2022 LiveLaw (SC) 48

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

AJAY RASTOGI; ABHAY S. OKA, JJ.

January 12, 2022

CRIMINAL APPEAL NO. 82 OF 2022 (Arising out of SLP (Crl.) No. 7129 of 2021)

VASUDHA SETHI & ORS. *v.* **KIRAN V. BHASKAR & ANR.**

Hindu Minority and Guardianship Act, 1956; Section 13 - Custody petition - The consideration of the well-being and welfare of the child must get precedence over the individual or personal rights of the parents - the rights of the parents are irrelevant when a Court decides the custody issue. *(Para 26, 32)*

Constitution of India, 1950; Article 226 - Habeas Corpus Petition - Custody Petition - The issue of custody of a minor, whether in a petition seeking habeas corpus or in a custody petition, has to be decided on the touchstone of the principle that the welfare of a minor is of paramount consideration. The Courts, in such proceedings, cannot decide where the parents should reside as it will affect the right to privacy of the parents - A writ Court while dealing with the issue of habeas corpus cannot direct a parent to leave India and to go abroad with the child. If such orders are passed against the wishes of a parent, it will offend her/his right to privacy. A parent has to be given an option to go abroad with the child. It ultimately depends on the parent concerned to decide and opt for giving a company to the minor child for the sake of the welfare of the child. It will all depend on the priorities of the concerned parent. *(Para 33)*

(Arising out of impugned final judgment and order dated 31-08-2021 in CRWP No. 3440/2020 passed by the High Court Of Punjab & Haryana At Chandigarh)

For Petitioner(s) Ms. Binu Tamta, Adv Mr. Dhruv Tamta, AOR Mr. Vikramaditya Bhaskar, Adv

For Respondent(s) Mr. Shadan Farasat, AOR Mr. Shourya Dasgupta, Adv. Mr. Bharat Gupta, Adv. Ms. Suhavi Arya, Adv. Ms. Hafsa Khan, Adv. Ms. Tanvi Tuhina, Adv. Mr. Aman Naqvi, Adv.

J U D G M E N T

ABHAY S. OKA, J.

Leave granted.

FACTUAL ASPECTS

1. This appeal arises out of an unfortunate dispute between the appellant no.1 - wife and the respondent no.1 - husband over the custody of their minor male child Aaditya Kiran. This appeal takes an exception to the Judgment and order dated 31st August 2021 passed by the learned Single Judge of the Punjab and Haryana High Court in a

petition for habeas corpus filed by the respondent no.1 herein for seeking custody of the minor.

2. The respondent no.1 and the appellant no.1 were married in New York, United States of America (for short "USA") on 13th January 2011. The child was born in USA on 21st January 2016. Thus, the child is a citizen of USA by birth and is holding a USA passport. Unfortunately, the child was diagnosed with hydronephrosis which required surgery. It is the case of the respondent no.1 that as they were not in a position to secure an appointment of a doctor in USA for surgery, it was agreed between the appellant no.1 and the respondent no.1 that the child will undergo surgery at Max Hospital, Saket. As the child is a citizen of USA, consent for international travel with one legal guardian was executed by and between the appellant no.1 and the respondent no.1 on 4th February 2019. The consent was recorded in the said document to enable the child to travel with the mother – the appellant no.1 to India. The consent was executed for the period between 5th February 2019 to 26th September 2019. The consent document recorded that the child will be leaving USA on 5th February 2019 and will be returning back to USA on 26th September 2019. It was further recorded that any changes to this plan shall be discussed and consented to by both the parents. A certificate dated 17th September 2019 issued by Dr. Anurag Krishna, Director, Paediatrics and Paediatric Surgery of Max Hospital, Saket, New Delhi records that the child underwent a surgery on 14th March 2019. It records that he had examined the child on 12th July 2019 when he found that the child was doing well. Dr. Anurag Krishna has recorded that the child needs to be reviewed 6 to 7 months post-surgery along with a fresh ultrasound and renal scan.

3. It is the case of the respondent no.1 that at the time of surgery, he flew down to India. After the surgery, he returned to USA for his work. It is brought on record that the respondent no.1 has a status of permanent resident in USA which is valid up to 16th August 2031. According to the case of the respondent no.1, the appellant no.1 violated the international travel consent by not allowing the minor child to come back to USA by 26th September 2019. According to the respondent no.1, the appellant no.1 detained the minor in her illegal custody in India. Therefore, the respondent no.1 filed a petition on 30th January 2020 before the Circuit Court of Benton County, Arkansas, USA, which according to the respondent no.1 is the Court of competent jurisdiction. The petition was filed for seeking primary care, control, and custody of the minor on account of his wrongful detention outside USA. On 3rd February 2020, the Circuit Court passed an interim order granting primary care, custody, and control of the minor child to the respondent no.1 and directed the appellant no.1 to return the child to the respondent no.1. In the petition for habeas corpus filed by the respondent no.1 in the High Court, he has stated that though a copy of the said order of the Circuit Court was forwarded to the appellant no.1 by email, she continues to detain the minor child in India. In the circumstances, the respondent no.1 filed a petition seeking a writ of habeas corpus in the High Court of Punjab and Haryana and prayed for a direction to the State of

Haryana to secure the release of the minor child from the illegal custody of the present appellants. The appellant nos.2 and 3 are the parents of the appellant no.1 who are residents of Gurgaon in Haryana. At present, the appellant no.1 is staying with them. Various interim orders were passed in the said petition from time to time. The High Court appointed a learned counsel as *amicus curiae*, who interacted with the appellant no.1 as well as the respondent no.1 on phone/WhatsApp calls with a view to ascertain their respective stands. He also submitted a report. By the impugned Judgment and order, the writ petition filed by the respondent no.1 was allowed. In paragraph 55, the High Court issued following directions: -

"(i) respondent No.2 is directed to return to USA along with minor child on or before 30.09.2021;

(ii) in case respondent No.2 opts to return to USA, the petitioner shall bear the travel and incidental expenses of respondent No.2 and the minor child for return to and also the expenses for their stay in USA till decision of the custody petition and the petitioner shall not initiate any criminal/contempt proceedings against respondent No.2 for inter country removal of the minor child;

(iii) if respondent No.2 fails to comply with aforesaid direction, respondent No.2 shall hand over custody of the minor child and his passport to the petitioner on 01.10.2021 or on such other date as may be agreed to by the petitioner;

(iv) in case respondent No.2 fails to hand over custody of the minor child and her passport to the petitioner on 01.10.2021 or on such other date as may be agreed to by the petitioner, respondent No.1 shall take over the custody and passport of the minor child from respondent No.2 and hand over custody and passport of the minor child to the petitioner on such date as may be agreed to by the petitioner;

(v) on custody of the minor child and his passport being handed over to the petitioner, the petitioner shall be entitled to take the minor child to USA;

(vi) in case passport of the minor child is not handed over to the petitioner or respondent No.1 by respondent No.2 on the ground of loss/damage etc., the petitioner shall be entitled to get the duplicate passport issued from the concerned authority; and

(vii) on such return of the minor child to USA, either of the parties shall be at liberty to revive the proceedings before US Court for appropriate orders regarding appointment of guardian and grant of custody of the minor child."

4. Further directions were issued in paragraphs 57 and 58 by the High Court based on a decision of this Court in the case of **Yashita Sahu** v**. State of Rajasthan, (2020) 3 SCC 67**. Paragraphs 57 and 58 read thus:-

"57. In view of the observations in *Yashika Sahu's case (supra)* it is ordered that till filing of any such application by either of the parties for revival of the proceedings before the US Court and passing of any interim/final order by the US Court of competent jurisdiction on the same, respondent No.2 shall be entitled to visit the child and have his temporary

custody from 10:00 a.m. to 5:00 p.m. on every Sunday or as agreed upon between the petitioner and respondent No.2 if respondent No.2 returns to and stays in USA or make video calls to the minor child for about half an hour on every day in between 5:00 p.m. to 6:00 p.m. (US time) or as agreed upon between the petitioner and respondent No.2 in case respondent No.2 does not return to and stay in USA and in such an eventuality, the petitioner shall bring the minor child to India to meet respondent No.2 and his maternal grand parents/other relatives once in a year.

58. However, nothing in this order shall prevent the parties from adopting any joint parenting plan as agreed to by the parties for welfare of the minor child such as by arranging admission of the minor child in some school with hostel facility and by visiting her during holidays and taking her custody during vacation as may be permitted by the school authorities. It is also further clarified that the observations in the present order have been made for the purpose of disposal of the present writ petition and shall not bind any Court or authority in disposal of any other case involving question of custody or welfare of the child."

5. As per the assurance recorded in the order dated 24th September 2021 of this Court, the respondent no.1 has secured a USA visa to the appellant no.1 of the B-2 non-immigrant category. As can be seen from the order dated 24th November 2021, this Court made an attempt to ascertain whether an amicable solution could be found to the dispute. Both sides were directed to submit their suggestions for the amicable resolution of the dispute. However, an amicable resolution of the dispute was not possible.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE APPELLANTS

6. The learned counsel appearing for the appellants submitted that even after surgery, the child needs constant medical care. She submitted that any lapses could be extremely fatal for the life of the minor. She submitted that the doctor who operated upon the child has advised a very strict care regime for the child. She pointed out that constant monitoring of his health is required. Even the water intake of the child has to be carefully monitored. She pointed out that even the appellant no.3, the grandmother of the child is taking care of the minor child and there is a family support available as she is residing with her parents. She pointed out that a detailed affidavit has been filed by the appellant no.1 indicating reasons why in the interest of the child he should be in India till he is 9-10 years old.

7. Relying upon the material on record, she submitted that even the respondent no.1 constantly wished to settle down in India and therefore, he purchased more and more land in India and especially in Bangalore. The learned counsel pointed out that it was the respondent no.1 who himself selected a pre-school for the child while he was in India in April, 2019. She submitted that the respondent no.1 since the time he got married to the appellant no.1 made plans to move back to India permanently and was planning to construct a farm house and a residential house in Bangalore. She submitted that it was the desire of the respondent no.1 that the appellant no.1 should

work in India. Accordingly, property was bought in Bangalore where the mother of the respondent no.1 resides. The learned counsel pointed out that after emails dated 25th December 2019 and 14th January 2020 were forwarded by the appellant no.1 to return the money to the appellant no.2 taken from him for land purchase in Bangalore, the aforesaid petition was filed by the respondent no.1 in the Court at Arkansas in USA.

8. In the written submissions of the appellants, there are various factors pointed out, such as the temperamental nature of the respondent no.1 and the conduct of the respondent no.1. The learned counsel submitted that this Court has held that principles of autonomy must inure in the individual against non-state persons as well. She submitted that in custody cases, a woman cannot be completely eliminated in the name of the welfare of the child. She urged that the woman cannot be deprived of her rights. She submitted that in any case, the appellant no.1 is the primary/sole caretaker of the child. Relying upon the decisions of this Court in **Smt. Surinder Kaur Sandhu** v. **Harbax Singh Sandhu and Another, (1984) 3 SCC 698; Elizabeth Dinshaw (Mrs.)** v. **Arvand M. Dinshaw and Another, (1987) 1 SCC 42** and **Nithya Anand Raghavan** v. **State (NCT of Delhi) and Another, (2017) 8 SCC 454** the learned counsel submitted that there is a statutory presumption in favour of the appellant no.1 under the doctrine of tender years. She submitted that this doctrine has been upheld in the aforesaid three cases and this Court asserted maternal preference as found under Section 6 of the Hindu Minority and Guardianship Act, 1956 (the Act of 1956). She submitted that the appellant no.1 is the primary caregiver and therefore, it is in the child's best interest to retain the custody with the appellant no.1.

9. The learned counsel submitted that to compel the appellant no.1 who is the primary caregiver to return to USA under the rule of "best interest of child" will amount to an invasion of her fundamental right of autonomy which is a part of the right of privacy guaranteed under Article 21 of the Constitution of India. By adopting a summary procedure, such invasion on the rights of the appellant no.1 cannot be made. She submitted that the welfare of the child will mean balancing the interests of all in the family of the child. The mother being the primary caregiver must be kept in mind by the Court and her legal rights must be respected and protected by the Court. She submitted that the appellant no.1 is a fit mother and, in patriarchy, some special care is needed to counter the dominant presence of the father of the child. The learned counsel extensively relied upon an Article by Mr.John Ekelaar under the title "Beyond the welfare principle". She submitted that the best interest of the child is the primary principle which also means the welfare of each member of the family of the child. She submitted that the matter in patriarchy becomes also a matter of gender rights which is a constitutional issue covered under Article 14 read with Article 15(3) of the Constitution of India. She submitted that the constitutional provisions recognize that women form a separate category who need to be enabled by the law.

10. She submitted that the citizenship of a child has nothing to do with the welfare principle. A child may be a citizen of any country, but if the competent Court finds that it

is in the best interest of the child that he is brought up in India, the child should be permitted to stay in India. The learned counsel invited our attention to a decision of this Court in the case of **Kanika Goel** v. **the State of Delhi through Station House Officer and another, (2018) 9 SCC 578** as well as a decision in the case of **Prateek Gupta** v. **Shilpi Gupta and others, (2018) 2 SCC 309**. She submitted that in these two cases, though the child was a foreign citizen, it was found to be in the best interest that the child remains in India to continue with the prime caregiver. Her submission is that in this case, the child can continue to be an American citizen and stay in India on the basis of an OCI card. She submitted that eventually, the child can make his own choice at the age of 18.

11. The learned counsel submitted that the decisions in the cases of **Nithya** (supra) and **Kanika** (supra) are binding precedents as the same are rendered by the Benches consisting of three Hon'ble Judges. She submitted that the High Court has completely ignored the binding precedents. She submitted that the learned Judge of the High Court cannot decide the case based on his subjective personal opinion. She submitted that it is necessary that clear and consistent law be followed even in the custody matters and judicial discretion is not used to subvert the evolving law.

12. The learned counsel submitted that in this case, a writ of habeas corpus was not maintainable as the custody of the appellant no.1 is not illegal. She pointed out that in the cases of **Nithya** (supra) and **Kanika** (supra), directions were issued to the Family Court to complete the hearing of custody matters within a time frame. The learned counsel submitted that in the cases of **Yashita** (supra) and **Lahari Sakhamuri** v. **Sobhan Kodali7**, an exception was made to the rule laid down, in the cases of **Nithya** (supra) and **Kanika** (supra) as in these two cases, the mothers had submitted to the jurisdiction of the Court in USA.

13. She reiterated that in the name of welfare and interest of the child, the welfare of one of the parents cannot be eliminated altogether. The learned counsel submitted that the appellant no.1 cannot be compelled to go back to USA. Her submission is that if the child is placed in the custody of the 7 (2019) 7 SCC 311 respondent no.1 on the ground that the appellant no.1 is not interested in going to USA, the child will be reduced to a chattel.

14. The learned counsel submitted that to refuse a woman the right of mothering is refusing to acknowledge and respect a very core biological and social identity. She submitted that a custody dispute cannot be decided purely in the facts of each case. She submitted that the law laid down in the case of **Nithya** (supra) has to be followed as recently done by Bombay High Court in the case of **Chandima Janaka Wijesinghe** v. **Union of India and others** in Crl. Writ Petition No. 547 of 2021.

15. The learned counsel submitted that the issue of medical evaluation of the child requires a detailed hearing. She submitted that the visa granted to the appellant no.1 is only a tourist visa which would entitle her to visit USA only for specific enlisted reasons.

She submitted that the stand of the respondent no.1 of supporting the appellant no.1 for getting the visa is illusory. She pointed out that the respondent no.1, by relying upon alleged legal separation, has contended that he cannot support the application for a grant of a green card to the appellant no.1. The learned counsel also invited our attention to the pleadings in the interlocutory applications filed by the respondent no.1. She submitted that the conduct of the respondent no.1 of making allegations in the applications shows that he is more interested in litigation and winning the battle against the appellant no.1 rather than acting in collaboration with her for the benefit of the child.

16. The learned counsel further submitted that the Indian medical system is better suited for taking care of the minor son and even the appellant no.3 is a doctor. She submitted that it is not in the interest of the minor son that he is taken to USA.

17. She submitted that considering the unique facts of the case, the larger Bench decisions of this Court in the cases of **Nithya** (supra) and **Kanika** (supra) are applicable. She submitted that the said two decisions constitute binding precedents and the cases of **Lahiri** (supra) and **Yashita** (supra) are exceptions to the general rule. She submitted that the concept of forum convenience has no place in the Guardianship proceedings. She submitted that this is not a case of abduction of the child as the child was brought to India with the consent of the respondent no.1 for the purposes of medical treatment. Therefore, the learned counsel submitted that the offer given by the respondent no.1 cannot be accepted for the reasons set out in the written submissions. She submitted that the impugned Judgment is erroneous and illegal which deserves to be set aside.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE RESPONDENT NO.1

18. The learned counsel appearing for the respondent no.1 pointed out that the appellant no.1 has spent more than nine years in USA. After her marriage with the respondent no.1, she has spent eight years in USA. He invited our attention to the consent executed by the appellant no.1 and the respondent no.1 for permitting the child to travel to India between 5th February 2019 to 26th September, 2019. He submitted that in the light of the increase in cases of international parental child abduction from the USA, the Immigration Authorities in USA do not allow a minor US citizen to leave the country only with one parent without the express consent of the non-travelling parent. He submitted that after the consent document was executed, no changes therein were even discussed between the parties. He submitted that documents on record will show that in terms of the international travel consent form, return tickets of 26th September, 2019 were also booked. He submitted that in violation of the international travel consent, the appellant no.1 has not sent back the minor son to USA, which amounts to the detention of the minor in her illegal custody in India.

19. The learned counsel appearing for the respondent no.1 submitted that there is no document produced on record by the appellants to show that the child needs continuous follow-up treatment.

20. The learned counsel submitted that in terms of the interim order dated 10th June 2020 of the High Court, the respondent no.1 has been interacting regularly with his minor son through video conference and there is a very healthy and deep father and son relationship between them. He stated that he has taken legal advice from a firm specialising in immigration law in USA. He submitted that the respondent no.1 received advice from the said firm that to enable the appellant no.1 and the child to travel to USA, the quickest as well as legally and practically most viable way to get a visa was to get a B-2 non-immigrant visa.

21. He pointed out that in the visa invitation letter, the respondent no.1 has clarified that he will take care of tour expenses of the appellant no.1, including the round trip, airfare, food, housing, medical insurance in USA. The learned counsel submitted that the order of the High Court is a very balanced order which is consistent with the law laid down by this Court in the cases of **Lahiri** (supra) and **Yashita** (supra). He would, therefore, submit that there is no reason to interfere with the equitable order passed by the High Court.

CONSIDERATION OF SUBMISSIONS

22. We have given a careful consideration to the submissions. The appellant no.1 and the respondent no.1 got married on 13th January 2011 in New York in USA. The minor son was born on 21st January 2016 and is admittedly a citizen of USA. There is no dispute regarding the appellant no.1 and respondent no.1 signing and executing a consent for travel of the minor to India with one legal guardian. It is necessary to reproduce the said document which reads thus:-

"CONSENT FOR INTERNATIONAL TRAVEL WITH ONE LEGAL GUARDIAN

I, Kiran Bhaskar of 321 Division St, Cenerton, AR 72719, United States declare that I am the legal parent/guardian of Aaditya Kiran, male, born January 21, 2016 at Bentonville, AR. Birth certificate registration number 2016001506, issued from Bentonville, AR. American passport numbered 546227929, issued on October 14, 2016 at United States, Department of State.

My child, Aaditya Kiran, has consent to travel:
(February 5th, 2019 to September 26th, 2019), C/o
Mrs. Usha Bhaskar, #33, "Udayaravi", 2nd Main Rd, Cholanagar,
Bangalore, India 560032
Ph: + 91 96112 230438

(February 5th, 2019 to September 26th, 2019), C/o,
Mr. Vinay Sethi, A-27/19, DLF Qutab Enclave,
Phase 1, Gurgaon, HR, India 122002
Ph: +91 9810048077

with Vasudha Sethi (my wife, Aaditya's mother) of 321 Division St, Centerton, AR 72719, United States. Vasudha Sethi has an Indian passport numbered J0499893, which was issued on June 8, 2010 at Regional Passport Office, Delhi, India. My child will be leaving

the United States on February 5th, 2019 and returning to the United States on September 26th, 2019. Any changes to this plan shall be discussed and consented upon by both parties.

Any questions regarding this document may be addressed to me at:

Kiran Bhaskar
321 Division St, Cenerton, AR 72719,
United States
Primary number: (425) 214-3212
Email: kiran.bhaskar@gmail.com

Signed on this 4th day of February, 2019.

Sd/-

Kiran Bhaskar

Sd/- Vasudha Sethi"

(underlines supplied)

23. It is not the case of the appellant no.1 that there was even a discussion between the appellant no.1 and the respondent no.1 for modification of the said consent till date. Admittedly, the period of travel mentioned in the consent was not extended by the respondent no.1. The minor son underwent surgery at the hands of Dr. Anurag Krishna on 14th March 2019. The certificate dated 17th September 2019 issued by Dr.Anurag Krishna records that he examined the minor on 12th July, 2019 and he found that the child was doing well. He has recorded in the certificate that the child needs to be reviewed 6 to 7 months after the surgery along with fresh ultrasound and renal scan. Thus, the surgery has taken place 33 months back. The appellant has not placed on record any medical certificate or opinion of Dr.Anurag Krishna on the present health condition of the child. The appellants have not placed on record any medical certificate of the treating doctor recording that the child needs any further treatment or medical care in India. The respondent no.1 consented for the child travelling to India and remaining in India till 26th September 2019. The reason for the grant of consent was to enable the minor to undergo surgery in New Delhi. We will have to proceed on the footing that there is no documentary evidence available on record to show that the presence of the child in India for further medical treatment is necessary.

24. On 3rd February, 2020, the Circuit Court of Benton County, Arkansas, USA passed an *ex-parte* order which reads thus:

"Now on the 3rd day of February, 2020, this matter comes before the Court, and the Court, being well and sufficiently advised finds and orders as follows:

1. The Court has jurisdiction over the parties and subject matter and venue is proper herein.

2. Defendant has removed the parties' minor child to India and remained there without the consent of Plaintiff.

3. Defendant has alienated the child from Plaintiff, which is harmful to the child's well-being.

4. Plaintiff is awarded primary care, custody and control of the minor child, Aaditya Kiran pending further orders of the Court.

5. Defendant shall return Aaditya Kiran to Plaintiff immediately.

6. A hearing will be scheduled promptly upon request by either party."

(underline supplied)

25. Firstly, we will deal with the legal submissions made by the learned Counsel for the appellants. The learned counsel appearing for the appellants has placed heavy reliance on the decisions of this Court in the cases of **Kanika** (supra) and **Nithya** (supra) which are rendered by Benches of three Judges of this Court. With some emphasis, the learned counsel appearing for the appellants had submitted that there is a need to make a departure from the rule of "best interest of the child" or the "welfare principle". Her contention is that welfare would mean balancing the interests of all the members of the child's family. She contended that the mother as the primary caregiver must be kept in mind as a person who has legal rights which must be respected and protected. The learned counsel relied upon a decision of this Court in the case of **K.S. Puttaswamy** v. **Union of India, (2017) 10 SCC 1** by contending that principles of autonomy must inure against non-state persons as well. Her submission is that the law regarding custody does not and cannot completely eliminate a woman in the name of child welfare. On this aspect, we must note that in the case of **Kanika** (supra), this Court has quoted with approval what is held in paragraph 53 of its decision in the case of **Prateek Gupta** (supra). In paragraph 53 of the decision in the case of **Prateek Gupta** (supra), it was held that the issue with regard to repatriation of a child has to be addressed not on a consideration of legal rights of the parties but on the sole criteria of the welfare of the child. In paragraph no.34 of its decision, this Court in the case of **Kanika** (supra), held thus:

"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 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 proceeding 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. This has been the consistent view of this Court as restated in the recent three-Judge Bench decision in *Nithya Anand Raghavan* [*Nithya Anand Raghavan* v. *State (NCT of Delhi)*, (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] , and the two-Judge Bench decision

in *Prateek Gupta* [*Prateek Gupta* v. *Shilpi Gupta*, (2018) 2 SCC 309 : (2018) 1 SCC (Civ) 795] . It is unnecessary to multiply other decisions on the same aspect."

(Underline supplied)

26. The learned counsel appearing for the appellant heavily relied upon an article by Mr.John Ekelaar. The article contains some criticism of "the welfare principle". The author has strongly advocated how the law should be reformulated by getting rid of "welfare" or "best interest" principles. The article is in the realm of the opinion of the learned author. The decision of this Court in the case of **Kanika** (supra) reiterates the well-settled law that the issue regarding custody of a minor child and the issue of the repatriation of the child to the native country has to be addressed on the sole criteria of the welfare of the minor and not on consideration of the legal rights of the parents. The principle that the welfare of the minor shall be the predominant consideration and that the rights of the parties to a custody dispute are irrelevant has been consistently followed by this Court. In fact, in sub-section (1) of Section 13 of the Hindu Minority and Guardianship Act, 1956 (for short "the 1956 Act"), it is provided that in appointment or declaration of guardian of a minor, the welfare of the minor shall be the paramount consideration. When a Court decides that it is in the best interest of the minor to remain in the custody of one of the parents, the rights of the other parent are bound to be affected. As provided in clause (a) of Section 6 of the 1956 Act, in the case of a minor boy or girl, the natural guardian is the father, but ordinarily, the custody of a minor who has not completed the age of 5 years shall be with the mother. On a conjoint reading of sub-section (1) of Section 13 read with clause (a) of Section 6 of the 1959 Act, if it is found that the welfare of a minor whose age is more than 5 years requires that his custody should be with the mother, the Court is bound to do so. In the same way, if interest of the minor which is the paramount consideration requires that the custody of a minor child should not be with the mother, the Court will be justified in disturbing the custody of the mother even if the age of the minor is less than five years. In such cases, the rights of the father or the mother, as the case may be, conferred by clause (a) of Section 6 are bound to be affected. Whenever the Court disturbs the custody of one parent, unless there are compelling reasons, the Court will normally provide for visitation rights to the other parent. The reason is that the child needs the company of both parents. The orders for visitation rights are essentially passed for the welfare of minors and for the protection of their right of having the company of both parents. Such orders are not passed only for protecting the rights of the parents. In view of the settled legal position, the welfare of the minor being the paramount consideration, we cannot act upon the suggestions of Mr.John Ekelaar in his Article. We cannot accept the submission that while applying the welfare principle, the rights of the mother or father need to be protected. The consideration of the well-being and welfare of the child must get precedence over the individual or personal rights of the parents. Whether the Court while dealing with a case like this can compel one of the parents to move from one country to another is a separate issue. We are dealing with the said issue separately.

27. Each case has to be decided on its own facts and circumstances. Though no hard and fast rule can be laid down, in the cases of **Kanika** (supra) and **Nithya** (supra), this Court has laid down the parameters for exercise of the power to issue a writ of habeas corpus under Article 226 of the Constitution of India dealing with cases of minors brought to India from the country of their native. This Court has reiterated that the paramount consideration is the welfare of the minor child and the rights of the parties litigating over the custody issue are irrelevant. After laying down the principles, in the case of **Nithya** (supra), this Court has clarified that the decision of the Court in each case must depend on the totality of facts and circumstances of the case brought before it. The factual aspects are required to be tested on the touchstone of the principle of welfare of the minor child. In the cases of **Lahiri** (supra) and **Yashita** (supra), the Benches of this Court consisting of two Judges have not made a departure from the law laid down in the decisions of larger Benches of this Court in the cases of **Nithya** (supra) and **Kanika** (supra). The Benches have applied the law laid down by the larger Bench to the facts of the cases before them. It is not necessary for us to discuss in detail the facts of the aforesaid cases. By its very nature, in a custody case, the facts cannot be similar. What is in the welfare of the child depends on several factors. A custody dispute involves human issues which are always complex and complicated. There can never be a straight jacket formula to decide the issue of custody of a minor child as what is in the paramount interest of a minor is always a question of fact. But the parameters for exercise of jurisdiction as laid down in the cases of **Nithya** (supra) and **Kanika** (supra) will have to be followed.

28. Now we turn to the findings recorded by the High Court. The perusal of the impugned judgment shows that the High Court has adverted to the law laid down in the cases of **Kanika** (supra) and **Nithya** (supra) apart from other cases. The High Court found that in the facts of the case, summary inquiry deserves to be adopted. The Court noted that the child has spent more than three years in USA and two and a half years in India. Therefore, it cannot be said that there is a complete integration of the child with the social, physical, psychological, cultural and academic environment of either USA or India. After considering the documents placed on record, the High Court found that the appellant no.1 has not produced any further medical report or medical treatment record to show that the minor child requires further regular medical treatment apart from usual periodical review and therefore, it will not be difficult to arrange a periodical review even if the child is in USA. The High Court on examination of the documents found that the respondent no.1 had financial resources to maintain the appellant no.1 and the minor child in USA. Merely because the respondent no.1 had asked the appellant no.1 to arrange funds for purchase of lands in Bangalore, it cannot be said that his intention is to abandon USA and settle down permanently in India. Moreover, the High Court noted that international travel consent signed by the appellant no.1 and the respondent no.1 required that the minor should come back to USA on 26th September, 2019. The High Court held that change in the travel plan was not discussed and consented by both the parties. The High Court also considered the

allegation that the respondent no.1 has temperamental issues. In fact, the respondent no.1 produced a Psychological Evaluation Report dated 21st October 2020 issued by the Centre for Psychology which recorded that the respondent no.1 is free of any neurophysiological problems and has no diagnosable mental health problems. The certificate recorded that he is free of depression, anxiety and reports no suicidal tendencies. The High Court also considered the relevance of the report of the USA Embassy regarding the welfare of the child. The Court noted that there is a disclaimer in the said report that the consular officer who is the author of the report is not trained in child protection, social work, or other similar discipline and therefore, the report is not a child custody evaluation. The High Court has also noted the allegations and rival allegations against each other made by the appellant no.1 and the respondent no.1. About the argument that the appellant no.1 is taking constant care of the minor child, the High Court referred to the said report of the USA Embassy. In paragraphs 48 and 49 of the Judgment, the High Court has noted the contents of the said report and has drawn conclusions which are recorded in paragraph 50. Paragraphs 48 to 50 of the impugned Judgment read thus:

"48. However, a perusal of the welfare report dated 17.12.2019 of Visiting Consular of US Embassy shows that respondent No.2 told the Visiting Consular that her aunt picks up minor child from school and brings him home each day and stays with him throughout the day while the mother and grand-parents are at work. The minor child has a domestic helper who takes care of his needs and plays with him. It is evident from the report that even respondent No.2 and her parents are not giving whole day personal care and attention to the minor child.

49. The petitioner has filed affidavit dated 15.06.2020 that the petitioner also has requisite skills to care for his child in the USA. The petitioner has also the option to work from home permanently, enabling him to care for the child full time when required. Further, the Petitioner's mother Smt. Usha Hanumantharayya has a valid US visa till 23.02.2024 and has expressed her willingness to take care of the minor child to this Court.

50. In these facts and circumstances, there is no reasonable ground to believe that the minor child cannot be given due personal care and attention in USA and therefore, repatriation of the minor child cannot be declined on the ground of lack of requisite personal care and attention to the minor child in USA."

(underline supplied)

29. After considering the said aspects, the High Court issued directions in paragraphs 55, 57 and 58 which we have already quoted above. The factors considered by the High Court were certainly relevant. The High Court had the benefit of the assistance of a learned Counsel who was appointed as Amicus Curiae. He interacted with the contesting parties. The report of the Amicus Curiae has been considered by the High Court.

30. The learned Judge of the High Court noted that except for the case filed by the respondent no.1 in USA Court regarding custody of the minor, there are no

proceedings pending between the appellant no.1 and the respondent no.1. It was also noted that the welfare report dated 17th December, 2019 of Visiting Consular of US Embassy records that the appellant no.1 informed that her aunt picks up the minor child from school and brings him home each day and stays with him throughout the day while the mother and grand-parents are at work. Moreover, a domestic helper is taking care of the needs of the child. Therefore, the appellant no.1 is not devoting her whole day to take personal care of the minor and to attend to the needs of the minor child. The High Court noted that on the other hand, an affidavit has been filed by the respondent no.1 that an option to permanently work from home is available to him and his mother has a valid visa to stay in USA till 23rd February 2024 who has expressed willingness to take care of the minor child in USA. The other factors considered by the High Court while holding a summary inquiry were that the stay of the minor child in India has been for too short a period to facilitate his integration into the social, physical, physiological, cultural and academic environment of India. Moreover, the minor child, if repatriated to USA, will not be subjected to an entirely foreign system of education. The High Court has also taken into consideration the fact that the child is a citizen of USA who will have better future prospects on return to USA. It is observed that the natural process of grooming in the environment of the native country is indispensable for his comprehensive development. The High Court further observed that it is not shown that return of the child to USA will be harmful to him.

31. After having perused the material on record, we find that the High Court has considered all relevant factors while holding a summary inquiry. The High Court has given reasons for coming to the conclusion that it will be in the interest and welfare of the child to return to USA. The High Court has not treated the order of USA court as conclusive. The High Court had the benefit of the assistance of a learned Counsel who was appointed as amicus. The exercise of power by the High Court cannot be said to be perverse or illegal. We find that the High Court has not overlooked the view taken by larger Benches of this Court in the cases of **Kanika** (supra) and **Nithya** (supra). We are in agreement with High Court when it came to the conclusion that it will be in the welfare of the child to return to USA.

32. The emphasis of the learned counsel appearing for appellants was more on the rights of the appellant no.1 and on making a departure from the well-known concept that the welfare of the minor is the paramount consideration. The said submissions are contrary to the law laid down by this Court in the case of **Kanika** (supra) as observed by us earlier. As we have noted earlier, the rights of the parents are irrelevant when a Court decides the custody issue. It is not a consideration at all for deciding the issue.

33. A question was raised whether the High Court was justified in passing an order directing the appellant no.1 to return to USA along with the minor child on or before a particular date. The issue of custody of a minor, whether in a petition seeking habeas corpus or in a custody petition, has to be decided on the touchstone of the principle that the welfare of a minor is of paramount consideration. The Courts, in such proceedings,

cannot decide where the parents should reside as it will affect the right to privacy of the parents. We may note here that a writ Court while dealing with the issue of habeas corpus cannot direct a parent to leave India and to go abroad with the child. If such orders are passed against the wishes of a parent, it will offend her/his right to privacy. A parent has to be given an option to go abroad with the child. It ultimately depends on the parent concerned to decide and opt for giving a company to the minor child for the sake of the welfare of the child. It will all depend on the priorities of the concerned parent. In this case, on a conjoint reading of clauses (i) to (iii) of paragraph 55 of the judgment, it is apparent that such an option has been given to the appellant no.1.

34. We may record here that an email dated 18th October, 2021 addressed by the appellant no.1 to the respondent no.1 is placed on record along with I.A. No. 147418 of 2021. In the said email, the appellant no.1 has informed the respondent no.1 that during her visa interview, if she is asked, she will clearly state that the intended purpose of visiting USA was also to contest cases filed by the respondent no.1 and to file cases against the respondent no.1. Therefore, an option has to be given to the appellant no.1 to return to USA along with the minor son though she cannot be forced to stay with the respondent no.1. Therefore, the respondent no.1 will have to make proper arrangements for a suitable residence for the comfortable stay of the appellant no.1 in USA. The reason is that the appellant no.1 cannot work in USA on the basis of a B-2 visa. The respondent no.1 will have to provide a reasonable amount per month to the appellant no.1 to maintain herself and the child in USA. Necessary steps will have to be taken by the respondent no.1 to secure admission for the child in a school in USA. To enable the appellant no.1 to contest the custody petition filed by the respondent no.1, a direction will have to be issued to the respondent no.1 not to enforce and act upon the said order of USA Court in any manner for a period of three months from the date on which the appellant no.1 reaches USA with the son. During the said period of three months, visitation rights will have to be provided to the respondent no.1 to meet the minor child. If the appellant no.1 opts to go to USA and contest the custody proceedings, the parties will have to abide by the result of the said proceedings in so far as the issue of the custody of the minor child is concerned.

35. The appellant no.1 will have to be given time of fifteen days from today to communicate the respondent no.1 her willingness to travel to USA with the child. If she intends to visit USA, along with her willingness, she must communicate possible dates of travel. The dates should be within maximum period of three months from today. On receiving the same, the respondent no.1 shall arrange for air tickets and make arrangements for the comfortable stay of the appellant no.1 and the minor in USA. The respondent no.1 shall, for the time being, transfer US$ 5,000 to the appellant no.1 for facilitating expenditure in USA. The respondent no.1, in addition, shall transfer US$ 1,500 to the appellant no.1 which can be used by the appellant no.1 for the benefit of the minor child in USA. The respondent no.1 will have to also provide a proper health

insurance to both of them. The respondent no.1 will also be under an obligation to take care of medical treatment of the minor son.

36. In the event the appellant no.1 fails to communicate her willingness to travel to USA within fifteen days from today, it will be open for the respondent no.1 to take the custody of the child. After the respondent no.1 arrives in India, the appellant no.1 shall hand over the custody of the minor son to the respondent no.1 to enable the respondent no.1 to take the minor son to USA. To the above extent, the order of the High Court requires modification. As noted earlier, now B-2 visa has been granted to the appellant no.1. The respondent no.1 will have to also facilitate extension of visa granted to the appellant no.1, in case she desires to continue her stay in USA.

37. Hence, we pass the following order:

(i) It will be open for the appellant no.1 to travel to USA along with the minor child and to contest the proceedings pending in USA. If the appellant no.1 is willing to travel to USA along with the minor child, she will communicate her willingness to do so to the respondent no.1 by email within a period of fifteen days from today. The appellant no.1 shall communicate to the respondent no.1 the possible dates on which she proposes to travel along with the minor child. The possible dates shall be within three months from today;

(ii) On receiving an intimation as aforesaid, the respondent no.1 shall book air tickets after consulting the appellant no.1. The respondent no.1 shall make proper arrangements for separate stay of the appellant no.1 in USA after consulting her. The arrangements for residence shall be made at the cost of the respondent no.1. As and when the appellant no.1 wants to return to India, it shall be the responsibility of the respondent no.1 to pay for her air tickets. If she wishes to continue in USA, the respondent no.1 shall take all possible steps for the extension of visa or for getting a new visa;

(iii) In the event the appellant no.1 agrees to travel to USA along with the minor son, it will be the responsibility of the respondent no.1 to pay a sufficient amount per month to the appellant no.1 for maintenance of herself and the minor son. Along with the air tickets, the respondent no.1 shall remit US$ 6,500 to the appellant no.1 by a mutually convenient mode. The amount shall be utilised by the appellant no.1 to meet initial expenditure in USA. After the expiry of period of one month from the date on which the appellant no.1 arrives in USA, the respondent no.1 shall regularly remit a mutually agreed amount to the appellant no.1 for maintenance. If there be any dispute, the parties are free to adopt remedy in accordance with law. The respondent no.1 shall provide proper medical insurance to the appellant no.1 and the minor child while they are in USA. Moreover, the respondent no.1 shall be under an obligation to provide proper medical treatment to the minor child;

(iv) In the event, the appellant no.1 along with the minor child visits USA in terms of this order, for a period of three months from the date of her arrival, the respondent no.1

shall not take any steps to implement or enforce the order dated 3rd February 2020 passed by the Circuit Court of Benton County, Arkansas which will enable the appellant no.1 to move the concerned Court for contesting the petition filed by the respondent no.1 and to file appropriate proceedings. A written undertaking to that effect shall be filed by the respondent no.1 in this Court within two weeks from today. Thus, for the said period of three months, the custody of the minor shall remain with the appellant no.1;

(v) After the appellant no.1 and minor child reach USA, subject to the orders which may be passed by the competent Court in USA, for a period of 3 months from their arrival, the respondent no.1 shall be entitled to have temporary custody of the minor child from 10 am to 5 pm on every Sunday or as mutually agreed upon by the appellant no.1 and the respondent no.1. In addition, the respondent no.1 shall be entitled to make a video call to talk to the minor child for about half an hour on every day (except Sunday) between 5 pm to 6 pm;

(vi) In the event, the appellant no.1 is not willing to visit USA along with her minor son and fails to communicate her willingness to visit USA within a period of fifteen days from today, it will be open for the respondent no.1 to take custody of the child. After the respondent no.1 visits India, the appellant no.1 shall hand over the custody of the minor child to him and the respondent no.1 shall be entitled to take the minor child with him to USA. In such an event, the appellant no.1 will be entitled to talk to the minor child on video call for half an hour on every day between 5 pm to 6 pm (USA time) or at such time as mutually agreed upon by the appellant no.1 and the respondent no.1;

(vii) As observed by the High Court in paragraph 58 of the impugned Judgment, an option of adopting agreed joint parenting plan remains open to the parties. If they wish to do so, they can always file appropriate application before the High Court; and

(viii) This order shall not be construed to mean that any final adjudication has been made on the rights of the parties.

The appeal is disposed of in the above terms.