IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 2037 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

and
HONOURABLE MR.JUSTICE A.G.URAIZEE

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

==========

SWATI BINAYKIA
Versus
ABHISHEK BINAYKIA

==========

Appearance:
MR PERCY KAVINA WITH MS GARIMA MALHOTRA WITH MR.BHASH H MANKAD(6258) for the Appellant(s) No. 1
JANAK S RAJPUROHIT(7881) for the Defendant(s) No. 1
SHIVANI RAJPUROHIT(5377) for the Defendant(s) No. 1

==========

CORAM: **HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 23/09/2019

CAV JUDGMENT

(PER : HONOURABLE MR.JUSTICE A.G.URAIZEE

1. The appellant-original defendant has preferred the present Appeal under section 19 of the Family Courts Act ("F.C.Act" for short) read with section 47 of the Guardian and Wards Act ("G & W Act" for short) to assail the judgment and order dated 10/03/2017 passed by the learned Judge, Family Court No.4, Ahmedabad in Family Suit No. 1546 of 2015, whereby and whereunder the respondent herein-original plaintiff-husband is permitted to retain custody of the minor child/son Vihaan Vinayak. For the sake of brevity, hereinafter the respondent shall be referred to as "the plaintiff" and the appellant shall be referred to as "the respondent".

2. Facts giving rise to the present Appeal, as could be carved out from the impugned judgment are reproduced hereunder in verbatim:-

2.1 The plaintiff completed his undergraduate degree in Electronics & Communication Engineering from Nirma Institute of Technology, Ahmedabad and pursue his masters in Electrical Engineering and MBA from United State of America and lived and worked in USA on a H1 Visa, whereas defendant claimed to be pursuing her undergraduate degree from CEPT, Ahmedabad. Plaintiff and defendant came into contact with each other by their family members in the year 2008. Initially court marriage took place between plaintiff and defendant on 5/12/2008

before the Registrar of Marriage at Ahmedabad and thereafter marriage of plaintiff and defendant was solemnized on 20/4/2009 according to Hindu rites and rituals at Ahmedabad. The defendant applied for H4 (dependent) Visa and plaintiff and defendant went for their vacation to Italy and then defendant shifted to USA with plaintiff permanently.

2.2 After few weeks of cohabitation, plaintiff found that defendant was authoritative, selfish, totalitarian and unreasonably dominant. The defendant demanded larger accommodation despite it was not possible for plaintiff. Defendant displayed an unprovoked and inexplicable dislike towards plaintiff's family members and even refrain from talking to them over the phone. The defendant completely failed to discharge her matrimonial obligation. The defendant behaved in an autocratic manner and acted as if she lived in a hotel and neglected plaintiff. The defendant always desired a very luxurious life and it was not possible for plaintiff to meet with all unreasonable and excessive demands of defendant from his salary. The defendant got green card within eight months and became eligible to work, but she was unwilling to work and to assist plaintiff financially. The defendant instead of talking with plaintiff chose to communicate with her friends in India. The defendant woke up and slept at her own convenient time owing to which plaintiff had to face adverse situation. The plaintiff was unemployed for about 8 months, however, the defendant went on with her extravagant lifestyle and continued with over the top spending pattern.

2.3 After one and half year of marriage, plaintiff wanted to have a child from their marriage, but defendant consistently refused to have a child. The defendant became pregnant in the year 2011, but the defendant consulted gynecologist for getting an opinion to terminate the pregnancy without consent of plaintiff. The defendant was not graduate and not worked even for a single day in USA, but the defendant with a view coerce plaintiff into consenting for terminating the pregnancy, defendant purportedly expressed her desire on her career instead of family. Defendant was determined to terminate her pregnancy and even tried to jump off from balcony to commit suicide. Plaintiff took carte and caution of defendant during pregnancy period of defendant.

2.4 After birth of their son, behavior of defendant did not change and she began avoiding minor child in the same manner as she had been avoiding plaintiff. The defendant failed to undertake most basic duties of a mother such as feeding and bathing of a child and insisted plaintiff to hire services of a caretaker. The plaintiff had to play dual role of father and mother. In July 2011, defendant quarreled with plaintiff and tried to cut her own wrist with knife and plaintiff was constrained to call police, who kept defendant under detention for analyzing her mental stability. Defendant adopted a completely casual attitude towards plaintiff and their minor child. Defendant constantly kept on pressuring plaintiff to take her out on vacation despite plaintiff being

financially constrained. Defendant even during family vacations often abandoned plaintiff and minor child and had preferred to go for sightseeing. Plaintiff narrated incident took place in October 2012 during their trip to Hawaii and stated that defendant went for photography for two hours and plaintiff and minor child waited for more than two hours and alternation took place and defendant opened door of running car and thereby endangering child's safety and plaintiff was constrained to call police to handle the situation. The defendant made unreasonable demands and misbehaved and non-cooperated and neglected plaintiff and minor child. It became impossible for plaintiff to live with defendant. Plaintiff apprehended that keeping minor child with defendant would be extremely unsafe and could have an adverse impact on his mental and physical growth. That defendant's needs for materialistic goods never ended. The defendant was arrested for shoplifting in October 2011.

2.5 Plaintiff's mother and sister visited USA in June 2015 and conduct of defendant was worsened with them and forced them to leave early. The minor child had fever at 104 degree, however, defendant gave priority to her course over the minor's health and plaintiff was forced to take leave. Plaintiff has been taking care of minor's school, school events, doctor visits, play dates with friends, sporting and extracurricular activities without help of defendant. Plaintiff was required to visit India for his work and wanted to bring minor child to India and defendant was busy in pursuing her course, however,

defendant refused to allow plaintiff to bring minor with him. After returning from India, plaintiff requested defendant to sign necessary papers for renewal of passport and also the documents for acquiring an OCI for minor child, but defendant refused to sign and threatened plaintiff. In August 2015, the father of the plaintiff had become extremely sick and hospitalized and presence of plaintiff was necessary in India. Since the defendant completely disregarded welfare of minor child and failed to look after minor child during their stay in USA, plaintiff came to India with minor child on 14/8/2015 after informing defendant. Plaintiff after taking into consideration consistent cruelty meted out by defendant decided to settle in India permanently. Plaintiff took decision to live with his parents and to provide education to minor child in India and such course of action is in the larger interest of minor in view of bitter history of acrimonious marital relation of plaintiff with defendant. Plaintiff being natural guardian of minor child entitled to take such decision and to retain custody of minor child in India and without any interference of defendant and the defendant is not entitled to remove custody of minor child. Plaintiff has apprehension that defendant is likely to contest his decision. Defendant had filed police complaint against plaintiff in USA and time and again threatened plaintiff.

2.6 Defendant displayed extremely violent, lawless and reckless behavior and has time and again endanger her own safety along with safety of their minor child. The defendant has been penalized for different traffic

violations of breaking red light at high speed, over speeding and violating parking norms and dush behavior of defendant is an absolutely careless and reckless parent.

2.7 The presence of plaintiff was essential in India, when his father was sick in August 2015, however, defendant did not support plaintiff's decision and threatened to face legal consequences, if he tried to go to India without her consent. The defendant was neither willing nor intending to take care of minor, and therefore, plaintiff was constrained to bring minor along with him to India on 14/8/2015. The plaintiff tried to convince defendant to accompany him but defendant chose not to accompany him, but defendant chose to accompany him and stay in USA. The defendant being aware of plaintiff's visit to India, defendant approached plaintiff's company and made false statements about not being aware about plaintiff's whereabouts and about plaintiff trying to threatened minor's safety. The plaintiff even proposed to defendant to purchase another residence in India so that they could reside together, if defendant has problem to live with plaintiff's parents, however, defendant refused to come to India and to join plaintiff. That minor child is a citizen of USA and his passport of USA and terms of the said passport expired in March 2016 and it is necessary to renew the said passport. The plaintiff also wants minor child to acquire ICA Card to enable him to stay in India. That signature of the defendant is essential for renewal of passport and OCI Card of minor child and despite repeated requests, defendant refused to sign such papers. The plaintiff being natural guardian of minor child

has right to take decisions about residence, education, upbringing of minor child and plaintiff has taken such decisions and brought the minor child in India, which is in the best welfare and interest of minor child. Plaintiff has identified few prospective schools for taking admissions of minor child. Plaintiff, defendant and minor child are governed by Hindu Law. Plaintiff and minor child are residing with plaintiff's parents and plaintiff's mother is in a position to help plaintiff in every possible care of minor child. Plaintiff has sufficient financial resources to provide good quality education to minor child. The plaintiff has, therefore, filed present suit to retain custody of minor child permanently and for permanent injunction restraining defendant from interfering or removing the custody of minor child from him as prayed in the plaint.

3. The appellant herein-original defendant wife resisted the Family Suit by filing Written Statement at Exh 46 and denied all the averments and allegations made by the respondent herein-original plaintiff husband in the Suit.

4. The learned Trial Judge after considering pleadings, framed the following issues:

:

(1) Whether the plaintiff proves that the welfare of the minor son is not with the defendant, but it is with the plaintiff ?

(2) Whether the plaintiff proves that in the paramount interest and welfare of the minor, he is entitled to retain the custody of minor?

(3) Whether this Court has jurisdiction to entertain and adjudicate the present petition regarding custody and welfare of the minor son Vihaan?

(4) Whether the plaintiff is entitled to get permanent injunction restraining the defendant from interfering with or removing the minor from the custody of plaintiff?

(5) Whether the plaintiff is entitled to get mandatory injunction that the defendant do sign all the necessary papers for renewal of the passport of the minor as prayed in paragraph 35(c) of the main petition?

(6) Whether the plaintiff is entitled to get a decree, as prayed for?

(7) What order?

5. The parties led oral and documentary evidence and after considering the evidence, the learned Trial Judge decreed the Family Suit instituted by the plaintiff-respondent herein husband and permitted him to retain custody of minor son Vihaan, which gave rise to file the present First Appeal.

6. The appeal was taken up for final disposal at the admission stage with the consent of learned counsels for the parties. We have heard the learned advocates appearing on behalf of the respective parties at great length. Learned advocates for the respective parties have reduced their oral submissions in writing, which are

reproduced as under:

7. **WRITTEN SUBMISSION OF THE APPELLANT HUSBAND:**

I. Issue of jurisdiction.

A. Petition filed by respondent barred under section 9 of the Guardian and Wards Act. It is submitted that the petition filed by the respondent before the Family Court, Ahmedabad is barred by section 9(1) of the Guardian and Wards Act. Section 9(1) of the Guardian and Wards Act, 1890, categorically reads that the courts within whose jurisdiction minor child "ordinarily resides" shall only have jurisdiction under the Act. In the present case the ordinary place of residence of the minor child since his birth has been only the United State and not India. It is submitted that the Family Court at Ahmedabad or any court in India, have no jurisdiction over the minor child Vihaan, who is admittedly :

(i) a US citizen by birth, holds a US Passport,

(ii) has been staying in US since his birth;

(iii) spent his entire formative 4.1/2 years in United State (until he was stealthily removed by respondent on 12/8/2015);

(iv) started his schooling in USA;

(v) born from the wedlock of such parents, who have been Staying in USA since inception of marriage, holding green cards, set up their family home in USA, applied for citizenship and staying in USA with the intention to make it their permanent residence (admitted in the suit filed by the respondent)

However, as far as “ordinary residence" of the minor child is concerned, it is USA which is the habitual and ordinary place of residence, where the parties together resided as a family with the child since inception of marriage. Hence, as per provisions of Guardian and Wards Act, it is the courts in USA which have the natural and original jurisdiction over the minor child and to decide the issue of welfare and custody of the minor child.

B. “No intention to permanently reside in Ahmedabad proved from the facts of the case". The argument advanced by the respondent relying upon the case of ***Ruchhi Majoo Vs. Sanjeev Majoo***, *reported in* ***(2011) 6 SCC 479*** is that in order to determine the “ordinary residence" of the minor child under section 9 of the G&W Act, it is the intention to make a place one’s ordinary abode which is to be kooked at, which is to be discerned from the facts of the case. It is submitted that in the present case if the determination of the “ordinary residence” is to be tested on the principle of “intention", even then it cannot be said that the ordinary place of residence of the minor child is “Ahmedabad' as :

(i) To make a place an ordinary abode as to the

collective decision of parents: The intention to permanently reside at a given place has to be a collective decision of the parents and not a unilateral decision by one parent. It is stated that the respondent and the appellant since inception of the marriage stayed in USA, set up their matrimonial home, had a child who all along grew up in United State which proves that their collective intention was to made USA their permanent and place of ordinary abode. Hence, merely because the respondent one fine day unilaterally decides to stay back in India after stealthily removing the minor child from his family home in USA, shall not and ought not to be taken as to minor's ordinary place of residence.

It is pertinent to note that even in the case of **Ruche Majoo V/s Sanjeev Majoo** (supra), the Hon'ble Supreme Court took note of the series of emails and correspondence exchanged between the parties which revealed that in the said case the father had consented vide various mails that the minor may stay back with the child in Delhi and even find herself a job and to admit the child in a school in Delhi (para 39 to 45). Therefore, it was the consensual intention of both the parties which was taken into consideration while determining the issue of "ordinary residence" under section 9 of the G&W Act. However, in the present case, the respondent stealthily and surreptitiously removed the child to India and no consent whatsoever has been given by the appellant to keep the child in India.

(ii) Mere Statement at the time of making application

under G&W Act cannot reveal the intention : Assuming though not admitting mere respondent's decision to make Ahmedabad permanent place of abode could be looked at, it is submitted that the intention to make a place one's permanent abode is to be discerned from the facts of the case and not on the basis of mere statement made by the respondent at the date of making the application.

The expression "ordinary residence" used in section 9(1) of the G&W Act, 1890 is not identical and cannot have the same meaning as "residence at the time of filing of the application". The purpose and object of the Act of using the expression "where the minor ordinarily resides" by the legislature is to avoid the mischief that a minor may stealthily removed to a distant place and even if he is forcibly kept there, the application for the minor's custody could only be filed within the jurisdiction of the District Court from where he had been removed or in other words, the place where the minor would have continued to remain but for his removal. Hence, the present case is one such case of mischief where the child has been stealthily removed by the respondent on the bogus and sham pretext of the illness of his father in order to oust the jurisdiction of the courts in United states. Therefore, a mere statement on the part of the respondent at the time of making application cannot be the conclusive factor to hold that the minor is a ordinary resident of Ahmedabad.

It is submitted that the expression "where the minor

ordinarily resides" has to be construed in a manner where the residence by compulsion or force at a place, no matter however long, cannot be treated as the place of ordinary residence, which legal position has been expounded in number of judgments.

(iii) Admission on the part of the respondent of having no intention to stay in India:

- Chief examination of respondent:- Para 41 @ 380 of respondent's paper book the respondent has himself in his chief examination admitted that when he came to India in August, 15 he neither had the intention nor he made up his mind to permanently stay in India and he has reiterated the same in his cross examination on page 440 of respondent's paper book.

- Postponement of Oath Ceremony for US Citizenship: The respondent himself admitted in his cross-examination (page 441 of respondent's Paper Book) that after coming to India in August, 2015, the respondent requested the United States Citizenship and Immigration Service department (USCIS) to postpone and reschedule his oath ceremony of citizenship from September 8, 2015 to sometime in December, 2015, which reveals that the respondent had no intention to permanently reside in India let alone Ahmedabad either at the time of filing of the suit or thereafter.

C. Doctrine of "Closest Concerned" and "Most Intimate Contact": The law has been well settled by the Hon'ble

Supreme Court in the case of **Smt. Surinder Sandhi Vs. Habax Sindhu Sandhu (1984) 3 SCC 698, Shilpa Aggarwal VIS Aviral Mittal (2010) 1 SCC 591, Dr. V. Ravichandran Vls. U0I and ors. 2010(1) SCC 174, Surya Vadanan V/s. State of Tamil Nadu 2015 (5) SCC 450, Elizabeth Dinshaw V/s Arvand M. Dinshaw** and catena of such other cases wherein it has been held that the jurisdiction of Courts under the Guardian and Wards Act is determined by whether the minor "ordinarily resides" within the area on which the court exercises such jurisdiction and further that the court which have the closest concern and most intimate contact with the minor child, have the jurisdiction over the minor child. The principle and ratio laid down in the case of **Surinder Kaur Sandhu** (supra) is applicable till date which reads as under :

"the modern theory of conflict of laws recognizes and, in any event, prefers the jurisdiction of the state which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by 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 cases will only result in encouraging forum-shopping. Ordinarily jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating matrimony and custody, the law of that place must be govern which has the closest concern with the well-being of the spouses and the welfare of the offspring of marriage.

Therefore, while deciding the issue of jurisdiction it is submitted that this Hon'ble Court may consider that :

(i) Parties in this case are green card holders;

(ii) Residing in US since inception of marriage with the intention to stay there permanently;

(iii) Made United States their home where the minor child was born to them; and

(iv) Further the fact that the matrimonial home of the spouses was in US;

(v) Respondent applied for citizenship in February 2015 and even gave interview for the same and further it was after coming to India, that the respondent requested the US authorities to postpone his oath ceremony of citizenship to December, 2015 which fact is contrary to his stand taken before the Courts in India that he wants to permanently resides in Ahmedabad.

Hence, these factors establish sufficient contacts and ties with United states in order to make it reasonable and just for the Courts of that State to assume jurisdiction for enforcing the obligations which were incurred therein by the spouses. It is pertinent to mention that the respondent even applied for US citizenship and even gave his interview for the same.

Applying the ratio laid down in the aforementioned judgments, the Family Court ought to have rejected the

Plaint of the respondent for want of jurisdiction and directed that the minor child be returned to the jurisdiction of the US Courts as it is the courts in US which have the closest concern with the child. It is submitted that such an order shall be in the best interest of the minor child.

D. Modus operandi adopted to stealthily remove the minor child Conduct of the respondent : It is submitted that the respondent has acted in a pre-planned manner with the mala fide intention to stealthily remove the minor child from the jurisdiction of the courts in US and his family home in US without consent of the appellant and that the reasoning given by respondent in the custody petition that he had to return to India as his father had suddenly fallen ill is bald, concocted and devoid of any documentary proof. The following would reveal that removal of child from his family home in US was a calculated move of the respondent which he pre-planned with his family. Therefore, the learned Family court has erroneously believed the story concocted by respondent despite the fact that the respondent grossly failed to prove the story of his father falling ill and by returning blind eye to the various documents placed on record by the appellant.

(i) Pre-planning on the part of respondent and his family to stealthily remove the minor child from USA to India : It is submitted that the respondent herein has indulged an illegal and mala fide act of stealthily removing the minor child Vihaan on 12/8/2015, when he

was merely 4 years and 9 months, from his family home and ordinary place of residence in USA about the consent of the appellant. The respondent herein concerted with his father and other family members to remove the minor child Vihaan and initiate court proceedings against the appellant in India. The same can be corroborated from the following documents which have been admitted by the respondent:

(a) Mail dated 28/7/2015 : addressed by the respondent to his father Mr. Madanlal Binaykia (@539 of appellant's Paper book) admitted by respondent in reply to SCA 20027 of 2015 @ pg 112 para 7;

(b) Change of postal address : Before leaving for USA, the respondent applied to US Postal service department for change of postal address, which fact also (document @ page 540 of appellant's paperbook). This fact has also been admitted by the respondent in his reply to SCA 20027 of 2015 @ 113 para 9;

It is trite law that admission of the best proof, hence, once aforementioned documents were admitted by the respondent himself on oath, in that case the plea of the respondent that the said documents cannot be read in evidence as the same are not exhibited holds no force. Therefore, there was no onus on the appellant to independently prove the said documents as the same stood proved on being admitted by the respondent on oath.

(ii) Stealthily removing the minor child on 12/8/2015 while appellant was away: It is an uncontroverted fact that after the appellant left the house to attend her course in the morning of 12/8/2015, the respondent surreptitiously picked up the child from school and left with the child for India, leaving a one line email and a hand written letter which is also never a natural course of communication between a husband and wife living under the same roof (Document @ 541 and 542 of appellant's paperbook). A false and bogus reason was given in the email by the respondent on his dad having been hospitalized and a communication by e-mail was meant to given aid to the respondents nefarious designs.

Further, assuming though not admitting that respondent had to leave as allegedly his father was hospitalized, however, the respondent has admitted in his cross-examination that his mother informed him about the purported hospitalization in the morning on 12/8/2015 and hence the respondent could have called the appellant informing her about the same. But the mere fact that the respondent chose to surreptitiously and clandestinely leave with the minor child by sending one line email before leaving in the evening, makes appellant the mala fide intent behind the story concocted by the respondent. Also, no prudent father would want to take a 4.1/2 years old child along with him when he is to go to attend his father who was allegedly hospitalized or communicate such news to his wife by an e-mail.

(iii) Alacrity in moving the Family Court, Ahmedabad :

As stated above that the email 28/7/2015 addressed by the respondent to his father reveals that he had already hatched a conspiracy with the family to remove the minor child and remove the courts in Ahmedabad against the appellant. Therefore, as pre-planned by respondent, within 2 weeks of his arrival in Ahmedabad, he filed the petition before the Family Court, Ahmedabad. Therefore, it is important to note the alacrity with which the respondent wanted to give colour to his nefarious designs of depriving the minor child (who was merely 4 years and 8 months old) of his mother and appellant of her only child and further in order to oust the jurisdiction of the courts in USA over the minor child.

(iv) Bogus and contrived medical certificate dated 11/8/2015 produced by the respondent : In order to corroborate his concocted story of his father having been hospitalized, the respondent for

(v) The first time filed a purported Medical Certificate dated 11/8/2015 (Document @ page 762 of appellant's paperbook and document @ pg 58, respondent's paperbook) by way of an additional affidavit before this Hon'ble Court in SCA 14299 of 2015. It is pertinent to note that the said purported Medical Certificate was not filed along with the suit before the Family Court, Ahmedabad. The bare reading of purported medical certificate reveals that the same is nothing but a fabricated document and has been procured to create false evidence.

No other document produced other than the fabricated Medical Certificate : Further, it is worthy to note that the respondent in his cross examination (page 440 of respondent's Paper-book) has specifically admitted that except the said purported medical certificate no other document such as hospital bills, admission and discharge card has been produced by the respondent in support of his story of rushing down to India as his father was hospitalized. Therefore, the Family court has materially erred in coming to an absolutely erroneously conclusion with respect to the fact that the respondent's father was ill and hospitalized despite there being no medical evidence on record barring a fake and fabricated medical certificate dated 11/8/2015 produced by the respondent, the contents of which reveals that the same is nothing but a sham and contrived document and which has been admittedly produced belatedly at the stage of wing the additional Affidavit by the respondent in SCA in 14299 of 2015 with an oblique motive to mislead the Hon'ble Courts in believing a false story of his father's purported illness being the sole reason of him bringing the minor child with him to India and staying back in India.

E. Order dated 16/9/2015 and 4/1/2015 passed by the Superior Court, California, USA ought to have been given due weightage: It is submitted that the learned Family Court has erroneously failed to give due weightage to the orders passed by the Supreme Court, California in the petition for custody moved by the appellant despite the fact that the said courts having the "most intimate contact" with the minor child, were best suited to

determine the issue of welfare and custody of the minor child.

(i) Order dated 16/9/2015 passed by Superior Court, California: On 15/9/2015, the appellant herein filed a petition for temporary custody orders before the Superior Court, California, USA (@ page 627 of appellant's paper-book) wherein the appellant on pg 660 revealed the cases filed by the respondent before the Family court and High Court in India and in the body of the petition @ pg 644 (appellant's paper-book) mentioned about the orders dated 3/9/2015 and 11/9/2015. On 16/9/2015, the Superior Court, California passed a substantive order holding that the habitual place of residence of the minor child is in USA and that the minor be returned to USA and appellant to have sole physical and legal custody of the minor child (Order dated 16/9/2015 @ pg 663 appellant's paper-book, which is at Ex.135). It is pertinent to note that the said order of the Superior Court, California was a substantive order which held that the habitual place of residence of the minor child is California, USA and directed respondent to bring the child back and further that this order was passed prior in time to the order dated 21/10/2015 of the Family Court, Ahmedabad, which decided the issue of jurisdiction and interim custody.

(ii) Participation of respondent in proceeding filed by appellant before Superior Court, California:

(a) Motion to quash filed by respondent on 27/10/2015: On being served with the copy of the petition filed by the

appellant before the Courts in USA, the respondent herein on 27/10/2015 filed before the Courts in USA a motion to quash the petition of the appellant on the ground of :

- Deficient service respondent claimed that the appellant has not served the petition as per hague convention; and

- Order dated 3/9/2015 and 11/9/2015 already having been passed by the courts in India.

(b) Order dated 4/1/2016 (Ex.136 @ pg 679 of appellant's paper-book) Appellant through lawyer and telephonic appearance in person for Court hearing on 19/11/2015 before Superior Court, California : Thereafter, admittedly the respondent, though his lawyer and telepathically in person, participated in the court hearing held on 19/11/2015 before the Superior Court, California wherein the motion to quash tiled by respondent was only allowed to have extent that the appellant may serve through hague convention. However, vide order dated 4/1/2016 it was categorically reiterated by the court that the habitual place of residence of the minor is USA. It was also held that the prior temporary orders dated 16/9/2015, which granted sole legal custody and physical custody of Vihaan to and ordered the respondent to return Vihaan’s custody to the appellant in California, are still valid and in effect.

(c) Motion filed by respondent before Superior Court,

California for registration of orders passed by Courts in India; In November 2015 the respondent also filed a petition to register before the Courts at California the order dated 21/10/2015 passed by the ld. Family Court and 11/9/2015 passed by this Hon'ble Court but vide order dated 22/7/2016 the said motion of respondent was rejected. (Order dated 22/7/2016 passed by Superior Court, California @ pg 694 of appellant's paper-book).

II. DETERMINATION ON MERITS:

A. Paramount welfare of the child of 6 years (at present) rests with the mother: It may be appreciated by this Hon'ble Court that when the respondent committed the gross act of stealthily removing the minor child from USA to India, the child was of a tender age of 4 years and 9 months and at present the child is 6 years old. A child of such a tender age of being deprived of the love, affection and care of his mother, which love, affection and care cannot be substituted by presence of anyone else around the child. Therefore, the stand of the respondent that the child living with his grandparents and a divorces and a separated aunts respectively, cannot be made the basis to decide the welfare of the child as indisputably the welfare of the child of such a tender age lies with his mother.

Further, welfare of the child cannot be lie with the respondent who (a) with his family schemed and plotted against the appellant to leave her destitute and financially detained; (b) with the family schemed and

plotted to illegally remove the minor child from his family home; (c) filed false and fabricated documents before the Court in India and misrepresented and concocted stories before the Courts in India; (d) has two sisters, one of whom is a divorcee and other living separately from her husband for past 20 years and have conspired with and supported the respondent to keep the minor child away from the appellant.

B. Respondent has failed to produce any evidence or prove that the appellant was an uncaring mother;

(i) It is stated that despite being a well-qualified Interior Designer from CEP, appellant took a conscious decision to be a stay at home mother and devote her entire time in looking after the house, the respondent and devoting herself towards upbringing of the minor child, while admittedly the respondent was out of job for approximately 9-10 hours in a day and also while the respondent made frequent business trips within USA and internationally (admitted by respondent in his cross-examination @ pg 433 of respondent's paper-book). It was the appellant who gave up her career ambitions and almost single handily took care of the child for four and half years until he was abducted by the respondent.

(ii) No documentary proof has been placed on record to show that since the birth of the child in January, 2011 and till he was stealthily removed

by respondent in 2015, the child was at any point of time caused any harm or his safety has been endangered at the ends of the appellant. It is stated that the appellant, like every other mother, has devoted all her time and attention towards the upbringing of the child.

(iii) The entire petition of the respondent before the Family Court is based on instances which reveals the acrimonious relationship of the respondent and appellant and the instances of temperamental differences between them which cannot be considered while deciding the custody of the minor child and hence, the petition bereft of any proof of appellant bring a reckless or an uncaring mother.

However, the learned Family Court sans any basis and merely on surmises and conjectures, concluded that though the appellant was not working in USA those 4.1/2 years and child was in the care and custody of the appellant but it cannot be believed that the appellant was taking good care of the minor child.

C. Appellant's case taken as gospel truth and evidence of respondent completely discarded: without providing any reasoning or on the basis of any evidence, the learned Family Court has come to the conclusion that there is a substance in the case of the respondent and that the oral evidence of the respondent is trustworthy

and believable. Therefore, without any basis or reasoning, the learned Family Court has taken the case of the respondent as gospel truth. Further, it is stated that the learned Family Court has committed a grave error in observing that the incidents mentioned by the respondent stand proved as the learned Family Court has taken the evidence on the respondent on its face value and has chosen to disregard the evidence placed by the appellant without any basis or reasoning.

D. “INCOM” ought not be a factor in determining the custody and welfare of the child criteria: It is fact that the appellant being a stay at house mother and having devoted her 4.1/2 hours towards the upbringing of her minor child, was financially dependent on the respondent and hence, it is respondent who manipulated the entire situation wherein he, along with illegally removing the minor child and taking him away from the appellant left appellant destitute, deserted, homeless and financially handicapped. Hence, the Family Court ought not to have granted custody of the child to the respondent on the ground that the appellant is not financially sound and that the respondent is better placed.

Even otherwise, it is submitted that the appellant placed on record her job details along with her earning details and is capable of providing all the necessary facilities to the minor child. Without prejudice to foregoing, it is stated that the father having a job and earning well cannot be the criteria at all to determine

the custody of the minor child as if that be the case then majority of women in India, who are not working and dependent upon their husbands, shall be deprived custody of their children.

In view of the above, it is submitted that the impugned order suffer from grave illegality and perversity and if not set aside, this Court shall lay down a wrong precedent of encouraging "Parental Abduction" and removal of minor child by one Parent from the native country to country of their convenience and further shall send a wrong message to the society that welfare of the minor child is not with the mother, who are not financially independent or earn less than their husband."

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT – WIFE:

"Before advancing submissions on the merits of the matter and before adverting to the factual and legal aspects of the matter, the respondent would like to submit that the appellant has filed false criminal complaints against the respondent before the concerned authorities in USA.

In view of such criminal complaints, an arrest warrant has been issued against the respondent in the USA by the concerned authorities and the respondent will be arrested and incriminated in connection with such complaint upon the respondent putting his foot on US

soil. In view of such arrest warrant, there are also chances of the respondent being arrested and deported to USA in case the respondent makes an attempt to travel to any international destination.

During the course of arguments, the appellant had submitted that such reservation of the respondent could be put to rest in view of the appellant submitting an undertaking before this Court that she would not insist upon the arrest of the respondent as and when he comes to USA. However, such undertaking is of no effect since the respondent is unaware about the penal proceedings in USA and an undertaking by the appellant will not result in the concerned authorities in USA restraining itself from arresting the respondent. Moreover, the appellant has procured permission from the US Courts to get a duplicate passport for minor Vihaan, which will make it very easy for her to remove him from India. Under such circumstances, irrespective of the undertaking being tendered by the appellant, there is a looming threat of the respondent being arrested in connection with the false and frivolous criminal complaint having been filed by the appellant in USA.

Moreover, exclusive and unsupervised visitation of the minor child cannot be granted to the appellant since, there is an apprehension that the appellant taking disadvantage thereof will remove the minor from India and take him to USA. Such removal will result in the decree of the learned Family Court becoming a mere paper decree. Even otherwise, the appellant has scant

regards for the orders passed by the Courts of India.

Now pursuant to the oral hearings, granted by this Court to the appellant and the respondent, and in furtherance thereof, the respondent hereby presents his written submissions.

1. The appellant and the respondent married according to Hindu Vedic Rites at Ahmedabad on 20th April, 2009. Prior thereto, the registered marriage took place on 5th December, 2008, before the Registrar of Marriage, Ahmedabad.

2. The respondent was living in U.S.A. since 2001. He went on student visa and acquired H-1 visa in 2004. After the marriage, the appellant and the respondent lived in U.S.A. One child Vihaan was born on 17th January, 2011.

3. The marital relations between the appellant and the respondent faced several problems from the beginning. The respondent had indicated to the appellant, as early as in 2009, that he wanted to go back to India and settle down there permanently and was only awaiting for the Green Card to come. The appellant knew, from their repeated conversations, and often recorded in chats, that the respondent did not want to live permanently in U.S.A. and always wanted to return to India.

4. The respondent filed Family Suit No.1546 of 2015

against the appellant on or about 28th August, 2015. Such proceedings came to be filed in the circumstances stated in detailed in the petition. For the sake brevity, the same are not repeated herein.

5. The respondent also sought interim injunction restraining the appellant from forcibly taking away minor Vihaan from the custody of the respondent. Since no ex-parte ad-interim injunction was granted and only notice was issued, the respondent preferred Special Civil Application No.14299 of 2015 before this Court on 3rd September, 2015. in such proceeding, this Court was pleased to pass an interim order, protecting the respondent's custody of minor Vihaan. Thereafter, the appellant appeared through her advocate in the same proceedings and this Court has been pleased to pass bi-parte order on 11th September, 2015 and directed the learned Family Court to decide the application for interim relief finally.

6. Thereafter, the appellant filed proceedings in U.S.A. and secured ex-parte order regarding the custody of minor Vihaan against the respondent. Such order was passed on 16th September, 2015. However, the appellant deliberately suppressed the order dated 3rd September and 11th September, 2015 from the U.S. Court and did not disclose that such interim orders have been passed in favour of the respondent. Therefore, substantive interim protection orders were first passed only in favour of

the respondent and the order of the U.S. Court against the respondent was later in point of time, and without disclosure and knowledge of the orders passed by our Courts and on account of the suppression by the appellant.

7. The appellant being aggrieved by such order, filed Special Leave Petition (Civil) No.29339 of 2015 before the Hon'ble Supreme Court. However, before the same could be heard, the learned Family Court was pleased to decide the application for interim relief and protected the custody of minor Vihaan in favour of the respondent till the disposal of the main Suit. In view of such order, Special Leave Petition (Civil) No.29339 of 2015 came to be disposed of vide order dated 26.10.2015.

8. Being aggrieved by the order dated 20.10.2015, the appellant Special Leave Petition (Civil) No.31430 of 2015 without approaching this Court. It came to be dismissed by the Hon'ble Supreme Court by observing that the appellant should approach this Court.

9. Accordingly, the appellant filed Special Civil Application No.20027 of 2015 before this Court, which came to be dismissed vide order dated 08.03.2016.

10. Being aggrieved by the aforesaid order, the appellant again preferred Special Civil Petition

(Civil) No.10045 of 2016 before the Hon'ble Supreme Court. This also came to be disposed of vide order dated 22.08.2016, with a direction to the learned Family Court to proceed with the trial and dispose of the matter within a period of three months, uninfluenced by any of the observations and findings of the High Court.

11. The respondent and the appellant lent oral evidence and both were subject to cross-examination. After considering the oral and documentary evidence on record, the learned Family Court allowed the Suit by judgment and order dated 10.03.2017 and protected the respondent's custody of minor Vihaan, with regulated visiting rights for the appellant as provided therein. Being aggrieved by such judgment and order, the appellant has preferred the present First Appeal.

12. The following issues have been framed by the learned Family Court at Exhibit 74:

1. Whether the plaintiff proves that the welfare of the minor son is not with the defendant but it is with the plaintiff?

2. Whether the plaintiff proves that in the paramount interest and welfare of the minor, he is entitled to retain the custody of the minor?

3. Whether this Court has jurisdiction to entertain and adjudicate the present petition regarding

custody and welfare of the minor son Vihaan?

4. The plaintiff is entitled to get paramount injunction restraining the defendant from interfering with or removing the minor from the custody of the plaintiff?

5. Whether the plaintiff is entitled to get mandatory injunction that the defendant do sign all the necessary papers for renewal of the passport of the minor as prayed in paragraph 35(c) of the main petition?

6. Whether the plaintiff is entitled to get a decree as prayed for?

7. What order?

13. The findings of the learned Family Court on such issues are as under:

1. In the affirmative.
2. In the affirmative.
3. In the affirmative.
4. In the affirmative.
5. In the negative.
6. Partly affirmative.
7. As per final order.

14. There are essentially two main issues in the matter. The first issue pertains to the jurisdiction of the learned Family Court,.The second issue pertains to the welfare of minor Vihaan.

15. **REGARDING ISSUE OF JURISDICTION**:

The requirement of being ordinarily resident is a matter of intention and not a matter of, or dependent upon or the duration of the stay. For this purpose, reliance was placed upon the judgment of the Hon'ble Supreme Court in the case of ***Ruchhi Majoo Vs. Sanjeev Majoo (Supra)***. In this connection, the following observations of the Hon'ble Supreme Court are relevant.

> *"31. Reference may be made to Bhagyalakshmi and Anr. v. K.N. Narayana Rao, Aparna Banerjee v. Tapan Banerjee, Ram Sarup v. Chimman Lal and Ors., Smt. Vimla Devi v. Smt. Maya Devi & Ors., Dr. Giovanni Marco Muzzu (Dr.). In ref. 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."*

16. The reliance was also placed upon the decision of ***Sm. Kamla Vs. Bhanu Mal***, reported in ***AIR 1956 Allahabad 328***, wherein following observations are relevant:

> *"..... When a person leaves the place where he has been residing as permanent resident for good i.e., with no intention to come back & goes to some other place to live there, the former place where he used to live, ceases to be his ordinary place of residence and the latter place becomes his ordinary place of residence.*
>
> *The question of residence is largely a question*

of intention. In the case of minors no question of intention arises. But the Court will take into consideration their actual place of residence at the time of the application and regard that as their ordinary place of residence."

17. In the present case, after the respondent came to India along with minor Vihaan, on 14thAugust, 2015, and after seeing his father's condition, he sent following e-mails to the appellant. For the sake of ready reference, such e-mails are reproduced herein below:

On 15 August, 2015 at 11:21 PM, Abhishek Binaykia to Swati Binaykia.

Swati,

As you are aware, I had to come urgently to India as my dad was unwell. After speaking with the doctors and evaluating the situation herein, I need to stay in India to take care of my parents. It is my responsibility to care for them. Obviously, you can come here and we will move into separate apartment.
Abhi.

On 17 August, 2015 at 09:53 PM, Abhishek Binaykia to Swati Binaykia.

Swati,

As I have told you multiple times, I had to urgently leave for India because I got the message that my father was very sick. I had to take Vihaan with me because you were busy in your school and there was no one to care for him after all I have been the one caring for Vihaan single handedly for a long time. I have also repeatedly requested that you come here, and I have even offered to get a separate apartment for us because you do not like my folks. But even today, you are not exhibiting any responsibility towards either Vihaan or myself, which is in line with your past behaviour as well.

Given the current situation with me having to stay in India to care for my father, and me being the sole earning member of the family, it will be extremely difficult to continue our expenses in the US (rent, etc.)- I have requested you many times to come here to India and stay with me in a separate apartment. But you have not responded. From my side, I will be terminating the apartment lease by the end of month, so you should plan to be here before then. I will send you that ticket for the day you think you can come here. I hope you understand and that we don't have the same conversation repeatedly.
Abhi.

Swati Binaykia to Abhishek Binaykia

Abhi,

I am ready to give this relationship last shot. You need to come here and let good sense prevail into you for Vihu. We need to start afresh.
As far as me coming to India, that is not happening. I know my options here if you don't get Vihaan so please think from your heart and not what others have been telling you.
Swati.

Swati Binaykia to Abhishek Binaykia

Trust me and you don't have to be scared after what you have done. Just be sorry and come back.

PM, Swati Binaykia to Abhishek Binaykia

Abhi, every communication I am trying to make with you, are cutting me off. What are you achieving with that.

Anyways I want to know when are you planning to get Vihaan back. I really need you to bring him back as soon as possible, don't test a mother. I will really have to take a legal action then.

Please bring him back and resolve our issues for

once and all whether being together or separate. Swati.

18. Despite the aforementioned emails, the appellant clearly refused to join the respondent as can be seen from aforementioned e-mails exchanged between them. The respondent also left his job and surrendered his rented accommodation. Such actions showed his intention to live permanently in Ahmedabad, India. Moreover, the appellant despite being aware about the fact that the minor was with the respondent filed missing child reports/complaints against the respondent on 17.08.2015 and 20.08.2015. Moreover, despite having filed such reports/complaints, the appellant invited the respondent to join her in USA with a view to trap him.

19. In view of the above, the requirements of Section 9 of the Guardian & Wards Act, 1890, and Section 7(1)(g) of the Family Courts Act, 1984 are duly fulfilled. Moreover, the marriage of the appellant and the respondent was solemnized at Ahmedabad and the respondent's family home is at Ahmedabad and the respondent has come to reside in such family home at Ahmedabad and the respondent has not taken minor Vihaan to any obscure place. In view of such facts also, this Court has jurisdiction.

20. The attempt of the respondent to acquire US citizenship was only with a view to facilitating his work related travel and greater ease in doing

business. It did not amount to any intention to permanently settle down in U.S.A. Even otherwise, the respondent has chosen not to acquire US citizenship.

21. The reliance was also placed upon the decision of the Hon'ble Supreme Court in the case of ***Sarita Sharma Vs. Sushil Sharma*** reported in ***(2000) 3 SCC 14***. In that case, the wife took the children from the husband's residence and later on brought them to India inspite of the American Court's order. When the husband filed the writ of habeas corpus against the wife, the Delhi High Court directed the wife to return the children to the husband. When the wife filed appeal, the Hon'ble Supreme Court allowed the appeal and the children were allowed to stay in the custody of the wife. In the course of the judgment, the Hon'ble Supreme Court observed that even the decree passed by the American Courts, though a relevant factor, cannot override the consideration of welfare of the minor children.

22. The reliance was laso placed upon decision in the case of ***Dhanwati Joshi Vs. Madhav Unde***, reported in ***(1998) 1 SCC 112***. In this case, mother removed the child from U.S.A. to India while father obtained an order from the US Court to have the custody of the child in U.S.A. The Hon'ble Supreme Court held that the Court in India has to take an independent decision on merits on the basis of elaborate inquiry in regard to custody of the child

having regard to his welfare and the order of foreign Court is only one of the factors for consideration. The question of welfare being a matter of paramount consideration is required to be decided by the Indian Courts and the order if any passed by the foreign Courts is not conclusive, but merely one of the factors to be taken into account while exercising discretion.

23. The reliance was also placed upon the following observation of the Hon'ble Supreme Court in the case of ***Surya Vadanan Vs. State of Tamil Nadu and Others***, reported in ***(2015) 5 SCC 450***, which have been narrated by this Court in the judgment passed in Special Civil Application No.20027 of 2017 in which this Court has clearly laid down the factors, which need to be taken into consideration by this Court while deciding the issue of custody of minor which are as under:

> *"(a) The nature and effect of the interim or interlocutory order passed by the foreign court.*
>
> *(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.*
>
> *(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country.*

[35] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

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

24. The reliance placed by the appellant upon the judgment of the Delhil High Court in the case of Mr. Paul Mohinder Gahun vs. Mrs. Selina Gahun, is misplaced. The decision in this case clearly runs counter to the decision of the Hon'ble Supreme Court in the case of ***Dhanwanti Joshi (Supra)*** and ***Sarita Sharma (Supra)***, where it is clearly laid down that the order of the foreign Court is only one of the factors to be taken into account while deciding the welfare of the minor. The decision of Gahun's case clearly runs counter to the well settled legal position repeatedly enunciated by the Hon'ble Supreme Court in various judgments.

25. The reliance placed by the appellant on the decision of **Surya Vadanan (Supra)** is also misplaced. The facts of that case are completely distinguishable from the present case. In paragraph No.59 of the judgment, the Hon'ble Supreme Court has observed that though Mayura filed proceedings for divorce in India way back in August, 2012, she made no serious effort to obtain any interim order in her favour regarding the custody of the children and

she also did not persuade the trial Court for more than two years to pass an interim order for the custody of the children. On the other hand, the foreign Court acted promptly on the asking of Surya and passed an interim order regarding the custody of the children, thereby making the first strike principles applicable.

26. In the present case, if the doctrine of first strike principle is applicable, it clearly favours the respondent. Not only did the respondent file the proceedings for protecting the custody., but the respondent was also protected by interim order passed on 3rd September and 11th September, 2015, much before the ex-parte ad interim order was granted by the U.S. Court in favour of the appellant on account of her willful suppression. Even thereafter, the respondent has pursued the matter with diligence and the entire Suit has been disposed of within the time limit granted by the Hon'ble Supreme Court. The respondent has shown diligence and respect to the orders of the Courts.

27. The reliance is also placed upon the latest decision in the case of ***Nithya Anand Raghavan Vs. State of NCT of Delhi & Another***, reported in ***2017 SCC Online SC 694***, wherein the observations in paragraph No.24 are relevant:

> *"24. We must remind ourselves of the settled legal position that the concept of forum convenience has no place in wardship*

jurisdiction. Further, the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters has been succinctly delineated in several decisions of this Curt. We may usefully refer to the decision in the case of Dhanwanti Joshi v Madhav Unde13. In Paragraphs 28 to 30, 32 and 33 of the reported decision, the Court observed thus:-

"28. The leading case in this behalf is the one rendered by the Privy Council in 1951, in McKee v. McKee. In that case, the parties, who were American citizens, were married in USA in 1933 and lived there till December 1946. But they had separated in December 1940. On 17-12-1941, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada. In habeas corpus proceedings by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child. The order of the foreign court in US would yield to the welfare of the child. "Comity of courts

demanded not its enforcement, but its grave consideration". This case arising from Canada which lays down the law for Canada and U.K. has been consistently followed in latter cases. This view was reiterated by the House of Lords in J v. C. This is the law also in USA (see 24 American Jurisprudence, para 1001) and Australia. (See Khamis v. Khamis)

29. However, there is an apparent contradiction between the above view and the one expressed in H. (infants), and in E. (an infant), to the effect that the court in the country to which the child is removed will send back the child to the country from which the child has been removed. This apparent conflict was explained and resolved by the Court of Appeal in 1974 in L. (minors) (wardship : jurisdiction), and in R. (minors) (wardship : jurisdiction), It was held by the Court of Appeal in L., that the view in McKee v. McKee is still the correct view and that the limited question which arose in the latter decisions was whether the court in the country to which the child was removed could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked, for example, if the child had been

removed from its native land and removed to another country where, maybe, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, -- for these are all acts which could psychologically disturb the child. Again the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed. In that event, the unauthorised removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. (See Rayden & Jackson, 15th Edn., 1988, pp. 1477-79; Bromley, Family law, 7th Edn., 1987.) In R. (minors) (wardship : jurisdiction), it has been firmly held that the concept of forum convenience has no place in wardship jurisdiction.

30. We may here state that this Court in

Elizabeth Dinshaw v. Arvind M. Dinshaw, while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts, -- which were independently considered -- it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (infants), which case, as pointed out by us above has been explained in L. as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in McKee v. McKee and J v. C and the distinction between summary and Nithya Anand Raghavan vs State Of Nct Of Delhi on 3 July, 2017 elaborate inquiries as stated in L. (infants), are today well settled in UK, Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 -- even assuming that the earlier orders passed in India do not operate as constructive res judicata.

31. xxxx xxxx xxxx

32. In this connection, it is necessary to refer to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the Convention, any child below 16 years who had been "wrongfully" removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application

to a central authority. Under Article 16 of the Convention, if in the process, the issue goes before a court, the Convention prohibits the court from going into the merits of the welfare of the child. Article 12 requires the child to be sent back, but if a period of more than one year has lapsed from the date of removal to the date of commencement of the proceedings before the court, the child would still be returned unless it is demonstrated that the child is now settled in its new environment. Article 12 is subject to Article 13 and a return could be refused if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. In England, these aspects are covered by the Child Abduction and Custody Act, 1985.

33. *So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee v. McKee unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in L. As recently as 1996-1997, it has been held in P (A minor) (Child Abduction: Non-Convention Country), by Ward, L.J. [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence -- which was not a party to the Hague Convention, 1980, -- the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt*

to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also A (A minor) (Abduction: Non-Convention Country) [Re, The Times 3-7-97 by Ward, L.J. (CA) (quoted in Current Law, August 1997, p. 13]. This answers the contention relating to removal of the child from USA." (emphasis supplied)

28. The following factors overwhelmingly show that the welfare of minor Vihaan is with the respondent:

1. The respondent is well educated and earns well. The appellant is not even a graduate. In the U.S. Court, she has admitted that she will need child support, and even if she substantially higher than what she prays now. There is no evidence to show how she prays now. There is no evidence to show how she can afford the rent.
2. The respondent is living with his parents. Vihaan is already admitted in Mahatma Gandhi International School, which offers IB Course.
3. The appellant is living with strangers and has only one room for her accommodation. There is no document or lease agreement showing on what terms she is living with the strangers. Once the appellant goes to her job, there is non on to take care of minor Vihaan. She has claimed that she will need to put Vihaan in child care in U.S.A.
4. The appellant has past history of unstable mental behaviour – suicide attempt by slicing writs, jumping our of running car and repeated threats

to commit suicide.

5. The appellant's ethical standards are also questionable as she was arrested for shoplifting. Later on, it was treated as detention and the appellant was not prosecuted on payment of community service charges.
6. The appellant has accepted that private schools in California are expensive and with fees around 3000 USD per month. She has also accepted that if a good public school district is chosen, the rent there will be substantially higher than what she pays now. There is no evidence to show how she can afford the rent.
7. The appellant claims to be earning a salary 3000 – 4000 USD a month. Out of which, she claims to be paying a monthly rent of 650 USD. She also claims to be incurring other expenses for grocery and petrol. Hence, from the aforementioned claims made by the respondent, it is evident that she hardly has any savings for herself.
8. The learned Family Court interviewed minor Vihaan before reaching its conclusion on welfare.
9. The appellant has visited minor Vihaan only twice in the last two years. Although visiting rights are available to her, she has not exercised the same.
10. When the appellant's father suffered a heart attack, she did not even come to India to take care of him. It shows her nature and her indifference to people in India. If she does not take care of her father, it is impossible to expect her to come and take care of her father-in-law.

29. In view of aforesaid, the judgment of learned Family Court, Ahmedabad, requires no interference and the appeal filed by the appellant is required to be dismissed with costs."

30. On 30.08.2019, the Bench had assembled for taking up specially assigned matters. At that time, Ms. Garima Malhotra, learned advocate for the appellant, though this Appeal was not listed, made a mention seeking audience of the Bench for around 2 hrs. to recapitulate the arguments canvassed on behalf of the appellant. Learned advocate Mr. Sharvil Shukhla, for Mr. Umesh Shukla, learned advocate for the respondent strongly objected to the request made by learned advocate for the appellant.

We made it clear to the learned learned counsel for the appellant that her request cannot be acceded to as the Bench is separated and have to specially assembled to hear the arguments, which would disrupt the proceeding of two Courts. However, liberty was given to the leaned advocate for the appellant to place on record the judgment/s on 03.09.2019, if any, in the appeal with a copy to the learned advocate for the respondent for consideration of this Court. Similar liberty was given to the learned advocate for the respondent. Accordingly, learned advocate for the appellant as well as learned advocate for the respondent placed

on record the decisions of the Hon'ble Supreme Court in the case of Lahari Sakhamuri Vs. Sobhan Kodali reported in AIR 2019 SC 2881 and Prateek Gupta Vs. Shilpi Gupta and Ors. reported in (2018) 2 SCC 309 respectively, which we have considered in this judgment.

31. The main thrust of the arguments of the learned counsel for the defendant is that the Suit filed by the plaintiff in Family Court, Ahmedabad, is barred by Section 9(1) of the G & W Act as this Section confers jurisdiction of the Court having “Closest Concerned” and “Most Intimate Contact” for the minor child, would have jurisdiction for the custody of minor child and learned trial Judge ought to have considered the paramount interest of the minor and the learned trial Judge ought to have given due weightage to the orders passed by the superior Court, California in the petition for the custody initiated by the defendant. It thus, urged that learned trial Judge Court ought not have granted custody of the minor to the plaintiff.

32. On the other hand, learned counsel for the plaintiff relying upon various decision of the Hon'ble Supreme Court has submitted that the pivotal consideration for the Court should be the child welfare and undue emphasize should not be given to the provisions of Section 9 of the G & W Act unless grave risk of harm to the person or property of the minor is taken into consideration and

established and it is urged that the impugned judgment does not call for any interference in this appeal.

33. The Hon'ble Supreme Court in the case of ***Ruche Majoo (Supra)*** has held as under:

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.

25. 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.

26. The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer.

27. 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, C.C.A Cal.**, 129 F2d 135, 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. (State ex rel. ***Bowden v. Jensen Mo.****, 359 S.W.2d 343, 349.)"*

28. 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"

29. In ***Mrs. Annie Besant v. 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:*

" ...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 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 v. Jaswant Singh, 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:

"8.....Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases there on, 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 the expression "ordinary residence" as used in the Representation of People Act, 1950 fell for interpretation. This Court observed:

"243. Lexicon refers to ***Cicutti v. Suffolk County Council (1980) 3 All ER 689*** *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 particular place is incapable of ensuring nexus between him and the place in question."

31. Reference may be made to Bhagyalakshim V. K.N. Narayan Rao , Aparna Banerjee v. Tapan Banerjee, Ram Sarup v. Chimman Lal, Smt.Vimla Devi v. Smt. Maya Devi and in re: Dr. Giovanni Marco Muzzu 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 "

34. The Hon'ble Supreme Court thereafter, considering the pleadings and the Emails exchanged between the parties to deny the custody of the minor to the respondent father by observing in para 45 as under:

"It is difficult to appreciate how the respondent could in the light of the above communications still argue that the decision to allow the appellant and master Kush to stay back in India was taken under any coercion or duress. It is also difficult to appreciate how the respondent could change his mind so soon after the above E-mails and rush to a Court in U.S. for custody of the minor accusing the appellant of illegal abduction, a charge which is belied by his letter dated 19th July, 2008 and the E-mails extracted above. The fact remains that Kush was ordinarily residing with the appellant his mother and has been admitted to a school, where he has been studying for the past nearly three years. The unilateral reversal of

a decision by one of the two parents could not change the fact situation as to the minor being an ordinary resident of Delhi, when the decision was taken jointly by both the parents."

35. It is thus, imminently clear that in case of Ruchi Majoor (Supra), the parties had taken joint decision that the minor was remained with the mother in Delhi and thereafter, a unilateral decision by one of the parents cannot change the fact situation that the minor was "ordinary residence" of Delhi.

36. As the doctrine of "Closest Concerned" and "Most Intimate Contact", the reliance placed by the learned counsel for the defendant on the decision of the Hon'ble Supreme Court in the case Smt. Surinder Sandhi Vs. Habax Sindhu Sandhu (1984) 3 SCC 698, Shilpa Aggarwal VIS Aviral Mittal (2010) 1 SCC 591, Dr. V. Ravichandran Vls. U0I and ors. 2010(1) SCC 174, Surya Vadanan V/s. State of Tamil Nadu 2015 (5) SCC 450, Elizabeth Dinshaw V/s Arvand M. Dinshaw, wherein it has been held that the jurisdiction of the Court under G&W Act is determined on the basis of the "ordinary residence" of the minor within the area of which the Court exercise jurisdiction and that Court which has "Closest Concerned" and "Most Intimate Contact" with the Chid, would have jurisdiction to entertaining the proceeding regarding the custody of the minor. In the case of Surya Vadanan (Supra), the Hon'ble Supreme Court has held as under:

(Paras 39.2 to 39.4 and 39.6 and 40)

"39.2 One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry.
39.3 An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.
39.4 Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.
40. On the facts of the case, this court held that: (Ruchi Majoo case SCC p.504, Para 67)

> *"repatriation of the minor to the United States, on the principle of "comity of courts" does not appear to us to be an acceptable option worthy of being exercised at that stage."*

Accordingly, it was held that the "Interest of the minor shall be better served if he continued (to be) in the custody of his mother [Ruchi Majoo]."

37. In the latest decision of Lahiri Sakhamuri (Supra) on

which reliance is placed by the learned counsel for the defendant, which is held in paras 49 to 51 as under:

"49. The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parents can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.

50. While dealing with the younger tender year doctrine, Janusz Korczar a famous Polish−Jewish educator & childrens author observed children cannot wait too long and they are not people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they are meant to be − the unknown person inside each of them is our hope for the future. Child rights may be limited but they should not be ignored or eliminated since children are in fact persons wherein all fundamental rights are guaranteed to them keeping in mind the best interest of the child and the various other factors which play a pivotal role in taking decision to which reference has been made taking note of the parental autonomy which courts do not easily discard.

51. The doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc., cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child. Taking a holistic consideration of the entire case, we are satisfied that all the criteria

such as comity of courts, orders of foreign court having jurisdiction over the matter regarding custody of the children, citizenship of the spouse and the children, intimate connect, and above all, welfare and best interest of the minor children weigh in favour of the respondent (Sobhan Kodali) and that has been looked into by the High Court in the impugned judgment in detail. That needs no interference under Article 136 of the Constitution of India."

38. In the case of ***Nithya Anand Raghvan Vs. State of NCT of Delhi & Anr.*** reported in reported in ***2017 SCC Online SC 694*** in para 49 it is held under:

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

39. In latest decision of the Hon'ble Supreme Court in the case of ***Pratik Gupta Vs. Shilpi Gupta & Ors.*** reported in ***(2018) 2 SCC 309***, it is held in para 53 as under:

"The e-mails exchanged by the parties as have been placed on records do suggest that they had been in touch since the child was brought to India and even after the first order dated 28.05.2015 was passed by the court in US. In the said e-mails, they have fondly and keenly referred to both the sons staying in each others company, expressing concern about their illness and general well-being as well. As has been claimed by the appellant, the child is growing in a congenial environment in the loving company of his grand-parents and other relatives. He has been admitted to a reputed school and contrary to the nuclear family environment in US, he is exposed to a natural process of grooming in the association of his elders, friends, peers and playmates, which is irrefutably indispensable for comprehensive and conducive development of his mental and physical faculties. The issue with regard to the repatriation of a child, as the precedential explications would authenticate has to be addressed not on a consideration of legal rights of the parties but on the sole and preponderant criterion of the welfare of the minor. As aforementioned, immediate restoration of the child is called for only on an unmistakable discernment of the possibility of immediate and irremediable harm to it and not otherwise. As it is, a child of tender years, with malleable and impressionable mind and delicate and vulnerable physique would suffer serious set-back if subjected to frequent and unnecessary translocation in its formative years. It is thus imperative that unless, the continuance of the child in the country to which it has been removed, is unquestionably harmful, when judged on the touchstone of overall perspectives, perceptions and practicabilities, it ought not to be dislodged and extricated from the environment and

setting to which it had got adjusted for its well-being."

40. It is clear from the decision of the Hon'ble Supreme Court that while considering the question of the custody of the minor child, the doctrine of comity of Court intimate contact and orders passed by the Foreign Court, etc. cannot override consideration of the best interest and welfare of the child. The Court has to consider on the basis of evidence adduced before it whether the direction to return the child to the Foreign jurisdiction would result into in physical, mental, psychological or other harm to the minor.

41. The undisputed fact emerging from the ocular and documentary evidence adduced by the parties can be adumbrated as under:

a. The defendant is living along in US in a small accommodation. She is working workman and she has herself admitted in the proceedings before the US Court that in her temporary absence in the house during the working hours, she would need a child support. It is thus, clear that in absence of defendant, if the child is returned to his native country, he would be left with strangers whereas here in Ahmedabad, he has the benefit of company of his grandparents.

b. It also emerges from the evidence that in past, the defendant had exhibited violative behaviour and had attempted to suicide by

slicing her wrist. The defendant herself has admitted in her evidence that once she had jumped out of running car, which has been tried to explain it away by saying that she had done so to save minor.

c. The defendant was also booked and detained for shoplifting but was not prosecuted for the same as she had agreed to pay community service charges.

d. The school education especially provide school education in US is quite expensive and it is very doubtful whether the defendant after defraying household and other incidental expenses, would be able to afford decent schooling for the minor.

42. Learned trial Judge has considered all the factors , which are relevant for the best interest and welfare of the minor child for granting the custody to the plaintiff, reasons assigned by the learned trial Judge are cogent and we are in complete agreement therewith. Hence, in our view, the impugned judgment and order of learned trial Judge does not warrant any interference in this appeal.

43. Hence, the appeal stands dismissed accordingly.

R & P, if summoned, be transmitted to the trial Court forthwith.

Parties to bear their own costs.

(S.R.BRAHMBHATT, J)

(A.G.URAIZEE, J)

YNVYAS