

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 110 OF 2024

Shishir Shirolkar s/o Kamalnayan .. Petitioner
Shirolkar

Versus

The State of Maharashtra and ors .. Respondents

...

Mr.Shadan Farasat, Sr. Advocate with Bimal Rajasekhar for the petitioner.

Mr. Abhay Khandeparkar, Sr. Advocate with Mr.Aditya Khandeparkar, Ms.Shilpa Joshi, Ms.Apoorva Khandeparkar and Gaurav Patole i/b Khandeparkar & Associates for respondent nos.2 and 3.

Ms. S.S. Kaushik, APP for the State.

CORAM: BHARATI DANGRE &

MANJUSHA DESHPANDE,JJ.

RESERVED : 22nd JULY, 2024

PRONOUNCED : 23rd SEPTEMBER, 2024

JUDGMENT:- (Per Bharati Dangre, J)

1 The Writ Petition seeking issuance of writ in the nature of Habeas Corpus revolves around the child 'T' born out of the wedlock between the petitioner and the respondent no.2, who at present, is aged 7 years and is presently in the custody of the mother.

The petitioner, a permanent resident of United States of America (USA), has filed the writ petition seeking return of his minor daughter and for transfer of her physical custody to him, so that she can return to the country of her birth, citizenship and domicile, as she is the habitual resident of USA.

Before we appreciate the counter claims in the Writ Petition, it is necessary for us to delve into the background facts which has resulted in a petition being filed by the petitioner seeking the aforesaid relief.

'Background facts'

2 The petitioner and respondent no.2 met in the year 2006 while they were pursuing their masters at the Texas A & M University. After being in relationship for approximately three years, they married in a civil ceremony in Harris County, Texas. The Marriage License under the signature of County Clerk, Harris County, Texas dated 13/11/2009 is annexed along with the petition.

Pursuant thereto, the families of the petitioner and the respondent no.2 had organized reception/cultural ceremony for their respective families and guests in India, but admittedly, no marriage was solemnized in India.

Out of the wedlock "L" was born at a hospital in Austin, Texas on 30/10/2017 who, by birth acquired US

citizenship. Her birth certificate along with the passport issued on 13/7/2018 is placed on record. The passport exhibit its date of expiry as 12/7/2023 and thus, as on date, her passport issued by the Department of State USA has expired.

Both the petitioner and respondent no.2 after marriage, are domiciled in the US as a married couple for 11 years and the respondent no.2 is also in possession of H-1B visa which also form part of the petition.

3 It is the pleaded case of the petitioner, that on 20/9/2020, he noticed the respondent no.2 standing at the door of their house with packed suitcases as she intended to rush back to India to take care of her mother, who was informed to be in critical condition.

Though the petitioner plead that he was in touch with respondent no.2 through Whatsapp/messages, he did not receive clear answers in respect of her return to the US. The respondent no.2 on 30/9/2020, refused permission to the petitioner to apply for a fresh US visa for her.

Expressing concern about the safety of "L" and on realizing that her mother could not be persuaded to return to USA unless she was legally bound to do so, the petitioner filed a petition (Cause No.20-2427-FC3) before Williamson County Court on 30/9/2020, seeking necessary orders for conservatorship of, possession of, access to and support of "L".

The petitioner continued his persuasive efforts of

establishing contact with his wife and expected her voluntary return along with his daughter, but soon his hope turned into despair.

Desperate to see his daughter whom he had not met for more than two months, the petitioner booked tickets to come to Mumbai on 3/12/2020, but when he landed in New Jersey, which was his first layover, he received a message from his wife that she was not comfortable with him meeting their daughter which compelled him to cancel his trip.

4 The respondent no.2 filed a Divorce and Maintenance petition under section 13(1)(a) read with Section 24, 25 and 27 of the Hindu Marriage Act before the Family Court, Bandra vide Petition No. A-2296/2020 on 18/12/2020, which made her intention apparent to the petitioner.

It is the claim of the petitioner that the petition was based on a false pleading that the marriage between the parties is solemnised in India, despite the fact that the marriage certificate annexed to the petition was of Texas. The place of last residence together was also falsely depicted as Mumbai and the petition contained a very specific statement that the parties are domiciled in State of Maharashtra, the petition though, did not disclose that minor child is a US citizen and she possesses US passport.

5 Despite filing of a petition before the Williamson County Court, the petitioner did not issue subpoena to

respondent no.2 as his intention was to salvage their relationship for the sake of their daughter, but when she cut him off all communications, he decided to serve the custody and divorce petition upon her. Accordingly, after serving the copy of the petition on respondent no.2 as well as her Advocate and by physically delivering a copy of the citation and the petition, to her mother's house in Mahim, where she was residing, he got the proceedings heard before the concerned Court but obviously, the respondent no.2 failed to participate.

On 21/9/2021, the Williamson County Court passed orders in the petition and granted the petitioner the sole conservatorship of his daughter after recording a finding that the wife has wrongfully removed the daughter from US to India in September 2020. The Court directed her immediate return and cessations of the daughter's residence in India and upon her return to US, granted visitation rights to respondent no.2. The Court also granted a decree of divorce and distribution of marital assets as per the prevailing law.

A copy of the decree of divorce is a part of the petition.

6 On the home front, the petitioner filed an application under Order 7 Rule 10 of the Code of Civil Procedure before the Family Court, Bandra, raising an objection about the jurisdiction to be exercised over the dispute between the parties and this application is still pending for adjudication.

On 8/12/2021, the respondent no.2 wife filed an application seeking amendment in the petition and converting the same from a petition filed under the Hindu Marriage Act, 1955 to the petition filed under the Special Marriage Act, 1954. It is the claim of the petitioner that there exist no certificate of marriage registered under the Special Marriage Act. During this period, there was also an attempt to amicably settle the dispute with the help of a mediator, but it did not render any success.

The present Writ Petition was filed before this Court on 12/5/2023 and by order dated 8/6/2023, the parties were referred to mediation to an expertise mediator, a Former Judge of this Court, but even this process did not yield any success. However, due to the intervention of the Court, petitioner was able to meet his daughter after more than 2 ½ years and this access was availed by him in the children's home at the Family Court in Bandra.

Contentions advanced on behalf of the petitioner.

7 Mr.Shadan Farasat, learned senior counsel for the petitioner in the background facts have submitted before us that as far as the minor daughter is concerned, since her passport has expired on 12/7/2023, she is an illegal migrant within the meaning of section 2(b)(ii) of the Citizenship Act, 1958. He would emphasize upon the fact that the child is an

US citizen and her overseas citizenship card of India has also expired, on expiry of her passport as OCI card remain valid only during the validity of the passport.

According to him, having become an “illegal migrant”, his daughter is subjected to potential deportation from India, as she can never become a citizen of India in the wake of section 4 and 5 of the Citizenship Act, as citizenship can be conferred only by descent and registration and shall not be available to “illegal migrants”.

Mr.Farasat has vehemently asserted before us the fact that the petitioner is a green card/permanent resident card holder, and he is on the verge of becoming a US citizen, which places him in a better position to take care of his daughter. In addition, it is also submitted before us that “L” had stayed in US almost till the age of three years and now she has crossed 6 years of age and she has been literally abducted by respondent no.2 and she herself filed an application under Order 39 Rule 1 and 2 of CPC before the Family Court Bandra, seeking a direction against the petitioner for imposing a restraint from removing the child from her custody. The petitioner in fact, has also given an undertaking to the Family Court that he shall not disturb the custody of the child till the pendency of the Habeas Corpus petition and therefore, he has never resorted to any mode of moving the child from her custody.

8 Learned counsel for the petitioner has specifically focused his arguments upon the conduct of the respondent

no.2, who, by deception had brought the child to India and her action is alleged to be in utter violation of the order dated 14/10/2021 passed by the Williamson County Court, which had appointed the petitioner as the sole managing conservator and the respondent no.2 as the possessory conservator of the child and it has conferred a right upon him to exclusively designate the primary residence of the child, without regard to geographic location and also conferred the exclusive right to apply/renew/maintain the child's passport and the exclusive right to decide on the child's education.

The learned counsel has described the act of respondent no.2 as a case of International Child Abduction by throwing the principle of Comity of Nations to air.

By laying his hands on the decision of the Apex Court in case of Mrs Elizabeth Dinshaw vs. Arvand M. Dinshaw and Anr¹, the learned counsel would submit that when a question arises before a Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of legal rights of the parties, but on the sole and predominant criteria of what would serve the interest and welfare of the minor, and if the child's interest lies in she being continued in US, as a US citizen, it should not be the mother's interest which should be the decisive factor, and in any case, the petitioner has an offer even for the mother, as he is ready to lend helping hand to her to secure a job in US, as she was already working in

¹ (1987) 1 SCC 42

US for considerable length of time.

The counsel has also placed reliance upon the following decisions of the Apex Court:-

- (i) *Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tewari*
(2019) 7 SCC 42
- (ii) *Lahari Sakhamuri vs. Sobhan Kodali*
(2019) 7 SCC 311.
- (iii) *Yashita Sahu vs. State of Rajasthan*
(2020) 3 SCC 67
- (iv) *Abhay Vs. Neha Joshi*
2023 SCC Online Bom 1943
- (v) *M Vs. A,*
2018, SCC Online Del 8005.

9 By placing reliance upon the aforesaid authoritative pronouncements, it is urged before us that the petitioner is ready and willing to provide all the facilities to the child as well as respondent no.2 for their stay in US, to enable her to join him in the US and if not, to stay with him atleast share joint parenting of the child, who is a US citizen as she has no legal status in India, as she can never acquire Indian Citizenship.

Submissions on behalf of the respondent no.2.

Mr.Khandeparkar, learned senior counsel representing respondent no.2, while contesting the submissions advanced on behalf of the petitioner would not deny that “L” is a US citizen, but according to him, she is an OCI holder and therefore, she is entitled to stay in India.

By inviting our attention to the provisions of Citizenship Act, 1955 and in particular to the definition of “illegal migrant” as defined in Section 2(1)(b) as a foreigner who has entered into India with a valid passport or other travel documents and such other documents or authority, as may be prescribed, under any law in that behalf, but remains beyond the permitted period of time, and according to him, this clause do not apply to those who hold OCI card. It is the submission of Mr.Khandeparkar that visa is granted for a particular period of time and on the basis of her OCI card, “L” she can continue to reside in India with her mother till she attain the age of 18 years, and upon attaining majority, she will chose whether she would give up US citizenship.

10 Mr.Khandeparkar would place reliance upon the decision of the Apex Court in case of Pratik Gupta Vs Shilpi Gupta and ors,², and also on the decision in case of Kanika Goel Vs. State of Delhi & Anr,³. He would also invoke the principle laid down by the Apex Court in case of Nithya Anand Raghavan Vs. State, (NCT of Delhi)⁴, to contend that merely because the order granting custody of the minor to the father has been passed by a Foreign Court, the custody with the mother cannot become unlawful, *per se*, and even if the parent having the custody of the minor have not filed any substantive proceedings for custody of the child that cannot whittle down

2 (2018) 2 SCC 309

3 (2018) 9 SCC 578

4 (2017) 8 SCC 454

the over reaching principle of the best interest and welfare of the child.

11 Mr.Khandeparkar has urged that being a girl child, aged 6 years, the guardianship of the mother is of utmost significance and ideally, she should be with her mother unless there are circumstances to indicate that would be harmful for the girl child to remain in custody of her mother, and the fact that the mother has violated the order of a Foreign Court, directing her to return the child to the native country, is not relevant.

Mr.Khandeparkar would submit that the summary jurisdiction to be exercised by the Court, while issuing the writ in the nature of Habeas Corpus shall be exercised only if the Court, to which the child has been removed, is moved promptly and quickly and in the present case, though the child is brought in India, as early as in September 2020, the present Writ Petition for issuance of writ of Habeas Corpus is filed in the month of May 2023 and the girl who is now aged 6 ½ years, has developed her roots in India and when the mother is in a position to offer her a better and safer environment, who also has support of her own parents, for upbringing her child and she being highly qualified and have secured a job in India and being financially independent, it cannot be said that she has illegally detained the child. Removing the child from the custody of the mother when she has been in India from the age of 2 ½ years, and now she is almost 6 ½ years, according to

Mr.Khandeparkar, would be uprooting her, as the child is now used to the native language and she will be disassociated from the social customs and contacts on being subjected to foreign system of education.

12 Mr.Khandeparkar would also submit that the petitioner had filed the petition for divorce before the Williamson County Court, Texas, immediately after expiry of 10 days when his client came back to India, and in fact, she was in touch with him and even the petitioner remained in touch with the daughter, but only when she was accused of child abduction by the petitioner over video call, she filed a petition for Divorce before the Family Court, Bandra.

The respondent no.2 has specifically disputed the service of notice of the proceedings and it is submitted that the Decree of Divorce that was passed by the Williamson County Court, was on the ground of insupportability.

13 The fact that the petitioner had filed an application for overnight access in Family Court on 22/11/2021, in fact, concealed about passing of the decree by the US Court on 8/9/2021 and the respondent no.2 came across a news article and became aware of such decree in May 2022. The petitioner's access application for overnight access was heard and he was granted access in Family Court complex.

It is the specific submission advanced on behalf of respondent no.2 that the access order was challenged before

this Court and the petitioner filed Contempt Petition alleging flouting of the orders, and thereupon she filed an affidavit bringing the attention of the Court to the ex-parte divorce decree passed by the US Court, which was concealed.

On 4/5/2023, the learned Single Judge of this Court stayed the Contempt Petition, taking note of the malafide intention of the petitioner, who had instituted the proceedings and after crossing all these proceedings, finally the petitioner had filed Habeas Corpus petition on 12/5/2023, and therefore, it is urged before us that although the US decree was passed on 8/9/2020, no action was taken till 2023.

It is therefore, submitted before us that since the petitioner is aware of the whereabouts of his daughter and she is in custody of her biological mother, and since proceedings are already adopted by the parties before the Family Court for custody of the child and the same are subjudice, where no interim relief is granted, the petitioner approached the Apex Court, which directed expeditious hearing of the matter.

Analysis of the submissions in the light of factual background and authoritative pronouncements cited before us

14 The present case is yet another case where the Court is confronted with a tricky and delicate issue of handing over of the custody of a minor child to the father, who has approached this Court with a claim that the child has been

illegally removed from his custody and without mincing any words, it is urged before us that the child has been abducted by her own mother.

Whenever the question arises before a Court pertaining to the custody of a minor child, the matter has to be decided not on consideration of the legal rights of the parties or on the basis of the acrimony between them as husband and wife, but on the sole and per-dominant criteria of what would best serve the interest and welfare of the minor.

Certain facts are not in dispute and the foremost fact being that the child who is now six and half year old and continue to be in the care of mother in India, is American citizen. Another undisputed fact is that from 20/09/2020 till date the child continue to be with her mother i.e. Respondent No.2. She was barely two and half years old when she was allegedly abducted by her mother on some pretense of her mother's illness and thereafter the child along with the mother never returned to US.

15 The scenario like the one which we have referred to above is not uncommon, and in case, where the child is moved out from one country to another and without the consent of either of the parent, the sudden act is often referred to as the unauthorized removal and some times even as abduction. In such a scenario when the Courts of jurisdiction are approached by either of the parent, alleging that the child has been

wrongfully removed from its jurisdiction and now moved to another country, there can be no two opinions about the fact that it is the duty of the Courts to see that the parent doing a wrong by removing child out of the country, does not gain any advantage by his/her wrong doing and one Court should pay regard to the orders of the other foreign Court, unless it is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child.

Catena of decisions are laid before us, which provide guiding factor as to how this conundrum is to be resolved and no doubt, the principles laid down in the authoritative pronouncements continue to guide us in the context of somehow similar situation; where the couple for some reason are distanced because of the friction or disharmony amongst themselves, and when one of them decided to move out of the country where they were jointly residing alongwith the child, and it is the other parent who has to suffer the impact as he/she is denied the access to the child on being removed from his/her custody.

It is also not infrequent that the respective spouses knocked the doors of different Courts which according to them exercised the jurisdiction over the dispute that they intended to get resolved.

Here steps in the principle of 'comity of courts' and the relevance of the orders passed by the Courts of foreign jurisdiction and the moot question which then falls for

consideration is how to give effect to the principle of 'comity of courts'.

In all these fierce, battles claiming custody of the children and particularly children of tender age, the paramount importance is the welfare of the child and merely because the parents are at loggerhead, does not mean that the child should be deprived of care, love and affection of either of the two parents. A child is definitely not a commodity or an object, who is shared amongst the parents by dividing him/her time, life and activities as doing so beyond the permissible limits would put the child in trauma and turn his whole life far from normalcy of a childhood.

Hence, the welfare of the child is a primary and paramount consideration, but definitely this do not mean that it is the welfare which either of the parent feel and, therefore, in such a scenario, the guidelines laid down to tackle such situation are relevant and we would be referring to a few of them to find a solution to the issue before us.

16 In **Mrs.Elizabeth Dinshaw Vs. Arvand M. Dinshaw & Anr (supra)**, when the Court directed restoration of the custody of the minor boy to the Petitioner i.e. the mother and it declared that the child shall be a ward of concerned Court in Michigan and permitted the father to move that Court for review of the custody of the child if so advised, the background facts disclose that when the differences arose between the spouses who settled down in US more or less on permanent

basis having secured employment and on account of breakdown of the marital relationship, the father picked up the child from his school and left USA without intimating the mother of his intention to take the child out of the custody and jurisdiction of the Court, the Apex Court directed restoration of the custody of the child to the mother.

It is worth to note that the child was removed on 10/01/1986 from USA and on 11/06/1986 upon the writ jurisdiction of the Court being invoked by the mother, the child was restored to her and the Court observed thus :

“11. As already observed by us, quite independently of this consideration we have come to the firm conclusion that it will be in the best interests of the minor child that he should go back with his mother to the United States of America and continue there as a ward of the concerned court having jurisdiction in the State of Michigan. The respondent has tendered before this Court in an affidavit filed by him an unconditional apology for having illegally brought Dustan over to India from the United States in violation of the order of the competent court in that country. The proper step to be taken by him is to tender such an apology to the court whose order he has violated.”

In case of **Lahari Sakhamuri vs. Sobhan Kodali**⁵, their Lordships of the Apex Court tested the application of principle that return of children to foreign jurisdiction cannot be directed unless the same is in best interest and welfare of the children and while dealing with the case of minor child residing in US since 2004 – 2005, and being a US citizens, when the mother came back to India, with the minor children in the year 2017 and within 20 days after her arrival in India proceedings were filed for custody of minor children in the family Court

5 (2019) 7 SCC 311

Hyderabad, concealing her application for custody filed in US Court, which had passed an adverse order against her. It was held that the minor children were not ordinary residents of India and, therefore, the application filed for custody before the Family Court at Hyderabad was rightly rejected.

It is, in this background facts the Apex Court observed thus :

“36. In V. Ravi Chandran case, this Court was concerned with the custody of the child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home. This Court took note of the English decisions, namely, L.(Minors) (Wardship: Jurisdiction), In re and McKee v. McKee and also noticed the decision of this Court in Elizabeth Dinshaw case and Dhanwanti Joshi v. Madhav Unde keeping into consideration the fact that the child was left with his mother in India for nearly twelve years, this Court held that it would not exercise its jurisdiction summarily to return the child to the US on the ground that his removal from US in 1984 was contrary to the orders of the US courts. The relevant portion is as under: [V. Ravi Chandran (2) case, SCC pp. 195-96, paras 29-30]

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in *McKee v. McKee* that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in *L. (Minors) (Wardship: Jurisdiction)*, *In re* and the said view has been approved by this Court in *Dhanwanti Joshi*, Similar view taken by the Court of Appeal in *H. (Infants)*, *In re* has been approved by this Court in *Elizabeth Dinshaw*."

While assigning meaning to the best interest of a child, what is held is as below :-

"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.

"48. It is true that this Court has to keep in mind the best interest of the child as the paramount consideration. The observations of the US court clearly show that principle of welfare of the children has been taken into consideration by the US court in passing of the order as it reiterates that both the parties are necessary for proper upbringing of the children and the ultimate decision of custody and guardianship of the two minor children will be taken by the US which has the exclusive jurisdiction to take the decision as the children happen to be US citizens and further order has been passed on the respondent's emergency petition with special release in custody on 9-3-2018 permitting the respondent (Sobhan Kodali) to apply for US passports on behalf of the minor children without the appellant (Lahari Sakhamuri) being mother's consent. The appellant (Lahari Sakhamuri) cannot disregard the proceedings instituted at her instance before the US court and she must participate in those proceedings by engaging solicitors of her

choice to espouse her cause.”

A very pertinent observation in this regard in this decision has to be taken note of

“51. 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. Taking a holistic consideration of the entire case, we are satisfied that all the criteria such as comity of courts, orders of foreign court having jurisdiction over the matter regarding custody of the children, citizenship of the spouse and the children, intimate connect, and above all, welfare and best interest of the minor children weigh in 14 ptfavour of the respondent (Sobhan Kodali) and that has been looked into by the High Court in the impugned judgment in detail. That needs no interference under Article 136 of the Constitution of India.”

17 In **Yashita Sahu vs. State of Rajasthan & Ors.**⁶ while dealing with the issue of custody of the child while the couple was living in USA after marriage, but on account of the disputes the wife removed the minor daughter and shifted to India in violation of US Courts order and when the husband filed the writ of Habeas Corpus for his production, in the facts and circumstances of the case, considering the age of the child, the nationality, proceedings in US Court and visa issue of husband, it was held that the father is entitled to custody in best interest of the child, but definitely the adult mother cannot be directed to go back to USA alongwith the minor against her will on account of the strained relationship.

6 (2020) 3 SCC 67

Emphasis was laid on the ‘comity of courts’ and it was specifically observed thus :-

“14. In the fast shrinking world where adults marry and shift from one jurisdiction to another, there are increasing issues of jurisdiction as to which country’s court will have jurisdiction. In many cases, the jurisdiction may vest in two countries. The issue is important and needs to be dealt with care and sensitivity. Though the interest of the child is extremely important and is, in fact, of paramount importance, the Court of one jurisdiction should respect the order of a court of competent jurisdiction even if it is beyond its territories. When a child is removed by one parent from one country to another, especially in violation of the order passed by a court, the country to which the child is removed must consider the question of custody and decide whether the court should conduct an elaborate enquiry on the question of child’s custody or deal with the matter summarily ordering the parent to return the custody of the child to the jurisdiction from which the child was removed, and all aspects relating to the child’s welfare be investigated in a court in his/her own country.”

By placing reliance on **Nithya Anand Raghavan vs. State (NCT of Delhi)** and the decision in case of **Lahari Sakhamuri** (*supra*), which interpreted the Judgment in **Nithya Anand** (*supra*), it was observed that the doctrine of ‘Comity of Courts’ is a very healthy doctrine and if Courts in different jurisdiction do not respect the order passed by each other, it will lead to contradictory orders being passed in different jurisdictions, but no hard and fast guidelines can be laid down in this regard and each case has to be decided on its own facts. Nonetheless the welfare of the child will always remain the paramount consideration.

18 Once again in **Rajeswari Chandrasekar Ganesh vs. State of Tamil Nadu & Ors.**⁷, 2022 SCC OnLine SC 885, the

⁷ 2022 SCC Online SC 885

issue of child custody was handled with the emphasis being laid down on welfare of the child and the children were directed to continue their stay with the mother in USA due to being accustomed with social and cultural milieu of USA with better educational opportunities being available to them as the children were admitted in special school meant for children with remarkably high IQ and the father was directed to take the children back to USA.

In the backdrop of the stands adopted by the father, who placed reliance upon the decision in case of **Elizabeth Dinshaw** (*supra*), V Ravichandran (*supra*), Shilpa Agrawal (*supra*), Lahari Sakhamuri (*supra*), the entitlement of the Petitioner came to be determined in the backdrop of the relief sought i.e. exercise of extra-ordinary jurisdiction for issuance of writ of Habeas Corpus and whether the Applicant had established a *priam facie* case that the detention is unlawful. Observing that it is only when the jurisdictional fact that the detention of the child is unlawful is established, the Applicant was to become eligible for writ as of right.

After referring to the precedents in this regard, the entitlement of the Petitioner was tested by tested whether it would be in the paramount interest and welfare of the minor children to go back to USA and abide by the shared parenting plan as ordered by the Court of Common Pleas Division of Domestic Relations, Cuyahoga country, Ohio, or to hand over the custody of minor children to the Petitioner- mother.

The crucial facts which justified the final conclusion derived were set out as below :

- 1] Both the minor children are residents of USA.*
- 2] The son is a natural citizen and daughter is permanent resident of USA;*
- 3] Both children have been brought up in social and cultural living of USA and they are accustomed to the lifestyle, language, customs, rules and regulations of that country and*
- 4] They will have better future prospects if they go back to USA.*

19 The facts involved reveal that marriage between the Petitioner and Respondent No.2 was solemnized in Chennai and thereafter they migrated to Delaware, USA. After about a year, the couple returned to India when the second child was born and in 2012 respondent No.2-Husband was able to secure a job in USA and since then the Parties continued to reside in USA.

The petitioner in 2016 secured admission in State University, Ohio, but respondent No.2 lost his job. By December, 2016, the children started going to school and respondent No.2 moved to yet another job in Wisconsin and the petitioner continued to stay alone with the minor children and take care of them. She completed her Masters and started working in a Company and respondent No.2-father managed to find a full time job in Michigan university and on 01/06/2019, he picked up the minor children and left for Michigan, USA

without informing the petitioner-mother alongwith all the legal documents of the petitioner and of the minor children.

Immediately thereafter, the petitioner filed Emergency Motion for temporary custody of minor children alongwith the complaint for divorce in the Court of Common Pleas, Division of Domestic Relations, Cuyahoga, County Ohio and she was granted temporary custody of the minor children.

Despite the said order, respondent No.2 did not pay heed to it and continued to keep the children away.

It is in this background, the Hon'ble Apex Court directed the respondent No.2-father to bring the children to USA and permitted the petitioner-mother to take care of the children, leaving an option open to the father to chalk out his own plan which included the return to India.

20 Another decision on which reliance is placed by the Petitioner is the case of **Rohith Thammana Gowda vs. State of Karnataka & Ors.**⁸, where the petitioner, resident of USA for two decades, solemnized the marriage with Respondent No.3 on 19.03.2008 as per Hindu rights and ceremonies at Bengaluru and thereafter the couple started residing in USA and made it their matrimonial home. Both of them secured a Green Card which made them entitled to live and work permanently in USA. Son Arya was born on 03/02/2011 in Washington, USA and he was a naturalized American citizen with an American Passport. He was studying in 3rd standard

⁸ 2022 SCC OnLine SC 937

elementary school in Washington during the year 2019-20.

When conflicts and confrontation occurred in the relationship, on 03/03/2020 wife came to Bengaluru in India with the child without his consent. He was also in India at that time to attend to his ailing mother and upon reaching USA he realized that the child was missing from the matrimonial home and he lodged the complaint alleging that the child was kidnapped by his wife. On establishing contact, he came to know that his wife alongwith the minor child was at home in Bengaluru and he withdrew the complaint. Subsequently he filed Habeas Corpus Petition before the High Court of Karnataka in September 2020 and also filed a Custody Petition in Superior Court of Washington, County of King, and obtained ex-parte order.

The respondent-wife was directed to return the child to United States and she participated in the proceedings before the US Court and moved a motion for vacating ex-parte order, which was vacated and the wife filed the Petition challenging the jurisdiction of US Court, which upheld the jurisdiction over the minor child.

The Respondent No.3-wife filed a Custody Petition before the Family Court, Bengaluru and it was dismissed as being not maintainable for want of jurisdiction under Section 9 of the Guardians and Wards, 1890.

According to the Appellant, only the US Courts had the jurisdiction to decide the question of custody of minor child

and it was contended by the respondent No.3-mother that though the child was brought to India without the Appellant's consent, but subsequently she was permitted to have the custody of the child by the Appellant himself and also by the US Court and she relied upon an email communication sent by the Appellant stating that the child is now admitted in school in Bengaluru and pursuing his studies, the Petition of Habeas Corpus was opposed.

It is, in these circumstances, the Court observed thus :

“16. The child in question is a boy, now around 11 years and a naturalised US citizen with an American passport and his parents viz., the appellant and respondent No. 3 are holders of Permanent US Resident Cards. These aspects were not given due attention. So also, the fact that child in question was born in USA on 03.02.2011 and till the year 2020 he was living and studying there, was also not given due weight while considering question of welfare of the child. Merely because he was brought to India by the mother on 03/03/2020 and got him admitted in a school and that he is now feeling comfortable with schooling and stay in Bengaluru could not have been taken as factors for considering the welfare of the boy aged 11 years born and lived nearly for a decade in USA. The very fact that he is a naturalised citizen of US with American passport and on that account he might, in all probability, have good avenues and prospects in the country where he is a citizen. This crucial aspect has not been appreciated at all. In our view, taking into account the entire facts and circumstances and the environment in which the child had born and was brought up for about a decade coupled with the fact that he is a naturalised American citizen, his return to America would be in his best interest. In this case it is also to be noted that on two occasions American courts ordered to return the child to USA. True that the first order to that effect was vacated at the instance of respondent No. 3. However, taking into account all aspects, we are of the view that it is not a fit case where courts in India should refuse to acknowledge the orders of the US Courts directing return of the minor child to the appellant keeping in view the best interests of the child. In our view, a consideration on the point of view of the welfare of the child

would only support the order for the return of the child to his native country viz., USA. For, the child is a naturalised American citizen with American passport. He has been brought up in the social and cultural milieu of USA and, therefore, accustomed to the lifestyle, language, custom, rule and regulations of his native country viz., USA. Further, he will have better avenues and prospects if he returns to USA, being a naturalized American citizen.”

21 From the aforesaid decisions, it is evident to us that the welfare of the child has always been considered of paramount importance and at the same time, the principle of Comity of Courts was also given its due weightage.

The question arises for consideration is, which of the principle should have an over-reaching effect over the other, as there may be situations and situations when there are orders passed by foreign courts which, if permitted to be adhered to, will hit the significant factor of welfare of the child, when the dispute between the couple involving the child, is an inter-country dispute.

Certain decisions which have given interest and welfare of a child primacy over the orders passed by the foreign court are also placed before us.

In **Nithya Anand Raghavan Vs. State (NCT of Delhi & Anr)** (supra), while dealing with the power to be exercised under Article 226 of the Constitution of India, in the form of writ in the nature of Habeas Corpus relating to custody of child in an inter-country dispute, the three Judges Bench of the Apex Court, expected the High Court to undertake elaborate enquiry

by considering question on merits bearing in mind the welfare of the child as of paramount importance and reckoning order of foreign court only as a factor to be taken into consideration, unless it thinks it fit to exercise summary jurisdiction. It is categorically held that High Court, in the interest and for welfare of the child is not denuded of power to deny relief of return of child to jurisdiction of UK Court on being satisfied that child may be exposed to grave harm, physical or psychological, and in such case, foreign court order must yield to welfare of the child.

22 The facts involved a minor child Nethra, aged over 7 years, who was removed from foreign country by biological mother in violation of interim/interlocutory order of foreign court, where wardship issue was pending, and Habeas Corpus Petition was filed before the High Court in India by the father from whose custody the child was removed.

The Apex Court held that the remedy of writ of Habeas Corpus cannot be used for enforcement of directions of foreign court and convert jurisdiction of High Court into an executing Court, but held that the petitioner can take recourse to other remedy or proceedings for enforcement of foreign court's order.

While dealing with the issue of custody of a child, his welfare was accorded prime consideration, by declaring that the Court must take into consideration all attending circumstances and the totality of situation. The Court

specifically observed as below:

“66The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the Court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign Court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi’s case (supra), in relation to non-convention countries is that the Court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration. While considering that aspect, the Court may reckon the fact that the child was abducted from his or her country of habitual residence but the Court’s overriding consideration must be the child’s welfare.

67. The facts in all the four cases primarily relied upon by the respondent no.2, in our opinion, necessitated the Court to issue direction to return the child to the native state. That does not mean that in deserving cases the Courts in India are denuded from declining the relief to return the child to the native state merely because of a pre-existing order of the foreign Court of competent jurisdiction. That, however, will have to be considered on case to case basis - be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment.

68. In the present case, we are of the considered opinion that taking the totality of the facts and circumstances of the case into account, it would be in the best interests of the minor (Nethra) to remain in custody of her mother (appellant) else she would be exposed to harm if separated from the mother. We have, therefore, no hesitation in overturning the conclusion reached by the High Court. Further, we find that the High Court was unjustly impressed by the principle of comity of courts and the obligation of the Indian Courts to comply with a pre-existing order of the foreign Court for return of the child and including the “first strike” principle referred to in Surya Vadanani’s case (supra).

23 Leaving an option open to the minor child, on attaining the age of majority to exercise her choice to go to UK

and stay with her father, until then she was directed to remain in custody of her mother, unless the Court of competent jurisdiction trying the issue of custody of the child ordered to the contrary. The father was also given visitation rights whenever he visits India, with an expectation that the mother shall positively respond to a request made in advance for availing access to the child.

Another Supreme Court decision in case of Kanika Goel Vs. State (NCT of Delhi) (supra), once again summed up the essential considerations while issuing a writ in the nature of Habeas Corpus under Article 226, 136 and 32 of the Constitution of India and the said considerations were held to be; (a) it has to be considered by Courts whether the custody of the child can be said to be unlawful or illegal and (b) whether welfare of the child requires that the present custody should be changed and child should be given to care and custody of somebody else.

24 One another decision on this point which deserve to be taken note of, is the decision of the Bombay High Court in case of Richard Alexander Geary Vs. State of Maharashtra, represented by Commissioner of Police and others, 2023 SCC Online Bom 2608 on a petition filed by the father of the minor girl, aged 3, seeking writ of Habeas Corpus for directing respondent no.2, the mother to produce the child. In addition, the petitioner also prayed for custody of the child together with the child's original passport, birth certificate, immigration and

health documents from respondent no.2 and for permission to take the child to Singapore.

The child born out of the wedlock between the couple in New York in USA, and the petitioner being a citizen of U.K and the respondent mother being an Indian citizen. Within two years of solemnization of the marriage, a child was born in New Jersey, USA, and the couple along with the child, moved to Singapore in April 2022 and child was enrolled in the school in Singapore. The parties surrendered their Green Card in USA and the respondent along with the child came to India in December 2022, and she did not return to Singapore. Habeas Corpus Petition was filed on 3/2/2023 and the Court considered the rival submissions advanced on behalf of the petitioner as well as the respondent. A series of decisions involving the issue of child custody were cited before the Court which included the decision in case of Nithya Raghavan, Elizabeth Dinshaw, Shilpa Agarwal, Surinder Kaur, Kanika Goel, Lahiri Sakhamuri, etc.

25 Consideration of the factual situation which was placed before the Court through affidavits and counter affidavits, the Court recorded that owing to the differences and disputes between the parties, the child never received any stability at any place and she is neither a citizen of Singapore and nor had she lived there for a considerable long time to make it a habitual place of residence. The Court did not find merit in the submission of the petitioner that because the

parties decided to reside in Singapore permanently, the child should go to Singapore. The child was enrolled in a pre-school in Singapore, but none of these factors were deemed to be sufficient enough to conclude that the parties had decided to live in Singapore permanently. The respondent wife raised various contentions to justify her decision to come to India along with the child for their safety, the Court recorded that the respondent has not illegally removed the child from Singapore, or that she has illegally detained the child in India, but considering the petitioner's conduct, she was justified in bringing the child to India to give her a secured life. Accepting the contention raised by the respondent that the child's safety was of paramount consideration, as the petitioner was guilty of violent and abusive conduct and despite a serious attempt being made by the respondent to concile, eventually, it could not be worked out.

Recording that the child is a US citizen and Singapore and India are both foreign countries to her, however, the respondent, who is her biological mother, is an Indian citizen having roots in India and therefore, it cannot be said that the child is residing in a country which is completely foreign to her. Singapore, being a foreign country and not a habitual place of the child or of either of the parties, the Court opined that it cannot be said that Singapore will be a better place to ensure fulfilment of the child's basic rights and needs, identity, social well being and physical, emotional and

intellectual development.

Holding that any direction to return the child to foreign jurisdiction will expose the child to some other physical, mental, psychological or other harm, the relief was declined to the petitioner father.

In paragraph 59 and 60, the Court specifically observed thus :-

“59 The essence of the principles of law laid down in all the aforesaid decisions is that the doctrines of comity of courts, intimate connect, orders passed by courts 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. We have already held that keeping the welfare of the child in mind, we find that it is in the best interest of the child to live with her mother, i.e. the respondent in India. Considering the aforesaid facts and circumstances of the case, none of the decisions relied upon by the learned senior counsel for the petitioner are of any assistance to the petitioner.

60. In the present case, the petitioner has initiated custody proceedings in Singapore, and the respondent has initiated custody proceedings in India. The parties have appeared in the respective proceedings and raised objections, including objections on jurisdiction. In both proceedings, certain interim orders are passed. We are not examining the merits of the proceedings initiated by the parties. Hence, those proceedings will be decided on its own merits. Our observations in this judgment are for the limited purpose of undertaking a summary inquiry for consideration of the reliefs sought in this petition seeking a writ of habeas corpus and will not be of any assistance to either party in the custody proceedings pending in the court in India or in Singapore, which will be decided on its own merits uninfluenced by our observations.”

26 The factual background in which the petition before us, filed by father, is largely not in dispute, so far as the solemnization of the marriage of the parties in Houston, Texas.

Both the petitioner and respondent were on work visa, and it is a bone of contention whether some vedic rites in relation to marriage were performed in India, but in any case at this stage, we may not be detained for determination of this issue. After solemnization of the marriage, the couple continued to reside in USA and daughter 'L was also born there.

It is not in dispute that the mother i.e. respondent no.2, with the child of 2 ½ year old returned to India on 20/09/2020, though it is the claim of the respondent no.2 that she returned to attend to her mother who was in critical condition, whereas according to the petitioner, she had planned the exit from the matrimonial house with an intention not to return back. The respondent no.2 was on H1B Visa at the time of her return. 'L a US citizen at the relevant time, possessed a valid passport which expired on 12/07/2023 i.e. during the pendency of the present petition.

The petitioner alleged that the respondent no.2 with a deliberate intention not to come back, had resigned from her job, and though she continued to remain in touch with him, she did not assure about her return to U.S.A.

Within 10 days of return of his wife along with his daughter leaving for India, the petitioner filed a petition before the Williamson County Court and to be precise, on 30/09/2020, requesting the Court to pass orders for conservatorship of possession of, access to and support of 'L. Despite filing of the proceedings, the petitioner did not take any

positive steps to obtain any orders and this according to him, was in the hope that the respondent no.2 would return along with his daughter. It is only in February, 2021, the notices were issued, and according to the petitioner, duly served upon the respondent who avoided participation in the proceedings.

27 It was on 21/09/2021, the Court granted sole conservatorship of his daughter, by recording that his wife had wrongly removed the daughter from U.S. to India and the Court directed her immediate return and cession of the daughters retention in India. In addition, the Court also granted divorce.

28 It is worth to note that decree of divorce is passed by the Williamson County Court by noting that the respondent wife was served with citation via substituted service by personal email and through her counsel on record in India and also by pasting a copy of citation and petition on the door of the flat of her mother's home in Mahim Mumbai, on 12/03/2021, in accordance with the applicable provisions of Texas Rules of Civil Procedure. Since there was no appearance on part of the respondent, the Court passed the decree of divorce ex-parte by dissolving the marriage on the ground of insupportability and appointed the petitioner as sole managing conservator and possessory conservator. The petitioner and the respondent no.2, as parent conservator, were assigned specific rights as per the Texas Family Code which included the rights and duties delegated exclusively to the father.

The Court rendered the following finding:-

“1. The child was born in the United States and resided in the United States with both parents until Respondent wrongfully removed her to India in September 2020.

2. Respondent has wrongfully withheld the child from Petitioner in India since the wrongful removal of the child from the United States in September 2020.

3. The child is a citizen of the United States.

4. The United States is the country of habitual residence of “L”
The Court finds that credible evidence has been presented that there is a risk of continued international abduction of “L” by her mother.

The Court further finds that the mother has taken, enticed away, kept, withheld, or concealed the child, “L” in violation of the father’s right of possession of or access to the child.”

It was, therefore, ordered that the respondent shall surrender the child to the petitioner immediately and a restrain order was also imposed upon her from applying for a new or a replacement passport or international travel Visa.

29 The question that arises before us is of grave significance about Comity of Courts, as it is the contention of the petitioner that the ex-parte decree shall bind the respondent. What the petitioner is praying before us, is enforcement of the decree, which according to him, is passed by Court of competent jurisdiction, but it is the case of the respondent wife that when she left India with her daughter, the petitioner was aware of her whereabouts, and was in touch with the daughter. There is a specific denial at the end of the respondent that the notice was received by her and in absence of adequate proof being tendered to that effect, the ex-parte

proceedings in the Williamson County Court gave her no chance for appearance, as the proceedings were filed within 10 days of her leaving the country. There is also some conundrum about the maintainability of the proceedings filed by the wife, three months thereafter, in the Family Court, Bandra, as she claims that the marriage was solemnized in India and therefore, the Family Court, Bandra has jurisdiction to entertain the petition filed under Section 13(1)(A) r/w Section 24, 25 and 27 of the Hindu Marriage Act.

30 The present Writ of Habeas Corpus is, however, filed by the petitioner only on 12/05/2023 i.e. after a period of 2 year and 8 months, and much after the Williamson County Court, gave a declaration that the wife had wrongfully removed the daughter from US to India in September, 2020.

As on date 'L' is 6 ½ years and from 20/09/2020, she is residing with her mother in India. By no stretch of imagination, we intend to convey a message that India is a country which encourages abduction of children, or it is an abduction heaven for those who in breach of comity of nations/courts bring a child to India and permit flouting of the orders passed by the competent court.

We are conscious as to how India is perceived globally in such scenario, and we must make it clear that we feel ourselves bound by the principle of comity of court orders and comity of nations, but we have before us a case, where the child aged 2 ½ years accompanied her mother to India and who

took a decision not to return, as according to the respondent, she suffered physical, verbal and mental abuse at the end of the petitioner and his behaviour deteriorated with time.

In the reply affidavit filed by the respondent no.2 and particularly in paragraph no.26, she has thrown light on the conduct of the petitioner, which is described as extremely controlling/dominating and that he was in a habit of creating tantrum, if things did not go his way. The affidavit also give the narration about the treatment which he had meted out to his own daughter and she alleged that the petitioner was mentally unstable and extremely negligent and unfit for parenting and due to his negligence, his daughter would have lost her life. She had offered her explanation to the allegations levelled against her in paragraph no.28 of the petition, and has made a specific averment that the petitioner used to sleep in another room and hardly attended to her, but in contrast, he was totally cruel in his behaviour, and when it came to taking care of the child, she was on maternity leave after the daughter was born.

31 It is with this counter submission, we are called upon to exercise our power by issuing the writ of Habeas Corpus at the instance of the father.

It is well established that while exercising the power in the case of minors, the jurisdiction which the court exercises is inherent jurisdiction as distinct from statutory jurisdiction conferred by any particular provision in any special statute. The jurisdiction to be exercised by the Court rests in such cases on

its inherent equitable powers and follow the principle of *parens patriae* , for protection of minor wards and the very nature of the scope of the enquiry and the result to be accomplished contemplate exercise of jurisdiction of a Court of equity. The primary object of a Habeas Corpus Petition, which proceedings are in the nature of summary proceedings is limited to determine the question, in whose custody the best interest of the child will probably be advanced.

Before approaching the said question in a petition seeking writ of Habeas Corpus claiming the custody of a child, one question which would fall for consideration is whether from the facts of the case, it can be stated that the custody of the child is illegal.

As far as 'Habeas Corpus' is concerned, it convey, obtaining the production of an individual. The Writ of Habeas Corpus is a prerogative writ and an extraordinary remedy. It has received the recognition as writ of rights and not a writ of course, and it deserve to be granted only on a reasonable ground or probable cause being shown as its object is to secure a release of a person, who is illegally restrained of his liberty.

The writ is, a command addressed to a person, who is alleged to have another person unlawfully in his custody requiring his production before the Court, that the production of the body of the person detained is directed in order that the circumstances of his detention may be enquired into, or in order that the appropriate judgment may be rendered on

judicial enquiry into the alleged unlawful restraint.

32 It is trite position of law, that exercise of extraordinary jurisdiction for issuance of Writ of Habeas Corpus, would therefore be seen to be dependent on the jurisdictional fact, where the applicant establishes a *prima facie* case that the detention is unlawful and only when such jurisdictional fact is established, the Court will issue a Writ of Habeas Corpus. As indicated in **Nithya Anand Raghvan** (supra), the principle duty of the Court is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that her present custody should be changed and the child to be handed over to the care and custody of any other person.

Thus, the principal consideration in a writ of seeking issuance of Habeas Corpus would be to ascertain whether the custody of the child with the other biological parent is unlawful or illegal, and where does the welfare of the child lie, since Writ of Habeas Corpus is a prerogative process of securing the liberty of the corpus through effective mechanism of immediate release from an illegal and improper detention, if the minor is detained by a person, who is not entitled to his legal custody, it may amount to illegal detention for the purpose of issuance of the writ, directing the custody of a minor child to the person who is entitled for it.

In case of Tejaswini Gaud Vs Shekhar Jagdishprasad Tiwari⁹ it is held that the petition in the nature of Habeas Corpus would be maintainable, where the detention by parents is found to be illegal, since it is without any authority of law. The Apex Court specifically observed thus:-

“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 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.”

33 In determining the welfare of the child, while exercising the powers under its writ jurisdiction, the Court would adopt a summary enquiry as an elaborate enquiry on the question of custody would be held in the Court of competent jurisdiction, where the Court would go into the merits as to

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whether, where the permanent welfare lie and ignore the order of foreign Court or treat the fact of removal of a child from another country as only one of the circumstance. The summary jurisdiction to return the child would be exercised *prima facie* looking at the circumstance of the child's placement in the country other than the country from his native land, and where the child is likely to be impacted by absence of his native language, social customs and contacts to which he has been accustomed or her education is likely to be interrupted, and he/she is subjected to foreign system of education or for all those acts which would physiologically disturb the child.

In the present case, what we have noticed is, the mother moved with the child on account of the alleged harassment, she and her child suffered, at the hands of the petitioner and definitely while exercising our writ jurisdiction, we may not demand or expect her to prove the said assertion. Suffice it to note that it is all the while the case of the respondent no.2 wife, that when she took the daughter from US to India, the petitioner was much aware of this factum and the Whatsapp messages on record do reveal that the couple was in contact, as regards the well being of the child. What is surprising to note and which we hold against the petitioner is, if with an intention, the respondent no.2 took 'L to India on 28/09/2020, what prohibited him from filing a writ of Habeas Corpus before 12/05/2023, as his claim is based upon illegal detention of his daughter and she being kept in illegal custody

of the mother.

Definitely, the custody with the biological mother, is not an illegal custody. The mother is equally entitled to the custody of her daughter as is the father, who is also one of her biological parent, but amidst the discord between the parents, and since they have decided to part, the child can stay with either of them. In fact, the petitioner has already obtained a decree of divorce from the Williamson County Court on 21/09/2021, and as far as his marriage with respondent no.2 is concerned, it is already dissolved. Though he had being conferred with the conservatorship of his daughter by the Williamson County Court, the proceedings which are filed by the respondent no.2 for divorce and custody are still pending in the Family Court at Bandra and the contest is yet to be laid before the Family Court.

Since we are of the clear opinion that the custody of the child with the mother is not illegal detention, the first limb of the exercise of our extraordinary power by Writ of Habeas Corpus fails the petitioner.

34 The second aspect of the writ jurisdiction, being what should be the paramount consideration, when we exercise our extraordinary jurisdiction and the answer to this, is to be found in various decisions and a few of them which we have referred to above, being the welfare of the child to be a paramount consideration.

The consistent view of the Courts had always being that if the child is brought within India, the Courts in India may conduct summary enquiry or an elaborate enquiry on the question of custody. In the course of summary enquiry, the Court may be deem it fit to return the child to the country from where he/she was removed, unless such return is shown to be harmful to the child. Thus, even in the matter of summary enquiry, it is open to the Court to decline the relief for return of the child to the country from where he/she was removed irrespective of any order of return of the child by a foreign court. However, in an elaborate enquiry, the Court is obliged to examine the merits, as to where the paramount interest and welfare of the child lie and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstance is to be considered. In either case, the question is to be answered by the Court by taking into consideration the child's welfare, and this has to be undertaken by bearing in mind the totality of facts and circumstances of each case independently.

In *Nithya Anand*, the three Judge Bench permitted exercise of the power by the Indian Courts to decline a relief of return of the child brought within its jurisdiction, if it is satisfied that, the child is now settled in new environment or it would expose the child to physical or physiological harm or otherwise place the child in a intolerable position or if the child is mature and he/she object to its return.

In no uncertain terms, it is held that overriding consideration must be the interest and welfare of the child, and no primacy be attached to the order of foreign court, and it must yield in best interest and welfare of the child, which is of paramount importance. Since India is not yet a signatory to the Hague Convention of 1980 on 'Civil Aspects of International Child Abduction' as regards the non-convention countries, the law is that the Court and the country to which the child has been removed must consider the question on merits by keeping in mind the welfare of the child.

35 One important point which must be given due weightage in exercise of summary jurisdiction is, that the Court must be satisfied that the proceedings instituted before it was in close proximity and filed promptly after the child was removed from his/her native State and brought within its territorial jurisdiction and that the child has not gained roots here, and further it will be in the child's welfare and best interest to return to his native State, because he feels uprooted on account of the different language being spoken, distinct customs, social customs adopted and severing the contacts to which he/she is accustomed to or such other like reasons. If the Court is satisfied during this summary enquiry that the child's return may expose him/her to grave risk of harm then it may refuse the return of the child.

In the present scenario we find that when the daughter is brought to India by her mother she was 2 ½ year old and now she is almost 6 ½ years. Last four years she has gained roots in India as she continued to stay with her mother and her grandparents. When she was removed from USA, she had hardly settled there and was not introduced to its social customs, language, way of leading life, but now within period of 4 years she is definitely accustomed to the culture of this country, and has established bond with her grandparents and has started rooting herself in its cultural atmosphere. She is now settled in the new environment and transferring her to USA to be with the petitioner, who definitely is serving and with no one to take care of the child, we feel that the child would be exposed to physical and physiological harm on her return.

The petitioner has approached this Court at a belated stage, and now on expiry of period of 4 years, by exercising our jurisdiction and by keeping in mind the welfare of the child which is of paramount importance and the order of the foreign court, can be only one of the factor for consideration, according to us the former overweighs the latter, and removing the child from mother and restoring the child to be with the father at this stage, according to us would do more harm to her than any benefit and therefore, we are not inclined to consider the claim of the petitioner.

36 As far as the arguments of the petitioner that her passport has expired, we have noticed that 'L is an OCI holder and on this basis she is entitled to stay in India and once she attains majority she will be entitled to choose, whether she would give up her US citizenship. Though OCI holder is not recognized as citizenship of India, but definitely it is a form of permanent residency available to people of Indian origin and the holder of OCI card is entitled to multiple entry, multipurpose life long permit to enter/stay in India and with 'permitted period of time' being complete, OCI card holder is entitled to continue the stay lifelong.

Merely by dangling a carrot that 'L will have a better life in US without specifically asserting in what scenario it would be better, we do not find that welfare of a girl aged 6 ½ lies in removing her from the custody of her biological mother with whom she has lived throughout. In any case, it is always open for the petitioner as a father to avail access to his daughter and we direct that the respondent no.2 shall permit him to visit his daughter as and when he deems it appropriate and convenient and when it suits both the parents and the child, keeping in mind her academic calendar as she is now admitted to a School in India.

37 In the wake of the aforesaid reasons, the writ petition filed by the petitioner seeking issuance of writ in the nature of Habeas Corpus and custody of his minor daughter 'L

is dismissed, as according to us her welfare lies in her staying with her mother, respondent no.2.

No order as to costs.

(MANJUSHA DESHPANDE,J)

(BHARATI DANGRE, J.)