IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
WP No. 22416 of 2024

[redacted] Vs *THE STATE OF MADHYA PRADESH THROUGH ITS PRINCIPAL SECRETARY AND OTHERS)*

Dated : 18-09-2025

Shri Prabhijeet Jauhar and Ms. Firoza Daruwala and Ms.Rosemary Raju - Advocates for the petitioner.

Shri A.S.Garg - Sr. Advocate with Shri Raunak Choukse and Shri Archit Jaykar Advocate for respondents No.4 and 5.

Shri Bhuwan Gautam - GA for respondent/State.

In this petition, a writ of habeas corpus for the custody of a minor child has been prayed in compliance with the order passed by a foreign Court.

[2] The respondents have raised an objection regarding the maintainability of a writ of habeas corpus in the matter of custody of a minor child that the same is not maintainable in view of the judgment passed by the co-ordinate bench at Gwalior in the case of **Vishnu Gupta Vs. State of MP & Ors. decided on 16th June, 2025**.

[3] The petitioner has filed the present writ petition for issuance of writ in the nature of Habeas Corpus or any other writ or order or direction, against the Respondent No.4, for the custody of Respondent No.5 [redacted], on account of the fact that [redacted] was unlawfully and wrongfully removed from the custody of the Petitioner, by fraud on false and frivolous grounds and to further repatriate the child [redacted] to Canada in accordance with the orders of the Canadian Family Court as her entire upbringing has been in North America. The petitioner has made several attempts to save the family, but the

Respondent no.4 is depriving the petitioner of his legal right to stay with his daughter and hence he is filing captioned writ petition, before this Hon'ble Court, to kindly direct the respondents 1 to 3 to take the custody of Respondent no. 5, from Respondent no. 4 and repatriate the child [redacted] to Canada and hand over the custody to the Petitioner.

[4] Learned counsel for the petitioner argued that the writ of habeas corpus for custody of a minor child is maintainable. In support of his submission, he has placed reliance on the following judgments:-

Jeewanti Pandey Vs. Kishan Chandra Pandey (1981) 4 SCC 517
Smt. Surindar Kaur Sandhu Vs. Harbax Singh Sandhu & another (1984) 3 SCC 698.
Mrs.Elizabeth Dinshaw Vs. Arvand M. Dinshaw & another (1987) 1 SCC 42.
Mr.Paul Mohinder Gahun Vs. Mrs. Selina Gahun 2006(130) DLT 524.
Aviral Mittal Vs. The State & another 2009(112) DRJ 635.
Shilpa Aggarwal Vs. Aviral Mittal & another (2010) SCC 591.
Dr.V.Ravi Chandran Vs. Union of India (2010) 1 SCC 174.
Sondur Gopal Vs. Sondur Rajini (2013) 7 SCC 426.
Arathi Bandi Vs. Bandi Jagadrakshaka Rao & Ors (2013) 15 SCC 790.
Surya Vadanan Vs. State of Tamil Nadu & Ors. (2015) 5 SCC 450.
Nithya Anand Raghavan Vs. State of Net of Delhi (2017) 8 SCC 454.
Tippa Srihari Vs. State of AP 2018 SCC Online Hyd 123.
Ganamukkala Sirisha Vs. Tippa Srihari MANU/SCOR/23943/2019.
Lahari Sakhamuri Vs. Sobhan Kodali (2019) 7 SCC 311.
Varun Verma Vs. State of Rajasthan 2019 SCC Online Raj 5430.
Yashita Sahu Vs. State of Rajasthan & Ors.(2020) 3 SCC 67.
Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tewari (2019(7 SCC 42.
Nilanjan Bhattacharya Vs. The State of Karnataka 2020 SCC Online SC 928.
Ghadian Harshavardhan Reddy Vs. State of Telangana & Ors.

MANU/TL/1033/2021.
Vasudha Sethi Vs. Kiran V. Bhaskar 2022 SCC Online SC 43.
Rohith Thammana Gowda Vs. State of Karnataka & Ors.2022 SCC Online SC 937.
Rajeswari Chandrasekar Ganes Vs. State of Tamil Nadu 2022 SCC OnLine SC 885.
Abhinav Gyan Vs. State of Maharashtra & Another Crl.WP No.693/2021.
Abhay Vs. Neha Joshi & another 2023 SCC Online Bom 1943.
Neha Joshi Vs. State of Maharashtra & another SLP (Cri)No.12866/2023.
Anupriya Vs. Abhinav Gyan SLP (Crl)No.10381/2022.

[5] Counsel for the petitioner further argued that the judgment passed by the Gwalior Bench is *per incuriam*, as it has incorrectly held that the judgment passed by the larger bench by a three-judge bench in the case of Nithya Anand Raghavan Vs. State (NCT of Delhi) & another (2017) 8 SCC 454, Kanika Goel Vs. State of Delhi & another (2018) 9 SCC 578 and a two-Judge bench in the case of Prateek Gupta Vs. Shilipi Gupta & Ors. (2018) 2 SCC 309 have not been considered.

[6] To decide the said preliminary objection, it is apposite to first consider the judgments on the point of maintainability of writ of Habeas Corpus in regard to custody of a child. In the case of **Yashita Sahu** (supra), the issue of whether a writ of Habeas Corpus is maintainable was considered. He referred to paragraphs 10 to 12, which are quoted as under:-

> *"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , Nithya Anand Raghavan v. State (NCT of Delhi) [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] and Lahari Sakhamuri v. Sobhan Kodali [Lahari*

Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.

11. We need not refer to all decisions in this regard but it would be apposite to refer to the following observations from the judgment in Nithya Anand Raghavan [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] : (SCC pp. 479-80, paras 46-47).

> *"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)."*

12. Further, in Kanika Goel v. State (NCT of Delhi) [Kanika Goel v. State (NCT of Delhi), (2018) 9 SCC 578 : (2018) 4 SCC (Civ) 411] , it was held as follows : (SCC p. 609, para 34):

> *"34. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive 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."

[7] In the said judgment, there is reference and consideration of the earlier three-judge judgment in the case of **Nithya Anand Raghavan** (supra) and also the judgment in the case of **Lahari Sakhamuri** (supra). He referred to paragraphs 40 and 45 of **Nithya Anand Raghavan** (supra), which is reproduced as under:-

*"**40.** The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to*

physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition.

45. *In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana [Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247 : 2001 SCC (Cri) 841] , has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , 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 v. State (NCT of Delhi) [Paul Mohinder Gahun v. State (NCT of Delhi), 2004 SCC OnLine Del 699 : (2004) 113 DLT 823] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.*

[8] The same issue was considered by another three Judge Bench in the case of **Kanika Goel** (supra) wherein it has been held that in a Habeas Corpus Petition, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person and if the Court is called upon to consider the prayer for return of the minor female child to the native country, it must have the option to resort to a summary enquiry or an elaborate enquiry and the court must take into account the totality of the facts and circumstances while ensuring the best interest of the minor child. Various considerations for return to its native country pursuant to the orders passed by the foreign country were laid down in the said case.

[9] A similar issue came for consideration again before a Judge Bench in the case of **Nilanjan Bhattacharya** (supra), and relevant paras 9 to 11 are

quoted as under:-

> *" 9. This Court observed that in cases where the child is brought to India from a foreign country, which is their native country, the Court may undertake a summary inquiry or an elaborate inquiry. The Court exercises its summary jurisdiction if the proceedings have been instituted immediately after the removal of the child from their State of origin and the child has not gained roots in India. In such cases, it would be beneficial for the child to return to the native State because of the differences in language and social customs. The Court is not required to conduct an elaborate inquiry into the merits of the case to ascertain the paramount welfare of the child, leaving such inquiry to the foreign court. However, this Court clarified that : (Nithya Anand Raghavan case [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] , SCC p. 477, para 40).*
>
> > *"40 … In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration."*
> > *While discussing the powers of the High Court in issuing a writ of habeas corpus in relation to the custody of a minor child, this Court further observed : (Nithya Anand Raghavan case [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] , SCC pp. 479-80, para 46)*
> > *"46. … 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 executing court."*
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> ***10.*** *In Prateek Gupta v. Shilpi Gupta [Prateek Gupta v. Shilpi Gupta, (2018) 2 SCC 309 : (2018) 1 SCC (Civ) 795] , this Court clarified that even if there is a pre-existing order of a foreign court with respect to the custody of the child, the principles of comity of courts, and "intimate contact and closest concern" are subservient to the predominant consideration of the welfare of the child. In that case, the parents and their minor child were residing in the US. After the separation of the parents, the father left the US with the child to come to India without any prior intimation. A US court passed an order that the mother has the sole physical and legal custody of the child and declared that the father will not have any visitation rights since he had violated an interim order of the Court directing him to return with the child to the Commonwealth of Virginia. Thereafter, the mother invoked the writ jurisdiction of the High Court of Delhi seeking a remedy of the writ of habeas corpus against the father alleging that he has the child in unlawful custody. The High Court observed [Shilpi Gupta v. Union of India, 2016 SCC OnLine Del 2561] that the most intimate contact of the parties and the child was with the US court, which had the closest concern with the well-being of the child and directed the father to hand over the custody to the mother. The decision of the High Court was set*

aside by this Court. While referring to the doctrines of the principle of comity of courts, and of "intimate contact and closest concern", this Court observed : (Prateek Gupta case [Prateek Gupta v. Shilpi Gupta, (2018) 2 SCC 309 : (2018) 1 SCC (Civ) 795] , SCC pp. 338-39, paras 49-50)

> *"49. … Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which the child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer res integra that the ever-overriding determinant would be the welfare and interest of the child. …*
> *50. The doctrines of "intimate contact" 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."*

11. *Where a child has been removed from their native country to India, this Court has held that it would be in the best interests of the child to return to their native country if the child has not developed roots in India and no harm would be caused to the child on such return. In V. Ravi Chandran (2) v. Union of India [V. Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] , this Court observed : (SCC pp. 196-97, paras 32 & 35-37)*

> *"32. Admittedly, Adithya is an American citizen, born and brought up in the United States of America. He has spent his initial years there. The natural habitat of Adithya is in the United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interests, the parties have obtained a series of consent orders concerning his custody/parenting rights, maintenance, etc. from the competent courts of jurisdiction in America. …*
> ***
> *35. … There is nothing on record which may even remotely suggest that it would be harmful for the child to be returned to his native country.*
> 36. It is true that the child Adithya has been in India for almost two years since he was removed by the mother—Respondent 6—contrary to the custody orders of the US court passed by the consent of the parties. It is also true that one of the factors to be kept in mind in exercise of the summary jurisdiction in the interests of the child is that application for custody/return of the child is made promptly and quickly after the child has been removed. This is so because any delay may result in the child developing roots in the country to which he has been removed. From the counter-affidavit that has been filed by Respondent 6, it is apparent that in the last two years Adithya did not have education at one place. He has moved from one school to another. He was admitted in a school at Dehradun by Respondent 6 but then removed within a few months. In the month of June 2009 the child has been admitted in some school in Chennai."

[10] Following the aforesaid judgments of three Judges in the case of **Nithya Anand** (supra) and **Kanika Goel** (supra) in the case of **Vasudha Sethi** (supra), in para 28 court held that no hard and fast rule has been laid down specifying considerations for custody of a child; therefore, each case has to be decided on its own facts and circumstances.

[11] In the case of **Rajeshwari Chandrasekar Ganesh** (supra), the Court considered the question of maintainability in para 89 onwards and held in para 89 and 99 as under:-

> *"**89.** The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for the custody of a minor was examined by this Court in Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari [Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42 : (2019) 3 SCC (Civ) 433] , and it was held that the petition would be maintainable where the detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where the ordinary remedy provided by the law is either unavailable or ineffective.*
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> ***99.** Thus, it is well established that in issuing the writ of habeas corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of habeas corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a habeas corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a habeas corpus proceeding brought by one parent against the other for the custody of their child, the Court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as parents patriae, has in promoting the best interests of the child."*

[12] A similar view has been taken following the previous judgments in **Abhinav Gyan Vs. State of Maharashtra** (supra), **Abhay Vs. Neha Joshi** (Bombay High Court) (supra), which was affirmed by the Supreme Court in

Neha Joshi Vs. State of Maharashtra (supra).

[13] In a recent judgment in the matter of **Anupriya Vs. Abhinav Gyan** (supra) the Apex Court has reiterated the same regarding maintainability of a writ petition of Habeas Corpus in the case of custody of a minor child.

[14] Now we revert to the objection raised by the respondent regarding maintainability of Habeas Corpus in view of the Judgment in the case of **Vishnu Gupta** (supra) by a co-ordinate bench at Gwalior.

[15] In order to appreciate the same, it is apt to refer to the following paragraphs of the Coordinate Bench in the matter of **Vishnu Gupta** (supra).

> *"18. So far as the scope of the petition under Article 226 of the Constitution in the nature of Habeas Corpus is concerned, that issue has been discussed in detail by a three-judge bench of the Apex Court in the case of* ***Nithya Anand Raghavan*** *(supra) in detail and held in the 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:*
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> *"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."

[16] On going through the aforesaid judgment **Vishnu Gupta** (supra), we find that in the said case, the coordinate bench has not considered the issue of maintainability of writ of Habeas Corpus in the case of custody of a minor child. The Court considered the scope of the petition under Article 226 of the Constitution of India in the nature of Habeas Corpus, which is pellucid from paragraph 18 of the judgment. Thus, the contention of learned counsel for respondents that in the case of **Vishnu Gupta** (supra) the writ of Habeas Corpus was held not to be maintainable for custody of a minor child, is not correct. Even during the course of arguments Shri A.S. Garg, Sr.

Counsel for respondents admitted that the issue of maintainability of Habeas Corpus in respect of custody of a minor child was not decided in the case of **Vishnu Gupta** (supra), however, he argued that in view of the findings of the co-ordinate bench in para 22, the present petition is liable to be dismissed.

[17] In regard to observations made in para 22 by the co-ordinate bench in the case of **Vishnu Gupt**a (supra), the learned counsel for the petitioner argued that the co-ordinate bench has erroneously held that in the case of **Yashita Sahu** (supra) by two Judge Bench, has not taken into consideration earlier judgments rendered by three Judges Bench of the Apex Court in the case of **Nithya Anan**d (supra), **Kanika Goel** (supra) and two benches judgment in the case of **Prateek Gup**ta (supra).

[18] On going through the entire judgments passed in the case of **Yashita Sahu** (supra), we find that the three Judges bench judgment in the case of **Nithya Anand** (supra) and **Kanika Goel** (supra) have been considered in paragraphs 10 to 12, which are already reproduced in preceding paragraphs, therefore, the observations made in para 22 by the coordinate bench in the case of **Vishnu Gupt**a (supra) are *per incuriam* as the aforesaid finding is incorrect without proper consideration of the judgment of **Yashita Sahu** (supra) which had taken into consideration the judgment of three Judges in the case of **Nitya Anand Raghavan** (supra), **Kanika Goel** (supra) and two Judge Bench in the case of **Prateek Gupta** (supra). Apart from that, we find that the finding in para 22 is a passing remark in the said judgment. The co-ordinate bench in para 18 started with the scope of the petition under Article 226 of the Constitution of India in the nature of Habeas Corpus and

considered the judgments of **Nithya Anand** (supra) and other judgments upto para 21 and in para 22 made a passing observation, however, the matter was decided as per paragraph 23 on the ground of an alternative remedy. Thus, we further held that para 22 is an *obiter dictum.*

[19] Thus, it is axiomatic that the issue of maintainability of Habeas Corpus in respect of custody of minor child was not decided by co-ordinate bench in the case of **Vishnu Gupta** (supra), therefore, the objection raised by learned counsel for respondents that the present petition is not maintainable in view of the judgment passed in the case of **Vishnu Gupta** (supra) is rejected.

[20] In the light of the enunciation of law as discussed in the earlier paragraphs, it is held that:

(1) The writ of Habeas Corpus in the matter of custody of a minor child is maintainable, in the light of the aforesaid judgment of the Apex Court, which has been discussed in the earlier paragraphs.

(2) A writ of Habeas Corpus cannot be used only for mere enforcement of the direction given by foreign Court and same is one of the facts to be considered and the extra ordinary power of writ of Habeas Corpus can be availed in exceptional cases where the detention of a child by parent or others is found to be illegal and without any authority of law where the original remedy provided by the law is either unavailable or ineffective.

(3) The Court, while passing the writ of Habeas Corpus, will examine whether the welfare of the child requires that the present custody should be changed and child should be left in the care and custody of somebody else.

(4) The paramount consideration while exercising the writ of Habeas

corpus for the change of custody of a child will be the welfare of the child.

[21] The matter is directed to be listed on 10.10.2025 for hearing on admission.

(VIJAY KUMAR SHUKLA)
JUDGE

(BINOD KUMAR DWIVEDI)
JUDGE

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