondent no. 6's brother, who resides in the USA and has further submitted that respondent no.6's parents had always intermittently resided with them in the USA and even in the future he will always welcome them to visit the parties and their daughter in the USA.

50. The parties have resided in the USA since the year 2014. Their daughter was born on 14th December 2018, 4 years of their marriage, and since then, is residing in the USA. The daughter is 5 years old now and has been residing in India for last around one year, out of which her stay in India for the last 8 months is only due to the unilateral decision of respondent no. 6 not to return to the USA. Thus, we also do not find any merit in the contention of respondent no. 6 that she and the daughter are vulnerable to the winter conditions in the USA. No cogent material is shown to us in support of the said contention.

51. The conduct of the petitioner in making attempts to resolve the differences, by (i) being apologetic if his conduct has hurt respondent no. 6 or her parents, (ii) not initiating any

unnecessary proceedings in the USA against respondent no. 6 or seeking custody of the daughter,(iii) immediately visiting India after receiving intimation of the proceedings initiated by respondent no. 6 and making an attempt to resolve the differences and requesting respondent no. 6 to return to the USA along with the daughter and (iv) seeking repatriation of the daughter by filing this petition with alacrity shows that the actions of the petitioner are well-intended. He has made genuine efforts to reconcile with respondent no. 6 and provide a healthy and safe family to the daughter in the USA where she will have the company of both parents and utilise all the rights and privileges available to her being a citizen of the USA.

52. Thus, after minutely examining the pleadings and documents on record, we find that the unilateral decision of respondent no. 6 not to return to the USA along with the daughter as scheduled is not justified. We find that the decision of respondent no. 6 has not only deprived the daughter of having the company of both parents but has also deprived her of better educational, health and social privileges available in the

USA being a citizen of the USA and has also lost important months of the academic year due to her extended stay in India.

53. Thus, for the reasons recorded above, we find that to ensure the fulfilment of the daughter's basic rights and needs, identity, social well-being and physical, emotional and intellectual development, it is necessary for the daughter to go back to the USA.

54. Once we hold that it is in the welfare and best interest of the daughter to go back to the USA, it is necessary to examine the requirements of the daughter who is of a tender age of five years. There is no manner of doubt that at such a tender age a girl child needs the love and affection of her mother. However, irrespective of gender, every child is entitled to the love and affection of both parents. The submission made by the learned counsel for respondent no. 6 that the laws in India recognize that till the age of 5 years, a child should ordinarily be in the care of the mother as per section 6 of the Hindu Minority and Guardianship Act is of no assistance to respondent no. 6 in view of the reasons recorded above and even otherwise the daughter

is now 5 years old. In the present case, we have held that respondent no. 6 - mother, is not justified in refusing to return to the USA as scheduled and the unilateral decision of respondent no. 6 has resulted in depriving the daughter of her right to return to the country of her origin, where she is entitled to the privileged rights of education, health and other social benefits. We are in an era of gender equality. We are in an era where both parents are equally responsible for the upbringing of a child by equally contributing towards all the needs of a child, which includes financial, emotional, social and other gender-related care and protection. Just like a mother can be held capable of providing all the care and protection to a child irrespective of the child's gender; similarly, even a father needs to be capable of providing all the care and protection to a child irrespective of the child's gender. It would be unfair to hold that the petitioner is not capable of providing all the care and protection to the daughter only on the ground of her gender. In the present case, there is no sufficient material on record to hold that the petitioner is not capable of providing all the care and protection to the daughter. The petitioner has filed

additional affidavits and undertaken to adjust his working hours to enable him to give the required time to the daughter. He has also undertaken to hire services of a Nanny to fulfill all the daughter's needs. In the event respondent no. 6 is willing to return to the USA, the petitioner has also undertaken to provide the facility of exclusive separate access in the present house to respondent no. 6 if she is not willing to stay with the petitioner. Thus, the petitioner has shown willingness to adopt all possible methods to provide a healthy and safe upbringing to the child that will not deprive her of having the company of both parents and also get all the privileges available to the daughter being a citizen of the USA. It is also important to note that in the event respondent no. 6 is not willing to return to the USA, the petitioner has also undertaken to facilitate her visit to the USA every year for two months and also facilitate the daughter's visits to India so that she gets unfettered time with respondent no. 6 as well her parents and other family members and friends.

55. The Hon'ble Supreme Court, in the case of *Lahari Sakhamuri Vs. Sobhan Kodali*⁹, considered its earlier decisions

⁹ (2019) 7 SCC 311

in the cases of *Nithya Raghavan* and *Kanika Goel* and held as under:

“41. The essence of the judgment in Nithya Anand Raghavan case [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc. cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

43. The expression “best interest of child” which is always kept to be of paramount consideration is indeed wide in its connotation and it cannot remain the love and care of the primary care giver i.e. the mother in case of the infant or the child who is only a few years old. The definition of “best interest of the child” is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean “the basis for any decision taken regarding the child, to ensure fulfilment of his basic

rights and needs, identity, social well-being and physical, emotional and intellectual development”.

(Emphasis applied)

56. In the case of *Yashita Sahu*, the parties were Indian citizens and were married in India. The husband was already working in the US, and the wife accompanied the husband to the US. A daughter was born to the couple in the US and acquired US citizenship. The relationship between the husband and wife got strained, and the wife initiated proceedings in the US Court. Joint, legal custody and shared physical custody of the child was given to the parents. The wife, along with the child, left the US and came to India; hence the husband filed a motion for an emergency brief before the US Court and an ex-parte order was passed granting sole legal and physical custody of the child to the husband and the wife was directed to return to the US along with child. A warrant was also issued against the wife for violating the order of the US Court. The husband filed a Petition to issue a Writ of Habeas Corpus before the Rajasthan High Court for producing the minor child and repatriation to the US. The High Court directed the wife to return to the US

along with the minor daughter to enable the Jurisdictional Court in the US to pass further orders. Aggrieved by the said Judgment, the wife filed an Appeal to the Hon'ble Supreme Court. The Hon'ble Supreme Court discussed in detail the law laid down by its various decisions and held that a Writ of Habeas Corpus is maintainable if the child is in the custody of another parent and that now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. Therefore, the Hon'ble Supreme Court held as under:—

*“20. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. **However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.**”*

21. 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 wary of what is said by each of the spouses.

22. 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.....

28. The child is a citizen of the USA by birth. Her father was already working in the USA when he got married. We are told that the mother had visited the US once before marriage and when she got married it was done with the knowledge that she may have to settle down there. The child was born in a hospital in the US

and the mother did not come back to India for delivery which indicates that at that time the parents wanted the child to be a citizen of USA. Since the child is a citizen of USA by birth and holds a passport of that country, while deciding the issue of custody we have to take this factor into consideration.

35. In view of the above discussion, we are clearly of the view that it is in the best interest of the child to have parental care of both the parents, if not joint then at least separate. We are clearly of the view that if the wife is willing to go back to the USA then all orders with regard to custody, maintenance, etc., must be looked into by the jurisdictional court in the USA. A writ court in India cannot, in proceedings like this direct that an adult spouse should go to America. We are, therefore, issuing directions in two parts. The first part will apply if the appellant wife is willing to go to the USA on terms and conditions offered by the husband in his affidavit. The second part would apply if she is not willing to go to the USA, how should the husband be granted custody of the child.”

Emphasis applied

57. Thus, the principles of law laid down in the case of ***Yashita Sahu*** are squarely applicable to the present case. Thus,

taking note of the position thus settled in the aforesaid decisions, we considered the questions raised in the present case. We have already held that respondent no. 6 is not justified in refusing to return to the USA along with the daughter as scheduled. Thus, we have to now consider the grant of relief in this petition by giving predominant importance to the welfare of the daughter.

58. We find in the facts of the present case that it is not necessary to hold any elaborate inquiry, but a summary inquiry is required to be adopted considering the emergent situation of repatriation of the five years old daughter who is a citizen of the USA who came to India in January 2023 on a return ticket and has stayed back in India since May 2023 only due to a unilateral decision of the respondent no. 6 of not returning to the USA as per the scheduled plan. We do not see anything adverse material on record to hold that it would be prejudicial or harmful to send the daughter to her native country or that the petitioner is incapable of taking care of the daughter. We are satisfied that it will be more beneficial for the daughter to live in the USA, in as

much as she, being a US citizen, is entitled to all the educational, social and medical benefits available there. We find that the stay of the daughter in India for the last around a year is too short a period to facilitate her integration into the social, physical, physiological, cultural and academic environment of India. Hence, if repatriated to the USA, she will not be subjected to an entirely foreign environment. Rather a maximum period of her life the daughter has lived in the USA.

59. By applying the principles laid down by the Hon'ble Supreme Court in the decision of *Vasudha Sethi Vs. Kiran V. Bhaskar*¹⁰, we find in the facts of the present case that the daughter, being a citizen of the US, will have better future prospects on return to the USA. We find that considering the tender age of the daughter, the natural process of grooming in the environment of the native country is indispensable for her comprehensive development. In these facts and circumstances, we do not see any reasonable ground to believe that the daughter should not be repatriated to the USA. Except for the tender age of the daughter, where the care and protection of a

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mother is important, we do not see any factor in favour of respondent no. 6. At the same time, it cannot be ignored that the daughter is also entitled to have the company of both parents. It is her basic human right to have the care and protection of both parents. Thus, respondent no.6 is not justified in unreasonably depriving the daughter of the company of her father. Respondent no. 6 cannot deprive the daughter of her basic human rights only because she has decided that she does not want to go back to the USA, where the parties are permanently settled.

60. The submissions on behalf of respondent no. 6 are on her rights and discomforts rather than the welfare and rights of the daughter. Just because respondent no. 6 has taken a unilateral decision to stay back in India, she cannot deprive the daughter of her rights. In these facts, accepting the submissions on behalf of respondent no. 6 would amount to making a departure from the well-known concept that the welfare of the minor is the paramount consideration. The said submissions are contrary to the law laid down by the Hon'ble Supreme Court in the cases

of *Kanika Goel* and *Nithya Raghavan*. Based on the well-established principles of law governing the custody of minor children, and more particularly as held by the Hon'ble Supreme Court in the decision of *Vasudha Sethi*, it is clear that the rights of the parents are irrelevant when a Court decides the custody issue. In the facts of the present case the principles of law laid down by the Hon'ble Supreme Court in the decisions of *Lahari Sakhamuri*, *Yashita Sahu and Vasudha Sethi*, by taking into consideration the earlier decisions are squarely applicable to the facts of the present case. Considering the grounds raised by respondent no. 6 on the personal discord between the parties, the principles of law laid down by this Court in the decision of *Abhinav Gyan* is also applicable to the present case.

61. In the present case, the petitioner has filed an undertaking dated 3rd November 2023 and stated that he is willing to put all the personal differences behind and cohabit with respondent no. 6 in the interest of their daughter. However, if respondent no. 6 is unwilling to cohabit with the petitioner, he is ready to provide unfettered liberty to her to reside at the present house with

access to a separate kitchen, laundry and entry-exit door so that the daughter will get company of both parents. Petitioner has also stated that he has no objection if either of her parents resides along with respondent no. 6. Petitioner has also agreed to unconditionally provide to respondent no. 6 all the fundamental needs such as food, medical insurance, additional medical requirements and all other basic necessities, including a separate car for her own use. The petitioner has also agreed to attend family counselling sessions at his cost. Petitioner has also agreed to adopt all measures for renewal of respondent no. 6's Green Card and also assist her in securing gainful employment.

62. The petitioner has filed an additional affidavit dated 9th November 2023 and stated that in the event respondent no. 6 is unwilling to return to the USA permanently, the petitioner has agreed to bear the air travel expenses for her visit to the USA and also additionally provide a monthly sum of 1500 USD for two months in lieu of the expenses during her stay in the USA. The petitioner has also undertaken to cooperate in every conceivable manner to facilitate maximum time for respondent

no. 6 to spend with the daughter and abide by any conditions imposed by this Court. The petitioner has also undertaken to make arrangements at his cost to facilitate the daughter's travel to India during her summer breaks from school as well as on other occasions subject to her school schedule so that she gets unfettered, unrestricted and uninterrupted stay not only with her mother but also with her maternal grandparents.

63. The reliance placed by the learned counsel for respondent no. 6 on the decisions in the cases of *Joshayet Kapuar* and *Antonio Zalba* is misplaced. The learned counsel for respondent no. 6 was unable to point out the reason for relying upon the said decisions. So far as the other two decisions of the Hon'ble Supreme Court relied upon by the learned counsel for respondent no. 6 are concerned, we have already discussed the principles of law laid down by those decisions. Considering the facts of the present case, and the aforesaid reasons recorded by us we find that the principles of law laid down in those decisions supports the contentions of the petitioner.

64. We do not find any merit in the contentions raised by

respondent no.6. All the apprehensions expressed by respondent no. 6 are taken care of by the petitioner and he has agreed to provide all the required care and protection to the daughter. We have held that the respondent no. 6's decision not to return to the USA is not justified. We do not find that the proceedings for divorce and custody of the daughter initiated by respondent no. 6 is a valid ground for not granting the reliefs prayed in this petition. For the reasons recorded above, we are satisfied that the welfare and best interest of the daughter lies in her living in the USA and that there is no valid ground to detain her in India. We, thus, find that to ensure the fulfilment of the daughter's basic rights and needs, identity, social well-being and physical, emotional and intellectual development, it is necessary for her to go back to the USA.

65. We make it clear that our observations in this judgment are for the limited purpose of undertaking a summary inquiry to consider the reliefs sought in this petition seeking a writ of habeas corpus.

66. Thus, for the aforesaid reasons, writ petition is allowed

by passing the following order:

- i) The respondent no.6 shall return the minor daughter Ananya Z. Menon to the petitioner within a period of fifteen days from today by handing over her physical custody to the petitioner.
- ii) In the event respondent no. 6 is willing to return to the USA along with the daughter, she will intimate her willingness through her Advocate to the Advocate for the Petitioner within a period of one week from today.
- iii) In the event respondent no. 6 intimates her willingness as directed in clause (ii) above, the petitioner shall, within a period of two weeks thereafter, book the air tickets for respondent no. 6 and the daughter and inform the respondent no.6 accordingly through her Advocate. In such eventuality, the petitioner shall unconditionally abide by all his undertakings given in the additional affidavits dated 3rd November 2023 and 9th November 2023, including the following direction :

(a) The petitioner shall unconditionally bear all the expenses for respondent no. 6 and the daughter and,

in addition, shall unconditionally pay a minimum of 500 US dollars per month to respondent no. 6 for her exclusive personal use by online bank transfer to the account of respondent no.6.

iv) In the event respondent no. 6 is not willing to cohabit with the petitioner, in such eventuality, the petitioner shall unconditionally abide by all his undertakings given in the additional affidavits dated 3rd November 2023 and 9th November 2023, including the following direction :

(a) On respondent no. 6 and the daughter reaching the USA, the petitioner shall forthwith make arrangements for the separate residence for respondent no. 6 in the present house by providing a separate entry-exit door, kitchen, bedroom, laundry and provide all the facilities for food, grocery, medicine, separate car, medical insurance for respondent no. 6 and the daughter, all at the cost of the petitioner.

v) In both the eventualities as stated in clauses (iii) or (iv) above, the petitioner shall unconditionally abide by all his undertakings given in the additional affidavits dated 3rd

November 2023 and 9th November 2023, including the following directions :

- a) *Petitioner shall make arrangements for family counselling sessions at his cost.*
- b) *Petitioner shall not take any legal recourse or any other coercive action against respondent no. 6.*
- c) *Petitioner shall assist respondent no. 6 to renew her green card and also secure employment.*

vi) In the event respondent no. 6 is not willing to return to the USA, the petitioner shall abide by all his undertakings given in the additional affidavits dated 3rd November 2023 and 9th November 2023, including the following directions :

- a) *Petitioner shall bear the air travel expenses for respondent no.6's visit to the USA once every year and pay a monthly sum of 1500 USD for two months in lieu of her expenses during the stay at the USA.*
- b) *Petitioner shall facilitate to enable respondent no. 6 to get temporary physical custody of the daughter during the said two months by*

providing separate residence for respondent no. 6 in the present house by providing separate entry-exit door, kitchen, bedroom, laundry and provide all the facilities for food, grocery, medicine, separate car, and medical insurance for respondent no. 6 all at the cost of the petitioner. However, during the said period, the petitioner will be entitled to meet the daughter at the timings convenient to the daughter.

c) Petitioner shall, at his cost, make arrangements for the daughter's visit to India every year during her summer breaks to enable her to spend time with respondent no. 6 and her parents, family members and friends. However, during the daughter's visit to India, the petitioner shall be entitled to talk to the daughter daily through video calls.

d) During the period when the daughter is in the custody of the petitioner in the USA, respondent no. 6 shall be entitled to talk to the daughter through video calls.

vii) Respondent no. 6 shall continue to provide video access to the petitioner till the handing over of physical custody of the daughter to the petitioner as directed in the above clauses.

viii) It is always be open for the parties to mutually adopt a plan for joint parenting on mutually agreed terms or by filing appropriate application before the appropriate jurisdictional court.

ix) The observations, findings and directions in this judgment and order are limited to the prayers in this petition and shall not be construed as any final adjudication of the rights and contentions of the parties to be agitated before the jurisdictional court.

x) Rule is made absolute in the aforesaid terms.

xi) All parties to act on authenticated copy of this judgment and order.

GAURI GODSE, J.

REVATI MOHITE DERE, J.

xii) After this judgment and order was pronounced, the learned counsel for respondent no.6 seeks stay of this judgment and order. Accordingly, we stay the execution and implementation of this judgment and order for a period of four weeks from today.

GAURI GODSE, J.

REVATI MOHITE DERE, J.