

2023:PHHC:112793

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

116+212

CRWP 1671 of 2023 (O&M)
Date of Decision: 21.08.2023

Ravi Ranga Nathan

...Petitioner

Vs.

State of Haryana and others

...Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present:- Mr. Sanjeev Sharma, Sr. Advocate with
Mr. Vikram Vir Sharda, Advocate and
Mr. Sandeep Singh, Advocate and
Mr. Jugansh Goyal, Advocate
for the petitioner.

Mr. Rajinder Kumar, DAG, Haryana.

Mr. R.S. Rai, Sr. Advocate with Mr. Ankur Mahinder,
Mr. R.D. Gupta, Mr. Rohan Taneja and Ms. Rubeena
Virmani, Advocates for the applicant-respondent No.5.

N.S.SHEKHAWAT, J. (Oral)

1. The petitioner has filed the present petition under Articles 226/227 of the Constitution of India with a prayer to issue a writ in the nature of Habeas Corpus, to protect the life and liberty of Tarini Vijaya Nathan (hereinafter to be referred as '**Tarini**'), daughter of the petitioner from forced/illegal custody of respondent No. 5, who has been confined at the present address of respondent No. 5.

2. Learned senior counsel for the petitioner contends that the petitioner is a citizen of United States of America and is a non-resident Indian. He is also an Overseas Citizen of India as per

Section 7-A of Citizenship Act 1955. The petitioner has been living in United States of America since April 1970 and is working as Associate Consultant for TCS under contract, whereas respondent No. 5, who is the wife of the petitioner is not working. As per the petitioner, he got married to Ms. Sanjana Chauhan, respondent No. 5, who was resident of Philadelphia, Pennsylvania, USA on 25.08.2010 under the Civil Law of State of Philadelphia, Pennsylvania. As per the petitioner, the petitioner and respondent No. 5 were not married as per the provisions of any Indian law and their marriage was governed by the Laws of the State of New York USA and the Civil Code of New York, USA. The petitioner and respondent No. 5 are domicile of USA and even respondent No. 5 is an applicant for U.S. Citizenship. On 14.02.2012, the petitioner and respondent No. 5 were blessed with a daughter Tarini in Gurugram, Haryana, India. However, after her birth, she was taken to USA and she acquired her USA Citizenship on 03.04.2012. Since the time of her birth the daughter of the petitioner and respondent No. 5 had been living with her parents from October 2012 to November 2022 and she attended various schools in USA. When Tarini was aged about 02 years, she was diagnosed of Autism and had been in autism related services since October 2014 in USA. Still further, the petitioner and respondent No. 5 stayed together till 05.05.2020, when respondent No. 5 made false allegations against the petitioner and called the

police and thereafter they separated. Even after separation, the petitioner as well as respondent No. 5 was stayed in New York USA. As per the learned counsel for the petitioner, the respondent No. 5 was in the habit of making false and unfounded allegations against the petitioner, so, the matter was referred to Family Service Unit and a detailed report dated 16.10.2020 (Annexure P-7) was submitted and as per the said report, Tarini was observed to be extremely happy, when she saw her father Mr. Nathan, i.e., the petitioner. However, on 08.12.2020, the respondent No. 5 filed a divorce petition before the Supreme Court of New York and notice was duly served on the petitioner. As per the learned senior counsel, the respondent No. 5 had voluntarily invoked the jurisdiction of Supreme Court of New York City as both the parties are domiciles of USA and the Supreme Court of New York was competent to decide the matter related to interim and permanent alimony as well as custody of Tarini. Apart from that, since the matter remained pending before the Supreme Court of New York City, various interim orders were passed from time to time. Apart from that, the respondent No. 5 had also filed a domestic violence complaint against the petitioner, however, her complaint was ordered to be dismissed by New York Criminal Court. Further, during the divorce proceedings, the Court granted custody and visitation rights to the petitioner to meet his daughter on alternative weekends, which was later on varied such as overnight stay with his daughter.

Apart from that respondent No. 5 also filed several false complaints against the petitioner in USA and the allegations levelled by her were found to be false. Apart from that, it was apparent that the respondent No 5 had voluntarily chosen the jurisdiction of Supreme Court of New York by filing the divorce, custody and alimony cases. Apart from that, the respondent No. 5 had initiated various proceedings against the present petitioner, however, she could not establish any of the allegations before the Court of law by a fair preponderance of evidence.

3. Learned senior counsel further submitted that unfortunately, father of respondent No. 5 passed away in August 2022. Since the matter relating to the custody of the child was pending before the Court of competent jurisdiction, i.e. Supreme Court of New York City, the respondent no. 5 was under a legal obligation to apply to the competent Court to grant her permission to travel to India to attend the funeral services of her father with her child. She moved an application in this regard before the competent Court, however, the petitioner seriously objected to the same. After hearing both the sides, vide order dated 18.08.2022, the Supreme Court of New York granted the permission to respondent No. 5 to visit India alongwith the child, however, condition was imposed on respondent No. 5 that the child must return to USA, not later than 05.09.2022. Finally, without the permission of the Court at New York,

respondent No. 5 took away Tarini from New York, USA to India on 10.11.2022 and since then, the respondent No. 5 and Tarini, both are staying at House No. 3212, Sector 23, Opp. Palam Vihar, Gurugram Haryana, which is parental home of respondent No. 5. Learned senior counsel further submitted when Tarini was taken away by respondent No. 5 on 10.11.2022, the divorce proceedings and the custody matter were already pending between the petitioner and respondent No. 5. Vide order dated 17.11.2022, Supreme Court of New York City, had recorded that the present petitioner had right of custody of the daughter Tarini, as such, the rights of the custody are contemplated in Hague Convention on the Civil Aspect of International Abduction and since the respondent No. 5 had removed the child from United States, it would be violation of the order dated 17.11.2022 passed by the Supreme Court of New York City. Further, since the respondent No. 5 had taken away daughter of the petitioner illegally from New York to India, without seeking permission to take her out of contempt Court, which was dealing with divorce, custody and alimony cases and the respondent No. 5 had failed to appear before the Supreme Court of New York City, the Supreme Court passed an order dated 20.12.2022 and ordered the arrest of respondent No. 5, after handing over the custody solely to the petitioner and awarded exclusive occupancy of the flat to the petitioner. Learned counsel further contends that since Tarini has been taken out from lawful custody, in violation of interim

orders passed by the Supreme Court of New York, the custody of Tarini with respondent No. 5 is illegal as the same has been granted in violation of interim orders passed by the competent Court at New York. Learned senior counsel has further submitted that the daughter of the petitioner has been shifted from New York to Gurugram without seeking permission to take her out of the jurisdiction of New York City, vide order dated 20.12.2022, still physical legal custody of the child was already handed over to the petitioner on 20.12.2022 and as such, at present Tarini is under illegal custody of respondent No. 5 in India. Still further, vide a separate order dated 20.12.2022, the Supreme Court of New York City issued an arrest warrant against respondent No. 5 and the direction was issued to hand over the child to the petitioner and if father was not present in New York City, then to a law enforcement personnel till the father was within the State. Learned senior counsel further submitted that the daughter of the petitioner has been living in USA since the year 2012 and had been availing autism related services since October 2014, and such services are critical to her well being. He further contended that the child is comfortable in staying in the company of the petitioner and his friends and family members. Even, the child was brought up in USA and is suffering from autism. The medical condition of the child has aggravated due to changed circumstances and it is imperative that she shall be returned to the place, where she is most comfortable. Still

further, the detenue i.e. Tarini was getting treatment at state expenses and it will be torturous and extremely disofortable for her to accept the change in environment as she has been taken away from New York as well as the company of her father. Still further, keeping in view the welfare of the child paramount, a Habeas Corpus writ petition is maintainable to decide the issues relating to custody of children and guardianship between the parents. Consequently, the directions may be issued to respondent No. 5 to visit USA alongwith her minor daughter and in case she fails to communicate the willingness to visit the USA within some reasonable period, the petitioner may be granted the custody of the child and he will be entitled to take the minor child with him to USA. Learned senior counsel for the petitioner further relied upon the judgment of divorce passed by the the Supreme Court of New York (Annexure P-31) and contended that the decree of divorce has been passed by the contempt Court and the present petitioner has been granted the sole, legal and peaceful custody of Tarini and no parental access was awarded to respondent No. 5 until such time as she participates in the proceedings in New York.

4. Learned senior counsel has relied upon the law laid down by Hon'ble Supreme Court in the matter of **Prateek Gupta Vs. Shilpi Gupta and others (2018) 2 Supreme Court Cases 309,** wherein, the Hon'ble Supreme Court held as follows:-

48. The following observations in Ruchi Majoo vs. Sanjeev Majoo¹² bearing on the parens patriae jurisdiction of Indian courts in cases involving custody of minor children are apt as well: (SCC p. 498, para 47)

“47. Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Civil Procedure, 1908, as amended by the Amendment Acts of 1999 and 2002. The duty of a court exercising its parens patriae jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision.”

(emphasis supplied)

32. 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 Principal of comity of courts, and the doctrines of “intimate contact and closest concern” notwithstanding. Though the Principal 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 Principals/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 enquiry 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 attentuations. 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.

50. The doctrines of “intimate contact” and “closest concern” are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom etc., with the portent of mutilative bearing on the process of its overall growth and grooming.

51. It has been consistently held that there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration”.

5. On the other hand, learned senior counsel appearing on behalf of respondent No. 5 has vehemently argued that the present petition appeared to have been filed on 07.02.2023, whereas, on 19.12.2022, the respondent No. 5 had already approached the Family Courts at Gurugram by way of divorce petition alongwith an application under Section 26 of the Hindu Marriage Act. Vide detailed order dated 19.12.2022 (Annexure R-5/2), the Family Court, Gurugram, held that the child was not growing at the pace she should have grown and there are several instances of atrocities as per the documents filed by the petitioner (respondent No. 5 here), therefore, at this stage, without commenting on the merits of the case and to prevent the multiplicity of proceedings, the respondent (petitioner

here) was restrained from interfering in the life of respondent No. 5 and Tarni and the present petitioner was also restrained from taking away the child from the jurisdiction of Gurugram and creating any hindrance in the peaceful life of the child except with the permission of the Court. Learned senior counsel further submitted that even the said order dated 19.12.2022 was duly communicated to the present petitioner even before the institution of the present petition before this Court. Learned senior counsel further submitted that on 19.12.2022, itself an email was sent by respondent No. 5 to her Advocate at United States of America stating that the petition had been filed in India and the protective orders have been passed and to withdraw the proceedings initiated by her in US. On 19.12.2022 itself, the respondent No. 5 addressed a similar e-mail to the Court Clerk in the US Court vide mail (Annexure R-5/4). However, on 20.12.2022, the Court Clerk e-mailed the counsel for the present petitioner asking him for guidance to draft a response to the respondent No. 5 and this mail was intentionally not marked to respondent No. 5. On 23.12.2022, the Court Clerk replied the e-mail dated 19.12.2022, sent by respondent No. 5 and it was marked to the counsel for the petitioner also. On 05.01.2023, the counsel for respondent No. 5 had sent an e mail to the petitioner with an order dated 19.12.2022, summons issued by the Gurugram Court and the copy of the divorce proceedings were also appended therewith. Even on 26.01.2023, the counsel for the

petitioner in USA wrote to the Court Clerk seeking for access to reports citing the urgency as the respondent No. 5 had already commenced proceedings in India. Thus, it is evident that the petitioner was not only aware of the HMA proceedings, however, has been earlier seeking help of the US Court to gather evidence in order to defend himself in the said proceedings. Even though, the petitioner had knowledge with regard to the pendency of the proceedings before the competent Court at Gurugram. Not even fleeting reference has been made in the present petition regarding the order dated 19.12.2022 passed by the Family Court. Since, the petitioner has not come up front and with clean hands before this Court, the petition is liable to be dismissed only on this score.

6. Learned senior counsel for respondent No. 5 further vehemently argued that the central issue in the present case is with regard to the legality of the custody and the welfare of the child is to be seen, the petitioner has wrongly invoked the writ jurisdiction of this Court, which is a discretionary remedy. Apart from that, for the purposes of being entitled to maintaining a Habeas Corpus writ petition in a criminal matter, the petitioner is under a legal obligation to show that the child is in illegal custody. In fact, the alleged detainee Tarini is in the custody of her biological mother, which can never be termed as an unlawful custody as there is a presumption to the contrary. Still further, on the date, when the child was brought to

India, there was no order passed by the USA Court restraining such travel or creating any impediment in the travel of the respondent No. 5 and her child. Still further, even, all other adverse orders were passed after the respondent No. 5 had left America and have been passed illegally, at the back of the respondent No. 5. Apart from that, the respondent No. 5 has already preferred a divorce petition alongwith an application under Section 26 of the Hindu Marriage Act before the Family Court Gurugram which had already passed an interim order dated 19.12.2022 restraining the petitioner herein from interfering in the life of respondent No. 5 and child, so by any stretch of imagination, the custody of the child with respondent No. 5 can never be held to be illegal.

7. Learned senior counsel further argued that there was been unreasonable delay of three months in approaching this Court by way of filing the present petition. Since, the petitioner had not promptly approached the territorial High Court, this Court must refuse to exercise the discretion under Article 226 of the Constitution of India and instead relegate the parties to exercise substantive remedies as available under the Guardianship Laws. Apart from that, the United States of America is not a reciprocating territory for the purposes of Section 44-A of Code of Civil Procedure and the petitioner has wrongly prayed that this Court should take orders of U.S. Courts on face value, which is contrary to the settled law.

Additionally, the Republic of India is also not a signatory to the Hague Convention on the Civil Aspects of International Abduction and therefore the Convention, on the basis of which, the Supreme Court of New York has been passing the orders had no legal recognition in India. Moreover, the petitioner cannot be handed over the custody of the child as the child has autism and required special attention. The child was never in the custody of the petitioner nor has the child reacted well to his limited visitation rights or access. Apart from that, the petitioner has always carried the child into doing vile and disgusting acts and had committed sexual atrocities on her. Learned senior counsel vehemently argued that AIMS, Delhi, Therapist had in fact instructed the respondent No. 5 to not even take the name of the petitioner in the presence of the child on account of the trauma being faced by her. Apart from that, the petitioner had concealed the fact that he had severe anger management issues and had been arrested on account of same on various occasions and it would be dangerous to hand over the custody of the child to the petitioner. Still further, the petitioner had also concealed the fact that multiple complaints of domestic violence, physical abuse and inappropriate behaviour had been filed against the petitioner by respondent No. 5 as well as Tarini, who had informed the many government agencies in USA about the sexual perversion, inappropriate behaviour and physical/mental harm being meted out

upon her and respondent No. 5 by the petitioner. Even, the petitioner was was arrested by the law enforcement agencies in USA for physically assaulting his wife, i.e. respondent No. 5 and he was taking anger management counselling for many years, prior to filing of the present petition. Learned senior counsel further argued that even the marriage between the petitioner and respondent No. 5 was solemnized as per the Hindu rites, rituals and ceremonies in the presence of relatives, friends and family members of both the parties on 04.04.2010 in New Delhi and also referred to the wedding invitation and photographs of the marriage (Annexure R-5/9), in this regard. After shifting to USA, their civil ceremony was held in August 2010 in Philadelphia, Pennsylvania, where the father of the petitioner resided. Consequently, the petitioner was conspicuously silent about the marriage solemnized as per the Hindu rites, rituals and misrepresented before the Court that the parties were not married as per the Indian law. Learned senior counsel further submitted that for the betterment, welfare and over all personality development of the child and to ensure that Tarini can lead a normal life, it is necessary that she should be allowed to reside with her mother, i.e., respondent No. 5 as she has been taking care of her primarily. Apart from that back in USA, the petitioner has on number of occasions misbehaved inappropriately with his own daughter and had also harassed, humiliated and threatened the respondent No. 5, so it is appropriate

that the custody of Tarini may be handed over to respondent No. 5 only. Still further, in the meantime, the Tarini was admitted at Presidium School, Gurugram, which is an acclaimed school at Gurugram and at present for the new grade, the respondent No. 5 got her enrolled in Sri Ram School, which is one of the top most schools in India and extremely sensitive towards autistic children. Further, the minor daughter, i.e. Tarini has also been involved in extra curricular activities such as skating and music and has been actively taking classes also, which keep her engaged, calm and happy. Learned senior counsel further submitted that even Tarini has been extremely benefited by shifting to India as she has been taken away from the toxic environment created by the petitioner in USA, where she was required to meet with strangers during the investigation/inquires/complaints and the child was extremely uncomfortable there in USA. As child was disturbed due to petitioner actions, the respondent No. 5 had to engage an experienced therapist/counselor for her minor daughter at AIIMS Hospital, New Delhi and Tarini, being a girl child is more comfortable in the guardianship of the mother.

8. I have heard learned counsel for the parties and perused the record and the following points emerge for consideration and adjudication by this Court.

Concealment of facts

9. Learned counsel appearing on behalf of respondent No. 5 argued that there was material and blatant non-disclosure in the present petition and the petition deserves dismissal only on this ground. As per the record, the present petition was filed before this Court on 07.02.2023, whereas, on 19.12.2022, the respondent No. 5 had already approached the Family Courts, Gurugram, by way of divorce petition alongwith an application under Section 26 of the Hindu Marriage Act for granting sole custody of Tarini to respondent No. 5 and to restrain any individual from removing Tarini from the jurisdiction of Courts at Gurugram. After hearing the counsel for respondent No. 5, the Family Court, Gurugram passed the following order:-

“In view of the forgoing submissions of learned counsel for petitioner and perusal of file, it is apparent that the child is not growing at the pace she should have grown and there are several instances of atrocities as per the documents filed by the petitioner, therefore, at this stage, without commenting anything on the merits of the case and prevent the case from multiplicity of proceedings, the respondent is restrained from interfering in the life of petitioner as well as the child and respondent is also restrained from taking away the child from the jurisdiction of Gurugram and creating any hindrance in the peaceful life of the child except with the permission of the Court.

In view of the foregoing discussion, the application under Section 26 of HMA, 1955 seeking interim relief is disposed of.”

10. As per the learned senior counsel for respondent No. 5, the said order and the factum of proceedings were duly communicated to U.S. Court as well as to respondent No. 5. The respondent No. 5 had sent an e-mail dated 19.12.2022 to her Advocate in U.S.A. informing that respondent No. 5 has already filed a petition and protective orders have been passed and requested her counsel to withdraw the proceedings in U.S.A. Similar, e-mail was addressed to the Court Clerk in U.S. Court on 19.12.2022, which is Annexure R-5/4. Even, the Court Clerk on 20.12.2022 e-mailed (Annexure R-5/5) to counsel for the present petitioner asking for guidance to draft a response to respondent No. 5. Even on 05.01.2023, the counsel for respondent No. 5 e-mailed the petitioner vide order dated 19.12.2023 and the summons issued by Gurugram Court, copy of divorce petition alongwith its annexures and the copy of the e-mail was appended as Annexure R-5/7. On 26.01.2023, the counsel for the petitioner in U.S. wrote to Court Clerk seeking for access to reports and the said e mail dated 26.01.2023 clearly showed that the petitioner was not only aware of the HMA proceedings before the Family Court, Gurugram, but was also seeking help of U.S. Court in order to collect the evidence to be able to defend himself in said proceedings. However, while filing the present petition, there is not even vague reference of

the pendency of the HMA proceedings and/all orders passed on 19.12.2022 by the Family Court Gurugram with regard to the controversy involved in the present case. Learned senior counsel also submitted that apart from that the above stated fact, the petitioner in the present case had also concealed following facts:-

- (i) *The petitioner had concealed the fact that the marriage between the petitioner and respondent No. 5 was solemnized as per Hindu rites and ceremonies at New Delhi and in para 6 of the petition, the petitioner had wrongly stated that the parties had not married as per the provisions of any Indian laws.*
- (ii) *The petitioner stated in para 8 of the petition that Tarini was taken to U.S.A. immediately after her birth in February 2012, whereas, she was taken to U.S. in October 2012. The petitioner had also concealed the first complaint for domestic violence meted out towards respondent No. 5, which took place in September 2014 and had also concealed the ACS case note dated 12.10.2014 which categorically stated that the petitioner had admitted to the said incident.*
- (iii) *The petitioner had also concealed the fact that on account of his temperamental and anger issues, he had been taking anger management classes for many years.*
- (iv) *The petitioner had also concealed the fact that on 30.07.2016 and 04.05.2020 he had physically assaulted the respondent No. 5, who called the*

police and he was thereafter arrested on both the occasions.

11. On the other hand, learned senior counsel appearing on behalf of the petitioner submitted that the present writ petition under Article 226 of the Constitution of India is maintainable and there was no concealment on the part of the present petitioner. Rather the respondent No. 5 herself is guilty of serious misconduct. Leaned senior counsel further submitted that the respondent No. 5 herself had approached the Court at U.S.A by filing a divorce petition in the Supreme Court of New York on 08.12.2020 and the divorce petition was finally decided against her. Even, both the parties had accepted the jurisdiction of the Family Courts at U.S.A. and she intentionally chose to leave the jurisdiction of Courts at U.S.A illegally and in complete disregard to orders passed by the competent Courts. Even, this Court could examine the matter independently as Tarini was in illegal custody of respondent No. 5 and since both the parties had accepted the jurisdiction of Supreme Court of New York, which was competent to adjudicate the matter related to custody of Tarini, consequently, the proceedings before the Family Court at Gurugram were in consequential, null and void. Still further, even after the proceedings before the Family Court at Gurugram were pending, still, by invoking the constitutional powers, this Court could adjudicate the

matter related to the custody of Tarini, who was in illegal custody of respondent No. 5.

12. In **Indian Bank v. Satyam Fibres (India) (P) Ltd.** (1996) 5 SCC 550, the Hon'ble Supreme Court of India has held as under:-

*“21. In **Smith v. East Elloe Rural Distt. Council** [1956 AC 736: (1956) 1 All ER 855 : (1956) 2 WLR 888] the House of Lords held that the effect of fraud would normally be to vitiate any act or order. In another case, **Lazarus Estates Ltd. v. Beasley** [(1956) 1 QB 702: (1956) 2 WLR 502] (QB at p. 712), Denning, L.J. said: ‘No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.’*

22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the

constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business.

23. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practised upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order. (See: Benoy Krishna Mukerjee v. Mohanlal Goenka [AIR 1950 Calcutta 287]; Gajanand Sha v. Dayanand Thakur [AIR 1943 Patna 127: ILR 21 Pat 838] ; Krishnakumar v. Jawand Singh [AIR 1947 Nagpur 236: ILR 1947 Nag 190]; Devendra Nath Sarkar v. Ram Rachpal Singh [ILR (1926) 1 Luck 341: AIR 1926 Oudh 315]; Saiyed Mohd. Raza Vs. Ram Saroop [ILR (1929) 4 Luck 562: AIR 1929 Oudh 385 (FB)]; Bankey Behari Lal Vs. Abdul Rahman [ILR (1932) 7 Luck 350:

AIR 1932 Oudh 63]; Lekshmi Amma Chacki Amma Vs. Mammen Mammen [1955 Ker LT 459], the Court has also the inherent power to set aside a sale brought about by fraud practised upon the Court (**Ishwar Mahaton Vs. Sitaram Kumar [AIR 1654 Patna 450]** or to set aside the order recording compromised obtained by fraud. (**Bindeshwari Pd. Chaudhary VS. Debendra Pd. Singh {AIR 1958 Patna 618: 1958 BLJR 651}; Tara Bai Vs. V.S. Krishnaswamy Rao [AIR 1985 Kant 270 : ILR 1985 Kant 2930]**)”

13. In **S.P. Chengalvarya Naidu Vs. Jagannath (1994) 1 SCC 1** the Hon'ble Supreme Court made the following observations:-

“5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that “there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence”. The Principal of “finality of litigation” cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of

the court is being abused. Property-grabbers, tax-evaders, bank-loan- dodgers and other unscrupulous persons from all walks of life find the court- process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the

court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

14. I have considered the submissions made by the learned counsel for the parties in the light of the principles settled by the Hon'ble Supreme Court. It is fundamental duty of any party approaching the Court of law that it must come with clean hands, more so, when the matter in issue involves the custody matter of a child. Any fraudulent conduct based on which the custody of the minor is obtained/sought to be taken under the orders of the Court would negate and nullify the element of trust reposed by the Court in the concerned person. The law is well settled whenever a dispute arises between parents or the concerned parties regarding the custody of a minor, the High Court has to exercise its **“parens patriae”** jurisdiction for deciding the primary custody of the minor and the custody of the minor has to be handed over to the person, who in the eyes of the Court, would be the most suitable person. Any action initiated to obtain such custody from the Court with fraudulent conduct and design would be a fraud on the process of the Court. The Courts of law are meant for imparting justice between the parties and one, who comes to the Court, must come with clean hands and I am constrained to say that more often than not, the process of the Court is

being abused and I have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He could be summarily thrown out at any stage of the litigation.

15. Adverting to the facts of the present case, it is evident that the petitioner had invoked the constitutional powers of this Court by way of filing the present petition with a view to secure the release of his daughter Tarini from the alleged/forced custody of respondent No. 5. However, from the record, it remains undisputed that the respondent No. 5 had already approached the Family Courts at Gurugram on 19.12.2022 by way of divorce petition alongwith an application under Section 26 of the Hindu Marriage Act (Annexure R-5/1), seeking the custody of the minor child Tarini and an interim order had already been passed by the Family Court (Annexure R-5/2) on 19.12.2022 itself. The said order was immediately communicated and brought to the notice of the present petitioner. Even, from the various communications, which are appended with the reply by respondent No. 5, it stands established on record that the petitioner was in knowledge of the proceedings before the Family Court and it was his bounden duty to inform this Court about the pendency of the proceedings before the learned Family Court. Even if, the petitioner under a bonafide impression that the proceedings at Family Court Gurugram are misuse of the process of the law and are nullity, still he was under a legal obligation to apprise this Court about the pendency

of the proceedings before the Family Court at Gurugram as the said facts were germane for the adjudication of the present petition. No doubt, this Court can hold inquiry, while exercising its power under Articles 226/227 of the Constitution of India to decide the lawful custody of a child, but the party approaching this Court has the most solemn duty to disclose each relevant fact to this Court at the time of initiating the proceedings and in case there is an attempt to suppress the material facts/documents, it would amount to a fraud not only on the Courts but on the opposite party as well. Once this Court has come to a firm conclusion that some vital and fundamental information has been concealed, the High Court can always decline to come to aid of such party by refusing to exercise its discretionary jurisdiction under Articles 226/227 of the Constitution of India.

Maintainability of a Habeas Corpus

16. Learned senior counsel appearing on behalf of the petitioner vehemently argued that respondent No. 5 herself had filed a divorce petition in the Supreme Court of New York on 08.11.2020 and the petition was finally adjudicated by Supreme Court of New York and the most of the issues were decided against the respondent No. 5 and sole custody of Tarini was ordered to be handed over to the petitioner. Learned senior counsel further submitted that the respondent No. 5 voluntarily with her own free will, invoked the jurisdiction of the Supreme Court of New York City as both the

parties were domiciles of U.S.A and both the parties had voluntarily agreed to get the matter adjudicated related to interim and permanent alimony as well as custody of Tarini decided by the Supreme Court of New York. Respondent No. 5 had, with her own free will, accepted the jurisdiction of Supreme Court of New York as the competent Court to adjudicate all the related matters and various interim orders related to the custody, joint custody of Tarini were passed by the U.S.A. Court. Apart from that, respondent No. 5 had also filed several police complaints against the petitioner in USA and all such complaints were held to be invalid as the respondent No. 5 herself admitted to the prosecutors dealing with the complaints that she had filed the complaints without any factual basis. Further, the invocation of jurisdiction of Supreme Court of New York by respondent No. 5 voluntarily in 2020 in relation to divorce custody and alimony makes it competent Court of jurisdiction on the basis of comity of Courts, which has been upheld by the Hon'ble Supreme Court of India. As per the learned senior counsel, the Court in the native country, i.e. closest concern and most intimate conduct with the issues arising in the case would be in the best position to investigate the aspect related to welfare of child. Still further, vide order dated 18.08.2022. the Supreme Court of New York granted permission to respondent No. 5 to visit India alongwith child, who also had imposed a condition that the child must return to USA not later than 05.09.2022. However,

without the permission of the Court at New York, the petitioner shifted Tarini from New York USA to India on 10.11.2022 and as such, the child was wrongly removed from New York USA by the respondent No. 5 and her custody can never be termed as lawful and Tarini is now in illegal custody of respondent No. 5 in India. Further, as child's father, such right of custody are contemplated in the Hague Convention on the Civil Aspect of International Abduction, and if respondent No. 5 has removed the child from United States of America in violation of Court orders, the custody of Tarini with respondent No. 5 should be held to be illegal. Thus, the present petition with a prayer to issue a writ in the nature of Habeas Corpus to secure the relations of Tarini from valid/legal custody of respondent No. 5, will be maintainable before this Court.

17. On the other hand, learned counsel appearing on behalf of respondent No. 5 submitted that even though the respondent No. 5 had chosen to invoke the jurisdiction of Supreme Court of New York, but before passing of an adverse order, vide e mail communication on 19.12.2022, addressed to the Court Clerk of U.S. Court, the respondent No. 5 had requested the advocate as well as Courts in U.S.A., stating that she has already filed a petition in Gurugram and protective orders have already been passed and she wanted to withdraw the proceedings before the Supreme Court of New York. However, in spite of her request to withdraw the proceedings, the

Court at New York continued with the proceedings, in absence of the respondent No. 5 without affording any opportunity of hearing to her. Still further, the oppressive nature of the Court proceedings in U.S.A was evident from the fact that the Court Clerk on 20.12.2022 e mailed the counsel for the petitioner asking for guidance to draft a response to the respondent No. 5 and the respondent No. 5 was not even marked on the said e mail intentionally. Still further, in the present case, the central issue was with regard to the legality of the custody of the child as well as the issues relating to paramount interest of the child were raised, in such a situation, the Family Court at Gurugram, would be competent to deal with such complex matters and disputed questions of fact as well and the present writ petition may not be maintainable. Learned senior counsel further contended that once a competent Court of law is already seized of the matter, the petitioner is not entitled to invoke the extra ordinary writ jurisdiction of this Court. I have considered the submissions made by learned counsel for the parties and perused the record in this regard.

18. The Hon'ble Supreme Court has held in the matter of **Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tiwari (2019) 7 SCC 42** as under:-

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court.

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

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

of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

19. In the present case also, the petitioner, who is father of Tarini has filed the present petition before this Court by alleging that the custody of Tarini with respondent No. 5 is illegal and forced and is in complete violation of the orders passed by the Court at U.S.A. However, even before filing of the present petition, the respondent No. 5 had already approached the Family Court at Gurugram and a protective order had already been passed by the Family Court at Gurugram. The present petitioner was well aware of the pendency of the proceedings before the Family Court, which is apparent from the various communications appended by respondent No. 5 with her reply. Even no reasons have been given or any stances have been communicated by the petitioner to point out that the observations recorded by the Principal Judge, Family Court in order dated 19.12.2022 are misconceived or are unconstitutional in law. Rather instead of challenging the order dated 19.12.2022 passed by a Family Court Gurugram before this Court, the petitioner chose to invoke extra ordinary constitutional power of this Court. In fact, a petition under under Section 26 of the Hindu Marriage Act is still pending adjudication before the Principal Judge, Family Court and certain interim orders have already been recorded by the Principal Judge, in the said matter, consequently, the petitioner if at all aggrieved, should

have challenged the orders passed by the Family Court, instead of filing the present petition. Availability of an alternative efficacious remedy although may not be a bar to the issuance of a habeas corpus, however, such competing claims between natural guardian should preferably be examined by the Family Court, which is more equipped to determine the welfare of the child and offers complete opportunity to the contesting parties to establish their claims and examine as to what would be in the best interest of the minor besides, availing of simultaneous remedy of habeas corpus would itself be a reason for the writ Court to be slow in intervention as disputed question of fact should preferably be resolved after affording the parties effective opportunity to lead their respective evidence. Consequently, the facts of the case do not call for existence of any circumstance as would justify intervention by the Court, in a writ of Habeas Corpus.

Orders of Foreign Courts and their binding effects

20. Learned senior counsel appearing on behalf of petitioner submitted that the respondent No. 5 herself had filed a divorce petition in Supreme Court of New York on 08.11.2020, which was finally decided against the respondent No. 5. Apart from that, respondent No. 5 had voluntarily, with her own free will, had invoked the jurisdiction of Supreme Court of New York, as she was habitual resident of New York City and was domicile of USA. The Supreme Court of New York which was competent to adjudicate the matters

relating to interim and permanent alimony as well as of custody of Tarini. Even respondent No. 5, out of her own free will had accepted the jurisdiction of Supreme Court of New York City and the said Court in USA also passed various interim orders from time to time. Consequently, the Supreme Court of New York will be the competent Court on jurisdiction on the basis of comity of Courts, which had been discussed in the recent judgments of the Hon'ble Supreme Court of India in the matter of **Prateek Gupta case (supra)**, wherein, the Hon'ble Supreme Court had held that the Court in the native country has closet concern and most intimate contact with the issues arising in case, would be in the best position to investigate the aspects relating to the welfare of the child. Apart from that, vide order dated 17.11.2022, the Supreme Court of New York had recorded that the present petitioner had right of custody of Tarini as the child's father has such rights of custody are contemplated in the Hague Convention on the Civil Aspects of International Abduction.

21. On the other hand, learned senior counsel appearing on behalf of respondent No. 5 has submitted that in the present case, where the custody of female minor child was with respondent No. 5, i.e. her biological mother, who is staying with her since her birth while exercising its writ jurisdiction, this Court could not make any further inquiry fixed if it is called upon to consider the prayer for return of the minor female child to native country, rather this Court

itself may hold at his own inquiry at the most. Further, in the present case, this Court should be slow in interfering, while exercising its writ jurisdiction as a detailed inquiry is being undertaken by the competent Court of law, i.e. the Family Court at Gurugram and a protective order has already been passed by the Family Court. Further, the Court instead of looking into such aspects should take into account the totality of the facts and the circumstances, whilst ensuring the best interest of the minor child. For the purposes of habeas corpus, the Court ought to take into consideration the entire circumstances of the minor child, which led the removal of the child from the native country and the doctrine of “**intimate contact and closest concern**” are of persuasive relevance. Still further, India is not a signatory to the Convention of 1980 on “Civil Aspects of International Child Abduction” and the Supreme Court of New York has wrongly placed reliance on the same.

22. I have heard the learned counsel for the parties and perused the record in this regard.

23. The Hon'ble Supreme Court of India has held in the matter of **Kanika Goyal Vs. State of Delhi through Station House Officer and another 2018 (9) SCC 578** as follows:-

“32. After these decisions, it is not open to contend that the custody of the female minor child with her biological mother would be unlawful, for there is presumption to the contrary. In such a case, the High Court whilst

exercising jurisdiction under Article 226 for issuance of a writ of habeas corpus need not make any further enquiry but if it is called upon to consider the prayer for return of the minor female child to the native country, it has the option to resort to a summary inquiry or an elaborate inquiry, as may be necessary in the fact situation of the given case. In the present case, the High Court noted that it was not inclined to undertake a detailed inquiry. The question is, having said that whether the High Court took into account irrelevant matters for recording its conclusion that the minor female child, who was in custody of her biological mother, should be returned to her native country. As observed in Nithya Anand Raghavan case, the Court must take into account the totality of the facts and circumstances whilst ensuring the best interest of the minor child. In Prateek Gupta case, the Court noted that the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration. Further, the doctrine of "intimate and closest concern" are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom, etc. with the portent of mutilative bearing on the process of its overall growth and grooming.

33. The High Court, in the present case, focused primarily on the grievances of the appellant and while rejecting those grievances, went on to grant relief to Respondent 2 by directing return of the minor girl child to her native country. On the totality of the facts and

circumstances of the present case, in our opinion, there is nothing to indicate that the native language (English) is not spoken or the child has been divorced from the social customs to which she has been accustomed. Similarly, the minor child had just entered pre-school in the USA before she came to New Delhi along with her mother. In that sense, there was no disruption of her education or being subjected to a foreign system of education likely to psychologically disturb her. On the other hand, the minor child M is under the due care of her mother and maternal grandparents and other relatives since her arrival in New Delhi. If she returns to US as per the relief claimed by Respondent 2, she would inevitably be under the care of a nanny as Respondent 2 will be away during the daytime for work and no one else from the family would be there at home to look after her. Placing her under a trained nanny may not be harmful as such but it is certainly avoidable. For, there is likelihood of the minor child being psychologically disturbed after her separation from her mother, who is the primary care giver to her. In other words, there is no compelling reason to direct return of the minor child M to the US as prayed by Respondent 2 nor is her stay in the company of her mother, along with maternal grandparents and extended family at New Delhi, prejudicial to her in any manner, warranting her return to the US.

34. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of

best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/ her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom, etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful. This has been the consistent view of this Court as restated in the recent three-Judge Bench decision in Nithya Anand Raghavans, and the two-Judge Bench decision in Prateek Gupta'. It is unnecessary to multiply other decisions on the same aspect.

24. In the present case, it is not disputed that the respondent No. 5 and the minor are presently residing in Gurugram and the respondent No. 5 does not seem to have any intention to return to matrimonial home with the present petitioner in USA. The respondent No. 5 has apprehensions and serious reservations on account of her past experience and it is not necessary to discuss the said facts in detail in the present judgment. This matter can be considered by a Court of competent jurisdiction, where the parties may chose to pursue their remedies, as permissible in law. But in the present case, it is admitted that Tarini is a female child and since her birth, she is

admittedly staying with her biological mother, i.e. respondent No. 5. As per the averments made in the present petition also, the present petitioner is employed whereas respondent No.5 chose to resign from her job and was taking full care of Tarini since her birth. Apart from that, *prima-facie*, the custody of a female minor with her biological mother cannot be said to be unlawful as there is a presumption to the contrary. More so, when the Family Court at Gurugram is already seized of the matter, this Court should be slow in interfering while exercising its jurisdiction under Article 226 of the Constitution of India. Apart from that, as held by the Hon'ble Supreme Court of India, in the matter of **Kanika Goyal (supra)** that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards of the non-convention countries, the law is that the Court in the country to which the child has been removed must consider the questions of merits bearing the welfare of the child as of paramount importance and to reckon the order of the foreign Court as only a factor to be taken into consideration, unless the Court finds it fit to exercise summary jurisdiction in the interests of child and its prompt return is for its welfare. Even, in the present case, *prima facie*, this Court is satisfied that having regard to the totality of the facts and circumstances, it would be in the interest and welfare of the minor child to decline the return of the child to USA, from where, she has been removed. Still further, the respondent No. 5,

who is having the custody of minor has already resorted to substantive proceedings for the custody of the child and the said Court can decide the best interests and welfare of the child by holding a detailed and elaborate inquiry by taking into consideration the settled principles of law.

25. In view of the above discussion, the present petition sans merits and deserves dismissal and dismissed accordingly.

21.08.2023

(N.S.SHEKHAWAT)

amit rana

JUDGE

Whether reasoned/speaking

:

Yes/No

Whether reportable

:

Yes/No