IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 3419 of 2020

FOR APPROVAL AND SIGNATURE:
HONOURABLE MS. JUSTICE SONIA GOKANI

and
HONOURABLE MR. JUSTICE NIRZAR S. DESAI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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SAPNA GEHLOT W/O DEVENDRA SINGH GEHLOT THRU POA KULDEEP SINGH CHAUHAN
Versus
STATE OF GUJARAT

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Appearance:
MR KARMENDRA SINGH WITH MR BHUVNESH GAHLOT(10286) for the Applicant(s) No. 1
for the Respondent(s) No. 3,4,5
MR ASHISH B DESAI(5163) for the Respondent(s) No. 2
MS JIRGA JHAVERI, ADDL.PUBLIC PROSECUTOR(2) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE SONIA GOKANI**
and
HONOURABLE MR. JUSTICE NIRZAR S. DESAI

Date : 27/01/2022

CAV JUDGMENT
(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. By way of the present petition under Article 226 of the Constitution of India the petitioner-mother is praying for the writ of habeas corpus by urging to this Court to produce her minor children namely Leon Gillian Singh Gehlot, Paurush Singh Gehlot and Thaarun Singh Gehlot. Minor children and mother are all citizens of New Zealand and father has a status of permanent resident of New-Zealand. The petitioner seeks an order of return of minor children in consonance with the guardianship order dated 04.10.2019 passed by the High Court of New Zealand in SG vs. GSG, (2019) NZHC 2523 and other order dated 11.10.2019 on the ground that the children's removal and retention in India by the respondent Nos.2, 3 and 4 is completely illegal and wrong.

Factual Matrix:

2. The facts which led to the present petition are in a capsulized form produced hereinafter:

2.1 The petitioner married respondent No.2 on 16.05.2010. Out of their wedlock three children begotten, who at the time of preferring this petition were 2 years and 11 months (twins Tarun Singh and Paurush Singh) in the year 2017 when she was moved an application. The children were born in New Zealand. The respondent No.2 had taken the petitioner to New Zealand in October, 2010 and the she became a permanent resident of New Zealand since 2012. The husband has been living and working in New Zealand since 2002 and is also a permanent resident of New Zealand.

2.2 On 06.08.2015 the petitioner was sent to India for the purpose of attending the marriage of the sister of the respondent No.2 and after reaching India, she was denied to attend the marriage and was forced to keep elder son with her mother in law-Laxmiben Gehlot in India and the husband told her that the twin kids are too small therefore, he would bring the elder son to New Zealand from India which never happened after 23.11.2015. She returned back to New Zealand with the twins. He, in the meantime, got her son admitted in the local school of India, although he was already enrolled in the Kindergarten at New Zealand.

2.3 The petitioner further states that on 14.10.2017 the respondent No.2-husband

took the wife along with twin children to Ahmedabad and the told his wife that the purpose of the visit is operation of his mother, which was never happened and after coming to India, he never took his wife to his mother (Ms.Laxmi Gehlot) and kept her in Hotel named as Radhika Place for 15 days and then she was sent to rented house.

2.4 It is further averred that on 15.11.2017 the respondent no.2 husband took all the children and he went away from the wife. He also communicated to the wife that the children were not be returned and he is no longer interest in living with her. He also refused to give the children back and he has filed the petition for custody of children and for the divorce.

2.5 After petitioner-wife filed a complaint in commissioner office that her husband-respondent No.2 has vanished with the children and their passport, she also informed the matter in New Zealand and Indian embassy.

2.6 As averred further in the petition on 24.12.2017 she was informed by the Ahmedabad Police that her children were admitted to a boarding school namely Divine Public School in Mehsana and then she went to there to meet her children, where she was firstly denied the same by principal. It is only after she conveyed about the police then she was permitted to meet for 10 minutes. She was also forced to give in writing that the petitioner will not take the children with her. The father had

admitted them in the school conveying that they do not have mother. The second time when she went to meet her children one child Tharun Singh Gehlot have a fever and was unwell, she had requested for the permission to take him to the hospital which she was refused.

2.7 Having felt harassed by the school authority, she filed an application under Section 97 of the Code of Criminal Procedure seeking the search warrant that the children were in illegal detention. The learned Chief Judicial Magistrate, Mehsana directed the matter of custody to be decided by the Competent Family Court by saying that there cannot be an order of search warrant against the minors when they are in the custody of the grandmother and

such custody cannot be treated as illegal confinement. However, the legal custody and guardianship of the child shall need to be decided. She came to know that the husband had given a power of attorney to his sister Mrs.Vinita Gehlot and his mother Laxmi Gehlot.

2.8 On 25.02.2018, the petitioner chose to return to New-Zealand as she realised that the husband had run away to New Zealand. The petitioner filed custody petition in New-Zealand High Court seeking their return to New-Zealand because they are the citizens of New Zealand. She also is gainfully employed and is financially capable to support the children.

2.9 After going to New-Zealand, the petitioner tried to call the principal of

Divine Public School for contacting the children, however, she was conveyed that since the litigation is going on between the spouses, the children have been removed from the school. The husband in his short reply given to the custody petition in New Zealand had conveyed that the children are in Bangalore Boarding School and the new change of the school came after filing the custody application in New-Zealand High Court. He gave permission before the Court that the mother can talk to the children through video call. She tried to do that, however, the warden of Global Residential School conveyed that the children can talk only on Sunday from 07:00p.m. to 08:00pm which is 01 O' clock at night in New-Zealand, which made it very difficult for her. She had implored with the husband not

to ruin the family life and children's future.

2.10. It is her say that after the complaint was made to the police, she got her passport on 27.12.2018. The New-Zealand High Court considered the jurisdiction issue and passed a detail order that New Zealand High Court has the jurisdiction for the purpose of deciding the guardianship of the children. The husband participated in proceeding and sister in law (Respondent no.4) and mother in law (Respondent no.3) have also filed affidavits at New Zealand High Court in the custody proceedings. After detailed submissions from both the sides, the Court directed respondent No.2 husband to bring all the three children back to the jurisdiction of New Zealand

High Court on 20.02.2019.

2.11 In continuation of the earlier order, the New-Zealand High Court passed another order on 10.05.2019 directing the husband to make the travel arrangements (including flight tickets) for return of the children to New-Zealand.

2.12 The New-Zealand High Court also appointed a lawyer for the children and also appointed Chief Executive of Oranga Tamariki – Ministry for Children (Chief Executive) and requested all the Judicial and Administrative Bodies in the Republic of India to render assistance ensuring that the children returned as soon as possible to the jurisdiction of New-Zealand. In a detailed well reasoned order, the High

Court of New-Zealand ensured children's welfare and best interest and also observed that the children were unlawfully removed from the New-Zealand.

2.13 The petitioner since has been granted the citizenship of the New-Zealand, she has a plan to live with her family and children in New-Zealand.

2.14 Ms.Usha Patel, who was appointed as an independent lawyer of children by the New-Zealand High court also sworn an affidavit for the purpose of filing this petition before this Court.

2.15 The petitioner has lamented that she has been deprived of her children all throughout and the children are not the Indian citizens and respondent No.2 in

connivance with the respondent Nos.3 and 4 has forcefully taken the custody.

2.16 With no other efficacious remedy, she is before this Court with this Writ of habeas corpus and sought the following prayers:

> *"6...*
>
> *A. Your Lordships may be pleased to allow the present application;*
>
> *B. Your Lordships may be pleased to issue a writ of Habeas corpus directing respondents to produce all the three children named (1) Leon Gillian Singh Gehlot, (2) Paurush Singh Gehlot and (3) Thaarun Singh Gehlot before this Hon'ble Court so that they can be send to their respective country.*
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> *C. Your Lordships may be pleased to grant interim relief by way of directing the private respondent nos. 2 to 4 to talk to the petitioner pending admission and final hearing of the present petition;*
>
> *D. Any other or further relief as may be deemed fit, just and proper may please be granted in the*

interest of justice."

3. Before this Court on 19.08.2020, the learned advocate, Mr.Karmendra Singh appearing for the petitioner had urged that in a blatant manner, there is an attempt to avoid implementation of the order of the New-Zealand High Court and the mother is sent from post to pillar to get the custody of the children. The Family Court also in Miscellaneous Application rejected the main petition for custody vide its order dated 02.11.2018 under Order VI Rule XI of the Code of Civil Procedure and rejection of request for grant of custody of children by the husband has not succeeded and further challenge has not been made by him.

3.1 This Court issued the notice and directed the children to be brought before

us through video conferencing at the City Civil and Sessions Court, Ahmedabad since the physical hearing because of the pandemic due to COVID-19 virus was not permissible.

3.2 On 19.08.2020 this Court has passed the following:

> *"1. This is a petition preferred under Article 226 of the Constitution of India by citizen of New Zealand through her power of attorney holder seeking issuance of writ of habeas corpus or any other appropriate writ to reach out to her children, where one is aged 06 years and the twins are aged 05 years. She has made a grievance as to how respondent No.2 has taken away the children from New Zealand and has been playing hide and seek game even with the High Court of New Zealand. The blatant manner in which, he has avoided to implement the order of the Courts at New Zealand, is the grievance and anguish of the mother of three young children, who is going from post to pillar to get the custody of the children. It is also her grievance that initially the children were at Divine Life Public School, Mehsana and to avoid court proceedings, they were shifted to Bangalore.*

2. We have heard learned advocate Mr.Karmendra Singh appearing with learned advocate Mr. Bhuvenesh Gahlot for the applicant. He drew our attention to the fact that attempt on the part of the husband to get the custody from the family Court also has not succeeded. The Court in Miscellaneous Civil Application No.1291 of 2017 rejected the main petition for custody of the children vide its order dated 02.11.2018 under Order VI Rule 11 of the Civil Procedure Code. Rejection of the request of grant of custody of children has not been challenged thereafter.

3. Learned advocate for the applicant has relied on the decision of the Apex Court rendered in the case of Yasheda Sahoo vs. State of Rajasthan, 2020 AICES SC 65636 to urge that on similar lines, let the custody of the children be handed over to the mother. They were too young when she was deprived of their custody and despite having succeeded before various Court, the children are still away from her.

4. Issue notice returnable on 21.08.2020. Mr. Manan Mehta, learned Additional Public Prosecutor waives service of notice for and on behalf of respondent-State. Respondents No.2 to 4 shall be served through respondent No.5. Respondent No.5, if has any difficulty in getting the corpus presented before this Court through the video conferencing from the City Civil & Sessions Court, Ahmedabad,he shall directly approach the Police

Commissioner,Ahmedabad for seeking all possible assistance to ensure that order is complied with.

5. A copy of this order also shall be given to Mr. Mehta, learned Additional Public Prosecutor, who in turn shall intimate learned Public Prosecutor and can have a direct talk with the Commissioner of Police in this regard. "

3.3 On 21.08.2020 the children were brought before us and the following was the order passed by this Court:

"1. Pursuant to our order dated 19.8.2020 where we directed to bring the corpus before us, today all the three children are produced before the Court through Video Conference arranged at City Civil Court, in the presence of learned Judge, City Civil and Sessions Court, Mrs.Preet Kamal Ram.

2. We could notice that in the beginning the respondent No.2 had attempted to avoid presenting the corpora, however, on a firm insistence of this court and advice given to him by learned advocate Mr.Desai representing the respondent No.2, children were brought before the City Court. This Court had an occasion to speak to them in a breakout room through

the Video Conference and also made a request to the learned Judge of the City Civil Court before whom they appeared physically to be quite friendly to speak to them at length. The conversation with the children we may not like to reproduce at this stage and if need be so, shall record the same while finally deciding the matter. For now, Learned Judge Mrs. Preetkamal is requested to prepare a brief report of visit of children.

3. For now, our endeavor is three folds. Firstly, we would like the petitioner mother to meet the children through Video Conference in our presence for which the next date is to be scheduled to 26.8.2020. Secondly, the request has come from learned advocate Mr.Desai appearing for respondent No.2 to file an Affidavit-in-reply since he does not have even the copy of petition. Let him be provided the copy and he may file Affidavit-in-reply by 26.8.2020 with an advance copy to the other side. Thirdly and the most important is that since this involves the future of three children and relationship of their parents, not to mention their being spouses, we have requested learned advocates on both the sides being the officers of this Court to venture the possibility of working out amicably the issues raised in this matter before the Court in fact chooses to adjudicate upon them.

4. The matter shall be posted on 26.8.2020 at 10:30 a.m. for the purpose of Video Conference with the Petitioner at New Zealand and thereafter to proceed further. All the three children shall be brought to the City civil and Sessions court at 10 .15 a.m.

5. Till then, the Respondent no.2 shall not change his present residence of Ahmedabad nor shall he make any changes in the arrangements of these children. In a simple attire, a security person shall be deputed by the Respondent PI to avoid any mischief till the next date.

6. Learned advocate Mr. Desai is permitted to file his appearance. His name shall be reflected in the cause list henceforth by the Registry."

3.4 Thereafter, on various occasions in presence of learned Judge, City Civil and Sessions Court, Ms.P.T.Ram we had permitted the meeting of mother through video conference which went on cordially. The report of the learned judge also is forming the part of the record, which at a later point of time we shall discuss.

Affidavit-in-reply:

4. At this juncture, apt would be to refer to the affidavit-in-reply filed by the respondent No.2-husband Mr.Devendra Singh Gehlot, who denied all averments set out in the petition. He raised a preliminary objection on the point of maintainability of the petition on the ground that the custody of the children is with the biological father and that by no means can be construed as illegal or unlawful and therefore, the writ proceeding is misconceived. Again, according to him, he had filed divorce proceedings before the Family Court at Ahmedabad being Family Suit No.830 of 2019. Again the petitioner was aware of the respondent-husband's address and was contacting on the mobile phone of

the respondent-husband for children and therefore, the custody of the children through habeas corpus cannot be sought. Again he has objected on the ground that if she has the order of the New-Zealand High Court, she does not require any other order from this Court. She has an alternative remedy of preferring an Execution Application to execute the order of the High Court of New-Zealand and therefore, also this Court must not exercise the jurisdiction.

4.1 It is further contended that the matter cannot be entertained on the ground of delay and latches as the Apex Court in case of ***Nithya Anand Raghavan vs. State (NCT of Delhi),*** reported in ***(2017) 8 SCC 454*** stating that the summary jurisdiction

for the custody of the children needs to 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.

4.2 According to the respondent, the elder son Leon is in India since August, 2015 and the younger twins are in India since October, 2017. Therefore also there is an intentional delay which does not require any entertainment.

4.3 It is further contended that in habeas corpus petition as held by the Apex Court in case of ***Nithya Anand Raghavan vs. State (NCT of Delhi) (supra)*** the Court must examine at the threshold whether the minor is in lawful or unlawful custody of another

person. In a matter before the Apex Court the natural guardian was her biologic mother and in such a case, only in exceptional situation, the custody of the minor may be ordered to be taken away from her mother for being given to any other person including the husband or the father of the child. According to the respondent No.2, the petitioner-wife was all the time quarreling and abusing. She was not interested in domestic work and she picked up quarrels on unessential matters and created unhealthy atmosphere. She had a habit of making false and frivolous allegations against the husband and his family including the allegations of his having illicit relationship with his own sibling.

4.4 As she could not conceive after the marriage, the couple tried IVF at Auckland, which did not succeed. Then, she was sent to India and twice the IVF has done and the first time Leon was born and second time twins. He has also further made an allegations about her not being willing to have the children the second time. He gave a detailed narration as to how her careless behavior had resulted into the first child having born prematuredly and during the second pregnancy also, she wanted to live her life with full freedom and therefore, she attempted the harassment to the respondent No.2. He has also alleged of having been beaten up by the family members of the petitioner, which made him leave his elder son with his mother and sister.

4.5 He has further alleged that every time his mother went to stay with him in New-Zealand, the petitioner was unhappy and expected the mother to do the household work. It is alleged by him of her ignorance of the children and her pressurizing the mother to be sent at old age home. He has further alleged of misbehavior of the petitioner with the children. She had her anger issue and abnormal behavior. She was told by the psychiatrist that she was angry with the kids because the kids were the symbol of the respondent No.2, he apprehended the harm to the kids.

4.6 With this background, he stated that he chose to reside in Ahmedabad in a rented house with no change in the behavior of the petitioner. The elder son since was living

with his mother from the childhood, they have already settled in India, the twins have been in India from 14.10.2017. They are accustomed to Indian environment, food and life style. They have adopted Hindi as their first language. He has taken admission for these young children. As the petitioner was not taking good care and her cruelty had crossed the limit, he chose to prefer an application under Section 25 of the Guardians and Ward Act being the Civil Misc. Application No.129 of 2017 before the Family Court, Ahmedabad and he also preferred a Family Suit No.2031 of 2017 seeking divorce.

4.7 The petitioner filed an application under Order VII Rule 11 of the Civil Procedure Code and the Family Court allowed

the said application on 02.11.2018.

4.8 Aggrieved respondent No.2 challenged the same by preferring First Appeal No.2 of 2019 and First Appeal 3 of 2019 against the divorce and custody of the children petition respectively. They were withdrawn with a liberty to file fresh proceedings before the concerned Family Court. He, has therefore, urged that on the ground of suppression of material fact and also on the ground of misrepresentation, she should be denied any discretionary relief.

4.9 The respondent No.2 preferred Family Suit No.830 of 2019 and this order of 25.02.2019 passed by the Family Court is in challenge before this Court and the divorce petition is part and parcel of the

affidavit dated 25.02.2019 filed by the respondent No.2 before the New-Zealand High Court.

4.10 It is also urged that the petitioner is jobless and she has no independent source of income and she is unable to take care of welfare of minor with the prevalent financial circumstances.

4.11 It is allegedly contended that she is a lady with extremely short temper and she some times behave as a psycho patient, whereas the respondent No.2 is an Associate Chartered Accountant, he is in a position to give a bright future to the children and all basic necessities of the children will be fulfilled by him. The paramount interest of the children shall need to be looked into.

4.12 The petitioner-wife has preferred and application for restitution of conjugal rights before the Family Court at Rajasthan. The said matter was dismissed for default on 19.07.2018. Thus, she has surrendered to the jurisdiction of the Court in India.

4.13 She had also preferred a complaint under the provision of Protection of Women from Domestic Violence Act and the learned Metropolitan Magistrate, Ahmedabad entertained the application.

4.14 It is further urged that the respondent No.2 was employed at New-Zealand on work contract, which was purely on contractual basis and once the contract came to an end, he had no source of

employment in New-Zealand. Hence, his future was not very certain in New-Zealand. There are other details given highlighting the application under Section 97 of the Code of Criminal Procedure, etc. which would not require any further reproduction.

5. This has been also replied to by denying all the allegation and contentions by the petitioner which may not require elaborations. According to the petitioner, hurting of these allegations and casting stigma on her is only a plop to succeed in legal battle without any semblance of truth in it.

Oral Submissions of learned advocates of the parties:

6. Learned advocates on both the sides

have extensively argued before this Court and written submissions also have been tendered, which since form the part of the record, they do not require the reproduction. Along the line of their respective pleadings, the submissions have been made, where reliance is also placed on various decisions by both the sides, which shall be discussed at proper place.

7. The art of emphasis on the part of the petitioner is the imminent need to get implementation of the order of the New-Zealand High Court made and the unlawful removal of the children from New-Zealand by the respondent No.2. Whereas according to the respondent No.2, this petition itself is not maintainable for the children being in the custody of the father, whose custody

cannot be said to be illegal according to him. The personal allegations on the part of the respondent No.2 against the petitioner has no bound. According to the petitioner, the court needs to bear in mind that these allegations are made by the party at a stage where there is already an order passed by the High Court of New-Zealand after bipartite hearing.

Decision of the High Court of New-Zealand:

7.1 Apt would be to refer at the outset the detailed judgment and order of the New-Zealand High Court which had been delivered on 04.10.2019.

7.2 In the proceedings of the custody of the three children of the petitioner and the respondent No.2, the Court noted that

these children are in India where the eldest one is taken since August, 2015 and the twins since October, 2017. The allegation of the petitioner mother that they have been removed from New-Zealand and retained in India by her husband without her consent, with a deliberate plan to lure her and the children to India has been extensively considered. All averments set out in the present petition are forming the part of the judgment in the introduction section.

7.3 The High Court of New-Zealand also noted that in a judgment delivered on 20.02.2019 the interim guardian's order had been made by the Court, meaning thereby that the children were under the guardianship of the High Court of New-

Zealand from 20.02.2019. In a subsequent judgment, the Court also directed the respondent No.2 to take all reasonable steps to ensure the children promptly return to New-Zealand, he has not so done it. The Court held and noted that in an application for guardianship order of the petitioner the hearing had commenced where the respondent No.2 participated and filed a substantial volume of affidavits in the form of evidence of his own and other witnesses on his behalf. And, on the last working day, before the hearing he informed the Court that he no longer intended to participate. As the strict rules of evidence did not apply to the proceedings under the Care of Children Act, 2004, the Court took into account the evidence which had been tendered by the respondent No.2

despite the persons he depended on, not being available for cross examination and the petitioner had been crossed examined by the lawyer appointed for the children and the counsel for the Chief Executive of Oranga Tamariki -the Ministry of Children as well as by the Court itself. The Court also had taken into consideration the evidence of the social worker as well as from the psychologist appointed by the Court to report on the children's welfare and best interests. The Court satisfied itself that the order is required to be passed to facilitate the return of the children to New-Zealand and the same is for the children's welfare and best interest. The order placing the children under the guardianship of the High Court is a *"stepping stone"* only as to any final

determination as to their ongoing care.

7.4 As there was noncompliance on the part of the respondent No.2 of the interim order, the Court held that the New-Zealand is a contracting state to the Hague Convention on the Civil Aspect of International Child Abduction, India is not a signatory to this. Therefore, the orders which have been made are not directly enforceable in India. Indian case law, nevertheless demonstrates that subject to any ongoing inquiry as to the children's welfare and best interests, Indian Courts do respect orders of the kind made in this case by the foreign courts. The Court, therefore, invited all the Judicial and Administrative Bodies in the Republic of India to render assistance for ensuring all

the three children to be returned to the jurisdiction of the New-Zealand as soon as possible. This has been based on the significant body of evidence before the Court. The Court chose not to address the evidence about dispute and disagreements between the parents unless relevant for the determination of the children's custody. It also took note of the reports and evidence given by Oranga Tamariki Social Worker and of the court appointed psychologist. On evidence and the credibility of the witnesses who gave evidence, the Court had made certain observations and also provided the overview of the legal framework which applies in the instant case.

7.5 Thus, in an extensive a well reasoned order, the Court held that the

Children were unlawfully removed from the New-Zealand by the respondent No.2-Mr.Devendra Singh Gehlot. The detailed order passed includes children's return to the New-Zealand and on their return, they shall live with the mother with the further order.

> *"32. Fitzgerald J's orders are detailed. It includes that after the children are returned to New Zealand the following is to happen:*
>
> *32.1 they are to live with their mother;*
>
> *32.2 they are to have contact with their father and paternal grandmother at least twice weekly if they are in India and if they are in New Zealand at least weekly supervised contact on an interim basis.*
>
> *32.3 Oranga Tamariki is appointed agent for the purpose of monitoring the children upon their return; provide reports to the Court if requested and provide social work and other assistance to both parents and the children;*

32.3 The court appointed psychologist, Dr Madhu Rai, will make arrangements to complete her report;

32.4 The matter is to come back before Fitzgerald J after two weeks and mother is to make an application for a day to day parenting order in the Family Court within two weeks of the children's return;

32.5 Leave granted to both parents to submit copies of documents in the New-Zealand proceedings to the Indian Court; and

32.6 Leave granted to either of the parties, the Chief Executive of Oranga Tamariki or me to apply to the court on 24 hours' notice for urgent orders if required."

33. The children will be living in the house that is adjacent to the home their family occupied for most of the children's time in New Zealand. They will be living, with their mother, and the family's landlady Ms Warrick. Mr Gehlot stayed with Ms Warrick before his marriage to Ms Gehlot and

subsequent to their marriage. The family stayed there until shortly before their departure to India.

34.On the children's return they will attend their local school. Primary and secondary education is free in New Zealand as is medical care for children under 14 years. Hospital care is also free for New Zealand citizens, which the Gehlot children are.

35. The orders provide for oversight of the children by Oranga Tamariki. Oranga Tamariki has extensive powers under the Oranga Tamariki Act 1989 to ensure the wellbeing of children in New Zealand.

36. Both Edwards J and Fitzgerald J requested in their orders that all Judicial and Administrative bodies in the Republic of India render assistance in ensuring that the children are returned as soon as possible to the Jurisdiction of New Zealand."

8. The Court notices from the said judgment that the guardianship order is not easily made by the New-Zealand High Court,

there is a long drawn line of the New-Zealand's case laws holding that the making of the guardianship order is a solution last resort. It is a jurisdiction to be invoked cautiously and only after proper inquiry, but it is a flexible and resourceful remedy for protecting the vulnerable children, the jurisdiction is to be exercised, which is broad and unfettered. The Court is of the firm opinion that the petitioner was not having any meaningful or ongoing role in a children's care, development and upbringing. Many important decisions about the children's welfare have been taken by the respondent No.2 without petitioner's knowledge or input including their schooling and living arrangements. He chose not to give any particular or ongoing role

in children's day to day care or development.

8.1 What weighed with the Court is the principle of the children's care, development and upbringing being the primary responsibility of the children's parents and guardians, according to the Court, this can be implemented in a timely way while promoting and preserving the rights and responsibilities of the respondent No.2, if the order is passed in favour of the guardianship order.

8.2 The Court also further held that Principle 5(c) which provides that a child's care, development and upbringing should be facilitated by ongoing consultation and cooperation between him or her parents. That is obviously not

occurring in this case and as set out above, the Court was satisfied that the respondent No.2 is being deliberately marginalised from ongoing consultation and cooperation in relation to her children and therefore, that principle has weighed in favour of the Court in making the guardianship order.

8.3 Principle 5(d) provides that a child should have continuity in his or her care, development and upbringing.

8.4 The mother being a primary caretaker till the children were removed to India and the children since have extremely disrupted existence being in India, there has been a continuity of relationship between them and the grandmother, but no continuity with the mother nor with the

father also, who returned to India late in February and as the principle 5(e) also provides for continuity of relationship with both his and her parents, and the child's relationship with his or her family group, the Court did not accept the suggestion of his mother's assault charge against the petitioner being an obstacle in her returning. The Court was also of the opinion that petitioner would not be afforded regular face-to-face contact with her children in India pending any formal arrangements being made in that jurisdiction as to ongoing arrangements and hence, the guardianship order has been made in detail.

Affidavit of Barrister Ms.Usha Patel:

8.5 This Court notices that the affidavit

filed by Ms.Usha Patel, who is a barrister of over 20 years of experience and specialising in family law, practicing in Aukland, New-Zealand and prior to her being a barrister she was barrister and solicitor for 17 years. She represented the children for more than 25 years before the New-Zealand Family Court and in the instant matter she was representing all the three children before the New-Zealand High Court with the consent of both the parties.

8.6 According to a long affidavit, she has given a chronology of events. According to her, the order has been passed by the New-Zealand High Court. When despite the Court's interim order dated 20.02.2019, the respondent No.2 did not return the children to New-Zealand. Further order was passed on

10.05.2019 and thereafter, on 04.10.2019 and second judgment on 11.10.2019 with reasons. She has also further urged this Court that in support of the orders passed in the New-Zealand High Court, and the young children who are the citizens of New-Zealand are to be returned requested the Court to support the said order.

Undertaking of petitioner Mother for expenses:

9. The petitioner also affirmed that she being a mother undertakes to take care of all expenses of day-to-day running of the house, medical insurance for all the three children, electricity, gas and all other incidental expenses till the time the New-Zealand High Court makes a provision in that regard. The New-Zealand High Court has

also appointed a social agency namely Oranga Tamariki to come and inspect her house and after completion of formal procedure including her personal interview and the interview with the landlady. They had observed that the children can stay safely and happy in the house with her. She also undertook to bear all expenses for education of the minor children including admission in school back at New-Zealand. She also undertook that she was capable to pay all expenses of the school supplies and other requirements as part of minor's child life. She is working as a catering assistant in Auckland and her job hours according to her are flexible and can be changed as per the needs and requirements of daily care of the children.

9.1 According to her, her husband can bring the children to New-Zealand, but if he is incapable to bear travel expense, she shall make all arrangements of stay and travel expenses (including air tickets) of her minor children in her house which is a five bed room house.

9.2 She depended on the order of the New-Zealand High Court as also on the affidavit of the barrister, who represented the children with the consent of the parties and the earnest request is made by the petitioner.

Indian Case Laws on Custody of Children:

10. The Court needs to regard the decision of the Apex Court rendered in case of ***Nithya Anand Raghavan vs. State (NCT of Delhi) (supra)*** which was also a matter

where under Article 226 of the Constitution of India, a habeas corpus petition was preferred for the custody of the child. There was an inter country dispute. The Court regarded the power of Indian court to decline the relief of return of child brought within its jurisdiction, if it is satisfied that the child is now settled in the new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. The Court has held that the overriding consideration must be the interests and and welfare of the child, no primacy to order of foreign court which must yield to best interests and welfare of the child, which is a paramount importance. It was a

case of child removed from foreign country (UK) by mother in violation of interim/ interlocutory order of the foreign court, which had directed the mother to produce the child where the issue of wardship of child was pending consideration. The court also discussed the law to be followed by the Indian courts when India is not a signatory of international convention concerned, the Civil Aspects of international child abduction, the scope of jurisdiction and power of foreign court and Indian court, etc. has been in principles summarised.

11. The Court also needs to regard the decision of the Apex Court rendered in case of ***Yashita Sahu vs. State of Rajasthan***, reported in ***2020 AIJEL-SC 65636.***

11.1 Relevant findings and observations of the Apex Court are as follow:

> *"9.It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw vs. Arvand M. Dinshaw & Ors.1, (1987)1 SCC 42 Nithya Anand Raghavan vs. State (NCT of Delhi) & Anr. 2 and Lahari Sakhamuri vs. Sobhan Kodali3 among others. In all these cases the writ petitions were entertained. Therefore, we reject the contention of the appellant-wife that the writ petition before the High Court of Rajasthan was not maintainable.*
>
> *10.We need not refer to all decisions in this regard but it would be apposite to refer to the following observations from the judgment in Nithya Anand Raghavan (supra):*
>
> > *"46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child in a given case, may*

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

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold

whether the minor is in lawful or unlawful custody of another person (private Respondent named in the writ petition).”

11. Further, in the case of Kanika Goel vs. State of Delhi 2018 9 SCC 578 it was held as follows:

“34. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country of otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom, etc interfering with his/her overall growth and grooming and whether continuance there will be harmful.”

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

11.2 Preliminary objection is raised by the respondent No.2 on the ground of the maintainability stating that he being a biological father, custody of the children cannot be construed as illegal or unlawful and therefore, the writ proceeding is misconceived and not maintainable has been answered in case of ***Nithya Anand Raghavan vs. State (NCT of Delhi) (supra)*** where the

Apex Court has held that the habeas corpus is essentially a procedural writ dealing with machinery of justice. The object underlying the writ is to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the Court. On production of the person before the Court, the circumstances in which the custody of the person concerned has been taken can be inquired into by the Court and upon due inquiry into the alleged unlawful restraint, the Court can give appropriate direction as may be deemed just and proper to if. In other words, inquiry by the High Court in such proceedings is for immediate

determination of the right of the person's freedom and his release when the detention is found to be unlawful.

> *"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling 23, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.*

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana, has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and

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

47.In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian

of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

11.3 This is a clear answer to the contention of maintainability of petition under Article 226 of the Constitution of India that the Court in its exercise of writ jurisdiction can entertain the petition of custody for the writ of habeas corpus where this Court is expected to examine at the threshold whether the minor is in lawful or unlawful custody of another person. Once the fact is ascertained that the custody of the minor is with the

mother, in exceptional situation, the custody of the minor may be ordered to be taken away from the mother for being given to any other person including the father, in exercise of writ jurisdiction instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.

11.4 In the instant case, the Court at a threshold has examined as to with whom the custody of the minor is and it is found to be with the father, who otherwise being a biological father can claim to have a lawful custody of the children and as provided by the Apex Court that this Court could direct the other parents to take recourse to the remedy prescribed under the law for the custody of the children.

11.5 However, the next question to be considered as also provided in the very decision of the Apex Court is as to whether an order passed by the foreign court directing the father to produce the children before it, could render the custody of the minor unlawful!!! According to the Apex Court, when such an order is passed by the foreign court, there are certain parameters to be considered. In a matter before the Apex Court, the order of a foreign court (UK) was an ex-parte order passed against the mother in relation to the minor who was the resident within the jurisdiction of England and Wales. Holding that the child was wrongfully removed from England and retained in India and the Courts of England and Wales since had

jurisdiction in the matter of parental responsibility over the child pursuant to the provision of law, it had been ordered that the minor shall remain a ward of the court during the minority or until further order and the mother shall return or cause the return of the minor forthwith to England and Wales and if she did not challenge the said order, the father was permitted to request for modification. In this background, the court held that there is no finding rendered that the custody of the minor with the mother will be treated as unlawful including for the purpose of considering a petition for issuance of the writ of habeas corpus. Therefore, the Apex Court held that the custody of the minor with the biological mother would be presumed to be lawful. It is mandated by

the Apex Court that the Court needs to consider the factum of interest of the child and all attending circumstances and totality of the situation while considering the decision of the foreign court.

> *"50. The High Court in such a situation may then examine whether the return of the minor to his/her native state would be in the interests of the minor or would be harmful. While doing so, the High Court would be well within its jurisdiction if satisfied, that having regard to the totality of the facts and circumstances, it would be in the interests and welfare of the minor child to decline return of the child to the country from where he/she had been removed; then such an order must be passed without being fixated with the factum of an order of the foreign court directing return of the child within the stipulated time, since the order of the foreign court must yield to the welfare of the child. For answering this issue, there can be no straitjacket formulae or mathematical exactitude. Nor can the fact that the other parent had already approached the foreign court or was successful in getting an order from the foreign court for production of the child, be a decisive factor. Similarly,*

the parent having custody of the minor has not resorted to any substantive proceeding for custody of the child, cannot whittle down the overarching principle of the best interests and welfare of the child to be considered by the Court. That ought to be the paramount consideration.

51. For considering the factum of interests of the child, the court must take into account all the attending circumstances and totality of the situation. That will have to be decided on case to case basis. In the present case, we find that the father as well as mother of the child are of Indian origin. They were married in Chennai in India according to Hindu rites and customs. The father. an Indian citizen, had gone to the UK as a student in 2003 and was working there since 2005. After the marriage, the couple shifted to the UK in early 2007 and stayed in Watford. The mother did get an employment in London in 2008, but had to come to her parents' house in Delhi in June 2009, where she gave birth to Nethra. Thus, Nethra is an Indian citizen by birth. She has not given up her Indian citizenship. Indeed, the mother, along with Nethra, returned to the UK in March 2010. But from August 2010 till December 2011. because of matrimonial issues between the appellant and Respondent 2, the appellant and her

daughter remained in India. It is only after the intervention of and mediation by the family members, the appellant and her daughter Nethra went back to England in December 2011, more than a year after they had come to India. After returning to the UK, Nethra was admitted to a nursery school in January 2012.

52. An application for grant of UK citizenship was made on behalf of Nethra in September 2012 which was subsequently granted in December 2012. The father (Respondent 2) then acquired the citizenship of the UK in January 2013. After grant of citizenship of the UK, Nethra was admitted to a primary school in the UK in September 2013 and studied there only till July 2015. Since Nethra had acquired British citizenship, the UK Court could exercise jurisdiction in respect of her custody issues.

53.Significantly, till Nethra returned to India along with her mother on 2-7-2015, no proceeding of any nature came to be filed in the UK Court, either in relation to the matrimonial dispute between the appellant and Respondent 2 or for the custody of Nethra. Further, Nethra is staying in India along with the appellant, her grandparents and other family members and relatives,

unlike in the UK where she lived in a nuclear family of the three with no extended family. She has been schooling here for the past over one year and has spent equal time in both the countries out of the first six years. She would be more comfortable and feel secured to live with her mother here, who can provide her love, understanding, care and guidance for her complete development of character, personality and talents. Being a girl child, the guardianship of the mother is of utmost significance. Ordinarily, the custody of a "girl" child who is around seven years of age, must ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in custody of her mother. No such material or evidence is forthcoming in the present case except the fact that the appellant (mother) has violated the order of the UK Court directing her to return the child to the UK before the stipulated date.

56.Admittedly, the appellant has acquired the status of only a permanent resident of the UK, as she was staying with Respondent 2 who is gainfully employed there. The appellant has alleged and has produced material in support of her case that during her stay with Respondent 2 in the UK, she was subjected to physical violence and mental torture. She has also alleged that if

she goes back to the UK, she may suffer the same ignominy. Further, the proceeding in the UK Court instituted by the husband is a counterblast to the complaint filed by her in Delhi about the violence inflicted on her by the husband and his family members. Indeed, Respondent 2 has vehemently denied and rebutted these: allegations. It is not necessary for us to adjudicate these disputed questions of facts.

57. Suffice it to observe that taking the totality of the facts and circumstances into account, it would be in the interests of Nethra to remain in custody of her mother and it would cause harm to her if she returns to the UK. That does not mean that the appellant must disregard the proceedings pending in the UK Court against her or for custody of Nethra, as the case may be. So long as that court has jurisdiction to adjudicate those matters, to do complete justice between the parties we may prefer to mould the reliefs to facilitate the appellant to participate in the proceedings before the UK Court which she can do through her solicitors to be appointed to espouse her cause before that court. In the concluding part of this judgment, we will indicate the modalities to enable the appellant to take recourse to such an option or any other remedy as may be permissible in law. We say so because the present appeal

arises from a writ petition filed by Respondent 2 for issuance of a writ of habeas corpus and not to decide the issue of grant or non-grant of custody of the minor as such. In a substantive proceeding for custody of the minor before the court of competent jurisdiction including in India if permissible, all aspects will have to be considered on their own merit without being influenced by any observations in this judgment.

58. As aforesaid, Respondent 2 has heavily relied on four decisions of this Court. The case of V. Ravi Chandran (2)12 also arose from a writ of habeas corpus for production of minor son and not from the substantive proceedings for custody of the minor by the father. The minor was in custody of his mother. It was a case of custody of a "male" child born in the US and an American citizen by birth, who was around 8 years of age when he was removed by the mother from the United States of America (USA) in spite of a consent order governing the issue of custody and guardianship of the minor passed by the competent court, namely, the New York State Supreme Court. The minor was given in joint custody to the parents and a restraint order was operating against the mother when the child was removed from the USA surreptitiously and brought to India. Before being removed from the USA, the minor

had spent his initial years there. These factors weighed against the mother, as can be discerned from the discussion in paras 32 to 38 of the reported judgment. This Court, therefore, chose to exercise summary jurisdiction in the interests of the child. The Court directed the mother to return the child "Aditiya" on her own to the USA within the stipulated time. In the present case, the minor is a "girl" child who was born in India and is a citizen of India by birth. She has not given up her citizenship of India. It is a different matter that she later acquired citizenship of the UK. We have already indicated the reasons in the preceding paragraph, which would distinguish the facts from the case relied upon by Respondent 2 and under consideration.

59. As regards the case of Shilpa Aggarwal, the minor (girl child) was born in England having British citizenship, who was only three-and-a-half years of age. The parents had also acquired the status of permanent residents. of the UK. The UK Court had not passed any order to separate the child from the mother until the final decision was taken with regard to the custody of the child, as in this case. This Court recorded its satisfaction on the basis of the facts and circumstances of the case before it that in the interests of the minor

child, it would be proper to return the child to the UK and then applied the doctrine of comity of courts. Further, the Court was of the opinion that the issue regarding custody of the child should be decided by the foreign court from whose jurisdiction the child was removed and brought to India. This decision has been rendered after a summary inquiry on the facts of that case. It will be of no avail to Respondent 2. It does not whittle down the principle expounded in Dhanwanti Joshi, the duty of the court to consider the overarching welfare of the child. Be it noted, the predominant criterion of the best interests and welfare of the minor outweighs or offsets the principle of comity of courts. In the present case, the minor is born in India and is an Indian citizen by birth. When she was removed from the UK, no doubt she had, by then, acquired UK citizenship, yet for the reasons indicated hitherto dissuade us to direct return of the child to the country from where she was removed.

60. In Arathi Bandi also, the male child was born in the USA and had acquired citizenship by birth there. The child was removed from the USA by the mother in spite of a restraint order and a red corner notice operating against her issued by the court of competent jurisdiction in the USA. The Court, therefore, held that

the matter on hand was squarely covered by facts as in V. Ravi Chandran (2). More importantly, as noted in para 42 of the reported decision the mother (the wife of the writ petitioner) had expressed her intention to return to the USA and live with the husband. However, the husband was not prepared to cohabit with her. In the present case, the situation is distinguishable as alluded to earlier.

61. In Surya Vadanan, the minor girls were again British citizens by birth. The elder daughter was 10 years of age and the younger daughter was around 6 years of age. They lived in the UK throughout their lives. In a petition for issuance of a writ of habeas corpus, the Court directed return of the girls to the UK also because of the order passed by the court of competent jurisdiction in the UK to produce the girls before that Court. The husband had succeeded in getting that order even before any formal order could be passed on the petition filed by the wife in Coimbatore Court seeking a divorce from the appellant husband. That order was followed by another order of the UK Court giving peremptory direction to the wife to produce the two daughters before the UK Court. A penal notice was also issued to the wife. The husband then invoked the jurisdiction of the Madras High Court for issuance of a

writ of habeas corpus on the ground that the wife had illegal custody of the two daughters of the couple and that they may be ordered to be produced in the Court and to pass appropriate direction thereafter. The said relief was granted by this Court. After the discussion of law in paras 46 to 56 of the reported decision, on the basis of precedents adverted to in the earlier part of the judgment, in para 56 the Court. opined as under:

> *"56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:*
>
> *(a) The nature and effect of the interim or interlocutory order passed by the foreign court.*
>
> *(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.*
>
> *(c) The repatriation of the child does not cause any*

moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

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

62. As regards clauses (a) to (c) above, the same, in our view, with due respect. tend to drift away from the exposition in Dhanwanti Joshi case, which has been quoted with approval by a three-Judge Bench of this Court in V.Ravi Chandran (2). In that, the nature of inquiry suggested therein inevitably recognises giving primacy to the order of the foreign court on the issue of custody of the minor. That has been explicitly negated in Dhanwanti Joshi case. For, whether it is a

case of a summary inquiry or an elaborate inquiry, the paramount consideration is the interests and welfare of the child. Further, a pre-existing order of a foreign court can be reckoned only as one of the factors to be taken into consideration. We have elaborated on this aspect in the earlier part of this judgment."

11.6 With regard to the first strike principles, the Apex Court held thus:

"63. As regards the fourth factor noted in clause (d) of para 56, Surya Vadanan case, we respectfully disagree with the same. The first part gives weightage to the "first strike" principle. As noted earlier, it is not relevant as to which party first approached the court or so to say "first strike" referred to in para 52 of the judgment. Even the analogy given in para 54 regarding extrapolating that principle to the courts in India, if an order is passed by the Indian Court is inapposite. For, the Indian Courts are strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction.

64. Section 14 of the said Act plainly deals with that aspect. The same reads thus:

"14. Simultaneous proceedings in different courts.-(1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more courts than one, each of those courts shall, on being apprised of the proceedings in the other court or courts, stay the proceedings before itself.

(2) If the courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

(3) In any other case in which proceedings are stayed under sub-section (1), the courts shall report the case to, and be guided by such orders as they may receive from, their respective State Governments."

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

"10. Stay of suit. No court shall proceed with the trial of any suit in which the matter in issue is also

directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation. The pendency of a suit in a foreign court does not preclude the courts in India from trying a suit founded on the same cause of action."(emphasis supplied).

66. The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi case,

in relation to non-Convention countries is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. While considering that aspect, the court may reckon the fact that the child was abducted from his or her country of habitual residence but the court's overriding consideration must be the child's welfare.

67. The facts in all the four cases primarily relied upon by Respondent 2, in our opinion, necessitated the Court to issue direction to return the child to the native state. That does not mean that in deserving cases the courts in India are denuded from declining the relief to return the child to the native state merely because of a pre-existing order of the foreign court of competent jurisdiction. That, however, will have to be considered on case to case basis- be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment."

11.7 What is thus vital for the court to consider every time the issue comes up

before the Court that it is not the invocation of first strike principle, which should be construed as a decisive factor, but, the best interest and welfare of the child would always be the guiding factor and would be of paramount importance. The order of the foreign court, if is in existence as held by the Apex Court, is one of the factors to be taken into consideration by the Court. The Principle of Comity of the Courts in relation to the non convention countries shall always need to be born in mind as the country to which the child is removed would need to consider the merit bearing the welfare of the child as of paramount importance and the order of the foreign court as one of the factors to be taken into consideration.

11.8 What is further to be regarded by the Court is that the child was abducted from his or her country, which is his habitual residence, the emphasis which has been laid by the Apex Court is the welfare of the child. We could notice that in all other matters, which had been referred to and regarded by the Court, the Court issued the directions to return the child to the native State and that as held in case of ***Nithya Anand Raghavan vs. State (NCT of Delhi) (supra)*** in deserving cases "*the Courts in India are not denuded from declining the relief to return the child to the native state merely because of a pre existing order of the foreign Court of competent jurisdiction*" and in a summary inquiry or an elaborate inquiry on case to case basis that needs to be regarded.

11.9 This Court must not apply the decision without taking note of the glaring fact in ***Nithya Anand Raghavan vs. State (NCT of Delhi) (supra),*** where the order of the UK Court was an ex-parte order passed against the mother in relation to the minor who was a habitual residence of England and Wales. There was an order for the mother to return the minor to England and Wales if she did not challenge the order. There was no finding that the custody of the minor with the mother would be treated as unlawful including for the purpose of considering the petition for issuance of writ of habeas corpus.

12. Therefore, what is firstly to be examined by this Court either by way of summary or an elaborate inquiry is as to

whether the minor is in a lawful or unlawful custody of the private respondent named in the petition. The Court needs to make a note of the fact that one of the private respondents herein is a natural guardian of the minor being biological father of all the three children. In such a case, the Court needs to regard what has been held by the Apex Court that it is natural and lawful for the custody of minor to be with mother. Once they are in the custody of the mother, it is presumed to be lawful and only in exceptional circumstances, the custody of the minor can be ordered to be taken away from her mother for being given to any other person including the husband (father of the child) in exercise of writ jurisdiction. The Apex Court is quite clear that the other parent

can be asked to resort to a substantive remedy prescribed under the law for getting custody of the child.

12.1 The sole ground of the order of the foreign court may not guide this Court in determining the custody of the children, but, the Court also cannot overlook other decisions in this regard and welfare of children shall need to be regarded as well.

13.The Apex Court as noted above in case of ***Yashita Sahu (supra)*** has also held thus:

> *"13. In the fast shrinking world where adults marry and shift from one jurisdiction to another there are increasing issues of jurisdiction as to which country's courts will have jurisdiction. In many cases the jurisdiction may vest in two countries. The issue is important and needs to be dealt with care and sensitivity. Though the interest of the child is extremely important and is, in fact, of paramount*

importance, the courts of one jurisdiction should respect the orders of a court of competent jurisdiction even if it is beyond its territories. When a child is removed by one parent from one country to another, especially in violation of the orders passed by a court, the country to which the child is removed must consider the question of custody and decide whether the court should conduct an elaborate enquiry on the question of child's custody or deal with the matter summarily, ordering the parent to return the custody of the child to the jurisdiction from which the child was removed, and all aspects relating to the child's welfare be investigated in a court in his/her own country.

14. Reference in this regard may be made to the judgment in Elizabeth Dinshaw (supra) wherein this Court was dealing with a case where the wife was an American citizen whereas the husband was a citizen of India. They got married in America and a child was born to them in the year 1978. In 1980, differences arose between the couple and the wife filed a petition for divorce. The jurisdictional court in America had dissolved the marriage by a decree of divorce on 23.04.1982 and by the same decree it was directed that the wife would have the care, custody and control of the child till he reaches the age of 18 years. The husband was given visitation rights. Taking advantage of the weekend visitation rights, the husband picked up the child from school on 11.01.1986 and brought him to India. The wife filed a petition under Article 32 of the Constitution of India before this Court.

Not only was the petition entertained, but the same was allowed and we would like to refer to certain important observations of this Court in Para 8:

> *"8. Whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. We have twice interviewed Dustan in our chambers and talked with him. We found him to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an American citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in school there."*

In our considered opinion it will be in the best interests and welfare of Dustan that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent court in that country. We are also satisfied that the petitioner who is the mother, is full of genuine love and affection for the child and she can be safely trusted to look after him, educate him and attend in every possible way to his proper upbringing. The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of his origin in the United States of America. The child's presence in India is the result of an illegal act of abduction and the

father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in some school in Pune. The conduct of the father has not been such as to inspire confidence in us that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present." In V. Ravi Chandran (Dr.) (2) vs. Union of India (UOI) and Ors.5 it was held as follows:

> *"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.*
>
> *30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects*

relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child."

15. In Nithya Anand Raghavan (supra), this Court took the following view:

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

"41...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 the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child."

16. We are of the considered view that the doctrine of comity of courts is a very healthy doctrine. If courts in different jurisdictions do not respect the orders passed by each other it will lead to contradictory orders being passed in different jurisdictions. No hard and fast guidelines can be laid down in this regard and each case has to be decided on its own facts. We may however again reiterate that the welfare of the child will always remain the paramount consideration. Welfare of the child – the paramount consideration.

17. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

18. The child is the victim in custody battles. In this fight

of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.

19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody

matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

20. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

21. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays. In cases like the present one where the parents are in two different continents effort should be made to give maximum visitation rights to the parent who is denied custody.

22. In addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, e-mail or in fact, we feel the best system of contact, if available between the parties

should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.

23. As far as the present case is concerned, keeping in view what we have held above, we are not going into various allegations and counter allegations made by both the spouses. However, we record the statement of the husband that he has no intention of divorcing his wife. We can only hope that the couple can either by themselves or through mediation settle their disputes which would not only be in their own interest but also in the interest of Kiyara. Having said so, since at this stage the dispute between them remains unresolved we shall list out the factors and weigh them in a proper manner to see what is best in the interest of the child."

Merit of the matter: (Maintainability and Best Interests)

14. Here the facts are quite glaring, it is the mother who is going from post to pillar to get the custody of the minor children. The eldest one was merely three years old when he was taken away surreptitiously by the respondent father to India and later, the twins were two years and nine months old when the mother was deprived of their custody. It is quite shocking that under one or the other pretext, the father had chosen to retain the custody of these children who are the citizens of New-Zealand and their natural residence is New-Zealand.

14.1 The writ jurisdiction since has come in wake of the father not allowing the

access to mother and as could be also noticed from the averments in the petition that they were first removed without her consent to India thereafter to Divine Public School in Mehsana and then without any notice to Bangalore School. Then, they were brought back from Bangalore to Ahmedabad and all along the mother was kept in complete dark. She was not even permitted the access either physically or through the video conferencing. The school authorities also may have been accordingly intimated for her not to have the privilege of talking to the children which is the bare minimum any mother would expect who is deceived by the spouse while removing the children from the country of their natural habitation. Disrespect expressed by the very respondent father writ large from his

conduct as can be noticed from chronology of events.

15. All throughout the video conferencing had been held as it was impermissible for any party to appear before this Court due to pandemics, we have also noticed her desperation to meet her only children and the events of past bear testimony of deprived mother of her right to be part of their growing children deliberately. This when considered coupled with the detailed bipartite order of New-Zealand High Court so also elaborate affidavit of Ms.Usha Patel, the Attorney and Barrister, who represented the minors with the consent of both the sides before the New-Zealand High Court, it is obviously saddening for the Court to know as to how

tactfully the respondent No.2-husband has played each card, ostensibly to fall within the parameter of legal proceedings and otherwise to ensure that the children do not go back to the mother or to their country of original.

16. First issue of sustainability of this petition for the custody of the children is not to be upheld as this may be a case where the custody of the minors is with the biological father, mother is ordinarily considered the natural guardian and the right person till the child reaches the age of seven years minimum. And in case of all the three minors, they were hardly of any age where she has been deprived of their custody and then of mother's care, warmth and love. We do not see any reason

to sustain this contention of the respondent No.2 on the maintainability of the writ jurisdiction. Her having known of the address or her having contacted the children at the school is also surely not a ground for us not to maintain the writ petition. Giving such a narrow meaning would tantamount to emboldening the respondent husband and the in-laws of the petitioner, who with their preconceived mind about the behavior of the petitioner and designed more had chosen to remove the children. Their self style judging the custody of children in a blatant disregard to the order and direction of the Court of competent jurisdiction also is not a matter to be regarded without due seriousness.

16.1 So far as the contention of the

pendency of other proceedings being a bar to the present petition, we need to deal with it elaborately hereinafter.

16.2 This Court is conscious of the fact that the present litigation has been filed by the petitioner in the month of May, 2018. The elder son Leon has been removed to India in August, 2015 and the younger twins since October, 2017. One of the reiterative contentions which has been raised by the respondent No.2 is that of delay in initiating the proceedings. This Court must be also conscious of the fact that the mother is all by herself at New-Zealand, she needs to struggle to respectfully earn for herself and for the children, whose custody she is claiming and she also has pursued the legal remedy

before the New-Zealand High Court. After the interim custody was handed-over to her and there had been no compliance, she needed to approach once again the New-Zealand High Court and eventually the final order has been passed. India being not the signatory to the Hague Convention, the decision of the foreign court will need to be respected and regarded, however, that may not be the reason for the Court to leave aside the independent either summary or elaborate inquiry in this regard. This Court needs to remind itself of an elaborate adjudication of issue of custody by the New-Zealand High Court after the fullest opportunity to both the parents and their having agreed for a neutral person to represent children, Ms.Usha Patel.

16.3 Thus, looking at the provision of law, as held above the writ jurisdiction under Article 226 of the Constitution of India is maintainable when the petitioner is the mother, a natural guardian of the children who are below six years of age as per the Hindu Marriage Act and mindful of the fact that all the three children were extremely young when she initiated the proceedings before the Court of competency in whose jurisdiction she lived and from where the children were removed. Well within reasonable time and after she felt constrained for not having received the custody of the children despite a well reasoned order and judgment, she needed to approach this Court and therefore, she cannot be non suited on the ground of delay on the ground of writ jurisdiction being

extraordinary jurisdiction.

16.4 Section 7 of the Family Courts Act, 1984 provides for the suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor before the Family Court which would have a jurisdiction to entertain the suit or any proceedings. Clause (g) to the explanation attached to sub-section (1) of Section 7 is not restricted to the dispute with respect to the custody or the visitation rights of a minor between husband and the wife, the Family Court also would have jurisdiction to consider the issue in relationship to the guardianship of the person or the custody of, or access to, any minor, if initiated by any related persons including grandfather or

grandmother.

16.5 It is necessary to make a mention herein that the divorce petition had been initiated by the respondent No.2 husband after removal of the children, which had been filed on 06.11.2017 leaving the petitioner at New-Zealand. On 18.11.2017, he returned back to the New-Zealand after filing these cases and handing over all the three children to respondent No.3 mother-in-law of the petitioner and respondent No.4 sister-in-law of hers. Petitioner was completely unknown and unaware of any of these developments.

16.6 The petitioner had returned on 21.11.2017 to the Commissioner of Police,

Ahmedabad and to the New-Zealand Embassy as to how the three children were taken to India and the husband had vanished with the children along with her passport and other documents and requested the authorities to help-her urgently. She also wrote to her husband not to destroy the life of the children through e-mail on 27.11.2017 and on 06.02.2018, she implored with him to come back with the children.

16.7 She was informed on 24.12.2017 that all the children were studying at Divine Public School in Mehsana which is a Boarding School. She somehow managed to come to India and went to meet the children where she was denied meeting initially by the Principal and it is only after the intervention she sought from the police

that she was permitted for 10 minutes to meet the children.

17. The Court must remember, at this stage, here is the husband who had with pre designed tact had taken the children away from natural guardian mother and the mother's passport also was taken away by him ensuring that she could not travel and could not follow him up. He also simultaneously initiated the legal proceedings for custody and divorce knowing fully well that the wife's passport was with him and she was unable to come to India. He had also represented himself at New-Zealand where the wife had initiated the proceedings and made a request for the children's custody. Therefore, to take a stand of the delay and initiating the

proceedings of the custody of the children is wholly unacceptable and deserves outright rejection with strong disapproval. His personal opinion of the wife and their internal bickering simply and obviously cannot decide the future of the children nor can that be decisive in the Court adjudicating issue of guardianship of the mother.

18. The Court is also conscious of the fact that Section 97 of the Code of Criminal Procedure was invoked, which the petitioner wife had filed against the husband, where the Court of learned Judicial Magistrate First Class disposed of the same observing that when the minors were in the custody of mother-in-law and sister-in-law, no search warrant can be

given. It was only on 27.12.2017 that she could manage to get her passport and the documents which were in possession of the respondent No.2.

19. The petitioner's objection of the divorce petition (Family Suit No.2031 of 2017) in Custody Petition being Civil Misc. Application No.129 of 2017 challenging the jurisdiction of the Court on the ground is quite apparent that no jurisdiction is available to that court in the matter as per Section 19 of the Hindu Marriage Act.

19.1 By way of Civil Misc. Application No.129 of 2017 the petitioner objected and preferred an application under Order VII Rule 11 of the Code of Civil Procedure ('the CPC' hereinafter) that there was no jurisdiction available under the

Guardianship and Wards Act, 1819.

20. The Family Suit No.2031 of 2017 and Civil Misc. Application No.129 of 2017 were disposed of with two separate orders on 02.11.2018.

20.1 The Civil Misc. Application in custody petition was disposed of with the observation that execution of rent note or passing of some period in Ahmedabad would not transfer the jurisdiction of the minor who are not the citizens of India and casual visit will not avail any territorial jurisdiction to the concerned court.

21. The respondent No.2 preferred an appeal before this Court against the order dated 02.11.2018 passed in the divorce petition in Family Suit No.2031 of 2017, thus what the respondent No.2-husband did

was that he questioned the order dated 02.11.2018 in divorce petition being Family Suit No.2031 of 2017, which later on, on 25.02.2019, he very smartly and strategically had withdrawn. He never challenged the order dated 02.11.2018 of custody petition, which is quite apparent from the order of this Court dated 25.02.2019. Had he challenged the order of custody petition, his surreptitious ways would have become quite obvious and that would have ended his game of hide and seek. Following are the Observations made by the Family Court in its order dated 02.11.2018:

> *"4. While on behalf of the respondent her Ld. Advocate K.A. Singh has submitted that the parties are not permanently and ordinarily residing at Ahmedabad. They have three children out of their wedlock who are also the citizens of New Zealand. They are not the citizens of India. The parties are not living at*

Ahmedabad. They have just temporarily visited Ahmedabad and both are living at New Zealand and the proceedings for seeking custody of minors are also pending before the New Zealand Court. Therefore, this Court has no jurisdiction to try this application and the application under 0. VII, R. 11 of the C.P.C. should be granted and the main petition of the petitioner-husband should be dismissed.

5. Certain admitted facts between the rival parties are that the parties are husband and wife. Due to this wedlock, the respondent-wife has given birth to three children and all the children have born at New Zealand and they are citizens of New Zealand and before filing of this petition, the parties to this proceeding were permanently residing at New Zealand since long time, Both the parties are also working at New Zealand and are residing at New Zealand.

6. It is also admitted fact that at present at the time of deciding this application, rival parties are not residing in India and they are residing and are working at New Zealand and the Power of Attorney Zerties are Holders of the parties are taking interest in the proceedings so the parties are not living in India at present.

7. The objections raised by the respondent are that

both of them are the permanent resident of Zealand and they have settled there. During the short visit in India, petition. Section 19 the husband has filed a divorce The ingredients of the provisions of the are not fulfilled i.e. the conditions prescribed for filing divorce petition before the competent Court are not fulfilled as after getting married on 16/05/2010 at Jodhpur, they always stayed at Auckland, New Zealand and they are still residing there, and therefore, this Court has no territorial jurisdicition to try this petition.

8. The present petitioner-husband has submitted his Special Power of Attorney vide M-16/1 wherein his address has been shown at Auckland, New Zealand and it is also mentioned that it is not possible for him to attend the Hon'ble Family Court at Ahmedabad and hence he is issued this Power of Attorney. So it is clear from his Special Power of Attorney that he is residing at Auckland, residing in India. New Zealand and he is not residing in India.

9. It is worth to reiterate the provisions of Section 19 as under:

> *"19. Court to which petition shall be presented: Every petition under this Act shall be presented to the district Court within the local limits of whose ordinary original civil*

jurisdiction -

(I) the marriage was solemnized, or

(II) the respondent, at the time of the presentation of the petition resides, or

(III) the parties to the marriage last resided together, or

[iiia) in case the wife is the petitioner, where she is residing on presentation of the petition, or". the date of (iv) the petitioner is residing at the the presentation of the petition, in time of a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard as being alive for a period of seven years or more by those persons who would naturally have, heard of him if he were alive].”

10. In this case, the on behalf of the respondent - wife submitted judgments also. The respondent has relied upon the following judgments:

(I) Koyyalamudi Nageswara Rao v. Koyyalamudi Pravena @Vallabhaneni Praveena; decided by Hon'ble High Court of Andhra Pradesh in C.M.A. No. 218 of 2013.

Wherein Hon'ble High Court has observed and held that the provisions contained in C.P.C. particularly from Sections 16 to 20 mandate that a suit or petition must be initiated in a Court within defendant resides. marriage provisions. whose or The Act on must territorial respondent as proceedings are also jurisdiction the under covered The Hindu Marriage Act case the by may the be Hindu these contains several provisions, which have a leaning towards a woman spouse. One such provisions is Section 19 of the Act.

(II) Minerva Singh v. Ramvir; decided by Hon'ble Punjab-Haryana High Court in CR. No. 2330 of 2014.

Wherein it is held that if the parties are governed by the Hindu law then matrimonial actions between them had to conform to Section 19 of the Hindu Marriage Act. It is also held that a casul or temporary visit to a place cannot be construed as a matrimonial home or a place where the parties together as a married couple. intend to reside together as a married couple.

It is also held that a casual or temporary visit

to a place cannot be construed as a matrimonial home or a place where the parties intend to reside together as a married couple. A visit can be a visit to any place like a hotel, holiday resort, religious place etc. But a place of residence has to be one particular place or an operational base which the parties create, where the parties intend to make their place of residence where their hearth burns and home their is lit, fulfilling personal and social commitments according to their station in life. The point of the territorial compass has its moorings there, encircled by the boundaries of the matrimonial court within the Sessions Division. When marriage breaks, it breaks there, so to speak. This, in my view is how to determine the locus of the matrimonial home as also pinpointing as resided together to where the parties last husband and wife for question of as purposes of deciding the jurisdiction within meaning of Section 19 of the HMA.

Ms. Luthra relies on the judgment of the Supreme Court in Jagir Kaur and another vs. Jaswant Singh, AIR 1963 SC 1521 to urge and submit that the Supreme Court held that the

meaning of "reside" in HMA does not include a casual stay or a flying visit to a particular Mittal place, Manju the accuracy 2014.04.24 and 13:51 integrity I attest this to the document of Chandigarh CR No. 2330 of 2014 purpose is to live together in a place of residence.

The principle was articulated by the Bombay High Court (Nagpur Bench) in Hariram Dhalumal Karamchandani vs. Jasoti, AIR 1963 Bombay 176 to hold that a casual visit for even limited period of stay may not amount to residence at any particular place.

The court observed: "It is stated before the Court by the applicant that he is in the permanent service of the Government of India and that he has to reside in Delhi for that service. Even if the applicant were so minded, he cannot come to Nagpur and "reside" in Nagpur or at any place within the jurisdiction of the Court at Nagpur because he will not be coming to Nagpur and residing as a measure of permanent residence. A casual visit to Nagpur or even a limited period of stay in Nagput may not possibly amount to residence

in Nagpur so as to satisfy the condition of Section 19 that both the husband and wife reside at Nagpur to give jurisdiction to Nagpur. " the Court at Nagpur."

11. Considering the definition of ordinarily resides', before filing of this application, what are the situation prevailing between the parties, should be considered."

22. In an order, on an application under Order VII Rule 11 of the Code of Civil Procedure, the Family Court was categorical as to how it would not have jurisdiction.

"15. It is admitted fact that their marriage was solemnized at Jodhpur and they are residing together at New Zealand and the wife is also residing at New Zealand. So, none of the conditions as specified in provisions of Section 19 is fulfilled here in this case.

16. It is also to be noted that they have never resided together at Ahmedabad permanently. Merely executing a rent note and on the basis of this rent note, residing or passing some of the period at Ahmedabad, does not

transfer the jurisdiction of the parties, Ahmedabad who and are the not casual residing visit permanently does not territorial jurisdiction to the concerned Court.

17. Considering the above facts and discussion, when the above fact both the parties are not living in Ahmedabad and parties are not permanently residing in Ahmedabad then this Court has no jurisdiction. Hence, this application deserves to be allowed and the main petition consequently requires to be returned back to the petitioner for its presentation before having territorial jurisdiction to try it.

18.In the result, therefore, I pass following final order :

ORDER

[1] The application under 0. VII R. 11 of C.P.C. is hereby ordered to be allowed.

[2] Consequently, the main application Exh.-1 is required to be returned to the petitioner for its presentation before the appropriate Court having territorial jurisdiction."

23. The respondent No.2 averred that the order dated 02.11.2018 in custody petition was challenged, however, the Court

in its order dated 25.02.2019 discussed only Section 19 of the Hindu Marriage Act and nowhere Section 9 of Guardianship and Wards Act, 1819 is referred to. The respondent No.2 never mentioned before the Court that he has been participating in the proceedings in New-Zealand High Court and no order of New-Zealand High Court had been shown to this Court. It appears that he had never truly and fully disclosed before the High Court all the litigations which were going on between the parties at New-Zealand nor had he revealed explicitly any aspects in relation to the order of custody of the children. No notice in fact was issued and hence, the other side was not representing in an appeal, which he had preferred before this Court. Therefore, the Coordinate Bench of this High Court gave a liberty sought by

him for filing a fresh divorce petition which later on he filed. Thus, this maneuvering in conducting himself has eventually succeeded in prolonging the matter and also in retaining the custody of the children despite the law having insisted contrary to that.

24. What is being stated by the respondent No.2 is not important, the order of the Court reflects and the proceedings will be vital to be known as held by the Apex Court when the judges say for in their judgment that something was done said or admitted that has to be the last word on the subject. The Apex Court in case of ***Commissioner Of Endowments & Ors vs Vittal Rao & Ors***, reported in ***2004 (0) AIJELSC 5815*** had held thus:

"18. There was some dispute as to whether the learned Advocate General himself appeared on the date when the writ petition was disposed of by the learned single Judge in terms of the compromise or his junior appeared. In the impugned judgment, it is stated that the State Government was duly represented by a lawyer. In State of Maharashtra V/S. Ramdas Shrinivas Nayak and Anr., 1982 2 SCC 463, dealing with the practice and procedure regarding statement of fact recorded in the judgment of a court, this Court held that such a statement is conclusive and not open to be contradicted in appeal. Paras 4 to 8 of the said Judgement read:

"4. When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation (Per Lord Atkinson in Somasundaram Chetty V/s. Subramanian Chetty, AIR 1926 PC 136)." We are bound to accept the statement of

the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their Judgement that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the Judgement of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhu Sudan Chowdhari V/s. Chandrabati Chowdhrain, AIR 1917 PC 30). That is the only way to have the record correct. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In R. V/s. Mellor, 1858 7 CCC 454, Martin, B. was reported to have said: We must consider the statement of

the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.

6.In King-Emperor V/s. Barendra Kumar Ghose, 28 Cal WN 170, Page J. said these proceedings emphasis the importance of rigidly maintaining the rule that a statement by learned judge as to what took place during the course of a trial before him is final and decisive: It is not be criticized or circumvented; much less is it to be exposed to animad version.

7. In Sarat Chandra Maiti V/s. Bibhabati Debi, AIR 1921 Cal 584 Sir Asutosh Mookerjee explained what had to be done:

> *"It is plain that in cases of this character where a litigant feels aggrieved by the statement in a Judgement that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment...*
>
> *(8) So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else."*

19.Under the circumstances, the Division Bench of the High Court was right in not disturbing the order of the learned single Judge accepting the compromise as represented by learned counsel for the parties."

25. The Court cannot be oblivious of the fact that after getting the passport from the respondent No.2, the petitioner moved back to New-Zealand on 25.02.2018 and she filed the petition for the custody of the three children. The respondent No.2 also worked in New-Zealand and participated in the proceedings through his counsel Mr.A.Hansen and after detailed hearings of both the sides the New-Zealand High Court decided the custody of the children.

25.1 The petitioner and the respondent No.2 also on 28.11.2018 agreed for Ms.Usha Patel, the Barrister of 20 years of

experienced to be appointed to represent the three children in the New-Zealand High Court. The detailed as to what transpired is reflected in her affidavit filed before this Court.

26. On 20.02.2019 the New-Zealand High Court passed the interim guardianship order for children and directed the respondent No.2 to bring back the children to the jurisdiction of New-Zealand High Court with a request to the Judicial and Administrative Bodies in India to render assistance in ensuring that the children returned to the jurisdiction of New-Zealand.

27. When this did not happen, the New-Zealand High Court on 10.05.2019 was constrained to pass further order to its

previous order setting out the steps to implement the order dated 20.02.2019. We notice that the respondent No.2 who participated all along has chosen not to obey the order despite his participation through his counsel.

28. The order of guardianship made by the Court considering the children's welfare and best interest on the basis of the contentions set out in the order dated 04.10.2019, even when, independently regarded, the Court needs to make a mention particularly referring to the Hindu Marriage Act that the custody of the minors till they attain the age of six years should always be with the mother unless there are exceptional circumstances.

29. We could notice that the

allegations made against the petitioner are vague and without any proof. They are also contrary to some of the documents which have come on the record. It is nothing but the unfortunate turn of event due to deliberate design on the part of the husband to justify the removal of the children and retaining their custody.

30. We must also make a specific mention of the report which had been given to this Court by the learned Judge, City Civil and Sessions Court when we found the misbehavior of the children while meeting them through the video conferencing that the learned presiding officer also found that they were under the surveillance all throughout as the CCTv cameras in each room of their residence has been installed

and they are under the scanner of the father all throughout and the children, who are otherwise to be the clean slates and learn from every event of the life, are being tutored the wrong things against the mother so as to create the dislike and hatred for fulfilling the ill design of retaining custody. These children are otherwise found to be a very enthusiastic, active and intelligent children. They were shifted from one institute to another to avoid the mother tracking them is also quite detrimental to their growth as their continuous study without any bickering and with the peace of mind will be so much essential. This itself is a potent ground for the Court not to continue this atmosphere.

30.1 This Court On 24.09.2020 passed the following order:

"1. Today, all the three children are produced before us through video conference, arranged at City Civil & Sessions Court, Ahmedabad, in the presence of the learned Presiding Officer, Ms. P.T. Ram. The petitioner also appeared through video conference from New Zealand so that she can meet her children, in the presence of the learned Presiding Officer.

2.We have heard the learned Advocate, Mr. karmendrasinh, appearing with learned Advocate, Mr. Gehlot, and learned Advocate, Mr. Desai, for the parties and they submitted that they are working out an amicable settlement. The proposals and the counter proposal have been given. Therefore, at the joint request, this matter is being referred for mediation and we request the learned Presiding Officer, City Civil and Sessions Court,Ms. P.T. Ram, to MEDIATE between the parties, as she is in know of the matter and as the corpora are being presented through her, by way of video conference, before this Court and she has graciously AGREED to mediate. Accordingly, with the consent of the parties, the matter is fixed firstly for mediation on 3 RD OCTOBER, 2020, at 12:00 P.M. and thereafter as may be decided by the Learned Mediator on considering convenience of all concerned. The parties are PERMITTED to appear / attend

the mediation through video conference. Repot accordingly shall be tendered before this court.

3. S.O. to 15TH OCTOBER, 2020. 4. Let all possible attempts be made to bring about an amicable settlement between the parties, as proposed. Further, during the course of mediation, we LEAVE it to the learned Presiding Officer, who has agreed to act as mediator, to ask the corpora to meet their mother. On the next scheduled date, i.e. on 03.10.2020, all the three children shall be kept present at the City Civil & Sessions Court."

30.2 On 13.10.2020 the learned Presiding Officer, Ms.P.T.Ram, City Civil and Sessions Court, Ahmedabad has submitted the following report:

"The undersigned presided over the mediation proceedings so conducted, on 03rd October, 2020 at 12.00 p.m., wherein the concerned parties i.e the petitioner-Sapna Gehlot alongwith Learned Counsels for petitioner and respondent were present through video conference and the respondent-Devendra Singh Gehlot was physically present at City Civil & Sessions Court, Ahmedabad before the undersigned. The three children namely Leon aged 6 years, Pouroush and Tharun both

aged 5 years were also present in the City Civil & Sessions Court. Thereafter the mediation proceedings were adjourned to 8-10-2020 at 2.00 p.m. for arranging a meeting between the petitioner and respondent.

Thereafter, the mediation proceedings were held accordingly, on 08-10-2020 and, the petitioner was present through Video conference and the respondent was physically present before the undersigned at City Civil & Sessions Court, Ahmedabad alongiwth three children in which both the parties had conversation with each other in the presence of the undersigned. But the parties could not reach to any settlement and hence, the mediation proceedings could not be materialized. Hence this report is submitted before Your Lordships for your kind consideration and perusal."

31. This Court attempted through the counsels and also had requested both the spouses to undertake this exercise even before the Presiding Officer, the City Civil and Sessions Court, but to no avail.

32. The children being the citizens of the New-Zealand, they would need to return to enjoy the benefits the nation offers and more particularly to receive love, affection and care of their mother. Even if the respondent No.2 is a biological father, and other relatives may be around, none can be equated with the care of mother. In every which way, it will be in the interest of the children and their best interest for them to go back to the country of theirs. The detailed analysis made by the High Court of New-Zealand while regarding the welfare of the children, we endorse fully. And, we are dismayed to say that obstinate and calculated behavior on the part of the respondent No.2 has resulted into the lengthening of stay of the children here. Respondent No.2 reflects a scant regards for the truth and the law. After initiating the proceedings before the Family Court, when it chose not

to entertain the petition, the appeal preferred by the respondent has been withdrawn with a liberty without disclosure of all material facts and and thereby gained the advantage when obviously half backed truth can never result into any advantage to the litigant eventually.

32.1 Before, we pass the detailed order of their return, direction of the Apex Court in case of ***Yashita Sahu (supra)*** would need reproduction..

> *"23. As far as the present case is concerned, keeping in view what we have held above, we are not going into various allegations and counter allegations made by both the spouses. However, we record the statement of the husband that he has no intention of divorcing his wife. We can only hope that the couple can either by themselves or through mediation settle their disputes which would not only be in their own interest but also in the interest of Kiyara. Having said so, since at stage the dispute between remains unresolved we shall list out*

the factors and weigh them in a proper manner to see what is best in the interest of the child:

24.Age of the child the child is less than 3 years old. She is a girl and, therefore, there can be no manner of doubt that she probably requires her mother more than her father. This is a factor in favour of the wife.

25.Nationality of the child the child is a citizen of USA by birth. Her father was already working in the USA when he got married. We are told that the mother had visited the USA once before marriage and when she got married it was done with the knowledge that she may have to settle down there. The child was born in a hospital in the USA and the mother did not come back to India for delivery which indicates that at that time the parents wanted the child to be a citizen of USA. Since the child is a citizen of USA by birth and holds a passport of that country, while deciding the issue of custody we have to take this factor into consideration.

26.Proceedings in the Norfolk Court It is the wife who approached the court of competent jurisdiction, i.e. Norfolk Juvenile and Domestic Relations District Court,

in the USA. She first applied for an emergency order and also instituted a petition seeking sole legal and physical custody of the child. After the husband put in appearance on the basis of the agreement, a consent order was passed which directed both the parties to live in the matrimonial home till 01.12.2018. It further directed that if the matter could not be settled by that date then the wife would make her own arrangements for residence etc. Provision was also made for shared parenting. The wife in total violation of the said order brought the child back to India.

27. We are not in agreement with the contention raised on behalf of the wife that she could not understand the order of the Norfolk Court. This is not the first time that the wife had approached the court. The wife is educated. She was working in Walmart in the USA. She had contacted an NGO and on 09.09.2017 had sent an e mail to Parsipanny Police Department against her husband. On 03.05.2018, the husband obtained an emergency protection order against the wife. Thereafter, the wife along with the minor daughter returned to India on 16.05.2018 and went back to the USA on 16.07.2018. The complaint filed by the husband is said to have been dismissed on 26.07.2018. On 25.08.2018 the wife called the Police as according to her

she was scared for her safety and that of her minor daughter. According to her she applied for an emergency protective order on 25.08.2018 which was passed in her favour. The wife also instituted a petition seeking sole legal and physical custody of the minor child before the Norfolk Court on 29.08.2018. On 26.09.2018 the consent order was passed. It would also be pertinent to mention that even according to the wife she had been sending e mails to the Indian Embassy in Washington for help. The wife also applied for Supplemental Nutrition Assistance Program which, according to her is a nutrition programme to help low income Americans to put food on the table.

28.The wife is aware of her rights. She has been taking the help of the Police, Magistrate, the Domestic Court and Federal Programmes, when the need arose. She was also working with Walmart and we are unable to accept her contention that because of lack of translator she could not understand what was happening. We are also unable to agree with the contention now raised that her counsel coerced her to enter into the agreement. In any event if she has any grievance with regard settlement was arrived at the proper course was to raise the issue before the Norfolk Court. No Indian Court can sit in appeal over the the manner in which the orders of the

Norfolk Court. We are clearly of the view that the plea she has set up is only to justify her patent violation of the orders of the Norfolk Court.

29.Obviously, the child who is less than three years old cannot be heard in the matter but keeping in view the facilities of education, social security etc., which would be available in USA, we are of the view that the child should not be deprived of the same only on the ground that the mother does not want to go back to USA.

30.Visa issue Learned counsel for the appellant wife has laid great emphasis on the fact that the visa/work permit of the husband is expiring in 2020. That by itself is no ground to deny custody of the child to the husband. If his visa/work permit is extended no problem will arise but if his visa/work permit is not extended, we shall be making directions in this regard in the latter part of the judgment. Whether the work visa/work permit of the husband is to be extended or not is for the authorities in the USA to decide and this Court cannot comment on the same. We cannot pass an order presuming that the visa will not be extended.

31. There are various factors to be taken into consideration while deciding what is best in the interest the child. No hard and fast rules can be laid down and each case has to be decided on its own merits. We are also not oblivious of the fact that when two parents are at war with each other it is impossible to provide a completely peaceful environment to the child. The court has to decide what is in the best interest of the child after weighing all the pros and cons of both the respective parents who claim custody of the child. Obviously, any such order of custody cannot give a perfect environment to the child because that perfect environment would only be available if both the parents put the interest of the child above their own differences. Even if parents separate, they may reach an arrangement where the child can live in an environment which is reasonably conducive to her/his development. As far as the present case is concerned other than the age of the child nothing is in favour of the mother. She herself approached the jurisdictional court in Norfolk. She entered into an agreement on the basis of which a consent order was passed. She has violated that order with impunity and come back to India and, this is a factor which we have to hold against her.

32. In view of the above discussion, we are clearly of

the view that it is in the best interest of the child to have parental care of both the parents, if not joint then at least separate. We are clearly of the view that if the wife is willing to go back to USA then all orders with regard to custody, maintenance etc., must be looked into by the jurisdictional court in USA. A writ court in India cannot, in proceedings like this direct that an adult spouse should go to America. We are, therefore, issuing directions in two parts. The first part will apply if the appellant wife is willing to go to USA on terms and conditions offered by the husband in his affidavit. The second part would apply if she is not willing to go to USA, how should the husband be granted custody of the child.

1st Part

33.(a) At the outset we note that the husband has filed an affidavit, the relevant portion of which reads as follows:

(2) That I have always been calling up my wife to come back to us along with the minor child so that all of us could stay together in the US as a happy family. In this regard I have sent her various emails to come back and I would be willing to bear all the expenses of the travel of my wife and minor child back to US.

(3) That I further undertake that I shall make all the arrangements of stay and travel expenses (including air tickets) of my wife and minor child in our own house which is a two bedroom apartment for which I am paying a rental of US $1500 per month.

(4) That in case my wife is not willing to stay with me for personal reasons, then I shall sift out and make arrangements to stay somewhere else.

(5) That I further undertake to take care of all expenses of day to day running of the house, medical insurance for both my wife and child, electricity, gas all other incidental expenses till the time the US Court makes a provision in this regard.

(6) That I also undertake to bear all expenses for the education of the minor child including the admission in a nursery school in the US which expense would be of about US $1000 $1500 per month not including the meals and school supplies. I also undertake that the expenses of the school supplies and other requirements as part of the minor child s life in school would also be borne by me.

8. That I also state that for each time that the minor child has visited in terms of an order of shared parenting, I have taken work from home to ensure that

all my time is spent around the child and I undertake that even after the minor childs admission to nursery school (Kindergarten), during her school hours I would go to my office and after school hours I will take work from home and avail parenting time with her. I undertake that should need arises, I will call my mother to help us in the US.

8.That I also undertake to pay US $200 towards the upkeep and maintenance of the minor child apart from all other expenses.

We record this as an undertaking to the Court and the husband is duty bound to abide by this undertaking.

(b) We feel that it will be in the interest of the child if the mother herself accompanies the child to USA. The appellant wife may like to live in USA or not, and this is a personal choice of the appellant wife. However, if she goes back to USA along with the child, then she must comply with the orders of the Norfolk Court. Obviously, she can apply for modification/vacation of the order, if so advised;

(c) In case the wife goes back to USA it shall be the responsibility of the husband to pay reasonable expenses for her entire travel and stay. The wife must within one

week of the passing of this order intimate counsel for the husband whether she is willing to go back to USA or not. In case she expresses her willingness to do so, the husband shall purchase tickets for travel of the wife, and the minor child to USA, which journey must be performed on or before 20.02.2020. We make it clear that it will be the wife s responsibility to obtain the requisite travel documents required by her to travel to the USA by the said date;

(d) In case the wife is willing to go back to USA but is not willing to live with the husband, in view of the undertaking given by the husband, we direct that the husband shall make alternative arrangements for his own stay and hand over the possession of the apartment now in his possession to the wife;

(e) The husband in terms of the undertaking is directed to take care of all expenses of day to day running of the house, medical insurance for both wife and child, electricity, gas and all other incidental expenses till the time the jurisdictional court in USA makes a provision in this regard;

(f) The husband shall not initiate any coercive or penal action against the wife in the USA and if such action has already been initiated by him or any proceedings in that regard are pending, then the same shall be

withdrawn and not pursued any further by the husband. This will be a precondition to facilitate the wife s appearance before the concerned Courts in the USA to effectively represent and defend herself in all matters relating to the matrimonial dispute (including custody and guardianship issues of the minor child) between the husband and the wife.

34. We, however, clarify that this arrangement will only continue up to 30.04.2020 before which date the parties must get proper directions from the jurisdictional court in USA. Once the jurisdictional Court in USA passes the order then this portion of the order shall cease to operate. In addition, we also direct that the husband shall pay US $250 per week to the wife for her personal expenses in USA till 30.04.2020 or till the jurisdictional court in USA passes orders in this regard. This amount is an addition to the US $200 per week that the husband has undertaken to pay for the upkeep and maintenance of the minor child.

2nd part

35. In case the wife does not inform the counsel for the husband within one week from today that she is willing to go back to USA then it shall be presumed that she has no intention to go to USA along with the child. In that event we issue the following directions:

(a) The wife shall handover custody of minor Kiyara to the husband or if the husband is unable to travel to India, then to the mother of the husband, before the Registrar General/Registrar(Judicial), of the High Court of Rajasthan on 03.02.2020 at 11.00 A.M. Thereafter, the husband shall make necessary arrangements for taking the child to USA accompanied by at least one of the husband's parents;

(b) In case the child goes to USA with the husband or either of his parents, the husband shall ensure that the child talks to her mother through video calling facilities such as WhatsApp. Skype etc., everyday at 8.30 P.M. Eastern Standard Time on weekdays (Monday Thursday) for at least 10 minutes each day and on weekends (Friday Sunday) he shall ensure that the child talks to the mother at the same time or any other time mutually settled between the parties through video calling for at least 15 minutes.

(c) We further direct that if the wife visits USA hereafter and is staying in the same town where the husband resides, she will be permitted custody of the child on all weekends from 6,00 P.M. on Friday till 6.00 P.M. on Sunday.

(d) Even if the mother does not visit USA, the father shall ensure that the child visits India at least twice a

year, once during the summer vacations and once during the winter break, as per the child's school schedule. It will be his responsibility to ensure that the child comes to India accompanied either by him or one of the grandparents of the child. During this period the child shall remain exclusively with the mother. However, in case the husband is also visiting with the child then during the period when the child is in India, the husband will have the custody of the child for 2 days per week, preferably on weekends or on other suitable days as settled by the parties."

33. We when look at independently in this backdrop of events, the best interest of children and their future prospects, New-Zealand is the country where they are born and are citizens of the same. Mother has her right to continue working there. Children would need both the parents and spouses can cease to act as husband and wife, they cannot cease to be parents ever. Home being the biggest university for every child to learn the core values of life from

parents and family, in our strong and considered opinion, custody of all the three children shall need to be with the petitioner-mother and natural guradian. The amount of education, facilities and amenities and all other care as the citizen of New-Zealand, these children would receive with mother having undertaken all the responsibilities and the competent court having examined these aspects in bi-partite proceedings, we cannot have any second opinion of showing our indulgence in the present matter. There is not a single ground for us not to respect the decision of the High Court of New-Zealand after independent inquiry undertaken by us.

34. While recognizing the right of father to call on children or to visit them as may

be later decided by the Court of New-zealand. For now, they must return to the country of their own, to join their natural mother and guardian who is waiting for them for a long time, with the substantiating order and judgment of High Court of New-zealand.

36. Before pronouncement of this judgment, we pertinently inquired from learned counsels on both the sides as to whether there is any change of circumstances in the interregnum, necessiating this Court to take note of the same and answer is in negation and thus, the custody of children having been retained by the respondent-father illegally and in complete contravention of direction of Court at New-Zealand and considering the best interest

of young children, petition merits consideration.

Operative Order:

37. Resultantly, this petition succeeds. We direct that the custody of all the three children (i) Leon Gillian Singh Gehlot, (ii) Paurush Singh Gehlot and (iii) Thaarun Singh Gehlot shall be handed over by the respondent-father to the petitioner-mother.

38. Following are further detailed directions for the purpose of actual implementation:

(i) The respondent-father shall within a period of eight weeks leave the children at New-Zealand. He will make all necessary arrangements including of their

air tickets. The handing over of the custody of the children shall take place in presence of the Barrister, Ms.Usha Patel at New-Zealand.

(ii) He shall also disclose his travel details to this Court within a period of four weeks and the same shall also be shared with the learned counsel of the petitioner-mother. If he goes to New-Zealand with the children, he shall also comply with other and further directions of High Court of New-Zealand. In case the respondent-father expresses his willingness to travel with the children, the ticket for travel

and other details of journey shall be shared with petitioner and such travel shall be performed on or before 25.03.2022.

(iii) In absence of any intimation to the learned counsel for the petitioner-mother of his wish to travel to New-Zealand with the children within a stipulated time period, it shall be presumed that he has no intention to so do it and in that eventuality he shall handover the custody of the minors to the petitioner-mother before the Registrar (Judicial) of this Court on 25.02.2022. Once the children go to the New-Zealand, the petitioner-mother shall also

facilitate the video calling for about two weeks and thereafter at a time mutually settled between the parties and after once the jurisdictional High Court decides in relation to the rights of audit, this order will not operate.

(iv) If the respondent-father is unwilling to travel with the children, he shall make an arrangement for their air tickets and travel.

(v) Thereafter, the petitioner-mother may make necessary arrangements for taking the children to New-Zealand accompanied by at least one of her parents or

trusted person.

(vi) The petitioner-mother also can contemplate personally to come and take the children or shall arrange for a trusted person with whom the children shall travel to New-Zealand. It will be in the interest of the children if the mother herself travels to India and take the children with her to New-Zealand.

(vii) If the respondent-father chooses not to make arrangement of air tickets the petitioner-mother shall bear the entire travel expenses and also for all other formalities, she will be entitled to recover in appropriate

proceeding from the husband.

(viii) The petitioner-mother in terms of her undertaking is directed to take care of all expenses, day to day running of house, medical insurance of children, etc. and all incidental expenses, once children are at New-Zealand.

(ix) The respondent-father will be at liberty to approach the High Court of New-Zealand if in case he is desirous of any modification. Once the jurisdictional court in New-Zealand passes any order, it shall be governing the rights of parties.

(x) With regard to the visitation

right of the respondent-father, let the jurisdictional Court decide on a permanent basis.

39. The Registrar (Judicial) is directed to send a copy of this judgment to the Registrar General/Registrar of the High Court of New-Zealand.

40. This petition is disposed of in above terms.

41. Over and above the regular mode of service, direct service through e-mode is also permitted.

Sd/-
(SONIA GOKANI, J)

Sd/-
(NIRZAR S. DESAI,J)

M.M.MIRZA