* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 18.04.2017
% Judgment delivered on: 16.11.2017

\+ **W.P.(CRL) 374/2017 and Crl. M.A. No.2007/2017**

K G ..... Petitioner
Through: Mr. Prabhjit Jauhar & Ms. Ankita Gupta, Advocates.

versus

STATE OF DELHI & ANR ..... Respondents
Through: Mr. Rahul Mehra, Standing Counsel (Crl.) and Mr. Tushar Sannu, Advocate along with SI Pankaj Kumar, PS-Vasant Kunj (South), for the State.
Ms. Malavika Rajkotia, Ms. Arpita Rai, Mr. Ranjay N. & Ms. Saumya Maheshwari, Advocates for and along with respondent No.2 in person.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

VIPIN SANGHI, J.

1. The petitioner herein has preferred the present writ petition seeking issuance of a writ of Habeas Corpus for production of his minor daughter, M G, who is presently three years eight months of age and is a permanent resident and natural born citizen of USA. He is also seeking a direction for return of M to the jurisdiction of the competent Courts in the United States

of America in compliance with the order dated 13.01.2017 passed by the Circuit Court of Cook County, Illinois, USA. The child is presently under the custody of her mother, Respondent No. 2.

Background

2. Petitioner is an Indian born citizen of USA since 2005. He is working as the CEO of a company called GetSet Learning. Respondent No. 2 is the wife of the petitioner and mother of M. She has the status of a US Permanent Resident and is a 'Green Card' holder, who has also applied for US Citizenship on 2.12.2016. She is a certified teacher in the State of Illinois, and was employed as a Special Education Classroom Assistant in Chicago Public Schools. The petitioner and respondent No. 2 got married on 31.10.2010 as per Sikh rites, i.e. Anand Karaj ceremony, and Hindu vedic rites in New Delhi, India.

3. The petitioner submits that it was understood between both the parties that the respondent no. 2 would come and live with the petitioner in the USA. Respondent No.2 applied for and obtained a *Fiancée Visa* from the US embassy, showing herself as *"Single (Never Married)"* and her name as "K L" with her address as that of parents, in the DS-230 Form.

4. After obtaining the *Fiancée Visa* on 03.03.2011, the respondent no. 2 travelled to the USA and got married with the petitioner again on 19.03.2011 at Cook County Court in Chicago, Illinois. A reception was also thrown for the couple in Ohio, USA by the family of the petitioner. Before the marriage, the parties entered into a Prenuptial Agreement dated

20.10.2010, enforceable in accordance with the laws of the State of Illinois, USA.

5. Respondent no. 2 adapted herself in her new home by changing her surname; applying for a State of Illinois Teaching certificate, and; working for gain as a teacher in Chicago Public Schools. She also secured a US Permanent Citizen Green card.

6. Respondent no. 2 became pregnant with M towards end of July 2013, and M was born on 15.02.2014. The petitioner submits that both the parties wanted M to be born in USA and attain US citizenship. He submits that M is a natural born US citizen and has been domiciled in the State of Illinois, USA since her birth. He relies upon M's US birth certificate dated 28.03.2014, and her passport issued by the US Department of State on 21.05.2014 as evidence of the same.

7. Until December 2016, M remained in Chicago with her parents. She was being taken care of by not just her parents, but her paternal grandparents as well when respondent no. 2 was working. M started pre-school from July 2016 onwards, and was scheduled to join a three year olds' classroom w.e.f. 09.01.2017.

8. On 25.12.2016, petitioner along with the respondent no. 2 and M left for New Delhi, India for a short trip. They stayed with respondent no. 2's parents. They were scheduled to head back to Chicago on 07.01.2017. The petitioner submits that 11 hours before their departure on 07.01.2017, the respondent no. 2 with their daughter went missing. He submits that he tried looking for the two of them everywhere but could not find them. He spoke

to his in-laws about their whereabouts and even tried calling respondent no. 2 on her cell phone but got no response. Because he had already pre-booked his flight to Chicago, he left.

9. Respondent no. 2 filed a petition under section 13(1) of Hindu Marriage Act, HMA No. 27/17 seeking dissolution of marriage on the ground of cruelty, along with an application under section 26 of HMA on 07.01.2017 seeking a restraint order against the petitioner from taking away M from the jurisdiction of Indian Courts. Notice was issued to the petitioner returnable on 11.01.2017 in the application under section 26 of HMA.

10. Subsequently, the petitioner moved an emergency petition for temporary sole allocation of parental responsibilities and parenting time in his favour, or in the alternative, an emergency order of protection for possession of his minor daughter M G before the Circuit Court of Cook County Illinois, USA on 09.01.2017. He submits that a notice of emergency motion was served by e-mail upon the respondent no. 2, informing her of the proposed hearing on 13.01.2017 in this matter.

11. On 11.01.2017, the Patiala House Family Court issued fresh notice to the petitioner. At the same time, it passed ex-parte orders on the application filed by respondent no. 2 under Section 151 CPC seeking an ad interim order restraining the petitioner from removing the minor child from the jurisdiction of the court, and restrained the petitioner *ex-parte* from removing M from the jurisdiction of the court pending the return of summons on 06.02.2017. However, during pendency of the present petition, the said application was dismissed upon contest on 25.03.2017. A

copy of the said order has been tendered in Court by learned counsel for the petitioner during the course of hearing. Consequently, there is no restraint against the petitioner from taking M – his daughter, to the USA.

12. On 13.01.2017, the petitioner caused a missing persons complaint to be filed before the SHO, Vasant Kunj (South) PS, New Delhi and on 14.01.2017, the complaint was acknowledged and registered by the PS Vasant Kunj (South) vide DDR NO. 208.

13. On the same date, i.e. 13.01.2017, the Circuit Court of Cook County ordered the following, while fixing the next date of hearing on 16.03.2017:

> "*1)The child M G born on Feb 15, 2014, in Chicago, Illinois and having resided in Chicago solely for her entire life (specifically at 360 East Randolph Street, Chicago, IL 60601) is also a US citizen.*
>
> *2) The child is a habitual resident of the state of Illinois, United States of America having never resided anywhere else. Illinois is the home state of the child pursuant to the Uniform Child Custody Jurisdiction Enforcement Act.*
>
> *3)* ***K G is the natural father of the minor child and granted interim sole custody of the minor child. Child is to be immediately returned to the residence located in Cook County, Illinois, USA by Respondent****.*
>
> *4) The Cook County, Illinois Court having personal and subject matter jurisdiction over the parties and matter.*
>
> *5) All further issues regarding visitation, child support are reserved until further Order of Court."* (emphasis supplied)

14. Because the respondent no. 2 did not comply with the said order of the Circuit Court, Cook County, the petitioner has preferred this petition for

production of his daughter M, and her return to the USA in view of the said order. The petitioner has been able to communicate with the child through Skype in the past few months. He flew to India to file the subject petition and has, vide orders dates 09.02.2017, 14.02.2017 and 28.03.2017, been able to see and spend time with the child in the presence of the respondent no. 2 and her parents. The passport of the child is presently in the possession of the petitioner.

Petitioner's submissions

15. Learned counsel for the petitioner, Mr. Prabhjit Jauhar submits that both the petitioner as well as his wife, respondent no. 2 – from even before of M came into this world, had full intentions of their child being a US citizen by birth. This is evident from the fact that both the parties are domiciled and permanently residing in the State of Illinois, USA since their marriage in 2011, and M was delivered in USA, though the parents of respondent No.2 reside in India. He submits that the respondent no. 2 also had clear intentions of staying in the USA, since she applied for citizenship of the USA. He relies upon the e-mail communication of respondent No.2 dated 07.11.2016 sent to one Nancy Vizer, inter alia, stating "*I wanted to let you know that I have decided to take up US citizenship*" a Form I-797C dated 07.12.2016 received from the Department of Homeland Security, U.S. Citizenship and Immigration Services, wherein the said department had informed respondent no. 2 that her application for Naturalization was received on 02.12.2016, and was being processed. He submits that the respondent no. 2 had taken this step with a clear desire to renounce her Indian citizenship, as India does not permit dual citizenship. She was

employed and was having separate bank accounts, health insurance, membership in trade union, and pension/retirement accounts as well in the USA. Learned counsel has referred to the reply filed by respondent No.2 before the Family Court to the petitioner's application under Order 7 Rule 11 CPC, wherein she has stated:

> *"a. ... ... It is not denied that the petitioner is a permanent resident of USA as a Green Card Holder. It is submitted that the Petitioner applied for citizenship of USA under duress, ...*
>
> *x x x x x x x x x x*
>
> *x x x x x x x x x x*
>
> *d. The contents of paragraph no.3(d) are false and denied, and admitted only to the extent that the parties left for USA after their marriage, and their matrimonial home is located in Chicago, Illinois. It is not denied that the parties resided at their matrimonial home, first at 512 N McClurg Court, Unit 2812, Chicago, IL-60611, USA, then at 512 N McClurg Court, Unit 1410, Chicago, IL-60611, USA, and since 31.01.2014 at 360, East Randolph Street, Unit 2805, Chicago, Illinois-60611, USA. The first two apartments were rented by the Parties, and the third was a condo bought by the parties but legally registered in the name of the Respondent and his father. It is not denied that the petitioner was employed full-time in USA as a Special Education Classroom Assistant with Chicago Public Schools. However, the Petitioner was employed full-time only from November 2012 to August, 2014 at James Otis Elementary School, and then from September 2015 to January 2017. She was not earning substantially well, and her monthly salary was around 2200 USD until 2014 and 2300 USD until January 2017, as opposed to the monthly salary of the Respondent, which was about 10,000 USD.*

e. ……. It is not denied that since the birth, M G has resided at the 360, East Randolph Street, Unit 2805, Chicago, Illinois-60601, USA. It is not denied that she started going to Lakeshore East, Chicago, Illinois, USA on 18.07.2016 on a two day per week schedule and was on a five days per week pre-school schedule from 17.08.2016. It is not denied that M G was scheduled to move into the three years old classroom w.e.f. 09.01.2017.

x x x x x x x x x x

g. ... ... It is admitted that the Respondent had booked return tickets for the parties and their daughter. ... ..."

16. Ld. Counsel submits that both the parents of the petitioner have greatly contributed to M's growth and well being. He submits that while the respondent no. 2 was working as a teacher, the petitioner's mother – who is a pediatrician, travelled regularly to Chicago to take care of M. She did this even when the petitioner's father was recovering from prostate cancer surgery. He submits that the petitioner had himself moved his company's office closer to his residence, in order to be able to attend to M. Petitioner also employed a nanny to take care of M when her mother – after taking a year long break from teaching, had decided to get back to teaching full time. Ld. Counsel submits that the petitioner was the one who oversaw the entire process of hiring the Nanny, including conducting reference checks, negotiating the contract, calculating payments and also overlooking the care provided by the Nanny through full-day interviews – when he watched the candidates interact with M.

17. Ld. Counsel submits that M was sent to a pre-school in Chicago from July 2016 onwards, and the petitioner was the one to have taken care of the

entire enrollment procedure along with paying the entire tuition fees. In this respect reference is made by Mr. Jauhar to the certificate dated 11.01.2017 issued by "Bright Horizons Family Solutions", inter alia, stating:

> *" M G has been enrolled at our preschool since July 18, 2016. She began her enrollment by attending the school two days a week (Monday and Tuesday) and switched to a five day schedule on August 17, 2016. M was enrolled in our two year old classroom and was scheduled to move into the three year old room effective January 9th, 2017.*
>
> *M communicates her wants and needs effectively with adults and is able to successfully communicate socially with her peers. She appears to be happy at school and engages in activities in the classroom.*
>
> *M's father, K G, is an active member of our school's Parent Partnership Group. This group meets once monthly to discuss school events, community outreach opportunities, and ways to promote parental involvement at the school. K has offered to be a resource for other families (both enrolled and perspective) that may have questions regarding enrollment at the school and to share his overall experiences with Bright Horizons."*

18. He further submits that the petitioner had also arranged for M's enrollment in a three year olds' classroom, which she was to join from 09.01.2017 i.e. after their arrival from the planned trip to New Delhi in December 2016.

19. Ld. Counsel submits that it is because of this involvement of the petitioner in M's life, that M and the petitioner are very close to each other. He submits that this is evident from the skype calls that the father and daughter have had, while she has been in her mother's custody.

20. Ld. Counsel submits that respondent no. 2 had planned well in advance to abduct and retain their daughter in India by vanishing from her parents' house on 07.01.2017 and, thus, she is guilty of inter-parental child removal/abduction. He submits that her conduct has been completely unresponsive since the said abduction. In this regard, he points out that the respondent no. 2 despite notice of the emergency petition filed before the Cook County, Circuit Court chose not to attend the said proceedings either in person, or through a representative/lawyer. Further, inspite of giving an undertaking to this Court – which was recorded by this court vide order dated 14.02.2017, she did not let the petitioner speak with the child twice a week on Skype. He submits that the reason behind her securing an ex-parte favorable order dated 11.01.2017 from the Patiala House Court, against the petitioner – restraining him from taking M away from the jurisdiction of this Court, is because she concealed material facts from the Court, including the fact that the child was a US born citizen. He places reliance upon the order dated 25.03.2017 which dismissed the application dated 11.01.2017 of the respondent no. 2 seeking ad-interim order for restraining the petitioner from removing the minor child from the jurisdiction of this Court, and submits that the Court noted that the respondent no. 2 has concealed the aforesaid fact. The Court in the said order recorded that:

> "6. ……*It is apparent that the petitioner maliciously deceived and hoodwinked the respondent by wrongfully retaining their daughter at New Delhi. The petitioner disappeared on 07.01.2017 because on that date, she appeared before this court to obtain interim orders behind the back of the respondent. The petitioner knew that a guardianship petition under the Guardian and Wards Act was not maintainable as the minor child M G does not ordinarily reside in New Delhi,*

hence, intentionally, the application u/s 26 of the HMA was filed only to avoid the bar of jurisdiction. The petition can not be allowed to abuse the process of law in this way because petition under HMA is not maintainable because the parties are not domiciled in India since marriage i.e. 19.03.2011 "

21. The Court further held:

"14. As per contents of application u/s 151 C.P.C. filed by the petitioner, it was requested that the contents of application u/s 26 of HMA shall be read as part and parcel of this application. The application U/S 26 of the HMA does not specify that the child M G is an American citizen. It is also admitted that respondent left India on 07.01.2017 at about 07:06 PM whereas the impugned order dated 11.01.2017 was passed around 02:30 PM by this court. It also admitted that presently respondent is at USA. It was also admitted that petitioner was working in Chicago, USA in a school on regular basis. It was also admitted that the child M G was going to pre-school at USA before coming to India. It is also admitted that returned tockets for petitioner, respondent and the child were booked on 07.01.2017 for going back to USA. The only ground mentioned in para 5 of the application was that respondent who is USA citizen would take the child and leave the country without the consent of the petitioner. It is admitted by petitioner that respondent has left on 07.01.2017 whereas the present application u/s 151 C.P.C. was filed on 11.01.2017. By this time, the respondent has already left for USA by the respondent. This becomes clear while obtaining the order dated 11.01.2017 the true facts were not brought before court. In view of the above discussion the order passed by this court 11.01.2017 stands vacated and application is dismissed."

22. Ld. Counsel submits that the most competent court to adjudicate upon the marital disputes between the petitioner and respondent No.2, as well as custody issues inter-se between the parties, is the Cook County Court in Illinois, USA because of the following facts;

a. Respondent no. 2 and the petitioner are both permanent residents of USA and domiciled there;

b. Respondent no. 2 and the petitioner were married in USA on 19.02.2011;

c. Their matrimonial home from 2011 onwards is in USA;

d. Their daughter M G was born in USA on 15.02.2014 and is a natural born US citizen;

e. Both parties are working for gain full-time in USA;

f. The permanent, habitual and ordinary residence of the parties, as well as the minor child M, is in Chicago, Illinois, USA.

23. In support of his submission that the Circuit Court of Cook County, Illinois, USA is the Court having most intimate contact with the issue of custody of the child, learned counsel places reliance upon ***Surya Vadanan vs. State of Tamil Nadu***, (2015) 5 SCC 450 wherein the Supreme Court had, *inter alia*, observed that it is in accord with the "principle of comity" as well as the welfare of the child – who is a foreign citizen, that the child returns back to his/her native land from where the child has been removed, and that the parties must establish their case before the court in the native state of the child. The Court held that it is of primary importance to determine *prima facie* if the foreign court has jurisdiction over the child – whose custody is in dispute, based on the place of residence of the child vis-à-vis the territory over which the foreign court exercises jurisdiction. If the foreign court does

have jurisdiction, the order of the foreign court should be given due weight and respect.

24. Ld. Counsel submits that Circuit Court of Cook County is the competent court of jurisdiction in view of the facts of the case, and the said Court in the USA is seized of the matter. He submits that the relevant evidence to decide the issues of matrimonial disputes and of custody of the minor child M are also located in the USA. Ld. Counsel submits that it is no longer *res integra* that in disputes/ matters relating to matrimony and custody, the law of the place which has the closest and most intimate contact with the well-being of the spouses, and welfare of the offspring of such marriage, must govern any and all disputes related to such marriage and offspring of such marriage. In this regard, he relies upon ***Aviral Mittal vs. State & Anr.,*** 163 (2009) DLT 627, ***Arathi Bandi vs. Bandi Jagadrakshaka Rao*** (2013) 15 SCC 790, ***Shilpa Aggarwal Vs. Aviral Mittal***, (2010) 1 SCC 591, and ***V. Ravichandran (Dr.)(2) Vs. U.O.I & Others***, (2010) 1 SCC 174, in this regard.

25. Ld. Counsel submits that the respondent No.2 is bound to comply with the order dated 13.01.2017 passed by the Circuit Court, Cook Country and, thus, the retention of child M in India is unlawful. The order directs respondent no. 2 to return M to jurisdiction of the Circuit Court of Cook County, Illinois USA.

26. Learned counsel submits that mere presence of the minor child for a temporary holiday in New Delhi for 2 weeks cannot confer any jurisdiction upon the Family Courts, Patiala House to deal with the issue of custody and

welfare of the minor child. Without prejudice to the abovementioned submission, Ld. Counsel submits that, till date, no injunction has been granted, restraining the petitioner from pursuing his remedy before the US Court.

27. Ld. Counsel also submits that the Hindu Marriage Act, 1955 is not applicable to the petitioner and respondent no. 2, as they are not domiciled in India and have never been so since the beginning of their marriage.

28. Ld. Counsel submits that respondent no. 2's inter-parental abduction is causing major adverse consequences to the overall development and well-being of the child M. He submits that the environment of the child has been as it prevails in the USA, and she has adapted herself to the local culture/ environment of USA. She has made many friends and is very happy and comfortable in the environment prevailing in the USA, and has thus developed roots in the said society in the USA. This transplantation of the minor child into an alien and unfamiliar environment will result in imminent and long lasting mental and psychological harm and trauma to her. It will be in her best interest that she is returned immediately to the jurisdiction of the competent Court in USA. He submits that return of M is in her best interest, as any delay may result in she being completely uprooted from her stable and set life and culture in USA, which can cause permanent damage to her personality and gravely affect her childhood. Her pre-school, paediatricians, dentist and also the Chicago Children's Museum – for which she has a membership, are all located in the vicinity of her home in the USA. Thus, it is in the minor child's best interest for her to be returned to USA. Learned counsel has placed reliance upon several photographs showing the child M

in the company of other children at her pre-school engaged in learning and playful activities, and with her parents, etc. on her outings. He also refers to and relies upon communications from several local people, known to the family, in support of his contention that it is in the interest of M, that she returns to the USA.

29. Ld. Counsel submits that the next term at M's pre-school has already commenced from 09.01.2017, and the said school is willing to take her at this stage as well. He submits that because of respondent no. 2's actions of separating M from the love, protection, and care of her father viz. the petitioner, M is being kept away from the educational, social and emotional development that she would be receiving from one of the best pre-schools in Chicago, Illinois, USA. She is also being denied the love, protection and care of her paternal grandparents and family in the USA which she has been experiencing since her birth; and from the comforts and joys of the only home she has known since birth, which is full of toys, books, games and love. He submits that M is irreparably suffering psychologically, emotionally and educationally on a daily basis due to the actions of her mother respondent no. 2.

Respondent No. 2's submissions

30. The petition has been contested by respondent No.2. Ld. Counsel for the respondent no. 2 Ms. Malvika Rajkotia submits that a writ of habeas corpus is not maintainable in the facts and circumstances of this case. She submits that it is settled law that a writ of Habeas Corpus is an urgent and immediate relief, which can be issued in custody petitions only, when the

whereabouts of the person concerned are not known. However, in the present case, where the petitioner has full knowledge and access – both telephonic and through Skype to the child M, and the whereabouts of child M and the respondent No.2 are known to the petitioner, the present petition is not maintainable. She further submits that a writ of Habeas Corpus cannot also be resorted to, to execute an order of a foreign court.

31. Ms. Rajkotia submits that the petitioner has failed to disclose that the parties are battling a broken marriage, as a result of which, respondent No.2 has been constrained to return to India with her daughter and seek a divorce. She submits that despite the respondent's earnest efforts to concede to the demands of the petitioner, the petitioner has subjected her to sex against her wishes. He, along with his mother have imposed their fanatical views about the need to strictly follow their religion i.e. Sikhism. The parents of the petitioner have violated the parties' privacy against the wishes of the respondent. The petitioner has played no role in looking after the child and the household chores; placing the entire responsibility of looking after the child and performing household chores upon the respondent No.2. Ms. Rajkotia submits that the petitioner has also concealed the fact that the he has filed a petition for divorce before the foreign court after his return to US from India. She submits that the present petition is only in retaliation to the divorce petition filed by the respondent No.2, and does not arise out of any love, affection or concern for the child, in whose life the petitioner has barely been involved.

32. Ms. Rajkotia, in particular alleges the following conduct of both the petitioner and his mother, which led her to leave for India with the child and file for divorce:

a. Petitioner's mother imposes her lifestyle on the couple. The mother-in-law follows a strict eco-friendly lifestyle which she imposed on the respondent, for example, sleeping on hard eco-friendly mattress, which caused the respondent chronic backache; not using plastic products, etc.

b. Interference by the mother-in-law into the privacy of the couple. The mother-in-law used to track the parties schedules. She used to barge into the bedroom of the parties when she and her husband visited the parties. She kept a close tab on the menstrual cycle of the respondent when she was expecting M. The name of the child was also chosen by the petitioner's mother.

c. Strict imposition of Sikh religion on respondent and her child. The petitioner as well as his mother did not let the respondent celebrate Hindu festivals. Respondent No.2 was prohibited from fasting during Navrataras, and doing Diwali Pooja, worshipping idols of Hindu Gods and Goddesses. She was also not allowed to go to the temple or celebrate Karva Chauth. Their child, M was not allowed to speak in Hindi at home. She could speak only in English or Punjabi. Thus M, inspite of living in a community of ethnically and linguistically diverse people, was being raised in and exposed to an ethnocentric view of life.

d. Minimal interest of petitioner in household affairs. The petitioner did not object to the lifestyle imposed by his mother upon the respondent, even

though the respondent had expressed that she was uncomfortable with it. His involvement in M's life was limited to educational and semi-educational activities such as visits to the zoo, aquarium, etc. only. It was the respondent who looked after the child like cooking for her, feeding her, doing her laundry, etc. The petitioner was not in favour of the respondent working and, therefore, she hired a Nanny for M's care, since the petitioner refused to do so.

e. Pressure by the petitioner and his parents to expand the family. The petitioner wanted the respondent to bear 3-4 children. In October 2014, the respondent was diagnosed with Graves' disease, a thyroid condition. She was recommended medication to treat the disease. However, the petitioner and his mother pressurized her to undergo surgery instead, since it would have been difficult for her to conceive, if she were to opt for medication. The petitioner threatened to divorce her and marry someone if she would take the medicine, and not bear children. The petitioner also coerced her into sexual intercourse against her wishes, only so she may bear another child for him.

f. Restriction from visiting India. The respondent and her child were time and again restricted from visiting India on the grounds that M will catch an infection in India. Respondent was not even allowed to attend the funeral of her maternal grandmother. The petitioner had hidden the passport of M, forcing the respondent to miss the funeral.

33. This attitude of the petitioner and his family has, in Ms. Rajkotia's submission, caused mental and physical cruelty to the petitioner. She relies

upon the respondent's e-mails to her friend to highlight her loneliness and sense of alienation in USA. She submits that her loneliness is also reflected by the letters filed by the petitioner from his friends to show that he is a caring father, as she could not break into his circle of friends and they were loyal to him, since they had known him for far longer time. She further submits that because these letters do not mention the respondent, it highlights the fact that the respondent was a non-entity to the petitioner and his friends. The parties were not living as a happy family, and underwent several counseling sessions.

34. Ms. Rajkotia submits that marriage between the parties took place in India on 31.10.2010 and relies upon the wedding ceremony invitation card sent by the family of the respondent. She submits that as per the Hindu Marriage Act, it is not necessary for a marriage to be registered. However, she has placed on record the marriage certificate from Guru Granth Sahib Vidya Kender, New Delhi on 11.02.2013 to show that the marriage was registered in India as well. She also submits that the reason behind having a *Fiancée Visa* was the timing of the application of the visa. Because the parties had to directly leave for the US after their marriage in India, respondent No.2 could not apply for a spouse visa.

35. Ms. Rajkotia submits that respondent No.2 was coerced to apply for citizenship of the USA because, had she not done so, the petitioner – in all likelihood, would not have let her travel to India. She also submits that the understanding between the parties was never to settle in USA. Rather they decided to settle in India. She relies upon an email dated 11.03.2008 from the petitioner, expressing his desire to return to India. She also relies upon

an e-mail exchanged between the respondent No.2 and her friends, wherein she mentioned that she had planned to come back to India and her husband viz. the petitioner, was also looking for opportunities to settle in India. Thus, the respondent's intention was always to come back to India. She denied that both parties wanted the child to be a US citizen, since the respondent was never given a choice to deliver the child in India.

36. She submits that the aforementioned pre-nuptial agreement was signed by her under duress, and without awareness of the waiver of her legal rights arising out of marriage, as the petitioner insisted that this was a common practice in the USA. The agreement is, therefore, null and void. She submits that the petitioner had paid for the legal representation of the respondent vis-à-vis the pre-nuptial agreement, which shows that the respondent's counsel was not independent. She submits that the respondent did not have the equal bargaining power while signing the agreement and, therefore, the contract is vitiated. Ms. Rajkotia submits that a pre-nuptial agreement is also not valid under the Hindu Marriage Act. This agreement was signed only to deprive the respondent of her right to maintenance, property etc. under Indian and Illinois family law. The respondent is, thus, denied of her rights, including – ownership rights over her stridhan; maintenance rights in the event of divorce or separation. She submits that the quantum of alimony fixed – in the event of a divorce after five years of marriage, is insignificant. She also submits that the agreement is silent on any provision as to custody of the child. Ms. Rajkotia submits that in these circumstances, if the respondent were to return to the USA, she would be

bound by an unfair agreement in a country where her means of survival are minimal, and where she has no parental support.

37. Ms. Rajkotia submits that India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. The respondent and her child could only come to India by stealth, and thus she was constrained to project to the petitioner that they were going to India for a holiday. This was the only way she could escape the domestic violence perpetrated upon her by the petitioner. She submits that the child has not been illegally and unlawfully removed from the custody of the petitioner, since the mother is the natural guardian of the child and is her primary care-giver. Therefore, the residence of the child naturally follows that of the mother. She submits that actions of the respondent were taken only in furtherance of the best interests of the child.

38. Ms. Rajkotia submits that mothers are homemakers and primary caregivers to their children, and would never abandon their children. She submits that the best interest of children is served, with continuity with the primary caregiver, i.e. the mother, and attachment between the mother and child is always special. She relies upon ***ABC vs. State (NCT of Delhi)***, AIR 2015 SC 2569, wherein the Court had noted that *"Avowedly, the mother is best suited to care for her offspring , so aptly and comprehensively conveyed in Hindi by the word 'mamta'."*. She further submits that courts need to assess and respect that a mother is the primary caregiver, and even though the mother may not be financially empowered, her legal persona deserves that her wishes be considered. She must not be enslaved to the role of primary caregiver, with no financial or emotional succor.

39. Ms. Rajkotia submits that the child has made a home for herself amidst the love and care of the respondent and her maternal grandparents in Delhi. She has adjusted to life in Delhi and adapted to the lifestyle as well. She has also started attending pre-school since March 2017 in Delhi. She will suffer from psychological harm if she is sent back to live with the petitioner to USA. She submits that the child's repatriation solely to maintain comity of courts, would not be in the child's best interest.

40. Ms. Rajkotia submits that the foreign court is not the most competent court to decide the issue of custody of the minor child. In this regard she submits that the respondent – who is the primary caregiver and natural guardian of the child, still holds an Indian passport and always had the intention of coming back to India and settling in India. She states that that the marriage of the parties also took place in India.

41. Ms. Rajkotia submits that the principle of comity of courts comes into play only when there is a violation of a foreign court order. But it need not be strictly applied in all situations, especially when a child's welfare is at stake and welfare of child should always prevail over comity of courts. In this regard she relies upon, ***Sarita Sharma vs. Sushil Sharma*** 2000(3) SCC 14; ***Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu & Anr.,*** (1984) 3 SCC 698; ***Elizabeth Dinshaw vs. Arvind Dinshaw*** (1987) 1 SCC 42, and; ***V Ravichandran v. State and Anr.*** (2010) 1 SCC 174. She submits that courts in US and UK have also upheld the principle of child welfare over comity of courts.

42. Ms. Rajkotia submits that the meaning of 'intimate contact' is not limited to geography and schooling. Rather, it is a place of social, psychological and emotional connect, and more than often this connect is with the primary giver rather than a place. She submits that in custody matters the courts should not diminish *Parens Patriae* jurisdiction and relies upon ***Ruchi Majoo vs Sanjeev Majoo*** AIR 2011 SC 1952 in this regard.

43. Ms. Rajkotia further submits that it is the Family Court in India which has jurisdiction over the matter, as the marriage was solemnized under the provisions of the Hindu Marriage Act, in India. She submits that habitual residence of the child should be determined on the basis of factors other than the place of residence, such as the social and cultural milieu that she was brought up in, the domicile of her primary caregiver, and so on.

44. She submits that under the Indian law, the foreign law will be acceptable only if it is in consonance with Indian law. She submits that ***Surya Vadanan*** (supra) gives credence to the first strike principle, and first substantive order. She submits that in the facts of the present case, the first substantive order had been secured by the respondent on 11.01.2017, restraining the petitioner from removing M from the jurisdiction of the Family Court. She submits that even though this order currently stands vacated vide order dated 25.03.2017, this fact will not be of any adverse consequence to the respondent, because there is an interim order of this court dated 09.02.2017 restraining the petitioner from removing M from the jurisdiction of this court.

45. Ms. Rajkotia relies upon Section 6(a) of the Hindu Minority and Guardianship Act, 1956 to protect custody of the minor child with the mother. India has obligations under the UN Child Rights Convention, which mandates that best interests of the child must be the primary concern in decisions that affect them.

46. In his rejoinder, learned counsel for the petitioner has stated that the petitioner shall not seek to enforce the agreement against the respondent no.2 in the American Courts. He has also left it to this Court to make such arrangement.

Discussion and Decision

47. Before we proceed to decide the case keeping in view the facts and circumstances thereof, it would be appropriate to examine how the Courts have dealt with such like situations, from time to time, where one of the parents has brought with him, or her, the minor child – who is a citizen of and domiciled in a foreign country, to India, and the other parent has petitioned the Court in India to seek custody of the minor child and/ or his/ her return to the foreign country. We will deal with the aforesaid cases in chronology.

Surinder Kaur Sandhu (supra)

48. In this case the husband, Harbax Singh Sandhu and wife, Surinder Kaur Sandhu got married in Faridkot, Punjab according to Sikh rites and soon after their marriage moved to England. Both of them were Indian citizens living as foreigners in England. They had a baby boy within one

year of their marriage. Eventually, the relationship between the parties got sour to such an extent, that the husband attempted to cause his wife's murder. He was convicted and sentenced for his said conduct, but on his wife's intervention – was let out on probation. After his release on probation, he removed their child from England and brought him to India. The wife, on the day of removal itself, procured an order under which the boy became the Ward of the Court. She came to India and filed a petition under Section 97 CrPC before the Judicial Magistrate 1st class. However, the petition was dismissed on the Court's agreement with the husband's reliance on Section 6 of Hindu Minority and Guardianship Act, 1956, and on acceptance of his contention that the father is the natural guardian. She subsequently obtained an order from the foreign Court, directing the child to be handed over into the custody of the mother. Armed with this order, the mother/wife came back to India and filed a writ petition in the High Court of Punjab and Haryana seeking production and custody of the child.

49. The petition was dismissed on the ground that the mother's status in England was that of a foreigner; she was a factory worker, and; she had no relatives in England, as opposed to the father who was living in an affluent atmosphere consisting his parents and a welcoming environment, after his traumatic experience of conviction of a criminal charge.

50. The Supreme Court applied, firstly, the principle of 'welfare of the child' and, secondly, of the Comity of Courts, in deciding the appeal. It did not agree with the High Court that the welfare of the child was with the father – a man who had offered solicitation for the commission of his wife's murder. The father had, even after his wife's magnanimous intervention of

letting him out on probation, abused her said gesture by running away with the child. He had also procured a duplicate passport by an untrue representation that the original passport was lost, while the same was with his wife. In these circumstances, the court observed that the mother's custody was in the child's best interest. The Court, inter alia, observed:

> *"8. ... ...* ***On the whole, we are unable to agree that the welfare of the boy requires that he should live with his father or with the grandparents.*** *The father is a man without a character who offered solicitation to the commission of his wife's murder. The wife obtained an order of probation for him but, he abused her magnanimity by running away with the boy soon after the probationary period was over. Even in that act, he displayed a singular lack of respect for law by obtaining a duplicate passport for the boy on an untrue representation that the original passport was lost. The original passport was, to his knowledge, in the keeping of his wife.* ***In this background, we do not regard the affluence of the husband's parents to be a circumstance of such overwhelming importance as to tilt the balance in favour of the father on the question of what is truly for the welfare of the minor. At any rate, we are unable to agree that it will be less for the welfare of the minor if he lived with his mother.*** *He was whisked away from her and the question is whether, there are any circumstances to support the view that the new environment in which he is wrongfully brought is more conducive to his welfare. He is about 8 years of age and the loving care of the mother ought not to be denied to him. The father is made of coarse stuff. The mother earns an income of £100 a week, which is certainly not large by English standards, but is not so low as not to enable her to take reasonable care of the boy.*
>
> *9. Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son.* ***But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the***

minor. As the matters are presented to us today, the boy, from his own point of view, ought to be in the custody of the mother.

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

England, where they gave birth to this unfortunate boy." (emphasis supplied)

Elizabeth Dinshaw (supra)

51. In this case, the wife Elizabeth Dinshaw was a citizen of United States of America. She was employed for the State of Michigan. She was also a student at the Northern Michigan University. Arvand M. Dinshaw – who was an Indian citizen, was a student at Northern Michigan University. They fell in love and got married in US in February, 1972. Both were working for gain in Michigan State of USA, with the husband maintaining a permanent immigration visa. A baby boy was born to them in August, 1978. Differences arose between the parties within 3 years of their child being born. The wife had moved to a women's shelter with the son and obtained a decree of divorce from the Michigan Circuit Court in April, 1982. The Court also directed that the care, custody and control of the minor child shall be with the mother until he turns 18 years of age, or until further orders of the court. The Court had granted the father visitation rights which included custody over the weekends. So far as travel outside the United States was concerned, the Court directed and adjudged that should the defendant Arvand M. Dinshaw, wish *"to travel with the minor child outside the territorial limits of the United States, he shall bring a petition before this Court, setting forth the conditions under which he intends to leave the country with the minor child. The court shall then make a determination as to whether such travel is in the best interests of the minor child, and what conditions shall be set forth to ensure the child's return*".

52. Taking advantage of the visitation rights, the father fled with the child to India without intimating the Court about his intention to take the child outside the jurisdiction of the court and the country. The wife/mother complained against the violation of the terms of the divorce decree, and an arrest warrant was issued against the father/husband in this regard. The mother flew to India and filed a petition before the Supreme Court for seeking custody of her child in terms of the order deciding the custody of the child by the foreign court.

53. The Court observed that taking the child from the custody of the person to whom it had been entrusted by the Court, was undoubtedly most reprehensible and the explanation offered by the father/ husband – that coming back to India was because of his father's illness, was far from convincing and a gross violation and contempt of the order of the Circuit Court, Michigan. The Court, relying upon the principle of welfare of the child and best interest of the child, directed the child to be returned back to the US. It observed:

> *"Whenever* ***a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.*** *We have twice interviewed Dustan in our Chambers and talked with him. We found him to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with.* ***The child is an American citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in school there. In our considered opinion***

it will be in the best interests and welfare of Dustan that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent Court in that country. *We are also satisfied that the petitioner who is the mother, is full of genuine love and affection for the child and she can be safely trusted to lookafter him, educate him and attend in every possible way to his proper upbringing.* ***The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of his origin in the United States of America.*** *The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child to some school in Pune. The conduct of the father has not been such as to inspire confidence in us that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present."* (emphasis supplied)

54. Ms. Rajkotia, in regard to these two cases, submits that the courts while citing the principle of comity of courts, made an independent assessment on child's welfare and premised their decisions primarily on that consideration. She submits that these cases can be differentiated from the present one, since the fleeing parties had not pleaded domestic violence as their reason for fleeing with the child, whereas in the present case, the respondent has alleged the same against the petitioner.

Sarita Sharma (supra)

55. In this case the husband, Sushil Sharma and the wife, Sarita Sharma were living in Texas, USA. They had two children out of the wedlock. Because of the differences between the parties, the husband had initiated divorce proceedings before the District Court of Tarrant County, Texas, USA in 1995. The Court passed an order for putting the children in the care of the father, and the wife was only given visitation rights. Inspite of this order, the wife, without obtaining any order from the American Court, brought the two children with her to India. Warrants of her arrest were issued. Subsequent to her departure, the Court passed the divorce decree while declaring that the sole custody shall be with the father. The wife was denied visitation rights.

56. The husband/father filed a writ petition in Delhi High Court seeking production of his children and permission to take them to the US. The wife raised the issue of welfare of children and submitted that the father was not a suitable parent, since he was an alcoholic and violent.

57. The writ petition of the husband was allowed by the High Court.

58. However, the Supreme Court allowed the appeal of the wife, again on the principle of 'welfare of the child'. The Court observed:

> "*6. **Therefore, it will not be proper to be guided entirely by the fact that the appellant Santa had removed the children from U.S.A. despite the order of the Court of that country.** So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no*

one else in the family. ***The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly locked after.*** *It is also not desirable that two children are separated from each other. If a female child has to stay with the mother it: will be in the interest of both the children that they both stay with the mother. Here In India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children,* ***we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held****. Still there is some possibility of mother returning to U.S.A. in the interest of .the children. Therefore we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A, with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the court in U.S.A. the circumstances under which she had left U.S.A. with the children Without taking permission of the Court. There is a possibility that: both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to*

the custody of the children and visitation rights." (emphasis supplied)

Aviral Mittal (supra)

59. In this case, the husband and wife were permanent residents in the UK and a girl child was born to them in England. She acquired a British passport. The parties were having differences with each other. They separately travelled to India. When the date for return of the wife and the minor child arrived, she refused to travel back to the UK. The husband, consequently, initiated proceedings before High Court of Justice, Family Division, U.K. seeking an order that the minor be made a ward of the Court, and a direction to the wife to return the child back to the UK. An interim order was passed by the foreign court directing return of the child, and forbidding the wife from removing the child from the UK, without obtaining permission regarding the same.

60. Since the wife did not oblige, the husband filed a writ petition for habeas corpus. The child was about three and a half years old when the matter was considered by the Division Bench. This Court allowed the petition. The Court held that since the parties had made the UK their matrimonial home, and there were serious allegations by both parties against each other, the UK courts were better equipped to decide the issue of custody of the child on the basis of the evidence, which was available in the UK. The Court further observed:

"15……The parties continued to live, cohabit, work for gain and bring up the child together in the U.K. The child is holding a British passport and both the parents have permanent

resident status in the U.K. In such a situation, it can hardly be said that any court other than the courts in the U.K. would best serve the ends of justice for determining the allegations and counter allegations between the parties.

16. We are conscious of the fact that in view of the observations made by the Supreme Court and judgments referred to aforesaid, it is the interest of the child which is paramount. *The interest of the child is always to have the benefit of company of both the parents. However, where such an ideal situation is not possible, the question would arise as to which of the parents is in a better position to look after the child. It is no doubt true that the child in the present case is a female child and as observed by the Supreme Court in Sarita Sharma v. Sushil Sharma's case (supra) and by a Division Bench of this Court in Paul Mohinder Gahun v. State of NCT of Delhi and Ors's case (supra), normally a child may be better taken care of by the mother, but then this in turn depends on the conduct of the parents. The facts in the present case, to some extent, are akin to the facts of Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu case (supra) where both the parties were settled in England and the child was born and brought up in England and had British citizenship. In the facts of that case also, a plea was advanced on behalf of the mother that she had no relatives in England and the child would have to live alone and in dismal surroundings in England. However, since the parents set up their matrimonial home in England where both the husband and wife were working, it was held that courts in England would best determine the aspect of custody of the child. We can draw strength from the observations made in the aforesaid judgment that* ***in matters relating to matrimony and custody, the law of that place must govern the parties which has the closest connection with the well-being of the spouses and the welfare of the offsprings of marriage. The present case is not one where the wife is an uneducated lady, who is married and has just gone to a foreign country where she has been unable to settle down. Both the parties are well-educated and were gainfully employed though the mother may have give up her job subsequently. The child is a British***

citizen by birth. The allegations and counter allegations of the parties against their personal conduct have all happened in the U.K. and thus it is in those courts that interest of the parties would be best taken care of.

17. It is no doubt true that the visit of the mother and the child to India was with the consent of the petitioner. The custody of the child with the mother is not illegal. However, this visit was on the premise of a return to the U.K. in November, 2008 which did not materialize. Once the High Court of Justice has directed that the child be produced, in our considered view, the retention of the child in India would be unlawful though it may not have been illegal at the inception." (emphasis supplied)

Shilpa Aggarwal (Ms.) (supra)

61. This decision was rendered by the Supreme Court in the appeal preferred by Shilpa Aggarwal, the wife from the judgment of the Division Bench of this Court in ***Aviral Mittal*** (supra). Thus, the facts need not be restated. The submission of the appellant mother that the High Court had "*lost sight of the fact that the interest of the minor is of paramount importance in matters relating to custody and particularly in this case where the minor was a girl child and was just about 3 ½ years old*". The appellant also relied upon Section 6 of the Hindu Minority and Guardianship Act whereunder the mother is entitled to retain custody of the minor child under the age of five years. The appellant also questioned the jurisdiction of the High Court to issue a writ in the nature of mandamus to a private individual to submit to the jurisdiction of a Foreign Court in a habeas corpus proceeding. Strong reliance was placed by the appellant on ***Sarita Sharma*** (supra).

62. The Supreme Court rejected all the submissions of the appellant including the ones taken note of herein above. The Supreme Court observed that "*between two contrasting principles of law which we are required to balance keeping in mind the interests of a 3½ year old minor girl child. Of the two principles, the High Court has placed greater reliance upon the theory of comity of nations and comity of judgments of the courts of two different countries in deciding the matter*".

63. The High Court of Justice, Family Division (U.K.) was also in seisin of the matter and had passed an interim order of restraint. The High Court had also taken into consideration the interest of a 3½ year old minor girl child directing the custody of the child be made over to the father in England. The Supreme Court further observed as follows:

> *"31. Although Mr Shishodia relied heavily on the decision in Surinder Kaur case[(1984) 3 SCC 698 : 1984 SCC (Cri) 464] , it cannot be ignored that the said case has duly considered the principle that the interest of the minor is paramount in any decision relating to custody. It is but natural that in a matrimonial tussle both the parents would want the custody of the minor child. In this tussle, we have to decide who would be more suited to have custody of the child. In our view, the High Court appears to have taken the correct approach in a matter like this.*
>
> *32. Although, on first impression, it would appear that the interests of the minor child would be best served if she is allowed to remain with the appellant, we cannot lose sight of the order dated 26-11-2008, passed by the High Court of Justice, Family Division, UK, which admittedly is an ex parte order and, inter alia, reads as follows:*
>
> > *"IT IS ORDERED THAT:*

1. The minor, Elina Mittal (date of birth 20-2-2006), shall remain a ward of court during her minority or until further order;

2. The defendant mother, Shilpa Aggarwal, do within 14 days of service of this order upon her cause the said minor to be returned to the jurisdiction of England and Wales;

3. Following the return of the said minor to England and Wales, the defendant mother shall thereafter be forbidden (whether by herself or by instructing or encouraging any other person) from causing or permitting the minor to be removed from the jurisdiction of England and Wales without the permission of a High Court Judge;

4. Within 72 hours of the return of the said minor to England and Wales, the defendant mother must deliver up to the plaintiff father's solicitors, Messrs Lyons Davidson of Victoria House, 51 Victoria Street, Bristol BS1 6AD all passports and international travel documents for the child on the basis that those documents will be held by that firm to the order of the Court and will not be released to either party without the permission of a High Court Judge;

5. Within 72 hours of the return of the said minor to England and Wales, the defendant mother must provide the plaintiff father's solicitors, Messrs Lyons Davidson of Victoria House, 51 Victoria Street, Bristol BS1 6AD with full details in writing of any address at which she intends to reside with the child and a contact telephone number for herself; she must also provide to the father's solicitors in writing full details of any new address to which she intends to move with the child prior to such move taking place;

6. There be liberty to the defendant mother to apply to vary or discharge any provision of this order upon giving 24 hours' notice to the plaintiff father's solicitors, Messrs Lyons Davidson of Victoria House, 51 Victoria Street, Bristol BS1 6AD (of PMM/CLP; Telephone No. 01179046000); any such application shall be supported by a sworn affidavit;

7. The application shall be adjourned and listed at risk for further directions before a High Court Judge sitting at the Royal Courts of Justice, Strand London at 10.30 a.m. on 15-12-2009 (time estimate ½ hour);

8. The costs of this application be reserved:

AND NOW THEREFORE this Court respectfully invites all judicial and administrative bodies in the Republic of India to render assistance in ensuring that the minor Elina Mittal is returned as soon as possible to the jurisdiction of England and Wales."

33. It is evident from the aforesaid order that except for insisting that the minor be returned to its jurisdiction, the English Court did not intend to separate the child from the appellant until a final decision was taken with regard to the custody of the child. ***The ultimate decision in that regard has to be left to the English courts having regard to the nationality of the child and the fact that both the parents had worked for gain in the UK and had also acquired permanent resident status in the UK.***

34. The High Court has taken note of the fact that the English Court has not directed that the custody of the child should be handed over to the respondent father but that the child should be returned to the jurisdiction of the courts in the UK which would then proceed to determine as to who would be best suited to have the custody of the child. In our view, the approach of the High Court takes into consideration both the questions

relating to the comity of courts as well as the interest of the minor child, which, no doubt, is one of the most important considerations in matters relating to custody of a minor child. ***It has been rightly observed by the High Court following the decision in Surinder Kaur case [(1984) 3 SCC 698 : 1984 SCC (Cri) 464] that it was the English courts which had the most intimate contact with the issue in question to decide the same.***

35. The fact that the minor child has been declared a ward of the English Court till she attains majority, is also a matter of considerable importance in considering whether the impugned order of the High Court should be interfered with or not.

36. We are satisfied from the materials produced before us and the submissions made on behalf of the parties that ***the High Court did not commit any error in relying on the doctrine of comity of courts since the question of what is in the interest of the minor still has to be considered by the UK Court and the interim order passed in the proceedings initiated by Respondent 1 is only of an interim nature with a view to return the child to the jurisdiction of the said Court***". (emphasis supplied)

V. Ravi Chandran (supra)

64. In this case, the husband Dr. V. Ravi Chandran was an American citizen who married the respondent – an Indian citizen in Tirupathi, Andhra Pradesh, India in the year 2000. They had a baby boy in the US in July, 2002. The wife had approached the New York State Supreme Court for divorce in July 2003, wherein the Court passed a consent order granting joint custody of the child to both parties in April, 2005. They were ordered to keep each other informed about the whereabouts of the child. In July, 2005 a separation agreement was entered into between the parties for distribution of marital properties, maintenance for the spouse and support

for the child. The parties agreed for joint custody, as already ordered in April 2005. The marriage between the parties was dissolved in September, 2005. In June, 2007, the Family Court in USA, by consent, devised the mechanism for the joint custody and upbringing of the minor child.

65. The wife brought the child with her to India in June, 2007, while informing the husband that she will stay with her parents in Chennai. In August, 2007, the husband then filed a petition for modification of the custody order, and violation of the order of the Family Court. As a result, the husband was granted temporary and sole custody of the minor child. The wife was ordered to return the child immediately to the father. Non-bailable warrants were also issued against the wife.

66. In the aforesaid background, the father preferred the writ petition before the Supreme Court to seek a writ of Habeas Corpus for production of minor child and for a direction that he be handed over to the petitioner father. The child and his mother were located after two years effort. The Supreme Court, in this background, examined the issue with regard to return of the custody of the minor child to the father.

67. In the course of its decision, the Supreme Court considered several decisions of foreign courts. One of the decisions taken note of by the Court was in ***L (Minors) in re***, (1974) 1 All ER 913 (CA). In this case, the Court of Appeal was concerned with the custody of the foreign children who were removed from foreign jurisdiction by one parent. A German national – domicile and resident of Germany married an English woman. Their matrimonial home was Germany and two children were born out of the said

wedlock and brought up in Germany. The lady, not being happy with her married life, in August 1972, brought her children to England with an intention to permanently establish herself and the children in England. The children were admitted to the school in England. The mother instituted an originating summons making them wards of Court. The Trial Judge held that the children being foreign nationals, who had been moved out of their foreign home, their life should continue in what were their natural surroundings - unless it appeared to the Court that it would be harmful to the children if they were returned. Keeping in view the arrangements which the father could make for them, the Trial Judge concluded that the children would not be harmed by being returned. Accordingly, he directed that the children be returned to Germany and they remain in their father's custody until further orders. The mother appealed, contending that in every case the welfare of the child was the first and paramount consideration and that the welfare of the children would be best served by staying with their mother in England. The Court of Appeal, speaking through Buckley, L.J, inter alia, observed:

> "*... Where the court has embarked [on] a full-scale investigation of [that] facts, the applicable principles, in my view, do not differ from those which apply to any other wardship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account any may be a circumstance of great weight; the weight to be attributed to it must depend [on] the circumstances of the particular case.* ***The court may conclude that notwithstanding the conduct of the 'kidnapper' the child should remain in his or her care: see McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942 (PC)]*** *; E(D) (An infant), In re [1967 Ch 287 : (1967) 2 WLR 445 : (1967) 1 All ER 329] and T.A. (Infants), In*

re [(1972) 116 Sol Jo 78] , (where the order was merely interim); or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed: T. (Infants), In re. [1968 Ch 204 : (1968) 3 WLR 430 : (1968) 3 All ER 411 (CA)] Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgment, apply, but the decision must be justified on somewhat different grounds.

* * *

*... **The Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.***" (emphasis supplied)

68. The Supreme Court, commented on ***L (Minors) in re*** as follows:

*"**24. In L (Minors), In re [(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] the Court of Appeal has made a distinction between cases where the court considers the facts and fully investigates the merits of a dispute, in a wardship matter in which the welfare of the child concerned is not the only consideration but is the first and paramount consideration, and cases where the court does not embark on a full-scale investigation of the facts and makes a summary order for the return of a child to a foreign country without investigating the***

merits. In this regard, Buckley, L.J. noticed what was indicated by the Privy Council in McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942 (PC)] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child*".* (emphasis supplied)

69. The Supreme Court also referred to ***Dhanwanti Joshi v. Madhav Unde***, (1998) 1 SCC 112. In ***Dhanwanti Joshi*** (supra), the Supreme Court had considered the earlier foreign decisions including the decision of the Court of Appeal in ***L (Minors) in re*** (supra) & ***Mckee*** (supra). The relevant observations from ***Dhanwanti Joshi*** (supra) taken note of by the Supreme Court read as follows:

"27. ... .

29. However, there is an apparent contradiction between the above view and the one expressed in H. (Infants), In re [(1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)] and in E(D) (An infant), In re [1967 Ch 761 : (1967) 2 WLR 1370 : (1967) 2 All ER 881 (CA)] to the effect that the court in the country to which the child is removed will send back the child to the country from which the child has been removed. ***This apparent conflict was explained and resolved by the Court of Appeal in 1974 in L. (Minors), In re [(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] and in R. (Minors), In re [(1981) 2 FLR 416 (CA)] . It was held by the Court of Appeal in L. (Minors),*** *In re [(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)]* ***that the view in McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942 (PC)] 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, maybe, 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 well 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 unauthorised removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, 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 Edn., 1988, pp. 1477-79; Bromley, Family Law, 7th Edn., 1987.) In R. (Minors), In re [(1981) 2 FLR 416 (CA)]*

it has been firmly held that the concept of forum conveniens has no place in wardship jurisdiction". (emphasis supplied)

70. In the light of the decisions taken note of by the Supreme Court including the decision in ***L (Minors) in re*** (supra), the Supreme Court in ***Ravi Chandran*** (supra) held as follows:

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, ***the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country.*** *Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so,* ***the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.***

30. ***However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942 (PC)] that there may be cases in which it is proper for a court in one***

jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re [(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] and the said view has been approved by this Court in Dhanwanti Joshi [(1998) 1 SCC 112] *. Similar view taken by the Court of Appeal in H. (Infants), In re [(1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)] has been approved by this Court in Elizabeth Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Cri) 13]".* (emphasis supplied)

71. The Supreme Court then proceeded to consider the issue whether the facts of the case before it warranted an elaborate inquiry into the question of custody of the minor and should the parties be relegated to the said procedure before an appropriate forum in India. The Supreme Court concluded that in its judgment it was not necessary to relegate the parties to an elaborate procedure in India. Its reasons are found in paras 32 to 35, which read as follows:

"32. Admittedly, Adithya is an American citizen, born and brought up in the United States of America. He has spent his initial years there. The natural habitat of Adithya is in the United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interests, the parties have obtained a series of consent orders concerning his custody/parenting rights, maintenance, etc. from the competent courts of jurisdiction in America. Initially, on 18-4-2005, a consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court whereunder the court granted joint custody of the child to the petitioner and Respondent 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a separation agreement

entered into between the parties on 28-7-2005, the consent order dated 18-4-2005 regarding custody of minor son Adithya continued.

33. In 8-9-2005 order whereby the marriage between the petitioner and Respondent 6 was dissolved by the New York State Supreme Court, again the child custody order dated 18-4-2005 was incorporated. Then the petitioner and Respondent 6 agreed for modification of the custody order and, accordingly, the Family Court of the State of New York on 18-6-2007 ordered that the parties shall share joint legal and physical custody of the minor Adithya and, in this regard, a comprehensive arrangement in respect of the custody of the child has been made.

34. The fact that all orders concerning the custody of the minor child Adithya have been passed by the American courts by consent of the parties shows that the objections raised by Respondent 6 in the counter-affidavit about deprivation of basic rights of the child by the petitioner in the past; failure of the petitioner to give medication to the child; denial of education to the minor child; deprivation of stable environment to the minor child; and child abuse are hollow and without any substance. The objection raised by Respondent 6 in the counter-affidavit that the American courts which passed the order/decree had no jurisdiction and being inconsistent with Indian laws cannot be executed in India also prima facie does not seem to have any merit since despite the fact that Respondent 6 has been staying in India for more than two years, she has not pursued any legal proceeding for the sole custody of the minor Adithya or for declaration that the orders passed by the American courts concerning the custody of minor child Adithya are null and void and without jurisdiction. Rather it transpires from the counter-affidavit that initially Respondent 6 initiated the proceedings under the Guardians and Wards Act, 1890 but later on withdrew the same.

35. The facts and circumstances noticed above leave no manner of doubt that merely because the child has been brought to

India by Respondent 6, the custody issue concerning minor child Adithya does not deserve to be gone into by the courts in India and it would be in accord with principles of comity as well as on facts to return the child back to the United States of America from where he has been removed and enable the parties to establish the case before the courts in the native State of the child i.e. the United States of America for modification of the existing custody orders. There is nothing on record which may even remotely suggest that it would be harmful for the child to be returned to his native country.

72. Despite the fact that the minor child Adithya had remained in India for over two years, the Supreme Court concluded that it could not be said that the he had developed his roots in India. The Supreme Court directed the respondent mother to take the child, of her own, to the USA and to report before the Family Court of the State of New York. The Supreme Court also imposed the condition on the petitioner that he shall bear all the travelling expenses of the mother and the minor child and make arrangements for their residence in the USA till further orders are passed by the competent Court. He was also directed to request the authorities that the warrants issued against the mother be dropped and he was directed not to file or pursue any criminal charge for violation by the mother of the consent order in USA.

Surya Vadanan (supra)

73. In this case, the husband and wife both were of Indian origin but the husband became a resident and citizen of the UK. Parties got married in India and had two daughters in UK. The wife had acquired British citizenship and a British passport as well. Both parties were working for gain in the UK. The parties started having some matrimonial problems as a

result of which the wife came back to India with her two daughters. The wife filed a petition under Section 13(1)(i-a) of the HMA seeking divorce in the Family Court, Coimbatore. Subsequently, the husband filed a petition in the High Court of Justice in UK for making the children wards of the court. The High Court made the children wards of the court during their minority, or until further orders of the court and the wife was directed to return the children to the jurisdiction of the foreign court. Because the wife did not obey the orders of the foreign court, the husband filed a writ petition of habeas corpus seeking production of his children and their return to the UK in the Madras High Court. The High Court dismissed the petition. The Supreme Court discussed the law on custody of children and observed the following:

> *"46. The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very good reasons not to do so.*
>
> ***47. From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance.*** *However, it should be clearly understood that this is the final goal or the final objective to be achieved—it is not the beginning of the exercise but the end.*
>
> ***48. Therefore, we are concerned with two principles in a case such as the present. They are:***

(i) the principle of comity of courts; and

(ii) the principle of the best interests and the welfare of the child.

These principles have been referred to as "contrasting principles of law" [Shilpa Aggarwal v. Aviral Mittal, (2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192] but they are not "contrasting" in the sense of one being the opposite of the other but they are contrasting in the sense of being different principles that need to be applied in the facts of a given case.

49. What then are some of the key circumstances and factors to be taken into consideration for reaching this final goal or final objective? ***First, it must be appreciated that the "most intimate contact" doctrine and the "closest concern" doctrine of Surinder Kaur Sandhu [Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698 : 1984 SCC (Cri) 464] are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. This is a factor that must be kept in mind.***

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52. What are the situations in which an interim or an interlocutory order of a foreign court may be ignored? There are very few such situations. It is of primary importance to determine, prima facie, that the foreign court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which

the foreign court exercises jurisdiction. If the foreign court does have jurisdiction, the interim or interlocutory order of the foreign court should be given due weight and respect. If the jurisdiction of the foreign court is not in doubt, the "first strike" principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic).

53. There may be a case, as has happened in the present appeal, where one parent invokes the jurisdiction of a court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another court and obtains a substantive order in his or her favour before the first court. In such an event, due respect and weight ought to be given to the substantive order passed by the second court since that interim or interlocutory order was passed prior in point of time.

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55. Finally, this Court has accepted the view [L. (Minors), In re, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court." (emphasis supplied)

74. Thus, it would be seen that while paragraph 49 recognised the well-settled principle/ doctrine of "most intimate contact" and the "closest concern" doctrine, paragraphs 47, 52 & 53 emphasized the doctrine of comity of Courts and the first strike principle. Even before stating the aforesaid principles, in paragraph 47, the Court observed that there is

complete unanimity that the best interests and welfare of the child are of paramount importance.

75. The Court allowed the appeal on the ground that the UK court had passed an effective and substantial order declaring the children of the parties as wards of that court and also that the UK court has the most intimate contact with the welfare of the children.

76. Ms. Rajkotia submits that the principles espoused by the Supreme Court in ***Surya Vadanan*** (supra) are not applicable here, because in the said case the parents were both UK citizens, and had established their residence in the UK for a long period of time. She distinguished ***Surya Vadanan*** (supra) from the present case by submitting that the respondent is an Indian citizen and is in intimate contact with her country of birth. Her family resides in India with her parents having made a loving home for M. But, as aforementioned, she relied upon the case on the principle of first strike/first substantive order. Her submission is that the first order in this case is of the Family Court, Patiala House, Delhi dated 11.01.2017 and as a result, the courts in India should deal with issue of custody.

77. After we had reserved judgment in the case on 18.04.2017, the Supreme Court rendered its decision in ***Nithya Anand Raghavan v. State (NCT of Delhi)***, 2017 SCC Online SC 694 dated 03.07.2017. Consequently, learned counsel mentioned the case and tendered a copy of the said decision. Both counsels also filed their respective submissions premised on the said decision. We have considered this decision and the submission of the parties regarding this decision as well.

78. ***Nithya Anand Raghavan*** (supra) was a tussle between an estranged couple, involving a seven year old girl child Nethra, who suffered from a cardiac disorder. Respondent no.2 – the husband, was the writ petitioner before this Court, whose writ petition was allowed and directions issued to the appellant wife to take the child to U.K.

79. The parties had got married on 30.11.2006 at Chennai; thereafter they shifted to U.K. in early 2007 and lived there as husband and wife; disputes erupted between the parties – according to the appellant they were often violent and she was physically, mentally and psychologically abused; the appellant got a job in London in 2008 earning close to 25,000 (GBP) pounds per annum; appellant conceived in December 2008; she came to New Delhi in June 2009 to be with her parents; she gave birth to a girl child – Nethra, on 07.08.2009 at Delhi; respondent no.2 – the husband joined them soon thereafter in India; they went back to U.K. in March 2010; in August, 2010 appellant and her daughter came back to India after several incidents with respondent no.2; legal correspondence ensued setting out the differences which had arisen between the parties, whereafter the appellant and her daughter went back to London in December 2011 – more than a year after they had come to India; in January 2012, Nethra was admitted to and attended a nursery school in U.K.; in September 2012, application was filed for daughters citizenship of U.K.; in December Nethra was granted citizenship of U.K.; in January 2013, respondent no.2 was also granted citizenship of U.K.; respondent no.2 bought another home in U.K. to which the family shifted; in September 2013 Nethra was admitted to a primary school in U.K.– when she was around four years old; in July 2014 appellant

returned to India, owing to certain health related problems, and brought Nethra with her; a month later she returned to U.K. with Nethra; from late 2014 to early 2015 Nethra was taken ill and diagnosed with a cardiac disorder; on 02.07.2015 the appellant came back to India with Nethra because of the alleged violent behavior of respondent no.2; she sent emails to Nethra's school – firstly stating that she had left due to "family medical reasons", and thereafter stating that Nethra would remain in India for an extended duration and, finally, stating that Nethra would not be returning to U.K. due to her own well being and safety; on 16.12.2015 the appellant filed a complaint against respondent no.2 at the CAW Cell, New Delhi which issued notice to respondent no.2 and his parents; neither of them appeared; respondent no.2 filed custody/ wardship petition on 08.01.2016 in U.K. to seek return of Nethra; on 23.01.2016 respondent no.2 filed the habeas corpus petition in the Delhi High Court, which was allowed by this Court on 08.07.2016.

80. The Supreme Court recapitulated the earlier precedents on the subject- most of which we have referred to herein above. The submission of the appellant was that ***Shilpa Aggarwal*** (supra) and ***Surya Vadanan*** (supra) had deviated from the established principle of putting the welfare of the child above all other considerations. The appellant contended that in these two decisions the *parens patriae* jurisdiction. The appellant contended that the "*intimate contact*" principle cannot be applied "*where the child returns to a country where he/ she has been born and brought up in, like in the present case*". The appellant contended that ***Surya Vadnan*** (supra) gives precedence to the principle of comity of courts over the welfare of the child.

The appellant contended that ***Surya Vadnan*** (supra) was in conflict with ***Ravi Chandran*** (supra) – a three judge bench decision, where the Supreme Court held that under no circumstances, can the principle of welfare of the child be eroded, and that the child can seek refuge under the *parens patriae* jurisdiction of the Court.

81. On the other hand, the thrust of the submission of respondent no.2-husband was the necessity to comply with the direction issued by the foreign Court against the appellant-wife to produce the daughter before the U.K. Court – where the issue regarding wardship was pending consideration. The husband contended that the U.K. Court alone could adjudicate that issue. He contended that comity of courts must be respected.

82. The Supreme Court referred to its decision in ***Dhanwanti Joshi*** (supra) which, in turn referred to ***Mckee*** (supra), where the Privy Council held that "*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*"".

83. The Supreme Court emphasized the decision in ***L.Minors*** (supra) which resolved the apparent conflict between ***McKee (supra)*** on the one hand, and ***H. (infants)*** (supra) and ***E (an infant)*** (supra) on the other hand. These later decisions held that the Court in the country to which the child is removed, will send back the child to the country from which the child was removed. In ***L.Minors*** (supra) and ***R (Minors)*** (supra) the Court held that the view in ***McKee*** (supra) 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 enquiry 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. The Supreme Court highlighted the extract from ***Dhanwanti Joshi (supra)*** which we have already noticed in para 69 above.

84. The Supreme Court also extracted paras32 and 33 from ***Dhanwanti Joshi*** (supra), which reads as follows:

> "*32. 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 going 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 mature and objects to its return. In England, these aspects are covered by the Child Abduction and Custody Act, 1985.*
>
> *33.* ***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 in the country to which***

the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee v. McKee 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 L. As recently as 1996-1997, it has been held in P (A minor) (Child Abduction: Non-Convention Country), by Ward, L.J. [1996 Current Law Year Book, pp. 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. See also A (A minor) (Abduction: Non-Convention Country) [Re, The Times 3-7-97 by Ward, L.J. (CA) (quoted in Current Law, August 1997, p. 13]. This answers the contention relating to removal of the child from USA. (emphasis supplied)*" (emphasis supplied)

85. The Supreme Court, then, in para 25 of the decision in ***Nithya Anand Raghavan (supra)***, held as follows:

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

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

86. The Supreme Court also quoted extracts from ***Ravi Chandran*** (supra) and went on to observe in paras 28, and 30 to 32 as follows:

"*28.* ***The consistent view of this court is that if the child has been brought within India, the Courts in India may conduct (a) summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the Court may deem it fit to order return of the child to the***

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

30. ..... In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in ***Sayed Saleemuddin v. Dr. Rukhsana & Ors.*** *, has held that the principal duty of the Court is to ascertain whether the custody of child is unlawful or illegal* ***and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child.*** *In the case of Mrs. Elizabeth (supra), it is held that in such cases the matter must be decided not by reference to the legal rights of the parties* ***but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court*** *(see Paul Mohinder Gahun Vs. State of NCT of Delhi, (2001) 5 SCC 247 & Ors. relied upon by the appellant). It is not necessary to multiply the authorities on this proposition.* (emphasis supplied)

31. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, ***may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above.*** *Once again, we may hasten to add that* ***the decision of the Court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign Court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court.*** *Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign Court or resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.*

32. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, ***only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.*****"** (emphasis supplied)

The Supreme Court also observed that "*merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se*".

87. The Supreme Court also held in view of the fact that the order passed by the English Court was an ex parte order, and no finding had been returned that till the minor returns to England, the custody of the minor with the mother was unlawful, that the custody of the minor with the appellant – being her biological mother, would have to be presumed to be lawful. The Supreme Court then observed:

> "*35.* ***The High Court in such a situation may then examine whether the return of the minor to his/her native state would be in the interests of the minor or would be harmful. While doing so, the High Court would be well within its jurisdiction if satisfied, that having regard to the totality of the facts and circumstances, it would be in the interests and welfare of the minor child to decline return of the child to the country from where he/she had been removed; then such an order must be passed without being fixated with the factum of an order of the foreign Court directing return of the child within the stipulated time, since the order of the foreign Court must yield to the welfare of the child.*** *For answering this issue, there can be no strait jacket formulae or mathematical exactitude. Nor can the fact that the other parent had already approached the foreign court or was successful in getting an order from the foreign court for production of the child, be a decisive factor. Similarly, the parent having custody of the minor has not resorted to any substantive proceeding for custody of the child, cannot whittle down the overarching principle of the best interests and welfare of the child to be considered by the Court. That ought to be the paramount consideration*." (emphasis supplied)

88. The Supreme Court then considered the facts of the case before it, including the following:

(i) Both parents were of Indian origin;

(ii) They were married in Chennai as per Hindu rites and customs;

(iii) The girl child was an Indian citizen by birth;

(iv) The child had spent equal time, since her birth, in India, and the UK;

(v) Whereas the child was staying in a nuclear family in UK with her parents, in India, she had her grandparents and extended family;

(vi) The appellant produced material before the Court to suggest her being subjected to physical violence and mental torture by Respondent No.2-the husband;

(vii) Even though the appellant had returned to India on 02.07.2015, no proceedings were instituted by the husband in the UK-including regarding custody of the child, till after the filing of the complaint by the appellant before the CAW Cell;

(viii) The child was attending school in India for over one year;

(ix) The child would receive love, understanding, care and guidance for the complete development of her character, personality and talent from the mother. Ordinarily, a girl child of upto seven

years must ideally be in the custody of the mother, unless there are circumstances to indicate that it would be harmful for the girl child to remain in the custody of the mother;

(x) When Nethra was brought to India by the mother, there was no order of restraint of any court in UK; and

(xi) The father/respondent no. 2 being employed, may not be able to look after the minor girl child.

The Supreme Court then observed:

"*38. .... Suffice it to observe that taking the totality of the facts and circumstances into account, it would be in the interests of Nethra to remain in custody of her mother and it would cause harm to her if she returns to the U.K. ... ...*"

89. The Supreme Court then proceeded to deal with ***Surya Vadanan*** (supra). It quoted para 56 of ***Surya Vadanan*** (supra), which reads as follows:

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

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

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

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

90. The Supreme Court, in paras 43-44, disapproved with the drift away from ***Dhanwanti Joshi*** (supra) and ***Ravi Chandran*** (supra). The relevant extract reads as follows:

"*43.* ***As regards clauses (a) to (c), the same, in our view, with due respect, tend to drift away from the exposition in Dhanwanti Joshi's case (supra), which has been quoted with approval by a three-judge bench of this Court in V. Ravi Chandran (supra)****. In that, the nature of inquiry suggested therein inevitably recognises giving primacy to the order of the foreign Court on the issue of custody of the minor. That has been explicitly negated in Dhawanti Joshi's case.* ***For, whether it is a case of a summary inquiry or an elaborate inquiry, the paramount consideration is the interests and welfare of the child. Further, a pre-existing order of a foreign Court can be reckoned only as one of the factor to be taken into consideration.*** *We have elaborated on this aspect in the earlier part of this judgment.*

44. ***As regards the fourth factor noted in clause (d), we respectfully disagree with the same.*** *The first part gives weightage to the "first strike" principle. As noted earlier,* ***it is not relevant as to which party first approached the Court or so***

to say "first strike" referred to in paragraph 52 of the judgment. *Even the analogy given in paragraph 54 regarding extrapolating that principle to the Courts in India, if an order is passed by the Indian Court is inapposite. For, the Indian Courts are strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction. Section 14 of the said Act plainly deals with that aspect. The same reads thus:-*

> *"14. Simultaneous proceedings in different Courts.- (1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself.*
>
> *(2) If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.*
>
> *[(3) In any other case in which proceedings are stayed under sub-section (1), the Courts shall report the case to and be guided by such orders as they may receive from their respective State Governments.]"*

91. The first strike principle was rejected by the Supreme Court while observing as follows:

> "*46.* ***The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the Court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance.*** *If the Court is convinced in that regard, the fact that there is already an order passed by a foreign Court in existence may not be so significant*

as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi's case (supra), in relation to non-convention countries is that the Court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration. While considering that aspect, the Court may reckon the fact that the child was abducted from his or her country of habitual residence but the Court's overriding consideration must be the child's welfare." (emphasis supplied)

92. The conclusions reiterated in para 49 of ***Nithya Anand Raghavan*** (supra) read as under:

"*49.* ***We once again reiterate that the exposition in the case of Dhanwanti Joshi (supra) is a good law and has been quoted with approval by a three-judge bench of this Court in V. Ravi Chandran (supra). We approve the view taken in Dhanwanti Joshi (supra), inter alia in paragraph 33 that so far as non-convention countries are concerned, the law is that the Court in the country to which the child is removed while considering the question must bear in mind the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration. The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, - for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the court to which the child has been removed is moved promptly and quickly. The***

***overriding consideration must be the interests and welfare of the child.*"**

93. What emerges from an analysis of all the above discussed decisions, including the latest decision in ***Nithya Anand Raghavan*** (supra), is that the paramount consideration in such like cases is the welfare of the minor child – in respect of whom the habeas corpus writ petition is preferred by one, or the other, parent. The other considerations – like comity of courts; orders passed by a foreign Court having jurisdiction in the matter regarding custody of the minor child; citizenship of the parents and the child; the "intimate connect"; the manner in which the child may have been brought to India i.e., even if it is in breach of an order of a competent court in the foreign jurisdiction, cannot override the consideration of the child's welfare, since it is the responsibility of the Court – which exercises the *parens patriae* jurisdiction, to ensure that the exercise of the extra ordinary writ jurisdiction is in the best interest of the child, and the direction to return the child to the foreign jurisdiction does not result in any physical, mental, psychological, or other harm to the child.

94. Thus, if it is not in the best interest and welfare of the minor child that he/ she should be returned to the foreign jurisdiction, and giving of such a direction would harm his interest and welfare, other considerations and principles, which persuade the Court to take a view in favour of directing the return of the minor child to the foreign Court's jurisdiction, shall stand relegated and the Court would not direct the return of the child to the place falling within the jurisdiction of the foreign Court. The aforesaid principles

were culled out from the earlier precedents as would become apparent from the earlier decisions taken note of hereinabove.

95. Thus, in ***Surinder Kaur Sandhu*** (supra) even though the minor child would have been materially better placed if his custody had continued with the father in India- since the father lived in an affluent setting as opposed to the mother, who was a factory worker in England, the Supreme Court invoked the principle of welfare of the child to direct that the child be returned to the custody of the mother, since the father was a convict who had attempted to cause his wife's murder and was let off on probation due to the intervention of his wife. He had also procured a duplicate passport by making false representations. The Supreme Court held that the influence of such a father on the child would not be in his best interest. The Supreme Court also invoked the principle of comity of courts in this case. However, perusal of the decision shows that the primary reason that swayed the Court was the welfare of the child, which the Supreme Court held would be better served if his custody is returned to the mother.

96. In ***Elizabeth Dinshaw*** (supra), once again, the Supreme Court emphasized that whenever a question arises before the Court pertaining to the custody of the minor child, the matter is to be decided-not on considerations of the legal rights of parties, but on the sole and predominant criterion as to what would best serve the interest and welfare of the child. The Supreme Court observed that in its considered opinion, it would be the best interest and welfare of the child Dustan, that he should go back to the U.S.A and continue his education in the custody and guardianship of the mother. The Supreme Court also observed that the child– who was an

American citizen, had not taken roots in this country, since not much time had elapsed from the time that he had been brought by the father into India in breach of the order of the American Courts.

97. In ***Sarita Sharma*** (supra), even though the mother had brought the two children into India-in breach of the order passed by the competent Court in U.S.A. giving custody to the father and only visitation rights to the mother, the Supreme Court allowed the appeal preferred by the mother/ wife against the decision of this Court directing the mother to take back the children to the U.S.A., by holding that it would not be proper to be guided entirely by the fact that the mother had removed the children from U.S.A. despite the order of the competent Court in that country. The Supreme Court held that it was not in the best interest of the children to direct return of their custody to the father, who was found to be in the habit of taking excessive alcohol. The Supreme Court was conscious of the possibility, that in the U.S.A. the two children would get better education. However, considering the age of the children – one of whom was a minor female child aged about 5 years, the Supreme Court felt that the direction to return the child to the U.S.A. was not justified. It also held that, what would be in the best interest of the children would require a full and thorough inquiry, and that the High Court should have directed the writ petitioner/ father to initiate appropriate proceedings in which such an inquiry could be held.

98. In ***Aviral Mittal*** (supra), the decision of the High Court was primarily based on considerations, such as, intention of the parties to make U.K. as their matrimonial home; the law of U.K. having the closest connection with

the parties, and should govern their relationship and considerations of welfare of the children.

99. The Supreme Court in ***Shilpa Aggarwal (Ms.)*** (supra) dismissed the appeal preferred by the mother from the decision in ***Aviral Mittal*** (supra), after noticing the order that had been passed by the High Court of Justice, Family Division, U.K. This was because, all that the said Court in U.K. had ordered, was to insist that the minor be returned to its jurisdiction. The English Court did not intend to separate the child from the appellant mother until a final decision was taken with regard to the custody of the child. The Supreme Court had observed that the ultimate decision in that regard has to be left to the English Courts having regard to the nationality of the child, and the fact that both the parents had worked for gain in the U.K and had also acquired permanent resident status in the U.K. From this decision in ***Shilpa Aggarwal (Ms.)*** (supra), it appears that the facts presented before the Supreme Court did not contra-indicate that it was not in the welfare of the minor child for her to return to the U.K. with the mother.

100. As observed by the Supreme Court in ***Nithya Anand Raghavan*** (supra), this decision was rendered after a summary inquiry into the facts of the case, and it did not whittle down what has been expounded in ***Dhanwanti Joshi*** (supra), i.e. the duty of the Court to consider the overarching welfare of the child. The Supreme Court drew a distinction with ***Shilpa Aggarwal (Ms.)*** (supra), while deciding ***Nithya Anand Raghavan*** (supra) by, inter alia, observing:

> "*40. ... ... In the present case, the minor is born in India and is an Indian citizen by birth. When she was removed from the*

UK, no doubt she had, by then, acquired UK citizenship, yet for the reasons indicated hitherto dissuade us to direct return of the child to the country from where she was removed".

101. As aforesaid, the Supreme Court in ***Nithya Anand Raghavan*** (supra) has re-emphasised the need to place the welfare of the child at the highest pedestal while considering the issue whether the minor child should be directed to be returned to the country of which he is a citizen, and/or where he may have mostly lived with his parents – or one of them. The determination of the said issue may be undertaken by the Indian Court either summarily or in an elaborate manner. On this aspect, in ***Nithya Anand Raghavan*** (supra), the Supreme Court places reliance on ***V. Ravi Chandran*** (supra) which, in turn, follows the earlier three Judge bench decision in ***Dhanwanti Joshi*** (supra).

102. We now turn to examine the facts of the present case in the light of the above decisions. We are presently focusing our attention on those aspects which concern the welfare and well being of the minor child M. Respondent no.2 has also made allegations against the petitioner and his mother which, according to her, demonstrate their cruel behaviour towards her – justifying her decision to leave her matrimonial home and to seek divorce from the petitioner. Those allegations are also being noticed, and we will consider whether they are such as would have a bearing on the welfare and well-being of the child.

103. The child in question, namely, M, is a girl child, born on 15.02.2014. Thus, she is about 3 years and 8 months old. When this petition was preferred on 01.02.2017, she was about 3 years old. M was born in the

USA. She is an American citizen by birth. The petitioner is her father and respondent No.2 is the mother. The petitioner/father has acquired citizenship of USA in 2005 and holds an American passport. He has been living in USA since 1994. The petitioner is thus domiciled in USA. He has acquired Bachelor's Degree in Economics from the University of Chicago and has also obtained MBA qualification from the University of Chicago. He is an education software entrepreneur who has built PrepMe – an adaptive learning platform. He is the CEO of GetSet Learning, which helps colleges and university students who are struggling to pass their courses and complete their degrees. Respondent No.2-the wife of the petitioner and the natural mother of M, acquired the USA Permanent Resident Status i.e. Green Card and also applied for American citizenship on 02.12.2016.

104. The petitioner has disclosed that he and respondent No.2 had been classmates in School, who reconnected in the 2000s. Gradually, their relationship developed and they decided to get married. The petitioner states that though it was understood that the parties would reside in USA where the petitioner had his work and home, they decided to have the Anand Karaj ceremony and Hindu Vedic Rites in India so that the elders in the two families could participate. Consequently, on 31.10.2010, the said ceremonies were performed at the residence of respondent No.2. He further states that the parties got married in the USA on 19.03.2011 after respondent No.2 arrived in USA.

105. The petitioner also describes the educational qualifications and attainments of respondent No.2 which she had acquired prior to her coming over to USA. Premised on her educational attainments, respondent No.2

applied for a teaching certificate examination. She started working for gain in USA in October, 2012 as a substitute teacher in Chicago Public Schools and in November, 2012, she started working full time at Otis Elementary School within the same Chicago Public Schools district. Respondent No.2 became pregnant with M towards the end of June, 2013. There is no real dispute on these facts. The petitioner states that the parties decided that the Baby should be born in USA, and should attain American citizenship. As aforesaid, baby M was born on 15.02.2014 at Chicago. Thus, respondent No.2 had worked as a teacher in USA for almost 16 months. She took maternity leave after M was born, but returned to work upon completion of the said leave.

106. The petitioner also states that his mother, J G, regularly travelled to Chicago to ensure that the child M was fully taken care of when respondent No.2 returned to work. This was despite the petitioner's father-S G recovering from prostate cancer surgery. The petitioner states that he moved his company's office closer to his residence, so that he could devote more time with the child M for her well being. This shows the love and care that the petitioner and his parents bestowed upon her, and that they were involved in her upbringing. Both the petitioner's parents are doctors-the petitioner's mother being a paediatrician.

107. The petitioner further states that in August, 2014, respondent No.2 decided to take a year off from her work and this decision was supported by the petitioner emotionally and financially. The parties also travelled to India on a short holiday and returned back to USA in late August/early September, 2015. When M was about 18 months old, respondent No.2

chose to return to working full time and joined Andrew Jackson Language Academy (another school in the Chicago Public Schools district). The petitioner employed a Nanny to take care of M on 14.09.2015. The petitioner states that he oversaw the entire process of hiring the Nanny, including, conducting reference checks, negotiating the contract, calculating the payments and most importantly overseeing the care provided by the Nanny through full day interviews when he watched the candidates interact with the child M. The petitioner states that the parties were living as a happy family together and were intent of making USA as their permanent matrimonial home. In this background, the petitioner states that respondent No. 2 vide email dated 07.11.2016 to her immigration attorney Nancy Vizer, informed that she had decided to take up USA citizenship. She also made her application for the said purpose which was received by the USA citizenship and immigration service on 02.12.2016 and was thereafter under process.

108. The petitioner also states that on 18.07.2016, M transitioned from care at home by a Nanny to attending Bright Horizons at Lakeshore East i.e. one of the top pre-schools in Chicago. She attended pre-school two days a week initially, and moved to a five days week, namely, full time schedule on 17.08.2016. The petitioner states that he took care of the enrolment procedure at the pre-school and even met the entire tuition fee of M. M was to move into three year old class room with effect from 09.01.2017 because she was developed well ahead of schedule. The petitioner relies on the certificate issued by Bright Horizons dated 11.01.2017 which, inter alia, states that "*M communicates her wants and needs effectively with adults and*

is able to successfully communicate socially with her peers". It also states that the petitioner is an active member of the school's parent partnership group which meets once monthly to discuss the school events, community outreach opportunities and ways to promote parental involvement at the school. The petitioner has offered to be a resource for other families that may have questions regarding the enrolment at the school and share his overall experiences with Bright Horizons.

109. Respondent no.2 admits that the couple settled down in Chicago in November 2010. She also admits that the petitioner's parents, who were settled in Cincinnati, Ohio would regularly visit the couple in Chicago. Respondent no.2 states that after the birth of M, she quit her job of a full time education assistant in the year 2014 and she was single handedly responsible to attend all her needs such as bathing her, feeding, making her sleep etc. The petitioner was not involved in looking after M until he was constrained to do so. The petitioner's involvement in M's life was only in educational and semi-educational activities such as visits to aquarium, zoo etc. She states that at the time of the marriage, the petitioner had assured that the respondent they would eventually settled in India, but it was later discovered that the petitioner had no such plans, which came as a shock to the respondent.

110. Thus, the couple started their matrimonial life in the United States and lived as a couple in that country. They made United Stated their home. Their entire married life, except the duration during which they were on short visits to India, had been spent in USA. They have not only given birth to and raised their daughter M in her initial 3 years and more in USA, both

of them have also worked and lived in the USA. Even their disputes and differences have arisen in USA since, according to the respondent wife, she allegedly faced difficulties in her married life – for one or the other reason, in USA. She has alleged interference in her married life by her mother-in-law – which too, would have taken place in USA. M had, in fact, started attending the pre-school in Chicago and had a full time schedule at school from August 2016. M, as per the certificate issued by the Bright Horizons – the pre-school, dated 11.01.2017 was already communicating her wants and needs with the elders and she was able to successfully communicate socially with her peers. Thus, the mental development of M while she was in USA, i.e. till the end of 2016, had taken place to such an extent that she was very well aware and conscious of her surroundings. She was perceiving and absorbing from her surroundings and communicated not only with her parents, but also with her other relatives, her peers at the pre-school, her instructors, teachers and other care givers. The American way of life and systems were already in the process of being learnt and experienced by M when she came to India in December 2016.

111. The environment in Chicago, USA which M was experiencing during her growth, is her natural environment. From the pleadings of the parties and the materials placed on record, it appears that M was being well taken care of by both the parents and they both were contributing to her proper upbringing. This is evident from the fact that she was being sent to a pre-school; she had a Nanny; and the grandparents – who are educated medical professionals, and were visiting and interacting with M.

112. Applying the principles laid down in ***Surinder Kaur Sandhu*** (supra); ***Aviral Mittal*** (supra); ***Shilpa Aggarwal*** (supra); ***V. Ravi Chandran*** (supra), and; ***Nithya Anand Raghavan*** (supra) to the case at hand, the Courts in US seem to be most appropriate to decide the issue of custody of M considering it has the most intimate contact with the parties and the child. From the facts it appears that both the parties had intention of living in the US. If that were not to be the case, the respondent would have firstly, not applied for permanent residence and obtained a green card. Secondly, she would not have undertaken the education courses required to teach in Chicago public schools and, thirdly, and most importantly, she would not have applied for citizenship by naturalization, which means giving up her Indian citizenship. All these factors point out towards the respondent's intention to stay in the USA permanently. Petitioner, evidently, always wanted a life in the USA. M has been so far brought up in the USA, and has started attending school as well. All these factors reflect that the courts in USA would have the most intimate contact with the parties and the child. Neither are we inclined to, nor are we in a position to undertake a detailed inquiry into the aspects of custody; visitation, and; co-parenting of the minor child in the facts and circumstances of the case, considering all the events unfolded in, and circumstances developed in, and evidences are located in USA.

113. We may say that, at this stage, we do not have to return any finding on the averments or counter averments of the warring parents of M. We are only trying to ascertain if there are any such compelling reasons disclosed by respondent no.2, so as to persuade this Court not to direct the return of M to her place of nationality and the environment where she was born and was

being brought up and, when in our considered view, her going back to the same environment – so as to be able to live with both her parents – though not at the same time, would be in her best interest.

114. The allegations of respondent no.2 against the petitioner and his mother are that the petitioner's mother follows a strict eco-friendly lifestyle and imposes the same on the couple, which even caused chronic backache to the respondent since she was forced to sleep on a hard eco-friendly mattress. She claim that all her day to day affairs were influenced by the lifestyle of her mother in law, such as not using plastic products, non stick cookware, personal care products etc. The respondent had no voice in the matter. The petitioner took minimal interest in household affairs, while his mother interfered in the lives of the parties by tracking their schedules. The petitioner and his mother did not respect the respondents privacy and the plan of the parties to bear a child were disclosed to the petitioner's mother in advance. She even imposed lifestyle changes upon the respondent. The petitioner's mother also did not permit the respondent to maintain a secular household. She was not permitted to celebrate both Sikh and Hindu festivals and the petitioner insisted that they celebrate only Sikh festivals. Respondent no.2 states that she was diagnosed with a grave's disease in October 2014. The petitioner and his mother insisted that the respondent undergoes surgery rather than taking medication, since medication would have made it difficult for her to conceive in future. She claims that the petitioner even threatened her with divorce in case she prioritised her own health at the cost of expanding their family. The respondent makes several

other allegations against the petitioner and his mother complaining of cruelty and indifference on their part towards her.

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

to be uprooted from the environment in which she was naturally growing up, and to be retained in an environment where she would not have the love, care and attention of her father and paternal grandparents, apart from her peers, teachers, school and other care givers who were, till recently, with her.

116. From the allegations made by respondent No.2, it appears that she may have had issues of living with and adjusting with the petitioner and his parents – particularly the mother-in-law. However, there is absolutely nothing placed on record to even remotely suggest that so far as the petitioner is concerned, his conduct qua M and his presence with M, or for that matter, even the grandparents, could be said to be detrimental to or harmful for M. It certainly cannot be said that if M were to be returned to her place of origin where she spent the initial three years of her life – considering that those three years constitute more than 3/4th of her entire existence on this planet till date, would be detrimental to her interest in any manner whatsoever.

117. The parties started their married life in USA, and as clearly appears from their conduct, their mutual commitment was to spend their married life and to raise their children in USA. There is absolutely nothing to suggest that the parties mutually ever agreed to or intended to shift from their place of residence to a place in India, though respondent no.2 may have unilaterally so desired. In such a situation, in our view, respondent No.2 cannot breach her maternal commitment without any valid justification and remain in return to India with M – who is an American citizen and would, obviously, be attached to her father and grandparents; her home; her Nanny;

her teachers & instructors and her peers and friends, all of whom are in USA.

118. Ms. Rajkotia has repeatedly emphasized that respondent No.2 being the mother of M, who is not yet four years old, is a primary care giver qua M. There can be no dispute or debate on this aspect. However, is that by itself sufficient to enable the mother to dictate as to in which part of the world she would choose to live with the child? In our view, the answer to this question cannot be assumed to be an obvious 'Yes'. By not returning to USA, is respondent No.2 not depriving M of the love, affection and care of her other parent, i.e. the father? Certainly, she is. She is depriving M all that M is entitled to and got used to in terms of love, attention, care, facilities, amenities, upbringing and environment, before she left the shores of USA. M did not make her choice to return to India, and not go back to USA. It is not her conscious decision to remain in India, away from her father, paternal grandparents, Nanny, teachers & instructors at her school and her peers. It is respondent No.2 who has taken that decision for her. By taking that decision, respondent No.2 is clearly depriving M of, firstly, the love and affection that she is entitled to receive from her father; secondly, the love and affection that she is entitled to receive from her paternal grandparents; thirdly, the care and learning that she was getting from her Nanny and her instructors; and fourthly, the love, companionship and joy that she was deriving from her peers at her pre-school. Though respondent no.2 may argue that M shall make new friends, and have new caregivers and teachers in India at her new school, she cannot deny that there can be no substitute for her natural father, or paternal grandparents. They are equally

important to the upbringing of M, just as respondent no.2 is. Just because respondent no.2 has found a safe haven in India – where her parents live, she could not have left USA permanently with M, without caring for the best interest of M and tearing the child away from her father and paternal grandparents, with whom M had spent her initial life. Chicago, USA was the petitioners and respondent no.2's *Karam Bhumi.* Respondent no.2 cannot run away from her *Karam Bhumi* and escape to India – which is her comfort zone, at the cost of her child's best interest. Respondent no.2 should return to Chicago, USA to fight her battles on that turf, so that the child M can be with both her parents. Respondent no.2 is not alone, and carries with her the responsibility of bringing up the child jointly with her father. It would have been a different matter if the couple had not had a child.

119. The expression "*best interest of child*", as used by the Supreme Court in the above referred decisions, is wide in its connotation. It cannot be read as being only the love and care of the primary care giver, i.e. the mother in the case of an infant, or a child who is only a few years old.

120. At this stage, we may look at some of the provisions of the Juvenile Justice (Care & Protection) Act, 2015 (JJ Act), which throw some light on the issue as to what is the content of "*best interest of the child*". We are conscious of the fact that the provisions of the JJ Act may not strictly apply to the present fact situation. However, the said provisions certainly would throw light on the concept of "*best interest of the child*", as understood by the Parliament in India.

121. Firstly, the preamble to the JJ Act takes note of the fact that "*the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations, which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of the child;*". Thus, it would be seen that the JJ Act has been enacted by the Parliament to implement its obligations under the Convention on the Rights of the Child, which has been acceded to by India. Consequently, it is the bounden obligation of all State actors - which would include the Courts in India, to implement in letter & spirit the said Convention on the Rights of the Child.

122. Section 2(9) of the JJ Act explains the meaning of "***best interest of child***" 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;*". Thus, to determine the best interest of the child, his/ her basic rights and needs, identity, social well-being and physical, emotional and intellectual development have to be addressed.

123. Section 3 of the JJ Act lays down the fundamental principles which the Central Government, the State Government, the Board created under the said Act, and other agencies should be guided by while implementing the provisions of the said Act. Clauses (iv), (v) & (xiii) of Section 3 are relevant and they read as follows:

"3. *x x x x x x x x x*

(iv) ***Principle of best interest****: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.*

(v) ***Principle of family responsibility****: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.*

x x x x x x x x x x

(xiii) ***Principle of repatriation and restoration****: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest."*

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

mean only one of the two parents, even if that parent happens to be the primary care giver.

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

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

shores of USA in December 2016, she left with a clear decision in her mind that she would not return to USA for any specific and justifiable reason.

127. We may also take note of some of the provisions of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20.11.1989, which was ratified by the Government of India on 11.12.1992. The Preamble to the said Convention sets out the basis on which the same has been framed. The relevant paragraphs from the said Preamble, which are relevant, read as follows:

> "***Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance*** *so that it can fully assume its responsibilities within the community,*
>
> ***Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment****, in an atmosphere of happiness, love and understanding,*
>
> *x x x x x x x x x x*
>
> *Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",*
>
> *x x x x x x x x x x*
>
> *Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,*

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries," (emphasis supplied)

128. Article 3 (1) & (2) of this Convention read as follows:

*"**Article 3***

*1. **In all actions concerning children, whether undertaken by** public or private social welfare institutions, **courts of law**, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**.*

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

129. Article 5 of this Convention reads as follows:

"***Article 5***

***States Parties shall respect the responsibilities, rights and duties of parents** or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons **legally responsible for the child**, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."* (emphasis supplied)

130. Article 6 (1) of this Convention reads:

"***Article 6***

1. States Parties recognize that every child has the inherent right to life."

131. The inherent right to life, in our view, is wide enough to be understood as the right to a family life, i.e. with the parents and immediate family of the child.

132. Articles 7 & 8 of the Convention reads as follows:

> "***Article 7***
>
> *1.* ***The child shall*** *be registered immediately after birth* ***and shall have the right from birth*** *to a name, the right to acquire a nationality and. as far as possible,* ***the right to know and be cared for by his or her parents****.*
>
> *2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.* (emphasis supplied)
>
> ***Article 8***
>
> *1.* ***States Parties undertake to respect the right of the child to*** *preserve his or her identity, including nationality, name and* ***family relations as recognized by law*** *without unlawful interference.*
>
> *2.* ***Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection****, with a view to re-establishing speedily his or her identity."* (emphasis supplied)

133. Article 9 (1) & (3) of the Convention read as follows:

> "***Article 9***
>
> *1.* ***States Parties shall ensure that a child shall not be separated from his or her parents against their will****, except*

when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

x x x x x x x x x x

3. ***States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis****, except if it is contrary to the child's best interests."* (emphasis supplied)

134. Article 10 of the Convention reads as follows:

"***Article 10***

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. ***A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents****. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public*

order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention." (emphasis supplied)

135. Article 18 of the Convention reads as follows:

*"**Article 18***

*1. **States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents** or, as the case may be, legal guardians, **have the primary responsibility for the upbringing and development of the child**. The best interests of the child will be their basic concern.*

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible." (emphasis supplied)

136. Article 20 of the Convention reads as follows:

*"**Article 20***

*1. **A child temporarily or permanently deprived of his or her family environment**, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

> *3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."* (emphasis supplied)

137. We may also refer to a Resolution passed by the Government of India and issued by the Ministry of Human Resource Development vide Resolution No.6-15/98-C.W., dated 09.02.2004 framing the "***National Charter for Children, 2003***". The said Charter has been framed by the Government of India "*to reiterate its commitment to the cause of the children in order to see that no child remains hungry, illiterate or sick"*. The Preamble to the said Charter, inter alia, reads:

> *"Whereas we affirm that the best interest of children must be protected through combined action of the State, civil society, communities and families in their obligations in fulfilling children's basic needs.*
>
> *Whereas we also affirm that while State, Society, Community and Family have obligations towards children, these must be viewed in the context of intrinsic and attendant duties of children, and inculcating in children a sound sense of values directed towards preserving and strengthening the Family, Society and the Nation.*
>
> *x x x x x x x x x x*
>
> *Underlying this Charter is* ***our intent to secure for every child its inherent right to be a child and enjoy a healthy and happy childhood****, to address the root causes that negate the healthy growth and development of children, and to awaken the conscience of the community in the wider societal context to*

protect children from all forms of abuse, while strengthening the family, society and the Nation." (emphasis supplied)

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

139. In the light of the aforesaid, we are more than convinced that respondent No.2 should, in the best interest of the minor child M, return to USA along with the child, so that she can be in her natural environment; receive the love, care and attention of her father as well – apart from her grandparents, resume her school and be with her teachers and peers. Pertinently, respondent No.2 is able-bodied, educated, accustomed to living in Chicago, USA, was gainfully employed and had an income before she came to India in December 2016 and, thus, she should not have any difficulty in finding her feet in USA. She knows the systems prevalent in that country, and adjustment for her in that environment would certainly not be an issue. Accordingly, we direct respondent no.2 to return to USA with the minor child M. However, this direction is conditional on the conditions laid down hereinafter.

140. Respondent No.2 has raised certain issues which need to be addressed, so that when she returns to USA, she and the minor child do not find themselves to be in a hostile or disadvantageous environment. There can be no doubt that the return of respondent No.2 with the minor child should be at the expense of the petitioner; their initial stay in Chicago, USA, should also be entirely funded and taken care of by the petitioner by providing a separate furnished accommodation (with all basic amenities & facilities such as water, electricity, internet connection, etc.) for the two of them in the vicinity of the matrimonial home of the parties, wherein they have lived till December 2016. Thus, it should be the obligation of the petitioner to provide reasonable accommodation sufficient to cater to the needs of respondent No.2 and the minor child. Since respondent No.2 came to India in December 2016 and would, therefore, not have retained her job, the petitioner should also meet all the expenses of respondent No.2 and the minor child, including the expenses towards their food, clothing and shelter, at least for the initial period of six months, or till such time as respondent No.2 finds a suitable job for herself. Even after respondent No.2 were to find a job, it should be the responsibility of the petitioner to meet the expenses of the minor daughter M, including the expenses towards her schooling, other extra-curricular activities, transportation, Attendant/ Nanny and the like, which even earlier were being borne by the petitioner. The petitioner should also arrange a vehicle, so that respondent No.2 is able to move around to attend to her chores and responsibilities.

141. Considering that the petitioner had initiated proceedings in USA and the respondent No.2 has been asked to appear before the Court to defend

those proceedings, the petitioner should also meet the legal expenses that respondent No.2 may incur, till the time she is not able to find a suitable job for herself. However, if respondent no.2 is entitled to legal aid/ assurance from the State, to the extent the legal aid is provided to her, the legal expenses may not be borne by the petitioner.

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

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

respondent No.2 challenging validity of the Pre-Nuptial Agreement. This undertaking shall, however, not come in the way of the petitioner while defending the said suit of the respondent No.2.

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

145. The petitioner is directed to file his affidavit of undertaking in terms of paras 140 to 144 above within ten days with advance copy to the

respondents. The matter be listed on 01.12.2017 for our perusal of the affidavit of undertaking, and for passing of final orders.

(VIPIN SANGHI)
JUDGE

(DEEPA SHARMA)
JUDGE

NOVEMBER 16 , 2017