SUPREME COURT OF INDIA

Prateek Gupta

Vs.

Shilpi Gupta

Crl.A.No.968 of 2017

(Dipak Misra and Amitava Roy,JJ.,)

06.12.2017

JUDGMENT

Amitava Roy, J.,

1. By the impugned judgment and order dated 29.04.2016 rendered by the High Court of Delhi, in a writ petition filed by the respondent No.1 seeking a writ in the nature of habeas corpus, the appellant-father has been directed to hand over the custody of the child, Master Aadvik, aged about 5 years to respondent No.1- mother. The appellant-father is in assailment of this determination and seeks the remedial intervention of this Court. By order dated 03.05.2016, the operation of the impugned verdict was stayed and as the said arrangement was continued thereafter from time to time, the custody of the child as on date has remained with the appellant. The orders passed by this Court though attest its earnest endeavour to secure a reconciliation through interactions with the parents and the child, the efforts having failed, the appeal is being disposed of on merits.

2. We have heard Ms. Binu Tamta, learned counsel for the appellant and Mr. N.S. Dalal, learned counsel for the respondent No. 1 (hereafter to be referred to as "respondent").

3. A skeletal outline of the factual backdrop is essential. The appellant and the respondent who married on 20.01.2010 in accordance with the Hindu rites at New Delhi had shifted to the United States of America (for short, hereafter referred to as 'U.S.'), as the appellant was already residing and gainfully employed there prior to the nuptial alliance. In due course, the couple was blessed with two sons, the elder being Aadvik born on 28.09.2012 and the younger, Samath born on 10.09.2014. As adverted to hereinabove, the present lis is with regard to the custody of Master Aadvik, stemming from an application under Article 226 of the Constitution of India filed by the respondent alleging illegal and unlawful keeping of him by the appellant and that too in violation of the orders passed by the Juvenile and Domestic Relations Court of Fairfax County, passed on 28.05.2015 and 20.10.2015 directing him to return the child to the Commonwealth of Virginia and to the custody and control of the respondent.

4. The pleaded facts reveal that the child resided with the parents from his birth till 07.11.2014 and thereafter from 07.11.2014 till 06.03.2015 with the respondent-mother in the United States. This is so, as in view of irreconcilable marital issues, as alleged by the respondent, particularly due to the volatile temperament and regular angry outbursts of the appellant often in front of the child, the parties separated on or about 15.11.2014. Prior thereto, the appellant had on 08.11.2014 left for India leaving behind the respondent and her children in U.S. He returned on 18.01.2015 to the U.S., but the parties continued to live separately, the respondent with her children. The appellant however, made short time visits in between and on one such occasion i.e. on 24.01.2015, he took along with him Aadvik, representing that he would take him for a short while to the Dulles Mall. According to the respondent, she did not suspect any foul play and permitted the child to accompany his father, but to her dismay though assured, the appellant did not return with the child in spite of fervent insistences and implorations of the mother. As alleged by the respondent, the appellant thus separated the child from her from 24.01.2015 to 07.03.2015 in a pretentious and cruel move, seemingly acting on a nefarious strategy which surfaced when on 07.03.2015, the appellant left U.S. with the child to India without any prior information or permission or consent of hers.

5. Situated thus, the respondent approached Juvenile and Domestic Relations Court Fairfax County, for its intervention and for that, on 15.05.2015, she filed "Emergency Motion For Return of Minor Child and Established Temporary Custody".

6. On the next date fixed i.e. 19.05.2015, after the service of the process on the appellant, his counsel made a "special appearance" to contest the service. On the date thereafter i.e. 28.05.2015, he however informed the court that he was not contesting the service upon the appellant, whereupon hearing the counsel for the parties at length and also noticing the plea on behalf of the appellant that he intended to return with the child in U.S. and that the delay was because of his mother's illness, the U.S. Court passed the following order:

"IN THE JUVENILE & DOMESTIC RELATIONS DISTRICT COURT FOR FAIRFAX COUNTRY
SHILPI GUPTA IN re: Aadvik Gupta

D.O.B. September 28, 2012

Petitioner

Case No. JJ 431468-01-00
Vs.
Prateek Gupta Respondent
ORDER
This cause came before this Court on the 19th May, 2015, upon the petitioner Shilpi Gupta's verified motion for return of minor child and to establish temporary custody;

It appearing to the Court that this Court has proper jurisdiction over the parties to this action pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, more specifically 20-146.24 and 20-146.32 of the Code of Virginia, 1950, as amended.

It further appearing to the Court that it is in the best interest of the child, Aadvik Gupta, (hereinafter "Aadvik") born on September 28, 2012, that he be immediately returned to the custody of the petitioner and to the Commonwealth of Virginia pending any further order of this Court and that good cause exists with which to require that the petitioner take immediate possession of the child by all means necessary. It is therefore adjourned and ordered as follows:

> "1. Custody: The petitioner Shilpi Gupta, is hereby granted sole legal and physical custody of the minor child, Aadvik Gupta, pending further order of this Court.
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> 2. Return of the Child: That the respondent, Prateek Gupta, is hereby ordered to immediately return Aadvik to the Commonwealth of Virginia, and to the custody and control of the petitioner or her agents. Thereafter, the respondent shall not remove the child from the Commonwealth of Virginia under any circumstances without further order of the Court.
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> 3. Enforcement: That the all law enforcement agencies and related agencies (including but not limited to Police Department(s), Sheriff's Department(s), U.S. State Department, Federal Bureau of Investigations) are hereby directed to assist and/or facilitate the transfer of Aadvik to the petitioner, if necessary, including taking the child into custody from anyone who has possession of him and placing him in the physical custody of the petitioner.
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> 4. Passport: That once the child has been returned to Virginia, any and all of Aadvik's passports must be immediately surrendered to the petitioner where it will be held until further order of this Court.
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> 5. Removal from the Commonwealth of Virginia: That all relevant and/or local law enforcement agencies shall do whatever possible to prevent the removal of Aadvik Gupta, from the Commonwealth of Virginia except at the direction of the petitioner, Shilpi Gupta.
>
> And this cause is continued.
> Entered this 28 day of May, 2015.
> Sd/-
> Judge"

7. Thereby, the Court in U.S. being satisfied that it had the proper jurisdiction over the parties to the action before it and also being of the opinion that it was in the best interest of the child, that he be returned to the custody of the respondent and to the Commonwealth of

Virginia pending further orders, and that being convinced that good cause existed to require that the respondent-mother take_immediate possession of the child by all means necessary, granted sole legal and physical custody of the child to the respondent pending further orders of the Court. The appellant was directed to immediately return the child to the Commonwealth of Virginia and to the custody and control of the respondent or her agents with a further restraint on him not to remove the child from the Commonwealth of Virginia under any circumstance without the further order of the Court. Thereby, all law enforcement and related agencies as mentioned in the order were directed to assist and/or facilitate the transfer of the child to the respondent, if necessary by taking the child into custody from anyone who had his possession and by placing him in the physical custody of the respondent.

8. As the records laid before this Court would divulge, the appellant meanwhile on 26.05.2015 filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1956 (as amended) and also a petition under Section 7(b) of the Guardian and Wards Act, 1890 in the court of the Principal Judge, Family Court, Rohini, Delhi seeking a decree for restitution of conjugal rights between the parties and for a declaration that he was the sole and permanent guardian of the child, respectively. Subsequent thereto on 26.08.2015 he also instituted a suit in the High Court of Delhi at New Delhi praying for a decree inter alia to adjudge the proceedings initiated by the respondent in the court in U.S. to be false, malicious, vexatious, oppressive and nullis juris, being without jurisdiction and also to declare the order dated 28.05.2015 with regard to the return of the child to the custody of the respondent-mother to be also null and void and not binding on him. A decree for permanent injunction against the respondent, her agents etc. from pursuing her proceedings before the court in U.S. was also sought for. The orders, if any, passed in these proceedings instituted by the appellant having a bearing on those pursued by the respondent before the court in U.S. are however not on record and we therefore refrain from making any comment thereon. Suffice is to state that the lodging of the proceedings by the appellant in courts in India demonstrates in unambiguous terms, his knowledge about the lis in the Court in U.S. and the order dated 28.08.2015, interim though, directing him to return the custody of the child immediately to the respondent-mother and to the Commonwealth of Virginia, pending further orders.

9.Be that as it may, the court in U.S. on 20.10.2015 noticing inter alia that the appellant had refused to return the child to the U.S. and to the custody of the respondent in direct violation of its earlier order dated 28.05.2015, ordered that the respondent be granted sole, legal and physical custody of the child and also declared that no visitation be granted to the appellant. It was further directed that if either party intended to relocate his or her residence, he/she would have to give 30 days' advance written notice of any such intended relocation and of any intended change in address to the other party and the court. The proceedings concluded with the observation "This cause is final". For immediate reference the proceedings of 20.10.2015 is also extracted hereinbelow:

"IN THE JUVENILE & DOMESTIC RELATIONS
DISTRICT COURT FOR FAIRFAX COUNTY

Shilpi Gupta In re: Aadvik Gupta
D.O.B. September 28, 2012
Petitioner

Case No. JJ431468-01-00/02-00

Vs.

Prateek Gupta

Respondent

CUSTODY AND VISITATION ORDER

This cause came before this Court on the 20 th day of October, 2015, upon the petitioner Shilpi Gupta's petitions for custody and visitation of Aadvik Gupta. It appearing to the Court that it has jurisdiction over the parties and the subject matter of the above-styled matter; It further appearing to the Court that the respondent. Prateek Gupta, unilaterally removed Aadvik Gupta to India without notice to or consent of the petitioner, and has further refused to return said child to the United States and into the custody of the petitioner in direct violation of this Court's order entered on May 28, 2015.

Having considered all of the factors of 20-124.3 of the Code of Virginia, 1950, as amended, it is hereby:

Adjudged and ordered that petitioner is granted sole legal and physical custody of Aadvik Gupta; it is further. Adjudged and ordered that no visitation is granted to the respondent at this time; and it is further; Adjudged and ordered that pursuant to 20-124.5 of the Code of Virginia, 1950 as amended, either party who intends to relocate his or her residence shall give thirty-days advance written notice of any such intended relocation and of any intended change of address, said notice being given to both the other party and to this Court. This cause is final Entered this 20th day of October, 2015."

10. Mentionably, before the order dated 20.10.2015 was passed, the respondent in the face of deliberate non-compliance of the order dated 28.05.2015 of the court in U.S. had filed a contempt petition before it and the copy thereof was served on the appellant asking him to show cause. It is also a matter of record that the order dated 28.05.2015 of the court in U.S. had been published in the daily "The Washington Times" on 03.09.2015, whereafter the order dated 20.10.2015 was passed in the presence of the counsel for the appellant after affording the respondent due hearing, whereupon the counsel of the appellant signed the order with the following endorsement "objected to for returning the child to mother sole legal and physical custody". The proceedings of the order dated 20.10.2015 would also

testify that he failed to appear even after personal service. That the notice of the proceedings in U.S. Court at both the stages had been served on the appellant is a minuted fact. It was in this eventful backdrop, that the respondent invoked the writ jurisdiction of the High Court of Delhi seeking a writ of habeas corpus against the appellant for the custody of the child alleging its illegal and unlawful charge by him.

11. In reinforcement of her imputations, the respondent elaborated that the child was an American citizen by birth, Virginia being his home State and that in spite of the order(s) of a court of competent jurisdiction, the appellant had illegally detained him. Various correspondences made by her with different authorities seeking their intervention and assistance as the last resort before approaching the Writ Court were highlighted.

12. In refutation, it was pleaded on behalf of the appellant that the petition for a writ in the nature of habeas corpus was misconceived in absence of any imminent danger of the life or physical or moral well-being of the child. Referring to, amongst others the proceedings initiated by him under the Guardian and Wards Act, 1890 which was pending adjudication, it was asserted on his behalf that as the same assured effective and efficacious remedy in law, the prayer in the writ petition ought to be declined. It was insisted as well that as the issue of the custody of the child was involved, a summary adjudication thereof was unmerited and that a proper trial was the imperative. Apart from referring to the reasons for the acrimonious orientation of the parties, the initiatives and efforts made by him and his family members to fruitlessly effect a resolution of the differences, were underlined. It was maintained on his behalf that the parties however, as an interim arrangement made on 24.01.2015 had agreed to live separately with each parent keeping one child in his/her custody and that in terms thereof Aadvik, the minor whose custody is in dispute, was given in charge of the appellant. Institution and pendency of the other proceedings before the Indian Courts were also cited to oppose the relief of the writ of habeas corpus. It was contended as well that the respondent being a single working woman, she would not, in any view of the matter, be capable of appropriately looking after both the children.

13. In rejoinder, it was asserted on behalf of the respondent that the proceedings instituted by the appellant were all subsequent to the one commenced by her in the court in U.S. on 15.05.2015 and in the face of the final order(s) passed, directing return of custody of the child to her and the Commonwealth of Virginia, the continuance of the child with the appellant was apparently illegal and unauthorized, warranting the grant of writ of habeas corpus.

14. The High Court, as the impugned judgment would evince, after traversing the recorded facts, amongst others took note of the disinclination of the respondent-wife to join the company of her husband in India because of his alleged past conduct and the trauma and torture suffered by her, a plea duly endorsed by her father present in court, granted the writ as prayed for. While rejecting the contention of the appellant that no orders ought to be passed in the writ petition in view of the pendency of the three proceedings initiated by him in India, the High Court seemed to place a decisive reliance on the decision of this Court in *Surya Vadanan vs. State of Tamil Nadu & Ors.,*[1] and after subscribing to the principle of

"comity of courts" and the doctrines of "most intimate contact" and "closest concern" returned the finding, in the prevailing factual setting, that the domestic court had much less concern with the child as against the foreign court which had passed the order prior in time. It observed further that no special or compelling reason had been urged to ignore the principle of comity of courts which predicated due deference to the orders passed by the U.S. Court, more particularly when the appellant was represented before it through his counsel and had submitted to its jurisdiction. It was held that as the child remained in the U.S. since birth upto March, 2015, it could be safely construed that he was accustomed to and had adapted himself to the social and cultural milieu different from that of India. It was observed that no plea had been raised on behalf of the appellant that the foreign court was either incompetent or incapable of exercising its jurisdiction or had not rendered a reasonable or fair decision in the best interest of child and his best welfare. In the textual facts, the conclusion of the High Court was that the most intimate contact with the parties and their children was of the court in U.S. which did have the closest concern for their well-being.

15. Having determined thus, the High Court directed the appellant to produce the child in court on the date fixed for consequential handing over of his custody to the respondent.

16. In the process of impeachment of the impugned ruling of the High Court, the learned counsel for the appellant at the threshold has assiduously questioned the maintainability of the writ proceeding for habeas corpus. According to the learned counsel, in the attendant facts and circumstances, the custody of the child of the appellant who is the biological father can by no means be construed as illegal or unlawful and thus the writ proceeding is misconceived. Further the appellant being in-charge of the child on the basis of an agreement between the parties, which also stands corroborated by various SMS and e-mails exchanged between them during the period from January, 2015 to 07.03.2015, the departure of the appellant with the child from the U.S. to India and its custody with him is authorized and approved in law. The learned counsel argued as well that during the interregnum, after the appellant had returned to India with the child, the couple had been in touch with each other with interactions about the well-being of the child and thus in law and on facts, there is no cause of action whatsoever for the writ of habeas corpus as prayed for. That in passing the impugned order, the High Court had visibly omitted to analyze the perspectives pertinent for evaluating the interest or welfare of the child has been underlined to urge that on that ground alone, the assailed ruling is liable to be interfered with. The learned counsel dismissed any binding effect of the order of the U.S. Court on the ground that the same had been obtained by the respondent by resorting to fraud in withholding the relevant facts from it and deliberately projecting wrongly that the safety of the child was in danger in the custody of the appellant. The order of the court in U.S. having thus been obtained by resorting to fraud, it is non est in law, she urged. Even otherwise, India being not a signatory to the Hague Convention of "The Civil Aspects of International Child Abduction", the order of the U.S. Court was not per se enforceable qua the appellant and as in any view of the matter, the principle of comity of courts was subject to the paramount interest and welfare of the child, the High Court had fallen in error in relying on the rendition of this Court in Surya Vardanan1 which in any event, was of no avail to the respondent in the singular facts of the

case. According to the learned counsel, the parties are Indian nationals and citizens having Indian passports and they are only residents of U.S. on temporary work visa. It has been argued that the respondent is all alone in U.S. with the younger child on a temporary work visa which would expire in 2017 and her parents and other family members are all in India. It has been pleaded as well that when the child was brought to India by the appellant, he was aged 2% years, by which age he could not be considered to have been accustomed and adapted to the lifestyle in U.S. for the application of the doctrines of "intimate contact" and "closest concern" by a court of that country. According to the learned counsel, the child after his return to India, has been admitted to a reputed school and has accustomed himself to a desired congenial family environment, informed with love and affection, amongst others of his grand-parents for which it would be extremely harsh to extricate him herefrom and lodge him in an alien setting, thus adversely impacting upon the process of his overall grooming. That the removal of the child by the appellant to India had not been in defiance of any order of the court in U.S. and that the issue, more particularly with regard to his custody as per the Indian law is presently pending in a validly instituted proceeding here has also been highlighted in endorsement of the challenge to the impugned judgment and order. The decisions of this Court in *Dhanwanti Joshi vs. Madhav Unde*[2], *Sarita Sharma vs. Sushil Sharma*[3] and Surya Vadanan1 have been adverted to in consolidation of the above arguments.

17. In his contrasting response, the learned counsel for the respondent, while edifying the sanctified status of a mother and her revered role qua her child in its all round development, urged with reference to the factual background in which the child had been removed from his native country, that his continuing custody with the appellant is patently illegal and unauthorized besides being ruthless and inconsiderate vis-a-vis the respondent-mother and his younger sibling. Heavily relying on the determination of this Court in Surya Vadanan1, the learned counsel has insisted that the High Court had rightly invoked the principle of comity of courts and the doctrines of "intimate contact" and "closest concern" and therefore, no interference is called for in the ultimate interest and well-being of the child. It was urged that the orders passed by the court in U.S. directing the return of the child to the custody of the respondent and the Commonwealth of Virginia is perfectly legal and valid, the same having been rendered after affording due opportunity to the appellant and also on an adequate appreciation of the aspects bearing on the welfare of the child. The orders thus being binding on the appellant, the defiance thereof is inexcusable in law and only displays a conduct unbecoming of a father to justify retention of the custody of the child in disobedience of the process of law. The High Court as well on a due consideration of the facts and the law involved had issued its writ for return of the custody of the child to the respondent after affording a full-fledged hearing to both the parties for which no interference is warranted, he urged. The learned counsel however denied that there was ever any agreement or understanding between the couple, under which they agreed that each parent would have the custody of one child as represented by the appellant. In the case in hand as a final order has been passed by the court in U.S. with regard to the custody of the child in favour of the respondent after discussing all relevant aspects, the impugned order of the High Court being in conformance with the letter and spirit thereof, no interference is merited, he

urged. While placing heavy reliance on the decision of this Court in Surya Vadanan1 , it was also insisted that the return of the elder child to the custody of the mother was indispensably essential also for the proper growth and grooming of the younger child in his company and association, sharing the common bond of love, affection and concern.

18. The recorded facts and the contentious assertions have received our due attention. A brief recapitulation of the state of law on the issue at the outset is the desideratum.

19. A three Judge Bench of this Court in *Nithya Anand Raghavan vs. State (NCT of Delhi) and another*[4] did have the occasion to exhaustively revisit the legal postulations qua the repatriation of a minor child removed by one of the parents from the custody of the other parent from a foreign country to India and its retention in the face of an order of a competent foreign court directing its return to the place of abode from which it had been displaced. The appeal before this Court arose from a decision of the High Court in a Writ Petition filed by the father alleging that the minor daughter of the parties had been illegally removed from his custody in United Kingdom (for short, hereafter referred to as "UK"), thus seeking a writ of habeas corpus for her production. By the verdict impugned, the High Court directed the appellant-mother therein to produce the minor child and to comply with an earlier order passed by the High Court of Justice, Family Division, Principal Registry, United Kingdom within three weeks or in the alternative to handover the custody of the daughter to the respondent-father therein within that time. The proceeding in which the Court in the UK had passed the order dated 08.01.2016 had been initiated by the respondent/father after the appellant/mother had returned to India with the minor.

20. A brief outline of the factual details, would assist better the comprehension of the issues addressed therein. The parties to start with, were Indian citizens and were married as per the Hindu rites and customs on 30.11.2006 which was registered before the SDM Court, Chennai, whereafter on the completion of the traditional formalities, they shifted to U.K. in early 2007 and set up their matrimonial home in Watford (U.K.). Differences surfaced between them so much so that as alleged by the wife, she was subjected to physical and mental abuse. She having conceived in and around December, 2008, left U.K. for Delhi in June, 2009 to be with her parents and eventually was blessed with a girl child, Nethra in Delhi. The husband soon joined the mother and the child in Delhi whereafter, they together left for U.K. in March, 2010. Skipping over the intervening developments, suffice it to state that the mother with the child who had meanwhile been back on a visit to India, returned to London in December, 2011, whereafter the minor was admitted in a Nursery School in U.K. in January, 2012. In December, 2012, the daughter was granted citizenship of U.K. and subsequent thereto, the husband also acquired the same. Meanwhile from late 2014 till early 2015, the daughter was taken ill and was diagnosed to be suffering from cardiac disorder for which she was required to undergo periodical medical reviews. As imputed by the wife, the father however, dis-played total indifference to the daughter's health condition. Finally on 02.07.2015, the appellant-mother returned to India along with the daughter because of alleged violent behavior of the respondent and also informed the school that the ward would not be returning to U.K. for her well-being and safety. The appellant thereafter filed a

complaint on 16.12.2015 against the respondent with the Crime Against Women Cell, New Delhi, which issued notice to the respondent and his parents to appear before it. According to the appellant, neither the respondent nor his parents did respond to the said notice and instead as a counter-blast, he filed a custody/wardship petition on 08.01.2006 before the High Court of Justice, Family Division, U.K. praying for the restoration of his daughter to the jurisdiction of that Court. The Court in U.K. on 08.01.2016 passed an ex-parte order inter alia directing the appellant to return the daughter to U.K. and to attend the hearing of the proceedings. Within a fortnight therefrom, the respondent also filed a writ petition before the High Court of Delhi against the appellant-wife seeking a writ of habeas corpus for production of the minor before the Court. By the impugned Judgment and Order, the High Court directed the appellant to produce the daughter and comply with the orders passed by the U.K. Court or hand over the minor to the respondent-father within three weeks therefrom. Assailing this determination, it was urged on behalf of the appellant inter alia that the High Court had wrongly assigned emphasis on the principle of comity of courts in complete disregard of the paramount interest and welfare of the child, more particularly in view of the vicious environment at her matrimonial home in U.K. in which she (appellant) had been subjected to physical and verbal abuse and had even placed the child at risk with his behaviour. The fact that India not being a signatory to the Hague Convention intended to prevent parents from abducting children across the borders, the principle of comity of courts did not merit precedence over the welfare of the child, an aspect overlooked by the High Court, was underlined. It was asserted that the impugned order did also disregard the parens patriae jurisdiction of the Indian court within whose jurisdiction the child was located as well as the welfare of the child in question in mechanically applying the principle of comity of courts. That though the welfare of the child in situations of the like as well, is of paramount consideration, this Court in *Shilpa Aggarwal vs. Aviral Mittal and another*[5] and in Surya Vadanan1 had deviated from this governing precept and had directed the child and mother to return to the jurisdiction of the foreign court by mis-interpreting the concept of 'intimate contact' of the child with the place of repatriation, was highlighted for reconsideration of the views expressed therein. It was urged that the decision in Surya Vadanan1 had a chilling effect of assigning dominance to the principle of comity of courts over the welfare of a child, which mentionably undermined the perspective of the child, thus encouraging multiplicity of proceedings It was insistingly canvassed that the view adopted in Surya Vadanan1 was in direct conflict with an earlier binding decision in *V. Ravi Chandran (Dr.) vs. Union of India and others*[6] in which a three-Judge Bench had categorically held that under no circumstance 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. While dismissing the initiative of the respondent before the UK Court to be one in retaliation of the appellant's allegation of abuse and violence and noticeably after she had filed a complaint with the Crime Against Women Cell (CAWC), New Delhi, it was also urged that the U.K. Court had passed ex parte order without affording any opportunity to her to present her case. It was canvassed further that the writ petition filed by the respondent seeking a writ of habeas corpus which is envisaged for urgent and immediate relief was also a designed stratagem of his bordering on the abuse of the process of the court and thus ought to have been discouraged by the High Court. It was underlined as well that the High Court in passing the impugned direction had also overlooked

that the respondent had defaulted in the discharge of his parental duty towards the child, who was suffering from serious health problems, thus compromising in all respects the supervening consideration of overall well-being of the child. In refutation, it was maintained on behalf of the respondent that the child was a British citizen and brought up in U.K. and as he had acquired its citizenship and the appellant was also a permanent resident of U.K., they had the abiding intention to permanently settle there along with the child and thus the U.K. Court had the closest concern and intimate contact with the child as regards her welfare and custody and thus indubitably had the jurisdiction in the matter. It was urged on behalf of the respondent by referring amongst others to the rendering in Surya Vadanan1 that the child had clearly adapted to the social and cultural milieu of U.K. and thus it was in its best interest to be rehabilitated there. That there was no material to suggest that the return of the child to U.K. would result in psychological, physical or cultural harm to her or that the U.K. Court was incompetent to take a decision in the interest and welfare of the child, was underlined. It was insisted as well that there was no compelling reason for the High Court to ignore the principle of comity of courts and that as acknowledged by the High Court, better medical facilities were available in U.K. to treat the child. The steps taken by the respondent towards the child's boarding and travelling expenses together with the expenditure incurrable for the school and other incidental aspects and his undertaking not to pursue any criminal proceeding against the appellant for kidnapping the child with the avowed desire of reinstating his home was highlighted to demonstrate his bona fides. That there was no delay on the part of the respondent in filing the writ petition, which he did immediately after coming to learn that the appellant was disinclined to return the child to U.K., was stressed upon as well. In this disputatious orientation, this Court premised its adjudication on the necessity to comply with the direction issued by the foreign court against the appellant to produce the minor child before the U.K. Court where the issue regarding wardship was pending for consideration and also to ascertain as to which Court could adjudicate the same.

While recalling that the concept of forum convenience has no place is wardship jurisdiction, this Court at the outset dwelt upon the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters and for that purpose, exhaustively traversed the relevant decisions on the issue. It referred to the verdict in Dhanwanti Joshi2, which recorded the enunciation of the Privy Council in *Mark T. Mckee vs. Evelyn Mckee* , which in essence underlined the paramountcy of the consideration of welfare and happiness of the infant to be of decisive bearing in the matter of deciding its custody with the observation that comity of courts demanded not its enforcement but its grave consideration. In that case, 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, whereafter in the habeas corpus proceedings by the mother, though initially the decisions of the lower courts went against her, the Supreme Court of Canada gave her custody and 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 U.S.A. earlier. The above observation was made by the Privy Council on appeal to it which held that in the proceedings relating to the 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 the 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 factors which must be taken into consideration. The duty of the Canadian Court to form any independent judgment on the merits of the matter with regard to the welfare of the child was emphasized. It recorded as well that this view was sustained in *L (minors) (Wardship: Jurisdiction), In. re , which reiterated that the limited*[8] question which arose in the latter decisions was whether the court in the country in which the child was removed could conduct (a) summary enquiry or (b) an elaborate enquiry in the question of custody. It was explicated that in case of (a) a summary enquiry, 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 and in case of (b) an elaborate enquiry, the court could go into the merits to determine 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 and 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. It was indicated that the summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land 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 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. It was mentioned as well that 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 be well persuaded that it will be better for the child that those facets be investigated in the court in his native country on the expectation that an early decision in the native country could be in the interest of the child before it would develop roots in the country to which he had been removed. It was expounded in the alternative, that the Court might as well think of conducting an elaborate enquiry on merits and have regard to the other facts of the case and the time that has elapsed after the removal of the child and consider, if it would be in the interest of the child not to have it returned from the country to which it had been removed, so much so that in such an eventuality, the unauthorized 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 interest of the child. This Court recalled its mandate in *Elizabeth Dinshaw vs. Arvand M. Dinshaw & Anr.*[9], directing the father of the child therein, who had removed it from USA contrary to the custody orders of U.S. Court, to repatriate it to USA to the mother not only because of the principle of comity but also because on facts, which on independent consideration merited such restoration of the child to its native State, in its interest. The following observations in Dhanwanti Joshi2 qua the state of law vis-a-vis the countries who are not the signatories of the Hague Convention are of formidable significance and as noticed in Nithya Anand Raghavan4 , are extracted hereinbelow:

> "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 Re [L. (Minors) (Wardship : Jurisdiction). As recently as 1996-1997, it has been held in P. (A minor) (Child Abduction: Non-Convention Country), Re: 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, 3-7-1997 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."

Here again the court in the country to which the child is removed was required to consider the question on merits bearing on its welfare as of paramount significance and take note of the order of the foreign court as only a factor to be taken into consideration as propounded in Mckee7, unless the court thought it fit to exercise the summary jurisdiction of the child and its prompt return to its native country for its welfare. In elaboration of the above exposition, this Court in Nithya Anand Raghavan4 propounded thus:

"40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either

situation−be it a summary inquiry or an elaborate inquiry−the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition."

The above excerpt would in no uncertain terms underscore the predication that the courts in India, within whose jurisdiction the minor has been brought "ordinarily" while examining the question on merits, would bear in mind the welfare of the child as of paramount and predominant importance while noting the preexisting order of the foreign court, if any, as only one of the factors and not get fixated therewith and that in either situation, be it a summary enquiry or elaborate enquiry, the welfare of the child is of preeminent and preponderant consideration, so much so that in undertaking this exercise, the courts in India are free to decline the relief of repatriation of the child brought within its jurisdiction, if it is satisfied that it had settled in its new environment or that it would be exposed thereby to physical harm or otherwise, if it is placed in an intolerable or unbearable situation or environment or if the child in a given case, if matured, objects to its return. Sustenance of this view was sought to be drawn from the verdict of another three-Judge Bench of this Court in V. Ravichandran6, as expressed in paragraphs 27 to 30 in the following terms:

"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 decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor."

(emphasis supplied)

Again in paras 29 and 30, the three-Judge Bench observed thus: (SCC pp. 195-96)

"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 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 [L. (Minors) (Wardship : Jurisdiction), (1974) 1 WLR 250 (CA)] and the said view has been approved by this Court in Dhanwanti Joshi [Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants) (1966) 1 WLR 381 has been approved by this Court in Elizabeth Dinshaw."

(emphasis supplied)

The quintessence of the legal exposition on the issue was succinctly synopsised in the following terms:

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

21. Thus the state of law as approved in Nithya Anand Raghavan4 is that if a child is brought from a foreign country, being its native country to India, the court in India may conduct (a) summary enquiry, or (b) an elaborate enquiry on the question of custody, if called for. In the case of a summary enquiry, the court may deem it fit to order the return of the child to the country from where he/she has been removed unless such return is shown to be harmful to the child. Axiomatically thus, even in case of a summary enquiry, it is open to the court to decline the relief of return of the child to the country from where he/she has been removed irrespective of a pre-existing order of return of a child by a foreign court, in case it transpires that its repatriation would be harmful to it. On the other hand, in an elaborate enquiry, the court is obligated to examine the merits as to where the paramount interest and welfare of the child lay and take note of the pre-existing order of the foreign court for the return of the child as only one of the circumstances. As a corollary, in both the eventualities whether the enquiry is summary or elaborate, the court would be guided by the pre-dominant consideration of welfare of the child assuredly on an overall consideration on all attendant facts and circumstances. In other words, the principle of comity of courts is not to be accorded a yielding primacy or dominance over the welfare and well-being of the child which unmistakeably is of paramount and decisive bearing.

22. This Court in Nithya Anand Raghavan4 also had to examine as to whether a writ of habeas corpus was available to the father qua the child which was in the custody of the mother, more particularly in the face of ex-parte order of the court in U.K. against her and directing her for its return to its native country by declaring it to remain as a ward of that court during its minority or until further orders. This Court noted that this order had remained not only unchallenged by the appellant mother but also no application had been made by her before the foreign court for its modification. This Court however was firstly of the view that this order per se did not declare the custody of the minor with the appellant mother to be unlawful or that till it returned to England, its custody with the mother had become or would be treated as unlawful inter alia for the purposes of considering a petition for issuance of writ of Hebeas Corpus. In this regard, the decision of this Court, amongst others in *Syed Saleemuddin vs. Dr. Rukhsana & Ors.*[10], was adverted to, wherein it had been proclaimed that the principal duty of the court moved for the issuance of writ of habeas corpus in relation to the custody of a minor child is to ascertain whether such custody is unlawful or illegal and whether the welfare of the child requires, that his present custody should be changed and the child ought to be handed over to the care and custody of any person. It was once again emphasized that while doing so, the paramount consideration must be, the welfare of the child. The observation in Elizabeth Dinshaw9 that in such matters, the custody must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion as to what would best serve the interest and welfare of the minor and that to that extent, the High Court would exercise its parens patriae jurisdiction, as the minor is within its jurisdiction was reminisced. In the facts of the case also, noting the supervening fact that the appellant was the biological mother and natural guardian of the minor child, the remedy of writ of habeas corpus invoked for enforcement of the directions of the foreign court was declined, however leaving the respondent/father to take recourse to such other remedy as would be available in law for the enforcement of the order passed by the foreign court for

securing the custody of the child. It was held that the appellant being the biological mother and natural guardian of the child, it could be presumed that its custody with her was lawful.

23. This Court in Nithya Anand Raghavan4 next turned to the contextual facts to record that the parents of the child were of Indian origin and that the minor was an Indian citizen by birth as she was born in Delhi and that she had not given up her Indian citizenship though she was granted UK citizenship subsequent thereto. That the child was admitted to a primary school in UK in September 2013 and that she had studied there in July 2015 was noted. It was mentioned as well that till she accompanied her mother on 02.07.2015 to India, no proceeding of any kind had been filed in the UK Court, either in relation to any matrimonial dispute between the parents or for her custody. In India, the child had been living with her grand-parents and other family members and relations unlike in U.K., where she lived in a nuclear family of three with no other relatives. That she had been studying in India for last over one year and had spent equal time in both the countries up to the first six years of her life was taken note of as well. This Court also expressed that the child would be more comfortable and secured to live with her mother here in India, who can provide her with motherly love, care, guidance and the required upbringing for her desired grooming of personality, character and faculties. That being a girl child, the custody, company and guardianship of the mother was of utmost significance was felt. It was also recorded that being a girl child of the age of about seven years, she ought to be ideally in the company of her mother in absence of circumstances that such association would be harmful to her. That there was no restraint order passed by any court or authority in U.K. before the child had travelled with her mother to India was accounted for as well. This Court noticed most importantly, that the child was suffering from cardiac disorder, which warranted periodical medical reviews and appropriate care and attention, which it felt could be provided only by the mother as the respondent/father being employed would not be in a position to extend complete and full attention to his daughter. That the appellant/mother had neither any intention to return to UK nor according to her if the child returns to UK, she would be able to secure the desired access to her to the child to provide care and attention was noted in express terms. On an evaluation of the overall facts and circumstances, this Court thus was of the unhesitant opinion that it would be in the interest of the child to remain in the custody of her mother and that her return to UK would prove harmful to her. While concluding thus, it was stated that this arrangement notwithstanding the appellant/mother ought to participate in the proceedings before the UK Court so long as it had the jurisdiction to adjudicate the matter before it. It was observed as well that, as the scrutiny involved with regard to the custody had arisen from a writ petition filed by the respondent/father for issuance of writ of a habeas corpus and not to decide the issue of grant or otherwise of the custody of the minor, all relevant aspects would have to be considered on their own merit in case a substantive proceeding for custody is made before any court of competent jurisdiction, including in India, independent of any observation made in the judgment. To complete the narrative, the analysis of the other relevant pronouncements rendered on the issue would be adverted to in seriatim. In V. Ravi Chandran6, a writ of habeas corpus for production of minor son from the custody of his mother was sought for by his father. The child was born in US and was an American citizen and was about eight years of age when he was removed by the mother from U.S., in spite of her consent order on the issue of custody and guardianship of the minor

passed by the competent U.S. Court. The minor was given in the joint custody to the parents and a restraint order was operating against the mother when it was removed from USA to India. Prior to his removal, the minor had spent few years in U.S.. All these factors weighed against the mother as is discernible from the decision, whereupon this Court elected to exercise the summary jurisdiction in the interest of the child, whereupon the mother was directed to return the child to USA within a stipulated time.

24. In Shilpa Aggarwal5, the minor girl child involved was born in England having British citizenship and was only 3% years of age at the relevant time. The parents had also acquired the status of permanent residents of U.K. In the facts and circumstances of the case, this Court expressed its satisfaction that in the interest of the minor child, it would be proper to return her to U.K. by applying the principle of comity of courts. The Court was also 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. A summary enquiry was resorted to in the facts of the case.

25. In *Arathi Bandi vs. Bandi Jagadrakshaka Rao and others*[11] the minor involved was a male child who was born in USA and had acquired the citizenship of that country by birth. The child was removed from USA by the mother in spite of a restraint order and a red corner notice operating against her had been issued by a court of competent jurisdiction in USA. This Court therefore held that the facts involved were identical to those in V. Ravi Chandran6 and further noticed that the mother of the child also had expressed her intention to return to USA and live with her husband though the latter was not prepared to cohabit with her.

26. In Surya Vadanan1, the two minor girls aged 10 years 6 years respectively were British citizens by birth. Following intense matrimonial discords, the mother had left UK and had come to India with her two daughters. She also instituted a proceeding in the Family Court at Coimbatore seeking dissolution of marriage. The husband, finding the wife to be unrelenting and disinclined to return to U.K. with her daughters, petitioned the High Court of Justice in U.K. for making the children as the wards of the Court, which passed an order granting the prayer and required the mother to return the children to its jurisdiction. This order was passed even before any formal order could be passed on the petition filed by the wife seeking divorce. This order was followed by another order of the U.K. Court giving peremptory direction to the wife to produce the two daughters before the U.K. Court and was supplemented by a penal notice to her. It was thereafter that the husband moved the Madras High Court for a writ of habeas corpus on the ground that the wife had illegal custody of the two daughters. On the following considerations as extracted hereinbelow, relief as prayed for by the husband was granted:

> "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."

27. Vis-a-vis the renditions in V. Ravi Chandran6, Shilpa Aggarwal5 and Arathi Bandi11, this Court in Nithya Anand Raghavan4 distinguished the facts involved therein from the one under its scrutiny. While underlining that the considerations which impelled the court to adopt its summary approach/jurisdiction in directing the return of the child to its native country, did not in any way discount or undermine the predominant criterion of welfare and interest of the child even to outweigh neuter or offset the principle of comity of courts, it disapproved the primacy sought to be accorded to the order of the foreign court on the issue of custody of minor in Surya Vadanan1 though negated earlier in Dhanwanti Joshi2 and reiterated that whether it was a case of summary enquiry or an elaborate enquiry, the paramount consideration was the interest and welfare of the child so much so that the preexisting order of a foreign court could be taken note of only as one of the factors. The alacrity or the expedition with which the applicant/parent moves the foreign court or the domestic court concerned, for custody as a relevant factor was also not accepted to be of any definitive bearing. This notion of "first strike principle" was not subscribed to and further the extrapolation of that principle to the courts in India as predicated in Surya Vadanan1 was also held to be in-apposite by adverting inter alia to Section 14 of the Guardians and Wards Act, 1890 and Section 10 of the Civil Procedure Code.

28. The following passage from Nithya Anand Raghavan4 discarding the invocation of "first strike" principle as a definitive factor in furtherance of the applicability of the principle of comity of courts is quoted as hereunder:

> "66. 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 case 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."

In conclusion, qua the decisions relied upon by the respondent-father, the facts contained therein were held to be distinguishable and it was observed that though the factual backdrop as obtained therein necessitated the court to issue direction to return the child to the native State, it did not follow that in deserving cases, the Courts in India were denuded of their powers to decline the relief to relocate the child to the native State merely because of a pre-existing order of foreign court of competent jurisdiction. The law laid down in Dhanwanti Joshi2 and approved by a three Judge Bench of this Court in V. Ravi Chandran6 was enounced to be the good law, thus reiterating that so far as non-convention countries are concerned, the court in the country in which the child is removed while examining the issue of its repatriation to its native country, would essentially bear in mind that the welfare of the child was of paramount importance and that the existing order of foreign court was only a factor to be taken note of. It was reiterated that the summary jurisdiction to return the child could be exercised in cases where the child had been removed from his native land to another country where his native language is not spoken or the child gets divorced from social customs and contacts to which he is accustomed or if his education in his native land is interrupted and the child is subjected to foreign system of education, thus adversely impacting upon his psychological state and overall process of growth. Though a prompt and expeditious move on the part of the applicant parent for the repatriation of the child in a court in the country to which it had been removed may be a relevant factor, the overwhelming and determinative consideration unfailingly has to be in the interest and welfare of the child. It was observed that in the facts of the case, the minor child after attaining majority would be free to exercise her choice to go to U.K and stay with her father but till that eventuality, she should stay in the custody of mother unless the court of competent jurisdiction trying the issue of custody of the child did order to the contrary. Visitation right to the respondent-father however was granted and directions were issued so as to facilitate the participation of the appellant- mother in the pending proceedings before the U.K. Court, inter alia by requiring the respondent-husband to bear the necessary costs to meet the expenditure towards all relevant aspects related thereto. The impugned judgment of the High Court issuing the writ of habeas corpus in favour of the respondent-husband was thus set aside.

29. The dialectics and determinations in Nithya Anand Raghavan4 have been alluded to in pervasive details as the adjudication therein by a Bench of larger coram has forensically analyzed all the comprehensible facets of the issue, to which we deferentially subscribe.

30. The decisions cited at the Bar and heretofore, traversed present fact situations with fringe variations, the common and core issue being the justifiability or otherwise factually and/or legally, of the relocation of a child removed from its native country to India on the basis of the principle of comity of courts and doctrines of "intimate contact" and "closest concern".

31. The following observations in *Ruchi Majoo vs. Sanjeev Majoo*[12] bearing on the parens patriae jurisdiction of Indian courts in cases involving custody of minor children are apt as well:

> "Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Civil Procedure, 1908, as amended by the Amendment Acts of 1999 and 2002. The duty of a court exercising its parens patriae jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully.

Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factory to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision."

32. The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of "intimate contact and closest concern" notwithstanding. Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer res integra that the ever overriding determinant would be the welfare and interest of the child. In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgeably subservient thereto. Though in the process of adjudication of the issue of repatriation, a court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the

applicant/parent is prompt and alert in his/her initiative and the existing circumstances ex facie justify such course again in the overwhelming exigency of the welfare of the child, such a course could be approvable in law, if an effortless discernment of the relevant factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological, social, cultural existence, thus exposing it to visible, continuing and irreparable detrimental and nihilistic attentuations. On the other hand, if the applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold.

33. The doctrines of "intimate contact" and "closest concern" are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom etc., with the portent of mutilative bearing on the process of its overall growth and grooming.

34. It has been consistently held that there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration.

35. Reverting to the present facts, the materials as available, do substantiate lingering dissensions between the parties. They are living separately since 2014 with one child each in their company and charge. The children are US citizens by birth. Noticeably, the child Aadvik, who is the subject matter of the lis and custody was barely 2% years old when he came over to India and had stayed here since then. Today, he is a little over 5 years old. In other words, he has spent half of his life at this age, in India. Considering his infant years of stay in US, we construe it to be too little for the required integration of his with the social, physical, psychological, cultural and academic environment of US to get totally upturned by his transition to this country, so much so that unless he is immediately repatriated, his inherent potentials and faculties would suffer an immeasurable set back. The respondent-mother also is not favourably disposed to return to India, she being a working lady in US and is also disinclined to restore her matrimonial home. The younger son is with her. There is no convincing material on record that the continuation of the child in the company and custody of the appellant in India would be irreparably prejudicial to him. The e-mails exchanged by the parties as have been placed on records do suggest that they had been in touch since the child was brought to India and even after the first order dated 28.05.2015 was passed by the court in US. In the said e-mails, they have fondly and keenly referred to both the sons staying in each other's company, expressing concern about their illness and general well-being as well. As has been claimed by the appellant, the child is growing in a congenial environment in the loving company of his grand-parents and other relatives. He has been admitted to a reputed school and contrary to the nuclear family environment in US, he is exposed to a natural process of grooming in the association of his elders, friends, peers and playmates, which is irrefutably indispensable for comprehensive and conducive development of his

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

36. Noticeably, a proceeding by the appellant seeking custody of the child under the Guardian and Wards Act, 1890 has been instituted, which is pending in the court of the Principal Judge, Family Court, Rohini, Delhi. This we mention, as the present adjudication pertains to a challenge to the determination made in a writ petition for habeas corpus and not one to decide on the entitlement in law for the custody of the child.

37. In Nithya Anand Raghavan4 as well, this Court while maintaining the custody of the child in favour of the mother in preference to the applicant-father had required the mother to participate in the proceeding before the foreign court initiated by the respondent-father therein. It was observed that the custody of the child would remain with the respondent-mother till it attained majority, leaving it at liberty then to choose its parent to reside with. The arrangement approved by this Court was also made subject to the decision with regard to its custody, if made by a competent Court.

38. In the overwhelming facts and circumstances, we see no reason to take a different view or course. In view of order dated 03.05.2016 of this Court, the child has remained in the custody of the appellant-father. To reiterate, no material has been brought on record, persuasive and convincing enough, to take a view that immediate restoration of the custody of the child to the respondent-mother in the native country is obligatorily called for in its interest and welfare. The High Court, as the impugned judgment and order would demonstrate, did not at all apply itself to examine the facts and circumstances and the other materials on record bearing on the issue of welfare of the child which are unmistakably of paramount significance and instead seems to have been impelled by the principle of comity of courts and the doctrines of "intimate contact" and "closest concern" de hors thereto. The appellant being the biological father of Aadvik, his custody of the child can by no means in law be construed as illegal or unlawful drawing the invocation of a superior Court's jurisdiction to issue a writ in the nature of habeas corpus. We are, in the textual facts and on an in-depth analysis of the attendant circumstances, thus of the view that the dislodgment of the child as directed by the impugned decision would be harmful to it. Having regard to the nature of the proceedings before the US Court, the intervening developments thereafter and most importantly the prevailing state of affairs, we are of the opinion that the child, till he

attains majority, ought to continue in the custody, charge and care of the appellant, subject to any order to the contrary, if passed by a court of competent jurisdiction in an appropriate proceeding deciding the issue of its custody in accordance with law. The High Court thus, in our estimate, erred in law and on facts in passing the impugned verdict.

39. The impugned judgment and order is thus set aside. We however direct that the parties would participate in the pending proceedings relating to the custody of the child, if the same is pursued and the court below, before which the same is pending, would decide the same in accordance with law expeditiously without being influenced in any way, by the observations and findings recorded in this determination.

40. The appeal is thus allowed.

Judgment Refetted.

[1](2015) 5 SCC 0450
[2](1998) 1 SCC 0112
[3](2000) 3 SCC 0014
[4](2017) 8 SCC 0454
[5](2010)1 SCC 0591
[6](2010) 1 SCC .0174
[7](1951) AC 352 (PC)
[8] (1974) 1 WLR 250 (CA)
[9](1987) 1 SCC 0042