Ruchi Majoo vs Sanjeev Majoo on 13 May, 2011

Equivalent citations: AIR 2011 SUPREME COURT 1952, 2011 (6) SCC 479, 2011 AIR SCW 3311, 2011 AIR CC 2025 (SC), AIR 2011 SC (CIVIL) 1570, (2011) 2 DMC 317, (2011) 104 ALLINDCAS 244 (SC), (2011) 2 HINDULR 129, (2011) 4 MAD LW 774, (2011) 3 MPLJ 642, (2011) 6 SCALE 290, (2011) 2 WLC(SC)CVL 316, (2012) 1 CIVLJ 1, (2011) 2 KER LT 788, (2011) 2 MARRILJ 481, (2011) 3 ALLMR 991 (SC), (2011) 1 CLR 1212 (SC), (2011) 6 MAD LJ 575, (2011) 5 MAH LJ 316, (2011) 5 ANDHLD 19, (2011) 4 ALL WC 4295, 2011 (2) SCC (CRI) 1033, 2011 (88) ALR SOC 1 (SC), (2011) 4 BOM CR 542

Author: T.S. Thakur

Bench: T.S. Thakur, V.S. Sirpurkar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICITION

CIVIL APPEAL NO. 4435 OF 2011

(Arising out of SLP (C) No.9220 of 2010)

Ruchi Majoo ...Appellant

Versus

Sanjeev Majoo ...Respondents

With

CRIMINAL APPEAL NO. 1184 OF 2011

(Arising out of SLP (Crl.) No.10362 of 2010)

J U D G M E N T

T.S. THAKUR, J.

Leave granted.

Conflict of laws and jurisdictions in the realm of private international law is a phenomenon that has assumed greater dimensions with the spread of Indian diasporas across the globe. A large number of our young and enterprising countrymen are today looking for opportunities abroad.

While intellectual content and technical skills of these youngster find them lucrative jobs in distant lands, complete assimilation with the culture, the ways of life and the social values prevalent in such countries do not come easy. The result is that in very many cases incompatibility of temperament apart, diversity of backgrounds and inability to accept the changed lifestyle often lead to matrimonial discord that inevitably forces one or the other party to seek redress within the legal system of the country which they have adopted in pursuit of their dreams. Experience has also shown that in a large number of cases one of the parties may return to the country of his or her origin for family support, shelter and stability. Unresolved disputes in such situations lead to legal proceedings in the country of origin as well as in the adoptive country. Once that happens issues touching the jurisdiction of the courts examining the same as also comity of nations are thrown up for adjudication.

The present happens to be one such case where legal proceedings have engaged the parties in a bitter battle for the custody of their only child Kush, aged about 11 years born in America hence a citizen of that country by birth.

These proceedings included an action filed by the father-

respondent in this appeal, before the American Court seeking divorce from the respondent-wife and also custody of master Kush. An order passed by the Superior court of California, County of Ventura in America eventually led to the issue of a red corner notice based on allegations of child abduction levelled against the mother who like the father of the minor child is a person of Indian origin currently living with her parents in Delhi. The mother took refuge under an order dated 4th April, 2009 passed by the Addl. District Court at Delhi in a petition filed under Sections 7, 8, 10, 11 of the Guardians and Wards Act granting interim custody of the minor to her. Aggrieved by the said order the father of the minor filed a petition under Article 227 of the Constitution of India before the High Court of Delhi. By the order impugned in this appeal the High Court allowed that petition, set aside the order passed by the District Court and dismissed the custody case filed by the mother primarily on the ground that the Court at Delhi had no jurisdiction to entertain the same as the minor was not ordinarily residing at Delhi - a condition precedent for the Delhi Court to exercise jurisdiction. The High Court further held that all issues relating to the custody of child ought to be agitated and decided by the Court in America not only because that Court had already passed an order to that

effect in favour of the father, but also because all the three parties namely, the parents of the minor and the minor himself were American citizens. The High Court buttressed its decision on the principle of comity of courts and certain observations made by this Court in some of the decided cases to which we shall presently refer.

Three questions fall for determination in the above backdrop. These are (i) Whether the High Court was justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same, (ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of Courts and (iii) Whether the order granting interim custody to the mother of the minor calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court. We shall deal with the questions ad seriatim:

> Re: Question No.1 There is no gainsaying that any challenge to the jurisdiction of the court will have to be seen in the context of the averments made in the pleadings of the parties and the requirement of Section 9 of the Guardian and Wards Act, 1890. A closer look at the pleadings of the parties is, therefore, necessary before we advert to the legal requirement that must be satisfied for the Court to exercise its powers under the Act mentioned above.
>
> The appellant-mother had in her petition filed under the Guardian and Wards Act, 1890 invoked the jurisdiction of the Court at Delhi, on the assertion that the minor was, on the date of the presentation of the petition for custody ordinarily residing at 73 Anand Lok, August Kranti Marg, New Delhi. The petition enumerated at length the alleged acts of mental and physical cruelty of the respondent- husband towards the appellant, including his alleged addiction to pornographic films, internet sex and adulterous behavior during the couple's stay in America. It traced the sequence of events that brought them to India for a vacation and the alleged misdemeanor of the respondent that led to the appellant taking a decision to past company and to stay back in India instead of returning to United States as originally planned. In para (xxxviii) of the petition, the appellant said :
>
> "That the petitioner in no certain terms told the respondent that considering his past conduct which was cruel, inhuman and insulting as well as humiliating, the petitioner has no plans to be with the respondent and wanted to stay away from him. The petitioner even proposed that since there was no (sic) possibility for them to stay together as husband and wife and as a result of which the petitioner has decided to settle in India for the time being, therefore some interim arrangement could be worked out. The arrangement which was proposed by the petitioner was that the petitioner will stay with her son for the time being in India and make best arrangements for his schooling. The petitioner had also conveyed to the respondent that since he wanted to have visitation rights, therefore, he must also contribute towards the upbringing of the child in India. It was further suggested that some cooling off period should be there so that the matrimonial disputes could be sorted

out subsequently."

The appellant further alleged that she had informed the respondent about a petition under the Guardian and Wards Act being ready for presentation before the Guardian Court at Delhi, whereupon the respondent is alleged to have agreed to the appellant staying back in Delhi to explore career options and to the minor continuing to stay with her.

The respondent eventually returned to America around 20th July, 2008, whereafter he is alleged to have started threatening the appellant that unless the later returned to America with the minor, he would have the child removed and put in the custody of the respondent's parents at Udaipur. Apprehending that the respondent may involve the appellant in some false litigation in America and asserting that she was fit to be given the custody of the minor being his mother and natural guardian, the appellant sought the intervention of this Court and her appointment as sole guardian of the minor.

Shortly after the presentation of the main petition, an application under Section 12 of the Guardian and Wards Act read with Section 151 of the Civil Procedure Code was filed by the appellant praying for an ex-parte interim order restraining the respondent and/or any one on his behalf from taking away and/or physically removing the minor from her custody and for an order granting interim custody of the minor to the appellant till further orders. The application set out the circumstances in brief that compelled the appellant to seek urgent interim directions from the court and referred to an e-mail received from the father of the minor by the Delhi Public School (International) at R.K. Puram, where the minor is studying, accusing the mother of abducting the minor child and asking the school authorities to refuse admission to him. The application also referred to an e-mail which the Principal of the school had in turn sent to the appellant and the order which the US Court had passed granting custody of minor child to the respondent. The appellant alleged that the US Court had no jurisdiction in the matter and that the order passed by that Court was liable to be ignored. On the presentation of the above application the Guardian Court passed an ex-parte interim order on 16th September, 2008 directing that the respondent shall not interfere with the appellant's custody of the minor child till the next date of hearing.

The respondent entered appearance in the above proceedings and filed an application for dismissal of the petition on the ground that the court at Delhi had no jurisdiction to entertain the same. In the application the respondent denied all the allegations and averments suggesting habitual internet sex, womanizing, dowry demand and sexual or behavioural perversity alleged against him. The respondent also alleged that the family had planned a vacation-cum-family visit to India and booked return air tickets to be in America on 20th July, 2008. The respondent's version was that the appellant along with the respondent and their minor son, Kush had stayed with the parents of the appellant at Delhi till 5th July, 2008.

Thereafter, they were supposed to visit Udaipur but since the appellant insisted that she would stay at Delhi and assured to send Kush after sometime to Udaipur, the respondent left for Udaipur where he received a legal notice on behalf of the appellant making false and imaginary allegations. On receipt of the notice the respondent returned to Delhi to sort out the matter. During the mediation

the respondent was allegedly subjected to enormous cruelty, pressure and threat of proceedings under Section 498A IPC so as to obstruct his departure scheduled on 20th July, 2008.

The respondent alleged that since any delay in his departure could cost him a comfortable job in United States, he felt coerced to put in writing a tentative arrangement on the ground of appellant trying "career option of Dental medicine at Delhi" and master Kush being allowed to study at Delhi for the year 2008. This letter was, according to the respondent, written under deceit, pressure, threat and coercion. At any rate the letter constituted his consent to an arrangement, which according to him stood withdrawn because of his subsequent conduct. It was alleged that neither the appellant nor Kush could be ordinarily resident of Delhi so as to confer jurisdiction upon the Delhi Court.

Several other allegations were also made in the application including the assertion that the interim order of custody and summons issued by the Superior Court of California, County of Ventura were served by e-mail on the appellant as also on Advocate, Mr. Purbali Bora despite which the appellant avoided personal service of the summon on the false pretext that she did not stay at 73 Anand Lok, New Delhi.

It was, according to the respondent, curious that instead of returning to USA to submit to the jurisdiction of competent court at the place where both the petitioner and respondent have a house to reside, jobs to work and social roots and where Kush also normally resided, has friends and school, the appellant wife had persisted to stay in India and approach and seek legal redress. It was further stated that the proceedings initiated by the appellant on or about 28th August, 2008, with allegations and averments that were ex-

facie false and exaggerated, were not maintainable in view of the proceedings before the Court in America and the order passed therein. It was also alleged that in terms of the protective custody warrant order issued on 9th September, 2008, by the Superior Court of California, County of Ventura, the appellant had been directed to appear before the US Courts which the appellant was evading to obey and that despite having information about the proceedings in the US Court she had obtained an ex-

parte order without informing the respondent in advance.

The respondent also enumerated the circumstances which according to him demonstrated that he is more suitable to get the custody of Master Kush in comparison to the appellant-mother of the child. The respondent husband accordingly prayed for dismissal of the petition filed by the appellant-wife and vacation of the ad-interim order dated 4th April, 2009 passed by the Guardian Court at Delhi.

The Guardian and Wards Court upon consideration of the matter dismissed the application filed by the respondent holding that the material on record sufficiently showed that the respondent-husband had consented to the arrangement whereby the appellant-wife was to continue living in Delhi in order to explore career options in dental medicine and that the minor was to remain in the custody of his mother and was to be admitted to a School in Delhi. The Court further held that since there

were serious allegations regarding the conduct of the respondent-husband and his habits, the question whether the interest of minor would be served better by his mother as a guardian had to be looked into. It is in the light of the above averments that the question whether the Courts at Delhi have the jurisdiction to entertain a petition for custody of the minor shall have to be answered.

Section 9 of the Guardian and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the Court to entertain a claim for grant of custody of a minor. While sub-

Section (1) of Section 9 identifies the court competent to pass an order for the custody of the persons of the minor, sub-sections (2) & (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor. Section 9(1) alone is, therefore, relevant for our purpose. It says :

> "9. Court having jurisdiction to entertain application - (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having Jurisdiction in the place where the minor ordinarily resides."

It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the `ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy. The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer. We may before doing so examine the true purpose of the expression `ordinarily resident' appearing in Section 9(1) (supra). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and the foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise the expression. The word `ordinary' has been defined by the Black's Law Dictionary as follows:

> "Ordinary (Adj.) :Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."

The word `reside' has been explained similarly as under:

> "Reside: live, dwell, abide, sojourn, stay, remain, lodge. (Western- Knapp Engineering Co. V. Gillbank, C.C.A. Cal., 129 F2d 135, 136.) To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as quality, to be vested as a right. (State ex rel. Bowden v. Jensen Mo., 359

S.W.2d 343, 349.)"

In Websters dictionary also the word `reside' finds a similar meaning, which may be gainfully extracted:

> "1. To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with in.
>
> 3. To be vested: with in"

In Mrs. Annie Besant v. Narayaniah AIR 1914 PC 41 the infants had been residing in the district of Chingleput in the Madras Presidency. They were given in custody of Mrs. Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the district Court of Chingleput for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chingleput Court was competent to entertain the application their Lordships of the Privy Council observed:

> "The district court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act 1890. By the ninth Section of that Act the jurisdiction of the court is confined to infants ordinarily residing in the district.
>
> It is in their Lordship's opinion impossible to hold that the infants who had months previously left India with a view to being educated in England and going to University had acquired their ordinary residence in the district of Chingleput."

In Mst. Jagir Kaur and Anr. v. Jaswant Singh AIR 1963 SC 1521, this Court was dealing with a case under Section 488 Cr.P.C. and the question of jurisdiction of the Court to entertain a petition for maintenance. The Court noticed a near unanimity of opinion as to what is meant by the use of the word "resides" appearing in the provision and held that "resides" implied something more than a flying visit to, or casual stay at a particular place. The legal position was summed up in the following words:

> ".....Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases there on, we would define the word "resides" thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case....."

In Kuldip Nayar & Ors. v. Union of India & Ors.

2006 (7) SCC 1, the expression "ordinary residence" as used in the Representation of People Act, 1950 fell for interpretation. This Court observed:

> "243. Lexicon refers to Cicutti v. Suffolk County Council (1980) 3 All ER 689 to denote that the word "ordinarily" is primarily directed not to duration but to purpose. In this sense the question is not so much where the person is to be found "ordinarily", in the sense of usually or habitually and with some degree of continuity, but whether the quality of residence is "ordinary" and general, rather than merely for some special or limited purpose.
>
> 244. The words "ordinarily" and "resident" have been used together in other statutory provisions as well and as per Law Lexicon they have been construed as not to require that the person should be one who is always resident or carries on business in the particular place.
>
> 245. The expression coined by joining the two words has to be interpreted with reference to the point of time requisite for the purposes of the provision, in the case of Section 20 of the RP Act, 1950 it being the date on which a person seeks to be registered as an elector in a particular constituency.
>
> 246. Thus, residence is a concept that may also be transitory. Even when qualified by the word "ordinarily"

the word "resident" would not result in a construction having the effect of a requirement of the person using a particular place for dwelling always or on permanent uninterrupted basis. Thus understood, even the requirement of a person being "ordinarily resident" at a particular place is incapable of ensuring nexus between him and the place in question."

Reference may be made to Bhagyalakshmi and Anr.

v. K.N. Narayana Rao AIR 1983 Mad 9, Aparna Banerjee v. Tapan Banerjee AIR 1986 P&H 113, Ram Sarup v.

Chimman Lal and Ors. AIR 1952 All 79, Smt. Vimla Devi v. Smt. Maya Devi & Ors. AIR 1981 Raj. 211, and in re:

> Dr. Giovanni Marco Muzzu and etc. etc. AIR 1983 Bom. 242, in which the High Courts have dealt with the meaning and purport of the expressions like `ordinary resident' and `ordinarily resides' and taken the view that the question whether one is ordinarily residing at a given place depends so much on the intention to make that place ones ordinary abode.
>
> Let us now in the light of the above, look at the rival versions of the parties before us, to determine whether the Court at Delhi has the jurisdiction to entertain the proceedings for custody of master Kush. As seen earlier, the case of the appellant mother is that Kush is ordinarily residing with her in Delhi. In support of that assertion she has among other circumstances placed reliance upon the letter which

the respondent, father of the minor child wrote to the appellant on 19th July, 2008. The letter is to the following effect:

"Ruchi, As you wish to stay in India with Kush and try career option of Dental medicine at Delhi, I give my whole-hearted support and request you to put Kush in an Indo-American school or equivalent at Delhi this year.

Please let me know the expenses involved for education of Kush and I would like to bear completely.

Sd/- Sanjeev July 19, 2008"

The appellant's case is that although the couple and their son had initially planned to return to U.S.A. that decision was taken with the mutual consent of the parties changed to allow the appellant to stay back in India and to explore career options here. Master Kush was also according to that decision of his parents, to stay back and be admitted to a school in Delhi. The decision on both counts, was free from any duress whatsoever, and had the effect of shifting the "ordinary residence" of the appellant and her son Kush from the place they were living in America to Delhi. Not only this the respondent father of the minor, had upon his return to America sent E-mails, reiterating the decision and offering his full support to the appellant. This is according to the appellant clear from the text of the E-mails exchanged between the parties and which are self-explanatory as to the context in which they are sent.

The respondent's case on the contrary is that he was coerced to put in writing a tentative arrangement on the ground of appellant trying career options in dental medicine at Delhi and minor Kush allowed to stay at Delhi for the year 2008. This letter was, according to the respondent, obtained under deceit, pressure, threat and coercion. In his application challenging the jurisdiction of the Delhi Court the respondent further stated that even if it be assumed that the appellant and Kush had stayed back in India with the permission of the respondent, the same stood withdrawn. To the same effect was the stand taken by the respondent in his petition under Article 227 filed before this Court.

It is evident from the statement and the pleadings of the parties that the question whether the decision to allow the appellant and Kush to stay back in Delhi instead of returning to America was a voluntary decision as claimed by the appellant or a decision taken by the respondent under duress as alleged by him was a seriously disputed question of facts, a satisfactory answer to which could be given either by the District Court where the custody case was filed or by the High Court only after the parties had been given opportunity to adduce evidence in support of their respective versions.

In the light of the above, we asked Mr. Pallav Shishodia, learned senior counsel for the respondent whether the respondent would adduce evidence to substantiate his charge of duress and coercion as vitiating circumstances for the Court to exclude the letter in question from consideration. Mr. Shishodia argued on instructions that the respondent had no intention of leading any evidence in support of his case that the letter was obtained under duress. In fairness to him we must mention

that he beseeched us to decide the question regarding jurisdiction of the Court on the available material without remanding the matter to the Trial Court for recording of evidence from either party. Mr. Shishodia also give us an impression as though any remand on the question of duress and coercion would be futile because the respondent father was not willing to go beyond what he has already done in pursuit of his claim to the custody of the minor. In that view of the matter, therefore, we are not remanding the case for recording of evidence as we were at one stage of hearing thought of doing. We are instead taking a final view on the question of jurisdiction of the Delhi Court, to entertain the application on the basis of the available material. This material comprises the letter dated 19th July, 2008 written by the respondent and referred to by us earlier and the e-

mails exchanged between the parties. That the letter in question was written by the respondent is not in dispute.

What is argued is that the letter was written under duress and coercion. There is nothing before us to substantiate that allegation, and in the face of Mr. Shishodia's categoric statement that the respondent does not wish to adduce any evidence to prove his charge of coercion and duress, we have no option except to hold that the said charge remains unproved.

More importantly the E-mails exchanged between the parties, copies whereof have been placed on record, completely disprove the respondent's case of any coercion or duress. The first of these E-mails is dated the 17th July, 2008 sent by the respondent to his friend in America, pointing out that the appellant was staying back in India with the minor for the present. The text of the E-mail is as under:

> "Hi Joanne, Hope all is well.
>
> I got your voicemail, actually we recently changed our service provider for home phone, please see below our updated contact information. Home-9187071716 Sanjay mobile - 8054100872, this works in India Ruchi's mobile remains the same, however it will not work since we are currently in India. I will be back in LA on Jul 2-, however Ruchi wants to stay in Delhi alongwith Kush for now.
>
> Regards, Sanjeev"

On 21st July, 2008 i.e. a day after the respondent reached America the appellant sent him an e-mail which clearly indicates that the minor was being admitted to a school in Delhi and by which the respondent was asked to send American School's record for that purpose. The e-mail is to the following effect.

> "Sanjeev Also please call up Red Oak elementary and inform them that Kush will be starting American schooling in India for now and request personal recommendation from Mrs. Merfield and Mrs. Johnson, they know Kush v well..Also we need 2 yrs of official school records (one from sumac and other from red oak) Please send $$ asap. I will find if they have a direct deposit at school, to make it easy on u..thanks Ruchi"

In response to the above, the respondent sent an E-

mail which does not in the least, give an impression that the decision to allow master Kush to stay back in Delhi and to get admitted to a School here was taken under any kind of duress or coercion as is now claimed. The E-mail is to the following effect:

> `Hi Ruchi, I checked out website for both American and British schools, the fees for these schools is extremely high between $ 20000 - $ 25000 per annum, this will deduct from Kush's college fund which I have worked hard to create. Also realize that if we take out $ 25,000 from his college fund now, we loose the effect of compounding when he needs $ for college 11 years from now. $ 25000 now will be worth $ 60000-70000 11 yrs from now. I really and honestly feel that we should not deplete Kush's college fund so much at grade 2m rather leave most of it for higher education.

Also I see a benefit for him to get into a logical high equality English medium school, he can learn a bit of Hindi. I would be happy to talk to Kush and make sure he is comfortable. Let me know your thoughts."

Equally important is another E-mail which the respondent sent to the appellant regarding surrender of the appellant's car and payment of the outstanding lease money, a circumstance that shows that the parties were ad-

idem on the question of the appellant winding up her affairs in America.

> "Hi Ruchi, I checked with Acura regarding breaking your lease, they said that you can surrender the car to them for repossession and then they will try to sell it in private action. You will then need to pay the difference between money raised from private auction and pay off amount. Also this repossession will damage your credit history. Let me know your thoughts.
>
> Hope you are feeling better.
>
> Sanjeev"

Two more E-mails one dated 24.7.2008 and the other dated 19.8.2008 exchanged between the parties on the above subject also bear relevance to the issue at hand and may be extracted:

> "Hi Ruchi, I did more digging for you on this.
>
> See below information from a broker who may be able to help transfer the lease to another buyer in exchange for the fees mentioned. Let me know how you want to proceed.

Sanjeev"

"Hi Sanjeev Please proceed with the plan, sell my acura with least damages...this seems like a better option. Thanks, Ruchi"

It is difficult to appreciate how the respondent could in the light of the above communications still argue that the decision to allow the appellant and master Kush to stay back in India was taken under any coercion or duress. It is also difficult to appreciate how the respondent could change his mind so soon after the above E-mails and rush to a Court in U.S. for custody of the minor accusing the appellant of illegal abduction, a charge which is belied by his letter dated 19th July, 2008 and the E-mails extracted above. The fact remains that Kush was ordinarily residing with the appellant his mother and has been admitted to a school, where he has been studying for the past nearly three years. The unilateral reversal of a decision by one of the two parents could not change the fact situation as to the minor being an ordinary resident of Delhi, when the decision was taken jointly by both the parents.

In the light of what we have stated above, the High Court was not, in our opinion, right in holding that the respondent's version regarding the letter in question having been obtained under threat and coercion was acceptable.

The High Court appeared to be of the view that if the letter had not been written under duress and coercion there was no reason for the respondent to move a guardianship petition before U.S. Court. That reasoning has not appealed to us. The question whether or not the letter was obtained under duress and coercion could not be decided only on the basis of the institution of proceedings by the respondent in the U.S. Court. If the letter was under duress and coercion, there was no reason why the respondent should not have repudiated the same no sooner he landed in America and the alleged duress and coercion had ceased. Far from doing so the respondent continued to support that decision even when he was far away from any duress and coercion alleged by him till the time he suddenly changed his mind and started accusing the appellant of abduction. The High Court failed to notice these aspects and fell in error in accepting the version of the respondent and dismissing the application filed by the appellant. In the circumstances we answer question no.1 in the negative.

Re: Question No.2 Recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much 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 Criminal Procedure 1908 as amended by the Amendment Act of 1999 and 2002. The duty of a Court exercising its Parens Patraie 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. Judicial pronouncements on the subject are not on virgin ground. A long line of decisions of the court has settled the approach to be adopted in such matters. The plentitude of pronouncements also leaves cleavage in the opinions on certain aspects that need to be settled authoritatively in an appropriate case.

A survey of law on the subject would, in that view, be necessary and can start with a reference to the decision of this Court in Smt. Satya V. Shri Teja Singh, (1975) 1 SCC

120. That was a case in which the validity of a decree for divorce obtained by the husband from a Court in the State of Naveda (USA) fell for examination. This Court held that the answer to the question depended upon the Rules of private International Law. Since no system of Private International Law existed that could claim universal recognition, the Indian Courts had to decide the issue regarding the validity of the decree in accordance with the Indian law. Rules of Private International Law followed by other countries could not be adopted mechanically, especially when principles underlying such rules varied greatly and were moulded by the distinctive social, political and economic conditions obtaining in different countries. This Court also traced the development of law in America and England and concluded that while British Parliament had found a solution to the vexed questions of recognition of decrees granted by foreign courts by enacting "The recognition of Divorces and Legal Separations Act, 1971" our Parliament had yet to do so. In the facts and circumstances of that case the Court held that the husband was not domiciled in Naveda and that his brief stay in that State did not confer any jurisdiction upon the Naveda Court to grant a decree dissolving the marriage, he being no more than a bird of passage who had resorted to the proceedings there solely to find jurisdiction and obtain a decree for divorce by misrepresenting the facts as regards his domicile in that State. This Court while refusing to recognize the decree observed:

> "True that the concept of domicile is not uniform throughout the world and just as long residence does not by itself establish domicile, a brief residence may not negative it. But residence for a particular purpose falls to answer the qualitative test for, the purpose being accomplished the residence would cease. The residence must answer "a qualitative as well as a quantitative test", that is, the two elements of factum et animus must concur. The respondent went to Naveda forum-hunting, found a convenient jurisdiction which would easily purvey a divorce to him and left it even before the ink on his domiciliary assertion was dry. Thus the decree of the Naveda Court lacks jurisdiction. It can receive no recognition in our courts."

(emphasis ours) In Dhanwanti Joshi v. Madhav Unde 1998(1) SCC 112, one of the questions that fell for consideration was whether the bringing away of a child to India by his mother contrary to an order of US Court would have any bearing on the decision of the Courts in India while deciding about the custody and the welfare of the child. Relying upon McKee v.

KcKee, 1951 AC 352: 1951(1) All ER 942 and J v. C 1970 AC 668:1969(1) All ER 788, this Court held that it was the duty of the Courts in the country to which a child is removed to consider the question of custody, having regard to the welfare of the child. In doing so, the order passed by the foreign

court would yield to the welfare of the child and that Comity of Courts simply demanded consideration of any such order issued by foreign courts and not necessarily their enforcement. This court further held that the conduct of a summary or elaborate inquiry on the question of custody by the Court in the country to which the child has been removed will depend upon the facts and circumstance of each case. For instance summary jurisdiction is exercised only if the court to which the child had been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded to hold that it would be better for the child that the merits of the case are investigated in a court in his native country, on the expectation that an early decision in the native country would be in the interests of the child before the child could develop roots in the country to which he had been removed. So also the conduct of an elaborate inquiry may depend upon the time that had elapsed between the removal of the child and the institution of the proceedings for custody. This would mean that longer the time gap, the lesser the inclination of the Court to go for a summary inquiry. The court rejected the prayer for returning the child to the country from where he had been removed and observed:

> "31. The facts of the case are that when the respondent moved the courts in India and in the proceedings of 1986 for habeas corpus and under Guardians and Wards Act, the courts in India thought it best in the interests of the child to allow it to continue with the mother in India, and those orders have also become final. The Indian courts in 1993 or 1997, when the child had lived with his mother for nearly 12 years, or more, would not exercise a summary jurisdiction to return the child to USA on the ground that its removal from USA in 1984 was contrary to orders of US courts."

We must at this stage refer to two other decisions of this Court, reliance upon which was placed by the learned counsel for the parties. In Sarita Sharma v. Sushil Sharma (2000) 3 SCC 14 this Court was dealing with an appeal arising out of a habeas corpus petition filed before the High Court of Delhi in respect of two minor children aged 3 years and 7 years respectively. It was alleged that the children were in illegal custody of Sarita Sharma their mother. The High Court had allowed the petition and directed the mother to restore the custody of the children to Sushil Sharma who was in turn permitted to take the children to U.S.A. without any hindrance. One of the contentions that was urged before this Court was that the removal of children from U.S.A. to India was against the orders passed by the American Court, which orders had granted to the father the custody of the minor children.

Allowing the appeal and setting aside the judgment of the High Court, this Court held that the order passed by the U.S. courts constituted but one of the factors which could not override the consideration of welfare of the minor children.

Considering the fact that the husband was staying with his mother aged about 80 years and that there was no one else in the family to lookafter the children, this Court held that it was not in the interest of the children to be put in the custody of the father who was addicted to excessive alcohol.

Even this case arose out of a writ petition and not a petition under the Guardians and Wards Act.

In V. Ravi Chandran (Dr.) (2) v. Union of India and Ors. (2010) 1 SCC 174 also this Court was dealing with a habeas corpus petition filed directly before it under Article 32 of the Constitution. This Court held that while dealing with a case of custody of children 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 whether the court could conduct an elaborate enquiry on the question of custody or deal with the matter summarily and order the parent to return the custody of the child to the country from which he/she was removed, leaving all aspects relating to child's welfare to be investigated by Court in his own country. This Court held that in case an elaborate enquiry was considered appropriate, the order passed by a foreign court may be given due weight depending upon the circumstances of each case in which such an order had been passed. Having said so, this Court directed the child to be sent back to U.S. and issued incidental directions in that regard.

In Shilpa Aggarwal (Ms.) v. Aviral Mittal & Anr.

(2010) 1 SCC 591 this Court followed the same line of reasoning. That was also a case arising out of a habeas corpus petition before the High Court of Delhi filed by the father of the child. The High Court had directed the return of the child to England to join the proceedings before the courts of England and Wales failing which the child had to be handed over to the petitioner-father to be taken to England as a measure of interim custody leaving it for the court in that country to determine which parent would be best suited to have the custody of the child. That direction was upheld by this Court with the observation that since the question as to what is in the interest of the minor had to be considered by the court in U.K. in terms of the order passed by the High Court directing return of the child to the jurisdiction of the said court did not call for any interference.

We do not propose to burden this judgment by referring to a long line of other decisions which have been delivered on the subject, for they do not in our opinion state the law differently from what has been stated in the decisions already referred to by us. What, however, needs to be stated for the sake of a clear understanding of the legal position is that the cases to which we have drawn attention, as indeed any other case raising the question of jurisdiction of the court to determine mutual rights and obligation of the parties, including the question whether a court otherwise competent to entertain the proceedings concerning the custody of the minor, ought to hold a summary or a detailed enquiry into the matter and whether it ought to decline jurisdiction on the principle of comity of nations or the test of the closest contact evolved by this Court in Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and Anr. (1984) 3 SCC 698 have arisen either out of writ proceedings filed by the aggrieved party in the High Court or this Court or out of proceedings under the Guardian & Wards Act. Decisions rendered by this Court in Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Anr. (1987) 1 SCC 42, Sarita Sharma's case (supra), V. Ravi Chandran's case (supra), Shilpa Aggarwal's case (supra) arose out of proceedings in the nature of habeas corpus. The rest had their origin in custody proceedings launched under the Guardian & Wards Act. Proceedings in the nature of Habeas Corpus are summary in nature, where the legality of the detention of the alleged detenue is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens

patriae jurisdiction. A High Court may, therefore, invoke its extra ordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the court views the rival claims, if any, to such custody. The Court may also direct repatriation of the minor child for the country from where he/she may have been removed by a parent or other person; as was directed by this Court in Ravi Chandran's & Shilpa Agarwal's cases (supra) or refuse to do so as was the position in Sarita Sharma's case (supra). What is important is that so long as the alleged detenue is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenue is within its territorial jurisdiction.

In cases arising out of proceedings under the Guardian & 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 is thus a significant difference between the jurisdictional facts relevant to the exercise of powers by a writ court on the one hand and a court under the Guardian & Wards Act on the other. Having said that we must make it clear that no matter a Court is exercising powers under the Guardian & Wards Act it can choose to hold a summary enquiry into the matter and pass appropriate orders provided it is otherwise competent to entertain a petition for custody of the minor under Section 9(1) of the Act. This is clear from the decision of this Court in Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112, which arose out of proceedings under the Guardian & Wards Act. The following passage is in this regard apposite:

> "We may here state that this Court in Elizabeth Dinshaw v. Arvand M. Dinshaw (1987) 1 SCC 42 while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts, -- which were independently considered -- it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (infants), Re (1966) 1 ALL ER 886 which case, as pointed out by us above has been explained in L. Re (1974) 1 All ER 913, CA as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in McKee v. McKee (1951) 1 All ER 942 and J v. C (1969) 1 All ER 788 and the distinction between summary and elaborate inquiries as stated in L. (infants), Re (1974) 1 All ER 913, CA are today well settled in UK, Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 -- even assuming that the earlier orders passed in India do not operate as constructive res judicata."

It does not require much persuasion for us to hold that the issue whether the Court should hold a summary or a detailed enquiry would arise only if the Court finds that it has the jurisdiction to entertain the matter. If the answer to the question touching jurisdiction is in the negative the logical result has to be an order of dismissal of the proceedings or return of the application for presentation

before the Court competent to entertain the same. A Court that has no jurisdiction to entertain a petition for custody cannot pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a Court in that country. The party aggrieved of such removal, may seek any other remedy legally open to it. But no redress to such a party will be permissible before the Court who finds that it has no jurisdiction to entertain the proceedings.

We have while dealing with question No.1 above held that the Court at Delhi was in the facts and circumstances of the case competent to entertain the application filed by the appellant. What needs to be examined is whether the High Court was right in relying upon the principle of comity of courts and dismissing the application. Our answer is in the negative. The reasons are not far to seek. The first and foremost of them being that `comity of courts' principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Decisions of this Court in Dhanwanti Joshi, and Sarita Sharma's cases, (supra) clearly support that proposition.

Secondly, the respondent's case that the minor was removed from the jurisdiction of the American Courts in contravention of the orders passed by them, is not factually correct. Unlike V. Ravi Chandran's case (supra), where the minor was removed in violation of an order passed by the American Court there were no proceedings between the parties in any Court in America before they came to India with the minor. Such proceedings were instituted by the respondent only after he had agreed to leave the appellant and the minor behind in India, for the former to explore career options and the latter to get admitted to a school.

The charge of abduction contrary to a valid order granting custody is, therefore, untenable.

Thirdly, because the minor has been living in India and pursuing his studies in a reputed school in Delhi for nearly three years now. In the course of the hearing of the case, we had an occasion to interact with the minor in our chambers. He appears to be happy with his studies and school and does not evince any interest in returning to his school in America. His concern was more related to the abduction charge and consequent harassment being faced by his mother and maternal grandparents. We shall advert to this aspect a little later, but for the present we only need to mention that the minor appears to be settled in his environment including his school studies and friends. He also holds the respondent responsible for the troubles which his mother is undergoing and is quite critical about the respondent getting married to another woman.

Fourthly, because even the respondent does not grudge the appellant getting custody of the minor, provided she returns to America with the minor. Mr. Shishodia was asking to make a solemn statement that the respondent would not, oppose the appellant's prayer for the custody of the minor, before the American Court. All that the respondent wants is that the minor is brought up and educated in America, instead of India, as the minor would benefit from the same.

The appellant was not willing to accept that proposal, for according to her she has no intentions of returning to that country in the foreseeable future especially after she has had a very traumatic period on account of matrimonial discord with the respondent. Besides, the offer was according to the appellant, only meant to score a point more than giving any real benefit to the minor.

In the light of all these circumstances, repatriation of the minor to the United States, on the principle of `comity of courts' does not appear to us to be an acceptable option worthy of being exercised at this stage. Dismissal of the application for custody in disregard of the attendant circumstances referred to above was not in our view a proper exercise of discretion by the High Court. Interest of the minor shall be better served if he continued in the custody of his mother the appellant in this appeal, especially when the respondent has contracted a second marriage and did not appear to be keen for having actual custody of the minor. Question No.2 is also for the above reasons answered in the negative.

Re. Question No.3 The order of the Delhi Court granting interim custody of the minor to the appellant did not make any provision for visitation rights of the respondent father of the child. In the ordinary course the court ought to have done so not only because even an interim order of custody in favour of the parent should not insulate the minor from the parental touch and influence of the other parent which is so very important for the healthy growth of the minor and the development of his personality. It is noteworthy that even the respondent did not claim such rights in his application or in the proceedings before the High Court. Indeed Mr. Shishodia expressed serious apprehensions about the safety of his client, if he were to visit India in order to meet the child and associate with him. Some of these apprehensions may not be entirely out of place but that does not mean that the courts below could not grant redress against the same.

One of these apprehensions is that the respondent may be involved in a false case under Section 498A & 406 of the IPC or provisions like the Prohibition of Dowry Act 1961. A case FIR No.97 dated 7.7.2009 has, in fact, been registered against the respondent, which has been quashed by the High Court by its order dated 22nd September, 2010 passed in Crl. M.C. No.3329 of 2009. We have by our order of even date dismissed an appeal against the said order, which must effectively give a quietus to that controversy, and allay the apprehension of the respondent. Not only that we are inclined to issue further directions to ensure that the respondent does not have any legal or other impediment in exercising his visitation rights.

The question then is what should the visitation rights be and how should the same be exercised. But before we examine that aspect, we may advert to the need for the visitation rights of the father to be recognised in the peculiar circumstances of this case. From what we gathered in the course of an interactive session with the minor, we concluded that the minor has been thoroughly antagonized against the respondent father. He held him responsible for his inability to travel to Malaysia, with his grandparents because if he does so, both the mother and her parents will be arrested on the charge of abduction of the minor. He also held the respondent responsible for his grandparent's skin problems and other worries. He wanted to stay only in India and wanted to be left alone by the respondent. He was reluctantly agreeable to meeting and associating with the respondent provided the respondent has the red corner notice withdrawn so that he and his grandparents can travel

abroad.

For a boy so young in years, these and other expressions suggesting a deep rooted dislike for the father could arise only because of a constant hammering of negative feeling in him against his father. This approach and attitude on the part of the appellant or her parents can hardly be appreciated. What the appellant ought to appreciate is that feeding the minor with such dislike and despire for his father does not serve his interest or his growth as a normal child. It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor can the role of the father in his upbringing and grooming to face the realities of life be undermined. It is in that view important for the child's healthy growth that we grant to the father visitation rights;

that will enable the two to stay in touch and share moments of joy, learning and happiness with each other. Since the respondent is living in another continent such contact cannot be for obvious reasons as frequent as it may have been if they were in the same city. But the forbidding distance that separates the two would get reduced thanks to the modern technology in telecommunications. The appellant has been according to the respondent persistently preventing even telephonic contact between the father and the son. May be the son has been so poisoned against him that he does not evince any interest in the father. Be that as it may telephonic contact shall not be prevented by the appellant for any reason whatsoever and shall be encouraged at all reasonable time. Video conferencing may also be possible between the two which too shall not only be permitted but encouraged by the appellant.

Besides, the father shall be free to visit the minor in India at any time of the year and meet him for two hours on a daily basis, unhindered by any impediment from the mother or her parents or anyone else for that matter. The place where the meeting can take place shall be indicated by the trial Court after verifying the convenience of both the parties in this regard. The trial Court shall pass necessary orders in this regard without delay and without permitting any dilatory tactics in the matter.

For the vacations in summer, spring and winter the respondent shall be allowed to take the minor with him for night stay for a period of one week initially and for longer periods in later years, subject to the respondent getting the itinerary in this regard approved from the Guardian & Wards Court. The respondent shall also be free to take the minor out of Delhi subject to the same condition. The respondent shall for that purpose be given the temporary custody of the minor in presence of the trial court, on any working day on the application of the respondent. Return of the minor to the appellant shall also be accordingly before the trial court on a date to be fixed by the court for that purpose. The above directions are subject to the condition that the respondent does not remove the child from the jurisdiction of this Court pending final disposal of the application for grant of custody by the Guardian and Wards Court, Delhi. We make it clear that within the broad parameters of the directions regarding visitation rights of the respondent, the parties shall be free to seek further directions from the Court seized of the guardianship proceedings; to take care of any difficulties that may arise in the actual implementation of this order.

CRIMINAL APPEAL NO. 1184 OF 2011 (Arising out of SLP (Crl.) No.10362 of 2010) In this appeal the appellant has challenged the correctness of an order dated 22nd September, 2010 passed by the High Court of Delhi, quashing FIR No.97 of 2009 registered against respondent-husband and three others in Police Station, Crime against Women Cell, Nanakpura, New Delhi, for offences punishable under Sections 498A, 406 read with Section 34 IPC. The High Court has recapitulated the relevant facts and found that the appellant-complainant is a citizen of USA and had all along lived in USA with her son and husband, away from her in laws. The High Court has, on the basis of the statement made by the appellant in California Court, further found that the alleged scene of occurrence was in USA and that her in-laws had no say in the matrimonial life of the couple. The appellant had further stated that all her jewelry was lying in the couple's house in USA and no part of it was with her in-laws as was subsequently stated to be the position in the FIR lodged by the appellant. No locker number of the bank was disclosed in the FIR nor any date of the opening of locker or the jewelry items lying in it. The particulars of the bank in which the alleged locker was taken by him were also not given in the FIR. The High Court further held that the appellant had not lodged any report although the appellant's parents in-

laws were alleged to have stated that the jewelry items were not commensurate with the status of their family as early as in the year 1996. The High Court in that view held that no offence under Section 498A and 406 IPC, was made out against her in-laws on the basis of the allegations made by the appellant in the FIR.

Having heard learned counsel for the parties we are of the opinion that in the light of the findings recorded by the High Court the correctness whereof were not disputed before us, the High Court was justified in quashing the FIR filed by the appellant. In fairness to the learned counsel, we must mention that although a feeble attempt was made during the course of hearing to assail the order passed by the High Court, that pursuit was soon given up by him. In that view of the matter we see no reason to interfere with the orders passed by the High Court in Crl. M.C. No.3329 of 2009.

In the result

(i) Civil Appeal is allowed and order dated 8th March, 2010 passed by the High Court hereby set aside.

Consequently, proceedings in G.P. No.361/2001 filed by the appellant shall go on and be disposed of on the merits as expeditiously as possible.

(ii) Order granting interim custody of minor Kush with appellant is resultantly affirmed subject to the grant of visitation right to the father as indicated in body of the order.

(iii) The observations made in this order shall not prejudice the cases of the parties before the trial Court and shall be understood to have been made only for purposes of this appeal except in so far as the question of jurisdiction of the trial Court is concerned which aspect shall be taken to have been finally decided by this Court.

(iv) All authorities statutory or otherwise shall act in aid of the directions given hereinabove.

(v) Criminal Appeal No. 1184 of 2011, (Arising out of SLP (Crl.) No.10362 of 2010) is dismissed.

(vi) The parties are left to bear their own costs in this Court and the Courts below.

.....J. (V.S. SIRPURKAR) .....J. (T.S. THAKUR) New Delhi May 13, 2011