

YASHITA SAHU

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v.

STATE OF RAJASTHAN & ORS.

(Criminal Appeal No. 127 of 2020)

JANUARY 20, 2020

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[DEEPAK GUPTA AND ANIRUDDHA BOSE, JJ.]

Child and Family Welfare – Child Custody – Parents in two different continents – In 2016, couple got married in India – Appellant-wife accompanied the husband, working in USA – A daughter was born in 2017 – Relationship of the couple got strained – Appellant inter alia sought sole custody of the minor child from the Norfolk Juvenile and Domestic Relations District Court– Consent order passed inter alia making provision for shared parenting – Before the next date fixed in the Norfolk Court, the appellant along with the child came to India– Husband filed motion for emergency relief before the said Court – Ex-parte order inter alia granted him custody of the child – Husband also filed petition for issuance of writ of habeas corpus before the Rajasthan High Court – High Court inter alia directed the wife to return to USA along with minor daughter – On appeal, held: It is too late in the day to urge that writ of habeas corpus is not maintainable if the child is in the custody of another parent – Court can invoke its extraordinary writ jurisdiction for the best interest of the child – Contention of the appellant that the writ petition was not maintainable, rejected – Further, since the wife brought the minor child to India in violation of the orders of the jurisdictional court in USA, her custody of the child cannot be said to be strictly legal – However, the High Court could not have directed the appellant to go to USA – Custody of a child is a different issue, but even while deciding such issue, no direction can be issued in writ jurisdiction to the adult spouse to go and live with the other strained spouse – In matters of custody of a child, the welfare of the child will always remain the paramount consideration – In cases like the present one where the parents are in two different continents, effort should be made to give maximum visitation rights to the parent

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- A *who is denied custody – Directions issued in two parts– First part will apply if the appellant is willing to go to USA on terms and conditions offered by the husband in his affidavit which is recorded as an undertaking to the Court and the husband is duty bound to abide by it– Second part to apply if she is not willing to go to USA, how should the husband be granted custody of the child – Further, in case if the visa/work permit of the husband is not extended and he has to leave USA then the appellant is at liberty to move Supreme Court for fresh directions – Constitution of India – Art.226 – Doctrine of comity of courts.*
- B *Constitution of India – Art.226 – Writ of habeas corpus – Maintainability of, in matters of child custody – Discussed – Child and Family Welfare.*
Doctrines/Principles – Doctrine of comity of courts – Held: Doctrine of comity of courts is a very healthy doctrine – If courts in different jurisdictions do not respect the orders passed by each other, it will lead to contradictory orders being passed in different jurisdictions – No hard and fast guidelines can be laid down in this regard and each case has to be decided on its own facts– Child and Family Welfare– Child Custody.
- C *Child and Family Welfare – Child Custody – Visitation rights; Contact Rights – Duty of Courts – Held: It is to be ensured that the Court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents – Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents – Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights – In addition to ‘Visitation Rights’, ‘Contact rights’ are also important for development of the child specially in cases where both parents live in different states or countries – Concept of contact rights in the modern age would be contact by telephone, e-mail or in fact, the best system of contact, if available between the parties should be video calling.*

Disposing of the appeal, the Court

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HELD : 1.1 Whether a writ of *habeas corpus* is maintainable?

It is too late in the day to urge that a writ of *habeas corpus* is not maintainable if the child is in the custody of another parent. The court can invoke its extraordinary writ jurisdiction for the best interest of the child. Therefore, the contention of the appellant-wife that the writ petition before the High Court of Rajasthan was not maintainable is rejected. In the present case since the wife brought the minor to India in violation of the orders of the jurisdictional court in USA, her custody of the child cannot be said to be strictly legal. However, the High Court could not have directed the appellant-wife to go to the USA. The wife is an adult and no court can force her to stay at a place where she does not want to stay. Custody of a child is a different issue, but even while deciding the issue of custody of a child, no direction can be issued to the adult spouse to go and live with the other strained spouse in writ jurisdiction. [Paras 9, 12] [427-C-D; 428-F-G]

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Elizabeth Dinshaw v. Arvand M. Dinshaw & Ors. (1987)

1 SCC 42 : [1987] 1 SCR 175 ; Nithya Anand Raghavan

v. State (NCT of Delhi) & Anr. (2017) 8 SCC 454 : [2017]

7 SCR 281 ; Lahari Sakhamuri v. Sobhan Kodali

(2019) 7 SCC 311 ; Kanika Goel v. State of Delhi (2018)

9 SCC 578 : [2018] 11 SCR 546 – relied on.

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1.2 Comity of Courts

In the fast shrinking world where adults marry and shift from one jurisdiction to another there are increasing issues of jurisdiction as to which country's courts will have jurisdiction. In many cases the jurisdiction may vest in two countries. The issue is important and needs to be dealt with care and sensitivity. Though the interest of the child is extremely important and is, in fact, of paramount importance, the courts of one jurisdiction should respect the orders of a court of competent jurisdiction even if it is beyond its territories. When a child is removed by one parent from one country to another, especially in violation of the orders passed by a court, the country to which the child is removed must

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- A consider the question of custody and decide whether the court should conduct an elaborate enquiry on the question of child's custody or deal with the matter summarily, ordering the parent to return the custody of the child to the jurisdiction from which the child was removed, and all aspects relating to the child's welfare be investigated in a court in his/her own country. The doctrine of comity of courts is a very healthy doctrine. If courts in different jurisdictions do not respect the orders passed by each other it will lead to contradictory orders being passed in different jurisdictions. No hard and fast guidelines can be laid down in this regard and each case has to be decided on its own facts. The welfare of the child will always remain the paramount consideration. [Paras 13, 16] [429-A-D; 432-D]

V. Ravi Chandran (Dr.) (2) v. Union of India (UOI) and Ors. (2010) 1 SCC 174 : [2009] 15 SCR 960 – relied on.

- D **1.3 Welfare of the child – the paramount consideration**

While deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. The courts should decide the issue of custody only on the basis of what is in the best interest of the child. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every re-union may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two

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parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. [Paras 17, 19 and 20] [432-E, F-H; 433-A-D]

1.4 Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays. In cases like the present one where the parents are in two different continents effort should be made to give maximum visitation rights to the parent who is denied custody. In addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, e-mail or in fact, the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if one happy home with two parents cannot be provided to the child then let the child have the benefit of two happy homes with one parent each. [Paras 21-23] [433-E-H; 434-A-C]

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A 1.5 Age of the child – The child is less than 3 years old. She is a girl and, therefore, there can be no manner of doubt that she probably requires her mother more than her father. This is a factor in favour of the wife. [Para 24] [434-E]

B 1.6 Nationality of the child - The child is a citizen of USA by birth. [Para 25] [434-F]

C 1.7 Proceedings in the Norfolk Court - The contention raised on behalf of the wife that she could not understand the order of the Norfolk Court is not agreed with. This is not the first time that the wife had approached the court. The wife is educated.

D She was working in Walmart in the USA. The wife is aware of her rights. Unable to agree with the contention now raised that her counsel coerced her to enter into the agreement. In any event if she has any grievance with regard to the manner in which the settlement was arrived at, the proper course was to raise the issue before the Norfolk Court. No Indian Court can sit in appeal over the orders of the Norfolk Court. Obviously, the child who is less than three years old cannot be heard in the matter but keeping in view the facilities of education, social security etc., which would be available in USA, the child should not be deprived of the same only on the ground that the mother does not want to go back to USA. [Paras 26, 27-29] [435-C, G-H; 436-A-B]

1.8 Visa issue

F The counsel for the appellant-wife laid great emphasis on the fact that the visa/work permit of the husband is expiring in 2020. That by itself is no ground to deny custody of the child to the husband. [Para 30] [436-C]

G 2.1 It is in the best interest of the child to have parental care of both the parents, if not joint then at least separate. If the wife is willing to go back to USA then all orders with regard to custody, maintenance etc., must be looked into by the jurisdictional court in USA. A writ court in India cannot, in proceedings like this direct that an adult spouse should go to America. Therefore, directions are being issued in two parts. The first part will apply if the appellant-wife is willing to go to USA on terms and conditions offered by the husband in his affidavit. The second part would

**apply if she is not willing to go to USA, how should the husband A
be granted custody of the child. [Para 32] [437-B-C]**

**2.2 The counsel for the appellant-wife urged that the position would totally change in case the work permit/visa of the husband is not extended. This is in the realm of speculation, it cannot be presumed whether the visa will be extended or not. Therefore, B
the aforesaid directions are issued but it is made clear that if the visa/work permit of the husband is not extended and he has to leave the USA then the wife will be at liberty to move this Court for fresh directions. [Para 36] [440-E, F]**

<u>Case Law Reference</u>			C
[1987] 1 SCR 175	relied on	Para 9	
[2017] 7 SCR 281	relied on	Para 9	
(2019) 7 SCC 311	relied on	Para 9	
[2018] 11 SCR 546	relied on	Para 11	D
[2009] 15 SCR 960	relied on	Para 14	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 127 of 2020.

From the Judgment and Order dated 01.07.2019 of the High Court E
of Rajasthan at Jaipur in D.B. Habeas Corpus Petition No. 229 of 2018.

Ms. Malvika Rajkotia, Ms. Akriti Tyagi, Lakshmi Raman Singh, Advs. for the Appellant.

Prabhjit Jauhar, Ms. Aishwarya, S. S. Jauhar, Vidhan Vyas, Ms. Harshita Dhingra, Nishanth Patil, Advs. for the Respondents. F

The Judgment of the Court was delivered by

DEEPAK GUPTA, J. 1. Leave granted.

2. Yashita Sahu (hereinafter referred to as the wife) and Varun Varma (hereinafter referred to as the husband), got married on 30.05.2016 G
in India. The husband was already working in the United States of America (hereinafter referred to as the USA). The wife accompanied the husband to the USA on 17.07.2016. A daughter named Kiyara Verma, was born to the couple on 03.05.2017. She is a citizen of the USA. The

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- A relationship between the husband and the wife got strained and they made various allegations and counter allegations against each other. The wife applied for an Emergency Protection Order on 25.08.2018 to the Norfolk Juvenile and Domestic Relations District Court (hereinafter referred to as the Norfolk Court), praying for her protection and an ex parte preliminary protection order was passed against the husband.
- B Thereafter, on 29.08.2018, the wife instituted a petition in the same Court seeking sole custody of the minor child. She also filed a petition praying that the husband be directed to give monetary support to her and the minor child. The said Court passed an order on 26.09.2018 in terms of the agreement reached between the parties. This agreement is part of the order and reads as follows:-
 - C “Father to continue paying rent and utilities @ the marital residence for October, 2018 and November, 2018. Father will add mother to lease as an authorized occupants or leaseholder. Father to pay mother 150/week for child support for October and November, 2018/ and 200/week for December, 2018. Parties to work together to reach a resolution as to who will continue occupy the martial residence after November, 2018. Mother to look for employment consistent with her educational and professional experience. Mother and father have joint legal custody of minor child and shared physical custody of child father’s parenting time to start Thursday September, 27, 2018 @ noon until Saturday September 29, 2018 @ noon. Thereafter, the parties are to share parenting time as follows :
 - D mother to have child every other week from Saturday @ noon until Wednesday @ noon and in alternating weeks from Saturday @ noon until Tuesday @ noon. Father shall have parenting time on Wednesday @ noon until Saturday with alternating weeks two @ noon until Saturday @ noon (i.e. 4 days on, 3 days off switching weeks for each parent) parents shall allow whatsapp calling with child with custodial parent at least 5 min. per evening upon reasonable notice to other parent. Parents shall use a third neutral party to facilitate exchanging the child. Parties shall corporate with each other & third party if noon exchange time is not feasible all parties will surrender their passports, including child’s passport, to guardian ad liten. Mother to reside @ marital residence until December 1, 2018 wherein mother will vacate the premises or assume full responsibility of the rent and utilities thereafter.”

As per this order, amongst other things the husband was to add the wife as an authorised lease holder in the rented premises and he was to pay weekly support to the child @ \$150 per week for the months of October and November, 2018 and \$200 per week for the month of December, 2018. Joint, legal custody and shared physical custody of the child was given to the parents, with each parent being given individual parenting time. As per the agreement the child was also permitted to talk to the other parent by WhatsApp calling, after reasonable notice. It is important to note that it was clearly mentioned that the parties shall cooperate with each other and try to reach an amicable settlement with the help of a neutral third party. If a settlement was not possible then they were to surrender their passports including the child's passport to the *guardian ad litem*. The wife was directed to reside in the marital residence till December 1, 2018, whereafter she had to vacate the premises or assume full responsibility of the rent and utilities.

3. It is not disputed before us that the wife, along with the child left the USA and came to India on 30.09.2018 i.e. after 26.09.2018 and before 01.10.2018, which was the next date fixed before the Norfolk Court.

4. The husband on coming to know of the fact that his wife, along with their child had left the USA for India, filed a motion for emergency relief before the Norfolk Court on 02.10.2019. An ex parte order was passed in favour of the husband whereby the Norfolk Court granted sole legal and physical custody of the child to the husband and directed the wife to return to the USA along with the child. A warrant was also issued against the wife for violating the order dated 26.09.2018 of the Norfolk Court.

5. The husband also filed a petition for issuance of a writ of *habeas corpus* before the Rajasthan High Court for production of his minor child. The High Court by the impugned judgment dated 01.07.2019 directed the wife to return to the USA along with her minor daughter within a period of 6 weeks to enable the jurisdictional court in USA to pass further orders in this regard in the proceedings already pending. The husband was directed to make all arrangements for the stay and travel of the wife and the minor child and any companion. It was further directed that in case the wife was not willing to stay in the house of the husband, then the petitioner-husband would make alternative

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- A arrangements for her stay at the place of her choice at a reasonable cost.

6. Aggrieved by this judgment of the Rajasthan High Court, the wife has filed the present appeal.

- B 7. We have heard Ms. Malvika Rajkotia, learned counsel for the appellant and Mr. Prabhjot Jauhar, learned counsel for the respondents, at length. Various contentions have been raised before us by both sides. It has been contended by Ms. Rajkotia that a writ of *habeas corpus* would not lie for the custody of the child since she could not be said to be in illegal detention, as the child was in the custody of the mother who is C the natural guardian. She also contended that the High Court erred in giving a direction to the wife to travel to the USA. Her next contention is that the child is only about 2 ½ years old and moreover being a girl-child requires the care, attention and protection of the mother and, therefore, it is in the interest of the child to be placed in custody of the D mother. With regard to the proceedings before the Norfolk Court in the USA, it is contended that the wife was unable to comprehend the proceedings before the Norfolk Court because of lack of knowledge of English and that too spoken in an American accent. She also submitted that the legal aid provided to the wife was of a lawyer who was a ‘caucasian male’, implying that there was lack of communication between E the two. It is also contended that the wife had raised objection to the alleged consent order vide e-mail dated 28.09.2018. She also submits that the order passed by the Norfolk Court is not binding on the parties, especially the wife and, in the larger interest of the child the writ petition filed by the husband before the Rajasthan High Court should have been dismissed. It was also contended by Ms. Rajkotia that the husband is F working in the USA on the basis of a work permit which is only valid till 2020 and the future of the wife and the child will be in jeopardy in case his visa/work permit is not extended.

- G 8. On the other hand, Mr. Jauhar, contends that it was the wife who approached the Court in Norfolk and, by agreement, an order was passed giving shared parenting to both the parents. The wife had been specifically directed neither to leave the USA nor take the child out of the USA, but she has violated the orders of the jurisdictional court, which jurisdiction was invoked by the wife herself. According to him the wife cannot be permitted to violate the orders passed by a court in another H country and then seek protection in the Indian courts. He also submitted

that in this modern age it is a well recognised principle of parenting that even a father can be an appropriate natural guardian for the minor daughter. Lastly, he submitted that the husband is not interested in divorcing the wife and his intention is to live with the child and the wife. He also urged that the husband is willing to make all arrangements for stay and travel for the wife and the child, if the wife comes to the USA along with the child.

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Whether a writ of habeas corpus is maintainable?

9. It is too late in the day to urge that a writ of *habeas corpus* is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in *Elizabeth Dinshaw vs. Arvand M. Dinshaw & Ors.*¹, *Nithya Anand Raghavan vs. State (NCT of Delhi) & Anr.*² and *Lahari Sakhamuri vs. Sobhan Kodali*³ among others. In all these cases the writ petitions were entertained. Therefore, we reject the contention of the appellant-wife that the writ petition before the High Court of Rajasthan was not maintainable.

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10. We need not refer to all decisions in this regard but it would be apposite to refer to the following observations from the judgment in *Nithya Anand Raghavan (supra)*:-

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“**46.** The High Court while dealing with the petition for issuance of a writ 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 including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, 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

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¹ (1987) 1 SCC 42

² (2017) 8 SCC 454

³ (2019) 7 SCC 311

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A into that of an executing court. Indubitably, the 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 to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

B **47.** In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private Respondent named in the writ petition)..."

C 11. Further, in the case of **Kanika Goel vs. State of Delhi**⁴, it was held as follows:

D "34. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom, etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful..."

E 12. In the present case since the wife brought the minor to India F in violation of the orders of the jurisdictional court in USA, her custody G of the child cannot be said to be strictly legal. However, we agree with the learned counsel for the appellant that the High Court could not have directed the appellant-wife to go to the USA. The wife is an adult and no court can force her to stay at a place where she does not want to stay. Custody of a child is a different issue, but even while deciding the issue of custody of a child, we are clearly of the view that no direction can be issued to the adult spouse to go and live with the other strained spouse in writ jurisdiction.

Comity of Courts

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

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14. Reference in this regard may be made to the judgment in *Elizabeth Dinshaw* (supra) wherein this Court was dealing with a case where the wife was an American citizen whereas the husband was a citizen of India. They got married in America and a child was born to them in the year 1978. In 1980, differences arose between the couple and the wife filed a petition for divorce. The jurisdictional court in America had dissolved the marriage by a decree of divorce on 23.04.1982 and by the same decree it was directed that the wife would have the care, custody and control of the child till he reaches the age of 18 years. The husband was given visitation rights. Taking advantage of the weekend visitation rights, the husband picked up the child from school on 11.01.1986 and brought him to India. The wife filed a petition under Article 32 of the Constitution of India before this Court. Not only was the petition entertained, but the same was allowed and we would like to refer to certain important observations of this Court in Para 8:

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"8. Whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. We have twice interviewed Dustan in our chambers and talked with him. We found him to be too tender in

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- A age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an American citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in school there.
- B In our considered opinion it will be in the best interests and welfare of Dustan that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent court in that country. We are also satisfied that the petitioner who is the mother, is full of genuine love and affection for the child and she can be safely trusted to look after him, educate him and attend in every possible way to his proper upbringing. The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of his origin in the United States of America. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in some school in Pune. The conduct of the father has not been such as to inspire confidence in us that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present."

In *V. Ravi Chandran (Dr.) (2) vs. Union of India (UOI) and Ors.*⁵ it was held as follows:

- F "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 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 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 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.

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30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child...."

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15. In *Nithya Anand Raghavan* (supra), this Court took the following view:-

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"42. The consistent view of this Court is that if the child has been brought within India, the courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for

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- A deciding the matter of custody or for return of the child to the native State.”

Thereafter, another bench of this Court in *Lahari Sakhamuri* (supra), while interpreting the judgment in *Nithya Anand Raghavan* (supra) held as follows :-

- B “41...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 the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.”

16. We are of the considered view that the doctrine of comity of courts is a very healthy doctrine. If courts in different jurisdictions do not respect the orders passed by each other it will lead to contradictory

- D orders being passed in different jurisdictions. No hard and fast guidelines can be laid down in this regard and each case has to be decided on its own facts. We may however again reiterate that the welfare of the child will always remain the paramount consideration.

Welfare of the child – the paramount consideration

- E 17. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

- G 18. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very wary of what is said by each of the spouses.

- H 19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the

requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every re-union may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

20. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

21. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays. In cases like the present one where the parents are in two different continents effort should be made to give maximum visitation rights to the parent who is denied custody.

22. In addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, e-mail or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video

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- A calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.
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- C 23. As far as the present case is concerned, keeping in view what we have held above, we are not going into various allegations and counter allegations made by both the spouses. However, we record the statement of the husband that he has no intention of divorcing his wife. We can only hope that the couple can either by themselves or through mediation
- D settle their disputes which would not only be in their own interest but also in the interest of Kiyara. Having said so, since at this stage the dispute between them remains unresolved we shall list out the factors and weigh them in a proper manner to see what is best in the interest of the child:-
- E 24. **Age of the child** – the child is less than 3 years old. She is a girl and, therefore, there can be no manner of doubt that she probably requires her mother more than her father. This is a factor in favour of the wife.
- F 25. **Nationality of the child** - The child is a citizen of USA by birth. Her father was already working in the USA when he got married. We are told that the mother had visited the USA once before marriage and when she got married it was done with the knowledge that she may have to settle down there. The child was born in a hospital in the USA and the mother did not come back to India for delivery which indicates that at that time the parents wanted the child to be a citizen of USA.
- G Since the child is a citizen of USA by birth and holds a passport of that country, while deciding the issue of custody we have to take this factor into consideration.
- H 26. **Proceedings in the Norfolk Court** - It is the wife who approached the court of competent jurisdiction, i.e. Norfolk Juvenile and

Domestic Relations District Court, in the USA. She first applied for an emergency order and also instituted a petition seeking sole legal and physical custody of the child. After the husband put in appearance on the basis of the agreement, a consent order was passed which directed both the parties to live in the matrimonial home till 01.12.2018. It further directed that if the matter could not be settled by that date then the wife would make her own arrangements for residence etc. Provision was also made for shared parenting. The wife in total violation of the said order brought the child back to India.

27. We are not in agreement with the contention raised on behalf of the wife that she could not understand the order of the Norfolk Court. This is not the first time that the wife had approached the court. The wife is educated. She was working in Walmart in the USA. She had contacted an NGO and on 09.09.2017 had sent an e-mail to Parsipanny Police Department against her husband. On 03.05.2018, the husband obtained an emergency protection order against the wife. Thereafter, the wife along with the minor daughter returned to India on 16.05.2018 and went back to the USA on 16.07.2018. The complaint filed by the husband is said to have been dismissed on 26.07.2018. On 25.08.2018 the wife called the Police as according to her she was scared for her safety and that of her minor daughter. According to her she applied for an emergency protective order on 25.08.2018 which was passed in her favour. The wife also instituted a petition seeking sole legal and physical custody of the minor child before the Norfolk Court on 29.08.2018. On 26.09.2018 the consent order was passed. It would also be pertinent to mention that even according to the wife she had been sending e-mails to the Indian Embassy in Washington for help. The wife also applied for Supplemental Nutrition Assistance Program which, according to her is a nutrition programme to help low income Americans to put food on the table.

28. The wife is aware of her rights. She has been taking the help of the Police, Magistrate, the Domestic Court and Federal Programmes, when the need arose. She was also working with Walmart and we are unable to accept her contention that because of lack of translator she could not understand what was happening. We are also unable to agree with the contention now raised that her counsel coerced her to enter into the agreement. In any event if she has any grievance with regard to the manner in which the settlement was arrived at, the proper course was to

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- A raise the issue before the Norfolk Court. No Indian Court can sit in appeal over the orders of the Norfolk Court. We are clearly of the view that the plea she has set up is only to justify her patent violation of the orders of the Norfolk Court.

29. Obviously, the child who is less than three years old cannot be heard in the matter but keeping in view the facilities of education, social security etc., which would be available in USA, we are of the view that the child should not be deprived of the same only on the ground that the mother does not want to go back to USA.

30. Visa issue

- C Learned counsel for the appellant-wife has laid great emphasis on the fact that the visa/work permit of the husband is expiring in 2020. That by itself is no ground to deny custody of the child to the husband. If his visa/work permit is extended no problem will arise but if his visa/work permit is not extended, we shall be making directions in this regard
- D in the latter part of the judgment. Whether the work visa/work permit of the husband is to be extended or not is for the authorities in the USA to decide and this Court cannot comment on the same. We cannot pass an order presuming that the visa will not be extended.

31. There are various factors to be taken into consideration while deciding what is best in the interest of the child. No hard and fast rules can be laid down and each case has to be decided on its own merits. We are also not oblivious of the fact that when two parents are at war with each other it is impossible to provide a completely peaceful environment to the child. The court has to decide what is in the best interest of the child after weighing all the pros and cons of both the respective parents who claim custody of the child. Obviously, any such order of custody cannot give a perfect environment to the child because that perfect environment would only be available if both the parents put the interest of the child above their own differences. Even if parents separate, they may reach an arrangement where the child can live in an environment which is reasonably conducive to her/his development. As far as the present case is concerned other than the age of the child nothing is in favour of the mother. She herself approached the jurisdictional court in Norfolk. She entered into an agreement on the basis of which a consent order was passed. She has violated that order with impunity

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and come back to India and, this is a factor which we have to hold A against her.

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

1st part

33. (a) At the outset we note that the husband has filed an affidavit, the relevant portion of which reads as follows:- D

“(2) That I have always been calling up my wife to come back to us along with the minor child so that all of us could stay together in the US as a happy family. In this regard I have sent her various emails to come back and I would be willing to bear all the expenses of the travel of my wife and minor child back to US.” E

(3) That I further undertake that I shall make all the arrangements of stay and travel expenses (including air tickets) of my wife and minor child in our own house which is a two bedroom apartment for which I am paying a rental of US \$1500 per month.

(4) That in case my wife is not willing to stay with me for personal reasons, then I shall sift out and make arrangements to stay somewhere else. F

(5) That I further undertake to take care of all expenses of day to day running of the house, medical insurance for both my wife and child, electricity, gas all other incidental expenses till the time the US Court makes a provision in this regard. G

(6) That I also undertake to bear all expenses for the education of the minor child including the admission in a nursery school in the US which expense would be of about US \$1000-\$1500 per month not including the meals and school supplies. I also undertake that H

- A the expenses of the school supplies and other requirements as part of the minor child's life in school would also be borne by me.
- (7) That I undertake that I will be available for any Medical Emergency and Vaccination during weekdays for my wife- Yashita and the minor child- Kiyara. I undertake that for any other errands, I will be available after the office or on weekends.
- B (8) That I also state that for each time that the minor child has visited in terms of an order of shared parenting, I have taken work from home to ensure that all my time is spent around the child and I undertake that even after the minor child's admission to nursery school (Kindergarten), during her school hours I would go to my office and after school hours I will take work from home and avail parenting time with her. I undertake that should need arises, I will call my mother to help us in the US.
- C (8) That I also undertake to pay US \$200 towards the upkeep and maintenance of the minor child apart from all other expenses."
- D We record this as an undertaking to the Court and the husband is duty bound to abide by this undertaking.
- E (b) We feel that it will be in the interest of the child if the mother herself accompanies the child to USA. The appellant-wife may like to live in USA or not, and this is a personal choice of the appellant-wife. However, if she goes back to USA along with the child, then she must comply with the orders of the Norfolk Court. Obviously, she can apply for modification/vacation of the order, if so advised;
- F (c) In case the wife goes back to USA it shall be the responsibility of the husband to pay reasonable expenses for her entire travel and stay. The wife must within one week of the passing of this order intimate counsel for the husband whether she is willing to go back to USA or not. In case she expresses her willingness to do so, the husband shall purchase tickets for travel of the wife, and the minor child to USA, which journey must be performed on or before 20.02.2020. We make it clear that it will be the wife's responsibility to obtain the requisite travel documents required by her to travel to the USA by the said date;
- G (d) In case the wife is willing to go back to USA but is not willing to live with the husband, in view of the undertaking given by the husband, we direct that the husband shall make alternative arrangements for his
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own stay and hand over the possession of the apartment now in his possession to the wife; A

(e) The husband in terms of the undertaking is directed to take care of all expenses of day to day running of the house, medical insurance for both wife and child, electricity, gas and all other incidental expenses till the time the jurisdictional court in USA makes a provision in this regard; B

(f) The husband shall not initiate any coercive or penal action against the wife in the USA and if such action has already been initiated by him or any proceedings in that regard are pending, then the same shall be withdrawn and not pursued any further by the husband. This will be a precondition to facilitate the wife's appearance before the concerned Courts in the USA to effectively represent and defend herself in all matters relating to the matrimonial dispute (including custody and guardianship issues of the minor child) between the husband and the wife. C

34. We, however, clarify that this arrangement will only continue up to 30.04.2020 before which date the parties must get proper directions from the jurisdictional court in USA. Once the jurisdictional Court in USA passes the order then this portion of the order shall cease to operate. In addition, we also direct that the husband shall pay US \$250 per week to the wife for her personal expenses in USA till 30.04.2020 or till the jurisdictional court in USA passes orders in this regard. This amount is an addition to the US \$200 per week that the husband has undertaken to pay for the upkeep and maintenance of the minor child. D

2nd part

35. In case the wife does not inform the counsel for the husband within one week from today that she is willing to go back to USA then it shall be presumed that she has no intention to go to USA along with the child. In that event we issue the following directions :- F

(a) The wife shall handover custody of minor Kiyara to the husband or if the husband is unable to travel to India, then to the mother of the husband, before the Registrar General/Registrar(Judicial), of the High Court of Rajasthan on 03.02.2020 at 11.00 A.M. Thereafter, the husband shall make necessary arrangements for taking the child to USA accompanied by at least one of the husband's parents; G

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- A (b) In case the child goes to USA with the husband or either of his parents, the husband shall ensure that the child talks to her mother through video calling facilities such as WhatsApp, Skype etc., everyday at 8.30 P.M. Eastern Standard Time on weekdays (Monday-Thursday) for at least 10 minutes each day and on weekends (Friday-Sunday) he shall ensure that the child talks to the mother at the same time or any other time mutually settled between the parties through video calling for at least 15 minutes.
- B (c) We further direct that if the wife visits USA hereafter and is staying in the same town where the husband resides, she will be permitted custody of the child on all weekends from 6.00 P.M. on Friday till 6.00 P.M. on Sunday.
- C (d) Even if the mother does not visit USA, the father shall ensure that the child visits India at least twice a year, once during the summer vacations and once during the winter break, as per the child's school schedule. It will be his responsibility to ensure that the child comes to India accompanied either by him or one of the grandparents of the child. During this period the child shall remain exclusively with the mother. However, in case the husband is also visiting with the child then during the period when the child is in India, the husband will have the custody of the child for 2 days per week, preferably on weekends or on other suitable days as settled by the parties.
- D 36. Mr. Rajkotia, learned counsel for the appellant-wife had urged that the position would totally change in case the work permit/visa of the husband is not extended. This is in the realm of speculation, we cannot presume whether the visa will be extended or not. We have, therefore, issued the aforesaid directions but make it clear that if the visa/work permit of the husband is not extended and he has to leave the USA then the wife will be at liberty to move this Court for fresh directions.
- E 37. The appeal is disposed of in the aforesaid terms. Pending application(s), if any, stand(s) disposed of. The Registrar (Judicial) of the Registry of the Supreme Court of India, is directed to send a copy of this judgment to the Registrar General/Registrar (Judicial) of the High Court of Rajasthan.