SUPREME COURT OF INDIA

Nithya Anand Raghavan

Vs.

State of NCT of Delhi

Crl.A.No.972 of 2017

(Dipak Misra,J., A.M.Khanwilkar and Mohan M. Shantanagoudar,JJ.,)

03.07.2017

JUDGMENT

A.M.Khanwilkar,J.,

SLP(Crl.)No.5751 of 2016

1. Leave granted.

2. This appeal arises from the final judgment and order (for short "the Impugned Judgment") passed by the High Court of Delhi dated 8th July, 2016 in a writ petition for issuance of a writ of habeas corpus for production of the minor daughter Nethra, allegedly illegally removed by the mother-appellant on 2nd July, 2015 from the custody of the father-respondent no.2 (writ petitioner) from the United Kingdom (UK), being Writ Petition (Criminal) No. 247 of 2016.

3. The High Court inter alia directed the mother to produce her daughter Nethra and to comply with the order dated 08.01.2016 passed by the High Court of Justice, Family Division, Principal Registry, United Kingdom (UK), within 3 (three) weeks from the date of the impugned order or in the alternative to handover the custody of the daughter to the father within 3 (three) weeks from the date of the order.

4. The appellant has assailed the aforesaid order inter alia on the ground that in the present scenario, the paramount interests and welfare of the daughter, Nethra, who is presently over seven years of age, is to remain in custody of her mother, especially because she suffers from a cardiac disorder and that she would face immense physical and psychological harm if repatriated to the custody of the father in England in light of the alleged physical, verbal and mental abuse meted out by him. The appellant has also contended that the UK Court does not have intimate contact with Nethra merely because she has acquired the citizenship of the UK in December, 2012. The daughter has her deep roots in India as she was born here in Delhi and has retained her Indian citizenship. She has been schooling here for the past 12 (twelve)

months and has spent equal time in both the countries out of her first six years. Further, Nethra has her grandparents, family and relatives here in India, unlike in the UK where she lived in a nuclear family of the three (father, mother and herself) with no extended family and friends. Thus, it is the Indian Courts which have the intimate contact with the minor and including the jurisdiction to decide the matter in issue. Furthermore, the respondent no.2 did not initiate any action for initial six months even after knowing that the appellant was unwilling to return along with her daughter and until he was slapped with a notice regarding complaint filed by the appellant before the Women Cell at Delhi in December 2015, relating to violence inflicted by him. As a counter blast to that notice the respondent no.2 rushed to the UK Court and then filed writ petition in the Delhi High Court to pressurize the appellant to withdraw the allegations regarding violence inflicted by him.

5. To be able to fully appreciate and analyse the issues raised before this Court, it would be expedient to first set out the factual milieu from which the present case arises:

> "a. The appellant has a Masters' degree in communication and had worked in India prior to her marriage. Respondent no.2 had gone to the United Kingdom as a student in 2003 and was working there since 2005. Admittedly, both appellant and respondent no.2 were Indian citizens when they contracted marriage.
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> b. On 30.11.2006, the appellant and respondent no.2 were married in Chennai according to Hindu rites and customs and was registered before SDM Court Chennai the under the Hindu Marriage Act. Their traditional marriage ceremony was performed in Chennai on 22.01.2007. After marriage, the parties shifted to the UK in early 2007 and began living in respondent no.2's home in Watford (UK).
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> c. After marriage, disputes and differences arose between the parties. The appellant contends that these disputes were often violent and that she was physically, mentally and psychologically abused, a claim strenuously denied by respondent no.2.
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> d. The appellant eventually got a job with an advertising agency in London in 2008, earning close to 25,000 pounds (GBP) per annum.
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> e. Having conceived in and around December 2008, the appellant left the UK for Delhi in June 2009 to be with her parents. On 7th August, 2009, the appellant gave birth to a girl child - Nethra, in Delhi. Respondent no.2 soon joined them in India.
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> f. After the birth of their daughter, they went back to the UK in March 2010. Subsequently in August 2010, the appellant and her daughter returned to India after several incidents with respondent no.2.
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> g. After an exchange of legal correspondence between the parties, setting out the numerous differences which had arisen in the marriage, the appellant and her

daughter eventually went back to London in December 2011, more than a year after they had come to India.

h. In January 2012, the daughter was admitted to a nursery school in the UK and attended the same till she was old enough to attend a primary school.

i. In September 2012, an application was filed on behalf of the daughter for grant of UK citizenship, purportedly with the consent of both the appellant and respondent no.2. The appellant, however, denies that she gave consent for this application. j. In December 2012 the daughter was granted citizenship of the UK. Soon thereafter in January 2013, respondent no.2 was also granted citizenship of the UK. Subsequently, respondent no.2 purchased another house in the UK, purportedly with the consent of the appellant, and the parties shifted there. The appellant had acquired a driving license in the UK around the same time. k. In September 2013, the daughter who was around 4 (four) years old at the time, was admitted to a primary school in the UK (and studied there till July 2015). Respondent no.2 was paying the annual fees for the school amounting to approximately 10,000 GBP per annum.

l. Subsequently, in July 2014, the appellant returned to India owing to certain purported health problems, and also brought her daughter along with her. Both the appellant and her daughter went back to the UK around a month later i.e. on 6th September, 2014, purportedly at the insistence of respondent no.2. m. From late 2014 till early 2015, the daughter took ill and was eventually diagnosed with a cardiac disorder for which she had to undergo periodical medical reviews. According to the appellant, she was taking care of her daughter during this period while respondent no.2 did not even bother about the daughter's condition, a claim vehemently contested by respondent no.2. n. On 2nd July, 2015, the appellant came back to India along with her daughter because of the alleged violent behavior of respondent no.2. Respondent no.2 asserts that soon after the appellant left for India with their daughter, she sent an email to the school in which the daughter was enrolled, giving the reason for her departure as 'family medical reasons'. The appellant then allegedly sent further emails to the school, first informing it that her daughter would remain in India for an extended duration and finally, informing it that her daughter would not be coming back to the UK due to her own well-being and safety. o. On 16th December, 2015, the appellant filed a complaint with the Crime Against Women Cell (CAWC), New Delhi which then issued notice to respondent no.2 and his parents, asking them to appear before it. On the date of hearing, neither respondent no.2 nor his parents appeared before the CAWC.

p. As a counter blast, respondent no.2 filed a custody/wardship petition on 8th January, 2016 before the High Court of Justice, Family Division, UK, seeking the return of his daughter to the jurisdiction of the UK Court. On this petition, the High Court of Justice passed an ex-parte order inter alia directing the appellant to return the daughter to the UK and to attend the hearing at the Royal Courts of Justice. q.

Then, on 23rd January, 2016, respondent no.2 filed a habeas corpus writ petition before the High Court of Delhi, seeking to have his daughter produced before the Court. The High Court passed the Impugned Judgment dated 8th July, 2016, inter alia directing the appellant to produce her daughter and comply with the orders passed by the UK Court or handover her daughter to respondent no.2 within 3 (three) weeks from the date of the order.

6. The High Court, while ordering that the mother-appellant return to the UK with the child and produce her before the UK Court, set out and examined the factual aspects of the case. The High Court held that the child, having lived in the UK since the time of her birth in 2009, had developed roots there. Further, the child was a permanent citizen of the UK and held a British passport. The High Court also examined the wardship order passed ex-parte by the High Court of Justice, Family Division, London on 8th January, 2016. In the said order, the UK Court inter alia recorded that the child had been wrongfully removed from England in July 2015 and wrongly retained in India since then. The UK Court also recorded the father's willingness to bear the expenses for the transport and stay of the mother and the child to the UK. The UK Court held that it had the jurisdiction to hear the matter and directed that the child would become a ward of the court during her minority or until further orders and that the mother would have to return the child to England by 22nd January, 2016. The High Court opined that in light of the order by the UK Court, the mother would not face any financial hardship and further, the order of the UK Court had attained finality due to lapse of time. The High Court then examined the law as propounded in several judgments, including *Arathi Bandi Vs. Bandi Jagadrakshaka Rao & Ors*[1]*. , Surya Vadanan Vs. State of Tamil Nadu & Ors*[2]*. , Surinder Kaur Sandhu Vs. Harbax Singh Sandhu & Anr*[3]*. , Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw & Anr*[4]*. , Marggarate Maria Pulparampil Nee Feldman V. Chacko Pulparampil & Anr*[5]*. , Kuldeep Sidhu V. Chanan Singh & Ors*[6]*. , In Re: H.(Infants*[7]*) and Ruchi Majoo V Sanjeev Majoo*[8]. The High Court held that since the mother had not sought custody of the child by approaching any competent Indian Court prior to the passing of the order by the UK Court, therefore, the first, effective order/direction had been passed by the UK/foreign court and, applying the principle expounded in Surya Vadanan (supra) of comity of courts, the balance of favour would lie with the UK Court. Since the child had spent most of her life in the UK and studied there, it would be in the best interests of the child that she be returned to the UK. After analyzing the principles deduced from the aforesaid judgments, the High Court was of the opinion that:

"a. The foreign court having the most intimate contact with the child would be better placed to appreciate the social and cultural milieu in which the child had been brought up;

b. The principle of comity of courts should not be discarded except for special and compelling reasons. Especially when interim or interlocutory orders have been passed by foreign courts;

c. If a foreign court has jurisdiction to hear the matter, then an interim/interlocutory order passed by such court should be given due weightage and respect. If such jurisdiction is not in doubt, then the "first strike" principle i.e. a substantive order passed by a foreign court prior to a substantive order passed by another foreign or domestic court, becomes applicable. Due respect and weight ought to be given to the earlier substantive order as compared to the latter order;

d. A foreign court passing an interim/interlocutory order can make prima facie adjudications, similar to a domestic court;

e. Merely because a parent has violated an order of a foreign court does not mean that the parent should be penalized for the same. While the conduct of the parent may be taken into account while passing the final order, the said conduct should not have a penalising result;

f. A court may either hold an elaborate inquiry to decide whether a child should be repatriated to a foreign country or a summary inquiry without going into the merits of the dispute, relating to the best interests and welfare of the child. If, however, there exists a pre-existing order of a foreign Court of competent jurisdiction, then a domestic court must have special reasons to hold an elaborate inquiry. It must consider various factors such as the nature of the interim order passed by the foreign court, the likelihood of harm caused to the child, if any, when repatriated, the alacrity with which the parent moves the foreign court etc."

7. The High Court essentially applied the exposition in the case of Surya Vadanan (supra) and held that there was no special or compelling reason to ignore the interim order passed by the UK Court and that the child was accustomed to and well adapted to the culture in the UK. Further, the High Court opined that there was no force in the mother's allegation that she was a victim of domestic abuse since she had not made a single complaint to the authorities while she was staying with the respondent no.2 in the UK. In addition, there was no documentary evidence to support such a claim either. Finally, the High Court rejected the contention, that the child ought to be medically treated only in Delhi for her heart condition and not in the UK, as baseless.

8. Advocate Malavika Rajkotia, learned counsel for the Appellant, first submits that the High Court has given undue emphasis to the principle of comity of courts in complete disregard to the paramount interests and welfare of the child. She submits that the welfare of the child is of paramount consideration and that such consideration ought to over-ride the need to enforce the principle of comity of courts. There is an obvious need to protect the interests of the child and the mother, especially in light of the fact that that the respondent no.2 had been physically and verbally abusive to the appellant in the past and even put the child at risk with his behavior. She submits that while India is a signatory to the United Nations Child Rights Convention (UNCRC), it is not a signatory to the Hague Convention. The UNCRC mandates that in all actions concerning children, the best interests of the child shall be of primary

concern and the child shall be provided the opportunity to be heard. The Hague Convention is intended to prevent parents from abducting children across borders and is governed by the principle of comity of courts. Upholding the principle of comity of courts while disregarding the welfare of the child would thus go against the public policy in India and result in great harm being caused to the child and the appellant.

9. Ms. Rajkotia submits that parens patriae jurisdiction of the court within whose jurisdiction the child is located as also the welfare of the child in question must be given greater weightage as opposed to a mechanical interpretation of the principle of comity of courts. By giving effect to the comity of courts, the High Court has eroded its own parens patriae jurisdiction and also ignored the welfare of the child who is located within its jurisdiction. In fact, the evolving standard, atleast as far as the USA and the UK Courts are concerned, is to give greater importance to the welfare of the child as opposed to giving primacy to the principle of comity of courts. She has relied upon a judgment of the United States Supreme Court in *Lozano v Montoya Alvarez*[9] wherein the Court inter alia stated that while the Hague Convention was intended to discourage child abduction, it was not supposed to do so at the cost of the child's interest in choosing to remain in the jurisdiction of the country or in settling the matter.

10. Ms. Rajkotia then submits that the High Court has failed to follow the established judicial trail of opinion as set out in several judgments of this Court while deciding custody matters. She submits that this Court has expounded that the welfare of the child is of paramount consideration and that the Court must rest its decision based on the best interests of the child. Even in instances where a mother has submitted to the jurisdiction of a foreign court but has subsequently fled that country with her child after an order of the foreign court, this Court has protected the welfare of the child. In the present case, the appellant left the UK prior to any proceedings being initiated against her, let alone any judicial order being passed. Ms. Rajkotia has relied upon the following judgments to buttress her argument: Smt. Surinder Kaur Sandhu (supra), Mrs. Elizabeth Dinshaw (supra), *Sarita Sharma Vs Sushil Sharma*[10] and *Dr. V. Ravi Chandran Vs Union of India & Ors*[11].

11. Ms. Rajkotia further submits that in two cases, viz Shilpa Aggarwal Vs. Aviral Mittal and Anr. And most recently in Surya Vadanan (supra), this Court has deviated from the established principle of putting the welfare of the child above all other considerations. In both these cases, the Court ordered that the child and mother return to the jurisdiction of the foreign court, despite the fact that the two had left the foreign jurisdiction before the court had passed any order. She has taken exception to the reasoning given in these two judgments on the ground that the decisions overlook the parens patriae jurisdiction of the Court as also misinterpreted the concept of 'intimate contact' with the child. The 'intimate contact' principle only applies in an instance where the child has been taken to a country with an alien language, social customs etc. It cannot be applicable where the child returns to a country where he/she has been born and brought up in, like in the present case. Further, the judgment in Surya Vadanan (supra) has the chilling effect of giving dominance to the principle of comity of courts over the welfare of the child. The judgment, in effect, rejects the perspective

of the child and may encourage multiplicity of proceedings. This, ultimately, leads to a mechanical application of the principle of comity of courts. This is in direct conflict with the binding decision in Dr. V Ravi Chandran (supra) where a three-judge bench categorically held that under no circumstances can the principle of welfare of the child be eroded and that a child can seek refuge under the parens patriae jurisdiction of the Court.

12. Ms. Rajkotia then submits that the child has been born and brought up in India. While the child now has British citizenship, she still retains her Indian citizenship. The child was forced to return with the mother under compelling situation emanating from domestic violence inflicted by the father. The appellant even informed respondent no.2 that she had no desire to return to the UK, to which there was no reply.

13. Ms. Rajkotia submits that the legal action taken by respondent no.2 was nothing but a counter-blast to the appellant's allegations of abuse and violence leveled against him. This can be discerned from the fact that respondent no.2 initiated action before the UK court 6 (six) months after the appellant had left the UK and only after he learned that she had filed a complaint with the CAWC in December 2015. The court also needs to consider that the order of the UK court was passed ex-parte without giving the appellant an opportunity to present her case. The intention of respondent no.2 can be ascertained by the fact that he filed a habeas corpus petition before the High Court, which is meant for urgent and immediate relief whereas the appellant and the child were staying in India for more than 6 months. Clearly, there was no immediate or urgent need necessitating the production of the child and the petition was filed as an after-thought and litigation stratagem. The High Court should have been loath to countenance such stratagem adopted by respondent no.2, which is bordering on abuse of the process of Court.

14. Ms. Rajkotia finally submits that the High Court has failed to consider certain factual circumstances and has committed manifest error in that regard. In that, respondent no.2 was offering the appellant a paltry monthly maintenance of just 1000 GBP whereas he himself was earning 10,000 GBP per month. Even after making such offer, respondent no.2 has not paid for the welfare or education of the child in India. Further, the High Court has not considered the serious health issues being faced by the child while ordering her to go back to the UK. Ms. Rajkotia submits that in India, the child has access to private, specialist healthcare whereas in the UK, the child would be constrained by the National Health Service (NHS) which is the publicly funded national healthcare system for England. Further, the High Court has relied on incorrect facts while passing the Impugned Judgment.

15. In addition to the aforementioned cases, Ms. Rajkotia has also submitted a compendium of judgments titled 'List of judgments filed on behalf of appellant'. The judgments referred to therein have been considered by us.

16. Per contra, Advocate S.S. Jauhar appearing for respondent no.2 first submits that the child was a British citizen and had been brought up in the UK. The child had been residing in the UK and the appellant was also a permanent resident of the UK. The respondent no.2 has

also acquired citizenship of the UK. Both the appellant and respondent no.2 had every intention to permanently settle in the UK along with their child. The appellant had even signed the application/citizenship form of the child for British citizenship. Thus, the appellant's submission before the High Court that she had not given permission to apply for their child's British citizenship is patently false. In the emails exchanged with the child's school, the appellant mentioned that they would be returning to the UK. It is only much later that respondent no.2 was made aware by the school that the appellant would not be returning to the UK. The High Court even recorded that the parties had every intention of making the UK their home and that the child had developed roots in the UK. Hence, the UK courts had the closest concern and intimate contact with the child as regards welfare and custody and would have jurisdiction in the matter.

17. Further, Mr. Jauhar submits that the High Court has duly considered the factum of welfare and interests of the child while passing the impugned judgment. While citing the judgments in Surinder Kaur Sandhu (supra) and Surya Vadanan (supra), the High Court noted that the UK Court would have the most intimate contact with and closest concern for the child. The child had clearly adapted to the social and cultural milieu of the UK and it was in the best interests of the child that she return to the UK. There was neither any material to suggest that repatriation of the child would result in psychological, physical or cultural harm nor anything to indicate that the UK Court was incompetent to take a decision in the interests and welfare of the child. There was no compelling reason for the High Court to ignore the principle of comity of courts. Further, as regards the medical condition of the child, the High Court was right in accepting the argument that the UK would have better medical facilities to treat the child and that she was fully covered by the medical services there. Further, respondent no.2 even had the resources to approach private hospitals.

18. Mr. Jauhar then submits that the respondent no.2's bonafides can be gleaned from the fact that the High Court directed respondent no.2 to honour his commitment of paying for accommodation near the child's school as well as boarding and travelling expenses of the appellant and the child. Respondent no.2 made statements before the UK court that he would vacate his family home for use of the appellant's family, pay for the child's school expenses and pay 1000 GBP per month for incidental expenses. In fact, respondent no.2 even made a statement before the High Court that he would not pursue any criminal proceedings against the appellant for kidnapping the child and only wished the family to be reunited in the UK so that the child could continue with her education. In addition to the aforesaid payments, respondent no.2 was even ready to provide a monthly payment of 1000 GBP to the appellant and is now willing to fund the cost of litigation borne by the appellant for custody of the child in the UK.

19. Mr. Jauhar then submits that only the UK Court would have jurisdiction with regard to the alleged acts of domestic violence leveled against respondent no.2 as the acts complained against allegedly occurred while the parties were staying in the UK.

20. Mr. Jauhar submits that there has been no delay on the part of respondent no.2 in filing the writ petition before the High Court of Delhi. Respondent no.2 became aware that the appellant was not inclined to bring the child back to the UK only on 23rd November, 2015 and thereafter came to India in December 2015. He then moved the UK court on 8th January 2016 and filed the writ petition before the High Court of Delhi on 23rd January 2016. Thus, it can be seen that respondent no.2 did not delay filing of proceedings.

21. Mr. Jauhar finally submits that legal notices were exchanged between the parties from 24th December 2010 till 7th June 2011, after which the appellant and the daughter came back to the UK on 11th December 2011 and the parties stayed together till 2nd July 2015. Thus, on applying the principle of condonation all the allegations made in the aforesaid legal notices stood condoned and the fact that these notices were exchanged in 2010-2011 are of no relevance and do not take away the jurisdiction of the foreign court.

22. In support of his arguments, Mr. Jauhar has cited several cases which have been placed before this Court in the form of a "List of judgments on Habeas Corpus"
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The same have been taken on record and duly considered.

23. We have cogitated over the submissions made by the counsel for both the sides and also the judicial precedents pressed into service by them. The principal argument of the respondent-husband revolves around the necessity to comply with the direction issued by the foreign Court against the appellant-wife to produce their daughter before the UK Court where the issue regarding wardship is pending for consideration and which Court alone can adjudicate that issue. The argument proceeds that the principle of comity of courts must be respected, as rightly applied by the High Court in the present case.

24. We must remind ourselves of the settled legal position that the concept of forum convenience has no place in wardship jurisdiction. Further, the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters has been succinctly delineated in several decisions of this Court. We may usefully refer to the decision in the case of *Dhanwanti Joshi v Madhav Unde*[13]. In Paragraphs 28 to 30, 32 and 33 of the reported decision, the Court observed thus:-

> "28. The leading case in this behalf is the one rendered by the Privy Council in 1951, in McKee v. McKee. In that case, the parties, who were American citizens, were married in USA in 1933 and lived there till December 1946. But they had separated in December 1940. On 17-12-1941, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada. In habeas corpus proceedings by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy

Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child The order of the foreign court in US would yield to the welfare of the child "Comitu of courts demanded not its enforcement, but its grave consideration". This case arising from Canada which lays down the law for Canada and U.K. has been consistently followed in latter cases. This view was reiterated by the House of Lords in J v. C. This is the law also in USA (see 24 American Jurisprudence, para 1001) and Australia. (See Khamis v. Khamis)

29. However, there is an apparent contradiction between the above view and the one expressed in H. (infants), and in E. (an infant), 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) (wardship : jurisdiction), and in R. (minors) (wardship : jurisdiction), It was held by the Court of Appeal in L.. that the view in McKee v. McKee is still the correct view and that the limited question which arose in the latter decisions was whether the court in the country to which the child was removed could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. The crucial question as to whether the Court (in the country to which the child is removed.) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked., for example. if the child had been removed from its native land and removed to another country where, 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 Jud.ge may well be persuad.ed 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 consid.er 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 consid.er 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) (ward.ship : jurisdiction), it has been firmly held that the concept of forum convenience has no place in ward.ship jurisdiction.

30. We may here state that this Court in Elizabeth Dinshaw v. Arvind M. Dinshaw. while dealing with a child removed by the father from USA contrary to the custody ord.ers of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts, -- which were independently consid.ered -- it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (infants), which case, as pointed out by us above has been explained in L. as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in McKee v. McKee and J v. C and the distinction between summary and elaborate inquiries as stated in L. (infants), are tod.ay well settled in UK, Canad.a, Australia and the USA. The same principles apply in our country. Therefore nothing preclud.es the Indian courts from consid.ering the question on merits, having regard to the delay from 1984 -- even assuming that the earlier orders passed in India do not operate as constructive res judicata.

31. xxxx xxxx xxxx

32. In this connection, it is necessary to refer to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As of tod.ay, about 45 countries are parties to this Convention. India is not yet a signatory. Und.er 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)

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."

25. Notably, the aforementioned exposition has been quoted with approval by a three-judge bench of this Court in Dr. V. Ravi Chandran (supra) as can be discerned from paragraph 27 of the reported decision. In that, after extracting paragraphs 28 to 30 of the decision in Dhanwanti Joshi's case, the three-judge bench observed thus:

"27 However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. It was also held that whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decid.ed not on consid.erations of the legal rights of the parties but on the sole and pred.ominant criterion of what would best serve the interest of the minor."

(emphasis supplied)

Again in paragraphs 29 and 30, the three-judge bench observed thus:-

"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 consid.er 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 ord.er of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign jud.gment must depend on the circumstances of each case.

30. However, in a case where the court decid.es 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 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 and the said view has been approved by this Court in Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants), in re has been approved by this Court in Elizabeth Dinshaw. "

(emphasis supplied)

26. 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.

27. The respondent husband has placed emphasis on four decisions of this Court in the case of V. Ravi Ch.an.dran, Shilpa Aggarwal, Arathi Bandi and Surya Vadanan. We shall deal with those decisions a little latter.

28. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in *Kanu Sanyal v. District Magistrate, Darjeeling & Ors*[14]. , has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the Court. On production of the person before the Court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the Court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful. 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*[15]. , 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 & Ors*[16]. relied upon by the appellant). It is not necessary to multiply the authorities on this proposition.

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

30. 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.

31. The next question to be considered by the High Court would be whether an order passed by the foreign court, directing the mother to produce the child before it, would render the custody of the minor unlawful? Indubitably, merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se. As in the present case, the order passed by the High Court of Justice, Family Division London on 8th January, 2016 for obtaining a Wardship order reads thus:

"Order made by His Honour Jud.ge Richard.s sitting as a Deputy High Court Jud.ge sitting at the Royal Courts of Justice, Strand, Lond.on WC2A 2LL in chambers on 8 January, 2016 IN THE MATTER OF THE CHILDREN ACT 1989 AND IN THE MATTER OF THE SENIOR COURTS ACT 1981 The Child is Nethra Anand (a girl, born 7/8/09) AFTER HEARING Counsel paul Hepher, on behalf of the applicant father AFTER consideration of the documents lodged by the applicant. IMPORTANT WARNING TO NITHYA ANAND RAGHAVAN If you NITHYA ANAND RAGHAVAN disobey this order you may be held to be in contempt of court and may be imprisoned., fined or have your assets seized.. If any other person who knows of this ord.er and does anything which helps or permits you NITHYA ANAND RAGHAVAN to breach the terms of this ord.er they may be held to be in contempt of court and may be imprisoned, fined or have their assets seized.
You have the following legal rights:

a) to seek legal advice. This right does not entitle you to disobey any part to this order until you have sought legal advice;

b) to require the applicant's solicitors, namely Dawson Cornwell, 15 Red Lion Square, Lond,on WC1R 4QT, tel 020 7242 2556 to provid.e you with a copy of any application form(s), statement(s), note of the hearing;

c) to apply, whether by counsel or solicitor or in person, to Jud.ge of the Family Court assigned to hearing urgent applications at the Royal Courts of Justice, Strand, London, if practicable after giving notice to the applicant's solicitors and to the court, for an order discharging or varying any part of this ord.er. This right does not entitle you to disobey any part of this order until your application has been heard;

d) if you do not speak or und,erstand English ad,equately, to have an interpreter present in court at public expense in order to assist you at the hearing of any application relating to this order

The parties

1. The Applicant is ANAND RAGHAVAN represented by Dawson Cornwell Solicitors The Respond,ent is NITHYA ANAND RAGHAVAN Recitals

2. This order was made at a hearing without notice to the respondent. The reason why the order was made without notice to the respondent is because she left England and Wales on or about 2 July 2015 and notice may lead her to take steps to defeat the purpose of the application and fail to return the child.

3. The Judge read the following documents:

a. Position statement

b. C67 application and C1A form

c. Statement of Anand Raghavan with exhibits dated 8.01.2016.

4. The court was satisfied on a provisional basis of the evidence filed that

a. NETHRA ANAND (a girl born on 7/8/09) was on 2 July 2015 habitually resid.ent in the jurisdiction of England and Wales.

b. NETHRA ANAND (a girl born on 7/8/09) was wrongfully removed from England on 2 July, 2015 and been wrongfully retained in India since.

c. The courts of England and Wales have jurisdiction in matters of parental responsibility over the child pursuant to Articles 8 and 10 of BIIR.

5. The Father has agreed to pay for the cost of the flights for the Mother and child in returning from India to England He will either purchase the tickets for the Mother and child himself, or put her in funds, or invite her to purchase the tickets on his credit card, as she may wish, in order for her to purcha.se the tickets herself Undertakings to the court by the solicitor for the applicant

6. The solicitors for the applicant undertake;
a. To issue these proceedings forthwith and in any event by no later than 4 pm 11 January 2016;

b. To pay the ex parte application fee forthwith and in any event by no later than 4 pm 11 January 2016;

AND NOW THEREFORE THIS HONOURABLE COURT RESPECTFULLY REQUESTS:

7. Any person not within the jurisdiction of this Court who is in a position to do so to co-operate in assisting and securing the immediate return to England and Wales of the Ward NETHRA ANAND (a girl born on 7/8/09)

IT IS ORDERED THAT:

8. NETHRA ANAND (a girl born on 7/8/09) is and shall remain a Ward of this Court during the minority or until further order.

9. The respondent mother shall return or cause the return of NETHRA ANAND (a girl born on 7/8/09) forthwith to England and Wales, and in any event no later than 23.59 on 22 January 2016.

10. Every person within the jurisdiction of this Honourable Court who is in a position to do so shall co-operate in assisting and securing the immediate return to England and Wales of NETHRA ANAND (a girl born on 7/8/09) a ward of this Court.

11. The applicant's solicitor shall fax copies of this order to the Office of the Head of International, Family Justice at the Royal Courts of Justice, the Strand, London WC2A 2LL (DX4550 Strand RCJ: fax 02079476408); and (if appropriate) to the Head of the Consular Division, Foreign and Commonwealth Office Spring Gardens Lond.on SW1A 2PA, Tel: 02070080212, Fax 02070080152.

12. The matter shall be listed for directions at 10:30 am on 29 January 2016 at the Royal Courts of Justice, the Strand., Lond.on Wc2A 2LL, with a time estimate of 30 minutes, when the court shall consider what further orders shall be made. The Court may consider making declarations in the terms of pamgraph 4 above.

13. The respond.ent mother shall attend at the hearing listed pursuant to the preceding paragraph, together with solicitors or counsel if so instructed. She shall file and serve by 4 pm 27 January, 2016 a short statement responding to the application.

14. This ord.er may be served on the respond.ent, outsid.e of the jurisdiction of England and Wales as may be required, by way of fax, email or personally in order for the court to deem that it constitutes good service.

15. Costs reserved..

Dated this 8 January 2016."

31. On a bare perusal of this order, it is noticed that it is an ex parte order passed against the mother after recording prima facie satisfaction that the minor Nethra Anand (a girl born on 07/08/2009) was as on 2nd July, 2015, habitually resident in the jurisdiction of England and Wales and was wrongfully removed from England on 2nd July, 2015 and has been wrongfully retained in India since then. Further, the Courts of England and Wales have jurisdiction in the matters of parental responsibility over the child pursuant to Articles 8 and 10 of BIIR. For which reason, it has been ordered that the minor shall remain a Ward of that Court during her minority or until further order; and the mother (appellant herein) shall return or cause the return of the minor forthwith to England and Wales in any event not later than 22 January, 2016. Indeed, this order has not been challenged by the appellant so far nor has the appellant applied for modification thereof before the concerned court (foreign court). Even on a fair reading of this order, it is not possible to hold that the custody of the minor with her mother has been declared to be unlawful. At best, the appellant may have violated the direction to return the minor to England, who has been ordered to be a Ward of the court during her minority and further order. No finding has been rendered that till the minor returns to England, the custody of the minor with the mother has become or will be treated as unlawful including for the purposes of considering a petition for issuance of writ of habeas

corpus. We may not be understood to have said that such a finding is permissible in law. We hold that the custody of the minor with the appellant, being her biological mother, will have to be presumed to be lawful.

32. 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.

33. For considering the factum of interests of the child, the court must take into account all the attending circumstances and totality of the situation. That will have to be decided on case to case basis. In the present case, we find that the father as well as mother of the child are of Indian origin. They were married in Chennai in India according to Hindu rites and customs. The father, an Indian citizen, had gone to the U.K. as a student in 2003 and was working there since 2005. After the marriage, the couple shifted to the U.K. in early 2007 and stayed in Watford. The mother did get an employment in London in 2008, but had to come to her parents' house in Delhi in June 2009, where she gave birth to Nethra. Thus, Nethra is an Indian citizen by birth. She has not given up her Indian citizenship. Indeed, the mother, along with Nethra, returned to the U.K. in March 2010. But from August 2010 till December 2011, because of matrimonial issues between the appellant and respondent no.2, the appellant and her daughter remained in India. It is only after the intervention of and mediation by the family members, the appellant and her daughter Nethra went back to England in December 2011, more than a year after they had come to India. After returning to the U.K., Nethra was admitted to a nursery school in January 2012. An application for grant of U.K. citizenship was made on behalf of Nethra in September 2012 which was subsequently granted in December 2012. The father (respondent no.2) then acquired the citizenship of the U.K. in January, 2013. After grant of citizenship of the U.K., Nethra was admitted to a primary school in the U.K. in September 2013 and studied there only till July, 2015. Since Nethra had acquired British citizenship, the U.K. Court could exercise jurisdiction in respect of her custody issues. Significantly, till Nethra returned to India along with her mother on 2nd July, 2015, no proceeding of any nature came to be filed in the U.K. Court, either in relation to the matrimonial dispute between the appellant and respondent no.2 or for the custody of Nethra. Further, Nethra is staying in India along with the appellant, her grandparents and other family members and relatives unlike in the UK she lived in a nuclear family of the three with

no extended family. She has been schooling here for the past over one year and has spent equal time in both the countries out of the first six years. She would be more comfortable and feel secured to live with her mother here, who can provide her love, understanding, care and guidance for her complete development of character, personality and talents. Being a girl child, the guardianship of the mother is of utmost significance. Ordinarily, the custody of a "girl" child who is around seven years of age, must ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in custody of her mother [see Sarita Sharma (supra) para 6]. No such material or evidence is forthcoming in the present case except the fact that the appellant (mother) has violated the order of the U.K. Court directing her to return the child to the U.K. before the stipulated date. Admittedly, when Nethra was in the U.K., no restraint order was issued by any court or authority in the U.K. in that behalf. She had travelled along with her mother from the U.K. to India on official documents. It is a different matter that respondent no.2 alleges that he was not informed before Nethra was removed from the U.K. and brought to India by his wife (appellant herein). It is common ground that Nethra is suffering from cardiac disorder and needs periodical medical reviews and proper care and attention. That can be given only by her mother. The respondent no.2 (father) is employed and may not be in a position to give complete attention to his daughter. There is force in the stand taken by the appellant that if Nethra returns to the U.K., she may not be able to get meaningful access to provide proper care and attention. Further, she has no intention to visit the U.K. Admittedly, the appellant has acquired the status of only a permanent resident of the U.K., as she was staying with respondent no.2 who is gainfully employed there. The appellant has alleged and has produced material in support of her case that during her stay with respondent no.2 in the U.K., she was subjected to physical violence and mental torture. She has also alleged that if she goes back to the U.K., she may suffer the same ignominy. Further, the proceeding in the UK Court instituted by the husband is a counter blast to the complaint filed by her in Delhi about the violence inflicted on her by the husband and his family members. Indeed, respondent no.2 has vehemently denied and rebutted these allegations. It is not necessary for us to adjudicate these disputed questions of facts. 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. That does not mean that the appellant must disregard the proceedings pending in the U.K. Court against her or for custody of Nethra, as the case may be. So long as that court has jurisdiction to adjudicate those matters, to do complete justice between the parties we may prefer to mould the reliefs to facilitate the appellant to participate in the proceedings before the U.K. Court which she can do through her solicitors to be appointed to espouse her cause before that court. In the concluding part of this judgment, we will indicate the modalities to enable the appellant to take recourse to such an option or any other remedy as may be permissible in law. We say so because the present appeal arises from a writ petition filed by respondent no.2 for issuance of a writ of habeas corpus and not to decide the issue of grant or non-grant of custody of the minor as such. In a substantive proceeding for custody of the minor before the Court of competent jurisdiction including in India if permissible, all aspects will have to be considered on their own merit without being influenced by any observations in this judgment.

34. As aforesaid, the respondent No. 2 has heavily relied on four decisions of this Court. The case of V. Ravi Chandran (supra) also arose from a writ of habeas corpus for production of minor son and not from the substantive proceedings for custody of the minor by the father. The minor was in custody of his mother. It was a case of custody of a "male" child born in the US and an American citizen by birth, who was around 8 years of age when he was removed by the mother from the United States of America (USA) in spite of a consent order governing the issue of custody and guardianship of the minor passed by the competent Court namely, the New York State Supreme Court. The minor was given in joint custody to the parents and a restraint order was operating against the mother when the child was removed from the USA surreptitiously and brought to India. Before being removed from the USA, the minor had spent his initial years there. These factors weighed against the mother, as can be discerned from the discussion in paragraphs 32 to 38 of the reported judgment. This Court, therefore, chose to exercise summary jurisdiction in the interests of the child. The Court directed the mother to return the child "Aditiya" on her own to the USA within stipulated time. In the present case, the minor is a "girl" child who was born in India and is a citizen of India by birth. She has not given up her citizenship of India. It is a different matter that she later acquired citizenship of the U.K. We have already indicated the reasons in the preceding paragraph, which would distinguish the facts from the case relied upon by the respondent no. 2 and under consideration.

35. As regards the case of Shilpa Aggarwal (supra), the minor (girl child) was born in England having British citizenship, who was only three and a half years of age. The parents had also acquired the status of permanent residents of the UK. The UK Court had not passed any order to separate the child from the mother until the final decision was taken with regard to the custody of the child, as in this case. This Court recorded its satisfaction on the basis of the facts and circumstances of the case before it that in the interests of the minor child, it would be proper to return the child to the UK and then applied the doctrine of comity of courts. Further, the Court was of the opinion that the issue regarding custody of the child should be decided by the foreign Court from whose jurisdiction the child was removed and brought to India. This decision has been rendered after a summary inquiry on the facts of that case. It will be of no avail to the respondent no. 2. It does not whittle down the principle expounded in Dhanwanti Joshi (supra), the duty of the Court to consider the overarching welfare of the child. Be it noted, the predominant criterion of the best interests and welfare of the minor outweighs or offsets the principle of comity of courts. 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.

36. In the case of Arathi Bandi (supra) also, the male child was born in the USA and had acquired citizenship by birth there. The child was removed from the USA by the mother in spite of a restraint order and a red corner notice operating against her issued by the Court of competent jurisdiction in the USA. The Court, therefore, held that the matter on hand was squarely covered by facts as in V. Ravi Chandran (supra). More importantly, as noted in

paragraph 42 of the reported decision the mother (the wife of the writ petitioner) had expressed her intention to return to the USA and live with the husband. However, the husband was not prepared to cohabit with her. In the present case, the situation is distinguishable as alluded to earlier.

37. In the case of Surya Vadanan (supra), the minor girls were again British citizens by birth. The elder daughter was 10 years of age and the younger daughter was around 6 years of age. They lived in the UK throughout their lives. In a petition for issuance of a writ of habeas corpus, the Court directed return of the girls to the UK also because of the order passed by the Court of competent jurisdiction in the UK to produce the girls before that Court. The husband had succeeded in getting that order even before any formal order could be passed on the petition filed by the wife in Coimbatore Court seeking a divorce from the appellant-husband. That order was followed by another order of the UK Court giving peremptory direction to the wife to produce the two daughters before the UK Court. A penal notice was also issued to the wife. The husband then invoked the jurisdiction of the Madras High Court for issuance of a writ of habeas corpus on the ground that the wife had illegal custody of the two daughters of the couple and that they may be ordered to be produced in the Court and to pass appropriate direction thereafter. The said relief was granted by this Court. After the discussion of law in paragraphs 46 to 56 of the reported decision, on the basis of precedents adverted to in the earlier part of the judgment, in paragraph 56 the Court opined as under:-

> "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 consid.eration:
>
> (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."

38. 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.

39. 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.]"

Similarly, the principle underlying Section 10 of the Code of Civil Procedure, 1908 can be invoked to govern that situation. The explanation clarifies the position even better. The same reads thus:-

> "10. Stay of suit. - No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other

Court in [India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [India] established or continued by [the Central Government] [***] and having like jurisdiction, or before [the Supreme Court].

Explanation.- The pendency of a suit in a foreign Court does not preclud.e the Courts in [India] from trying a suit found,ed on the same cause of action."

(emphasis supplied)

40. 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.

41. The facts in all the four cases primarily relied upon by the respondent no.2, in our opinion, necessitated the Court to issue direction to return the child to the native state. That does not mean that in deserving cases the Courts in India are denuded from declining the relief to return the child to the native state merely because of a pre-existing order of the foreign Court of competent jurisdiction. That, however, will have to be considered on case to case basis - be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment.

42. In the present case, we are of the considered opinion that taking the totality of the facts and circumstances of the case into account, it would be in the best interests of the minor (Nethra) to remain in custody of her mother (appellant) else she would be exposed to harm if separated from the mother. We have, therefore, no hesitation in overturning the conclusion reached by the High Court. Further, we find that the High Court was unjustly impressed by the principle of comity of courts and the obligation of the Indian Courts to comply with a pre-existing order of the foreign Court for return of the child and including the "first strike" principle referred to in Surya Vadanan's case (supra).

43. 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.

44. Needless to observe that after the minor child (Nethra) attains the age of majority, she would be free to exercise her choice to go to the UK and stay with her father. But until she attains majority, she should remain in the custody of her mother unless the Court of competent jurisdiction trying the issue of custody of the child orders to the contrary. However, the father must be given visitation rights, whenever he visits India. He can do so by giving notice of at least two weeks in advance intimating in writing to the appellant and if such request is received, the appellant must positively respond in writing to grant visitation rights to the respondent no. 2 - Mr. Anand Raghavan (father) for two hours per day twice a week at the mentioned venue in Delhi or as may be agreed by the appellant, where the appellant or her representatives are necessarily present at or near the venue. The respondent no. 2 shall not be entitled to, nor make any attempt to take the child (Nethra) out from the said venue. The appellant shall take all such steps to comply with the visitation rights of respondent no. 2, in its letter and spirit. Besides, the appellant will permit the respondent no. 2 - Mr. Anand Raghavan to interact with Nethra on telephone/mobile or video conferencing, on school holidays between 5 PM to 7:30 PM IST.

45. As mentioned earlier, the appellant cannot disregard the proceedings instituted before the UK Court. She must participate in those proceedings by engaging solicitors of her choice to espouse her cause before the High Court of Justice. For that, the respondent no.2 - Anand Raghavan will bear the costs of litigation and expenses to be incurred by the appellant. If the appellant is required to appear in the said proceeding in person and for which she is required to visit the UK, respondent no.2 - Anand Raghavan will bear the air fares or purchase the tickets for the travel of appellant and Nethra to the UK and including for their return journey to India as may be required. In addition, respondent no.2 - Anand Raghavan will make all arrangements for the comfortable stay of the appellant and her companions at an independent place of her choice at reasonable costs. In the event, the appellant is required to appear in the proceedings before the High Court of Justice in the UK, the respondent no.2 shall not initiate any coercive process against her which may result in penal consequences for the appellant and if any such proceeding is already pending, he must take steps to first withdraw the same and/or undertake before the concerned Court not to pursue it any further. That will be

condition precedent to pave way for the appellant to appear before the concerned Court in the UK.

46. Accordingly, this appeal is allowed in the above terms. The impugned judgment and order passed by the High Court of Delhi dated 8th July 2016 in Writ Petition (Criminal) No. 247 of 2016 is set aside. Resultantly, the writ petition for issuance of writ of habeas corpus filed by the respondent no. 2 stands dismissed subject however, to the arrangement indicated above in paragraphs 44 and 45 respectively.

47. No order as to costs.

Judgment Referred.

[1]*(2013) 15 SCC 0790*
[2]*(2015) 5 SCC 0450*
[3]*(1984) 3 SCC 0698*
[4]*(1987) 1 SCC 0042*
[5]*(1970) AIR (Ker) 001*
[6]*(1989) AIR (P&H) 0103*
[7] *(1966) 1 AII ER 0886*
[8]*(2011) AIR SC 1952*
[9]*572 US (2014)*
[10]*(2000) 3 SCC 0014*
[11]*(2010) 1 SCC 0174*
[12]*(2010) 1 SCC 0591*
[13]*(1998) 1 SCC 0112*
[14]*(2001) 5 SCC 0247*
[15]*113 (2004) DLT 0823*