Supreme Court of India
Dhanwanti Joshi vs Madhav Unde on 4 November, 1997
Author: M J Rao
Bench: S.B. Majmudar, M. Jagannadha Rao

PETITIONER:
DHANWANTI JOSHI

Vs.

RESPONDENT:
MADHAV UNDE

DATE OF JUDGMENT: 04/11/1997

BENCH:
S.B. MAJMUDAR, M. JAGANNADHA RAO

ACT:

HEADNOTE:

JUDGMENT:

THE 4TH DAY OF NOVEMBER, 1997 Present;

Hon'ble Mr.Justice S.B.Majmudar Hon'ble Mr.Justice M.Jagannadha Rao In-person for the appellant Kailesh Vasdev, Adv. for the Respondent J U D G M E N T The following Judgment of the Court was delivered: M. JAGANNADHA RAO, J.

These two appeals are connected and can be disposed of together C.A.No 5517 of 1997 arises out of order dated 10.6.1997 and 4.7.1997 passed by the High Court in appeal against M.J.Petition No. 985 of 1985 filed by the appellant in Civil Court which was transferred to the Family Court. C.A. No. 5518 of 1997 arises out of orders passed on same dates by the High Court in Family Court Appeal No. 99 of 1995 (arising out of order dated 1.212.1995 in custody case No. 9 of 1993 filed by the respondent). The orders dated 10.6.1997 are orders dismissing the matters for default and orders dated 4.7.1997 are those refusing to restore the matters and vacating the ad interim order. In the Family Court Appeal 99 of 1995 while passing orders on 4.7.1997, it was also stated by the High Court that appellant has no case on merits.

The facts leading to the appeals are as follows:- The respondent Mr.Madhav Under married the appellant (who was then in U.S.A) on 11.6.82 at Omaha, State of Nebraska in the U.S.A.. On

19.6.1982, a separate marriage ceremony as per Hindu rituals was performed. It appears that the respondent had earlier married one Bhagyawanti at Nagpur on 20.4.1967. The respondent later left for USA and obtained an exparte divorce order against Bhagyawanti in the trial court at Oakland in the State of Michigan on 25.10.1997 allegedly by way of misrepresentation. (Later Bhagyawanti moved that Court for vacation of that order). The said Bhagyawanti also filed petition No.101/81 in the District Court, Nagpur and claimed that the decree obtained by respondent in USA was void and based on misrepresentation of facts and she claimed for divorce maintenance and the reliefs. She succeeded in that case and a fresh divorce decree was passed by the Nagpur Court on 11.6.84 relying upon Smt. Satya vs. Tej Singh [1975 (1) SCC 120]. That would mean that the Indian Court held that the US divorce decree dt. 25.10.1997 was not binding on the said Bhagyawanti.

The appellant lived with the respondents in USA for 10 months after her marriage on 11.6.1982. On 15.3.1983, a male child was borne to them, is USA and was named Abhijeet. Due to certain compelling circumstances, the mother (appellant) and the child left the respondent on 20.4.83 the child was 35 days old. Thereafter, the respondent-husband had no occasion to live with his wife and the child so far. They have been involved in unfortunate litigations both Civil and Criminal both in USA and India for the last 14 years. The respondent is continuing to live in USA while the appellant and her son have been living in India. The boy is now studying in 8th Standard in a school at Pune.

The respondent-husband filed a divorce case in USA against the appellant and also sought custody of the child. Initially on 15.3.1983 the US Courts had given custody of the child to the mother-appellant. A divorce decree was passed exparte on 23.9.1983. On 20.2.84 the child reached India with the appellant s-mother. The respondent then obtained an order on 11.4.1984 exparte containing directions as to visitation rights in his favour. Late on, 30.4.84 the Court passed an order exparte modifying the earlier order unto one of "temporary custody" in favour of the husband-respondent and shifting the temporary care, control or possession of the child from the appellant to the respondent, until a final bearing as to be held on all issues. On 28.4.86, the US Court passed on exparte order granting 'permanent custody' to the respondent-husband.

In the meanwhile, the appellant proceeded from USA to Australia and then reached India and joined her son. She then filed M.J. Petition No. 985 of 1985 in the Civil Court, Bombay for a declaration that her marriage with respondent on 11.6.1982 was null and void inasmuch as the respondent's marriage with Bhagyawanti was subsisting on that date. She claimed maintenance for her and the child and for a declaration that the divorce decree passed by the US Court on 23.9.83 was not binding on her and for injunction against respondent from removing the child from her. That the divorce decree obtained on 25.10.77 by the respondent against Bhagyawanti did not bind Bhagyawanti has now been declared in the fresh divorce decree passed by the Indian Court on 11.6.84 as stated above:

The respondent came to Bombay and filed Habeas Corpus petition No. 328 of 1986 in the High Court of Bombay and the said Writ Petition was dismissed on 15.4.86 and custody was granted to the appellant by the High 'court. The Court said In a elaborate order);

> "Therefore, taking the totally of circumstances into consideration, we find allowed to retain the custody for the present and at the stage. The interim Custody of Abhijeet be handed over to the mother Dhanwanti forthwith. The petitioner-father-Madhav will the right of visiting between 4.000 p.m. and 6 p.m. every day. Subject to the above, rule is discharged.

(The permanent custody order of UDS Court dated 25.4.86 in favour of the husband is after this dated. B Social leaves petition No. 1290 of 1986 filled by respondent was dismissed on 8.5.1986.

We come to the next stage of proceedings under the Guardian and wards Act, and eye 13 of the Hindu Minority & Guardianship Act, 1890) filed by the appellant for permanent guardianship of the person/property of her son and other reliefs. The Court appointed her as permanent & Lawful guardian of the person/property of the child or 20.8.1986. This was an exparte order in favour of the appellant-wife. The application filed by respondent for setting aside the same was dismissed on 23.1.1987 by the trial court. Appeal No. 1313 of 1987 to the High Court filed by the respondent-husband was dismissed on 23.11.1987 observing;

> "We have heard Mr. Ganesh learned counsel appearing on behalf of the appellant t length and we find that there is no merit whatsoever in the appeal. From what has been stated hereinabove it is very clear that the appellant is fighting with the Respondent for over several years. The conduct of the appellant clearly indicates that he is a much married man and he had entered into marriage with the Respondent by suppressing the fact of the first marriage with a girl at Nagpur.
>
> The earlier judgment of the Division Bench of this court clearly indicates that the appellant had treated the Respondent with cruelty and the Respondent was required to leave the matrimonial house with the child under great stress and compulsion. The conduct of the appellant does not indicate that he is interested in the welfare of the child but the anxiety of the appellant seems to be to seek custody of the child only a with a view to avoid payment of maintenance for the child. Apart from the merits of the claim, we must bear in mind that whatever may be, the disputes between the parties the Court has to consider in the proceedings under the Guardianship Act as to what is in the interest of the minor child. The minor child has remained with the mother for last over four years and in our judgment it would not be in interest of the minor to be snatched away from the mother and the order of the learned Single Judge appointing the mother as guardian could not be faulted with."

Once again, the respondent filed appeal in this Court in C.A. No. 1289/90. This was dismissed on 10.10.1990. This Court, however, while dismissing the appeal, made an observation:

> "We make it clear that we have decided the case only on the grounds which we have set earlier and we decline to express ay view on the legal merits of the decree or on merits of the disputes between the parties concerned except to the extent that there was no good cause for setting aside the exparte decree. I the appellant has any other

remedy open in law against the exparte decree this judgment will not preclude him from pursuing such remedy."

Taking advantage of the said observation, the respondent filed Case No.D9 of 1993 in the Family Court, Bombay afresh for custody of child. That petition was clubbed with M.J. Petition No. 985 of 1985 filed earlier by the appellant in the City Civil Court regarding declaration that her marriage was void, which was transferred to the Family Court. The Family Court passed an order dt. 1.12.95 allowing the respondent's application D9 of 1993 and granting him custody of the child to the respondent and dismissed appellant's M.J.Petition No.985 of 1985 filed to declare her marriage with respondent as null & void.

The appellant preferred appeal to the High Court. Stay was granted. It appears, during the hearing of the appeal, the respondent was given custody of the child for 4 days but on the first day the boy ran away from the respondent and was traced, and then all the parties met at a police station and the custody of the boy was given to the respondent for three days. The boy was later taken by respondent to his village called Baddlapur in Maharashtra for those three days. The appellant's appeals were listed after vacation in the first week for 9th June. It is the case of the appellant that the case was not listed on 9th. it was listed on 10th June, 1997, and she had no notice and when the Advocate requested the court for time, the case was not adjourned but was only passed over till 2.245 p.m. and then at 2.45 p.m. it was dismissed for non-prosecution. The application o. 3411 of 1997 to set aside the same was dismissed on 4.7.97. It was also held i the order dt, 4.7.97 that the appellant-mother had no case on merits for retaining custody of the child.

Aggrieved by the order dismissing the appeals for default and the refusal to restore the same, and aggrieved by the findings given on merits of the application for custody and aggrieved by the dismissal of the appeal in the case for declaring the marriage as null & void - without giving any reasons, - these two Civil appeals have been preferred by the appellant.

We have heard arguments on the merits of the petition filed for custody of the child. So far as the appeal relating to declaration of the marriage as null & void filed by the appellant is concerned, the appellant stated fairly that she does not want to pursue the same. Therefore, the earlier decree of divorce as between her and her husband can be treated as having become final.

So far as the dismissal of the appellant's appeal (against the orders in respondent's application D9 of 1993 for custody) for default on 10.6.97 and the refusal of the High Court on 4.7.97 to restore the same, we have been taken through the affidavits and the circumstances of the case and we are satisfied that the High Court was not justified in not restoring the appeals and in refusing to give a hearing. it appears to us that the High Court did not give due importance to the fact that the case related to custody of a child who has been living with the appellant for more than 12 years or more and that it involved serious consequences for the child, whatever be the fault of the appellant. it was a fit case where the appeal should have been restored, If the child, on account of his superience in the three days with his father - during the pendency of the appeal when temporary custody was given to the respondent was not willing to accompany the mother to the High Court, prima facie it appears to us that there was no ground for initiating contempt proceedings against her for not

producing the child. Be that as it may, the said contempt proceedings will be disposed of in accordance with law by the High Court. In any event we direct recall of the bailable warrants issued against the appellant, if they are still pending.

Before the hearing of the case, we interviewed the boy in Chambers and found that he was quite intelligent and was able to understand the facts and circumstances in which he was placed. He informed us that he was not inclined to go with his father to USA and he wants to continue his studies in India till he completes 10-2 or he finishes his graduation. He feels that he will then be in a position to decide whether to go to USA for higher studies. He wants to continue to be in the custody of his mother. He told us that his desire is to become a Veterinary doctor.

Parties & counsel on both sides wanted us to dispose of the custody matter on merits.

The High Court while holding that the appellant had no case on merits, has given only one reason for granting custody to the father. it stated that the father.

> "Who has acquired citizenship in America is well-placed in is career. The boy is nearing the age of 14. The paramount interest of a boy aged 14 years of age is definitely his future education and career. The further education of the boy whose father is well-placed in America will be comparatively superior. The lower Court took note of this circumstance and granted custody of the boy to respondent. Therefore, we do not find any error in the order passed by the Court below"

It is clear that the Family Court and the High Court have therefore based their decision on the said sole circumstance regarding the financial capacity of the father to give better education to the boy in USA. Learned counsel for the respondent-husband has contended in addition, that the appellant had violated Court orders in USA and brought the child to India and had also not produced the child in the Bombay High Court and had violated Court directions, and that by such conduct she was disqualified from having custody of the child. It was also argued that she was living in Bombay while the chile, is studying at Pune, and that she does not have the capacity to educate the child in USA. The husband led evidence that his brother & brother's wife are prepared to come to USA to take care of the child if the child should come to USA.

On the other hand, the appellant has contended that earlier orders granting custody to her have become final and that there is no change in the circumstances warranting the shifting of the custody to the father, that the Child cannot be uprooted from the environment in which he has grown for the last more than 12 years, that she has the capacity to educate the child in USA, that the child is a citizen of USA and is entitled to go there in his own independent right at any time, that in US, there is no body to take care of the child in the husband's household and that the respondent's brother/wife could not be substitutes for the mother, even if they go to USA . She submitted that the respondent made efforts taking away the child from her within 35 days of its birth and she had to leave the house in USA with the child and the child was sent to India through her mother; she escaped the detectives employed by the respondent, and proceeded to India via Australia. Her Sringing the child to India in those circumstances cannot be a ground for shifting custody of the

child to the respondent. She contended that the Courts below could not ignore the earlier orders of the High Court in the Habeas Corous case or the orders in the proceedings under the Guardian & Wards Act, 1890. The Supreme Court had also rejected the respondent's appeal in both cases. In the latter case the High Court/supreme Court had refused to set aside the ex parte orders passed in her favour and against the respondent. This operated as res judicata or estoppel. She also contended that when the child was not willing to come before the Bombay High Court in view of his unpleasant' experience with the father for 3 days when the Bombay Court gave custody to the father, she could not be found fault with for not bringing the child to the Court and that fact cannot also be a ground for shifting custody to the respondent.

On these submissions, the following points arise for consideration:

(1) Could the Family Court and High Court have ignored the orders passed in favour of the appellant in the Habeas Corpus Case on 15.4.86 and the exparte order in the Guardian & Wards Act case dated 23.11.87 and the orders of refusal of the High Court or Supreme Court in 1990 to set aside the latter orders and could the respondent file a fresh case in the Family Court in 1993 to claim custody, and if so is whether there is proof of changed circumstances between 1990 and 1993 or 1997 warranting the shifting of custody to the respondent-father, and whether the capacity of the respondent to give education to the child in USA could alone be sufficient ground to shift custody?

(2) Do the fact relating to the appellant bringing away the child to India in 1984 contrary to an order of the US Court or not producing the child in the Bombay High Court have any bearing on the decision o the Courts in India while deciding about the paramount welfare of the child in 1993 or 1997? (3) In case the respondent is not entitled to permanent custody, is he entitled to temporary custody or visitation rights.

Point 1: From the facts already stated, it is clear that the appellant has an order in her favour of the High Court of Bombay dated 15.4.86 giving her the custody of the child passed while dismissing the writ petition filed by the respondent seeking a writ of baheas corpus. The appellant then has also an order in her favour passed again under the Guardian & Wards Act dated 23.11.1987, though in exparte proceedings, giving her permanent custody of the child. The appeals preferred by the respondent against he said order to the Supreme Court have been dismissed. The order in the proceedings under the Guardian & Wards Act, 1890 dated 23.11.1987, even though exparte is binding on the respondent as it concerns the same subject matter and operates as res judicata (Mulla, CPC, Vol.1, 15th Ed., P. 109) (See also Sarkar on Evidence 13th Ed. P. 1128 that judgment by default creates an estoppel - quoting sailendra Narayan vs. State of Orissa AIR 1956 SC 346).

We re of the view that the High Court, in the present proceedings, was clearly in error in not even referring to the earlier orders and their binding nature on the respondent, in so far as the said orders considered that in the interests of the paramount welfare of the child, the custody was to be with the mother, the appellant. In the present proceedings started start on the premise that the permanent custody was with the mother. it will be necessary for the respondent to establish facts subsequent to 1990 and before 1993 or 1997, which can amount to change in circumstances requiring custody of the child to be shifted from the appellant to the respondent.

It is no doubt true that orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at an future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interests of the child [Rosy Jacob vs. Jacob a. Chakramakkal (1973 (1) SCC 840)]. However, we may state that in respect of orders as to custody already passed in favour of the appellant the doctrine of res judicata applies and the family Court in the present proceedings cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated. There must be proof of substantial change in the circumstances presenting anew case before the court. It must be established that the previous arrangement was not conductive to the child's welfare or that it has produced unsatisfactory results. Ormerod L.J. pointed out in S vs. W [(1981) 11 Fam.Law 21 (82) {CA)] that "the status quo argument depends for its strength wholly and entirely on whether the status quo is satisfactory or not, the more satisfactory the status quo, the stronger the argument for not interfering. The less satisfactory the status quo, the less one requires before deciding to change".

We shall next consider the point which solely appealed to the Family Court and the High Court in the present proceedings namely that the respondent is financially well- off and can take care of the child better and give him superior education is USA. Lindley, L.J. in Re. vs. McGrath (Infants) 1893 (1) Ch. 143 (148) stated that:

> "....the welfare of the child is not to be measured by money alone nor by physical comfort only. The word 'welfare' must be taken in its wides sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

As to the "secondary" nature of material considerations, Hardy Boys, J. of the New Zealand Court said in Walker vs. Walker & Harrison (See 1981 N.Z.Recent Law 257) (cited by British Law Commission, working Paper No. 96 Para 6.10) "Welfare is an all-encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents"

From the above, it is clear that the High Court in the case before us was clearly in error in giving sole or more importance to the superior financial capacity of the husband as stated by him in his evidence. Assuming that his financial capacity is superior to that of his wife, that in out opinion cannot be the sole ground for disturbing the child from his mother's custody. As of today, the child is getting good education and is doing well in his studies. The proposal of an immediate American education which the father is prepared to finance cannot, in our opinion, be a sufficient ground for shifting the child to the father's custody, ignoring the fact that for the last more than 12 years, the child has been in the mother's custody. Thee is also, no basis, having regard to the oral evidence adduced by the parties, for holding that the mother is permanently residing at Bombay leaving the

child at Pune. The appellant's categorical evidence that whenever she had to go to Bombay from Pune, her mother used to come from Bombay to pune to take care of the child, leaves no doubt in our mind that the mother is residing mostly at Pune and goes to Bombay occasionally for very short periods in connection with certain official duties in her employment. the appellant has also reiterated before us that she has been residing at Pune and she has a flat there. As contended by her, the child is a citizen of USA by both and he can go to USA in his own right in future whenever it is so decided. Further the evidence of the respondent and of his brother that in the event the child is allowed to go to USA with the respondent, the respondent's brother and the latter's wife have agreed to proceed to USA, leaving their three daughters in India (of whom o e has been married recently) or anticipating the migration of their daughters, appears to us to be too artificial and a make believe affair rather than real. It appears to us that the effort on the part of the respondent here is only to impress the Court that the child will have company of these persons in case the child is allowed to proceed to USA. This evidence has not appealed to us.

In the result, therefor, we do not find any substantial change in the circumstances between 1990 and 1993 or 1997 which can justify the shift over the permanent custody of the child from the appellant to the respondent. Point 2: Much of the argument for the appellant was based upon the fact that the appellant had, during 1984, removed the child from US to India violating Court orders passed in that country. It is said she has also not produced the child before the Bombay High Court. It was argued for the respondent that this conduct disqualified the appellant from having custody of the child.

This point can perhaps be rejected on ground of constructive res judicata because of the earlier order as to custody in favour of the appellant but a the point has been argued and is important we shall decide the same as a matter of law. Such a question has been considered and decided in various decisions of Courts to which we shall presently refer.

The leading case in this behalf is the one rendered by the Privy Council in 1951, in McKee vs. McKee (1951 AC 352). In that case, the parties, who were American citizens, were married in USA in 1933 and lived there till Dec, 1946. But they had separated in Dec. 1940. On 17.12.1941, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada. In habeas corpus proceeding by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada, once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of the permanent consideration and the order of a foreign court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign Court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child. The order of the foreign Court in US would yield to the welfare of the child. Comity of Courts demanded not its enforcement, but its grave consideration. This case arising from Canada which lays down the law for Canada and U.K. has been consistently followed in latter cases. This view was reiterated by

the House of Lords in vs. C [1970 AC 668]. This is the also in USA (see 24 American Jurisprudence, para 1001) and Australia. (See Khamis vs. Khamis) [(1978) 4 Fam. L.R. 410 (full Court (Aus)].

However, there is an apparent contradiction between the above view and the one expressed in ReH. (infants) 1996 (1) All E.R. 886 (CA) and in ReE (an infant) 1967 (1) All E.R. 881 to the effect that the Court in the country to which he child is removed will send back the child to the country from which the child has been removed. This apparent conflict is explained and resolved by the Court of Appeal in 1974 in ReL. (minor) (Wardship : Jurisdiction): 1974 (1) All E.R. 913 (CA) and in RER (Minors) (Wardship : Jurisdiction) : 1974 (1) All e.R. 913 (CA) and in ReR (Minors) (Wardship Jurisdiction) 1981 (2) FLR 416 (CA). It was held by the Court of Appeal in ReL that the view in McKee vs. McKee is still the correct view and that the limited question which arose in the latter decisions was whether the Court in the country to which the child was removed could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of (a) a summary inquiry, the Court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the Court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign Court or treat the fact of removal of the child from another country as only one of the circumstances. The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked, for example, if 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 is exercised only if the Court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may will be persuaded that it would be better for the child that those merits should be investigated in a Court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. Alternatively, the said Court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed. In that event, the removal of the unauthorised child from the native country would not come in the way of the Court in the country to which the child has been remove, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. (See Rayden & Jackson, 15th Ed. 1988, pp. 1477- 14791 (Bromley, Family law, 7th Ed. 1987). In ReR (Minors) (wardship: Jurisdiction) 1981 (2) FLR 416 (CA) it has been firmly held that the concept of forum conveniens has no place in wardship jurisdiction.

We may here state that this Court in Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw & Another (1987 Z(1) SCC 42), while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts, - which were independently considered - it was in the interests of the child to be sent back to the native state. There the removal of the child

by the father and the mother's application in India were within six months. In that context, this Court referred to ReH. (infants), 1966 (1) All ER 886 (CA) which case, as pointed out by us above has been explained in ReL (1974 (1) ALL ER 913) as a case where the Court thought it fit to exercise its summary Jurisdiction in the interests of the child. Be that as it may, the general principles laid down in Mckee vs. McKee (1951 AC 3351) and Jvs. C (1970 AC 668) and the distinction between summary and elaborate inquiries as stated in ReL (infants) are today well settled in U.K., Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian Courts from considering the question on merits, having regard to the delay from 1984 - even assuming that the earlier orders passed in India do not operate as constructive res judicate.

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

In this connection, it is necessary to refer to the Hague Convention of 1980 on Civil Aspects of International Child Abduction. As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the convention, any child below 16 years who had been wrongfully removed or retained in another Contracting state, could be returned back to the country from which the child had been removed, by application to a Central authority. Under Article 16 of the Convention, if in the process, the issue goes before a Court, the Convention prohibits the Court from point into the merits of the welfare of the child. Article 12 requires the child to be sent back, but if a period of more than one year has lapsed from the date of removal to the date of commencement of the proceedings before the Court, the child would still be returned unless it is demonstrated that the child is now settled in its new environment. Article 12 is subject to Article 13 and a return could be refused, 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 nature and objects to its return. In England, these aspects are covered by the Child Abduction and Custody Act, 1985.

So far as non-convention countries are concerned, or where the removal related to a period before adopting the convention, the law is that the Court to which the child is removed will consider the question on merits bearing the welfare o the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee vs. McKLee (1951 AC

351), unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in ReL 1974 (1) All ER 193 (CA). As recently as 1996-1997, it has been held in P(A Minor) (Child Abduction: Non Convention Country), Re: (1996 (3) FCR 233 (CA) by Ward, LJ 1996 (Current Law) (Year Book) (p. 165-166) that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence-which was not a party to the Hague Convention, 1980, - the Courts overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the

provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. She also A(A minor) (Abduction : Non-Convention Country) (re, The Times 3-7-97 by Ward LJ (CA) (quoted in Current Law Aug. 1997, P.13). This answers the contention relating to removal of the child from USA.

Again as stated earlier, we do not prima facie find any willful disobedience on the part of the appellant in not producing the child before the Bombay High Court warranting shifting of custody to the father. If the child, after its three day experience with the father was not willing to come to the Court, the appellant could not be faulted.

For the aforesaid reasons, the contention of the respondent based on violation of the earlier orders of the US Courts or of the Bombay High Court for production of the child, is rejected.

Point 3: Though we have held that the respondent is not entitled to permanent custody of the child, It is necessary to consider whether the respondent is to be given temporary custody or visitation rights.

On the facts of this case, we are not inclined to grant temporary custody to the respondent to take the child from India. That would affect the child's studies and further there is an exparte order of the US Court given permanent custody to the father and if that order is executed by the respondent, there is danger of the boy not returning to India thus frustrating any order that we are asked to pass giving temporary custody to the respondent.

As to visitation rights, of course, the respondent can be given, as long as he wants to visit the child in India, at Pune, So far as this aspect is concerned, the point has not been argued before us elaborately but, in case the respondent is coming to India, he could, in advance of atleast 4 weeks. intimate in writing to his counsel either at Bombay/Delhi with copy to the address of the appellant/child and if that is done, the appellant shall positively respond in writing. We grant visitation rights for three hours per day twice a week (for 3 weeks) at a time and venue at Pune to be agreed by counsel and the appellant, and this shall be at a place at Pune where the counsel or their representatives are necessarily present it or near the venue. the respondent shall not be entitled to take the child out from the said venue. The appellant shall take all such steps to comply with the above visitation rights of the respondent. it will also be open to the parties to move this Court for any other directions in regard to these visitation rights.

Appeal of the appellant-mother against order passed in the application for custody filed by the respondent before the Family Court, is allowed as stated above and the respondent's application for custody of child is dismissed subject however to the visitation rights stated above. Appeal against the order in the petition for declaring the marriage of appellant and respondent null & void is dismissed as not pressed in view of the decree of divorce, already passed. The bailable warrants issued against appellant are directed to be withdrawn, if they are subsisting.