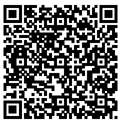

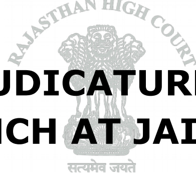

Rajasthan High Court
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HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Habeas Corpus Petition No. 292/2022

Pratyush Shastri S/o Sh. Madan Lal Shastri, Aged About 37 Years, R/o 602 Opal 4 Building, Behind Burjuman Mall, Bur Dubai, Dubai, Uae Permanent R/o 78, Navlakha Road, Near Chhawni, Indore, Madhya Pradesh, India

----Petitioner

Versus

1. State Of Rajasthan, Through Secretary, Home Department, Govt. Of Rajasthan, Secretariat, Jaipur
2. Additional Director General Of Police, Anti Human Trafficking Unit, Jaipur, Rajasthan
3. Superintendent Of Police, Jaipur (South)
4. Station House Officer, Police Station, Ashok Nagar, Jaipur (South)
5. Awadh Mishra, R/o C-1/c-2, Vinayak Apartment, Flat No. 310, Prithviraj Road, C-Scheme, Ashok Nagar, Jaipur (South)
6. Akanksha Shastri W/o Mr. Pratyush Shastri, Currently R/o C-1/ C-2, Vinayak Apartment, Flat No. 310, Prithviraj Road, C-Scheme, Ashok Nagar, Jaipur (South)

----Respondents

For Petitioner(s)	:	Mr. V.R. Bajwa, Senior Advocate assisted by Mr. Tarun Agarwal Advocate.
For Respondent(s)	:	Mr. Pratush Choudhary Advocate with Mr. Hitanshu Joshi Advocate on behalf of Mr. Deepak Chauhan Advocate. Mr. Nasir Ali Naqvi, Additional Advocate General assisted by Mr. Hakam Ali Advocate.

HON'BLE THE CHIEF JUSTICE MR. MANINDRA MOHAN SHRIVASTAVA

HON'BLE MRS. JUSTICE SHUBHA MEHTA

Order

Reportable

31/05/2024

By the Court: (Per Manindra Mohan Shrivastava,CJ)

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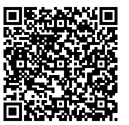

RAJASTHAN HIGH COURT सत्यमेव जयते

Factual matrix of the case:-

1. This Habeas Corpus Petition under Article 226 of the Constitution of India has been preferred by the father of the minor son seeking issuance of writ of habeas corpus for protection as also for custody of the minor son on the allegation of the minor being in illegal custody and detention of Respondent No.5, the maternal grandfather and Respondent No.6, the mother.

Rajasthan High Court Web Copy - Not Official सत्यमेव जयते

2. The petitioner-husband, in his petition has pleaded *inter alia* that his marriage with Respondent No.6 was solemnized on 15.02.2015 at Indore. After few days, the petitioner and Respondent No.6-wife/mother decided to move to Dubai where the petitioner was already working. From their wedlock, while the parties were residing at Dubai, a son was born on 23.06.2017 at Dubai. The mother of the child travelled to Jaipur from Dubai on 09.08.2017 and stayed there until she again came back. Further pleading reveals various events leading to differences and disputes, disturbing peace of married life. Respondent No. 6 again came to India along with minor son in the month of March, 2022. However, in a sudden turn of events, Respondent No.6 started making allegations against the petitioner and she refused to come back to Dubai with the child. The petitioner, thereafter, hurriedly came to India, but Respondent No.6 refused to meet or even allow the petitioner to meet the child. Respondent No.5, father of Respondent No.6 threatened the petitioner of dire consequences and, therefore, the petitioner had to return to Dubai alone on 08.04.2022. It is also pleaded that anticipating petitioner's move to seek custody of minor child, Respondent No.6 lodged FIR against the petitioner and his family members on 23.04.2022

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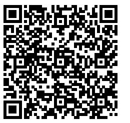

inter alia alleging dowry demand and domestic violence etc. Respondent No.6 and her parents are not allowing the petitioner to meet his child. The petitioner earns handsomely and lives an affluent life at Dubai where the son was born and enrolled in educational institution. Son is getting best education and all other facilities at Dubai. Respondent No.6 has illegally removed the child from Dubai and brought him to India without the consent of the father and is illegally retaining the custody of the child in India. She does not have financial capacity to maintain herself and the minor son and she is financially dependent on the petitioner for all her needs including needs of the child. As compared to the mother, the father is in a better position to provide far more better education and other facilities for the growth and development of the child. The petitioner filed a petition before the Dubai Court for obtaining the passport of the child from Respondent No.6 and an order in his favour was passed directing Respondent No.6 to return the passport of the child to the petitioner and the child was illegally removed from Dubai to India. The child is a natural resident of his native country, i.e., Dubai and, therefore, as per local laws, taking out the child and keeping him away from Dubai without the consent of the father, is unlawful and amounts to illegal detention. It is adversely impacting on the welfare of the child. Ordinary remedy under the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act of 1890') is not available. It is also the case of the petitioner that the jurisdiction of the Court in Dubai has the most intimate contact to the issues. Continuance of the child with the mother is harmful to his welfare and best interest, for the reasons stated in

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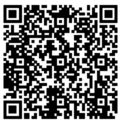

the writ petition. Therefore, on such pleadings, petitioner has prayed for issuance of an order for handing over the custody of the child to the petitioner.

3. In rebuttal, through counter affidavit filed by Respondent No.6, the mother of the child as also Respondent No.5, Maternal Grandfather, relief sought in the writ petition has been opposed. Though facts regarding date and place of marriage as also the date and place of birth of child have not been disputed, maintainability of habeas corpus petition has been questioned on the ground that Respondent No.6 is the natural guardian of the child and it is not a case of illegal or wrongful detention as mother can never be said to be in illegal and wrongful detention of her own minor son. The petitioner on his own showing had allowed the mother to travel along with the minor son to India as he himself booked the flight tickets. Therefore, it cannot be said that the child was removed from the custody of the father without his knowledge or consent. The petition is merely an afterthought and counter blast to FIR lodged by the Respondent No.6 against the petitioner. The petition has been filed with an oblique motive to pressurise Respondent No.6 to withdraw FIR. The best interest of the child who is a minor of tender age lies with the mother, who is a well educated and independent lady. Minor son has already been enrolled in a prestigious school of Jaipur. According to Respondent No.6, the petitioner is a drug and sex addict and it would not be in the best interest of the child to allow custody of the child with person of such immorality. The petitioner or Respondent No.6 or the child none are the citizens of Dubai though child was born at Dubai. They all continue to be Indian

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Nationals holding Indian passports only. The order passed by the Court at Dubai does not decide the issue of custody on considerations regarding welfare of the minor child, but deals only with the technical issue of passport. It is not a straitjacket rule of law that a child who is 5 years of age should necessarily be given in the custody of the father, but on the other hand, the custody of the child may and should remain with the mother where the welfare of the minor is best sub-served in allowing him to remain in the custody of the mother. The petitioner has an alternative remedy. Respondent No.6 had lodged FIR because she was subjected to harassment, there were demand of dowry, domestic violence and offences have also been registered. Because of such dowry demands, domestic violence and harassment, Respondent No.6 is unable to reside with the petitioner and in such a situation that the parents are not residing together but have parted, the welfare of the minor son lies in allowing him to remain in custody of mother who will take care of all his needs of education, health as well as mental growth & physical development along with necessary love and affection, which may not be provided at Dubai by the petitioner.

4. This Court passed various interim orders on 10.10.2022, 17.10.2022 & 25.11.2022. Attempt was also made to resolve dispute through mediation. This Court also interacted with the child on 25.11.2022 and also issued directions for medical examination of the petitioner to verify allegation regarding petitioner being a drug addict.

5. Respondent No.6 approached the Hon'ble Supreme Court aggrieved by various interim orders passed by this Court. On

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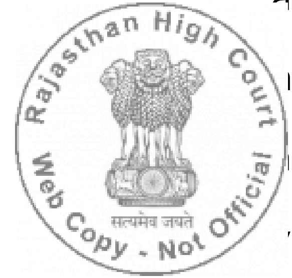

02.12.2022, all interim orders passed by this Court were stayed. The appeal was finally disposed off on 01.08.2023, taking the view that instead of issuing repeated interim directions, the appropriate course for the High Court would be to decide the habeas corpus petition on merits and till such time, the interim arrangement made by the Hon'ble Supreme Court giving visitation rights to the petitioner was ordered to continue to operate.

6. In addition to main pleadings, the petitioner filed an application seeking direction for renewal of passport of the corpus and for appointment of child counsellor. Respondent No.6 filed application under Section 151 CPC for bringing additional documents on record giving details of admission as also charge-sheet filed against the petitioner. Further return, rejoinder and additional affidavits have also been filed by the respective parties. The petitioner has also filed affidavit in the welfare of the child to which counter affidavit has been filed by Respondent No.6. The petitioner has also filed another additional affidavit about his current income and financial position. Respondent No.6 has filed an additional affidavit giving details of her employment, admission of minor son in the school & payment of fee etc.

Submissions on behalf of the petitioner:-

7. Learned Senior counsel appearing for the petitioner argued extensively and urged that present is a case of illegal and sudden removal of the minor son of the petitioner from Dubai to India by the Respondent No.6, which is an act of deceit by Respondent No.6. The petitioner and Respondent No.6 have been residing at Dubai ever since their marriage and the son was also born in

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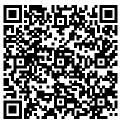

Dubai and is, therefore, natural resident and native of Dubai. He has been brought up in the environment ever since his childhood at Dubai only. The minor son has also been admitted in prestigious educational institution. The petitioner is a person of affluence getting handsome salary out of his employment at Dubai. He is leading settled and comfortable life at Dubai. Sudden removal of child from the environment of his native place where he was born and brought up, has not only resulted in a rude shock because of the change of environment surroundings, but has also deprived him of the education and continuity thereof at Dubai. This has adversely affected the physical and mental growth of his son and Respondent No.6, only to settle her score with the petitioner on frivolous allegation of criminal act, has illegally removed son from Dubai and brought to India. Further submission is that as far as financial condition & stability is concerned, the petitioner is far better placed as compared to Respondent No.6 who though educated, is unemployed and is dependent on meager pension of her father which rendered it impossible to fulfill all needs of her own and child both. This would adversely affect the education of the child. It is one of the most important attribute to decide the paramount consideration of welfare of child. The Respondent No.6 is fully dependent on the financial support given by the petitioner, details of which have been given in the petition which have not been disputed by the Respondent No.6. Even now, she is getting monthly financial help from the petitioner. Moreover, the standard of the education which the child is getting at Dubai is far better as compared to the quality of education which is being provided by the Respondent

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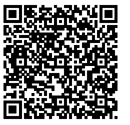

No.6 in India as the Respondent No.6 is not financially affluent nor capable of providing good and quality education as compared to what the child was getting at Dubai. The father is a natural guardian of the minor son who his more than 5 years of age, as provided under the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as 'the Act of 1956') and he takes precedents over the mother, other things be equal. On application of principles of 'Court of intimate contact & 'closest concern' and 'comity of courts', minor son is required to be returned to the country of his natural and habitual residence where his best interest and welfare would be protected in the hands of his father, the petitioner. Family Court in India do not have any jurisdiction over custody matters of minor children who are foreign residents and do not ordinarily reside within the jurisdiction of the Family Court. Therefore, ordinary remedy under Section 9 of the Act of 1890 is unavailable to the petitioner and it is the UAE Court alone which is competent to decide the question of custody of the minor. On application of the principle that welfare of the child is the paramount consideration, on all relevant aspects, it would be in the interest of the child that the custody is given to the father. Only in order to avoid and oppose a possible claim of custody of child by the petitioner, Respondent No.6 has made frivolous and baseless allegations of dowry, domestic violence, drug abuse and prostitution. He also submitted that the custody of the child with Respondent No.6 is harmful as she has utterly failed to look after the support, health and education of the minor son and is unable to ensure welfare and holistic development of the child. She lacks financial support, capacity, resources and ability to provide access

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to good schooling. Overall background and character of Respondent No.6 and her parents reflects immoral character and degraded value system, which is detrimental to the holistic growth and well being of the child. In support of his submissions, learned Senior Counsel has placed reliance upon the decisions of the Hon'ble Supreme Court in the cases of **Nithya Anand Raghavan Versus State (NCT of Delhi) and Another, (2017) 8 Supreme Court Cases 454, Lahari Sakhamuri Versus Sobhan Kodali, (2019) 7 Supreme Court Cases 311, Tejaswini Gaud and Others Versus Shekhar Jagdish Prasad Tewari and Others, (2019) 7 Supreme Court Cases 42, Yashita Sahu Versus State of Rajasthan and Others, (2020) 3 Supreme Court Cases 67 & Soumitra Kumar Nahar Versus Parul Nahar, (2020) 7 Supreme Court Cases 599 & Rohith Thammana Gowda Versus State of Karnataka and Others, (2022) SCC OnLine SC 937** and decision of Madras High Court in the case of **Bhagyalakshmi and Another Versus K. Narayan Rao, (1981) Supreme Court Cases OnLine Mad 190.**

<u>Submissions on behalf of the respondents:-</u>

8. Per-contra, learned counsel for the respondents, opposing relief sought by the petitioner, not only raised objection with regard to the maintainability of the petition, but also on merits of the case. He would submit that present is not a case of illegal or unlawful custody as the child is with his natural guardian, the mother and remedy of writ petition for issuance of writ of habeas corpus petition should not be allowed. If the petitioner is willing to seek custody of the child, he should take recourse to ordinary

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remedy by moving appropriate application before the Court of competent jurisdiction under the Act of 1890. There is no order of Dubai Court for return of the child so as to say that the minor son has been removed from Dubai and brought to India in defiance of any order of grant of custody of the minor son with the petitioner. The order passed by the Dubai Court nowhere directs return of the child to Dubai, but it only directs return of child's passport. The order does nowhere discuss the aspect of welfare of the child, therefore, order dated 14.09.2022 passed by the Dubai Court does not render the custody of the child with the mother illegal so as to justify invocation of writ jurisdiction for issuance of writ of habeas corpus. It is also submitted that the petition has been filed after delay of more than 6 months from the date the child was brought to India from Dubai and the petition is, therefore, liable to be dismissed as habeas corpus petitions, in child custody cases, are entertained in exceptional circumstances and one who seeks to invoke this extraordinary remedy must approach the constitutional court immediately after the cause of action. Therefore, on threefold grounds as raised above, the petition is not maintainable and is liable to be dismissed as such.

9. On the merits of the case, it has been argued extensively and contended that the mother is the natural guardian and the child has been living in India for about 2 years now along with his mother and maternal grand parents, getting education in best school in Rajasthan and is also undertaking various extracurricular activities, therefore, it cannot be said that child's stay in India is in any way detrimental to the development of the child. The mother and maternal grand parents are highly educated and

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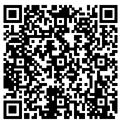

currently the mother is also well employed. Even though the child was born in Dubai, he continues to be the Indian citizen as is not being granted any citizenship rights, therefore, his best interest including economic and social security, diverse career prospects are best protected in India and there is no overwhelming consideration for return of the minor son to Dubai. The present proceedings are only summary in nature and unless an exceptional case is made out that continuance of the child with the mother in India, is seriously detrimental to his health, welfare, social security and other aspect of well being, order of repatriation of Indian citizen child could not be prayed through such petition filed by the petitioner, particularly when both parents are Indian citizens. Merely because the petitioner, for the time being, is employed and working in Dubai, that by itself, does not make out a case that the child should be sent back to Dubai, which does not offer citizenship to foreigners. Therefore, there is no chance that the child or his parents would be offered citizenship of UAE. Further submission is that though the son was born in Dubai, he had not gained roots in Dubai. He was born in 2017 and at the age of 5 years, he was brought to India and since then he is residing here with all necessary comforts and surroundings, getting best of education and atmosphere for proper mental and physical growth in love, care and affection of the mother and maternal grand parents. There is no material placed by the petitioner that continuance of the custody of the child with the mother is posing grave danger to life, limb, security and health of the minor. As compared to half of pre-primary schooling in Dubai, most of his primary and formative education

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has been done in India in last 2 years. He has made friends and is completely accustomed to the sociology of India. Any order of his repatriation to Dubai would not be conducive to his overall growth. In the absence of there being any alien environment of living in India, invocation of extraordinary jurisdiction without proof through a detailed enquiry that welfare of the minor son lies in allowing him in the custody of the father, is not warranted. Respondent No.6 has improved her financial condition, as reflected from various materials placed before this Court with additional affidavit that she is earning well and looking to the cost of living index, with the support of her father, it cannot be said that child's best interest towards his physical and mental growth could not be secured. Learned counsel for the respondents also contended, with reference to various materials on record that the petitioner is not a person of clean moral character. He is a person who is not only drug addict but also a sex addict and it would not at all be safe to allow the custody of the child with the father when mother and other relatives in the family are not around. If such custody is allowed, the safety, security, mental and physical growth of the child would be in grave danger. In support of his submissions, learned counsel for the respondents has placed reliance upon the decision of the Hon'ble Supreme Court in the cases of **Dhanwanti Joshi Versus Madhav Unde, (1998) 1 Supreme Court Cases 112, Githa Hariharan (Ms) and Another Versus Reserve Bank of India and Another, (1999) 2 Supreme Court Cases 228, Sarita Sharma Versus Sushil Sharma, (2000) 3 Supreme Court Cases 14, Gaurav Nagpal Versus Sumedha Nagpal, (2009) 1 Supreme Court Cases**

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42, Ruchi Majoo Versus Sanjeev Majoo, (2011) 6 Supreme Court Cases 479, Roxann Sharma Versus Arun Sharma, (2015) 8 Supreme Court Cases 318, Nithya Anand Raghavan Versus State (NCT of Delhi) and Another (Supra),Kanika Goel Versus State of Delhi Through Station House Officer and Another, (2018) 9 Supreme Court Cases 578, Sara Carriere Dubey Versus Ashish Dubey and Others (Criminal Appeal No(s). 304 of 2020, decided on 17.02.2020) & Rohith Thammana Gowda Versus State of Karnataka and Others (Supra), Balkar Singh Mola Versus State of Haryana & Others (Special Leave to Appeal (Crl.) No.3414/2022, decided on 06.05.2022), the decision of the Division Benches of this Court in the cases of **Goverdhan Lal & Others Versus Gajendra kumar, (2002) 1 Western Law Cases (Raj.) 419, Jhamku Versus Goda (D.B. Civil Misc. Appeal No.952 of 2001, decided on 23.11.2005), Janni Versus State of Rajasthan & Others (D.B Habeas Corpus Petition No.8/2022, decided on 16.02.2022),** the decision of the Madras High court in the case of **K.V. Bhaskaran Versus P.O. Shobha (H.C.P. No.168 of 1992, decided on 20.10.1992)** and the decision of the Karnataka High Court at Bengaluru in the case of **Shri Pavan Srikanth Reddy Versus The State of Karnataka & Others, (WPHC No.130/2016, decided on 22.02.2018.)**

<u>Analysis and Conclusion:-</u>

10. We have heard learned counsel for the parties, gave our anxious consideration to various respective submissions and minutely perused the record of the case.

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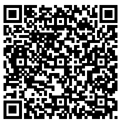

11. Keeping in view that the present case involves not a dispute with regard to immovable property/chattel but a living human being a minor, adopting parents patriae approach with utmost sensitivity at our command, we shall proceed to analyse legal as well as factual aspects of the case.

12. In addition to main pleadings, various affidavits filed by the parties at different point of time even after the case was ordered to be listed for hearing, have been taken on record keeping aside all technical aspects but only keeping in view that welfare of the child is paramount consideration.

13. Before dealing with the various submissions on merits, we shall first deal with objection with regard to the maintainability of the present habeas corpus petition on threefold submissions made by learned counsel for the Respondents No.5 & 6.

14. The first objection with regard to the maintainability of petition is premised on the submission that the present is not a case of illegal or wrongful detention of the child with the mother. It is contended that mother is a natural guardian and whether the child was living in Dubai or India, he has through been in the company of none other than his own biological mother, therefore, this petition for issuance of writ of habeas corpus is not maintainable as such remedy is available only in the case of illegal detention and there cannot be any circumstance or situation when the custody of the child with the mother can be said to be a case of illegal detention. It is argued that irrespective of issue whether the interest of the child lies in the custody of the mother or the father, it cannot be a case of illegal detention and, hence, instant petition is liable to be dismissed only on this ground.

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The answer lies in authoritative pronouncement of the Hon'ble Supreme Court in the cases of **Tejaswini Gaud and Others Versus Shekhar Jagdish Prasad Tewari and Others (Supra) & Yashita Sahu Versus State of Rajasthan and Others (Supra).**

A division bench of this Court in the case of **Dr. Swati Joshi Versus The State of Rajasthan and Others, (D.B. Habeas Corpus Petition No.349/2022, decided on 02.06.2023)** had an occasion to decide similar objection raised by the father of the child opposing petition for issuance of writ of habeas corpus filed by the mother of the child. In that case also, similar objection as is being made here by Respondent-mother, was raised which was answered, relying upon the aforesaid two decisions of the Hon'ble Supreme Court, as below:-

> "Serious objections with regard to the maintainability of the petition for issuance of the writ in the nature of Habeas Corpus have been raised by submitting that the petition for habeas corpus for custody of the child against the parents is not maintainable.
>
> Such contention is liable to be rejected in view of the Hon'ble Supreme Court decision in the cases of **Tejaswini Gaud and Others Versus Shekhar Jagdish Prasad Tewari and Others (Supra) and Yashita Sahu Versus State of Rajasthan & Others (Supra)**.
>
> In the case of **Tejaswini Gaud and Others Versus Shekhar Jagdish Prasad Tewari and Others (Supra)**, the Hon'ble Supreme Court after taking into consideration earlier decision, held as under:-
>
> > "19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it

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is proved that the detention of a minor child by a parent or others was illegal and without any authority of law."

In a subsequent decision in the case of **Yashita Sahu Versus State of Rajasthan & Others (Supra)** also, it was authoritatively pronouncement by the Hon'ble Supreme Court as below:-

"**10**. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw (1987) 1 SCC 42, Nithya Anand Raghavan v. State (NCT of Delhi) (2017) 8 SCC 454 and Lahari Sakhamuri v. Sobhan Kodali (2019) 7 SCC 311 among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.

11. We need not refer to all decisions in this regard but it would be apposite to refer to the following observations from the judgment in Nithya Anand Raghavan (supra): (SCC pp.479-80, paras 46-47).

"**46**.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.

47. 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)"

12. Further, in the case of Kanika Goel v. State (NCT of Delhi) (2018) 9 SCC 578, it was held as follows: (SCC p.609, para 34)

"34. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of

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best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom, etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful"

13. In the present case since the wife brought the minor to India in violation of the orders of the jurisdictional court in USA, her custody of the child cannot be said to be strictly legal. However, we agree with the learned counsel for the appellant that the High Court could not have directed the appellant wife to go to the USA. The wife is an adult and no court can force her to stay at a place where she does not want to stay. Custody of a child is a different issue, but even while deciding the issue of custody of a child, we are clearly of the view that no direction can be issued to the adult spouse to go and live with the other strained spouse in writ jurisdiction."

In view of the aforesaid decisions of the Hon'ble Supreme Court, the objections with regard to maintainability of habeas corpus writ petition seeking custody of the child from the father, is not sustainable in law and, therefore, rejected."

Therefore, the first objection with regard to maintainability of the petition is repelled.

15. The second objection to the maintainability of the petition is raised on the ground that, even though, there exists an alternative remedy of making an application for custody of the child under the Act of 1890, without there being any exceptional circumstances, a petition has been directly filed before this Court. It is contended that various contentions raised by both the parties levelling allegations of a serious nature against each other go to the root of the matter to decide which way lies the welfare of the child. In a writ petition only summary enquiry could be held, therefore, in such circumstances instead of approaching this Court invoking its extraordinary jurisdiction for issuance of writ of

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habeas corpus, the petitioner ought to have approached jurisdictional and competent Court under the Act of 1890.

From the petitioner's side, this objection has been opposed mainly on the ground that application under Section 9 of the Act of 1890 could be moved only before the District Court having jurisdiction in the place where the minor ordinarily resides. The ordinary residence of the minor has throughout been in Dubai where he was born and brought up until stealthily removed by the mother to India. The minor is having temporary residence in India with his mother at Jaipur. Therefore, application under Section 9 of the Act of 1890 would not be maintainable.

To appreciate the aforesaid submission and to examine the tenability of the objection, it is useful to refer to the provisions contained in Section 9 of the Act of 1890, which is extracted for ready reference herein below:-

"**9. Court having jurisdiction to entertain application.-**

> **(1)** If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.
>
> **(2)** If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.
>
> **(3)** If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

Sub-section (1) of Section 9 of the Act of 1890 clearly provides that the law requires application for custody of the minor to be moved before the District Court having jurisdiction in the

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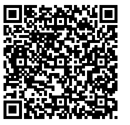

place where the minor ordinarily resides. Therefore, in order to confer territorial jurisdiction on the competent Court at Jaipur, it is necessary that the child must be ordinary resident of Jaipur.

16. The undisputed facts of the case are that the minor son of the petitioner and Respondent No.6 was born on 23.06.2017 at Dubai. At the time when the child was born, the petitioner as well as Respondent No.6 were residing at Dubai as the petitioner was employed at Dubai. It is not a case where during temporary residence at Dubai, the child was born otherwise the parents were ordinary residents in India. The admitted facts of the case are otherwise. Even Respondent No.6 does not dispute that she was married to the petitioner and then moved to Dubai where the petitioner and Respondent No.6 resided. After the child was born in June, 2017, though on few occasions, the parents had come to India but it was only to visit India and not that the petitioner or Respondent No.6 had permanently shifted back to India and resided there with all intention to continue when the petition was filed before this Court. It is also not in dispute that the minor after he was born in Dubai continued to reside with his parents at Dubai only. He was admitted in local school. The admitted facts which are on record are that on 15.03.2023, Respondent No.6 came to India along with the child with return tickets on 08.04.2022, but thereafter, she did not return back, obviously because certain disputes had surfaced and later on FIR against the petitioner was filed by Respondent No.6 on 23.04.2022. Relationship between the parties were strained and the dispute worsened with lodging of FIR followed by filing of the present petition by the petitioner before this Court in the month of

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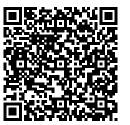

September, 2022. In the above said factual circumstances obtaining on record, it cannot be said that the minor was ordinarily resident of Jaipur within the meaning of the expression as contained in Section 9 of the Act of 1890.

17. In the case of **Ruchi Majoo Versus Sanjeev Majoo (Supra)**, the Hon'ble Supreme Court explained the meaning of the expression 'ordinary residence' of the minor, as contained in Section 9 of the Act of 1890, which reads as below:-

> "**22**. It is in the light of the above averments that the question whether the Courts at Delhi have the jurisdiction to entertain a petition for custody of the minor shall have to be answered.
>
> **23**. Section 9 of the Guardian and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the Court to entertain a claim for grant of custody of a minor. While sub-Section (1) of Section 9 identifies the court competent to pass an order for the custody of the persons of the minor, sub-sections (2) & (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor. Section 9(1) alone is, therefore, relevant for our purpose. It says:
>
>> "***9. Court having jurisdiction to entertain application*** - (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having Jurisdiction in the place where the minor ordinarily resides."
>
> **24**. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the `ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy."

The aforesaid dictum is based on the principle that whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact and it may at best be a mixed question of law and fact. It is further propounded that unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered

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without an enquiry into the factual aspects of the controversy. Thereafter, the expression "ordinarily resident" was further interpreted with reference to dictionary meaning as also interpretation in earlier precedents, as below:-

"**26**. We may before doing so examine the true purpose of the expression `ordinarily resident' appearing in Section 9(1) (supra). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and the foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise the expression. The word `ordinary' has been defined by the Black's Law Dictionary as follows:

> "Ordinary (Adj.) :Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."

The word `reside' has been explained similarly as under:

> "Reside: live, dwell, abide, sojourn, stay, remain, lodge. (Western-Knapp Engineering Co. V. Gillbank, 129 F 2d 135 (C.C.A. 9th Cir 1942) F2d 135, 136.), F 2d at p.136) To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as quality, to be vested as a right. (Bowden v. Jensen, 359 SW 2d 343 (Mo Banc 1962), SW 2d p. 349.)"

27. In Websters dictionary also the word `reside' finds a similar meaning, which may be gainfully extracted:

> "1. To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with in. 3. To be vested: with in"

28. In Annie Besant v. G. Narayaniah, AIR 1914 PC 41, the infants had been residing in the district of Chingleput in the Madras Presidency. They were given in custody of Mrs. Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the district Court of Chingleput for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chingleput Court was competent to entertain the application their Lordships of the Privy Council observed: (IA p.322)

> "…….The district court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards

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Act, 1890. By the ninth Section of that Act the jurisdiction of the court is confined to infants ordinarily residing in the district. It is in their Lordship's opinion impossible to hold that the infants who had months previously left India with a view to being educated in England and going to University had acquired their ordinary residence in the district of Chingleput."

29. In *Jagir Kaur and Anr. v. Jaswant Singh,* AIR 1963 SC 1521, this Court was dealing with a case under Section 488 Cr.P.C. and the question of jurisdiction of the Court to entertain a petition for maintenance. The Court noticed a near unanimity of opinion as to what is meant by the use of the word "resides" appearing in the provision and held that "resides" implied something more than a flying visit to, or casual stay at a particular place. The legal position was summed up in the following words: (AIR p.1524, para 8)

> "8. .… Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon, we would define the word "resides" thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case."

30. In *Kuldip Nayar v. Union of India & Ors*. 2006 (7) SCC 1, the expression "ordinary residence" as used in the Representation of People Act, 1950 fell for interpretation. This Court observed: (SCC p.96, paras 243-46)

> "**243**. Lexicon refers to Cicutti v. Suffolk County Council (1980) 3 All ER 689 (DC) to denote that the word "ordinarily" is primarily directed not to duration but to purpose. In this sense the question is not so much where the person is to be found "ordinarily", in the sense of usually or habitually and with some degree of continuity, but whether the quality of residence is "ordinary" and general, rather than merely for some special or limited purpose.
> **244.** The words "ordinarily" and "resident" have been used together in other statutory provisions as well and as per Law Lexicon they have been construed as not to require that the person should be one who is always resident or carries on business in the particular place.
> **245**. The expression coined by joining the two words has to be interpreted with reference to the point of time requisite for the purposes of the provision, in the case of Section 20 of the RP Act, 1950 it being the date on which a person seeks to be registered as an elector in a particular constituency.
> **246.** Thus, residence is a concept that may also be transitory. Even when qualified by the word "ordinarily" the word "resident" would not result in a construction having the effect of a requirement of the person using a particular place for dwelling always or on permanent uninterrupted basis. Thus understood, even the requirement of a person being "ordinarily resident" at a

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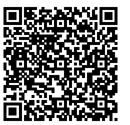

particular place is incapable of ensuring nexus between him and the place in question."

31. Reference may be made to *Bhagyalakshmi v. K. Narayana Rao* AIR 1983 Mad 9, *Aparna Banerjee v. Tapan Banerjee,* AIR 1986 P&H 113, *Ram Sarup v. Chimman Lal,* AIR 1952 All 79, *Vimla Devi v. Maya Devi,* AIR 1981 Raj. 211 and Giovanni Marco Muzzu (Dr.), In re AIR 1983 Bom 242, in which the High Courts have dealt with the meaning and purport of the expressions like `ordinary resident' and `ordinarily resides' and taken the view that the question whether one is ordinarily residing at a given place depends so much on the intention to make that place ones ordinary abode."

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Thereafter, the factual aspects of the case were examined. On facts, it was found that there was an agreement in writing between the parties, though alleged to have been obtained by coercion, to shift the child from USA to India. This was taken as expression of intention of the parties to permanently shift ordinary place of residence of the child from USA to India and on facts, it was then held that the application would be maintainable before the Court at Delhi. Thus, it was the intention of the parties expressed through an agreement in writing that shifting of the child from USA to India was treated as permanent shifting of ordinary place of residence.

18. In the case of **Lahari Sakhamuri Versus Sobhan Kodali (Supra)**, the expression "whether the minor ordinarily resides" was explained. The facts of that case were that the mother went to USA for her masters, but started working there. The father also went to USA and engaged in medical profession. Children were born in US and were US citizens, holding US passports. The parties purchased house also and son and daughter were studying in school. The children were, thus, in US from their birth. However, the relationship between the parents strained so much so that the mother filed petition in the Court in US seeking

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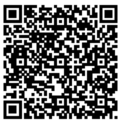

divorce as well as custody of minor children. An order was passed in the court proceedings directing both the parties not to change residence of the children which would affect the other party's ability to exercise custodial rights. While the proceedings were pending, on account of demise of member in the family of the mother, she travelled to India with both the minor children, but then instead of returning back, she filed petition in the Family Court at Hyderabad seeking custody of minor children as also injunction against the father, under the provisions of the Act of 1890. She, later on, also lodged FIR against the husband and family members. The father moved an application under Order 7 Rule 11 CPC with assertion that the Family Court at Hyderabad had no jurisdiction to decide the application for the custody of minor children as they are not the ordinary resident of Hyderabad which, however, came to be rejected. Simultaneously, father also filed a writ petition seeking issuance of writ of habeas corpus for protection. The appeal against the order of the Family Court and the writ petition were clubbed and decided by the High Court holding that the Family Court at Hyderabad had no jurisdiction as the children are not ordinarily residing within the jurisdiction of the Family Court, within the meaning of the expression as provided under Section 9 of the Act of 1890.

The Hon'ble Supreme Court noted the manifest facts on record which clearly manifested that the parties were residing in US though the marriage was solemnized in Hyderabad and further that the children were born in US became US citizens, it was observed as below:-

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"30. In the instant case, the facts on record clearly manifest that parties were residing in US since 2004-2005 and their marriage was solemnized in Hyderabad on 14-3-2008. Both the children were born in US on 14-03-2012 and 13-10-2014 and are US citizens with US passports. Notably, the appellant (Lahari Sakhamuri) filed application for divorce and custody of minor children in the US Court on 21-12-2016 and order came to be passed by the US Court on 21-12-2016. Despite that interim order, the appellant (Lahari Sakhamuri) came to India on 23-03-2017 and within 20 days of her arrival in India, filed an application on 12-04-2017 for custody of minor children in the Family Court, Hyderabad concealing her application for custody filed in the US Court. She also did not disclose that an order came to be passed by the US Court against her dated 22-05-2017 after hearing the counsel for the parties."

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In the above factual premise, it was held that the children were not ordinary residents of Hyderabad as envisaged under Section 9(1) of the Act of 1890. It was further held thus:-

"31. In the given facts and circumstances, we find no difficulty in upholding the opinion of the High Court that the minor children were not ordinary residents of Hyderabad (India) as envisaged under Section 9(1) of the Guardians and Wards Act, 1890. Resultantly, the application for custody of minor children filed before the Family Court, Hyderabad is rightly rejected by the High Court in exercise of power under Order 7 Rule 11 CPC. At the same time, when the orders have been passed by the US Court, the parties cannot disregard the proceedings instituted before the US Court filed at the instance of the appellant (Lahari Sakhamuri) who is supposed to participate in those proceedings."

Drawing support for conclusion, their Lordships in the Supreme Court relied upon its earlier decision in the case of **Smt. Surindar Kaur Sandhu Versus Harbax Singh Sandhu and Another (1984) 3 Supreme Court Cases 698**, as below:-

"34. This Court in Surinder Kaur Sandhu case (supra) was concerned with the custody of a child who was British citizen by birth whose parents had been settled in England after their marriage. The child was removed by the husband from the house and was brought to India. The wife obtained a judicial order from the UK Court whereby the husband was directed to hand over the custody of a child to her. The said order was later confirmed by Court of England and thereafter the wife came to India and filed a writ petition in the High Court of Punjab and Haryana praying for custody and production of the child which came to be dismissed against which the wife appealed to this Court. This Court keeping in view the 'welfare of the child', 'comity of courts'

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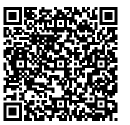

and 'jurisdiction of the State which has most intimate contact with the issues arising in the case' held thus:

> "10. We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offspring of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses (See International Shoe Company v. State of Washington 1945 SCC OnLine US SC 158: [90 L Ed 95 (1945) : 326 US 310], which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

19. In the case of **Bhagyalakshmi and Another Versus K. Narayan Rao (Supra)**, the expression "ordinarily resides" in Section 9(1) of the Act of 1890 came up for consideration before the Madras High Court. It was held that the words connote, a regular, normal or settled home and not a temporary or forced one to which a minor might have been removed either by stealth

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or by compulsion. The place of residence at the time of filing of the petition under the Act of 1890 does not help to ascertain whether a particular court has jurisdiction to entertain the proceedings or not, as it would be easy to stifle proceedings under the provisions of the Act by the mere act of the moving the minors from one place to another and consequently from one jurisdiction to another. Mere temporary residence or residence by compulsion at a place however long, cannot be equated to or treated as the place of ordinary residence. The aforesaid view of the Madras High Court was also affirmed by the Apex Court in the case of **Ruchi Majoo Versus Sanjeev Majoo (Supra).**

20. Present is not a case where the Respondent No.6 has tried to setup even a case that she and her husband, the petitioner had an intention of temporary residence in Dubai or that under an agreement, oral or in writing, she had shifted to India, permanently with intention to permanently shift place of ordinary residence of the minor from Dubai to India. Present appears to be a case where the Respondent No.6 came to India with the minor with return tickets giving impression to her husband that she would be returning with child as per return schedule, but she did not return obviously because she did not want to go back but to part away from the husband and lodged FIR against him on certain allegations. The facts of the case certainly shows that it is not a case where she stealthily removed the child but it is a case where she removed the child with her by giving false impression to her husband that she would be returning soon but suppressing that she had no intention to come back. She very well knew that had she disclosed that she would not be returning and would be

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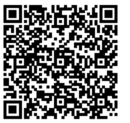

taking action against the petitioner, it would be difficult for her to remove the child.

21. In view of the above, it has to be held that the Court at Jaipur has no territorial jurisdiction under Section 9 of the Act of 1890 and, therefore, that remedy would not be available to the petitioner. Therefore, the second objection is also rejected.

22. The third objection to the maintainability of the petition is on the submission that there is inordinate delay in filing of the writ petition and, hence, the discretion may not be exercised and the petition may be dismissed only on this ground. The facts of the case which are floating on its surface are that there is no history of any litigation between the parties until Respondent No.6 moved to India on 15.03.2023 along with minor. Annexure/P-23 annexed with the petition shows that there was a return ticket of 08.04.2022. The petitioner has also placed on record while staying in India, Respondent No.6 withdrew INR 50,000/- from her Equitas bank account and requested the petitioner to transfer more money to meet out expenses for attending her sister's wedding. Annexure/P-24 supports such statement. This dispute seems to have surfaced only in the month of April when FIR was lodged on 23.04.2022 against the petitioner alleging dowry demand, domestic & physical violence and commission of offences under Sections 406, 498A & 323 of the Indian Penal Code, 1860. The petitioner came to India on 07.06.2022 to record his statement in the Police Station at Jaipur. It is evident from the petitioner's pleadings and documents that the petitioner filed an application on 14.09.2022 before the Dubai Court which directed Respondent No.6 to return the passport of the child to the

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petitioner. Soon thereafter, the petitioner came to India and filed present writ petition on 17.09.2022.

23. It is well settled legal position that inordinate delay in approaching the Court may render the habeas corpus petition liable to be dismissed in the matter of child custody cases.

24. The law requires prompt action by one who alleges that the child was removed from his/her native state and on that basis seeking indulgence of the writ court for issuance of writ of habeas corpus.

25. In the case of **Nithya Anand Raghavan Versus State (NCT of Delhi) and Another (Supra)**, It has been held that in exercise of summary jurisdiction, the Court must be satisfied and of the opinion that the proceedings instituted before it were 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 there. Applying the aforesaid principle to the present case, as narrated herein above, it cannot be said that the petitioner did not take prompt steps to file petition before this Court in India. Therefore, the third objection is also rejected.

26. The petitioner's case mainly rests upon the contention that the minor son was stealthily and illegally removed from his native country, i.e., Dubai and brought to India to deprive the petitioner, who happens to be the natural guardian of the minor, as provided under Section 6 of the Act of 1956. The course legally open for the Respondent No.6 was to institute case before the jurisdictional Court in Dubai seeking custody of the child through a detailed enquiry rather than betraying the petitioner as if she was going to

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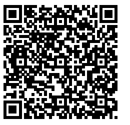

India for few days with a return ticket of 08.04.2022. The serious allegations required detailed enquiry, which could be done only in properly instituted proceedings before the Court of competent jurisdiction in Dubai where the parties would be at liberty to lead oral and documentary evidence and it would be fair to the petitioner and Respondent No.6 both that those allegations and counter allegations are enquired into properly and just decision is arrived at as to where lies the welfare of the minor child and whether the custody should be given to the petitioner or to Respondent No.6. The Courts in India does not have jurisdiction and the enquiry in writ petition being summary in nature, removal of minor son from Dubai to India must be held to be illegal. As the petitioner is the natural guardian, the onus is on the Respondent No.6 as to why the petitioner who is natural guardian, should not continue to have the custody of the child unless it is proved that custody of the child with the father would result in grave injury or danger to the physical and mental health of the child. In the alternative, it is submitted that even in the present summary enquiry, upon balancing relevant factors determining welfare of the child, on comparative analysis, the custody of the child may be handed over to the petitioner as the custody of the child with the petitioner is far more beneficial as compared to his custody with the mother, towards overall welfare of the child including health, education, comfort and other aspects. It has also been stated that an order has been passed by the Dubai Court directing mother to return the passport of the child which means that the custody of the child with the mother is illegal.

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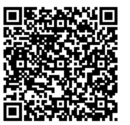

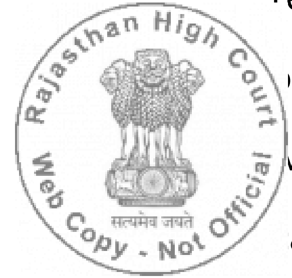

27. The claim of the petitioner for custody of his minor son, based on statutory preference as natural guardian, engrafted in Section 6 of the Act of 1956 cannot be accepted dehors other relevant considerations as relevant factors in determining welfare of the minor, that being the paramount consideration. In other words, an application for grant of custody of a minor by the father cannot be allowed only on the ground that he happens to be the natural guardian as hindu father under Section 6 of the Act of 1956. It is always subject to the paramount consideration being welfare of the minor and it is the duty of the Court, adopting parens patriae approach, to examine all relevant aspects to arrive at just conclusion as to where lies the welfare of the minor irrespective of who is the natural guardian. In appropriate cases, if the Courts comes to the conclusion that welfare of the minor would be adversely affected or life and limb of the minor would be in grave danger in granting custody of the minor in the hands of his natural guardian, Courts are not bound to mechanically order handing over the custody of the minor to the natural guardian only for that reason alone. Plethora of the decisions on this aspect, a few of which have been considered herein below, propound the aforesaid principle succinctly stated and re-stated.

28. In the case of **Githa Hariharan (Ms) and Another Versus Reserve Bank of India and Another (Supra)**, while examining challenge to the constitutional validity of Section 6(a) of the Act of 1956 on the ground of alleged violation of Articles 14 & 15 of the Constitution of India, their Lordship's in the Supreme Court placed following interpretation:-

"Per A.S. Anand, C.J. and M. Srinivasan, J"

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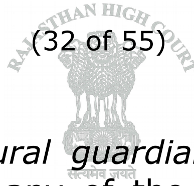

"**7**. The expression "*natural guardian*" is defined in Section 4(*c*) of the HMG Act as any of the guardians mentioned in Section 6 (*supra*). The term "*guardian*" is defined in Section 4(*b*) of the HMG Act as person having the care of the person of a minor or of his property or of both, his person and property, and includes a natural guardian among others. Thus, it is seen that definition of "guardian" and "natural guardian" do not make any discrimination against mother and she being one of the guardians mentioned in Section 6 would *undoubtedly* be a *natural guardian* as defined in Section 4(*c*). The only provision to which exception is taken is found in Section 6(a) which reads *"the father, and after him, the mother"*. (emphasis ours) That phrase, on a cursory reading, does give an impression that the mother can be considered to be the natural guardian of the minor only *after the lifetime of the father.* In fact, that appears to be the basis of the stand taken by the Reserve Bank of India also. It is not in dispute and is otherwise well settled also that the welfare of the minor in the widest sense if the paramount consideration and even during the lifetime of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of the court, where to do so would be in the interest of the welfare of the minor.

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8. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a Court of law, the word 'after' in the Section would have no significance, as the Court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumed importance only when the mother acts as the guardian of the minor *during* the life time of the father, without the matter going to the Court, and the validity of such an action is challenged on the ground that she is *not* the legal guardian of the minor in view of Section 6(*a*) (*supra*). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as a guardian only *after* the life time of the father and not during his life time.

10. We are of the view that the Section 6(*a*) (*supra*) is capable of such construction as would retain it within the Constitutional limits. The word 'after' need not necessarily mean 'after the life time'. In the context in which it appears in Section 6(*a*) (*supra*), it means '*in the absence of*,' the word 'absence' therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be *absent* and the mother being a recognized natural guardian, can act validly on behalf of the minor as the

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guardian. Such an interpretation will be the natural outcome of harmonious construction of Section 4 and Section 6 of HMG Act, without causing any violence to the language of Section 6(*a*) (*supra*).

"Per Umesh C. Banerjee, J."

40. The whole tenor of the Act of 1956 is to protect the welfare of the child and as such interpretation ought to be in consonance with the legislative intent in engrafting the statute on the Statute-Book and not dehors the same and it is on this perspective that the word 'after' appearing in section 6(*a*) shall have to be interpreted. It is now a settled law that a narrow pedantic interpretation running counter to the constitutional mandate ought always to be avoided unless, of course, the same makes a violent departure from the Legislative intent in the event of which a wider debate may be had having due reference to the contextual facts.

44. The expression 'natural guardian' has been defined in Section 4(*c*) as noticed above to mean any of the guardians as mentioned in section 6 of the Act of 1956. This section refers to three classes of guardians, viz., father, mother and in the case of a married girl the husband. The father and mother, therefore, are natural guardians in terms of the provisions of Section 6 read with Section 4(*c*). Incidentally, it is to be noted that in the matter of interpretation of statute, the same meaning ought to be attributed to the same word used by the statute as per the definition section. In the event, the word 'guardian' in the definition section means and implies both the parents, the same meaning ought to be attributed to the word appearing in section 6(*a*) and in that perspective mother's right to act as the guardian does not stand obliterated during the lifetime of the father and to read the same on the statute otherwise would tantamount to a violent departure from the legislative intent. Section 6(*a*) itself recognises that both the father and the mother ought to be treated as natural guardians and the expression 'after' therefore shall have to be read and interpreted in a manner so as not to defeat the true intent of the legislature.

46. In our opinion the word 'after' shall have to be given a meaning which would sub-serve the need of the situation, viz., the welfare of the minor and having due regard to the factum that law courts endeavour to retain the legislation rather than declaring it to be a void, we do feel it expedient to record that the word 'after' does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as 'in the absence of' - be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word 'after' as used in Section 6 then and in that event, the same would be in accordance with the intent of the legislation, viz., the welfare of the child."

29. In the case of **Gaurav Nagpal Versus Sumedha Nagpal (Supra)**, primacy of welfare of child over the statutory rights

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under Section 6(a) of the Act of 1956 was clearly stated as below:-

> "**43**. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the `welfare of the child' and not rights of the parents under a statute for the time being in force.
>
> **44**. The aforesaid statutory provisions came up for consideration before Courts in India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.
>
> **46**. *In Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840*, this Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The *power* and *duty* of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.
>
> **49**. In *Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698*, this Court held that Section 6 of the Act constitutes father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. [See also *Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42* and *Chandrakala Menon v. Vipin Menon (Capt.), (1993) 2 SCC 6*]."

30. In another decision in the case of **Roxann Sharma Versus Arun Sharma (Supra)**, the principle of primacy of welfare of the minor over the statutory rights of parents under the Act of 1956 and provisions contained in Section 6 (a) of the Act of 1956 was explained thus:-

> "**10**. Section 6 of the HMG Act is of seminal importance. It reiterates Section 4(*b*) and again clarifies that guardianship covers both the person as well as the property of the minor; and then controversially states that the father and after him the mother shall be the natural guardian of a Hindu. Having said so, it immediately provides that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. The significance and amplitude of the proviso has been fully clarified by the decisions of this Court and very briefly stated, a proviso is in the nature of an exception to what has earlier been generally prescribed. The use of the word "ordinarily" cannot be overemphasised. It ordains a presumption, albeit a rebuttable one, in favour of the mother. The learned Single Judge appears to have lost sight of the significance of the use of word "ordinarily" inasmuch as he has

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observed in paragraph 13 of the Impugned Order that the Mother has not established her suitability to be granted interim custody of Thalbir who at that point in time was an infant. The proviso places the onus on the father to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of the Parliament or the Legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(*a*) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this Section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

31. In the case of **Tejaswini Gaud and Others Versus Shekhar Jagdish Prasad Tewari and Others (Supra)**, the principles stated and restated hereinabove have been concretised as below:

"***Welfare of the minor child is the paramount consideration***

26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

27. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, in *Nil Ratan Kundu v. Abhijit kundu*, (2008) 9 SCC 143, it was held as under: (SCC pp. 427-28, paras 49-52)

"*49. In Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148,* the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of

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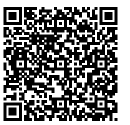

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the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, in *M.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Mad 315,* the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51. In *Kamla Devi v. State of H.P*. AIR 1987 HP 34, the Court observed: (SCC OnLine HP Para 13)

> '*13*. … the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.'

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and wellbeing of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, *nay* bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

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32. We are, therefore, of the view that only on the basis that the petitioner has the statutory preference as natural guardian being father, the custody of the child cannot be mechanically ordered to be returned to the petitioner but the welfare of the child would receive primacy of the consideration over and above statutory rights of the guardian. As to how such a claim of custody of the child by the natural guardian, declared under statute, has to be approached, shall be dealt with at appropriate stage in our decision to follow hereinafter.

33. The present case deals with a situation where a minor has been removed from the native state/country and then brought to India coupled with the fact that the petitioner who claims return of the child in his custody for being taken back to native state happens to be the natural guardian provided under statute governing personal laws, like in the present case, under Section 6(a) of the Act of 1956. There have been cases where the minor was removed from the native state to India despite there being an order of grant of custody of the child to the natural guardian in that case. In those cases, cited before us, a common thread running throughout is the aspect of welfare of the minor being given primacy overall other considerations be it right of a natural guardian or be it a case where the child has been removed from his native country and brought to India. The Court's approach invariably has been that of parents patriae rather than right oriented as claimed by respective parties, being the parents of the minor. As to what are the relevant considerations have also been highlighted in those decisions providing beacon light to all the Courts to deal with such peculiar complex situation where the

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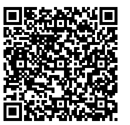

parents are contesting claim of custody of a minor removed from native country to India. In cases which have been directly dealt with by the High Court and the Supreme Court, nature of enquiry that can be made by the writ court, has also been explained. As aforesaid issues were considered as intertwined with each other, we shall now survey those decisions, culling out applicable broad principles and then proceed to deal with the case in hand on its own peculiar facts and circumstances in order to conclude keeping in view the welfare of the minor as the paramount consideration, of course, with parens patriae approach.

34. In one of its earlier decision in the case of **Dhanwanti Joshi Versus Madhav Unde (Supra)**, the Apex Court dealt with rival claim of custody of the child in the factual background where the minor was removed by his mother from foreign jurisdiction (USA) to India. The father had sought custody of the child by the Court in USA. After the child was removed and brought to India, an ex-parte order of temporary custody of the child in favour of the father was passed, followed by an ex-parte order granting permanent custody of the child to the father. The mother who had brought the minor to India approached the Civil Court not only for declaration that her marriage was null and void but also claimed maintenance for her and the child. She sought a declaration that the divorce decree passed by the US Court was not binding on her as also seeking injunction against her husband (father of the child) from removing the child from her. Father then filed Habeas Corpus Petition in the High Court. The writ petition was dismissed allowing the mother to retain the custody of the minor, granting visitation rights to the father. Mother filed an application seeking

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permanent guardianship of the person/property of her minor son by filing application under Section 13 of the Hindu Minority and Guardianship Act. She was appointed as permanent & lawful guardian of the person/property of the child as that was an ex-parte order, though the father moved an application for setting aside, it was dismissed. Appeal was also dismissed by the High Court. In this background, that matter travelled up to the Apex Court, rival claim for custody of the child was examined. It was argued that the mother had removed the child from US to India violating court orders passed in that country. Taking into consideration that the India is not a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". It was propounded as below:-

> "**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 o the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in *McKee vs. McKee* (1951 AC 352), 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., Re 1974 (1) All ER 193 (CA). As recently as 1996-1997, it has been held in P(A *Minor*) (*Child Abduction: Non-Convention Country*), Re (1996) 3 FCR 233, CA: by Ward, 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. She 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."

35. In the case of **Sarita Sharma Versus Sushil Sharma (Supra)**, the factual background leading to rival claim of custody of minor between the father and the mother was that while

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parents were residing in US, proceedings for dissolution of marriage were instituted by the husband in Taxas, USA wherein, interim orders were passed from time to time with respect to the care and custody of the children and visitation rights. During pendency of the divorce proceedings, mother of the children removed the children from USA and came to India. The court at US, taking note of the fact that mother had gone away with the children, passed an order for putting the children in the care of father and mother was given only visitation rights. Thereafter, the mother picked up the children from father's residence in exercise of her visitation rights and without there being any order of the Court having jurisdiction, she fled away from USA to India. The Court of competent jurisdiction in USA, while granting decree of divorce, also passed an order declaring that the sole custody of the children shall be with the father and the mother was denied even the visitation rights. Placing such facts and documents, the father filed writ petition in the High Court seeking custody of the children mainly on the ground that the children were illegally removed by the wife from their native country and in violation of the orders passed by the Court there. Father’s claim was also based on his preferential rights under Section 6(a) of the Act of 1956. Relying upon the decision in the case of **Dhanwanti Joshi Versus Madhav Unde (Supra)**, it was held that it will not be proper to be guided entirely by the fact that the mother had removed the children from USA despite the order of the Court of that country and it was held that the decree passed by the American Court cannot override the consideration of welfare of the minor children. The case was examined keeping in forefront

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welfare of the minor as the paramount consideration. It was held as below:-

> "6. Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A. despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the Welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of the mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the Court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court. There is a possibility that both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights."

36. There is long list of decisions, some of which have been relied upon by the respective parties, which have dealt with peculiar situation where the minor was removed from his native

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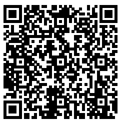

country and brought to India by one of the parents followed by petition/application seeking custody of the child. In some of the cases, the argument raised before the Court was that the minor had been removed from the lawful custody of the parent in whose favour custody orders were passed by the Court of the native country and, therefore, the removal of the child was alleged to be illegal. Submissions were made before the Court that only on this ground the minor is required to be returned to his native country. Similar submissions were made in those cases that though there was no order of custody in favour of the parent, the custody of the child was sought only on the ground that the child has been removed illegally from the native country and brought to India.

Irrespective of whether or not there was any custody order in favour of one of the parents, in all those cases, consistent approach of the Apex Court has been to examine the case in parents patriae jurisdiction, keeping in forefront as paramount consideration the welfare of the child. In ultimate analysis in some cases, the Court has directed the child to be returned to his native country, whereas, in some of the cases, it has not been done. Therefore, each case has turned on its own facts and circumstances.

37. In the case of **Lahari Sakhamuri Versus Sobhan Kodali (Supra)**, in the factual backdrop of the children having been removed from US, in a Habeas Corpus Petition filed in India, the Apex Court examined the matter from the point of view as to where lies the welfare of the minor.

38**.** In the case of **Tejaswini Gaud and Others Versus Shekhar Jagdish Prasad Tewari and Others (Supra)** also, the

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similar situation existed where the minor was removed from native country and brought to India followed by petition for Habeas Corpus filed by the parent residing in the native country. Relying upon the principle laid down in **Nithya Anand Raghavan Versus State (NCT of Delhi) and Another (Supra) and V. Ravi Chandran Versus Union of India, (2010) 1 Supreme Court Cases 174**, the rival claim of the parents for custody of the child was examined, to find out where lies the welfare of the minor irrespective of the fact that the child was removed from native country and brought to India by one of the parent.

In the case of **Yashita Sahu Versus State of Rajasthan and Others (Supra)** also, in the similar backdrop of removal of the child from foreign country, the welfare of the child was kept as paramount consideration.

39. Therefore, it can be safely concluded that the consistent view even in cases where a minor has been removed from his native country and brought to India, while examining claim of custody by the parent, the Court's approach has been guided on the principle of welfare of the child as paramount consideration.

40. In the case of **Ruchi Majoo Versus Sanjeev Majoo (Supra)**, the scope and ambit of enquiry in a petition for Habeas Corpus seeking custody of the child was explained as below:-

> "**58**. Proceedings in the nature of Habeas Corpus are summary in nature, where the legality of the detention of the alleged detenue is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extra ordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the

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minor depending upon how the court views the rival claims, if any, to such custody.

59. The Court may also direct repatriation of the minor child for the country from where he/she may have been removed by a parent or other person; as was directed by this Court in V. Ravi Chandran (Dr.) Versus Union of India, (2010) 1 SCC 174 & Shilpa Aggarwal Versus Aviral Mittal, (2010) 1 SCC 591 cases or refuse to do so as was the position in Sarita Sharma Versus Shushil Sharma, (2000) 3 SCC 14. What is important is that so long as the alleged detenue is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenue is within its territorial jurisdiction."

41. The petitioner, father has sought custody of the child by alleging that the child has been illegally removed from Dubai to India by the respondent-mother. His case is that the child was born in Dubai, therefore, Dubai is the natural habitat and has the 'most intimate contact' and 'closest concern' to the child and, therefore, child ought to be returned to Dubai so that he can live in his natural environment, receive the love, care and attention of his father and paternal grandparents, resume his schooling and be with his teachers, peers and friends. On the principle of 'court of intimate contact & closest concern' and 'comity of courts', the child should be directed to be returned to Dubai under custody of the petitioner. It has also been stated that the petitioner is financially more sound as compared to the mother. She is dependent on her husband, i.e., the petitioner and, in-fact, she is being financially supported by making payment of Rs.20,000/- per month. She left job in the year 2016 and, thereafter, she has not been earning and, therefore, she is financially incompetent to take care of schooling and all other needs of the son, whereas, the petitioner is earning handsomely and is financially affluent. It is also the case of the petitioner that the minor was admitted in

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the school at Dubai. Removal of the minor after five years from Dubai has resulted in his uprooting from Dubai. Attack has also been laid on the conduct and moral of Respondent No.6 by stating that she has been making false complaints and allegations against the petitioner and his family members and her conduct does not entitle her to custody of the child as custody of the child with Respondent No.6 is going to be harmful. She does not have ability to provide access to good schooling. She is person with immoral character and degraded value system.

42. In the supplementary affidavit, which has been filed by Respondent No.6 during pendency of the proceedings, it has been disclosed to the Court that the mother has secured a job. It has also been stated that the child has been admitted in School at Jaipur. Salary slip, photocopy of the certificate of minor Ayaansh and his school performance have also been placed on record.

43. True it is that initially when the petition was filed, Respondent No.6 did not have very good financial means except that she was mainly dependent on her father, though qualified to undertake employment, but later on she has secured job for herself and there is no reason to disbelieve the documents, which have been placed by her. The employment letter and salary slip show that she would be paid Rs.3,00,000/- per year. However, if we compare her financial status with that of the petitioner, the petitioner has far better financial means and effluence as compared to Respondent No.6. The petitioner has setup his own company and claims to have made revenue equivalent to Rs.9.40 crores in the calendar year 2023. Comparative statement of the

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financial status, therefore, clearly shows that the petitioner is far more financially competent as compared to Respondent No.6.

44. Respondent No.6 has levelled allegations against the petitioner that he is drug and sex addict. The allegations of the petitioner being drug addict are not supported with any clinching material. The petitioner has placed on record his drug test. This Court had also directed the petitioner to be subjected to drug test. None of the report supported the case of Respondent No.6 of petitioner being a drug addict.

45. The allegation of petitioner being sex addict is based on certain WhatsApp chat, which have been seriously disputed by the petitioner. If the Respondent No.6 has made such a serious allegation, it is for the Respondent No.6 to establish by leading clinching evidence and mere WhatsApp chat, which have also been seriously disputed by the petitioner, could not be made a basis to prove such serious allegation against the petitioner.

46. Though the petitioner has alleged that Respondent No.6 has made false allegations regarding commission of offence of dowry, domestic violation, in these proceedings, this Court would not undertake any trial to decide either way. The fact remains that the Respondent No.6 has lodged FIR and a criminal case has also been registered and charge-sheet filed against the petitioner. The case is pending trial.

47. Though the financial condition of the petitioner is far more better than Respondent No.6, that by itself cannot be taken as a decisive factor to direct handing over the custody of the minor with the father.

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The allegation against Respondent No.6 that she had been making false complaints and allegations and has nurtured hate against the parents and relative of the petitioner is not a factor to hold that Respondent No.6 is not suitable to have the custody of the child. Naturally once there are allegations and counter allegations by the petitioner and Respondent No.6 against each other, they are required to prove all cases against each other. All those cases would require detailed enquiry in Civil and Criminal courts respectively. Unless there is clinching material brought on record by the respective parties in support of those allegations which on the face of it warrant drawing inference of one of them being unsuitable to have the custody of the child, this Court would hold that there is no element of unsuitability as such either of the petitioner or the Respondent No.6 so as to say that custody of the child with either of them would be detrimental to the life and security of the minor. The parties might be quarreling with each other and making wild allegations, there is nothing on record which shows that either the petitioner or the Respondent No.6 has treated the minor with such behavior which would render it unsafe to continue the custody of the child with either of them.

48. One of the main submissions of the petitioner has been that the child was born in Dubai, therefore, he is the natural resident of that place. During the course of arguments, however, it could not be disputed that none of the parties including minor son have acquired citizenship of Dubai. True it is that the petitioner has been at Dubai for long but it cannot be said that he has become a citizen of Dubai. The minor son of the parties was born in Dubai and, therefore, he would be a natural resident of the area.

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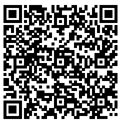

However, it is not a case where the child has remained in Dubai for a very long time so much so he has developed close and intimate contact of teachers, friends, peers and was accustomed to lifestyle and culture of Dubai that his removal from Dubai has the effect of uprooting. Admittedly, at the time when the child was removed from Dubai and brought up to India, he was merely five years of age. At such a tender age, the child remains mostly in the care, company and affection of his parents and more particularly his mother. As the child grows, his dependency on the parents gradually reduces and he gets accustomed to his surroundings and develops a natural environment around him because of his long period of residence in a particular place. However, in the present case, it is difficult to hold that the child has been uprooted on account of his removal at the age when he was only five years. One can not ignore that whether in Dubai or in India, the minor son has been under constant care and company of his mother. Certainly the father may have been showering his affection and the child may have remained in his company along with mother, but looking to the age of the child when he was removed from Dubai, it cannot be said that he was so accustomed to his surroundings and environment that it has resulted in his uprooting. It would take more time for a child to establish his roots as his place of residence.

49. Weighing pros and cons on the basis of the pleadings on affidavit made by the respective parties, except the father having better financial condition, all other factors are almost at par but the edge is provided in favour of the mother because it is the mother who is closest to the child of tender age because of child's

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dependency on his mother for everything. The child is seven and eight years old by now. Throughout, whether at Dubai or in India, he has been under constant care and company of his mother though detached from father's company for the last about two years.

If we look at the entire facts and circumstances from the above point of view, removing the child at this age from the custody of the mother and handing over to the father and that too returning him to Dubai with father where it would be extremely difficult for the mother to meet her child, in our considered opinion, may not be in the best interest of the child. In our opinion, the present age of the child is such that his welfare would be best sub-served if he is allowed to continue in the custody of his mother for some more time and it is only when the expenses of his education and other requirements go on higher side in times to come that the interest of the child may be adversely affected in allowing him to continue the custody of his mother, unless, of course the mother improves her financial capacity in such a manner that she is able to cater to all the needs of the child including his health, education, extracurricular activities and all other needs for his overall physical and mental growth in appropriate manner.

50. Father being financially effluent, it would be easier for him to frequently travel to India and visit the child rather than the mother going to Dubai to meet her minor son. Therefore, the arrangements of child being in the custody of the mother would be more beneficent and in the best interest of the child as in that case, the child would be in a position to get not only care and

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affection of the mother but also constant support, meeting and guidance of the father. This is also one factor which goes in favour of Respondent No.6 continuing with the custody of the minor.

51. Learned counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Lahari Sakhamuri Versus Sobhan Kodali (Supra)**, where the Court found that the children were not only born in US but had become US citizen with US passports. Further that was a case where the children were removed against an order of granting temporary and physical custody of the children with the father. Moreover, the Court took into consideration that observation of the US Court in the matter of custody reflected that principle of welfare of the children was taken into consideration by the US Court in passing of the order of custody in favour of the father and no remedy was taken by the mother against the said order. Taking into consideration cumulative effect of aforesaid factors, which are absent in the present case, the Court directed return of the children to US so as to enjoy natural environment.

52. Learned counsel for the petitioner has also placed reliance on the decision of the Hon'ble Supreme Court in the case of **Tejaswini Gaud and Others Versus Shekhar Jagdish Prasad Tewari and Others (Supra)**, wherein the contested cause of custody was between the natural guardian, i.e., the father on one side and sisters of deceased mother of the child on the other side. It was noted that the child went into the custody of the sisters of the mother in strange and unfortunate situation. During the period, the father was extremely sick and hospitalized, the sisters of the mother had taken care of the child. Relying upon the

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decision in the case of **Rosy Jacob Vesus Jacob A. Chakramakkal, (1973) 1 Supreme Court Cases 840**, it was held that the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor child in the context of all the relevant circumstance, the child lost her mother when she was merely fourteen months and if she is left in the custody of the sisters of her mother, she would be deprived from the love of her father for no valid reason when there is nothing against father who happens to be highly educated person and is working in a reputed position with stable economic condition. In the present case, rival claim of custody is between the father and the mother, therefore, the aforesaid decision does not come to the aid of the petitioner.

53. Learned counsel for the petitioner has also placed reliance on the decision of the Hon'ble Supreme Court in the case of **Nithya Anand Raghavan Versus State (NCT of Delhi) and Another (Supra).** In that case, it was found that both father as well as mother of the child were of Indian origin. After marriage, father had gone to U.K. as a student. The couple shifted to U.K. and stayed there. Though the mother took up employment but she had to come to her parents house in Delhi where the child was born. Because of the dispute between the husband and wife, the wife stayed in India with the child. It was found that the child was throughout residing with the mother and her grandparents unlike stay in U.K. where she lived in a nuclear family of the three with no extended family. It was found that the child has been schooling in India for past over one year. It was also taken into consideration that the child would be more comfortable and feel

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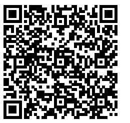

secured to live with her mother, who can provide her love, understanding, care and guidance for her complete development of character, personality and talents. The only additional factor which weighed in the mind of the Court was that it was a case of girl child. Taking into consideration the totality of the circumstances, the Court was of the view that it would be in the best interest of the child that the child should remain in the custody of her mother. It is noticeable that in that case, the child was removed by the mother from U.K. in violation of Court's order directing production of child where issue of wardship was pending consideration. Taking into consideration that India is non signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction", the custody of the child was allowed to remain with the mother.

54. Learned counsel for the petitioner has heavily relied upon the decision of the Hon'ble Supreme Court in the case of **Yashita Sahu Versus State of Rajasthan and Others (Supra).** That was, on facts, a case where the child was removed and shifted to India in violation of the US Court order. The principle of best interest of the child was again applied notwithstanding orders passed by a foreign Court. Various factors like age of the child, nationality of the child, proceedings in foreign court, visa issue etc. were taken into consideration and in the finality, the custody of the child was allowed in the hands of the mother. The Court had taken into consideration the affidavit filed by the father. Similar affidavit has been filed in the present case also.

55. Learned counsel for the petitioner has also placed reliance on the decision of the Hon'ble Supreme Court in the case of

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Rohith Thammana Gowda Versus State of Karnataka and Others (Supra). That was a case where the foreign Court had passed orders of return of the child to USA and there was nothing on record to show that such an order passed on the second occasion was vacated subsequently. The child in that case was a boy aged about eleven years and was a naturalised US citizen with an American passport and his parents were also holders of permanent US Resident Cards, which were not given due attention. On facts, it was also found that the child was born in 2011 and till 2020, he was living and studying and this factor was also not taken into consideration by the High Court against which the petition was preferred before the Supreme Court.

56. It would, thus, be clear that each case has turned on its own facts and circumstances and no straitjacket conclusion could be drawn merely because the father has a better financial condition as compared to the mother.

57. Accordingly, keeping in view the best interest of the child who is aged seven-eight years and taking into consideration that the mother has also started working at Jaipur and the allegations and the counter allegations made by the parties against each other are not substantiated from any clinching material, keeping all other things equal and at par, particularly taking into consideration that the child has consistently been with his mother ever since, he was born and that mother does not suffer from any disqualification of such a nature that would render the child in grave risk and injury with the mother and also taking into consideration that it would be easier for the father to exercise visitation rights as compared to the mother, we are of the view

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that the child should continue in the custody of the mother rather than directed to be returned to Dubai.

58. However, the father would be entitled to effective visitation rights in the manner that whenever father visits India and wishes to meet the child, the respondent No.6 shall be obliged to allow full access to the petitioner as not only mother but father is equally important for welfare of the child. In times to come, the son may require financial support from his father for undertaking higher studies followed by other requirements which are at present at very low level looking to his age and other needs. Therefore, it is of utmost importance that irrespective of the differences and disputes between the parents, the child grows with the care, love affection, bonding and attachment equally with the father as well as the mother. Therefore, the Respondent No.6 is duty bound to ensure that whenever father seeks access to child, he is readily provided access to child. Ordinarily weekend, i.e., Saturday & Sunday would be comfortable for the child to spend time with his father. Once the father intimates the mother regarding his arrival in India expressing his intention to meet the child, he would be entitled to have visitation rights and the company of the child from 10.00 am to 6.00 pm on Saturday & Sunday. Moreover, if there are vacations and holidays in the school, on every such vacation and every such holiday, the father would have access to the child during the hours stated herein above. Subject to the consent of the mother, the child may be taken for outing, shopping and other activities by the father. It is advisable to both the parents that their dispute should not affect their son and he is not deprived of love, care and attention of

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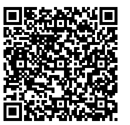

both of them. This Court would appreciate if Respondent No.6 agrees to go along with the petitioner and the child for outing for such period as both may agree. That would be a gesture on the part of the parents which will be beneficial to the welfare of the child despite there being some pending disputes. In case, father wants to interact with the child through video conferencing from Dubai, on the request made by the petitioner, Respondent No.6 shall be obliged to provide proper interaction facility to the child so that the father interacts with the child through video conference system.

59. Any change in circumstances, the parties will be entitled to again approach this Court for appropriate clarification/ modification of this order with regard to custody and visitation rights.

60. If in future, it is found that the Respondent No.6 is violating the court order and avoiding access of the child on lame excuses, this Court may be inclined to vary or modify the present order regarding custody and/or visitation both.

61. The petition is, accordingly, disposed off.

(SHUBHA MEHTA),J (MANINDRA MOHAN SHRIVASTAVA),CJ

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