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LAHARI SAKHAMURI

v.

SOBHAND KODALI

(Civil Appeal Nos. 3135-3136 of 2019)

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MARCH 15, 2019

[A. M. KHANWILKAR AND AJAY RASTOGI, JJ.]

Family Law:

- Child custody – Petition for divorce and for custody of minor children (US citizens) filed by wife/mother in US – Order by US Court directing the husband/father to appear for conciliation and not to change the residence of children – In the meantime, due to family urgency wife/mother when came to India, filed petition in the Family Court seeking custody of the children – Family Court passed ex parte interim injunction order restraining the husband/father from taking away minor children – Emergency petition by husband/father before US Court – US Court passed order for continuing jurisdiction over custody matter and granted temporary custody to the wife/mother with direction to return the children to the jurisdiction of US Court – Husband/father's application objecting to jurisdiction of Family Court rejected – Appeal to High Court – Husband/father also filed writ petition seeking writ of Habeas Corpus for producing the minor children – High Court disposed of the appeal and the writ petition holding that Family Court did not have jurisdiction and that it was in the interest of the children to return to US – On appeal, held: In the facts of the case, High Court rightly rejected the application for custody of minor children before Family Court holding that the children were not ordinary residents of India – Taking holistic consideration of entire case, all the criteria such as comity of courts, orders of foreign court having jurisdiction over the matter regarding custody of children, citizenship of spouse and children, intimate connect and welfare and best interest of minor children weigh in favour of the husband/father – Direction issued to the wife/mother to return to US alongwith the children – Foreign Court – Comity of Court.*

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Child custody – Court has to keep in mind the best interest of the child as the paramount consideration while granting custody of minor children – The crucial factors for gauging the welfare of the children are such as maturity and judgment; mental stability; ability to provide access to school; moral character; ability to provide continuing involvement in the community; financial sufficiency; factors involving relationship with the child as opposed to characteristic of the parent as an individual.

Custody dispute – Negotiated resolution – Preference of, over judicial resolution – Held: Negotiated resolution is preferable from child's perspective.

Disposing of the appeals, the Court

HELD: 1. The appellant had filed application for divorce and custody of minor children in the US Court and order came to be passed by the US Court. Despite that interim order, the appellant came to India and within 20 days of her arrival in India, filed an application for custody of minor children, in the Family Court in India concealing her application for custody filed in the US Court. She also did not disclose that an order came to be passed by the US Court against her. In the given facts and circumstances, the opinion of the High Court that the minor children were not ordinary residents of India as envisaged under Section 9(1) of the Guardians and Wards Act, 1890, is upheld. Resultantly, the application for custody of minor children filed before the Family Court in India is rightly rejected by the High Court in exercise of power under Order 7 Rule 11 of CPC. At the same time, when the orders have been passed by the US Court, the parties cannot disregard the proceedings instituted before the US Court filed at the instance of the appellant who is supposed to participate in those proceedings. [Para 31] [265-E-H]

2.1 Child rights may be limited but they should not be ignored or eliminated since children are in fact persons wherein all fundamental rights are guaranteed to them keeping in mind the best interest of the child and the various other factors which play a pivotal role in taking decision to which reference has been made taking note of the parental autonomy which courts do not easily discard. [Para 50] [276-B]

- A 2.2 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 happened to be the US citizens and further order been passed on the respondent's emergency petition with special release in custody on 9th March, 2018
- B permitting the respondent to apply for US passports on behalf of the minor children without appellant being mother's consent. The appellant 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. [Para 48] [275-D-F]
- D 2.3 The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be *inter alia*, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual. [Para 49] [285-G]
- F 2.4 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, identify, social well-being and physical, emotional and intellectual development". [Para 43] [273-D-E]

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2.5 It is not in dispute that both the minor children, from the very inception of their birth, till removal from the US were living with their parents in US. This fact was admitted by the appellant also in the guardianship petition filed before the Family Court in India and also in the divorce and custody petition filed by her in US and only after hearing counsel for the parties, order was passed by the US Court on 22nd May, 2017 on the emergency custody petition granting temporary physical custody of the children with further direction to the appellant to return along with the children to the jurisdiction of US Court on 2nd June, 2017. In case she was aggrieved by the order dated 22nd May, 2017 passed by the US Court after affording an opportunity of hearing which she contested through her Attorney, all the courses were available to her to assail the order of the Court. Since the appellant failed in returning the children to the jurisdiction of the US Court despite order dated 22nd May, 2017, there was no option left with the respondent but to file a Habeas Corpus Petition and pray that the children be repatriated back to US in compliance of the order of the US Court. [Para 47] [274-G-H; 275-A-C]

2.6 The best interest of the children being of paramount importance will be served if they return to US and enjoy their natural environment with love, care and attention of their parents including grandparents and to resume their school and be with their teachers and peers. [Para 56] [277-F-G]

2.7 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, the Court is 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

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- A in favour of the respondent 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. [Para 51] [276-C-E]

3. The judicial resolution of a custody dispute may permanently affect or even end the parties' legal relationship but the social and psychological relationship will usually continue and it seems appropriate that a negotiated resolution between the parents is preferable from the child's perspective for several reasons. A child's future relationship with each of his parents may be better maintained and his existing relationship is less damaged by a negotiated settlement than by one imposed by a court after adversarial proceedings. In the present case, there is every possibility that the parties may reconcile and start over their relationship afresh, at least for the sake of happiness of their own off-spring if for no other reason. The parties are indeed mature and sensible enough to understand that the ordinary wear and tear of married life has to be put up in within the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Spouses must come over the temperamental disharmony which usually exists in every marriage, rather than magnifying it with impulsive desires and passions. Parents are not only caretakers, but they are instrumental in the development of their child's social, emotional, cognitive and physical well-being and work harmoniously to give their children a happy home to which they are justly entitled to.
- F [Para 54, 55] [277-B-E]

4. The appellant is directed to return to US along with both the children, within a period of six weeks. Further respondent is directed to make all arrangements of stay and travel expenses(including air tickets) of the appellant and both the children as well as her companion, if any, in their own house or if she is not willing to stay for any personal reasons, make all arrangements for stay at the place of her choice at reasonable cost. In case the appellant reports that she is not inclined to travel to US along with the minor children, or do not show any

interest to accompany the children, the respondent shall deposit a sum of Rs. 15 lakhs in the bank account of the appellant and proof of deposit shall be placed in the Registry of the High Court who shall thereupon call upon the Consulate General of the US at Hyderabad to take the custody of the minor children, along with their passports and other travel documents from the appellant and hand over the same to the respondent with a condition for taking the custody of the minor children for being taken to US and hand over to the jurisdictional Court in US until further orders are passed in the pending proceedings by the US Court. The appellant will be at liberty to utilize the money deposited by the respondent in connection with her visit to US, if so desired, in future and the respondent shall not take any coercive steps against her which in any manner may result in adverse consequences.[Para 57] [277-G-H; 278-A-D]

Nithya Anand Raghavan v. State (NCT of Delhi) and Another (2017) 8 SCC 454: [2017] 7 SCR 281; Surya Vadanan v. State of Tamil Nadu and Others (2015) 5 SCC 450 : [2015] 4 SCR 903 ; Jasmeet Kaur v. Navtej Singh (2018) 4 SCC 295 ; Surinder Kaur Sandhu v. Harbax Singh Sandhu and Anr. (1984) 3 SCC 698 : [1984] 3 SCR 422 ; Elizabeth Dinshaw v. Arvand M. Dinshaw and Another (1987) 1 SCC 42; V. Ravi Chandran (Dr.) v. Union of India and Others [2010] 1 SCC 174 : [2009] 15 SCR 960 – relied on.

Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112 : [1997] 5 Suppl. SCR 30 ; Kanika Goel v. State of Delhi through Station House Officer and Another (2018) 9 SCC 578 – referred to.

L(Minors) in re (1974) 1 All ER 913(CA) ; McKee v. McKee (1951) AC 352 – referred to.

Case Law Reference

[2017] 7 SCR 281	relied on	Para 21
[2015] 4 SCR 903	relied on	Para 21
(2018) 4 SCC 295	relied on	Para 22

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A	[1984] 3 SCR 422 (1987) 1 SCC 42 [2009] 15 SCR 960 [1997] 5 Suppl. SCR 30	relied on relied on relied on referred to	Para 23 Para 23 Para 23 Para 36
B	(2018) 9 SCC 578	referred to	Para 42

CIVIL/CRIMINAL APPELLATE JURISDICTION: Civil Appeal
Nos.3135-3136 of 2019

C From the Judgment and Order dated 08.02.2018 of the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in FCA Nos. 372 and 373 of 2017

With

D Criminal Appeal No. 500 of 2019.

Ms. Malvika Rajkotia, Ms. Akriti Tyagi, Ms. Rytim Vohra, Ms. Arpita Rai, Ms. Aashna Talwar, Mayank Grover, Ms. Trisha Gupta, Ms. Udita Singh, Vivek Singh, Lakshmi Raman Singh, Advs. for the Appellant.

E Ms. M. Arora, Sr. Advocate, Prabhjit Jauhar, Ms. Sheetal Kocher, A. Ishwar Rosemary Raju, S. S. Jauhar, Advs. for the Respondents.

The Judgment of the Court was delivered by

RASTOGI, J. 1. Leave granted.

F 2. Both the appeals although arise from two separate orders passed by the High Court of Hyderabad for the State of Telangana and State of Andhra Pradesh dated 8th February 2018 in a Habeas Corpus Petition filed at the instance of the respondent (Sobhan Kodali) and by the appellant (Lahari Sakhamuri) under the Guardians & Wards Act, 1890 primarily for the custody of the two minor children who were born in the

G United States on 14th March, 2012 and 13th October, 2014 and are US citizens and holding US passports. For the custody of children, a tussle was going on between the parents who are residing in US since 2004-2005. Their marriage was solemnized on 14th March 2008 in Hyderabad and both are green card holders and not only highly educated but well placed. It appears that some differences cropped up which can be a

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misunderstanding or failing to understand each other, various efforts were made through conciliation and after the matter came to this Court through the process of mediation, the orders of this Court indicate that lot of efforts were made for reconciliation and at one point of time, it reached to a final stage but unfortunately could not reach to its logical end for various reasons and factors.

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3. The persons who are affected are the minor children who have been directly impacted because of the fact that their parents have not been able to resolve their differences. Children are very sensitive and due to the conflict of their parents if could not be resolved at the earliest, the minor children became the victim of time for which they are not at fault but indeed the sufferers. It has to be examined in different perspective also that rights of the child as a progressive approach to the best interest of the child and what is needed in the best interest of the child is the one which has to be deciphered by us in the instant proceedings through the manifold arguments being advanced from both sides keeping in view the principles of law on the subject but still remain a guess work.

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4. Before this Court may proceed to examine the question, there are plentitude of judgments of this Court but still each case has to be decided on its own facts and circumstances. Obviously, the ultimate goal which has to be kept in mind is the best interest of the child which is of utmost importance and of a paramount consideration.

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5. The brief facts of the case which manifests from the voluminous record placed before us are that the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) are the parents of the minor children. Appellant (Lahari Sakhamuri) went to USA for her masters in September, 2004 and thereafter started working in USA. She is a Biomedical Engineer by profession. Respondent (Sobhan Kodali) is also highly qualified and went to USA in July 2005 and is presently a Cardiologist by profession. Their marriage was solemnized according to Hindu rites in Hyderabad on 14th March, 2008. From this wedlock, son, namely, Arthin and daughter Neysa were born on 14th March, 2012 and 13th October, 2014 and both are US citizens and also hold US passports. The couple purchased house in Pennsylvania on 29th January, 2016 in their joint names and moved to their new home. The son started going to a school in September 2014 and a daughter in December, 2016. Both the children being there in US from their birth, the social and cultural value of US certainly was embedded in both of them.

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- A 6. This fact cannot be ruled out that something certainly has gone wrong in their marital relations and it went to an extent where the appellant (Lahari Sakhamuri) took a decision to file petition for divorce and custody of the minor children in US on 21st December, 2016 on the premise that there was a complete irretrievable breakdown of marriage under the Divorce Code, 1980 prevalent in US. It may be relevant to note that along with the application filed for divorce and custody of minor children, there is a prescribed format which has to be filled disclosing the details of any wrong, if happened physically or abuse has been committed and the fact is that she was completely silent and positive in assertion in her application. Although both the parties were residing together in the same house, with joint legal custody of their children who were residing with them and there was no criminal/abuse history ever in the past.

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- D 7. Irretrievable breakdown of marriage can be due to marital difficulties with no reasonable prospect of reconciliation but it appears that in the US before such matrimonial matters are taken up for adjudication on the judicial side, all efforts are being made for conciliation and mediation between the parties which is also being actively taken note of under Section 89 of Code of Civil Procedure of resolving matrimonial and custodial disputes through the process of mediation and which is very successful and effective in India as well.

- E 8. It reveals from the record that on the date of filing of the petition for divorce and custody of minor children by the appellant (Lahari Sakhamuri), i.e. 21st December, 2016 in US, the order came to be passed on the petition directing respondent (Sobhan Kodali) to appear for conciliation conference on 20th January, 2017 and both the parties were directed not to change the residence of the children which would affect the other party's ability to exercise custodial rights. It may be appropriate to quote the extract of the order which came to be passed on the application filed by the appellant (Lahari Sakhamuri) which reads as under:
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G “ **ORDER OF COURT**

You, Sobhan Kodali, Defendant/Respondent, have been sued in court to obtain shared legal and primary physical custody of the children, Arthin Kodali, born March 14, 2012 and Neysa Sakhamuri Kodali, born October 13, 2014.

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You are ordered to appear in person at Room 325, Lehigh County Courthouse, 455 W. Hamilton Street, Allentown, Pennsylvania, on **January 20, 2017 at 2:00 p.m.**, for

XX	a conciliation or mediation conference.
	a pretrial conference.
	a hearing before the Court.

If you fail to appear as provided by this Order, an order for custody may be entered against you or the Court may issue a warrant for your arrest.

You must file with the Court a verification regarding any criminal record or abuse history regarding you and anyone living in your household on or before the initial in-person contact with the Court (including, but not limited to, a conference with a conference officer or judge or conciliation) but not later than 30 days after service of the Complaint or Petition.

No party may make a change in the residence of any child which significantly impairs the ability of the other party to exercise custodial rights without first complying with all of the applicable provisions of 23 Pa.C.S. §5337 and Pa.R.C.P. No. 1915.17 regarding relocation.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Lehigh County Bar Association

Lawyer Referral Service

P.O. Box 1324

Allentown, PA 18105-1324

Telephone: 610-433-7094

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Americans with Disabilities Act of 1990

- The Court of Common Pleas of Lehigh County is required by law to comply with the Americans with Disabilities Act of 1990. For information about accessible facilities and reasonable accommodations available to disabled individuals having business before the Court, please contact the Court Administrator's Office at (610) 782-3014. All arrangements must be made at least 72 hours prior to any hearing or business before the Court. You must attend the scheduled conference or hearing.

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BY THE COURT:

12/21/2016

Date

/RR

J.”

- D 9. It reveals from the record that efforts were going on in the process of conciliation and the same were held on 21st March, 2017 and since the parties could not arrive to any consensus regarding the custody of their children, another conference was scheduled as agreed for 25th March, 2017.

- E 10. By the time parties could reach to a final consensus by the intervention of the trained conciliators which indisputedly play a very pivotal role in matrimonial matters, there was a sad demise of the maternal grandmother of the appellant (Lahari Sakhamuri) and in providing strength and support to the family, the appellant travelled to India with both the minor children on 23rd March, 2017 with return tickets of 24th April, 2017 and within 20 days of coming to Hyderabad(India) where her family reside, filed a petition in the Family Court, Hyderabad on 12th April, 2017 seeking custody of minor children and injunction against respondent (Sobhan Kodali) under the Guardians and Wards Act, 1890 and she was able to succeed in getting ex-parte interim injunction on G 12th April, 2017. It would be appropriate to quote the extract of the ex-parte injunction order passed by the learned Family Court, Hyderabad dated 12th April, 2017 which is as follows:-

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LAHARI SAKHAMURI v. SOBHN KODALI
[RASTOGI, J.]

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“AD INTERIM INJUNCTION

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IN THE COURT OF JUDGICE ADDITIONAL FAMILY COURT :

CITY CIVIL COURT : HYDERABAD

I.A. No. 292 OF 2017

in

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OP No.433 of 2017

BETWEEN :

Smt. Lahari Sakhamuri,
W/o Sobhan Kodali, Hindu,
aged 34 years, R/o Plot No. 443/A-28,
Road No.86, Jubilee Hills,
Hyderabad T.S

... Petitioner

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AND

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Sobhan Kodali,
S/o Dr. Jaya Ramesh Kodali, Hindu,
aged about 37 years,
R/o # 2C85, Bellflower Lane,
Centre Valley, Lehigh County,
Pennsylvania-18034, USA

... Respondent

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To

Sobhan Kodali,
S/o Dr. Jaya Ramesh Kodali,
Hindu, aged about 37 years,
R/o # 2C85, Bellflower Lane,
Centre Valley, Lehigh County,
Pennsylvania-18034, USA

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UPON MOTION made unto this court by Sri K. Chaitanya, Counsel for the petitioner seeking the court to grant ad interim injunction restraining the respondent from forcibly taking away

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A the minor children Arthin Kodali and Neysa Sakhamur from the custody of the petitioner pending the above O.P.

Upon hearing of the arguments of the counsel for the petitioner this court while issuing notice to respondent returnable by 26.04.2017 doth order restraining respondent from taking away

B minor children namely Arthin Kodali and Neysa Sakhamur from the custody of the petitioner till 26.04.2017 and that petitioner should not shift the children from the jurisdiction of this court without permission from the court, and that petitioner should also look after food, shelter and medical facilities of the children petition stood posted to 26.04.2017.

C Given under my hand and the seal of the court on this the 12th day of April, 2017.

Sd/-

D JUDGE, ADDL. FAMILY COURT
CITY CIVIL COURT, HYDERABAD”

E 11. After few days, she also filed a FIR against respondent (Sobhan Kodali) and his family members for offence under Section 498A IPC i.e. on 21st April, 2017 but after investigation, the police filed closure report on 1st November, 2017. The fact to be noticed here at this stage is that the very appellant (Lahari Sakhamuri) filed a petition for divorce and custody of minor children in US on 21st December, 2016, there was no whisper or an averment that there was any domestic violence or abuse either subjected upon her or the minor children by respondent (Sobhan Kodali) and he was informed on 23rd April, 2017, twelve hours before her flight that she would not be returning and does not have a travel date in mind. Respondent (Sobhan Kodali) and his counsel in the US were orally informed of the ex-parte order which was received by respondent (Sobhan Kodali) on 29th April, 2017 through e-mail from the counsel for appellant (Lahari Sakhamuri) in India.

F G 12. Immediately, on receiving the oral information, on 26th April, 2017, emergency petition for interim orders in petition for divorce and custody filed at the instance of the appellant (Lahari Sakhamuri) was

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filed by respondent (Sobhan Kodali). The said application was contested by the appellant (Lahari Sakhamuri) through Attorney and in defence stated that she had only temporarily relocated to India for attending her grandmother's funeral and providing emotional support to her mother. After hearing the parties, the US Court passed order on 22nd May, 2017 for continuing the jurisdiction over the custody matter and granted temporary physical custody of the children to respondent (Sobhan Kodali) with a further direction that children be returned to the jurisdiction of the Court in US by 2nd June, 2017. It would be appropriate to quote the extract of the order passed by US Court on the emergency custody petition filed by respondent Sobhan Kodali on 22nd May, 2017:-

“IN THE COURT OF COMMON PLEAS OF LEHIGH

COUNTY, PENNSYLVANIA CIVIL DIVISION

Lahari Sakhamuri)
Plaintiff) File No.2016-FC-1641

Vs)

Sobhan Kodali) in custody
Defendant)

ORDER

AND NOW, this 22nd May, 2017 upon consideration of the Emergency Petition for Relief Requesting an Interim order of custody filed 26.04.2017, by defendant and hearing conducted on 22.05.2017 attended by the defendant / petitioner Sobhan Kodali represented by his legal counsel, Mark B. Dischell, Esquire and plaintiff/respondent, Lahari Sakhamuri having failed to appear for said hearing, but represented by her legal counsel, Mary J B. Eidelman Esquire;

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A IT IS HEREBY ORDERED that :

1. Lehigh County, Pennsylvania, United States of America shall remain the sole home country, home state and country of the parties' minor children, Arthin Kodali born 14.03.2012 and Neyas Sakhamuri Kodali, born 13.10.2014.
- B 2. This Court shall have sole continuing jurisdiction of this custody matter which was filed by the plaintiff, Lahari Sakhamuri, on 21.12.2016.
3. Pending further order of court, father is granted temporary physical custody of the children;
- C 4. Mother shall return the children to Lehigh County, Pennsylvania, United States of America, to the father's custody on late than 02.06.2017.
- D 5. Until the children's return, father shall have telephone and video chat contact with the children each day;
6. Upon her return to this jurisdiction, mother shall not be permitted to travel out of the Commonwealth of Pennsylvania with the minor children without further order of court;
- E 7. The passports of the children shall be held in escrow by the parties' counsel or another mutually agreeable person;
8. Should the mother fail to return the children to father by 02.06.2017, mother shall pay to father \$1,000 each day she does not return the children;
- F 9. In the event mother does not return the children to the father by 02.06.2017, father and/or any of his designees being his father, Jayaramesh Kodali; his mother, Vijaya Bharathi; his cousin, Chaitanya Kadiyala, shall be permitted to receive the children from mother in India and bring them to Lehigh County, Pennsylvania, United States of America;
- G 10. Until such time as mother returns to the United States, she shall be precluded from seeking child support on behalf of the children;

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11. A certified copy of this order shall be sent to the America Consulate in India and shall be registered with appropriate court / jurisdiction in Hyderabad, India; A
12. Within thirty (30) days of this order, mother shall pay father \$10,000 as partial payment towards counsel fee incurred by father in this matter. A final determination on the amount of counsel fees to be paid by mother to father will be made by the court after subsequent hearing which may be requested by either party. B

BY THE COURT : C

Sd/-

Daniel K. McCarthy”

13. Thereafter, the respondent (Sobhan Kodali) moved an application under Order 7 Rule 11 CPC in the proceedings instituted in the Family Court, Hyderabad asserting that the Family Court, Hyderabad has no jurisdiction to decide the application for the custody of minor children as they are not the ordinary resident of Hyderabad but that came to be rejected vide order dated 15th September, 2017 holding that the Family Court, Hyderabad is competent to exercise jurisdiction to examine the application filed at the instance of the appellant (Lahari Sakhamuri) on merits. D E

14. At this stage, respondent (Sobhan Kodali) preferred appeal to the High Court under Section 19(1) of the Family Courts Act against the order dated 15th September, 2017 passed by the learned Family Court, Hyderabad holding jurisdiction to examine the application filed by the appellant (Lahari Sakhamuri) regarding custody of the minor children under Guardians and Wards Act, 1890. Simultaneously, without any loss of time, respondent (Sobhan Kodali) also filed a writ petition seeking Writ of Habeas Corpus for producing the minor children in the custody of the US Court taking note of the earlier order passed dated 21st December, 2016 followed with order dated 22nd May, 2017. The appeal and the writ petition were clubbed but were decided by the High Court by separate orders dated 8th February, 2018 holding that the Family F G

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- A Court, Hyderabad has no jurisdiction as the children are not ordinarily residing within the jurisdiction of the Family Court, Hyderabad as provided under Section 9 of the Guardians and Wards Act, 1890. In consequence thereof, application filed by the appellant (Lahari Sakhamuri) stood rejected. At the same time, in the Habeas Corpus Petition, Order came to be passed dated 8th February, 2018. The Court finally ordered as under:-
- C “36 In view of the above discussion and the legal position, we are of the considered opinion that it would be in the best interest of the minor children to return to the US so that they can enjoy there in the natural environment, receive the love, care and attention of their father and paternal grandparents, resume their school and be with their teachers, peers and friends.
- D 37. Accordingly, we hereby direct the 5th respondent to return the children to the petitioner in India within four (04) weeks from the date of receipt of a copy of this order failing which, the Consulate General of the US at Hyderabad shall take the custody and handover the custody of the children to the petitioner in India or in the US by making their comfortable journey to US.
- E 38. The 5th respondent is also highly educated and was gainfully employed in the US for number of years. Accordingly, we hereby grant liberty to the 5th respondent, whenever she feels to visit the children in US, the petitioner shall make all arrangements i.e., travel, comfortable stay at US and other expenses till the US Court pass directions in the petitions filed by the 5th respondent or she become the gainful in any country, whichever is earlier.
- F 39. As undertaken by the petitioner that, we direct the petitioner that he shall not insist upon costs and fine imposed by the Court of US upon the 5th respondent.
- G 40. We also direct the petitioner that if children are in India and 5th respondent happens to be in India, the children shall remain with 5th respondent. He shall give all access to 5th respondent to chat with the children on whatsapp and video conference etc.”
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15. Both the orders passed by the High Court while disposing of the appeal filed by the respondent (Sobhan Kodali) under Section 19(1) of the Family Courts Act as well as the Habeas Corpus Petition dated 8th February, 2018 came to be challenged by the appellant (Lahari Sakhamuri) in the present appeals.

16. In the pending proceedings, in the Court of Common Pleas of Lehigh County, Pennsylvania Civil Division-Law, further order has been passed on 9th March, 2018 permitting the respondent (Sobhan Kodali) to apply for replacement of US passports on behalf of the minor children. The order is reproduced as under:-

“IN THE COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION – LAW

LAHARI SAKHAMURI, :
Plaintiff, : NO. 2016-FC-1641
Vs. : D

SOBHAND KODALI, : IN CUSTODY
Defendant, : E

ORDER OF COURT

AND NOW THIS 9th day of March, 2018, upon consideration of the Defendant’s Emergency Petition for Special Relief in Custody, it is hereby ORDERED and DECREED as follows:

1. Defendant’s Emergency Petition for Special Relief is GRANTED;
2. Defendant, Sobhan Kodali, is granted sole legal custody of the minor children, Arthin Kodali, born March 14, 2012, and Neysa Sakhamuri Kodali, born October 13, 2014;
3. Mother’s retention of the children in India is a “wrongful retention” of the children pursuant to the Child Abduction Remedies Act, codified at 23 Pa.C.S. § 5201 et. seq.

- A 4. Defendant, Sobhan Kodali, shall be permitted to apply for replacement U.S. Passports on behalf of the minor children, Arthin Kodali, born March 14, 2012, and Neysa Sakhamuri Kodali, born October 13, 2014, through application of Form DS-11 attached hereto as Exhibit "B", and without Mother's consent.
- B 5. The United States Department of State, upon presentation of a Certified Copy of this Order, shall issue replacement passports to Sobhan Kodali, Father of the minor children, even though Father previously requested the entry of the children into the Department's Child Passport Issuance Alert Program (CPIAP) and received confirmation of the entry of the children into that system on May 24, 2017, via Case Number 1536567.
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BY THE COURT

J.”

- D 17. Before the submissions made by the learned counsel for the parties being canvassed, it may reveal from the orders passed by this Court that keeping in view the personal relations of the spouse and the utmost and paramount consideration of the welfare of the children on a high pedestal and to find out if there is any possibility in resolving their matrimonial differences through the process of mediation which indisputably plays a very pivotal role in such matters. The parties appeared in person on various dates and at one stage, it was sent for mediation as it reveals from Order dated 12th October 2018, the Court appointed Mediator used his good office to find out an amiable solution which may be acceptable to the parties and at one stage from Order dated 29th
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- F October, 2018, it reveals that the parties had reached to an amicable solution in resolving their on-going matrimonial differences by sitting across the table with the intervention of the Court appointed Mediator. But what happened thereafter is really very unfortunate that parties could not reach to any final conclusion and both the learned counsel informed this Court that as the mediation could not have been now possible, the matter may be heard and decided on merits.
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- H 18. Learned counsel for the appellant Ms. Malavika Rajkotia, submits that repatriation to US would not be in the best interest of the children and this Court has always held that the best interest of the children cannot be sacrificed on the principle of comity of courts or any

other legal principle could not plead in overcoming the best interest of the children which is of primary and paramount consideration. Learned counsel submits that there is a statutory presumption in favour of the mother, under the tender years doctrine and respondent (Sobhan Kodali) is unable to dispel from the pleadings on record in the instant proceedings and she being a fit mother and the best interest of the children is with mother as the primary caretaker and once the custody of the minor children is with mother appellant (Lahari Sakhamuri), it is in the children's best interest for the court to ensure the psychological well-being and the legal rights of the mother by protecting her autonomy at the first instance, to exercise her choice of location, particularly when she is distressed in her matrimonial home.

19. Learned counsel further submitted that the *prima facie* assumption may be rebutted in a trial but she cannot be non-suited by not providing her an opportunity in establishing her parental competence and the circumstances leading to protect herself and the children. Learned counsel further submitted that the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) are Indian citizens and to separate the primary caregiver from the children under the "best interest of child" rule constitutes invasion of her fundamental right of autonomy guaranteed to her under the law and further submitted that in giving parental rights and privileges, what is to be ensured is the best interest of the children that is admittedly difficult as it is related to their life and welfare in such circumstances is being called by a psychologist as the "least worst option" considering that the ideal of proximity with both parents is not possible in a given situation. The children and their mother are in India and is an accessible jurisdiction for the father being married in India and Indian law applies in a cultural context that is well appreciated here and respondent (Sobhan Kodali) father has means to come to India and meet his children in India.

20. Learned counsel for the appellant further submits that though she has been completely silent in her proceedings instituted in the US Court in a divorce and custody petition of the children as there is a provision in US that one can seek divorce if there is a irretrievable break down of marriage and prospects of conciliation is reasonably ruled out hence there was no occasion for her to indicate what mentally and physically she has suffered and how constrained it was to live due to acute mental, emotional and even physical violence and it is not in the

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- A interest of the children that their mother be pinned into an unhappy, abusive situation. It is not in the welfare of the children to be witness to their mother being devalued. It is also not in their interest that they, witness continued toxic conflict of their parents living as a family or even in proximity of collaborative parenting. In such cases, distance with the spouse, with the child as the only point of contact between two parents in their own location is the best solution.

21. Learned counsel for the appellant submits that due to the harassment meted out and humiliation suffered by her and their minor children at the hands of respondent (Sobhan Kodali) husband, no other option was left with her other than staying away from US. Further, the children are admitted in the best school in Hyderabad where they are presently studying. Learned counsel has further submitted that in *Nithya Anand Raghavan Vs. State(NCT of Delhi) and another*¹, this Court has disagreed with the conclusions drawn in *Surya Vadanan Vs. State of Tamil Nadu and Others*² laying down the “first strike” principle that weightage should be given to the order of the foreign Court which has jurisdiction and held that the best interest and welfare of the children is of paramount importance and that if handing over of the children to the foreign Court’s jurisdiction would harm their best interest and welfare, the Court would not direct their return to the place falling within the jurisdiction of the foreign Court. That applying the principles laid down in the said case, the two minor children who are happily placed in the company of the appellant and her parents, if are entrusted to the foreign court’s jurisdiction, the same may not be in their best interest and welfare of the children. Learned counsel submits that Indian Courts have jurisdiction because the parties had married here and the Hindu Marriage Act applies to Divorce and Section 26 deals with custody. What is being pleaded by the respondent under Order 7 Rule 11 CPC is a mixed question of law and facts and hence could be examined only during the course of the trial but not at this stage.

22. In support of the submission, learned counsel has placed reliance on the decision of this Court in *Jasmeet Kaur Vs. Navtej Singh*³ holding that the jurisdiction founded on domicile is a matter of trial and cannot be decided summarily and submitted that the custody petition filed under Guardians and Wards Act, 1890 has been rejected by the High Court

¹ 2017(8) SCC 454

² 2015(5) SCC 450

H ³ 2018(4) SCC 295

without taking note of the given fact situation and the scope under Order A
7 Rule 11 CPC.

23. Per contra, learned senior counsel for the respondent Ms. Meenakshi Arora, referred to the decisions of this Court in Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Anr.⁴; Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Another⁵; V. Ravi Chandran(Dr.) Vs. Union of India and Others⁶; Nithya Anand Raghavan's case(supra) and Surya Vadanan's case(supra), and taking assistance thereof, submitted that two minor children were born in US and both of them are US citizens and are school goers and they enjoyed their schooling (which is evident from the photographs filed along with the additional documents) and removal of children from the US despite the Order of the US Court affects their future and the same may not be in their best interest.

24. Learned counsel further submitted that the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) started their matrimonial life in the US and been there for almost 14 years, they are being acclimatized with that culture and in their married life, except for duration on short visit to India, they spent their good time in US and removing the children from the US, in the given circumstances, may not be in their best interest. Learned counsel submitted that the appellant (Lahari Sakhamuri) had herself admitted that children were in shared custody with respondent (Sobhan Kodali) and she was never subjected to domestic violence at any given point of time and she had invoked the jurisdiction of US Court for divorce and custody of minor children based on their residence and, therefore, it may not be open for her to disregard the orders of US Court, more specially the order dated 22nd May, 2017 whereby respondent (Sobhan Kodali) was granted temporary physical custody of the children and appellant (Lahari Sakhamuri) was directed that minor children should be returned to the jurisdiction of US Court by 2nd June, 2017.

25. Learned counsel submitted that from the material which has come on record, even inference cannot be drawn that there could be any harm caused to the minor children in returning to their native state, i.e. US. Moreover, in the proceedings on behalf of the appellant (Lahari

⁴ 1984(3) SCC 698

⁵ 1987(1) SCC 42

⁶ 2010(1) SCC 174

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- A Sakhamuri) filed before the US Court, it is her own admission that there was no domestic violence having perpetrated upon her nor she was subjected to cruelty rather had asked for shared custody of children along with respondent (Sobhan Kodali) and in the given circumstances, her unilateral decision to return to India cannot deprive the minor children in terms of the love, attention, care and facilities, amenities, upbringing and environment to which they are accustomed to while in the US. No doubt, it is not the decision of the minor children to remain in India away from their father and their school and their peers. The US Court has the most intimate contact and closest concern to decide on the issue of minor children which has been extensively examined by the High Court
- B and finding has been recorded under the impugned judgment upholding children best interest.

26. Learned counsel submitted that best interest of children has been sidelined while deciding to stay back in India with the minor children who are admittedly US citizens and were permanently residing in US till
- D 23rd March, 2017 when they were removed from US in contravention of the Order dated 21st December, 2016 passed by the US Court and forcibly separated from their father respondent herein and the environment in US which children were experiencing, is their natural environment and in the given circumstances, detention of the children in India is unlawful and in violation of Child Abduction Remedies Act of minor children applicable in US and US Court has rightly directed the appellant (Lahari Sakhamuri) to bring back the children to US Court by 2nd June, 2017 and the findings which have been recorded by the High Court are based on cogent available material on records and needs no further interference.

27. Learned counsel further submits that the minor children are not ordinary residents of the jurisdiction of Family Court, Hyderabad as defined under Section 9 of the Guardians and Wards Act, 1890 as both are natural born US citizens and came to India only on 23rd March, 2017 and within 20 days, application came to be filed by the appellant (Lahari Sakhamuri) on 12th April, 2017 before the Family Court, Hyderabad for
- G the custody of the children with ex-parte interim injunction passed by the learned Court and even from the pleadings, nothing is borne out that how the Ld. Family Court, Hyderabad was having jurisdiction to entertain application under Guardians and Wards Act, 1890 and in the given

circumstances, the application filed by the respondent (Sobhan Kodali) under Order 7 Rule 11 CPC was arbitrarily rejected by the Ld. Family Court and that was reviewed by the High Court on the material available on record and the finding has been recorded holding that the children are not the ordinary residents of jurisdiction of the Family Court, Hyderabad where an application was filed by the appellant (Lahari Sakhamuri) for custody of the children and no error was committed by the High Court in rejecting the application filed by the appellant (Lahari Sakhamuri) under Guardians and Wards Act, 1890 for lack of jurisdiction and merely because their marriage was solemnized in Hyderabad would not confer a territorial jurisdiction to the Family Court, Hyderabad for the purpose of custody of the minor children under the Guardians and Wards Act, 1890.

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28. Learned counsel further submits that both the issues in respect of the custody of the minor children and rejection of an application due to lack of territorial jurisdiction entertained by learned Family Court, Hyderabad has been discussed in detail under the two separate impugned judgments by the High Court and needs no further interference of this Court.

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29. We have heard learned counsel for the parties and with their assistance perused the record and also the plentitude of judgments cited of this Court. Before we proceed, it will be appropriate to take note of what transpired between the hearing of the instant appeals. On 26th March, 2018, this Court directed the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) to remain personally present on the next date of hearing which was 9th April, 2018. During pendency of the proceedings, respondent (Sobhan Kodali) was allowed to meet children possibly keeping in view the amicable solution, if possible, to be arrived at between the parties and at one stage by Order dated 12th October, 2018, the parties were granted liberty to resolve their issues inter se amicably and to facilitate the parties in arriving at an amicable solution, a senior counsel was requested to mediate which was voluntarily accepted by the parties. Pursuant thereto, possibilities of settlements were explored and at one stage, settlement was also arrived at possibly acceptable to the parties as it reveals from the Order dated 29th October, 2018 of this Court. It will be appropriate to quote the extract of the order dated 29th October, 2018 followed by Order dated 27th November, 2018, which are as under:-

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A **Order dated 29th October, 2018**

“Both the respondent/husband and petitioner/wife are present. We are extremely happy that they have decided to forgive each other, forget the past and take their family life forward.

B Mrs. Lahri Sakhamuri/petitioner has submitted that she will withdraw all the cases filed by her in India and abroad and she does not want to pursue any criminal proceedings.

Since Mr. Sobhan Kodali/respondent has to go back to United States tomorrow i.e. on 30.10.2018, post this matter on 14.11.2018 for formal orders, on the basis of the arrangement the parties have jointly made.

We stay all the pending cases between Mrs. Lahari Sakhamuri and Sobhan Kodali, both civil and criminal.

D We also restrain them from instituting any case against each other or the members of their family or filing any petition/complaint against each other or their family members, without express permission from this Court.

E We record our appreciation for the strenuous efforts taken by Mr. Gurukrishna Kumar, learned senior counsel, for facilitating the reconciliation.”

Order dated 27th November, 2018

“Learned counsel for both sides on instructions submit that they will withdraw all the cases filed against each other either in India or in United States.

F We direct the petitioner-Mrs. Lahari Sakhamuri to withdraw all the cases in both the jurisdictions within a period of one week from today. Let the respondent also withdraw all the cases filed both in India or in United States within the same period of time.

G Learned counsel for the respondent-husband on instructions submits that within 10 days, he will arrange for the passport of the minor child-Arthin from U.S. Consulate. It is also stated that husband will take all necessary steps for resolving all issues, if any, pertaining to the immigration and Visa status of the petitioner within the same period of time.

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Once such issues are cleared, we direct the petitioner to travel to U.S. along with her husband and children within a week of obtaining such clearances.

We record our appreciation for the strenuous efforts taken by Shri Gurukrishna Kumar, learned senior counsel for assisting the parties to arrive at an amicable settlement and for reunion.

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List on mentioning by either side.”

30. What unfolded thereafter may not be appropriate for this Court to take notice but the fact remains that agreement arrived at between the parties could not be taken to its logical end. It would have been better and in the interest of the parties themselves to amicably resolve their differences for their better future but as they have failed to do so, the judicial process has to intervene to decide the case on merits based on judicial precedents.

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31. In the instant case, the facts on record clearly manifest that parties were residing in US since 2004-2005 and their marriage was solemnized in Hyderabad on 14th March, 2008. Both the children were born in US on 14th March, 2012 and 13th October, 2014 and are US citizens with US passports. Notably, the appellant (Lahari Sakhamuri) filed application for divorce and custody of minor children in the US Court on 21st December, 2016 and order came to be passed by the US Court on 21st December, 2016. Despite that interim order, the appellant (Lahari Sakhamuri) came to India on 23rd March, 2017 and within 20 days of her arrival in India, filed an application on 12th April, 2017 for custody of minor children in the Family Court, Hyderabad concealing her application for custody filed in the US Court. She also did not disclose that an order came to be passed by the US Court against her dated 22nd May, 2017 after hearing the counsel for the parties. In the given facts and circumstances, we find no difficulty in upholding the opinion of the High Court that the minor children were not ordinary residents of Hyderabad(India) as envisaged under Section 9(1) of the Guardians and Wards Act, 1890. Resultantly, the application for custody of minor children filed before the Family Court, Hyderabad is rightly rejected by the High Court in exercise of power under Order 7 Rule 11 of CPC. At the same time, when the orders have been passed by the US Court, the parties cannot disregard the proceedings instituted before the US Court filed at the instance of the appellant (Lahari Sakhamuri) who is supposed to participate in those proceedings.

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- A 32. The judgment relied upon by the learned counsel for the appellant of *Jasmeet Kaur's case*(supra) may not be of any assistance for the reason that it was a case where one of the child was born in India which was one of the reason prevailed upon this Court to hold that principle of comity of courts or principle of forum convenience cannot determine the threshold bar of jurisdiction and when paramount consideration is the best interest of the child, it can be the subject-matter of final determination in proceedings and not under Order 7 Rule 11 CPC. In our considered view, the application for custody of minor children filed at the instance of the appellant was rightly rejected by the High Court under the impugned judgment, in consequence thereof, no legal proceedings in reference to custody of the minor children remain pending in India.

33. The custody of minor children has been considered difficult in adjudication by the Courts apart from raising delicate issues, especially when the spouses are non-resident Indians(NRIs).

- D 34. This Court in *Surinder Kaur Sandhu's case*(supra) was concerned with the custody of a child who was British citizen by birth whose parents had been settled in England after their marriage. A child was removed by the husband from the house and was brought to India. The wife obtained a judicial order from the UK Court whereby the
- E husband was directed to hand over the custody of a child to her. The said order was later confirmed by Court of England and thereafter the wife came to India and filed a writ petition in the High Court of Punjab and Haryana praying for custody and production of the child which came to be dismissed against which the wife appealed to this Court. This Court keeping in view the ‘welfare of the child’, ‘comity of courts’ and ‘jurisdiction of the State which has most intimate contact with the issues arising in the case’ held thus:-

- G “**10.** We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact

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with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses (See *International Shoe Company v. State of Washington* [90 L Ed 95 (1945) : 326 US 310] which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy.”

35. In Elizabeth Dinshaw's case (supra), this Court held that it is the duty of courts in all countries to see that a parent doing wrong by removing children out of the country does not gain any advantage by his or her wrongdoing and was guided by the factors such as the longer time spent by the child in the US in which the child was born and became US citizen and also the fact that the child has not taken roots in India and was still not accustomed and acclimatized to the conditions and environment obtaining in the place of his origin in the United States of America. This Court took note of the fact that the child's presence in India is the result of an illegal act of abduction and the father who is

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- A guilty of the said act cannot claim any advantage by stating that he has already put the child in some school in Pune.

36. In *V. Ravi Chandran(Dr.)'s case*(supra), 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) in re*⁷ and *McKee Vs. McKee*⁸ and also noticed the decision of this Court in *Elizabeth Dinshaw's case*(supra) and *Dhanwanti Joshi Vs. Madhav Unde*⁹ 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 US Courts. The relevant portion is as under:-

- D “**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.
- E **30.** However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country,

H ⁷(1974) 1 All ER 913(CA)

⁸1951 AC 352

H ⁹1998(1) SCC 112

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* [1951 AC 352 : (1951) 1 All ER 942 (PC)] 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), In re* [(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] and the said view has been approved by this Court in *Dhanwanti Joshi* [(1998) 1 SCC 112]. Similar view taken by the Court of Appeal in *H. (Infants), In re* [(1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)] has been approved by this Court in *Elizabeth Dinshaw* [(1987) 1 SCC 42 : 1987 SCC (Cri) 13].”

37. This Court once again reiterated the principles of the closest concern, most intimate contact with the issues arising in the case, natural habitat of the minor child, best interest of the child and comity of Courts. This Court eventually directed the child to be taken to US from where he was removed to enable the parties to establish their right in the native state of the child, i.e. US.

38. In *Surya Vadanan's* case(supra), it was a case where the spouses were of Indian origin and later the husband became the citizen of UK. They got married in India and had two daughters in UK. The wife also became a British citizen and had a British passport. After matrimonial dispute arose between them, the wife returned to India with her daughters and filed a petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955 seeking divorce in the Family Court. At the same time, husband filed a petition in the High Court of Justice. The said Court had passed an order making the children wards of the Court during their minority or until further orders of the court and the wife was directed to return the children to the jurisdiction of the foreign court. This Court applied the principles of (i) “the first strike”, i.e the UK Court had passed effective and substantial order declaring the children of the parties as wards of that court, (ii) the comity of courts and (iii) the best interest and

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- A welfare of the child. It also held that the “most intimate contact” doctrine and the “closest concern” laid down in *Surinder Kaur Sandhu’s case*(supra) are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. The Court also reiterated that the best interest and welfare of the child are of paramount importance which shall always be kept in mind by the courts while adjudicating the disputes.

39. This was followed by a three Judge Bench of this Court in *Nithya Anand Raghavan’s case*(supra) in which one of us(Justice Khanwilkar) was a party. In that case, the couple married on 30th November, 2006 at Chennai and shifted to UK in early 2007. Disputes arose between the spouse. The wife had conceived in December, 2008 came to New Delhi in June 2009 and stayed there with her parents and she gave birth to a girl child in August, 2009 at Delhi. After the husband arrived in India, the couple went back to UK in March, 2010 and following certain unsavoury events, the wife and the daughter returned to India in August 2010. After exchange of legal correspondence, the wife and her daughter went back to London in December 2011. In July, 2014, the wife returned to India along with her daughter and early 2015 the child became ill and was diagnosed with cardiac disorder and due to the alleged violent behavior of her husband filed complaint against him at the GAW Cell, New Delhi. In 2016, husband filed custody/wardship petition in UK to seek return of the child. He also filed habeas corpus petition in 2017 in Delhi High Court which was allowed. The matter was brought before this Court by the wife. This Court heavily relied upon its earlier judgment in *Dhanwanti Joshi’s case*(supra) which in turn referred to *McKee’s case*(supra) where the Privy Council held that the order of foreign court would yield to the welfare of the child and that the comity of courts demanded not its enforcement, but its grave consideration. This Court also relied upon the judgment in *V. Ravi Chandran’s case*(supra) and held that the role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parents patriae jurisdiction, as the minor is within the jurisdiction of the Court. This Court further held that the High Court while dealing with the petition for issuance of habeas corpus concerning a minor child in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances into consideration. It was held further by this Court that each case must
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depend on the totality of the facts and circumstances brought before it while considering the welfare of the child which is of paramount consideration and the order of the foreign Court must yield to the welfare of the child and the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. It was further observed that writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or resort to any proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised. This Court has disapproved paragraph 56 (a) to (d) in *Surya Vadanan's case*(supra) which reads as follows:-

“**56.** However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. [*Arathi Bandi v. Bandi Jagadrakshaka Rao*, (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable

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A and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.”

40. As regards clauses (a) to (c) of paragraph 56 above, this Court termed the same as tending to drift away from the exposition in *Dhanwanti Joshi's case*(supra) and *V. Ravi Chandran's case*(supra)

B and with regard to clause (d), this Court disagreed with the same, and it was finally concluded as under:-

“69. We once again reiterate that the exposition in *Dhanwanti Joshi* [*Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112] is a good law and has been quoted with approval by a three-Judge

C Bench of this Court in *V. Ravi Chandran* (2) [*V. Ravi Chandran* (2) v. *Union of India*, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44]. We approve the view taken in *Dhanwanti Joshi*, inter alia, in para 33 that so far as non-Convention countries are concerned,

the law is that the court in the country to which the child is removed while considering the question must bear in mind 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. The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is

E not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the court to which the child has been removed

F is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child.”

41. The essence of the judgment in *Nithya Anand Raghavan's case*(supra) is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding

G 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.

H ¹⁰ 2018(9) SCC 578

42. In Kanika Goel Vs. State of Delhi through Station House Officer and another¹⁰ in which one of us(Justice Khanwilkar) is a member, the marriage of the couple was solemnized in New Delhi and accordingly girl child was born in US in 2014. The mother along with the child came to India in December, 2016 with their return ticket to Chicago in January 2017. She filed a divorce petition after coming to India in Delhi and husband filed emergency custody petition in US Court. Wife obtained an ex-parte order from Family Court, Delhi restraining husband from removing the child from India on 11th January, 2017. Husband obtained ex-parte order for interim sole custody on 13th January, 2017 from foreign Court. At the same time, husband filed Habeas Corpus Petition in Delhi High Court which ordered the mother to comply with the order of UK Court. This Court, after taking into consideration totality of facts and circumstances, observed that the custody of the minor girl child to remain with the appellant mother until she attains the age of majority or the court of competent jurisdiction, trying the issue of custody of the minor.

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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, identify, social well-being and physical, emotional and intellectual development”.

44. We shall now consider as to whether the facts and circumstances of the present case warrant summary enquiry into the question of custody of minor children, namely, Arthin and Neysa (as no legal proceedings between the parties remain pending in India) or whether an elaborate enquiry procedure will be necessary for entrustment of custody of the two minor children to the appellant (Lahari Sakhamuri) until they are produced before the US Court.

45. Indisputedly, the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) both were residing in US since 2004-2005 and are well educated as the appellant (Lahari Sakhamuri) did Biomedical Engineering and the respondent (Sobhan Kodali) is a Cardiologist by profession. Their marriage was solemnized on 14th March, 2008 and two loving children

- A namely, Arthin and Neysa, were born from this wedlock in US on 14th March, 2012 and 13th October 2014. Both have started going to school. They purchased a house in their joint name and moved to the new house in January, 2016. Something must have been gone wrong between them which compelled the appellant (Lahari Sakhamuri) in filing a divorce and custody petition of the minor children in the Court of Common Pleas of Lehigh County, Pennsylvania Civil Division on 21st December, 2016, seeking divorce, equitable distribution of marital property, primary physical and shared legal custody of the minor children. In the divorce petition, the appellant (Lahari Sakhamuri) made a specific averment about the permanent residence in US for both the parties and securing children's
- B custody and also admitted that both the minor children were residing in US. It was also admitted that both the children were in joint custody of the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) and they resided at 2085, Bellflower Lane, Canter Valley, Pennsylvania 18034.

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- D 46. It was her own admission in the declaration form annexed to the application that no mode of domestic violence or abuse was ever subjected upon her or upon the minor children by the respondent (Sobhan Kodali). The respondent (Sobhan Kodali) had purchased to and fro tickets of the appellant (Lahari Sakhamuri) and of minor children as also of his mother in law who was staying together in their matrimonial home, US with return tickets of 24th April, 2017 but after coming to India on 23rd March, 2017, because of the alleged death of her maternal grandmother, the appellant (Lahari Sakhamuri) refused to return back and was advised to file a Guardianship Petition before the Family Court, Hyderabad on 12th April, 2017 and took the ex-parte order concealing the material facts from the Family Court that such a petition is pending
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- F in US filed at her instance and there was an order passed on 21st December, 2016 restraining both the parties not to change residence of the children which would affect the other parties ability to exercise custodial rights.

- G 47. It is not in dispute that both the minor children, from the very inception of their birth, till removal from the US on 23rd March, 2017 were living with their parents in US. This fact was admitted by the appellant (Lahari Sakhamuri) also in the guardianship petition filed before the Family Court, Hyderabad and also in the divorce and custody petition filed by her in US and only after hearing learned counsel for the parties, order was passed by the US Court on 22nd May, 2017 on the emergency
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custody petition granting temporary physical custody of the children with further direction to the appellant (Lahari Sakhamuri) to return along with the children to the jurisdiction of US Court on 2nd June, 2017. In case she was aggrieved by the order dated 22nd May, 2017 passed by the US Court after affording an opportunity of hearing which she contested through her Attorney, all the courses were available to her to assail the order of the Court. Since the appellant (Lahari Sakhamuri) failed in returning the children to the jurisdiction of the US Court despite order dated 22nd May, 2017, there was no option left with the respondent (Sobhan Kodali) but to file a Habeas Corpus Petition and pray that the children be repatriated back to US in compliance of the order of the US Court.

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 happened to be the US citizens and further order been passed on the respondent's emergency petition with special release in custody on 9th March, 2018 permitting the respondent (Sobhan Kodali) to apply for US passports on behalf of the minor children without 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.

49. The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.

50. While dealing with the younger tender year doctrine, **Janusz Korczar** a famous Polish-Jewish educator & children's author observed "children cannot wait too long and they are not people of tomorrow, but

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- A are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they are meant to be - the unknown person inside each of them is our hope for the future.” Child rights may be limited but they should not be ignored or eliminated since children are in fact persons wherein all fundamental rights are guaranteed to them keeping in mind the best interest of the child and the various other factors which play a pivotal role in taking decision to which reference has been made taking note of the parental autonomy which courts do not easily discard.

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 favour 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.

52. Before we conclude, we would like to observe that it is much required to express our deep concern on the issue. Divorce and custody battles can become quagmire and it is heart wrenching to see that the innocent child is the ultimate sufferer who gets caught up in the legal and psychological battle between the parents. The eventful agreement about custody may often be a reflection of the parents' interests, rather than the child's. The issue in a child custody dispute is what will become of the child, but ordinarily the child is not a true participant in the process. While the best-interests principle requires that the primary focus be on the interests of the child, the child ordinarily does not define those interests himself or does he have representation in the ordinary sense.

53. The child's psychological balance is deeply affected through the marital disruption and adjustment for changes is affected by the way parents continue positive relationships with their children. To focus on the child rights in case of parental conflict is a proactive step towards

looking into this special situation demanding a specific articulation of A
child rights.

54. The judicial resolution of a custody dispute may permanently affect or even end the parties' legal relationship but the social and psychological relationship will usually continue and it seems appropriate that a negotiated resolution between the parents is preferable from the child's perspective for several reasons. A child's future relationship with each of his parents may be better maintained and his existing relationship is less damaged by a negotiated settlement than by one imposed by a court after adversarial proceedings. B

55. In the present case, there is every possibility that the parties may reconcile and start over their relationship afresh, at least for the sake of happiness of their own off-spring if for no other reason. The parties are indeed mature and sensible enough to understand that the ordinary wear and tear of married life has to be put up in within the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Spouses must come over the temperamental disharmony which usually exists in every marriage, rather than magnifying it with impulsive desires and passions. Parents are not only caretakers, but they are instrumental in the development of their child's social, emotional, cognitive and physical well-being and work harmoniously to give their children a happy home to which they are justly entitled to. We hope and trust that the parties will forget and forgive their differences and join hands together in providing the congenial atmosphere which may be good not for themselves but also for the development of their minor children. C

56. In our view, the best interest of the children being of paramount importance will be served if they return to US and enjoy their natural environment with love, care and attention of their parents including grandparents and to resume their school and be with their teachers and peers. D

57. We accordingly direct the appellant (Lahari Sakhamuri) to return to US along with both the children, namely, Arthin and Neysa, within a period of six weeks from today. We further direct respondent (Sobhan Kodali) to make all arrangements of stay and travel expenses(including air tickets) of the appellant (Lahari Sakhamuri) and G

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- A both the children as well as her companion, if any, in their own house or if she is not willing to stay for any personal reasons, make all arrangements for stay at the place of her choice at reasonable cost. In case the appellant (Lahari Sakhamuri) reports that she is not inclined to travel to US along with the minor children, or do not show any interest to accompany the children, the respondent (Sobhan Kodali) shall deposit a sum of Rs. 15 lakhs in the bank account of the appellant (Lahari Sakhamuri) and proof of deposit shall be placed in the Registry of the High Court of Andhra Pradesh who shall thereupon call upon the Consulate General of the US at Hyderabad to take the custody of the minor children, namely, Arthin and Neysa, along with their passports and other travel documents from the appellant (Lahari Sakhamuri) and hand over the same to the respondent (Sobhan Kodali) with a condition for taking the custody of the minor children (Arthin and Neysa) for being taken to US and hand over to the jurisdictional Court in US until further orders are passed in the pending proceedings by the US Court. The appellant (Lahari Sakhamuri) will be at liberty to utilize the money deposited by the respondent (Sobhan Kodali) in connection with her visit to US, if so desired, in future and the respondent (Sobhan Kodali) shall not take any coercive steps against her which in any manner may result in adverse consequences.
- E 58. It is further made clear that the observations which has been made by us are only for the limited purpose of engaging in summary inquiry for consideration in the petition of Habeas Corpus and will be of no assistance to either party in the custody proceedings pending in the US Court which indeed will be decided on its own merits.
- F 59. While parting, we express our word of gratitude for the sincere efforts put in by Mr. Gurukrishna Kumar, Senior Advocate, in persuading the parties to arrive at an amicable settlement.
- G 60. Consequently, Civil Appeals arising out of SLP(Civil) Nos. 15892-15893 of 2018 are dismissed. No costs.
- G 61. The Criminal Appeal arising out of SLP(Crl.) No. 2316 of 2018 stands disposed of in the above terms.
- G 62. Pending application(s), if any, stand disposed of.