IN THE HIGH COURT OF MADHYA PRADESH AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE ANAND PATHAK
&
HON'BLE SHRI JUSTICE RAJENDRA KUMAR VANI

WRIT PETITION NO. 10746 of 2024

VISHNU GUPTA
Vs.
STATE OF MADHYA PRADESH AND OTHERS

APPEARANCE:

Shri Prashant Sharma and Shri Rudraksh Gupta – Advocates for the petitioner.

Shri Saket Udainiya – Government Advocate for respondents No.1&3/State.

Shri V.D. Sharma and Shri Harshit Sharma – Advocates for respondent No.2.

ORDER

{Passed on 16th the Day of June, 2025}

1. The instant petition under Article 226 of the Constitution in the nature of Habeas Corpus is preferred by the petitioner seeking following reliefs:

> "*A. To issue an appropriate writ, order or direction in the nature Habeas Corpus to the Respondent No.1 to immediately trace and* produce the minor child ******Gupta before this Hon'ble Court *and deliver his custody to the Petitioner Father so as to be repatriated to the U.S. in compliance with the Order passed by the U.S. Court dated 04.04.2023.*
>
> *B. Issue an appropriate writ, order or direction in the nature of Habeas Corpus to Respondent No.2 to cooperate with any one appointed by the Petitioner to transport the minor child to the United States within a time frame;*

C. Pass any such other order or further orders and directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice."

2. Precisely stated facts of the case are that petitioner is seeking direction to the respondents to produce petitioner's son Gupta before this Court with a further direction to return his son to the United States of America (USA) with petitioner being father, with whom vests sole custody by virtue of order dated 04-04-2023 by Superior Court of New Jersey, Chancery Division, USA.

3. On 01-02-2013, petitioner and respondent No.2 – Shilpi Khaira (wife of petitioner) married in Vidisha according to Hindu Rites and Rituals. After their marriage, initially petitioner and thereafter respondent No.2 moved to USA and established their matrimonial home in Austin Texas in March, 2013.

4. On 14-02-2015 they were blessed with a son master ******Gupta and he acquired citizenship of USA by birth. It appears that domestic incompatibility ensued between the couple resulted into return of respondent No.2 to India in July, 2018. Since then she is living at her maternal home with her parents at Sehore (Madhya Pradesh) along with her son. It is the allegation of petitioner that despite efforts being made to contact respondent No.2 and their son master ******Gupta, no response was ever given by respondent No.2. Even she did not

allow the petitioner to be in touch with their son.

5. Meanwhile, it appears that petitioner contacted IPCA (US Agency under State Department) regarding access to his son but failed. Later on, US Consulate got access to the child and gave report in this regard. Petitioner also approached National Commission for Protection of Child Right (NCPCR) and District Magistrate, Sehore as well as Child Welfare Committee and Child Welfare Commission.

6. It further appears that petitioner filed a case of divorce and seeking custody of his child before Superior Court of New Jersey, Chancery Division and vide order dated 04-04-2023 divorce has been granted to the petitioner and the Court entrusted the sole physical and legal custody of his son to father and ordered that he shall be parent of primary residence of master ******Gupta. Despite order of custody being granted in favour of petitioner when respondent No.2 did not respond then he preferred this petition in the nature of Habeas Corpus.

7. It is the submission of learned counsel appearing for the petitioner that despite the directions being issued by the Court of New Jersey, Chancery Division, USA no step has been taken by respondent No.2 to hand over custody of child of master ****** Gupta to the petitioner. Same is arbitrary and illegal. Therefore, looking to the

principle of comity of courts, it is imperative that custody be handed over. According to him, Superior Court, New Jersey, Chancery Division, USA already adjudicated the following issues by way of an enquiry in favour of petitioner:

"*(i) Custody*
(ii) Child Support
(iii) Child's College Education
(iv) Emergency Decision Making
(v) Restriction on leaving the Country with the Child
(vi) Restriction on leaving the State with the Child
(vii) Sharing the records
(viii) Communication guidelines and Notifications
(ix) Child's Extra-Ordinary Hobbies
(x) Emancipation."

Therefore, order is required to be complied with, hence custody of child be handed over to the petitioner.

8. It is further submitted that corpus (son of petitioner) is a foreign national who is minor and is being forcibly kept in India without any authority. The child not being Indian citizen is being deprived of all rights and remedies available to Indian citizen. Now complication regarding visa availability is also apparent which would consume some time, therefore, petitioner be given custody.

9. Learned counsel for the petitioner heavily relied upon the judgment of Apex Court in the case of **Yashita Sahu Vs. State of Rajasthan**

and others, (2020) 3 SCC 67, Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42, Lahari Sakhamuri Vs. Sobhan Kodal, (2019) 7 SCC 311 and **Rohith Thammana Gowda vs. State of Karnataka, AIR 2022 SC 3511** and submits that because of comity of courts based on interest of child and scope of writ of Habeas Corpus vis-a-vis custody of minor child petition is not only maintainable but deserves consideration. He seeks custody of child and/or visitation rights alternatively.

10. *Per contra*, learned counsel for respondent No.2 (wife of petitioner) opposed the prayer with equal vehemence and prayed for dismissal of petition as non maintainable.

11. Learned counsel for respondent No.2 Shri V.D. Sharma submits that petitioner is claiming a relief in the shape of execution and enforcement of US Court order dated 04-04-2023 while invoking prerogative writ of Habeas Corpus, whereas an alternative remedy is available to the petitioner by virtue of provision so enshrined under the Code of Civil Procedure, 1908. He relied upon CPC with Limitation Act, 1963, 7th Edition, authored by Justice C.K. Thakkar reprinted 2016 to bring home the analogy that petitioner has alternative remedy.

12. On merits, respondent No.2 vehemently opposed the allegations of petitioner and submits that because of misbehaviour and conduct of petitioner she was forced to leave USA. According to respondent No.2 she tried to mend the relationship by making efforts to contact him but in vain. Petitioner did not respond to the e-mails/messages sent by her. Respondent No.2 levelled series of allegations (as per reply/synopsis filed) and held the petitioner responsible for discordant relationship.

13. Learned counsel for respondent No.2 refers order dated 18-12-2024 passed by the Coordinate Bench while hearing application for psycho analysis of child ****** Gupta vide I.A.No.8875/2024. Said application was considered in detail by the Coordinate Bench and rejected the same. It is held in the said order that in writ jurisdiction such exercise cannot be undertaken. Petitioner may approach the Civil Court under the Guardians and Wards Act, 1890 (hereinafter referred to as "the Act of 1890") for the same.

14. Learned counsel for respondent No.2 further refers order dated 17-10-2024 passed by the Principal Judge, Family Court, Sehore whereby the application under Section 25 of the Act of 1890 preferred at the instance of parents of petitioner namely, Morarilal and Shanti Devi Gupta for declaration of guardianship and to meet

their grandson, was dismissed by the Family Court while allowing the application preferred under Order VII Rule 11 of CPC at the instance of present respondent No.2.

15. Learned counsel for respondent No.2 also relied upon three Judge Bench judgment passed by the Apex Court in the case of **Nithya Anand Raghavan Vs. State (NCT of Delhi) and another, (2017) 8 SCC 454** in which scope of petition in the nature of Habeas Corpus under Article 226 is discussed *vis-a-vis* order of foreign Court. Learned counsel also relied upon the judgment of Apex Court in the case of **Prateek Gupta Vs. Shilpi Gupta and others, (2018) 2 SCC 309** as well as another three Judge Bench judgment of Apex Court in the case of **Kanika Goel Vs. State of Delhi and another, (2018) 9 SCC 57**8. He also relied upon judgment in the case of **Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba Vs. State of West Bengal and others, 2021 SCC OnLine SC 3434**.

16. Heard learned counsel for the parties at length and perused the documents appended thereto.

17. This is a petition under Article 226 of the Constitution in the nature of Habeas Corpus. As per allegation, corpus (son of petitioner) is in illegal custody of respondent No.2 who happens to be the mother of corpus. Date of birth of corpus is 14-02-2015, therefore, at present

corpus is more than 10 years of age.

18. So far as scope of petition under Article 226 of the Constitution in the nature of Habeas Corpus is concerned that issue has been discussed in detail by three Judge Bench of the Apex Court in the case of **Nithya Anand Raghavan (supra)** in detail and held in following manner:

> "***38.*** *We have cogitated over the submissions made by the counsel for both the sides and also the judicial precedents pressed into service by them. The principal argument of the respondent-husband revolves around the necessity to comply with the direction issued by the foreign Court against the appellant-wife to produce their daughter before the UK Court where the issue regarding wardship is pending for consideration and which Court alone can adjudicate that issue. The argument proceeds that the principle of comity of courts must be respected, as rightly applied by the High Court in the present case.*
>
> ***39.*** *We must remind ourselves of the settled legal position that the concept of forum convenience has no place in wardship jurisdiction. Further, the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters has been succinctly delineated in several decisions of this Court. We may usefully refer to the decision in the case of Dhanwanti Joshi Vs. Madhav Unde .....*"
>
> "**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, 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, 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 the case of Mrs. Elizabeth (supra), 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 (see:Paul Mohinder Gahun Vs. State of NCT of Delhi15 (2001) 5 SCC 247& Ors.16 relied upon by the appellant). 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, 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). 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."

19. Besides that, custody of minor or welfare of child is of paramount consideration and this aspect has been dealt with by the Apex Court while relying upon the judgment rendered in the case of **V. Ravi Chandran (2) Vs. Union of India** and **Dhanwanti Joshi Vs. Madhav Unde, (1998) 1 SCC 112**. The Apex Court in the case of **Nithya Anand Raghavan (supra)** discussed in para 41 as under:

*"**41.** Notably, the aforementioned exposition has been quoted with approval by a three-judge bench of this Court in Dr. V. Ravi Chandran(supra) as can be discerned from paragraph 27 of the reported decision. In that, after extracting paragraphs 28 to 30 of the decision in Dhanwanti Joshi's case, the three-judge bench observed thus:*

"27.....However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. It was also held that 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 the parties but on the sole and predominant criterion of what would best serve the interest of the minor." (emphasis supplied)

Again in paragraphs 29 and 30, the three-judge bench observed

thus:-

> *"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 the 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 the 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 the 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 interests of the child. The indication given in Mckee v. McKee that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re and the said view has been approved by this Court in Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants), in re has been approved by this Court in Elizabeth Dinshaw." (emphasis supplied)"*

20. While addressing the question whether an order passed by the Foreign Court directing the mother to produce the child before it would render the custody of the minor unlawful, Apex Court discussed this question in following manner:

> *"**48.** The next question to be considered by the High Court would be whether an order passed by the foreign court, directing the mother to produce the child before it, would render the custody of the minor unlawful? Indubitably, merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se. As in the present case, the order passed by the High Court of Justice, Family Division London on 8 th January, 2016 for obtaining a Wardship order....."*
>
> ***49.** On a bare perusal of this order, it is noticed that it is an ex parte order passed against the mother after recording prima facie satisfaction that the minor Nethra Anand (a girl born on 07/08/2009) was as on 2nd July, 2015, habitually resident in the jurisdiction of England and Wales and was wrongfully removed from England on 2nd July, 2015 and has been wrongfully retained in India since then. Further, the Courts of England and Wales have jurisdiction in the matters of parental responsibility over the child pursuant to Articles 8 and 10 of BIIR. For which reason, it has been ordered that the minor shall remain a Ward of that Court during her minority or until further order; and the mother (appellant herein) shall return or cause the return of the minor forthwith to England and Wales in any event not later than 22 January, 2016. Indeed, this order has not been challenged by the appellant so far nor has the appellant applied for modification thereof before the concerned court (foreign court). Even on a fair*

reading of this order, it is not possible to hold that the custody of the minor with her mother has been declared to be unlawful. At best, the appellant may have violated the direction to return the minor to England, who has been ordered to be a Ward of the court during her minority and further order. No finding has been rendered that till the minor returns to England, the custody of the minor with the mother has become or will be treated as unlawful including for the purposes of considering a petition for issuance of writ of habeas corpus. We may not be understood to have said that such a finding is permissible in law. We hold that the custody of the minor with the appellant, being her biological mother, will have to be presumed to be lawful.

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 strait jacket 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.

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 U.K. That does not mean that the appellant must disregard the proceedings pending in the U.K. 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 U.K. 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 no.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."*

21. This three Judge Bench judgment of **Nithya Anand Raghavan (supra)** later on relied upon in another three Judge Bench judgment delivered in the case of **Kanika Goel (supra)** and in two Judge Bench of **Prateek Gupta (supra)**. Therefore, facts of the case as unfolded in the case of **Nithya Anand Raghavan (supra)** appears to

be of same tenor and texture as that of the facts of the present case. On the other hand, the judgment relied upon by the petitioner in the case of **Tejaswini Gaud and others (supra)** moves in different factual realm because there, custody of child was sought by the father from maternal aunts of corpus. Here, the case is between husband and wife and wife is having the custody of their son.

22. So far as the judgment in the case of **Yashita Sahu (supra)** is concerned, it is a decision rendered by two Judge Bench and that judgment has not taken into consideration earlier judgments rendered by three Judge Bench of Apex Court in the case of **Nithya Anand Raghavan (supra)**, **Kanika Goel (supra)** and two Judge Bench in the case of **Prateek Gupta (supra)**.

23. Even otherwise, petitioner has alternative remedy as per different provisions of CPC including Section 44A and Sections 13 and 14 of CPC and if required and if law permits, may proceed under Guardians and Wards Act, 1890. While doing so, petitioner has to satisfy the exceptions carved out in Section 13 of CPC. Section 13 of CPC is reiterated for ready reference:

> ***"13: When foreign judgment not conclusive.-*** *A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-*

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud; (f) where it sustains a claim founded on a breach of any law in force in India."

24. In the conspectus of facts and circumstances of the case, despite the fact that petitioner is making efforts to meet his child, legal provisions and judgments as referred above do not come to his rescue. Thus, the petition fails.

However, looking to the nature of dispute and the fact that petitioner being a father, may request respondent No.2 to meet his son and if she feels so, it is her discretion to permit for meeting personally or on video call. That is an expectation raised by the Court and not issuing any command to comply. It is purely between the couple and for respondent No.2 to decide.

25. Writ petition stands disposed of with aforesaid observations.

(ANAND PATHAK)
JUDGE

(RAJENDRA KUMAR VANI)
JUDGE

Anil*