

(2018) 09 DEL CK 0247

In the Delhi High Court

Case No : Criminal Writ Petition No. 1251 Of 2018

M

APPELLANT

Vs

State Of Nct & Anr

RESPONDENT

Date of Decision : 20-09-2018

Acts Referred:

Constitution of India, 1950 — Article 226
Guardian and Wards Act, 1890 — Section 9, 17(3)
Hindu Marriage Act, 1955 — Section 13(1), 26
Protection of Women Against Domestic Violence Act, 2005 — Section 18, 19, 20, 21, 22

Citation : (2018) 09 DEL CK 0247

Hon'ble Judges : S. Muralidhar, J; I.S. Mehta, J

Bench : Division Bench

Final Decision : Disposed Off

Judgement

Dr. S. Muralidhar, J.

1. This writ petition, under Article 226 of the Constitution of India, seeking issuance of a writ of habeas corpus is by a German national who states that

his wife Respondent No.2, an Indian national, on 10th April 2018, brought away their minor daughter (hereafter "the child") to India from Dubai

where they were residing without his knowledge and on an emergency travel document issued in favour of the child by the Consulate General of India

("CGI") in Dubai. He prays for a direction to the Respondents to produce the child before the Court and hand her custody over to him. It is

further prayed that Respondent No.2 and the child be allowed to return to Dubai, United Arab Emirates ("UAE").

2. In this judgment, the names of the parties and some of their personal details have been withheld/anonymised, in order to respect their privacy.

Access to the records of this case will be available only to the parties.

3. It is pertinent to note at the outset that although orders in this matter were initially reserved on 22nd May 2018 having heard both parties on merits, this Court by the order dated 1st June 2018 deemed it necessary for both parties to address it further on working arrangements that can be put in place, within the framework of law, in the event the Court agreed either with the Petitioner or with the Respondent No.2, the main consideration being the welfare of the child. Thus, both parties were directed to file their written notes of submissions in that regard and share advance copies of the same with each other. The matter was then listed on 6th July 2018, on which date the Court was made aware of several developments that had taken shape in the intervening period.

Background

4. The Petitioner, a German Christian and Respondent No.2, an Indian Hindu, underwent a Hindu religious ceremony of marriage at New Delhi on 29th December 2011. On 24th January 2012, their marriage was formally solemnized under the Special Marriage Act 1954 at Bangalore. The parents of Respondent No.2 reside in New Delhi. However, neither the Petitioner nor Respondent No.2 lived together in New Delhi at any point in time. They met in Bangalore and resided together at Bangalore and Hyderabad.

5. On 14th March 2013, the child was born to the Petitioner and Respondent No.2 at Bangalore. She has a German passport issued to her by the German Consulate in Bangalore on 6th May 2013. It is valid till 5th May 2019. The child had an Indian passport which was issued on 1st August 2013 and expired on 31st July 2018. The further developments in this regard will be referred to hereafter.

6. In February 2017, the Petitioner found a job in Dubai. Respondent No.2 and the child joined him there in April 2017. When this matter was first heard by the Court, the Petitioner was stated to be working as a General Manager in a company based in Abu Dhabi, UAE. His residence permit was stated to be valid up to 7th March 2020. The Petitioner further stated that his parents, who live in Germany, are to retire shortly and being very emotionally attached to the child, proposed to be with her throughout.

7. The child had been attending the German International School in Dubai from September 2017 onwards in kindergarten. The Petitioner is stated to have paid the registration fees, tuition fees, etc. for the academic year ending

September 2018. She had been issued an entry permit on 8th April 2018 by the General Directorate of Residence and Foreigners Affairs, Ministry of Interior, UAE on her valid German passport, thus permitting her stay in Dubai.

8. Both the Petitioner and Respondent No.2 admit that there were differences and disputes between them while they lived in Dubai. Sometime in June 2017, Respondent No.2 brought the child to India for a brief period without informing the Petitioner. According to her, this was on account of the Petitioner's changed behaviour towards her which made it impossible for her to continue living in the matrimonial home. She, however, returned to Dubai with the child in July 2017 and resumed living with the Petitioner there.

9. On 27th October 2017, Respondent No.2 left the house to stay separately in Dubai. In the affidavit filed by her in this Court on 24th May 2018, Respondent No.2 stated that she was constrained to leave her matrimonial home on 27th October 2017 without her daughter as life was becoming unbearable for her on account of the Petitioner's conduct towards her. The Petitioner, on the other hand, states that he was shocked to learn of the conduct of Respondent No.2 which destroyed their mutual trust and when he confronted her with the facts he had gathered, she left the matrimonial home of her own accord. The Court does not propose to dwell on these aspects in this order since they involve disputed questions of fact that may warrant the leading of evidence by the parties. What is relevant to note, however, is that both the Petitioner and Respondent No.2 have acknowledged at this stage that they have irreconcilable differences and that their staying together in the same place as a family is not realistic.

10. To resume the chronological narration of the background events, within a month of their living separately in Dubai, the Petitioner and Respondent No.2 entered into a written agreement on 25th November 2017 titled "Interim Agreement" Rules of Engagement 25.11.2017. The said interim agreement began by acknowledging that it was necessitated in order to keep things clear, free of confusion and misunderstanding and allow time to be taken between them as a married couple to understand the extent of their marital problems and feelings towards each other. There are 12 clauses in the said agreement, the gist of which is that Respondent No.2 had taken an apartment for herself since 1st November 2017 and was staying

separately from the Petitioner and their child â??to provide time, distance and space for the Petitioner to process what he came to know of recentlyâ??. The Respondent No.2 had the promise and guarantee from the Petitioner to get unlimited access to the child â??within boundaries of her safekeeping and needs of upbringing, e.g. ability to reach school bus in the morning, collection from her school bus in the afternoon, being supervised post school prior a parentâ??s return from work, etc.â??. The Petitioner and Respondent No.2 were to have alternate evenings with the child in their original home where the Petitioner and the child continued to reside during the weekdays with equal time for each to make sure that the child had both parents in her life. Respondent No.2 was permitted to take the child to her separate apartment for two weekends every month. She could collect the child on Thursday afternoon from the school bus or from her home after work until Sunday morning drop off for the school bus. For the other two weekends per month the child would stay exclusively with the Petitioner. Alternatively, it could be agreed upon to share a weekend with the other parent in the fairest possible way of splitting the childâ??s time.

11. As far as the present petition is concerned, Clause 7 of the interim agreement is important. This recorded a promise of Respondent No.2 not to leave UAE with the child again without the consent of the Petitioner. Clause 8 records the promise of the Petitioner not to take his daughter out of the country of residence (UAE) except for the already planned week of Christmas vacation in Germany in December 2017 which Respondent No.2 was informed about. Clause 9 recorded the consent of Respondent No.2 to the Petitioner holding the passport and Emirates ID and general day to day care aspects of custody of the child. Both the Petitioner and Respondent No.2 confirmed that as on that day, no legal action had been initiated and â??shall not be initiated, unless discussed with or informed to the other partner prior any such steps being takenâ??.

12. Respondent No.2 now claims that she felt compelled to sign the above interim agreement on the dotted line as she was distraught without the child and was desperate to have even limited access to her. According to Respondent No.2, the agreement subsisted for only 5 months. She was all along trying to make the marriage work but it is the Petitioner who violated the agreement and verbally intimidated the Respondent No.2 that he had filed for

divorce in Dubai without giving any details. She states that she felt devastated and insecure in a "totally patriarchal" country and was left with no choice but to leave. All of these allegations have been refuted by the Petitioner.

13. The Petitioner invoked the jurisdiction of the Dubai Personal Courts for initiation of a non-Muslim divorce which was accepted for preproceedings counselling on 25th March 2018. It was fixed for hearing before the Family Counsellor, Dubai on 11th April 2018. According to the Petitioner, intimation of the said proceedings was given telephonically to Respondent No.2 but she did not appear.

14. Interestingly, in a parallel move, Respondent No.2 appears to have travelled to India in March 2018 to file a suit for obtaining an anti-suit injunction so as to restrain the Petitioner from initiating proceedings before the courts in Dubai in relation to their matrimonial dispute. The specific prayer was to restrain the Petitioner from "filing/initiating any petition/suit/claim/case in the nature of divorce proceeding or any other matrimonial proceeding pertaining to marriage between the parties or the minor child of the parties before any other Court except courts of competent jurisdiction in India".

15. The affidavit of Respondent No.2 in support of the plaint in Suit No.3/2018 in the Family Court, Saket is dated 26th March 2018. In the opening paragraph of the affidavit, Respondent No.2 has given her Dubai address and stated that she is currently residing in Alaknanda, New Delhi. The said suit appears to have been heard on several dates starting from 28th March 2018 onwards. It, therefore, appears that both the Petitioner and Respondent No.2 parties were anticipating the initiation of court proceedings against each other at around the same time.

16. It must be mentioned at this stage that Respondent No.2 is a qualified lawyer, having completed her B.Com. and her LL.B. from Delhi. In drawing a comparison between herself and the Petitioner on parameters which she states are relevant for determining their respective eligibility to ensure the welfare of the child, Respondent No.2 states that she has worked in law firms and various organizations as a Human Resources Consultant.

17. The Court has consciously not referred to the averments in the petition which refer to the reasons why the Petitioner instituted the divorce proceedings against Respondent No.2 in the courts in Dubai. The Court also does not propose to discuss the allegations and counter allegations made

by each of the parties against each other. It appears that they are likely to be involved in litigation concerning their marriage and nothing said here

should prejudice their respective rights and contentions in those proceedings.

Respondent No.2 brings the child to India

18. In her affidavit dated 24th May 2018, Respondent No.2 stated inter alia that in the face of continued threats of criminal action, Sharia divorce, and

apprehending being forcibly deprived of the custody of the child, she was left with no choice but to return to India to her parents. She approached the

CGI in Dubai so as to obtain an emergency travel document (â??ETDâ??) for the child to return to India. She obtained it on 1st April 2018 but could

not travel immediately on account of Government procedures and formalities. She was given clearance to travel with the child only on 10th April 2018.

She reached India with the child in the early hours of 11th April 2018.

19. A photocopy of the said ETD dated 1st April 2018 and expiring on 30th June 2018 was enclosed with the above affidavit. It reveals that the

reason given for issuance of the ETD was â??Passport Lostâ??. In the remarks column it is stated that there existed no objection to issuing a further

passport subject to usual checks and Ministry instructions.

20. The Petitionerâ??s version of what transpired differs. He states that Respondent No.2 knew that he had with him their daughterâ??s original Indian

and German passports and yet misled the CGI into issuing an ETD for their daughter. He alleges that â??the CGI, Dubai, colluded with Respondent

No.2 in this planned abduction and chose not to contact, confirm or establish the true facts by reaching the petitioner in Dubaiâ??. He has further

averred that on 10th April 2018, Respondent No.2 â??on the pretext of taking their daughter to a trampoline play area on a visitation, instead left for

India and took a flight to leave UAE and flew to New Delhi without the knowledge and consent of the Petitionerâ??. The Petitioner alleges that

â??this was all pre-planned and pre-meditated by Respondent No.2 with advance planning and organising her movement to India surreptitiouslyâ??.

21. The Petitioner was not successful in getting the CGI to provide him with a copy of the ETD or even the reasons for its issuance. He received an

email dated 17th April 2018 from Ms. Sumathi Vasudev of the CGI, Dubai stating inter alia:

Â â??2. As I mentioned in my earlier email an Emergency Certificate was issued

to (name anonymised) on an application made by her mother (name withheld) We can share with you that in her application (the mother) had reported that the passport of (name anonymised) had been lost and had requested issuance of Emergency Certificate urgently because she wanted to visit her ailing mother in India on medical grounds. She reported that her husband is not in touch with her.

Â 3. As per Government of India rules a single parent can apply for passport on Emergency Certificate if the other parent is not available, by giving an undertaking that he or she will be responsible and liable for any issue arising out of obtaining passport on Emergency Certification on such an undertaking.â??

22. The Petitioner contends:

Â â??...the rights of petitioner as a father have been violated and the illegal removal of his daughter from Dubai has been abetted by the CGI, permitting the kidnapping of his daughter. Petitioner is astonished that the CGI, Dubai made no efforts or attempts to ascertain from him directly as to why and where the existing passports of minor (name anonymised) were and proceeded to act on one sided statements made by the Respondent No. 2, who was in contact and regular communication with the petitioner. Therefore, the parental rights of petitioner have been violated and in utter contravention of Article 8 of the European Convention on Human Rights and the United Nations Convention on the Rights of the Child have been infringed since their daughter has a right to a family life in Dubai and to continue schooling in Dubai as was the agreement of parties.â??

23. After coming to India on 10th April 2018, Respondent No.2 filed, on 21st April 2018, an application against the Petitioner claiming various reliefs under Sections 18 to 22 of the Protection of Women Against Domestic Violence Act 2005 (â??PWDV Actâ??) in the learned MMâ??s Court at Saket.

A copy of this complaint has been enclosed with the affidavit dated 24th May 2018 filed by Respondent in this petition. According to Respondent No.2, the said application lists in detail the cruel acts which she was subjected to and which compelled her to leave Dubai with her daughter in an emergency and return to India.

Proceedings before this Court till 22nd May 2018

24. This petition was first heard on 24th April 2018. On that date, Respondent No.2 was present in person. Her counsel accepted notice in the petition.

Since both the Petitioner and Respondent No.2 were willing to explore the possibility of settling their differences and disputes through mediation, and

Respondent No.2 was also willing to appear in the mediation centre with the child, the Court directed the parties along with the child to appear before

the Delhi High Court Mediation and Conciliation Centre (DHCMCC). The Petitioner was permitted to meet the child for two hours in the

DHCMCC on that day and on the following day.

25. The Court, on 24th April 2018, directed that till the next date of hearing, both the Petitioner and Respondent No.2 would be restrained from taking

any precipitate action. Learned counsel for Respondent No.2 undertook that he would seek adjournment in the above proceedings under the PWDV

Act instituted by her.

26. When the case was heard next on 26th April 2018, the Court was informed that no settlement could be reached in the mediation. The judges

constituting this Bench first met the child in the Judge's chambers. We found her to be articulate. In spite of being just 5 years old, she was very

aware of what was happening. She was clear that she loved both her parents very much and wanted to stay with both of them. She did not like to

have to choose between either. She further stated that she was very happy being in Dubai with her father and attending school there. She asked if her

mother could also not come back with her to Dubai so that they could all be together.

27. We next met Respondent No.2 in the chambers. She was emotional and reacted strongly to the suggestion that she consider returning to Dubai for

the welfare of the child. Respondent No.2 explained that she had no help in Dubai and it was not possible for her to continue to live there even in the

vicinity of the Petitioner for a variety of reasons, which need not be discussed here. While she cared very much for her child, she pleaded that it would

be unfair to deprive her of the custody of the child on the pretext of the child's best interests.

28. We next met the Petitioner. He stated that he was deeply attached to the child. He explained the circumstances under which the relationship

between him and Respondent No.2 broke down and they started living separately

since October 2017. He stated that he was not interested in separating Respondent No.2 from the child. He was willing to consider modifications to the earlier arrangement which was in place prior to 10th April 2018. He assured that he was not interested in seeking the criminal prosecution of Respondent No.2 or invoking the Sharia law in the divorce proceedings instituted by him in Dubai. He explained that the child was very happy attending school in Dubai. He stated that his parents were proposing to move in with him in Dubai after their retirement. The Petitioner stated that in his current line of work, there were hardly any job prospects in India. He was doing well in his present job in the UAE.

29. The Court at that stage felt that the parties should still explore the possibility of settlement through mediation and referred them to a second round of mediation at the DHCMCC. This time, a child counsellor and family counsellor were asked to be associated in the mediation process. The Court issued interim directions facilitating the meeting of the Petitioner with his child for two hours every day in the presence of Respondent No.2 either at the DHCMCC or at a mutually agreed convenient place.

30. On 5th May 2018, the Court was again informed that the mediation had not succeeded. The report of the child counsellor, submitted to the Court in a sealed cover, stated that the child wished to return to Dubai to resume her schooling. The child counsellor noted that, at that point in time, the child was confused as to whether she wanted to be with her mother in India or with her father in Dubai. She further observed that the child was facing a difficult phase due to estrangement of her parents and that in the given set of circumstances she has expressed her willingness to live with her father. However, as noted by us, the child clearly did not want to be away from her mother. She expected that her mother would be with her even if she opted to return to school in Dubai.

31. The Court then proceeded to hear the petition on merits. On 22nd May 2018, while reserving judgment for the first time, the Court issued directions permitting the Petitioner to interact with the child from Dubai on video link at a mutually agreed time on a daily basis for about an hour.

Learned counsel for Respondent No.2 informed the Court that she would place on record a copy of the emergency travel document issued by the Indian embassy in Dubai with the help of which the child was brought to India by

Respondent No.2. This was done two days later on 24th May 2018 along with the affidavit filed by Respondent No.2.

32. On 22nd May 2018, Mr. Malhotra, on the instructions of Petitioner, stated that the Petitioner was willing to let Respondent No.2 have the custody of their daughter as long as she returned to Dubai with her. The Petitioner was also willing to abide by any conditions that this Court may deem necessary to impose. The Petitioner was also prepared to give an assurance to the effect that he would not proceed against Respondent No.2 in Dubai under the Sharia law which according to him, in any event, was not applicable to the parties even as per the procedure evolved under the prevalent legal system in Dubai.

33. However, Respondent No.2 instructed learned counsel Ms. Kamini Jaiswal who was appearing on her behalf to inform the Court that she was not willing to consider the above offer and insisted that the Petitioner would have to come to India if he wants to visit the child and further that under no circumstances would Respondent No.2 return to Dubai with the child.

Proceedings after 1st June 2018

34. While preparing its order, the Court noticed the ETD issued in the child's name submitted by Respondent No.2 which gave rise to the question as to whether the Court's orders regarding working arrangements for visitation of either spouse can be given effect to within the framework of the law.

The case was, therefore, again listed for hearing on 1st June 2018 on which date the following order was passed:

1. Although the orders were reserved, while further deliberating on the matter the Court felt that both the parties should address it further on the working arrangements that can be put in place, within the framework of law, in the event of the Court agreed either with the Petitioner or with the Respondent No.2, the main consideration being the welfare of the child.

2. Both the Petitioner and Respondent No.2 will file their respective notes of submissions on the above aspect after exchanging advance copies at least two weeks prior to the next date.

3. Mr. Malhotra informs that the Petitioner is present today. The Petitioner is permitted to meet the child today for two hours at a mutually convenient place and time in the presence of Respondent No.2. On his future visits to India,

the counsel for the Respondent No.2 will be notified by the Petitioner in advance so that a similar visitation can be arranged on every date of his visit. The earlier directions regarding meeting the child through video link will continue.

4. List on 6th July 2018 at 2:15 pm.â??

35. On 6th July 2018, learned counsel for Respondent No.2 informed the Court that her daughterâ??s Indian passport which was due to expire on 31st July 2018 had been renewed for another five years. He sought time to produce the renewed passport and the case was then listed for 9th July 2018.

The 9th July 2018 order

36. On 9th July 2018, copies of the renewed Indian passport issued to the child were produced before the Court. An additional affidavit of that date was tendered on behalf of Respondent No.2 offering an explanation regarding the issuance of the said passport. The Court then passed the following detailed order on 9th July 2018:

â??1. The Petitioner is a German national, who approached this Court with the present petition stating that his wife, Respondent No.2, has brought away their child, a minor daughter namely (name anonymised) born to them in Bangalore on 14th March, 2013 to India from Dubai where they were residing without his knowledge and on an emergency travel document. The Court has since then been engaged with the question of the custody of the minor child. In the mediation proceedings, attempted during the pendency of the present petition, the parties have not been able to arrive at any acceptable terms of settlement. The child is at present with her mother and both of them are living in Delhi with the parents of Respondent No.2.

2. An issue that has cropped up during the hearing of the petition concerns the passports issued to the minor child. Relevant to this issue are certain

facts which are not in dispute. These are that the Petitioner is a German national and Respondent No.2 is an Indian citizen. Their marriage was

solemnized in India under, the Special Marriage Act on 24th January, 2012 at Bangalore. The child, (name anonymised), was born in Bangalore to the

Petitioner and Respondent No.2 on 14th March, 2013. A German Passport bearing No. (withheld by this Court) was issued by the German Consulate

in Bangalore to (name anonymised) on 6th May, 2013 and the said passport is valid up to 5th May, 2019. Thereafter, on 1st August, 2013 an Indian

Passport bearing No. (withheld by this Court) was issued to (name anonymised) at Bangalore. This is valid up to 31st July, 2018.

3. The Petitioner has in his possession the original of both the above passports. The original passports have been shown to the Court by the Petitioner.

He had made an averment to this effect in paras 13 to 15 of his writ petition filed on 23rd April, 2018. There was no specific denial of this fact in the counter affidavit of Respondent No.2.

4. In explaining the circumstances under which she returned to India with her daughter on 10th April 2018 on an emergency travel document issued in favour of (name anonymised), Respondent No.2 stated in para 19 of her counter affidavit, filed on 11th May, 2018 as under:

In the above circumstances, the respondent no.2 had no option but to return to India with her daughter. The emergency travel document was secured from the Indian consulate at Dubai since the petitioner had told the respondent that he had lost/misplaced (the child)'s Indian passport. Though the respondent did not realise the actual intent of the petitioner, at that time. However, this is not the first time that the respondent had to return to India in this manner. Even in June 2017 the respondent, along with (the child), had returned to India (on her Indian passport) owing to their differences but went back to Dubai in July 2017 on the insistence & assurance of the petitioner to mend his ways.

5. Further, in an affidavit was filed on 24th May, 2018 Respondent No.2 stated in paras 7 and 8 as under:

7. That on 1/4/2018, the Respondent approached the Indian Embassy in Dubai and asked for an Emergency Travel Document to return to India. I

narrated my aforesaid ordeal to the officials of the Indian Embassy who were inclined to help me. I stated to the officials of the Indian Embassy that I

feared for my life and liberty in Dubai and that it was absolutely imperative for me and my daughter to return to India. Thereafter, I was issued the

Emergency Travel Document with respect to my daughter on 1/4/2018. I was constrained to take the extreme step as aforesaid as I feared not only for myself but the threat of not seeing my daughter ever again.

8. That I could not return to India immediately after obtaining the Emergency Travel Document as several governmental procedural formalities had to be completed which would ensure clearance of my daughter and mine through

the immigration at the Dubai Airport. The said Dubai Government formalities took about 10 days to complete and I was given a clearance to travel along with my daughter only on 10/4/2018. I, along with my daughter, reached India at early hours on 11/4/2018. True copy of the Emergency Travel Document issued to my daughter is annexed hereto as ANNEXURE

A-2.

6. The photocopy of the emergency travel document enclosed with the above affidavit showed that in the column titled 'reason' it is stated 'passport lost'. This emergency travel document was valid upto 30th June, 2018.

7. The Petitioner has, in para 14 of the petition, reproduced the complete text of an e-mail dated 17th April, 2018 received by him from one Smt.

Sumati Vasudev, Consul (Cons. & Labour), Consulate General of India, Dubai in response to his RTI application. It reads as under:

Dear Mr. M (anonymised),

Kindly refer to your email below. I have already sent you a reply on April 2018 giving our response to the various issues raised by you. We had also

asked your wife to reply to the comments pertaining to her which have been answered by her with a copy to you.

2. As I mentioned in my earlier email an Emergency Certificate was issued to (name anonymised) on an application made by her mother. We can

share with you that in her application (the mother) had reported that the passport of (the child) had been lost and had requested issuance of

Emergency Certificate urgently because she wanted to visit her ailing mother in India on medical grounds. She reported that her husband is not in

touch with her.

3. As per the Government of India rules a single parent can apply for passport on Emergency Certificate if the other parent is not available, by giving

an undertaking that he or she will be responsible and liable for any issue arising out of obtaining passport on Emergency Certification on such an undertaking.

4. As is clear we reject all your allegations and insinuations. We issued the Emergency Certificate to (the child) as per our rules, as we would issue to any other Indian national.

8. On 1st June, 2018 this Court had asked the parties to present to it a working

arrangement within the framework of the law in the event the Court

agreed either with the Petitioner or the Respondent No.2, the main consideration being the welfare of the child. At the subsequent hearing of this

petition on 6th July 2018 the Court was informed by learned counsel for the Respondent No.2 that the Indian Passport issued to (the child) has been

renewed for another five years. He stated that he would produce the said passport before this Court along with the copies of the documents relevant

to the renewal.

9. Today, Mr. Mendiratta has produced in the Court an additional affidavit dated 9th July, 2018 of the Respondent No.2 explaining inter alia that since

the Indian passport issued to (the child) was expiring. Respondent No.2 had applied for its renewal. Copies of the birth certificate of (name

anonymised), the blank copy of the form used by Respondent No.2 for applying for renewal of (the child)'s Indian passport as well as the copy of the

renewed Indian passport have been enclosed with the above affidavit as Annexures A-1 to A-3 respectively. On a perusal of the original of the

renewed passport, the Court finds that it notes ""old passport reported lost"". The address given in the renewed passport is the address of the parents of

the Respondent No.2 in Delhi.

10. The pleadings in the present case show that there was an agreement between the Petitioner and the Respondent No.2 dated 25th November, 2017

(Annexure-P7) entered into between the parties in Dubai. Paragraph 9 thereof records that the Respondent No.2 agreed to handover the passport and

ID of (name anonymised) (valid in the Emirates) to the Petitioner to ensure that (the child) remains there. The case of the Respondent No.2, however,

is that the Petitioner had told her that he had ""lost / misplaced (name anonymised)'s Indian passport."" Be that as it may, after the filing of the present

petition, with the Petitioner having positively stated that he had with him the original passports â?" both German and Indian - issued to (the child),

Respondent No.2 could not have, while applying for the renewal of (name anonymised)'s Indian passport told the Indian Passport authority in Delhi

that the earlier Indian passport issued to (the child) was lost. It is also not clear what was disclosed (or not) by Respondent No.2 in the application for

such renewal of (the child)'s Indian passport.

11. The Court considers it appropriate to bring the above facts to the notice of

the Regional Passport Office in Delhi which issued the renewed Indian passport to (name anonymised) on 27th June, 2018 with the expiry date of 26th June, 2023. The Court accordingly issues notice to the Regional

Passport Officer, Delhi requiring him to depute any responsible officer to appear before the Court together with the files concerning the

(i) Indian Passport No. (withheld by this Court) dated 1st August, 2013 issued to (the child) by the Regional Passport Office, Bangalore;

(ii) Passport (withheld by this Court) dated 1st April, 2018 issued by the Indian Consulate in Dubai to (the child) and

(iii) Passport No. (withheld by this Court) issued in favour of (the child) on 27th June, 2018 by the Passport Office in Delhi with an expiry dated of

26th June, 2023.

12. In particular, the applications filed on each instance for issuance of Indian passport for (the child) along with all the other documents submitted

with those applications be produced before the Court on the next date.

13. The Court also requests Ms. Maninder Acharya, learned Additional Solicitor General of India to assist the Court on the aspects of the issuance of

the Indian and German passports to (the child) and the correct legal position in that regard.

14. The Petitioner has filed further written submissions today which are taken on record.

15. The Registry is directed to have the notice issued to the Regional Passport Officer, Delhi, without process fees, by a Special Messenger forthwith

together with a certified copy of this order.

16. The. Registry is also directed to serve forthwith upon Ms. Maninder Acharya, learned ASG, again without process fee, the certified copy of the

present order, along with the complete set of paper book (which will be provided by the learned counsel for the Petitioner) and all other previous

orders passed in the present petition by this Court.

17. List on 20th July, 2018, at 2.15 pm. The interim orders passed as regards the Petitioner meeting the child in Delhi and over video link shall

continue.â??

Clarification by the Govt. of India

37. On 20th July 2018, the learned Additional Solicitor General of India (â??

ASGâ??), Ms. Maninder Acharya, appeared and sought to examine the legal issues that arose as a result of the above developments, in light of the Citizenship Act 1955 as well as the Passports Act 1967 and the rules thereunder. While continuing the interim orders, the case was adjourned to 30th July 2018 when submissions of the learned ASG on the above aspect were heard. On 9th August 2018, when the case was heard next, an affidavit was filed by Mr. Arun K. Chatterjee, Joint Secretary (PSP) and Chief Passport Officer, CPV Division, Ministry of External Affairs, Government of India in which it was stated inter alia that the child â??ceased to be a citizen of India following her acquisition of a German Passportâ??. It was further noted that this fact had not been disclosed to the Passport Office by Respondent No.2 while the application for the same was being made. Stating that had this information been available, the application would have been declined, the affidavit concludes by noting that the passport issued to the child in 2018 â??cannot be deemed to be a valid passport now since it has been brought to the notice of the Government that the child holds a valid German Passport and is, therefore, a German nationalâ??.

38. After noting the contents of the affidavit, the Court passed an order on 9th August 2018 wherein the following observations were made:

â??2. Upon a query by the Court as to the consequence of the Indian passport issued to (the child) not being a valid passport and in the particular context of her being a child aged five years, Ms. Maninder Acharya, learned Additional Solicitor General of India, states that she will have to seek instructions on the question of issuance of an Indian visa to the child.

3. It may be noted at this stage that Mr. Mendiratta, learned counsel for Respondent No.2, submits that the determination recorded in the aforementioned affidavit cannot be treated as final since the procedure under the Passports Act, 1967 for arriving at such a determination is yet to be complied with.

4. The Court has also asked Ms. Acharya to clarify the question of issuance of visa to the Petitioner for visitation in the event this Court decides the issue of custody of (the child) in favour of Respondent No.2. She states that on this issue as well, she will seek instructions and revert on the next date of hearing.

5. On his part, Mr. Anil Malhotra has produced a legal opinion dated 11th July

2018 of the Counsellor and Consul, Head of Legal and Consular Section

of the Embassy of the Federal Republic of Germany, New Delhi where inter alia it is stated as under:

German Citizenship can, in certain circumstances, be lost through voluntary acquisition of a foreign citizenship (naturalization after voluntary application), in accordance with Article 25 of the German Citizenship Act.

The issuance of a foreign passport to a minor child by a passport agency of a foreign country can never trigger the loss of German citizenship, if it has

not been preceded by a full naturalization process, and even in this case only if all legal representatives of the minor have applied for such

naturalization jointly, and if competent German authorities and Court have been heard.

The Embassy has been informed that the mentioned minor child's mother has obtained a new Indian passport for the child.

The Embassy cannot speculate if the mentioned minor child is indeed an Indian citizen. The Embassy can, however, confirm that (name anonymised),

the mentioned child, has not lost her German citizenship through her mother's successful application for an Indian passport.

6. List on 21st August 2018 at 4 pm.

7. Interim orders to continue. The compilation of case law tendered by Mr. Malhotra is taken on record.â??

39. At the hearing on 28th August 2018, a written clarification of the Joint Deputy Director and FRRO dated 24th August 2018 was placed before the

Court by the learned ASG which read as follows:

â??1. The petitionerâ??s minor child (name anonymised) (German Citizen) may be granted an X-2 (Entry) visa subject to production of her valid

German passport.

2. The petitioner (father of minor child) may come on appropriate visa. He is eligible for an X-2 (Entry) visa, subject to usual checks.â??

Change in the Petitionerâ??s position

40. In its order on that date, the Court noted that the above clarification was of particular relevance should it decide to determine the question of the

childâ??s custody in favour of Respondent No.2. On the same date, the learned counsel appearing for the Petitioner, Mr. Anil Malhotra, informed the

Court by way of an affidavit tendered on the same date that the Petitioner now intends to relocate to Germany having applied for and secured

employment at IMCD, a multi-national chemical distribution company headquartered at Rotterdam, Netherlands. It was further stated therein that he

would possibly be posted at the company's Zurich branch which is purportedly just an hour's drive from his native place/parents' home in

Lorrach, Germany. The matter was adjourned to 6th September 2018 on which date the Respondent No.2 was to respond to this latest development.

41. At the hearing on 6th September 2018, learned counsel Mr. Prashant Mendiratta appearing for Respondent No.2 stated that there was no change

in her stance notwithstanding the Petitioner's intention to take up employment in Germany. He informed the Court that it would not be possible for

her to relocate to Germany. However, Mr. Mendiratta offered that the Petitioner could come to India particularly in light of the assurance given by the

Respondent No.2 that she would not pursue any criminal case against him or ask for orders in the case instituted by her in the Family Court in Delhi.

42. On his part, the learned counsel for the Petitioner stated that he had been instructed by the Petitioner to state that it was going to be impossible to

relocate to India and that according to the Petitioner, there would be no impediment whatsoever to Respondent No.2 and the child relocating to

Germany. He pointed out that if there is any apprehension about the child not learning the English language while in Germany, the Petitioner was

willing to make all possible arrangements for the child to get special tuitions for the same.

43. It was further stated that with the Petitioner intending to relocate to Germany, the question of Respondent No.2 having to participate in any

proceedings in the UAE does not arise anymore. The Court was informed that the proceedings earlier instituted by the Petitioner in the Dubai courts

have now terminated due to lapse of time. With the Petitioner taking no further steps in that regard, it is stated that as of today, no such proceedings

are pending there. He further states that the only proceeding currently pending between the parties is the one instituted in the Family Court in Dwarka

by Respondent No.2 in which there has been no further progress owing to the interim orders of this Court.

44. The Court reserved the matter for judgment on 6th September 2018 and on that date, sought to meet the child in the Judge's chambers. The

Petitioner could not reach India for the proceedings in time. The child was reluctant to meet the two of us by herself and insisted on being with her

mother, i.e. Respondent No.2 throughout. The Court, however, could gather from the child's replies that she was not under any pressure. She is

pursuing her schooling in Delhi without any difficulty. The child appears to have adjusted well to her present environment.

Welfare of the child

45. The Court would like to begin its consideration of the case by first acknowledging the well-settled position that in cases such as the present one,

the paramount consideration of the Court should be the best interests and overall welfare of the child. In *Prateek Gupta v. Shilpi Gupta* (2018) 2 SCC

309, the Supreme Court observed:

“51. It has been consistently held that there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the

adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration.”

46. Reference should also be made to the decision of the Supreme Court in *Nil Ratan Kundu v. Abhijit Kundu* (2008) 9 SCC 413, wherein it was

observed:

“56. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to

custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by

interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is

neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount

consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising *parens patriae* jurisdiction and is

expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable

surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more

important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider

such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.â??

47. Therefore, the question before the Court is not always one of determining whether a parent is in illegal custody of the child. Rather, there must be interaction with the child so as to properly appreciate the childâ??s preference. It was further emphasised in the same judgment:

â??74. In our considered opinion, the Court was not right. Apart from statutory provision in the form of sub-section (3) of Section 17 of 1890 Act, such examination also helps the Court in performing onerous duty, in exercising discretionary jurisdiction and in deciding delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the Court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. Normally, therefore, in custody cases, wishes of the minor should be ascertained by the Court before deciding as to whom custody should be given.â??

48. Given the nature of the dispute, these are no doubt difficult issues to deal with for any Court as was noted recently in *Vivek Singh v. Romani Singh* (2017) 3 SCC 231 where it was observed as under:

â??9. â?|.In cases of this nature, where a child feels tormented because of the strained relations between her parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. No doubt, paramount consideration is the welfare of the child. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts.â??

49. When the present petition was heard on merits and reserved for judgment on 22nd May 2018, the central plank of the submissions made by learned counsel Ms. Kamini Jaiswal appearing on behalf of Respondent No.2 was the decision of the Supreme Court in *Nithya Anand Raghavan v. State (NCT of Delhi)* (2017) 8 SCC 454. Reference was made, in particular, to the following observations in para 47:

â??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 exceptional 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.â??

50. Ms. Jaiswal accordingly submitted that unless the Petitioner is able to show that their daughter is in the unlawful custody of Respondent No.2, the

question of entertaining the present petition or issuing a writ of habeas corpus does not arise. She pointed out that, as of 22nd May 2018, there was no

order of the courts in Dubai in this regard and even if there was one, it would not affect the nature of the motherâ??s custody of the child as a natural

guardian.

51. The learned counsel Mr. Anil Malhotra appearing for the Petitioner, meanwhile, also relied on the same decision to urge that the welfare of the

child should be the paramount consideration in determining the best interests of the child.

The decision in Nithya Anand Raghavan

52.1 In Nithya Anand Raghavan, two Indians, after marriage, shifted to the United Kingdom (â??UKâ??). A daughter was born to them in Delhi and

they then returned to the UK. The father and the daughter were subsequently granted citizenship of the UK. At one stage, the daughter took ill and

was diagnosed with a cardiac disorder and had to undergo periodical medical reviews.

52.2 In July 2015, the mother came back to India with the daughter alleging the violent behaviour of the father. After coming to India, the mother filed

a complaint with the Crime Against Women Cell (â??CAW Cellâ??) in Delhi which then issued notice to the father and his parents asking them to

appear before it. As a counter-blast, the father filed a custody/wardship petition in the UK before the Family Division of High Court of Justice seeking

return of his daughter. In that proceeding, the High Court of Justice passed an ex parte order inter alia directing the mother to return the daughter to

the UK and to appear before the Royal Courts of Justice.

52.3 The father filed a habeas corpus petition before the High Court of Delhi on 23rd January 2016 seeking to have the daughter produced before the Court. On 8th July 2016, this Court inter alia directed the mother to produce the daughter and comply with the orders passed by the court in the UK or hand over the daughter to the father within three weeks from the date of the order. It was noticed that this Court opined that the foreign court having the most intimate contact with the child would be better placed to appreciate the social and cultural milieu in which the child had been brought up. This Court held that the principle of comity of courts should not be discarded except for special and compelling reasons especially when interim or interlocutory orders have been passed by the foreign Courts. This Court applied the law in *Surya Vadanam v. State of Tamil Nadu* (2015) 5 SCC 450 and held that there was no special or compelling reason to ignore the interim order passed by the court in the UK.

52.4 It was argued on behalf of the mother in the Supreme Court that the High Court had given undue emphasis to the principle of comity of courts â??incomplete disregard to the paramount interests and the welfare of the childâ??. It was urged that â??there is an obvious need to protect the interest of the child and the mother, especially in light of the fact that Respondent No.2 had been physically and verbally abusive to the Appellant in the past and even put the child at risk with his behaviourâ??. It was urged that â??upholding the principle of comity of Courts while disregarding the welfare of the child would thus go against the public policy of India and result in grave harm being caused to the child and the appellantâ??. It was pointed out in that case that â??the child has been born and brought up in India. While the child now has British citizenship, she still retains her Indian citizenship. The child was forced to return with the mother under compelling situation emanating from domestic violence inflicted by the fatherâ??.

52.5 In *Nithya Anand Raghavan*, the Supreme Court noted:

â??28. â?!. The intention of Respondent No.2 can be ascertained by the fact that he filed a habeas corpus petition before the High Court, which is meant for urgent and immediate relief whereas the appellant and the child were staying in India for more than 6 months. Clearly, there was no immediate or urgent need necessitating the production of the child and the petition was filed as an afterthought and litigation strategem. The High

Court should have been loath to countenance such stratagem adopted by Respondent No.2, which is bordering on abuse of the process of Court.â??

52.6 The Supreme Court concluded that it would be in the interest of the child to remain in the custody of her mother and it would cause harm to her if

she returned to the UK. In other words, what weighed with the Supreme Court in Nithya Anand Raghavan was the welfare of the child and not the

principle of comity of jurisdictions. Among other factors, that weighed with the Supreme Court was the fact that the child in that case had â??been

schooling here for the past over one year and has spent equal time in both the countries out of the first six yearsâ??. It is in that context it is stated that

being a girl child, â??the guardianship of the mother is of utmost significanceâ??. It was observed that â??ordinarily, the custody of a â??girlâ?? 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 motherâ??. The Supreme Court then reiterated:

â??The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshiâ??s

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 Courtâ??s

overriding consideration must be the childâ??s welfare.â??

The decision in Kanika Goel

53.1 After the hearing of the present petition resumed on 6th July 2018, the Supreme Court on 20th July 2018 delivered its decision in Kanika Goel v.

State of Delhi AIR 2018 SC 3425. Mr. Malhotra, on behalf of the Petitioner, sought to distinguish the judgment as regards its applicability to the

present case. It is nevertheless an important decision that has a bearing on the issues that arise here.

53.2 In that case, the father of a minor child â??Mâ?? (anonymised), aged three years at the time of filing of the writ petition in 2017, approached this

Court seeking the writ of habeas corpus and a direction for the return of â??Mâ?? to the jurisdiction of the competent court in the United States of

America (â??USAâ??) in compliance with the order dated 13th January 2017 passed by the Circuit Court of Cook County, Illinois, USA.

53.3 The father in that case was born in India but had become a citizen of the USA in 2005. The mother too was a Permanent Resident of the USA

and held a Green Card. On 2nd December 2016, she had applied for US citizenship. She was a certified teacher in the State of Illinois and was

employed as a Special Education Classroom Assistant in Chicago Public Schools.

53.4 The father (respondent therein) and the mother (appellant therein) of the child got married in New Delhi on 31st December 2010 as per Sikh

rites. According to the respondent, it was understood that his wife would reside with him in the USA. She travelled to USA on a Fianc e Visa and

again got married to the respondent on 19th March 2011 at the Cook County Court in Chicago, Illinois. Before marriage, a Pre-nuptial Agreement

dated 20th October 2010 was entered into between the parties, enforceable in accordance with the laws of the State of Illinois USA. â??M   was

born on 15th February 2014 in the USA. â??M   was thus a natural born US citizen domiciled in the State of Illinois, USA from her birth.

53.5 The case of the husband was that his wife had, in December 2016, under the guise of making a short trip to New Delhi to meet her parents,

clandestinely removed their child. The mother was scheduled to return to Chicago on 7th January 2017 but went missing. She filed a petition in the in

the Family Court in New Delhi under Section 13(1) Hindu Marriage Act 1955 (â??HMAâ??) along with an application under Section 26 HMA on 7th

January 2017 seeking a restraint order against the father from taking â??M   away from the jurisdiction of Indian courts. Notice was issued in the

said petition and application to the father made returnable on 11th January 2017.

53.6 Meanwhile, the father filed an emergency petition for temporary sole allocation of parental responsibilities and parenting time in his favour and in

the alternative, an emergency order of protection for possession of â??M  , before the Circuit Court of Cook County, Illinois on 9th January 2017. A

notice of emergency motion was served on the mother by e-mail, informing her of the proposed hearing on 13th January 2017.

53.7 In the meanwhile, on 11th January 2017, the Family Court in New Delhi issued fresh notice to the father. An ex-parte order was passed on the

application filed by the mother whereby the father was restrained from removing

from the jurisdiction of the Family Court, New Delhi until further orders.

53.8 The father caused a missing person complaint to be filed on 13th January 2017 before the Station House Officer (SHO) of PS Vasant

Kunj. This complaint was acknowledged by the PS on 14th January 2017. Simultaneously, on 13th January 2017 the father moved the Circuit Court of

Cook County, Illinois. An ex-parte order was passed by that Court granting the father interim sole custody of and inter alia it was directed

that was to be immediately returned to the residence of the father in Cook County, Illinois.

53.9 The mother did not comply with the above order leading the father to file a habeas corpus writ petition before this Court on 1st February 2017

seeking the prayers as noticed hereinbefore. Interim orders were passed by this Court granting the father access to the minor child in the presence of

the mother and her parents.

53.10 A final judgment was rendered by this Court on 16th November 2017 in favour of the father after recording a finding that the paramount interest

of the minor child was to return to USA so that she could be in her natural environment. This Court put in place a working arrangement

to minimise the inconvenience that might be caused to all parties. Inter alia the directions issued by this Court were that it would be in the interest of

for the mother to return to USA with so that could be in her natural environment; receive the love, care, and attention of

the father as well apart from her grandparents; and resume her schooling and be with her teachers and peers. Further, it was noted that the mother

was able-bodied, educated, and accustomed to living in Chicago, USA and in fact had been gainfully employed there before she came to India. Certain

directions were issued regarding provision of reasonable accommodation by the father to cater to the needs of the mother and the minor child in the

USA and also to meet the expenses towards food, clothing, and shelter for the initial period of six months or till such time the mother found a suitable

job.

53.11 Directions were also issued by this Court to the father to meet the expenses of schooling, extra-curricular activities, transportation, hiring an

attendant/nanny for the child, and arranging a vehicle so that the mother would

be able to move around to attend to her chores and responsibilities. The father was also directed to meet the legal expenses involved in the mother defending herself in the proceedings in the Cook County Court in Chicago.

After the return of the minor child with her mother to the USA, the custody of the minor child was to remain with the mother and the father would not take the custody of the minor child by use of force. The visitation and custody rights of the parties, was to be decided thereafter by the competent court in the USA which was to be honoured by both parties. Further it was directed that until the suit instituted by the mother challenging the Pre-nuptial Agreement was decided, the father was restrained from relying upon or enforcing it.

53.12 A further order was passed by this Court on 1st December 2017, noting that the father had filed an affidavit undertaking to abide by all the conditions imposed upon him. He also tendered before this Court the proposed financial aid in terms of the said judgment, which may be made available to the wife in the USA. The Court directed him to deposit \$25,000 in an escrow account which was to be operated upon orders of the competent Court in Cook County, Illinois at the instance of the mother in the event of non-compliance of any of the conditions. Again, on 6th December 2017, the Court took on record another affidavit of undertaking sworn by the father which was in satisfaction of the earlier directions issued by the Court. The Court directed the mother to return to the USA with the minor child within two weeks, failing which, the minor child would be handed over to the father to be taken to USA.

53.13 Aggrieved by the above orders, the mother approached the Supreme Court in appeal. An interim order was passed on 15th December 2017 to the effect that the arrangement made by the High Court with regard to visitation rights would remain in force and the wife would not create any kind of impediment in that respect. It was also noted that the husband was not to implicate the wife in any criminal proceedings. On 24th January 2018, further interim directions were issued regarding visitation by the husband when he was in India.

53.14 In its final judgment, the Supreme Court, after reviewing the entire case law, including Nithya Anand Raghavan (supra) and Prateek Gupta (supra), observed as under:

22. After these decisions, it is not open to contend that the custody of the female minor child with her biological mother would be unlawful, for

there is presumption to the contrary. In such a case, the High Court whilst exercising jurisdiction under Article 226 for issuance of a writ of habeas

corpus need not make any further enquiry but if it is called upon to consider the prayer for return of the minor female child to the native country, it has

the option to resort to a summary inquiry or an elaborate inquiry, as may be necessary in the fact situation of the given case.

53.15 It was further observed, on the facts of that case, as under:

As observed in Nithya Anand Raghavan's case (supra), the Court must take into account the totality of the facts and circumstances whilst

ensuring the best interest of the minor child. In Prateek Gupta's case (supra), the Court noted that the adjudicative mission is the obligation to

secure the unreserved welfare of the child as the paramount consideration. Further, the doctrine of 'intimate and closest concern' are of

persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom

etc. with the portent of mutilative bearing on the process of its overall growth and grooming. The High Court in the present case focused primarily on

the grievances of the appellant and while rejecting those grievances, went on to grant relief to respondent No.2 by directing return of the minor girl

child to her native country. On the totality of the facts and circumstances of the present case, in our opinion, there is nothing to indicate that the native

language (English) is not spoken or the child has been divorced from the social customs to which she has been accustomed. Similarly, the minor child

had just entered pre-school in the USA before she came to New Delhi along with her mother. In that sense, there was no disruption of her education

or being subjected to a foreign system of education likely to psychologically disturb her. On the other hand, the minor child M is under the due care of

her mother and maternal grand-parents and other relatives since her arrival in New Delhi. If she returns to US as per the relief claimed by the

respondent No.2, she would inevitably be under the care of a Nanny as the respondent No.2 will be away during the day time for work and no one

else from the family would be there at home to look after her. Placing her under a trained Nanny may not be harmful as such but it is certainly

avoidable. For, there is likelihood of the minor child being psychologically disturbed after her separation from her mother, who is the primary care giver to her. In other words, there is no compelling reason to direct return of the minor child M to the US as prayed by the respondent No.2 nor is her stay in the company of her mother, along with maternal grand-parents and extended family at New Delhi, prejudicial to her in any manner, warranting her return to the US.â??

53.16 It was further observed as under:

â??23. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive 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. This has been the consistent view of this Court as restated in the recent three- Judge Bench decision in Nithya Anand Raghavan(supra), and the two Judge Bench decision in Prateek Gupta (supra). It is unnecessary to multiply other decisions on the same aspect.â??

53.17 On the facts of that case, it was finally held that the â??proceedings pending in the Family Court at New Delhi are decided with utmost promptitude in the first place before the wife was called upon to appear before the US Court, including production of the minor child before that Courtâ??. The Supreme Court was very keen that â??parties must eschew from pursuing parallel proceedings in two different countriesâ??. Therefore, it was deemed appropriate that the proceedings pending in the Family Court, New Delhi â??are decided in the first place including on the question of jurisdiction of that Courtâ??. Depending on the outcome of the said proceedings, â??the parties will be free to pursue such other remedies as may be permissible in law before the Court of Competent Jurisdictionâ??. Further, even

though the minor girl had a US passport and had travelled to India on a tenure visa which was expired, â??that does not mean that she is in unlawful custody of her biological mother. Her custody with the Appellant would nevertheless be lawfulâ??.

53.18 The Supreme Court in Kanika Goel (supra) noted that the father had also filed proceedings in a court in the USA for custody of the minor child.

It observed as under:

â??In such a situation, the arrangement directed by this Court in the case of Nithya Anand Raghavan (supra), as exposited in paragraphs 70-71, may be of some help to pass an appropriate order in the peculiar facts of this case, instead of directing the biological mother to return to the US along with the minor girl child, so as to appear before the competent court in the US. In that, the custody of the minor girl child M would remain with the appellant until she attains the age of majority or the Court of competent jurisdiction, trying the issue of custody of the minor child, orders to the contrary, with visitation and access rights to the biological father whenever he would visit India and in particular as delineated in the interim order passed by us reproduced in paragraph 11 (eleven) above.â??

53.19 Directions were further given that the husband would not initiate coercive penal action against the wife in the USA and if any such proceeding was initiated by him, it shall be withdrawn and not pursued before the concerned Court any further. Ultimately, while setting aside the orders of this Court, the directions issued by the Supreme Court were as follows:

â??The appellant and respondent No.2 must ensure early disposal of the proceedings for grant of custody of the minor girl child to the appellant, instituted and pending before the Family Court at Patiala House, New Delhi. All contentions available to the parties in that regard will have to be answered by the Family Court on its own merits and in accordance with law.â??

The present case

54. In the present case, in our initial interaction with the child, she said she wanted to return to Dubai to continue her schooling there and to be with her father. She nevertheless also said that she wanted her mother to be with her in Dubai. She conveyed more or less the same wish to the Child

Counsellor who submitted a confidential report to this Court. Her bond with both

her parents is undeniable. Also undeniable is the considerable emotional attachment that both parents have to their child. It became apparent to us in our initial interactions with the child that she resented having to choose between staying with either parent as she would ideally want to be with both of them. The principle of “welfare of the child” as repeatedly emphasised in *Nithya Anand Raghavan* (supra) would mean that this Court cannot possibly ignore the wishes of the child. However, the Court cannot also be oblivious to the fact that it is not feasible as of present for both parents to be with her in the same place.

55. The earlier assurances by the Petitioner that if Respondent No.2 returned to Dubai with the child, he would not insist on the custody of the child as long as he was given visitation rights are no longer relevant. The proceedings initiated by the Petitioner have lapsed and in any event he is in the process of relocating to Germany. The situation of there being a parallel exercise of jurisdiction by a foreign Court no longer exists since no fresh proceedings have been instituted by the Petitioner in Dubai or anywhere else.

Factual position as of date

56. The Court finds that the situation at present is as follows:

- (i) The child is in the custody of her biological mother. In terms of the law explained in *Prateek Gupta* (supra), *Nithya Anand Raghavan* (supra), and most recently in *Kanika Goel* (supra), her custody with the Respondent No.2 is lawful notwithstanding that she has been taken away by Respondent No.2 from the UAE where the parties last resided together.
- (ii) There was no order as such of the UAE Court restraining Respondent No.2 from taking away the child.
- (iii) Notwithstanding that the renewed Indian passport issued to the child may be of doubtful validity, the procedure under the Passports Act for declaring it to be invalid is yet to be initiated. Be that as it may, she can continue to stay in India as the daughter of the Respondent No.2, an Indian citizen, on a valid visa, as confirmed by the learned ASG.
- (iv) The child is presently attending school in Delhi/NCR and is with her mother and maternal grandparents in Delhi.
- (v) The Petitioner has been regularly visiting the child whenever he is in India and has also been in regular touch over video for various lengths of

time. The Government of India has clarified that whenever he visits India, the Petitioner will be eligible for an appropriate X-2 Entry visa subject to usual checks.

(vi) The Petitioner is in the process of relocating to Germany, having taken up a new job and as such there are no proceedings instituted by him in Germany.

(vii) Although the child wishes both her parents to be with her, it is not practical considering that the Petitioner is not willing to relocate to

India and neither is Respondent No.2, in terms of the renewed offer of the Petitioner, willing to relocate to Germany.

(viii) The parties have never lived in Germany together as a family unit. Respondent No.2 would have to begin life anew there, if compelled to relocate to Germany with the child.

(ix) For that matter, even the child has never lived in Germany for any length of time and therefore, it would be a completely new environment for her

as well. On the other hand, the Petitioner and Respondent No.2, along with their daughter, lived in India together from the time the child was born till

she was 4 years old. The child lived in the UAE for around 12 months, but has been in India since 8th April 2018. Therefore, India is not an alien

environment as far as she is concerned. Even the Petitioner has lived in India for several years.

57. The child is presently comfortably relocated in India and is in the company of her mother and maternal grandparents. The working arrangements earlier put in place by this Court through its interim orders shall continue. The further directions set out hereafter will enable the Petitioner to visit the child whenever he desires without any legal impediment.

58. Applying the "best interests of the child" test, this Court is of the view that, pursuant to the summary inquiry undertaken by it, the child should

not be compelled at this point in time to relocate with her mother, viz. Respondent No.2, to Germany where the Petitioner has currently taken up

employment. The Petitioner's prayer in that regard is, therefore, declined.

Place of "ordinary residence"

59. A submission was made on behalf of Respondent No.2 that the Petitioner can approach the Courts in India for relief under Section 9 Guardian and

Wards Act 1890 (GWA) which confers jurisdiction on the Court having territorial jurisdiction in the place where the minor ordinarily resides.

The child returned to India on 10th April 2018 after a 12 month gap and has been living in Delhi continuously since then.

60. It will be for the concerned Court in Delhi if approached by the Petitioner to decide the issue in light of the law explained in Ruchi Majoo v.

Sanjeev Majoo AIR 2011 SC 1952. It is not necessary for this Court to decide that issue in the present petition.

Directions

61. It will be the responsibility of Respondent No.2 to ensure that the child pursues her schooling in Delhi/NCR till the end of the current academic

year and has a stable and healthy environment/ambience in the company of her maternal grandparents and other friends and relatives. It is further

directed that till the end of the current academic year, Respondent No.2 shall not seek employment outside Delhi/NCR as doing so would deprive the

child of the company of her mother which she clearly needs on a continuous basis at the present stage of her life.

62. The Petitioner will hand over to Respondent No.2 forthwith the original German passport of the child to enable the Government of India to grant

the child the X-2 Entry visa on such passport. He will also return to Respondent No.2 forthwith the original of the expired Indian passport of the child.

The Petitioner will not cause any legal impediment in keeping the said German passport of the child renewed from time to time.

63. The Court appreciates the positive attitude displayed by the Petitioner as well as Respondent No.2 in working to ensure the best future for the

child. Respondent No.2 fairly agreed not to pursue, during the pendency of this petition, the cases instituted by her. As far as the case seeking an anti-

suit injunction is concerned, it has now been rendered infructuous since the proceedings instituted in the UAE by the Petitioner have lapsed. The said

suit will not continue and shall be withdrawn by Respondent No.2 in light of the changed circumstances. However, the petition filed by Respondent

No.2 against the Petitioner under the PWDV Act before the Family Court in Dwarka, is permitted to be continued as regards the issues of financial

support/maintenance to the child and herself.

64. The Court further directs that no coercive or criminal proceedings shall be

instituted or directions of a coercive nature sought from any Court or Tribunal by either party against the other either in India or elsewhere with regard to events that have already transpired. This is only to ensure an atmosphere conducive to the parties resolving their matrimonial disputes and so that no undue emotional stress is caused to their child on account of their differences and disputes.

65. Both the Petitioner and Respondent No.2 should attempt to resolve the issues concerning their marriage as peacefully as possible. If there has to be a divorce, the parties should attempt, as far as possible, to have it done by mutual consent instead of a contest on merits as the latter option is likely to be long drawn and cause the child emotional and mental stress.

66. The Court directs that whenever the Petitioner visits India, he will give Respondent No.2 at least one week's advance notice. The Petitioner can meet the child at any mutually convenient place for a period of 4 hours on each occasion (without disrupting her schooling). Such visits shall take place during the day time, over the weekend, and in the presence of Respondent No.2.

67. The child's paternal grandparents will be permitted access to their granddaughter (through phone and video chats) and may visit her subject to the mutual convenience of the parties.

68. The above directions will not prevent the parties undertaking joint visits with the child to any place of their choice, subject to the mutual convenience of the parties. The Petitioner will have access to the child through video-link on terms set out in the interim orders earlier issued in this petition.

69. The parties are at liberty to approach the Family Court where the proceedings under the PWDV Act are pending or in the divorce proceedings, if any, that might be instituted hereafter for any further interim directions or for modification of any of the above conditions as regards access to the child through video-link, visitation, financial support and travel.

70. The Petitioner is permitted to approach the Family Court for directions concerning custody of the child, after the expiry of the current academic year. Such request will be considered on its merits by the Family Court on the basis of the facts and circumstances then prevalent.

71. The petition is disposed of in the above terms.