Mrs. Kanika Goel vs The State Of Delhi Thru Sho on 20 July, 2018

Equivalent citations: AIRONLINE 2018 SC 71

Author: A.M. Khanwilkar

Bench: D.Y. Chandrachud, A.M. Khanwilkar, Dipak Misra

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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 635-640 OF 2018

Mrs. Kanika Goel ….A

:Versus:

State of Delhi through S.H.O.
and Anr. ....R

J U D G M E N T

A.M. Khanwilkar, J.

1. These appeals take exception to the judgment and orders passed by the High Court of Delhi at New Delhi dated 16 th November, 2017, 1st December, 2017 and 6th December, 2017, in Writ Petition (Criminal) No.374 of 2017 and Criminal M.A. No.2007 of 2017, whereby the writ petition filed by respondent No.2 for issuing a writ of habeas corpus for production of his minor daughter M (assumed name), who was about 3 years of age at the time of filing of the writ petition and for a direction for return of M to the jurisdiction of the competent Court in the United States of America in compliance with the order dated 13th January, 2017 passed by the Circuit Court of Cook County, Illinois, USA, came to be allowed. The Delhi High Court directed the appellant to comply with the directions as M was in her custody, the appellant being M's mother.

2. The respondent No.2 asserted that he was born in India but presently is a citizen of USA since 2005. He is working as the CEO of a Company called 'Get Set Learning'. The appellant is his wife and mother of the minor child M. She is a US Permanent Resident and a "Green Card" holder and has also applied for US citizenship on 2nd December, 2016. At the relevant time, she was a certified teacher in the State of Illinois and was employed as a Special Education Classroom Assistant in Chicago Public Schools. The respondent No.2 and the appellant got married on 31st December, 2010 as per Sikh rites, i.e. Anand Karaj ceremony, and Hindu Vedic rites in New Delhi. It was clearly understood between both the parties that the appellant, after marriage, would reside with respondent No.2 in the USA. Eventually, the appellant travelled to the USA on a Fiance Visa and got married to respondent No.2 again on 19th March, 2011 at Cook County Court in Chicago, Illinois. Before the marriage, the parties entered into a Pre-Nuptial Agreement dated 20th October, 2010 enforceable in accordance with the laws of the State of Illinois, USA. The appellant then took employment as a teacher in Chicago Public School and also secured a US Permanent Citizen Green Card. The appellant became pregnant and gave birth to M on 15th February, 2014 in USA. M is thus a natural born US citizen and was domiciled in the State of Illinois, USA from her birth till she was clandestinely removed by the appellant in December 2016 under the guise of undertaking a short trip to New Delhi to meet the appellant's parents.

3. The appellant was scheduled to return to Chicago on 7th January, 2017 but she went missing and filed a petition under Section 13(1) of the Hindu Marriage Act, 1955 (for short "the 1955 Act") being H.M.A. Case No.27 of 2017 seeking dissolution of marriage on the ground of cruelty, along with an application under Section 26 of the 1955 Act on 7th January, 2017 seeking a restraint order against respondent No.2 from taking M away from the jurisdiction of Indian Courts. A notice was issued thereon to respondent No.2, made returnable on 11th January, 2017.

4. The respondent No.2, however, filed an emergency petition for temporary sole allocation of parental responsibilities and parenting time in his favour or in the alternative, an emergency order of protection for possession of his minor daughter M, before the Circuit Court of Cook County, Illinois on 9th January, 2017. A notice of emergency motion was served on the appellant by e-mail, informing her of the proposed hearing on 13th January, 2017.

5. In the meantime, on 11th January, 2017 the Family Court at New Delhi issued a fresh notice to respondent No.2 and passed an ex-parte order on the application filed by the appellant under Section 151 of the Code of Civil Procedure, restraining respondent No.2 from removing the minor child from the jurisdiction of that Court until further orders.

6. The respondent No.2 on the other hand, caused to file a missing person complaint on 13 th January, 2017 before the SHO, Vasant Kunj (South), P.S. New Delhi, which was acknowledged by the Police Station on 14 th January, 2017. Besides the said complaint, respondent No.2 moved the Circuit Court of Cook County, Illinois, USA on 13 th January, 2017 when an ex□parte order was passed for interim sole custody of the minor child. The said order reads thus:

> "1) The child M born on 15.02.2014, in Chicago, Illinois and having resided in Chicago solely for her entire life (specifically at 360 East Randolph Street, Chicago, IL 60601) is also a US citizen.
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> 2) The child is a habitual resident of the state of Illinois, United States of America having never resided anywhere else. Illinois is the home state of the child pursuant to the Uniform Child Custody Jurisdiction Enforcement Act.
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> 3) Karan Goel is the natural father of the minor child and granted interim sole custody of the minor child. Child is to be immediately returned to the residence located in Cook County, Illinois, USA by Respondent.
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> 4) The Cook County, Illinois Court having personal and subject matter jurisdiction over the parties and matter.
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> 5) All further issues regarding visitation, child support are reserved until further Order of Court."

7. The appellant did not comply with the order of the Circuit Court of Cook County, Illinois, therefore, respondent No.2 filed a writ petition before the Delhi High Court on 1 st February, 2017, to issue a writ of habeas corpus and direct the appellant to produce the minor child M and cause her return to the jurisdiction of the Court in the United States, in compliance with the order dated 13th January, 2017 passed by the Circuit Court of Cook County, Illinois, to enable the minor child to go back to United States and if the appellant failed to do so within a fixed time period, to direct the appellant to immediately hand over the custody of the minor child to respondent No.2 (writ petitioner) to enable him to take the minor child to the jurisdiction of the US Court.

8. This writ petition was contested by the appellant. The High Court issued interim orders including regarding giving access of the minor child to respondent No.2 in the presence of the appellant and her parents. Finally, all the contentious issues between the parties were answered by the High Court by a speaking judgment and order dated 16 th November, 2017, in favour of respondent No.2, after recording a finding that the

paramount interest of the minor child was to return to USA, so that she could be in her natural environment. To facilitate the parties to have a working arrangement and to minimize the inconvenience, the Division Bench of the High Court issued directions in the following terms:

> "139. In the light of the aforesaid, we are more than convinced that respondent No.2 should, in the best interest of the minor child M, return to USA along with the child, so that she can be in her natural environment; receive the love, care and attention of her father as well – apart from her grandparents, resume her school and be with her teachers and peers. Pertinently, respondent No.2 is able□bodied, educated, accustomed to living in Chicago, USA, was gainfully employed and had an income before she came to India in December 2016 and, thus, she should not have any difficulty in finding her feet in USA. She knows the systems prevalent in that country, and adjustment for her in that environment would certainly not be an issue. Accordingly, we direct respondent no.2 to return to USA with the minor child M. However, this direction is conditional on the conditions laid down hereinafter.
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> 140. Respondent No.2 has raised certain issues which need to be addressed, so that when she returns to USA, she and the minor child do not find themselves to be in a hostile or disadvantageous environment. There can be no doubt that the return of respondent No.2 with the minor child should be at the expense of the petitioner; their initial stay in Chicago, USA, should also be entirely funded and taken care of by the petitioner by providing a separate furnished accommodation (with all basic amenities & facilities such as water, electricity, internet connection, etc.) for the two of them in the vicinity of the matrimonial home of the parties, wherein they have lived till December 2016. Thus, it should be the obligation of the petitioner to provide reasonable accommodation sufficient to cater to the needs of respondent No.2 and the minor child. Since respondent No.2 came to India in December 2016 and would, therefore, not have retained her job, the petitioner should also meet all the expenses of respondent No.2 and the minor child, including the expenses towards their food, clothing and shelter, at least for the initial period of six months, or till such time as respondent No.2 finds a suitable job for herself. Even after respondent No.2 were to find a job, it should be the responsibility of the petitioner to meet the expenses of the minor daughter M, including the expenses towards her schooling, other extra□curricular activities, transportation,

Attendant/ Nanny and the like, which even earlier were being borne by the petitioner. The petitioner should also arrange a vehicle, so that respondent No.2 is able to move around to attend to her chores and responsibilities.

141. Considering that the petitioner had initiated proceedings in USA and the respondent No.2 has been asked to appear before the Court to defend those proceedings, the petitioner should also meet the legal expenses that respondent No.2 may incur, till the time she is not able to find a suitable job for herself. However, if respondent no.2 is entitled to legal aid/assurance from the State, to the extent the legal aid is provided to her, the legal expenses may not be borne by the petitioner.

142. The petitioner should also undertake that after the return of the minor child M with respondent No.2 to USA, the custody of M shall remain with respondent No.2 and that he shall not take the minor child out of the said custody by use of force. He should also undertake that after respondent No.2 lands in Chicago, USA, the visitation and custody rights qua the parties, as may be determined by the competent Court in USA, shall be honoured.

143. Respondent No.2 has also expressed apprehension that the petitioner would seek to enforce the terms of the Pre-Nuptial Agreement entered into between the parties.

Since the said agreement has been entered into in India, its validity has to be tested as per the Indian law. Respondent No.2 has already initiated suit for declaration and permanent injunction to challenge the said Pre-Nuptial Agreement dated 22.10.2010. We have perused the said agreement and we are of the view the petitioner should not be permitted to enforce the terms of this agreement in USA, at least till the said suit preferred by the respondent No.2 is decided. The petitioner should, therefore, give an undertaking to this Court, not to rely upon or enforce the said Pre-Nuptial Agreement to the detriment of respondent No.2 in any proceedings either in USA, or in India. The undertaking shall remain in force till the decision in the suit for declaration and injunction filed by respondent No.2 challenging validity of the Pre-Nuptial Agreement. This undertaking shall, however, not come in the way of the petitioner while defending the said suit of the respondent No.2.

144. With the aforesaid arrangements and directions, in our view, respondent No.2 can possibly have no objection to return to USA with M. The comfort that we have sought to provide to respondent No.2, as aforesaid, is to enable her to have a soft landing when she reaches the shores of USA, so

that the initial period of at least six months is taken care of for her, during which period she could find her feet and live on her own, or under an arrangement as may be determined by the competent Courts in USA during this period. At this stage, we are not inclined to direct that the custody of M be given to the petitioner so that he takes her back to USA. M is a small child less than 4 years of age, and that too, is a female child. Though she may be attached to the petitioner – her father, she is bound to need her mother – respondent no.2 more. In our view, once M returns to USA with her mother, i.e. respondent No.2, orders for custody or co□ parenting should be obtained by the parties from the competent Courts in USA. Moreover, it would be for the Courts in USA to eventually rule on the aspect concerning the financial obligations and responsibilities of the parties towards each other and towards the minor child M – for upbringing the minor child – M independent of any directions issued by this Court in this regard.

145. The petitioner is directed to file his affidavit of undertaking in terms of paras 140 to 144 above within ten days with advance copy of the respondents. The matter be listed on 01.12.2017 for our perusal of the affidavit of undertaking, and for passing of final orders."

9. By this judgment and order passed by the High Court and the directions issued, as reproduced hitherto, the substantive issues inter se the parties were answered against the appellant to the extent indicated. In continuation of the aforementioned directions, a further order was passed on 1 st December, 2017 by the High Court which reads thus:

> "1. In terms of the directions contained in our judgment dated 16.11.2017, the petitioner Karan Goel has filed the affidavit dated 20.11.2017. A perusal of the affidavit shows that the petitioner has undertaken and consented to abide by all the conditions imposed upon him, so that respondent no.2 could return to USA with the minor child.
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> 2. Respondent no.2 has also filed a counter□affidavit to the said affidavit of the petitioner. Respondent no.2 has raised the issue that the petitioner has not particularized the amounts and facilities that the petitioner would provide in case respondent no.2 were to return to USA with the minor child.
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> 3. The petitioner is present in Court with his parents.

The petitioner has tendered in Court the details/particulars of the proposed financial aid in terms of our judgment. The said details/ particulars read as follows:

'1. Upon Respondent No.2 giving a date/this Hon'ble Court fixing a date on which she and minor child M will depart from Delhi for Chicago, Illinois, USA, the Petitioner shall do the following at least 3 [three] days prior to their departure date:□

(i) Book airline tickets on United Airlines with a non□stop flight from Delhi to USA for minor child M and Respondent No.2;

(ii) Provide a hotel room at The Hyatt Regency (located ~7 minute walk from minor child M's preschool) for the first seven (7) days after landing in Chicago to enable Respondent No.2 to sign leases for

(a) accommodation and (b) a car; and

2. The Petitioner is/ was already paying [directly out of his salary] the following amounts for minor child M and shall continue to do so in compliance of the directions of this Hon'ble Court (all amounts in US Dollars = USD):□

(i) ~$2,100/month Preschool tuition at Bright Horizons Lakeshore East where she was enrolled five days a week; and

(ii) ~$232/month for health insurance via Blue Cross Blue Shield of Illinois.

3. In addition to point 2 above, the Petitioner shall pay the following amounts (all amounts in US Dollars =USD) for a total of $4,200/month to Respondent No.2 in advance for the first month [by transferring the said amount into a joint account prior to Respondent No.2 and minor child M taking off from Delhi] and thereafter by the 28th of every month for the subsequent month [for the initial period of six months]:□

(i) $2,600/month as rent for a fully furnished apartment with high□speed internet, air conditioning and heating, water, garbage disposal, and parking for a vehicle;

(ii) $400/month for Respondent No. 2's health insurance;

(iii) $1,000/month in expenses for food, shelter, and clothing for minor child M and Respondent No. 2; and

(iv) $200/month for a car lease and car insurance.

4. In case legal aid / assurance is not available / provided to Respondent No.2, the Petitioner shall give an additional amount of $1,500/ month to Respondent No.2 for her legal expenses for the first six months after her and minor child M's return to Chicago, Illinois, USA'.

4. We have also separately recorded the statement of petitioner on oath, wherein he has undertaken to this Court to abide by the offer made by him in terms of our decision. He has also undertaken that in case of any breach of the said stipulation, respondent no.2 may enforce the same before the competent Court in USA.

5. To ensure compliance of the aforesaid obligation, the petitioner has offered that he shall deposit an amount US$ 25,000 in an escrow account, which shall be operated upon orders of the competent Court in Cook County, Illinois, USA. The said account shall be operatable at the instance of respondent no.2 in case of non compliance of any of the condition and to the extent it becomes necessary, under the orders of the said Court.

6. The petitioner seeks a short adjournment to produce the relevant documents in that regard before this Court.

7. Since the petitioner and his parents are in India, and it is submitted that the petitioner has not met his minor daughter since March 2017, it is agreed that the petitioner and his parents shall be allowed to meet the minor child M today, tomorrow and day after tomorrow at DLF Promenade Mall, Vasant Kunj, New Delhi.

8. Today's meeting shall take place between 6:00 p.m. to 8:00 p.m., and on Saturday and Sunday, the meeting shall take place from 11:00 a.m. to 2:00 p.m. The petitioner has desired that the meeting may take place exclusively.

9. Since respondent no.2 has apprehensions, the petitioner has offered to and has deposited his American Passport with the Court Master. The Court Master shall seal the same in Court and thereafter the same be handed over to the Deputy Registrar concerned to be kept in safe custody. The same shall not be parted with unless so ordered by this Court.

10. The petitioner has assured that the child shall not be taken away unauthorisedly and shall be duly returned to respondent no.2 at the end of the meeting on each date.

11. List on 06.12.2017 for further directions. On the next date, the child may be brought to the Court so that the petitioner and his parents are able to meet the child in the Children's Room at the Mediation Centre between 2:30 p.m. to 4:30 p.m.

12. Order dasti under the signatures of the Court Master."

10. Again, on 6th December, 2017, another order was passed to formally dispose of the writ petition finally in the following terms:

> 1. "Mr. Jauhar has tendered in Court the affidavit of undertaking sworn by the petitioner along with three annexures, which are:
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> (i) A statement from Citibank, USA in respect of joint account held by the petitioner and respondent No.2;
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> (ii) An affidavit of Molshree A., Sharma, ESQ., a partner at the law firm of Mandel, Lipton, Roseborough & Sharma Ltd., based in Chicago; and
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> (iii) Documents to show deposit of US$25,000 in an escrow account operated by the aforesaid law firm.

2. The petitioner has stated that he has already deposited US$25,000 into his attorney's escrow account. The affidavit of Molshree A., Sharma affirms that the said escrow account may be operated by respondent No.2/ Kanika Goel in the event of failure of the petitioner/ Karan Goel in meeting his obligations as per his undertaking given to this Court.

3. We are satisfied with the aforesaid arrangement made by the petitioner to secure the interests of respondent No.2 and the minor child in terms of our decision dated 16.11.2017.

4. In these circumstances, we now direct respondent No.2 to return to USA along with the minor child M within two weeks from today, failing which the minor child M shall be handed over to the petitioner, to be taken to USA.

5. We may observe that learned counsel for respondent No.2 has sought more time on the ground that respondent No.2 wishes to assail the decision dated 16.11.2017 and that the Supreme Court shall be closed for Winter Vacation in later part of December, 2017 and early part of January, 2018. However, we are not inclined to grant any further time for the reason that it is imperative for respondent No.2 to return to USA on or before 23.12.2017, and if she does not so return, her return may not be permitted by the Immigration Department of USA without further compliance being made by her. We cannot permit a situation to arise where respondent No.2 is able to defeat the direction issued by this Court on account of her own acts & omissions.

6. The passport of the petitioner deposited in this Court is directed to be returned forthwith. The said passport be returned to Mr. Prabhjit Jauhar, larned counsel for the petitioner. The said passport shall be retained by Mr. Jauhar so as to enable the petitioner and his parents to meet the child M, while they are in New Delhi, India. Mr. Jauhar shall return the passport to the petitioner only at the time when the petitioner has to return to USA, after ensuring that the custody of the child is with respondent No.2.

7. The meeting between the petitioner and his parents, on the one hand, and the child, on the other hand, shall be undertaken as per the arrangement worked out by us earlier, i.e. two hours every working day, and three hours at the weekends, as mutually agreed between the parties.

8. The petition stands disposed of in the aforesaid terms."

11. Being aggrieved by the aforesaid judgment and orders, the appellant, being the mother of the minor child M, has approached this Court by way of Special Leave under Article 136 of the Constitution of India. This Court issued notice on 15th December, 2017, when it passed the following interim order:

> "O R D E R Issue notice.
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> As Dr. Abhishek Manu Singhvi and Mr. R.S. Suri, learned senior counsel along with Mr. Prabhjit Jauhar, learned counsel has entered appearance for the respondent No.2, no further notice need be issued.
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> Counter affidavit be filed within two weeks. Rejoinder affidavit, if any, be filed within a week therefrom.
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> Let the matter be listed on 24th January, 2018. As an interim measure, it is directed that the arrangements made by the High Court for the visitation rights shall remain in force. The petitioner□wife shall not create any kind of impediment in the meeting of the father with the child.
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> In the course of hearing, we have also been apprised by Dr. Singhvi that the Green Card issued in favour of the petitioner□ wife is going to expire on 22nd December, 2017. Be that as it may, If, eventually, the petitioner loses in this proceeding and the respondent No.2 succeeds, the expiration of the Green Card cannot be a ground to deny the custody of the child to the father. Needless to say, if the petitioner wife intends to go to United States of America and gets the Green

Card renewed, it is open for her to do so. We may also record that the husband has acceded to, as stated by the learned counsel for the respondent No.2, that he shall not implicate her in any criminal proceeding."

In continuation of the aforementioned interim arrangement, a further order was passed by this Court on 24th January, 2018, which reads thus:

"ORDER Heard Mr. Kapil Sibal, learned senior counsel along with Ms. Malavika Rajkotia, learned counsel for the petitioner and Dr. A.M.Singhvi, learned senior counsel along with Mr. Prabhjit Jauhar, learned counsel for the respondents.

Though, we are not inclined to interfere with the interim arrangement made by the High Court yet, regard being had to some grievances of both the parties, we intend to pass an order clarifying the position.

Having heard learned counsel for the parties, it is directed as follows:

(i) Whenever respondent No.2 is available in India, he shall intimate the petitioner by E□mail and also forward a copy of the said E□ mail to the counsel for the petitioner so that she can make the child available for meeting with the father at Promenade Mall, Vasant Kunj between 5.30 P.M. to 7.30 P.M. on weekdays and 11.00 A.M. to 2.00 P.M. on holidays when the school is closed.

(ii) When the father will be meeting the child, they shall meet without any supervision.

(iii) When the father is not in India, there can be communication/interaction through Skype at about 7.30 P.M.(Indian Standard Time) or any other mode on line.

(iv) The passport of the child, which is presently with the father, shall be handed over to the mother for a period of one week so that she can take appropriate steps to complete certain formalities for admission of the child in a school. This direction is without prejudice to the final result in the special leave petition. The passport shall be returned by Ms.Malavika Rajkotia, learned counsel for the petitioner to Mr.Prabhjit Jauhar, learned counsel for the respondents.

Let the matter be listed on 19.02.2018 at 2.00 P.M. for final disposal."

These are the relevant interim orders, which were to operate until the final disposal of the appeals. On 18th May, 2018, a grievance was made before this Court about non□cooperation by the appellant, which has been recorded as under:

"O R D E R As mentioned in the first hour, the matter is taken up today. Be it noted, we have listed the matter today as it relates to the conversation right of the father with the child.

In the course of hearing, Mr. Prabhjit Jauhar, learned counsel appearing for the respondent-father submitted that the directions issued by this Court on earlier occasion relating to Skype contact are not being complied with.

Ms. Malavika Rajkotia, learned counsel appearing for the appellant submitted that there has been no deviation and in any case, the mother does not intend to anyway affect, indict or intervene in the right to converse by Skype. Ms. Rajkotia has assured this Court that her client has not given any occasion to raise any grievance and if any grievance is nurtured by the father, the same shall be duly addressed, so that the order of this Court is duly complied with.

We are sure, the parties shall behave like compliant litigants." The hearing was concluded and the interim arrangement as directed by this Court was to be observed by the parties until the pronouncement of the final judgment.

12. The appellant, being the mother of the minor child M, has assailed the decision of the High Court for having overlooked the rudimentary principles governing the issue of invoking jurisdiction to issue a writ of habeas corpus in respect of a minor child who was in lawful custody of her mother. According to the appellant, the High Court has completely glossed over or to put it differently, misconstrued and misapplied the principles of paramount interest of the minor girl child of tender age of about 4 years. Similarly, the High Court has glossed over the doctrine of choice and dignity of the mother of a minor girl child keeping in mind the exposition in K.S. Puttaswamy & Anr. Vs. Union of India & Ors.1 The High Court has also failed to take into account that the intimate contact of the minor child would be her mother who was her primary care giver and more so, when she was at the relevant time in the company of her mother. The appellant, being the mother, had a fundamental right to look after her minor daughter which cannot be whittled down or trivialized on the considerations which found favour with the High Court. The welfare and paramount interest of the minor girl child would certainly lean towards the mother, all other things being equal. The role of the mother of a minor girl child cannot be reduced to an appendage of the child and the

mother cannot be forced to stay in an unfriendly environment 1 (2017) 10 SCC 1 where she had been victim of domestic violence inflicted on her. This would be so when the mother was also a working woman whose career would be at stake in the event the directions given by the High Court were to be complied with in letter and spirit. The High Court ought to have adopted a child rights based approach but the reasons which weighed with the High Court, clearly manifest that it was influenced by the values of pre□ constitutional morality standard. The approach of the High Court, of delineating an arrangement, which it noted as the lowest prejudice option to the mother, has no place for deciding the issue of removing the custody of a minor girl child of tender age from her mother and giving it to her father for being taken away to her native country. The High Court has misunderstood and misapplied the principle expounded in Nithya Anand Raghavan Vs. State (NCT of Delhi) & Anr.,2 and Prateek Gupta Vs. Shilpi Gupta & Ors.3 The High Court has completely overlooked the autonomy of the appellant inasmuch as the directions given by the High 2 (2017) 8 SCC 454 3 (2018) 2 SCC 309 Court would virtually subjugate all her rights and would compel her to stay in an unfriendly environment at the cost of her career and dignity. The arrangement directed by the High Court can, by no standard, be said to be a just and fair muchless collaborative arrangement to be worked out between the parents, without compromising on the paramount interest and welfare of the minor girl child. The High Court committed a manifest error in answering the issue of best interest of the minor girl child, inter alia on the basis of the provisions of the Juvenile Justice Act and disregarding the crucial fact that the minor girl child was presently staying with her mother along with her extended family, which she would be completely deprived of if taken away to a place within the jurisdiction of the US Court by respondent No.2 □ her father. It was also contended that in the process of reasoning out the plea taken by the appellant regarding the circumstances in which she fled from USA with the minor girl child due to domestic violence inflicted on her, the said issue has been trivialized. It is contended that as the marriage between the appellant and respondent No.2 was solemnized in New Delhi as per Anand Karaj ceremony and Hindu Vedic rites, the fact that the appellant went to the United States to stay with her husband, would make no difference to her status and nationality, much less have any bearing on the issue of best interest of the minor girl child.

13. On the other hand, the respondent No.2 would submit that the High Court analysed all the relevant aspects of the matter keeping in mind the legal principles expounded in the recent decisions of this Court and recorded its satisfaction about the best interest of the minor girl child coupled with the necessity of the minor girl child to be produced before the Circuit Court of Cook County, Illinois, USA, which had intimate contact with the minor girl child, inasmuch as the minor girl child was born and was domiciled within the jurisdiction of that Court before she was clandestinely removed by the appellant to India. It is contended that since both the father as well as the minor girl child are US citizens and the mother is a permanent resident of US and domiciled in that country, only the Courts of that country will have jurisdiction to decide the matrimonial issues between the parties, including custody of the minor girl child and her guardianship. Further, at the tender age of about 3 years, the minor girl child had hardly spent any time in India so as to suggest that she has gained consciousness in India and thus it would be in the best interest of the child to be taken away to the US. It is contended by respondent No.2 that the High Court has analysed all the relevant facts before recording the finding that the welfare and best interest of the minor girl child would be served by returning to United States. As that finding is based on tangible material on record as adverted to by the High Court, this Court should be loath to overturn the same and, more so, when the High Court has issued directions to balance the equities and also facilitate return of the minor child to be produced before the Court of competent jurisdiction. The directions so issued are no different than the directions given by this Court in Nithya Anand Raghavan's case, (supra).

It is contended by respondent No.2 that this Court may primarily examine the directions issued by the High Court and if necessary, issue further directions to safeguard the interest of the appellant, but in no case should the plea taken by the appellant, that the minor girl child should not return to US, be accepted. It is contended that the sole consideration in a proceeding such as this, must be to ascertain the welfare of the minor girl child and not to adjudicate upon the rights of the father or the mother. While doing so, the Court may take into account all such aspects to ascertain as to whether any harm would be caused to the minor child or for that matter, has been caused in the past during her stay in US. From the order passed by the US Court, it is evident that the custody of the minor girl child with the appellant had become unlawful and for which reason, this Court in exercise of its jurisdiction for issuance of a writ of habeas corpus, must direct the appellant to give the custody of the minor girl child to her father. It is contended that the argument regarding health or personal matters raised by the appellant are only arguments of causing prejudice and should have no bearing for answering the matters in issue, particularly in the context of the equitable directions passed by the High Court. The Court must keep in mind that the

minor girl child is presently staying in India without a valid Visa after her Visa obtained for travelling to India expired. The respondent No.2 would submit that no interference with the directions issued by the High Court is warranted in the fact situation of the present case.

14. We have heard Ms. Malavika Rajkotia, learned counsel appearing for the appellant and Ms. Meenakshi Arora, learned senior counsel appearing for the respondent No.2.

15. We shall first advert to the analysis made by the High Court in respect of the contentious issues. That can be discerned from paragraph 102 onwards of the impugned judgment. The High Court was conscious of the fact that it must first examine the issue regarding the welfare and best interest of the minor child. It noted that the minor girl child was about 3 years when the writ petition for habeas corpus was preferred on 1st February, 2017. It then noted that the respondent No.2 – father of the minor girl child had acquired citizenship of the USA in 2005 and holds an American Passport. He is living in the USA since 1994 and is thus domiciled in the USA. He had acquired a Bachelors' degree in Economics and obtained MBA qualification from the University of Chicago. He was an Education Software Entrepreneur. The appellant wife is the biological mother of the minor child M, who has acquired permanent resident status of the USA i.e. Green Card and had also applied for American citizenship on 2nd December, 2016. The respondent No.2 and appellant were classmates during their schooling and revived their contacts in 2000. Eventually, they decided to get married and thereafter reside in USA where the respondent No.2 had his work place and home. The marriage was solemnized in New Delhi in India on 31st October, 2010 as per Anand Karaj ceremony, and Hindu Vedic rites in the presence of the elders of both the families. After the appellant arrived in USA, they performed civil marriage before the competent Court in USA on 19 th March, 2011.

16. The High Court adverted to the accomplishment of the appellant in her education and occupation. The High Court noted that the couple started their matrimonial life in the United States and lived as a couple in that country. They made the United States their home and their entire married life, except the duration during which they were on short visits to India, had been spent in the USA. They gave birth to a girl child M in USA on 15th February, 2014 at North Western Memorial Hospital, Chicago, Illinois, USA. The minor child M is a US citizen by birth and grew up there until she was clandestinely removed by the appellant to India on 25 th December, 2016. The minor child had, in fact, started attending pre□school in Chicago and had a full time schedule at school from August, 2016. Thus, the mental development of M while she was in USA till the end of 2016, had taken place

to such an extent that she was very well aware and conscious of her surroundings. She was perceiving and absorbing from her surroundings and communicated not only with her parents, but also with her other relatives, her peers at the pre□ school, her instructors, teachers and other care givers. The American way of life and systems were already in the process of being learnt and experienced by M when she came to India in December, 2016. The environment which M was experiencing during her growth was the natural environment of Chicago, USA. Both her parents were looking after her proper upbringing. The Court also noted that the paternal grandparents of the minor child M were visiting and interacting with her. The Court then adverted to the decisions in Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Anr.4, Aviral Mittal Vs. State5, Shilpa Aggarwal Vs. Aviral Mittal and Anr.6, Dr. V. Ravi Chandran Vs. Union of India & Ors.7, and Nithya Anand Raghavan (supra), to opine that the Court in the US seemed to be the most appropriate Court to decide the issue of custody of M, considering that it had 4 (1984) 3 SCC 698 5 (2009) 112 DRJ 635 6 (2010) 1 SCC 591 7 (2010) 1 SCC 174 intimate contact with the parties and the child. It went on to observe that it was neither inclined nor in a position to undertake a detailed enquiry into aspects of custody, visitation and co□parenting of the minor child in the facts and circumstances of the case, considering all the events unfolded in, circumstances developed in and evidences were located in the USA. After having said this, it examined the compelling reasons disclosed by the appellant to dissuade the Court from issuing directions for return of M to her native country and the environment where she was born and being brought up. That analysis has been done in paragraph 114 onwards. The High Court considered the grievances of the appellant in paragraphs 114 to 117 in the following words:

> "114. The allegations of respondent no.2 against the petitioner and his mother are that the petitioner's mother follows a strict eco□ friendly lifestyle and imposes the same on the couple, which even caused chronic backache to the respondent since she was forced to sleep on a hard eco□friendly mattress. She claim that all her day to day affairs were influenced by the lifestyle of her mother in law, such as not using plastic products, non stick cookware, personal care products etc. The respondent had no voice in the matter. The petitioner took minimal interest in household affairs, while his mother interfered in the lives of the parties by tracking their schedules. The petitioner and his mother did not respect the respondents privacy and the plan of the parties to bear a child were disclosed to the petitioner's mother in advance. She even imposed lifestyle changes upon the respondent. The petitioner's mother also did not permit the respondent to maintain a secular household. She was not permitted to celebrate both Sikh and Hindu festivals and the petitioner insisted that they celebrate only Sikh festivals. Respondent no.2

states that she was diagnosed with a grave's disease in October 2014. The petitioner and his mother insisted that the respondent undergoes surgery rather than taking medication, since medication would have made it difficult for her to conceive in future. She claims that the petitioner even threatened her with divorce in case she prioritised her own health at the cost of expanding their family. The respondent makes several other allegations against the petitioner and his mother complaining of cruelty and indifference on their part towards her.

115. The above allegations per se do not suggest any grave undesirable conduct or deviant behavior on the part of the petitioner, or his mother qua the child M – even if they were to be assumed to be true for the time being. The allegations even remotely, not such as to suggest that the minor child M may be exposed to any adversity, harm, undesirable influence, or danger if she were to be allowed to meet them or spend time with them in USA. There is nothing to suggest that the petitioner – father of M, or her grandmother would leave a bad and undesirable influence on M. These allegations are not such as to persuade this Court not to send the child M back to her country of origin and initial upbringing. On the contrary, the petitioner appears to be an educated person who is gainfully managing his business, and the photographs on record show healthy bonding between M and her father. He also appears to have actively participated in the upbringing of M – if the averments made by him in his petition are to be believed. In fact, respondent no.2 had also expressed her willingness to let M interact with the petitioner and to allow him visitation rights, which would not have been the case if she considered him to be a bad influence on, or a potential threat to her daughter. The fact that the petitioner's mother is a pediatrician, in fact, is a reassuring fact that M would be taken good care of medically in her tender years. The photographs filed by the petitioner along with the petition show M to be having a healthy and normal upbringing while she was in USA. She is seen enjoying the love, care and company of her parents and others – including children of her age. There is no reason why she should be allowed to be uprooted from the environment in which she was naturally growing up, and to be retained in an environment where she would not have the love, care and attention of her father and paternal grandparents, apart from her peers, teachers, school and other care givers who were, till recently, with her.

116. From the allegations made by respondent No.2, it appears that she may have had issues of living with and adjusting with the petitioner and his parents – particularly the mother-in-law.

> However, there is absolutely nothing placed on record to even remotely suggest that so far as the petitioner is concerned, his conduct qua M and his presence with M, or for that matter, even the grandparents, could be said to be detrimental to or harmful for M. It certainly cannot be said that if M were to be returned to her place of origin where she spent the initial three years of her life – considering that those three years constitute more than 3/4th of her entire existence on this planet till date, would be detrimental to her interest in any manner whatsoever.
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> 117. The parties started their married life in USA, and as clearly appears from their conduct, their mutual commitment was to spend their married life and to raise their children in USA. There is absolutely nothing to suggest that the parties mutually ever agreed to or intended to shift from their place of residence to a place in India, though respondent no.2 may have unilaterally so desired. In such a situation, in our view, respondent No.2 cannot breach her maternal commitment without any valid justification and remain in return to India with M – who is an American citizen and would, obviously, be attached to her father and grandparents; her home; her Nanny; her teachers & instructors and her peers and friends, all of whom are in USA."

17. After having said this, the High Court considered the argument of the appellant that she was the primary care giver qua M but disregarded the same by observing that that alone cannot be made the basis to reject the prayer for return of the minor girl child to her native country, and more so, when the minor girl child deserves love, affection and care of her father as well. The Court found that nothing prevents the appellant from returning to the USA if she so desires. Further, the fact that the minor girl child would make new friends and have new care givers and teachers in India at a new school, cannot be the basis to deny her the love and affection of her biological father or parenting of grandparents which was equally important for the grooming and upbringing of the child. The Court then went on to notice that the expression "best interest of child" is wide in its connotation and cannot be limited only to love and care of the primary care giver i.e. the mother. It then adverted to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, while making it clear that it was conscious of the fact that the said Act may not strictly apply to the case on hand for examining the issue of best interest of the child. In paragraphs 124 to 126 of the impugned judgment, it went on to observe thus:

> "124. Thus, all decisions regarding the child should be based on primary consideration that they are in the best interest of the child and to help the child to develop to full potential.

When involvement of one of the parents is not shown to be detrimental to the interest of the child, it goes without saying that to develop full potential of the child, it is essential that the child should receive the love, care and attention of both his/ her parents, and not just one of them, who may have decided on the basis of his/ her differences with the other parent, to re-locate in a different country. Development of full potential of the child requires participation of both the parents. The child, who does not receive the love, care and attention of both the parents, is bound to suffer from psychological and emotional trauma, particularly if the child is small and of tender age. The law also recognizes the fact that the primary responsibility of care, nutrition and protection of the child falls primarily on the biological family. The "biological family" certainly cannot mean only one of the two parents, even if that parent happens to be the primary care giver.

125. The JJ Act encourages restoration of the child to be re-united with his family at the earliest, and to be restored to the same socio-economic and cultural status that he was in, before being removed from that environment, unless such restoration or repatriation is not in his best interest. The present is not a case where respondent No.2 fled from USA or decided to stay back in India on account of any such conduct of the petitioner which could be said to have been detrimental to her own interest, or the interest of the minor child M. The decision of respondent No.2 to stay back in India is entirely personal to her, and her alone. It is not based on consideration of the best welfare of the minor child M. In fact, the best interest of the child M has been sidelined by respondent no.2 while deciding to stay back in India with M.

126. Pertinently, respondent No.2 in her statement in response to the missing person report made by the petitioner on 14.01.2017 vide DD No.20B dated 14.01.2017 at PS – Vasant Kunj (South), New Delhi, inter alia, stated that 'the parties came to New Delhi, India with their daughter M on 20.12.2016. She further stated that during this time, I realized that I do not want to continue with his suppressed marriage and file for divorce and custody petition against K G in the Hon'ble Court Sh. Arun Kumar Arya, Principle Judge, Family Courts, Patiala House, New Delhi via HMA No.27/17.....'. Thus, it appears from the statement of respondent No.2 that the realization that she did not want to continue in her marriage dawned upon her only when she came to India, and it is not that when she left the shores of USA in December 2016, she left with a clear decision in her

mind that she would not return to USA for any specific and justifiable reason."

18. Reference was then made to the provisions of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations dated 20 th November, 1989, which was ratified by the Government of India on 11 th December, 1992, and the resolution by the Government of India issued by the Ministry of Human Resource Development vide Resolution No.6-15/98 C.W., dated 9 th February, 2004 framing the "National Charter for Children, 2003" and the Court observed in paragraph 138 as follows:

> "138. Thus, best welfare of the child, normally, would lie in living with both his/her parents in a happy, loving and caring environment, where the parents contribute to the upbringing of the child in all spheres of life, and the child receives emotional, social, physical and material support - to name a few. In a vitiated marriage, unfortunately, there is bound to be impairment of some of the inputs which are, ideally, essential for the best interest of the child. Then the challenge posed before the Court would be to determine and arrive at an arrangement, which offers the best possible solution in the facts and circumstances of a given case, to achieve the best interest of the child."

19. On a perusal of the impugned judgment, it is noticed that the High Court has taken note of all the relevant decisions including the latest three-Judge Bench decision of this Court in Nithya Anand Raghavan's case, (supra), which has had occasion to exhaustively analyse the earlier decisions on the subject matter under consideration. The exposition in the earlier decisions has been again restated and re-affirmed in the subsequent decision of this Court in Prateek Gupta Vs. Shilpi Gupta & Ors., (supra). Let us, therefore, revisit these two decisions. In paragraph 40 of the Nithya Anand Raghavan's case, (supra), this Court observed thus:

> "40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to

his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition." (emphasis supplied)
Again in paragraph 42, the Court observed thus:

"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 deciding the matter of custody or for return of the child to the native State." (emphasis supplied) It will be apposite to also advert to paragraphs 46 & 47 of the reported decision, which read thus:

"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 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.

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). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child." (emphasis supplied) Again in paragraph 50, the Court expounded as under:

"50. The High Court in such a situation may then examine whether the return of the minor to his/her native state

would be in the interests of the minor or would be harmful. While doing so, the High Court would be well within its jurisdiction if satisfied, that having regard to the totality of the facts and circumstances, it would be in the interests and welfare of the minor child to decline return of the child to the country from where he/she had been removed; then such an order must be passed without being fixated with the factum of an order of the foreign court directing return of the child within the stipulated time, since the order of the foreign court must yield to the welfare of the child. For answering this issue, there can be no straitjacket formulae or mathematical exactitude. Nor can the fact that the other parent had already approached the foreign court or was successful in getting an order from the foreign court for production of the child, be a decisive factor. Similarly, the parent having custody of the minor has not resorted to any substantive proceeding for custody of the child, cannot whittle down the overarching principle of the best interests and welfare of the child to be considered by the Court. That ought to be the paramount consideration." (emphasis supplied) In paragraphs 67 and 69, the Court propounded thus:

"67. The facts in all the four cases primarily relied upon by Respondent 2, in our opinion, necessitated the Court to issue direction to return the child to the native state. That does not mean that in deserving cases the courts in India are denuded from declining the relief to return the child to the native state merely because of a pre-existing order of the foreign court of competent jurisdiction. That, however, will have to be considered on case to case basis — be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment.

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

(emphasis supplied)

20. At this stage, we deem it apposite to reproduce paragraphs 70 and 71 of the reported judgment, which may have some bearing on the final order to be passed in this case. The same read thus:

> "70. Needless to observe that after the minor child (Nethra) attains the age of majority, she would be free to exercise her choice to go to the UK and stay with her father. But until she attains majority, she should remain in the custody of her mother unless the court of competent jurisdiction trying the issue of custody of the child orders to the contrary. However, the father must be given visitation rights, whenever he visits India. He can do so by giving notice of at least two weeks in advance intimating in writing to the appellant and if such request is received, the appellant must positively respond in writing to grant visitation rights to Respondent 2 Mr Anand Raghavan (father) for two hours per day twice a week at the mentioned venue in Delhi or as may be agreed by the appellant, where the appellant or her representatives are necessarily present at or near the venue. Respondent 2 shall not be entitled to, nor make any attempt to take the child (Nethra) out from the said venue. The appellant shall take all such steps to comply with the visitation rights of Respondent 2, in its letter and spirit. Besides, the appellant will permit Respondent 2 Mr Anand Raghavan to interact with Nethra on telephone/mobile or video conferencing, on school holidays between 5 p.m. to 7.30 p.m. IST.
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> 71. As mentioned earlier, the appellant cannot disregard the proceedings instituted before the UK Court. She must participate in those proceedings by engaging solicitors of her choice to espouse her cause before the High Court of Justice.

For that, Respondent 2 Anand Raghavan will bear the costs of litigation and expenses to be incurred by the appellant. If the appellant is required to appear in the said proceeding in person and for which she is required to visit the UK, Respondent 2 Anand Raghavan will bear the air fares or purchase the tickets for the travel of appellant and Nethra to the UK and including for their return journey to India as may be required. In addition, Respondent 2 Anand Raghavan will make all arrangements for the comfortable stay of the appellant and her companions at an independent place of her choice at reasonable costs. In the event, the appellant is required to appear in the proceedings before the High Court of Justice in the UK, Respondent 2 shall not initiate any coercive process against her which may result in penal consequences for the appellant and if any such proceeding is already pending, he must take steps to first withdraw the same and/or undertake before the court concerned not to

pursue it any further. That will be condition precedent to pave way for the appellant to appear before the court concerned in the UK."

21. In the subsequent judgment of two Judges of this Court in Prateek Gupta (supra), after analysing all the earlier decisions, in paragraphs 49 to 51 the Court noted thus:

> "49. The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of "intimate contact and closest concern" notwithstanding. Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer res integra that the ever-overriding determinant would be the welfare and interest of the child. In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgeably subservient thereto. Though in the process of adjudication of the issue of repatriation, a court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the applicant/parent is prompt and alert in his/her initiative and the existing circumstances ex facie justify such course again in the overwhelming exigency of the welfare of the child, such a course could be approvable in law, if an effortless discernment of the relevant factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological, social, cultural existence, thus exposing it to visible, continuing and irreparable detrimental and nihilistic attenuations. On the other hand, if the applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold.
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> 50. The doctrines of 'intimate contact' and 'closest concern' are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom, etc. with the portent of mutilative bearing on the process of its overall growth and grooming.

51. It has been consistently held that there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration." (emphasis supplied) Again, in paragraph 53 of the judgment, the Court observed thus:

"53. .... The issue with regard to the repatriation of a child, as the precedential explications would authenticate has to be addressed not on a consideration of legal rights of the parties but on the sole and preponderant criterion of the welfare of the minor. As aforementioned, immediate restoration of the child is called for only on an unmistakable discernment of the possibility of immediate and irremediable harm to it and not otherwise. As it is, a child of tender years, with malleable and impressionable mind and delicate and vulnerable physique would suffer serious set-back if subjected to frequent and unnecessary translocation in its formative years. It is thus imperative that unless, the continuance of the child in the country to which it has been removed, is unquestionably harmful, when judged on the touchstone of overall perspectives, perceptions and practicabilities, it ought not to be dislodged and extricated from the environment and setting to which it had got adjusted for its well-being." (emphasis supplied)

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

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

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

24. In the present case, the minor child M is a US citizen by birth. She has grown up in her native country for over three years before she was brought to New Delhi by her biological mother (appellant) in December 2016. She had joined a pre-school in the USA. She had healthy bonding with her father (respondent No.2). Her paternal grand-parents used to visit her in the USA at some intervals. She was under the care of a Nanny during the day time, as her parents were working. Indeed, the work place of her father is near the home. The biological father (respondent No.2) of the minor child M has

acquired US citizenship. Both father and mother of the minor child M were of Indian origin but domiciled in the USA after marriage. The mother (appellant) is a permanent resident of the USA Green Card holder and has also applied for US citizenship. In her affidavit filed before the Delhi High Court dated 30th November, 2017, she admits that her legal status was complicated as she has ceased to be an Indian citizen and her status of citizenship of the USA is in limbo.

25. Be that as it may, the father filed a writ petition before the Delhi High Court for issuance of a writ of Habeas Corpus for production of the minor child and for directions for her return to USA without any loss of time. Given the fact that the parties performed a civil marriage on 19 th March, 2011 in the USA and cohabited in the native country and gave birth to minor child M who grew up in that environment for at least three years, coupled with the fact that the father and minor child M are US citizens and mother is a permanent resident of USA, the closest contact and jurisdiction is possibly that of the Circuit Court of Cook County, Illinois, USA. However, we may not be understood to have expressed any final opinion in this regard. At the same time, it is indisputable that the appellant and respondent No.2 first got married on 31 st October, 2010 as per Sikh rites, i.e. Anand Karaj ceremony, and Hindu Vedic rites and that marriage was solemnised in New Delhi at which point of time the appellant was admittedly a citizen of India. Presently, she is only a Green Card holder (permanent resident) of the US. It is, therefore, debatable whether the Family Court at New Delhi, where the appellant has already filed a petition for dissolution of marriage, has jurisdiction in that behalf including to decide on the question of custody and guardianship in respect of the minor child M. For that reason, it may be appropriate that the said proceedings are decided with utmost promptitude in the first place before the appellant is called upon to appear before the US Court and including to produce the minor child M before that Court.

26. It is not disputed that the appellant and minor child are presently in New Delhi and the appellant has no intention to return to her matrimonial home in the U.S.A. The appellant has apprehensions and serious reservations on account of her past experience in respect of which we do not think it necessary to dilate in this proceedings. That is a matter to be considered by the Court of Competent Jurisdiction called upon to decide the issue of dissolution of marriage and/or grant of custody of the minor child, as the case may be. For the time being, we may observe that the parties must eschew from pursuing parallel proceedings in two different countries. For, the first marriage between the parties was performed in New Delhi as per Anand Karaj Ceremony and Hindu Vedic rites on

31st October, 2010 and the petition for dissolution of marriage has been filed in New Delhi. Whereas, the civil marriage ceremony on 19th March, 2011 at Circuit Court of Cook County, Illinois, USA, was performed to complete the formalities for facilitating the entry of the appellant into the US and to obtain US Permanent Resident status. It is appropriate that the proceedings pending in the Family Court at New Delhi are decided in the first place including on the question of jurisdiction of that Court. Depending on the outcome of the said proceedings, the parties will be free to pursue such other remedies as may be permissible in law before the Court of Competent Jurisdiction.

27. As aforesaid, it is true that both respondent No.2 and also the minor child M are US citizens. The minor girl child has a US Passport and has travelled to India on a tenure Visa which has expired. That does not mean that she is in unlawful custody of her biological mother. Her custody with the appellant would nevertheless be lawful. The appellant has already instituted divorce proceedings in the Family Court at Patiala House, New Delhi. The respondent No.2 has also filed proceedings before the Court in the US for custody of the minor girl child, directing her return to her natural environment in the US. In such a situation, the arrangement directed by this Court in the case of Nithya Anand Raghavan (supra), as exposited in paragraphs 70□71, may be of some help to pass an appropriate order in the peculiar facts of this case, instead of directing the biological mother to return to the US along with the minor girl child, so as to appear before the competent court in the US. In that, the custody of the minor girl child M would remain with the appellant until she attains the age of majority or the Court of competent jurisdiction, trying the issue of custody of the minor child, orders to the contrary, with visitation and access rights to the biological father whenever he would visit India and in particular as delineated in the interim order passed by us reproduced in paragraph 11 (eleven) above.

28. A fortiori, dependant on the outcome of the proceedings, before the Family Court at New Delhi, the appellant may then be legally obliged to participate in the proceedings before the US Court and must take all measures to effectively defend herself in the said proceedings by engaging solicitors of her choice in the USA to espouse her cause before the Circuit Court of Cook County, Illinois, USA. In that event, the respondent No.2 shall bear the cost of litigation and expenses to be incurred by the appellant to pursue the proceedings before the Courts in the native country. In addition, the respondent No.2 will bear the air fares or purchase the tickets for the travel of the appellant and the minor child M to the USA and including their return journey for India, as may be required. The respondent No.2 shall also make all suitable arrangements for the comfortable stay of the appellant and her companions at an independent place of her choice, at a reasonable cost. Further, the respondent No.2 shall not initiate any coercive/penal action against the appellant and if any such proceeding initiated by him in that regard is pending, the same shall be withdrawn and not pursued before the concerned Court any

further. That will be the condition precedent to facilitate the appellant to appear before the Courts in the USA to effectively defend herself on all matters relating to the matrimonial dispute and including custody and guardianship of the minor child.

29. The appellant and respondent No.2 must ensure early disposal of the proceedings for grant of custody of the minor girl child to the appellant, instituted and pending before the Family Court at Patiala House, New Delhi. All contentions available to the parties in that regard will have to be answered by the Family Court on its own merits and in accordance with law.

30. We, accordingly, set aside the impugned judgment and orders of the High Court and dispose of the writ petition in the aforementioned terms. The appeals are allowed with no order as to costs.

.....CJI.

(Dipak Misra) .....J. (A.M. Khanwilkar) .....J.
(Dr. D.Y. Chandrachud) New Delhi;

July 20, 2018.