IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 97 OF 2021

Mr. Abhay S/o. Sanjeev Mogal
Age : 41 years, Hindu, adult, Indian Inhabitant,
Occ : Service permanently residing at
C-1/2 Dnyaneshwar Nagar CHS
R.A.Kidwai Road, Sewree, Wadala
Mumbai 400 031 ..... Petitioner

Versus

1. Mrs. Neha Joshi
   Age : 41 years, Hindu, Adult
   Indian Inhabitant, Occ:Service Presently
   residing at Shreeji Seva Sang Apartment
   4B, Sector 42, Opposite to Seawoods
   Railway Station, Nerul.
   Having Office at 24255, Pacific Coast
   Highway, Malibu, California 90263,
   United States.

2. The State of Maharashtra
   Through the Public Prosecutor
   High Court, Bombay ..... Respondents

Mr. Prabhjit Jauhar a/w. Mr. Niranjan Mundargi, Ms. Keral Mehta and Mr. Vikrant Shinde i/b. Ms. Jai Abhyudaya Vaidya for the Petitioner.

Ms. Lata Desai, Senior Advocate a/w. Dr. Pallavi Divekar, Ms. Manasi Hirve i/b. Ms. Darshana Pawar for Respondent No. 1.

Ms. P. P. Shinde, APP for the State.

CORAM : REVATI MOHITE DERE &
GAURI GODSE, JJ.
RESERVED ON : 31st JULY 2023
PRONOUNCED ON : 14th SEPTEMBER 2023

JUDGMENT (PER: GAURI GODSE, J.) :

1. This petition is filed by the father of a minor child ("Aaryan"), seeking a writ of habeas corpus for directing respondent no.1-mother ("respondent") to produce Aaryan before this court. At the time of filing of the petition on 30th December 2020, Aaryan was one year old. By way of amendment, the petitioner seeks a direction against the respondent to handover physical custody of Aaryan to the petitioner for taking Aaryan along with him to the United States of America ("the US") in compliance with the order dated 26th January

2021 of the 470th Judicial District Court of Collins County, Texas. By way of amendment, the petitioner has also prayed for directing respondent to hand over all the official documents of Aaryan, including his original passport, visa, etc., to the petitioner. Presently, Aaryan is around 3 ½ years old.

FACTUAL ASPECTS:

2. Respondent is the petitioner's wife and mother of Aaryan. The petitioner and respondent are citizens of India; however, they are permanent residents of the US. Aaryan is a citizen of the US by birth. The petition was filed on 30th December 2020 as the respondent had refused to allow the petitioner to meet Aaryan and refused to return to the US along with Aaryan.

3. Before dealing with the rival contentions of both parties, it is necessary to note the status regarding access/physical custody granted to the petitioner during the pendency of the petition.

4. After the petition was filed, by way of interim relief, the

petitioner was permitted access to Aaryan through WhatsApp Video Calls. This court, by order dated 12th January 2021, had recorded the statement made on behalf of the respondent that access would be given to the petitioner through WhatsApp Video Call. We are informed that in view of the interim arrangement, the petitioner continued to get access to Aaryan through WhatsApp Video calls every day for a minimum of 20 minutes. By orders dated 13 October 2021 and 17th November 2021, physical access was also given to meet Aaryan when the petitioner travelled to India. This court, by order dated 28th October 2021, recorded that the petitioner met Aaryan, and interaction with Aaryan was cordial. Since the parties were agreeable to explore the possibility of an amicable settlement, the parties were permitted to meet at the Mediation centre of this court. With respect to the access through video calls, the earlier arrangement was continued.

5. By order dated 6th December 2022, the petition was admitted, and by consent of the parties, they were granted time to submit modalities of visitation rights of the petitioner to meet Aaryan. By

order dated 16th December 2022, it was recorded that under the orders of this court, the petitioner had availed visitation rights of Aaryan, and the petitioner was well aware of the whereabouts of Aaryan; hence, the petition was disposed of.

6. Feeling aggrieved by the said order dated 16th December 2022, the petitioner approached the Hon'ble Supreme Court. The Hon'ble Supreme Court, by order dated 13th March 2023, allowed the appeal preferred by the petitioner and set aside the order dated 16th December 2022. By the said order, the present petition was directed to be restored to file for a fresh decision. By the said order, the Hon'ble Supreme Court observed that all the rights and contentions of the parties, including such objections as the respondent may have on the maintainability of the habeas corpus petition, were kept open. The Hon'ble Supreme Court further observed that endeavour may be made for expeditious disposal of this petition. Hence, this petition was heard by us for final disposal.

7. For considering the various submissions made on behalf of

both parties, it is necessary to note the relevant undisputed dates and sequence of events as follows:

- **2002-2005**: The petitioner was studying in Texas, US and has been living there since 2002-2005.

- **31st March 2010**: The petitioner and respondent got married in Mumbai under the Special Marriage Act, and the same was duly registered.

- **29th May 2010**: The petitioner and respondent performed a traditional ceremony of their marriage in Mumbai.

- **16th June 2010**: The petitioner and respondent went to the US with the intention of permanently settling down in the US and thus started residing in the matrimonial Home in Texas, US.

- **17th June 2010**: The petitioner and respondent remarried in the US in the Texas Family Court, US.

- **August 2011**: Respondent completed her MBA from the University of Texas, and the entire expenditure for the same was borne by the petitioner to the tune of USD 20,000.

- **2010 – April 2019**: Petitioner and respondent continuously resided in Dallas in various apartments.

- **January 2014**: Respondent got an internship with Ericsson and then got a job with Sodexo. Thus, the respondent became financially independent and continued to work in the US.

- **February 2016**: Respondent suffered a miscarriage and thereafter was unable to conceive naturally; hence, parties decided to have a child through an IVF procedure.

- **20th January 2017**: Petitioner purchased a house in Texas in the joint name of the petitioner and respondent.

- **April 2019**: The petitioner and respondent decided and agreed to have their child born in the US, and hence, the respondent started the IVF procedure in the US, and she conceived through the IVF procedure. Thus, they had the necessary intention to reside in the US permanently and to make their child a US citizen.

- **May 2019**: Since the respondent was pregnant, her parents came to the US and stayed with the parties for a period of 3-4

months till August 2019.

- **20th August 2019 to 1st November 2019**: The parents of the petitioner came and stayed with the parties in the US and also organised a baby shower to welcome the child.

- **November 2019**: The parents of respondent again came to stay with the parties in the US in view of the due date of delivery of the child.

- **25th December 2019**: Aaryan was born in Texas, US.

- **23rd October 2020**: The petitioner, as well as the respondent, were granted green cards, which enabled them to stay in the US permanently.

- **4th November 2020**: Both parties received their green card.

- **14th November 2020**: The US Passport of Aaryan was delivered to the parties.

- **19th December 2020**: Visa of Aaryan for travel to India was delivered to the parties.

- **20th December 2020**: Respondent booked tickets for travel to India for herself, her parents and Aaryan and also booked the return tickets for herself and Aaryan to return to the US on 13th January 2021.

- **21st December 2020**: Petitioner and respondent, along with parents of respondent and Aaryan, landed at Mumbai Airport. Respondent left the airport with Aaryan to stay with her parents for two days, and she was supposed to go to the petitioner's parents' house on 23rd December 2020 to celebrate the first birthday of Aaryan, which was on 25th December 2020.

- **24th December 2020**: Respondent sent a WhatsApp message to the petitioner that he should not try to contact her and that she would not be visiting the petitioner's parent's home. On the same day, the petitioner made an application to R.A. Kidwai Police Station, informing them that the petitioner was unable to contact the respondent.

- **25th December 2020**: Respondent did not visit the petitioner's

parent's house at Wadala, Mumbai; hence, the petitioner visited her parent's house to enquire and wish Aaryan on his birthday. However, the respondent's parent's house at Nerul, Navi Mumbai, was found locked. The petitioner was informed that that they had already left one day prior, i.e. 24th December 2020.

- **25th December 2020**: Petitioner was neither able to contact the respondent nor was able to find his son Aaryan. In spite of making repeated calls to the respondent, all the calls of the petitioner were unanswered, and the respondent, as well as Aaryan, were untraceable. Hence, the petitioner reported the same to the Seawood Police Station.

- **25th December 2020**: Petitioner filed a complaint through email to the US Embassy complaining that Aaryan, who is a US citizen, was abducted.

- **30th December 2020**: In such circumstances, the petitioner filed the present petition seeking a writ of habeas corpus for producing Aaryan before this court.

- **8th January 2021**: In view of the inter-parental abduction of Aaryan, who is a US citizen, the petitioner filed a petition for legal separation and custody of Aaryan in the Collin County Court, Texas, US.

- **11th January 2021**: Petitioner filed an Emergency Motion before the US court, and on the same date, respondent was directed to return Aaryan to the US by 25th January 2021.

- **13th January 2021**: Respondent filed a domestic violence proceeding in Belapur Court, and the proceedings of the same were served on the petitioner on 20th January 2021.

- **20th January 2021**: Petitioner left for the US as he had to resume his work.

- **21st January 2021**: Respondent filed a Divorce proceeding in the Thane Court.

- **26th January 2021**: The US Court passed an order directing the respondent to return the child to the US by 29th January 2021 by

holding that the Texas Court had the jurisdiction, and the petitioner was appointed as temporary Sole Managing Conservator of Aaryan and was given a sole right to possess the Passport of Aaryan and to renew the same.

- **2nd February 2021**: The petitioner amended the present petition seeking custody of the minor pursuant to the order passed by the US Court.

- **12th February 2021**: Respondent continued her job in the US by working from home; however, she tendered her resignation in February 2021.

- **28th April 2021**: The Collin County Court, Texas, US, finally decided the matrimonial dispute on merits after a full trial and granted divorce and irrevocable custody of Aaryan to the petitioner.

8. We have heard the learned counsels for both parties at length.

SUBMISSIONS ON BEHALF OF THE PETITIONER:

9. The entire marital life of the petitioner and respondent of

more than 10 years was in the US. Though the petitioner and respondent had got married under the Special Marriage Act in Mumbai, after travelling to the US, the parties remarried in the Family Court in Texas, US and thus submitted to the jurisdiction of the Texas Court. The Texas Court is the most competent court to adjudicate the matrimonial disputes and custody disputes between the parties.

10. The petitioner and respondent were gainfully employed in the US and had also purchased a house in the joint name in the US. The parties, with the intention of permanently settling down in the US, had decided to have their child born in the US. Since the respondent had suffered a miscarriage, the parties had decided to have their child through an IVF procedure. The entire IVF procedure was completed in the US Hospital, and the parties had made a conscious decision to have their child born in the US and to make their child a US citizen. Thus, there was a clear intention of the parties to reside in the US permanently.

11. After Aaryan was born in the US, the parties decided to visit India. Hence, the parties had also booked a return ticket. However, the respondent unilaterally changed the decision and refused to return to the US along with Aaryan. Respondent had never made a single complaint against the petitioner, alleging physical or mental torture. It was only after this court granted access to talk to Aaryan through WhatsApp Video Calls that the respondent, by way of counterblast, filed a domestic violence proceeding by making false and baseless allegations. As a counterblast to the proceeding initiated by the petitioner in the Texas Court, the respondent filed divorce proceedings in the Thane Court.

12. During their stay of 10 years in the US, the respondent's parents, as well as the petitioner's parents, also visited them and stayed with them in the US. Respondent's parents stayed in the US at the time of the delivery of Aaryan and also thereafter. Considering the fact that Aaryan is a US citizen and the parties had always decided to make their child a US citizen with an intention to reside in the US permanently, it is in the welfare of Aaryan that he be

repatriated to the US. It is the fundamental right of Aaryan to have the company and love of both parents. Aaryan, being a US citizen, shall have better prospects of education and social security in the US.

13. The petitioner had filed substantive proceedings for custody of Aaryan in the Texas Court, and the Texas Court has passed orders in favour of the petitioner, directing the respondent to hand over custody of Aaryan to the petitioner. The Respondent has not challenged the order passed by the Texas Court. Hence, considering the settled principles of law, it is clear that the respondent cannot choose to disregard orders passed by the Texas court. Respondent, at the highest, can approach the Texas court for modification of the orders if she feels aggrieved by the said orders. Till date, there are no orders passed in favour of the respondent in either of the proceedings initiated by her in India. The dates and events would clearly show that the respondent has initiated proceedings in India only as a counterblast to the proceeding initiated by the petitioner in the Texas court.

14. Respondent has not disputed the sequence of dates and events as pleaded by the petitioner. Respondent, in her response, has only narrated the incidents after the parties arrived in India on 21st December 2020. Considering the facts of the case, it is beneficial for Aaryan to stay in the US, in the area where the petitioner and respondent were residing. Aaryan, being a US National, is also entitled to all the health care facilities in the US, which includes comprehensive insurance packages covering the minor child. The petitioner has been a Senior System Analyst at Sirius XM since 2018, and his work profile allows him to work from home most of the time (office 1-2 days a week), and the mother of the petitioner is undertaking to move to the US in case of repatriation of Aaryan is allowed as she has a 10-year visa to US and therefore, there will be enough caretakers to look after Aaryan.

15. The petitioner is also a certified Cricket Australian Coach and is already coaching the kids. He is an excellent cook and can cook any cuisine. Thus, the petitioner can also provide Aaryan with the best of both worlds, American and Indian. Respondent is also a

Green Card Holder and permanent resident of the US thoroughly embedded and entrenched in the system in the US and is highly qualified, having an MBA Degree in Finance and Accounting from the US, which she did after coming to the US and therefore respondent would not face any difficulty, in case she decided to go back to the US.

16. The learned counsel for the petitioner thus submitted that the entire sequence of events would show that the parties always intended to permanently settle down in the US and also bring up their child in the US. Learned counsel submitted that there was no material on record to even remotely suggest that there would be any stake/or physical harm caused to Aaryan if he was repatriated to the US. Learned counsel submitted that, till date there are no orders passed in favour of the respondent with respect to the custody of Aaryan. He, therefore, submitted that it is clear that the respondent has illegally detained Aaryan in India, which is against the welfare and interest of Aaryan.

17. In support of the submissions made on behalf of the petitioner, learned counsel relied upon the following decisions :

(a) *Aviral Mittal Vs. The State and Another* [1]

(b) *Shilpa Aggarwal (Ms) Vs. Aviral Mittal and Another* [2]

(c) *V. Ravi Chandran (Dr.) Vs. Union of India and Others* [3]

(d) *Nithya Anand Raghavan Vs. State (NCT of Delhi) and Another* [4]

(e) *Lahari Sakhamuri Vs. Sobhan Kodali* [5]

(f) *Yashita Sahu Vs. State of Rajasthan and Others* [6]

(g) *Tejaswini Gaud and Others Vs. Shekhar Jagdish Prasad Tewari and Others* [7]

(h) *Nilanjan Bhattacharya Vs. State of Karnataka and Others*[8]

(i) *Vasudha Sethi and Others Vs. Kiran V. Bhaskar and Another* [9]

1 2009 (112) DRJ 635
2 (2010) 1 SCC 591
3 (2010) 1 SCC 174
4 (2017) 8 SCC 454
5 (2019) 7 SCC 311
6 (2020) 3 SCC 67
7 (2019) 7 SCC 42
8 2020 SCC Online SC 928
9 2022 SCC Online SC 43

(j) *Rohith Thammana Gowda Vs. State of Karnataka and Others*[10]

(k) *Mr. Abhinav Gyan S/o. Gangeshwar Prasad Vs. State of Maharashtra and Another* [11]

18. Learned counsel for the petitioner, by relying upon the aforesaid decisions, submitted that the undisputed facts and circumstances would show that it is in the interest and welfare of Aaryan to be repatriated to the US. He further submitted that though the parties had initially got married in Mumbai in India, both the parties remarried in the US and submitted to the jurisdiction of the Texas Court. Hence, the proceedings initiated by the respondent in India are without jurisdiction. He submitted that the respondent is under obligation to comply with the orders passed by the Texas Court and hand over custody of Aaryan to the petitioner. By relying upon the decisions of the Hon'ble Supreme Court in the case of ***Yashita Sahu*** and ***Nilanjan Bhattacharya*** and the decision of this Court in the case of ***Abhinav Gyan***, learned counsel submitted that

10 2022 SCC Online SC 937
11 2022 SCC Online Bom 2958

without prejudice to the rights and contentions of the petitioner, he is ready and willing to provide all the facilities to the respondent as well as Aaryan for their stay in the US, to enable her to take appropriate steps within the jurisdiction of Texas Court and apply for modification of the orders passed in the event the said orders aggrieve her.

19. To show his bonafide, the learned counsel has placed on record an affidavit duly affirmed by the petitioner in the US, thereby undertaking that he shall not take recourse to any coercive proceeding for non-compliance with the orders passed by the Texas Court. The petitioner has undertaken that he shall provide 2 Bedroom, Hall, and Kitchen apartment on rent for the stay of the respondent and Aaryan near the house of the parties in the US for a period of three months and shall also provide medical insurance for the respondent and Aaryan and bear expenses towards electricity and gas for a period of three months. The petitioner, in the said affidavit, has also undertaken to bear all expenses of the education of Aaryan as well as the medical emergency of Aaryan. Thus, the

petitioner has filed the said undertaking subject to the respondent bringing Aaryan to the US and submitting to the jurisdiction of the US Court.

SUBMISSIONS ON BEHALF OF RESPONDENT:

20. The learned senior counsel for the respondent submitted that the dates and events, as narrated by the learned counsel for the petitioner, would show that the petitioner has acted in a hasty manner. She submitted that without waiting for a single day, the petitioner approached the police station, making allegations of abduction against the respondent. Aaryan is around 3 ½ years old today and is in the lawful custody of his biological mother. There are no compelling circumstances to uproot Aaryan, who is in the custody of the respondent. In the US, Aaryan will be left to the mercy of outside help. In India, the grandparents of Aaryan are available to take care of Aaryan. Thus, it is beneficial for Aaryan to stay in India as he will be brought up in his native place.

21. Learned senior counsel for the respondent further submitted that the dates and events as relied upon by the petitioner would show that there is, in fact, no case made out as alleged by the petitioner. She submitted that after the parties arrived in Mumbai, there was some argument between the parties at the airport and later, some messages were exchanged. Thereafter, one day's absence of respondent and Aaryan is construed by the petitioner as abduction. There was no substance in the allegation of abduction made by the petitioner. Learned senior counsel submitted that instead of initiating appropriate proceeding under the Hindu Minority and Guardianship Act, 1956, the petitioner instructed his lawyer in the US to file proceedings for separation and custody while the petitioner himself was in India. There was no pre-existing order in the present case, and hence, the petition for habeas corpus would not be maintainable. In all the decisions relied upon by the petitioner, there were pre-existing orders for filing the petitions for habeas corpus. However, in the present case, there are no such pre-existing orders.

22. Learned senior counsel for the respondent further submitted that Aaryan has roots in India, and hence, it would not be in the interest of Aaryan to uproot him from India and take him to the US, which is a foreign land. She relied upon the decision of the Hon'ble Supreme Court in the case of ***Nithya Anand Raghavan*** to support her submission that the orders passed by the Texas Court are without jurisdiction, and the petitioner is not entitled to invoke the same in India. She further relied upon the decision of the Hon'ble Supreme Court in the case of ***Kanika Goel vs. State of Delhi***[12] to support her objection that the courts in the US would not have any jurisdiction to deal with the dispute between the parties and that only the courts in Mumbai would have jurisdiction to decide the dispute between the parties. She, therefore, submitted that the petition for habeas corpus is not maintainable, and in the proceeding of habeas corpus, custody of Aaryan cannot be handed over to the petitioner. She submitted that under the Hindu Minority and Guardianship Act, 1956, the respondent, being the biological mother, is the natural guardian of Aaryan, and thus, she is entitled to have physical custody of Aaryan.

12 2018 (9) SCC 578

23. The learned senior counsel also relied upon the decisions of the Hon'ble Supreme Court in the case of ***Dhanwanti Joshi*** and in the case of ***Prateek Gupta Vs Shilpi Gupta***[13] and ***Y. Narasimha Rao and Others Vs Y. Venkata Lakshmi and Another***[14]. She submitted that in either contingency of the court deciding to hold a summary enquiry or an elaborate enquiry; the court would be guided by the pre-dominant consideration of the welfare of the child on the basis of all the facts and circumstances. She, therefore, submitted that there is no reason to disturb the custody of Aaryan, who has been settled in India for the last 2 ½ years. She, therefore, submitted that there was no merit in the petition and, hence, the petition deserves to be dismissed.

ANALYSIS:

24. We have considered the submissions made on behalf of both parties. Before dealing with the rival submissions on merits, it is necessary to consider the well-settled principles of law applicable to

13 (2018) 2 SCC 309
14 (1991) 3 SCC 451

the facts of the present case. The learned counsel for the petitioner has placed on record a compilation of all the decisions in the petitions filed seeking a writ of habeas corpus dealing with the issue of repatriation of minor children.

LEGAL POSITION AS RELEVANT TO THE FACTS OF THE PRESENT CASE :

25. In the case of ***Nithya Raghavan,*** the Hon'ble Supreme Court has considered all the decisions right from the cases of ***Surinder Kaur Sandhu Vs Harbax Singh Sandhu*** [15], ***Mrs. Elizabeth Dinshaw Vs Arvand M.Dinshaw & Another***[16], ***Dhanwanti Joshi v. Madhav Unde***[17], ***Shilpa Aggarwal, V. Ravi Chandran, Arathi Bandi Vs. Bandi Jagadrakshaka Rao & Others***[18], ***Surya Vadanan vs. State of Tamil Nadu & Others***[19] . In all these cases, the minor children held citizen-ship of a foreign country, and the parents were permanent residents of that country. However, one of the spouses had removed the child to India, disregarding the orders passed by the foreign court. In all

15 (1984) 3 SCC 698
16 (1987) 1 SCC 42
17 (1998) 1 SCC 112
18 (2013) 15 SCC 790
19 (2015) 5 SCC 450

these cases, the child was repatriated to the country's jurisdiction from where the child was removed, except in the case of ***Dhanwanti Joshi.***

26. In the case of ***Nithya Raghavan,*** the couple married in India and shifted to the United Kingdom and their girl child was born in Delhi, and thus, the child was a citizen of India. After the husband arrived in India, the couple returned to the UK, but following certain unsavoury events, the wife and the daughter returned to India. After an exchange of legal correspondence, the wife and daughter went back to London; however, the wife returned to India along with her daughter, and the child became ill and was diagnosed with a cardiac disorder and due to the alleged violent behaviour of her husband the wife filed a complaint against him at the CAW Cell, New Delhi. The husband filed a custody/wardship Petition in the UK to seek the return of the child. He also filed a habeas corpus petition in the Delhi High Court, which was allowed. The matter was brought before the Hon'ble Supreme Court by the wife. The Supreme Court relied upon its earlier judgment in ***Dhanwanti Joshi,*** which in turn referred to the

case of ***McKee Vs McKee***[20], where the Privy Council held that the order of the foreign court would yield to the welfare of the child and that the comity of courts demanded not its enforcement, but its grave consideration. The Supreme Court held that the minor was born in India and was a citizen of India by birth, and the child has not given up her Indian Citizenship and for more than one year, she, along with her mother, remained in India due to the marital discord of the parties. It was also observed that since the child has later acquired British Citizenship, the UK Court could exercise jurisdiction regarding her custody issues. Further, it was observed by the Supreme Court that the child was suffering from a cardiac disorder and needed periodical medical reviews and proper care and attention that could only be given by her mother. Since the father is employed, he may not be in a position to give complete care to his daughter. Considering the allegations against the father, the Supreme Court held that it would cause harm to her if she returned to the UK. Thus, in the facts of the case the order passed by the High Court was set

20 1951 AC 352 (PC)

aside. The Supreme Court approved the view taken in ***Dhanwanti Joshi*** and observed as under;

> "69. ..... *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".*

27. In the case of ***Kanika Goel,*** though the parties were married in India, they later settled in Chicago and married again. Their daughter was born in the US. The wife, along with the daughter, came to India; however, they did not return. The wife filed a Petition for divorce and a restraint order against the husband from taking the minor child from the jurisdiction of the Indian Court. The husband filed an Emergency Petition in the US. The Family Court at New Delhi passed an ex-parte order on the application filed by the wife restraining the husband from removing the minor child from the jurisdiction of that Court until further orders. The US Court passed an ex-parte order, and the husband was granted interim sole custody

of the minor child. Thereafter, a Writ Petition was filed in the Delhi High Court, which was allowed and the child was directed to be repatriated to the US. However, the Supreme Court set aside the order of the High Court. Since the jurisdiction of the Family Court at New Delhi was invoked at a prior point in time, the Supreme Court directed that it may be appropriate that the said proceedings are decided with utmost promptitude in the first place before the wife is called upon to appear before the US Court including to produce the minor child before that Court. The Supreme Court observed that it is appropriate that the proceedings pending in the Family Court at New Delhi are decided in the first place, including the jurisdiction of that Court and 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 competent jurisdiction. It was held that A fortiori, dependent on the outcome of the proceedings before the Family Court at New Delhi, the wife must be legally obliged to participate in the proceedings in the US Court and must take all measures to defend herself in the said proceedings

and the husband effectively shall bear the expenses for the travel of the wife and the minor child to the US as may be required.

28. In the case of ***Lahari Sakhamuri***, the parties were married in India, but both were residing in the US. Two children were born from this wedlock in the US. The couple purchased a house in their joint name and moved to the new house. The husband purchased a return ticket for the wife and the minor children, who came to India and were scheduled to return. However, the wife filed a Petition seeking custody of the children before the Family Court, Hyderabad and got an interim order. The husband filed an Application under Order VII Rule 11 CPC seeking a rejection of the case. In the meantime, the husband also filed an Application before the US Court seeking an emergency order of return of the minor children, and the wife appeared through Counsel. The US Court directed the mother to return the children to the US. The husband filed an Appeal before the High Court assailing the order of rejection of his application under Order VII Rule 11 CPC and also simultaneously filed a Writ of Habeas Corpus seeking repatriation of the minor children pursuant

to the order passed by the US Court. The High Court held that the Family Court, Hyderabad, had no jurisdiction and the children were not ordinarily residing within the jurisdiction of the Family Court, Hyderabad, as provided under Section 9 of the Guardians & Wards Act and rejected the Application filed by the wife for custody. At the same time, the Habeas Corpus Petition was also allowed, and children were directed to be repatriated to the US. The wife assailed both the orders before the Hon'ble Supreme Court. The Hon'ble Supreme Court confirmed the decision of the High Court and held that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc., cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child. However, certain directions were passed for the children to come back, and the husband was directed to make arrangements for the stay of the wife

in the US, including her travel expenses. The Supreme Court considered its earlier decisions in the cases of ***Nithya Raghavan*** and ***Kanika Goel*** and held as under:

> *"**41.** The essence of the judgment in Nithya Anand Raghavan case [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc. cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.*
>
> 43. ***The expression "best interest of child" which is always kept to be of paramount consideration is indeed wide in its connotation and it cannot remain the love and care of the primary care giver i.e. the mother in case of the infant or the child who is only a few years old. The definition of "best interest of the child" is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean "the basis for any decision taken***

> *regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development*".
>
> *(Emphasis applied)*

29. In the case of ***Yashita Sahu,*** the parties were Indian citizens and were married in India. The husband was already working in the US, and the wife accompanied the husband to the US. A daughter was born to the couple in the US and acquired US citizenship. The relationship between the husband and wife got strained, and the wife initiated proceedings in the US Court. Joint, legal custody and shared physical custody of the child was given to the parents. The wife, along with the child, left the US and came to India; hence the husband filed a motion for an emergency brief before the US Court and an ex-parte order was passed granting sole legal and physical custody of the child to the husband and the wife was directed to return to the US along with child. A warrant was also issued against the wife for violating the order of the US Court. The husband filed a Petition to issue a Writ of Habeas Corpus before the Rajasthan High Court for producing the minor child and repatriation to the US. The

High Court directed the wife to return to the US along with the minor daughter to enable the Jurisdictional Court in the US to pass further orders. Aggrieved by the said Judgment, the wife filed an Appeal to the Hon'ble Supreme Court. The Hon'ble Supreme Court discussed in detail the law laid down by its various decisions and held that a Writ of Habeas Corpus is maintainable if the child is in the custody of another parent and that now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child as has been done in ***Elizabeth Dinshaw***, ***Nithya Anand Raghavan***, and ***Lahari Sakhamuri*** among others. Therefore, the Hon'ble Supreme Court held as under:-

> "20. *It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way.* ***However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.***

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

*22. **A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents.....***

28. The child is a citizen of the USA by birth. Her father was already working in the USA when he got married. We are told that the mother had visited the US once before marriage and when she got married it was done with the knowledge that she may have to settle down there. The child was born in a hospital in the US and the mother did not come back to India for delivery which indicates that at that time the parents wanted the child to be a citizen of USA. ***Since the child is a citizen of USA by birth and holds a passport of that country, while deciding the issue of custody we have to take this factor into consideration.***

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

> *would apply if she is not willing to go to the USA, how should the husband be granted custody of the child."*
>
> ***Emphasis applied***

30. In the case of ***Nilanjan Bhattacharya,*** the parties got married in Kerala. The couple moved to the US, and both started working. Their son was born in the US, and he became a US citizen. The wife travelled to India for a short period with the child and, after reaching India, informed the husband of her plans not to return to the US and continued to reside in India with the child. The US Court, on a petition filed by the husband, granted legal and temporary custody of the minor child to the husband. The husband initially filed a Habeas Corpus Petition before the Supreme Court, but the same was withdrawn with the liberty to move the appropriate forum. The husband filed a Habeas Corpus Petition before the High Court of Karnataka, and the Division Bench allowed the Habeas Corpus and allowed the father to take the child to the US. However, two conditions were imposed that prior to repatriation of the child, a certificate shall be issued from the District

Health Officer, Bangalore, that the country is safe from COVID. Similarly, the father should also obtain a certificate from the concerned Medical Authority in the US certifying that the conditions in the US where he was residing are congenial for shifting the residence of the minor child. The wife did not challenge the order of the High Court. On the contrary, the father challenged the correctness of the two conditions of obtaining the Medical Certificates. The Hon'ble Supreme Court allowed the appeal and set aside the said two conditions. The child was born in the US and was a citizen of the US by birth. The husband had taken the responsibility for shared parenting while the child was in the US. The Court, having been apprised of the fact that the husband was ready and willing to provide financial assistance to enable the wife to travel to New Jersey, the husband was directed to make arrangements for her residential accommodation and stay close to the place of the residence of the child. Alternatively, if the wife was not desirous of living in the US, the husband was directed to make arrangements for giving access to the wife to meet the child by providing access

through video conferencing and bear the expenses of the wife for travel to the US for a period of ten days once in a year for the purpose of meeting the child; and the husband was directed to bring the child to India for a period of ten days on an annual basis when access would be provided to the wife.

31. In the case of ***Vasudha Sethi and Ors*** the parties were married in the US, and the child was born in the US. Thus, the child was a citizen of the US by birth and was holding a US passport. The father had a status of permanent resident in the US and secured a B-2 Non-Immigrant visa for the mother. Unfortunately, the child was diagnosed with hydronephrosis, which required surgery, and they were not in a position to secure an appointment with a doctor in the US for surgery. Therefore, it was agreed between the husband and wife that the child would undergo surgery in India. As the child was a citizen of the US, consent for international travel with one legal guardian was executed by and between the husband and wife. It was the case of the father that at the time of surgery, he flew down to India, and after the surgery, he returned to the US for his work. The

mother violated the international travel consent by not allowing the minor child to return to the US and detained the minor in her illegal custody in India. On a petition filed by the father before the court in the US, an interim order granting primary care, custody, and control of the minor child to the father and direction to the mother to return the child to the father was passed. The father then filed a petition seeking a writ of habeas corpus in the High Court of Punjab and Haryana, which was allowed and the wife was directed to return to the US. The wife assailed the said Judgment in the Hon'ble Supreme Court, and the Supreme Court vide a detailed Judgment upheld the Judgment of the High Court and held that even if the child was less than 5 years old, the child could be repatriated to the US. The Hon'ble Supreme Court considered the cases of both ***Nithya Anand Raghavan*** and ***Kanika Goel*** and even then allowed the repatriation of a child less than 5 years old by observing inter-alia as under;

> "28. *Each case has to be decided on its own facts and circumstances. Though no hard and fast rule can be laid down, in the cases of Kanika (supra) and Nithya (supra),*

this Court has laid down the parameters for exercise of the power to issue a writ of habeas corpus under Article 226 of the Constitution of India dealing with cases of minors brought to India from the country of their native. This Court has reiterated that the paramount consideration is the welfare of the minor child and the rights of the parties litigating over the custody issue are irrelevant. After laying down the principles, in the case of Nithya (supra), this Court has clarified that the decision of the Court in each case must depend on the totality of facts and circumstances of the case brought before it. The factual aspects are required to be tested on the touchstone of the principle of welfare of the minor child. In the cases of Lahiri (supra) and Yashita (supra), the Benches of this Court consisting of two Judges have not made a departure from the law laid down in the decisions of larger Benches of this Court in the cases of Nithya (supra) and Kanika (supra). The Benches have applied the law laid down by the larger Bench to the facts of the cases before them. It is not necessary for us to discuss in detail the facts of the aforesaid cases. ***By its very nature, in a custody case, the facts cannot be similar. What is in the welfare of the child depends on several factors. A custody dispute involves human issues which***

> *are always complex and complicated. There can never be a straight jacket formula to decide the issue of custody of a minor child as what is in the paramount interest of a minor is always a question of fact. But the parameters for exercise of jurisdiction as laid down in the cases of Nithya (supra) and Kanika (supra) will have to be followed."*
>
> *Emphasis applied*

32. In the case of ***Rohith Gowda,*** the father had been residing in the US for two decades. The parties were married in India. Soon after the marriage, they shifted to the US and made it their matrimonial home. They both were given Green Cards (Permanent Resident or PR Card). The child of the parties was born in the US, and he was an American Citizen with an American Passport. The child was studying at a school in Washington. The mother came to India with the child without the consent of the father when the father was already in India to attend to his ailing mother. Upon reaching the US, he realised that the child was missing from the matrimonial home. The father filed a Habeas Corpus writ petition

before the High Court of Karnataka and also filed a Custody Petition in the Superior Court of Washington and got an ex-parte order directing the mother to return the child to the US. The wife participated in the proceedings before the US Court and moved a motion for vacating the ex-parte order. Consequently, the ex-parte order to return the child was vacated. Later, the mother filed a petition challenging the jurisdiction of the US Court, and the US Court upheld its jurisdiction over the minor child. The US Court passed an order directing her to return the child to the US. The mother also filed a custody petition before the Family Court Bengaluru, which was dismissed as being not maintainable for want of jurisdiction. In the circumstances, only the US Courts had jurisdiction to decide the question of custody of the minor child. The High Court of Karnataka dismissed the Habeas Corpus filed on behalf of the husband. However, on an Appeal, the Hon'ble Supreme Court allowed the Habeas Corpus Petition. The Hon'ble Supreme Court held that the child is a naturalised American citizen with an American passport and will have better avenues and prospects if he

returns to the US, being a naturalised American citizen. The Hon'ble Supreme Court relied upon its earlier decisions in the cases of ***Nithya Raghavan*** and ***V. Ravi Chandran*** and allowed the Writ Petition and directed the husband to arrange accommodation for the wife and her parents in the US.

33. In the case of ***Rajeswari Chandrasekar Ganesh Vs State of Tamil Nadu & Others***[21] , the parties were married in India and migrated to the US. Their daughter was born in India, whereas their son was born in the US. The US court passed a consent order for divorce wherein Shared Parenting was ordered. The father illegally took the children to India from the US, removing them from the mother's custody in contravention of the joint custody plan and order of the US Court. The wife, aggrieved of the abduction of the minor children, straightaway filed a Petition under Article 32 of the Constitution of India seeking a writ of Habeas Corpus, and CBI was also made a party. The Hon'ble Supreme Court allowed the Writ Petition, noted the entire law of Habeas Corpus and held that the

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Court exercises an inherent jurisdiction in Habeas Corpus Petition distinct from a statutory jurisdiction. The Hon'ble Supreme Court held as under:

> *"**110.** Thus, what has been explained by this Court as aforesaid is the doctrine of Parental Alienation Syndrome, i.e. the efforts made by one parent to get the child to give up his/her own positive perceptions of the other parent and get him/her to agree with their own viewpoint. It has two psychological destructive effects:*
>
> *(1) It puts the child in the middle of a loyalty contest, which cannot possibly won by any parent;*
>
> *(2) It makes the child to assess the reality, thereby requiring to blame either parent who is supposedly deprived of positive traits.*
>
> ***111.** The intent of the court should be to circumvent such ill effects."*

34. In the case of ***Abhinav Gyan,*** the husband had been living in the US. The parties got married in India and the wife joined the husband in the US. The wife secured a permanent job in the US. The parties resided together in their matrimonial house in the US and

they bought a joint house together in the same place. Their son was born in the US and thus was a citizen of the US, holding a passport of that country. There was matrimonial discord between the parties and the wife left the matrimonial house along with the minor child and came to India and started residing with her parents. The husband initiated a proceeding for legal separation and for custody of the minor child in the US court. The wife, filed for divorce in India. The wife also appeared before the US Court. The US court designated the father as the child's primary residential parent and ordered the mother to return the child to the father. Since the mother did not return the child, the father filed a Writ Petition in the Bombay High Court to repatriate the minor child to the US. This Court ordered the wife to return the minor child to the jurisdiction of the US court. This Court held that the paramount factor of the best interests and welfare of the child gives its colour to the jurisdiction of this Court while considering a habeas corpus petition in such facts and circumstances. This Court rejected the argument of non-maintainability of the writ petition, and as indicated in the

decisions of the Hon'ble Supreme Court in the case of ***Nithya Raghavan*** read with the decision in the case of ***Rajeswari Ganesh*** High Court held that the husband has moved with alacrity and the petition was to be decided on merits and despite the fact that the minor child had remained in India for about 1½ years the High Court considered the aspect of the welfare of the child and held that the order of the US Court would be a relevant factor. Thus, this Court allowed the petition.

CONCLUSIONS :

35. In our country, matrimonial disputes constitute the most bitterly fought adversarial litigation, and when the issue of custody of children is involved, children suffer the most. In such cases, the role of the Court becomes crucial. The Court is required to exercise *parent patriae* jurisdiction and compel the parties to do something that is in the best interest of the child. Hence, in such a peculiar situation, it is the responsibility of the Court to enter into the role of a guardian for the child.

36. Thus, we have considered the submissions made by both parties by keeping in mind the well-established principles of law as laid down in the aforesaid decisions. It is well established that the summary jurisdiction be exercised if the Court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interest and welfare of the child. That the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc., cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child. The expression "best interest of the child", which is always kept to be of paramount consideration, is indeed wide in its connotation, and it cannot remain only the love and care of the primary caregiver i.e. the mother in the case of the child who is only a few years old and the basis for any decision taken regarding the child, is to ensure fulfilment of his basic rights and needs,

identity, social well-being and physical, emotional and intellectual development. However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The Courts should decide the issue of custody only on the basis of what is in the best interest of the child.

37. Thus, keeping in mind the aforementioned principles, in the present case, the questions to be decided are as under:

(i) whether the refusal on the part of the respondent-mother to return to the US with the child, as scheduled, is justified and whether such refusal will amount to illegally detaining the child in India.

(ii) whether, in the facts of the case, the petition seeking a writ of habeas corpus is maintainable and

(iii) whether the petitioner-father is justified in seeking repatriation of the child to the US.

38. In the present case, from the undisputed facts, it is clear that (i) the parties always had the intention to permanently settle down in

the US for which the respondent, after their marriage, completed her further education in the US and secured a job (ii) after undergoing the IVF medical procedure in the US, respondent gave birth to their son in the US (iii) all the facts and circumstances clearly show that the parties took a conscious decision to make their child a US citizen (iv) parents of the parties resided with them in the US intermittently to help and support them during the days of pre-delivery and post-delivery of the child (v) parties had booked their return tickets to the US (vi) respondent had never made any complaint against the petitioner until this Court passed an order granting video access to the petitioner to meet the child and the US court passed the order on the petition filed by the petitioner.

39. On perusal of the pleadings and documents on record, we find that the proceedings initiated by the respondent in India appear to be afterthought only with the intention of not allowing the petitioner to take the child back to the US. There is no satisfactory explanation forthcoming from the respondent for not allowing the petitioner to meet their child on his first birthday. It appears that with an

intention to celebrate the first birthday of the child in India, the parties had scheduled their visit. The Petitioner made all possible efforts to contact the respondent to meet the child. The undisputed WhatsApp messages exchanged between the parties reveal that the respondent and their child were not available at her parent's place on the first birthday of the child; the respondent and her brother informed the petitioner that he should not try to contact them and they even concealed their whereabouts. In such circumstances, the petitioner immediately filed a complaint alleging that the respondent had abducted the child. We do not find any justification for such conduct on the part of the respondent in not allowing the petitioner to meet their child on his first birthday. There is absolutely no explanation coming forth from the respondent for concealing the whereabouts of the child from the petitioner. It appears from the order dated 20th December 2021 passed in the present petition that even on the second birthday of Aaryan in the year 2021, when a request was made on behalf of the petitioner to meet Aaryan on his birthday, i.e. on 25th December 2021, a statement was made on

behalf of the respondent that she and Aaryan were travelling from 24th December 2021 to 2nd January 2022 and that the petitioner can meet Aaryan on 22nd and 23rd December 2021.

40. So far as the objection to the maintainability of this petition is concerned, the law in this regard is no more res-integra. It is a well-settled principle of law that the Court can invoke its extraordinary writ jurisdiction for the best interest of the child. The objection raised on behalf of the respondent on the maintainability of this petition is based on the submission that there is no pre-existing order in favour of the petitioner for custody of Aaryan and that the petition is filed in haste by construing one day's absence of respondent and Aaryan as the abduction of Aaryan by the respondent. We do not find any merit in this submission. It is well established principle of law as laid down in catena of judgments discussed above that a writ for habeas corpus cannot be used only for mere enforcement of the directions given by a foreign court, and that the same is one of the factors to be considered. Therefore, there

being no pre-existing order of the US Court in the present case cannot be a ground to contend that a writ for habeas corpus is not maintainable. Even otherwise during the pendency of this petition, the US Court has ordered respondent to bring back Aaryan to the US.

41. The aforementioned undisputed facts would show that though the parties visited India just before the first birthday of Aaryan with a scheduled plan to return, the respondent not only restrained the petitioner from meeting Aaryan on his first birthday but also concealed his whereabouts. A perusal of the WhatsApp messages exchanged between the parties shows that the respondent and her brother informed the petitioner not to try to contact them. In the admitted facts of the present case, we find that the petitioner has acted with alacrity and has taken quick and prompt action to find the whereabouts of his son. The petitioner immediately filed a complaint through email to the US Embassy complaining about the inter-parental abduction of the child and thereafter filed the present petition. The quick and prompt actions taken by the petitioner for

seeking the whereabouts of his son cannot be termed as any hasty action of alleging abduction. Thus, it cannot be said that this petition seeking a writ of habeas corpus is not maintainable as sought to be contented on behalf of the respondent.

42. A perusal of the reply filed by the respondent is bereft of any explanation for refusing to return to the US as scheduled. We do not find any substance in the submission that the child has developed roots in India. It is not disputed that the parties had visited India with a scheduled plan to return to the US. Just because the respondent refused to return, the child has stayed in India for around two and a half years. Such a stay of the child in India cannot be said that he has developed roots in India. The undisputed facts reveal that not only had the parties permanently settled down in the US but had taken a conscious decision to make their child a US citizen. Thus, the respondent is not justified in taking a unilateral decision that the child will not return to his native country.

43. We also do not find any merit in the submissions made by the respondent that it will be more beneficial for the child to stay in India as his grandparents are available to care for him in as much as it is not disputed that during the days of pre-delivery and post-delivery of the child, the respective parents of both parties had stayed in the US to support them. The petitioner submits it, stating that if the child is sent to the US, the mother of the petitioner, who holds a US visa for ten years, is willing to stay in the US to care for the child.

44. We also find substance in the submission of the petitioner that he can provide Aaryan with the best of both worlds, American and Indian. Considering the petitioner's work profile, he is allowed to work from home most of the time. It is not disputed that the petitioner is also a certified Cricket Australian Coach and is already coaching the kids; he is an excellent cook and can cook any cuisine. Aaryan, being a US National, is also entitled to all the health care facilities in the US, which includes comprehensive insurance

packages covering the minor child. It is further the submission of the petitioner that the respondent is also a Green Card Holder and permanent resident of the US and is highly qualified, having an MBA Degree in Finance and Accounting from the US, which she did after coming to the US. The respondent does not dispute all these factual submissions. Thus, all these factors support the petitioner's case that it will be in the interest of Aaryan to return to the US.

45. The most important factor in the present case is that the respondent-mother has not disputed the petitioner's case that the parties had scheduled their visit to India with a plan to return. As already recorded by us, there is no satisfactory explanation coming forth from the respondent for not returning to the US as planned. Thus, the child's presence in India is only the result of the respondent's unilateral decision of not returning to the US and her act of neither complying with the order passed by the US Court nor challenging the same by taking appropriate steps. Thus, the respondent cannot claim any advantage by stating that the child has developed roots in India.

46. Aaryan is in the physical custody of the respondent, who is his biological mother, however, she is not entitled to claim his exclusive custody. It is not disputed that till this Court passed an order on 12th January 2021 granting video access to the petitioner to meet Aaryan, the respondent had not initiated any proceedings against the petitioner. It has come on record that the respondent filed a complaint against the petitioner for the first time in India on 13th January 2021, which was served upon the petitioner on 20th January 2021. So far as her decision not to return to the US, she cannot be compelled to change her decision. However, her action of not permitting Aaryan to return to his native country without any valid and justifiable reason amounts to illegally detaining Aaryan in India.

47. The steps taken by the petitioner with alacrity is an important factor to be considered. Though served with the order passed by the US Court, the respondent took no steps to comply with the same or challenge it. Instead, as a counterblast, she initiated proceedings in India; however, there is no order passed in favour of the respondent. Though there was no order passed prior to the petitioner filing this

petition, subsequently, there is an order passed by the US court directing the respondent to return Aaryan to the US. The respondent has chosen not to challenge the same. Thus, there is no substance in the argument on behalf of the respondent that the petitioner is not entitled to seek relief of repatriation of Aaryan on the basis of the order passed by the US Court. It is well settled in the catena of decisions as stated hereinabove that an order of a foreign court may not be the sole criteria to seek repatriation of a minor child, but it is an aspect that can be taken into consideration.

48. So far as the jurisdiction of the Texas Court or the Courts in India for deciding the custody dispute of Aaryan is concerned, we do not find it necessary to examine the same in this petition. As held by the Hon'ble Court in the decision of ***Nithya Raghavan*** and ***Kanika Goel***, we find in the facts of the present case that it is not necessary to hold any elaborate inquiry, but a summary inquiry is required to be adopted considering the emergent situation of repatriation of a minor child of three and half years who is a US citizen and has stayed back in India for last more than two and a half years only due to a

unilateral decision of the respondent-mother of not returning to the US as per the scheduled plan. Considering the age of Aaryan it cannot be said that he has developed any roots in India. Nothing adverse was brought on record to show that it would be prejudicial or harmful to send Aaryan to his native country. There is nothing adverse brought on record to show that the petitioner is incapable of taking care of Aaryan. We have already held that there is substance in the submission of the petitioner that it will be more beneficial for Aaryan to live in the US, in as much as he being a US citizen is entitled to all the educational, social and medical benefits available there. We find that the stay of Aaryan in India for last two and half years is too short a period to facilitate his integration into the social, physical, physiological, cultural and academic environment of India. Hence, if repatriated to the US, he will not be subjected to an entirely foreign education system. By applying the principles laid down by the Hon'ble Supreme Court in the decision of ***Vasudha Sethi***, we find in the facts of the present case that Aaryan, being a citizen of the US, will have better future prospects on return to the

US. We find that considering the tender age of Aaryan, the natural process of grooming in the environment of the native country is indispensable for his comprehensive development. In these facts and circumstances, we do not see any reasonable ground to believe that Aaryan should not be repatriated to the US.

49. Except for the tender age of Aaryan, where he needs the care and protection of a mother, we do not see any factor in favour of the respondent. At the same time, we believe that at this tender age, Aaryan is entitled to have the company of both his parents. Rather, it is his basic human right to have the care and protection of both parents. Thus, the respondent is not justified in unreasonably depriving Aaryan of the company of his father. The respondent cannot deprive Aaryan of his basic human rights only because she has suddenly decided that she does not want to go back to the US, where the parties were permanently settled.

50. The submissions on behalf of the respondent are more on her rights than the welfare and rights of Aaryan. Just because the

respondent has taken a unilateral decision to stay back in India, she cannot deprive Aaryan of his rights. In these facts, accepting the submissions on behalf of the respondent would amount to making a departure from the well-known concept that the welfare of the minor is the paramount consideration. The said submissions are contrary to the law laid down by this Court in the case of *Kanika* Goel and *Nithya Raghavan*. From the aforesaid well-established principles of law governing the custody of minor children, and more particularly as held by the Hon'ble Supreme Court in the decision of *Vasudha Sethi* it is clear that the rights of the parents are irrelevant when a Court decides the custody issue.

51. In the facts of the present case the principles of law laid down by Hon'ble Supreme Court in the decisions of *Lahari Sakhamuri, Yashita Sahu, Nilanjan Bhattacharya, Vasundha Sethi, Rohith Gowda, Rajeswari Ganesh* by taking into consideration the earlier decisions including the decisions relied upon by the learned senior counsel for the respondent, are squarely applicable to the facts of the present case.

52. The Hon'ble Supreme Court in the decision of ***Rohith Gowda,*** has held as under;

> **"9.** *To answer the stated question and also on the question of jurisdiction we do not think it necessary to conduct a deep survey on the authorities This Court in Nithya Anand Raghawan v. State (NCT of Delhi) [(2017) 8 SCC 454], reiterated the principle laid in V. Ravi Chandran v. Union of India [(2010) 1 SCC 174] and further held thus:—*
>
> *"In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceedings 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".

(Emphasis added)

10. *In Ravi Chandran's case (supra), this Court took note of the actual role of the High Courts in the matter of examination of cases involving claim of custody of a minor based on the principle of parens patriae jurisdiction considering the fact that it is the minor who is within the jurisdiction of the court. Based on such consideration it was held that even while considering Habeas Corpus writ petition qua a minor, in a given case, the High Courts may direct for return of the child or decline to change the custody of the child taking into account the attending facts and circumstances as also the settled legal position. In Nitya Anand's case this Court had also referred to the decision in Dhanwanti Joshi v. Madhav Unde [(1998) 1 SCC 112] which in turn was rendered after referring to the decision of the Privy Council in Mckee v. Mckee [[1951] A.C. 352]. In Mckee's case the Privy Council held that the order of the foreign court would yield to the welfare and that the*

comity of courts demanded not its enforcement, but its grave consideration. Though, India is not a signatory to Hague Convention of 1980, on the "Civil Aspects of International Child Abduction", this Court, virtually, imbibing the true spirit of the principle of parens patriae jurisdiction, went on to hold in Nithya Anand Raghavan's case thus:

"40. … 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 preexisting 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 an

objects to its return. We are in respectful agreement with the aforementioned exposition."

53. Thus, taking note of the position thus settled in the aforesaid decisions, we considered the questions raised in the present case. In addition to the aforesaid reasons, another important factor to be taken into consideration is that the respondent does not challenge the order for the return of Aaryan to the US. There is no order passed in favour of the respondent in any of the proceedings initiated by her in India. Be that as it may, we have to consider the grant of relief in this petition only by giving predominant importance to the welfare of Aaryan.

54. The petitioner has placed on record the orders passed by the Collin County Court Texas, US. On an emergency motion the US Court on 11th January 2021 directed the respondent to return Aaryan to the US by 25th January 2021. On 26th January 2021, the US court passed another order directing the repatriation of Aaryan to the US. On 28th April 2021, the 470th Judicial District Court of

Collin Couty US finally decided the matrimonial dispute between the parties, granting divorce and irrevocable custody of Aaryan to the petitioner. The Orders passed by the US Court shows that though served with the notice and proceedings, respondent has not contested the proceedings. It is not even the case of the respondent that she has challenged these orders.

55. The essence of the principles of law laid down in the decision of ***Nithya Raghavan, Kanika Goel,*** as explained in the decision of ***Lahari Sukhumari*** and other aforesaid decisions is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc. cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child. We have already held that keeping the best interest of Aaryan in mind, we find that it is beneficial for Aryan to go back to the US. The best interest of Aaryan cannot remain only

the love and care of the primary caregiver, i.e. the respondent as Aaryan is below five years of age. The facts and circumstances do not even remotely suggest that the petitioner is unable to give the love, care and protection required for Aaryan's age. We find that to ensure fulfilment of Aaryan's basic rights and needs, identity, social well-being and physical, emotional and intellectual development, it is necessary for Aaryan to go back to the US.

56. We do not find any merit in the objection raised on behalf of the respondent that only the Mumbai Courts would have jurisdiction to decide the disputes between the parties. The reliance on the decision of the Hon'ble Supreme Court in the case of ***Kanika Goel*** to support this submission is misplaced. The Hon'ble Supreme Court, in the case of ***Kanika Goel,*** observed that it is appropriate that the proceedings pending in the family Court at New Delhi are decided in the first place, including the jurisdiction of that court and depending on the outcome of those proceedings, the parties will be free to pursue such other remedies as may be permissible in law before the competent jurisdiction. This observation was in the light of the fact

that the proceedings initiated by the wife in India were prior in time. In the present case, the proceedings initiated by the petitioner in the US court are prior in time. Thus, the observations of the Hon'ble Supreme Court in the decision of ***Kanika Goel,*** are of no assistance to the submissions made on behalf of the respondent that only the Courts in Mumbai will have jurisdiction to decide the disputes between the parties. In view of the different facts of this case, the decision in the case of ***Y. Narasimha Rao*** is also of no assistance to the respondent. Even otherwise, in the present case, we are not examining the merits of the proceedings initiated by the respondent.

57. We make it clear that our observations in this judgment are for the limited purpose of undertaking a summary inquiry for consideration of the reliefs sought in this petition seeking a writ of habeas corpus.

58. Thus, for the aforesaid reasons, writ petition is allowed by passing the following order:

(a) The respondent no.1 shall return the minor child Aaryan to the petitioner within a period of fifteen days from today. In the event respondent no. 1 is willing to travel to the US along with Aaryan, she will intimate her willingness through her Advocate to the Advocate for the Petitioner within a period of one week from today.

(b) In the event respondent no. 1 intimates her willingness as directed in clause (i) above, the petitioner shall, within a period of two weeks thereafter, book the air tickets for the respondent no. 1 and Aaryan and inform the respondent no.1 accordingly through her Advocate.

(c) On respondent no. 1 and Aaryan reaching the US, the petitioner shall forthwith make arrangements for the residence of respondent no. 1 and Aaryan for a period of three months from the date of their arrival, as per the undertaking dated 27th July 2023 filed by the petitioner in this court, and shall abide by his undertaking as follows:

(i) The petitioner shall pay 1500 US dollars per month to respondent no. 1 for three months towards monthly expenses for herself and Aaryan, by online bank transfer to the account of respondent no.1.

(ii) The petitioner shall provide a two bedroom apartment on rent at the cost of petitioner for the stay of respondent no. 1 and Aaryan near their house in the US, for a period of three months from their date of arrival in the US. The rent amount shall be directly paid by the petitioner to the apartment owner.

(iii) The petitioner shall provide medical insurance for respondent no.1 and Aaryan and bear all the expenses towards electricity and gas for a period of three months from the date of their arrival in the US.

(iv) The petitioner shall not adopt any coercive steps against the respondent no. 1 for a period of three months from the date of her arrival in the US for non-compliance of the orders passed by the US court.

(v) The Petitioner shall bear all the expenses towards education of Aaryan and make arrangements for admitting Aaryan to school.

(vi) The petitioner shall make himself available for any medical emergency or otherwise any help in taking care of Aaryan.

(d) It is made clear that the aforesaid arrangement is without prejudice to the rights and contentions of both the parties and subject to respondent no. 1 accompanying Aaryan to the US as directed in the aforesaid clauses and subject to any further orders being passed by the US court.

(e) In the event the respondent no.1 fails to intimate her willingness as directed in clause (a) above, the petitioner shall be entitled to take physical custody of Aaryan on expiry of fifteen days from date of this order and the respondent no. 1 shall hand over physical custody of Aaryan and his original passport to the petitioner if he visits India for the same or to the mother of the

petitioner if so authorized by him in writing. In the event the physical custody of Aaryan is handed over to the petitioner's mother, she shall within a period of two weeks thereafter accompany Aaryan to the US and hand over custody of Aaryan to the petitioner.

(f) In the event of handing over custody of Aaryan as per clause (e) above, the respondent no. 1 shall be entitled to talk to Aaryan on video call everyday for half an hour between 6pm to 8pm (US time) or as mutually agreed between the parties.

(g) It is always open for the parties to mutually adopt a plan for joint parenting by filing appropriate application before the appropriate court.

(h) The observations, findings and directions in this judgment and order are limited to the prayers in this petition and shall not be construed as any final adjudication of the rights and contentions of the parties to be agitated before the jurisdictional court.

(i) Rule is made absolute in the aforesaid terms.

(j) It is made clear that till the aforesaid directions are complied with the petitioner shall be entitled to talk to Aaryan through video calls as per the arrangement existing during the pendency of this petition.

(k) All pending interim applications stand disposed of in view of disposal of the Writ Petition.

(l) All parties to act on authenticated copy of this judgment and order.

GAURI GODSE, J. REVATI MOHITE DERE, J.

(m) After this order was pronounced in the aforesaid petition, the learned counsel appearing for the respondent no. 1 seeks stay of the said order. Accordingly, we stay the order for a period of three weeks from today.

GAURI GODSE, J. REVATI MOHITE DERE, J.