Parminder Kaur Brar Vs State Of Punjab And Others

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Dec. 17, 2020

Acts Referred: Hindu Minority And Guardianship Act, 1956 â€" Section 6, 7, 13, 13(1), 13(2), 17(1), 17(2), 17(3) Constitution Of India, 1950 â€" Article 32, 226, 227

Hon'ble Judges: Arun Kumar Tyagi, J

Bench: Single Bench

Advocate: Ashok Kumar Khunger, P.S. Walia, Arvinder Singh

Final Decision: Disposed Of

Judgement

Arun Kumar Tyagi, J

(The case has been taken up for hearing through video conferencing.)

2. The petitioner has filed present petition under Articles 226/227 of the Constitution of Indian for issuance of a writ in the nature of habeas corpus for

directing the release of detenue Inayat Brar minor daughter of the petitioner aged about 6 years (hereinafter referred to as 'the child') from illegal

custody of respondents No.4 to 6 by appointment of a warrant officers with roving writ/direction to search the premises of respondents No.5 and 6 or

any other place pointed out by the petitioner with direction to hand over her custody to the petitioner. The petitioner has also sought issuance of further

direction to respondents No.4 to 6 to hand over the passport of the child to the petitioner.

3. Briefly stated, the petition has been filed on the averments that petitioner was married with respondent No.4 on 22.01.2011 at Abohar. The

petitioner after clearing her IELTS settled at Canada in the year 2013 and after getting permanent residency status called her husband/respondent

No.4 and they both settled at Canada. The child was born out of the wedlock on 28.07.2014 at Canada and passport was issued in her name by the

Canadian Government which is valid upto 21.07.2021. Deteune Inayat Brar was admitted in Sikh Academy at Canada in Class KG3 for the session

2019-2020. The petitioner alongwith her husband-respondent No.4 and their minor daughter Inayat Brar came to India on 02.01.2020 to meet their

parents and relatives. Due to call from the employer, the petitioner went back to Cananda on 25.01.2020 leaving her husband-respondent No.4 and the

child in India. The petitioner came to India on 02.03.2020 and requested respondent No.4 to return to Canada but respondent No.4 conveyed his

intention to stay in India due to Covid-19 on which the petitioner again went back to Canada and joined her duties. The petitioner came to India on

03.08.2020 and asked respondent No.4 to return to Canada alongwith the child but respondent No.4 refused. The petitioner also received e-mail dated

09.09.2020 from Sikh Academy Canada to bring the child to the school for the next academic session. Thereupon she visited her in-laws house at

Village Chak Sherewala but the child was not present there. Respondent No.4 told her that the child had gone to the house of respondent No.5 at Sri

Muktsar Sahib. The petitioner went to the house of respondent No.5 and found the child with respondents No.5 and 6. The child expressed her

willingness to return with her to Canada but respondents No.5 and 6 did not allow the child to accompany the petitioner. Respondents No.4 to 6 have

illegally detained the child and there is danger to her life from them.

4. Pursuant to notice of motion order, learned State Counsel has appeared on behalf of respondents No.1 to 3. However, no reply has been filed by

respondents No.1 to 3.

5. The petition has been opposed by respondents No.4 to 6 in terms of reply dated 28.09.2020 of respondent No.4 filed on behalf of respondents No.4

to 6.

6. In the reply respondents No.4 to 6 have made preliminary submissions that respondent No.4 being father is natural guardian of the child and her

custody with her father-respondent No.4 cannot be said to be illegal. In the month of January, 2020 the petitioner left the child with respondent No.4

and threw her passport on the table in front of all the relatives in joint family house of respondent No.4 and said Ã¢â‚¬Å“keep your child and her

passportÃ¢â‚¬. The petitioner came to India in March, 2020 to attend a marriage and did not even try to meet respondent No.4 and the child. The child is

living with and being looked after well by the joint family of respondent No.4 which includes his parents, his elder paternal uncle, his cousin

(respondent No.5) and wife (respondents No.6) and son of his cousin. The child has been admitted in Iconic International School, Malout Road, Sri

Muktsar Sahib which is holding online classes. The petitioner is now living all alone in Canada and if the custody of the child is given to her then there

will be no one to look after the child when the petitioner goes for her work. Due to her tender age of 6 years, the child cannot be left alone in the

house. Welfare of the child is paramount consideration for considering the question of handing over her custody. The petitioner did not take respondent

No.4 to Canada for permanent settlement because of her own merit and the petitioner and respondent No.4 went together to Canada with advantage

of points due to brother of respondent No.4 having already settled there. Respondent No.5 and 6 have no role to withhold the child back. The

petitioner and respondent No.4 never had any cordial relations with each other and due to bitterness of their relationship respondent No.4 does not

want to go back to Canada and live with the petitioner. Respondent No.4 and his family members insisted to hand over the custody of the child in the

presence of the respectables particularly the mediator in the marriage who did not accompany the petitioner due to which custody of the child was not

given to her. The child is happily living in the joint family in the company of her father, grand parents and other members. Therefore, the petition may

be dismissed.

7. I have heard arguments addressed by Mr. Ashok Kumar Khunger, learned Counsel for the petitioner, Mr. Amit Mehta, Sr. DAG, Punjab for

respondents No.1 to 3 and Mr. Arvinder Singh, learned Counsel for respondents No.4 to 6 and gone through the relevant record.

8. While reiterating factual averments made in the petition, Mr. Ashok Kumar Khunger, learned Counsel for the petitioner has submitted that the

petitioner and respondent No.4 are permanent residents of Canada. The child was born in Canada, is a citizen of Canada and came to India on

Canadian passport. The petitioner and respondent No.4 along with the child had come to India for visiting their parents and relatives but respondent

No.4 stayed in India with the child due to Covid-19. Now, respondent No.4 has refused to return to Canada and hand over custody of the child to the

petitioner. The petitioner is employed in Canada and having sufficient income to properly look after the child and it will be in the best of interest and

welfare of the child that her custody and passport are handed over to the petitioner for return to Canada and the question of her custody is decided by

the Court of competent jurisdiction in Canada.

9. Learned Counsel for the petitioner has further argued that in the facts and circumstances of the case, detention of the child by respondents No.4 to

6 amounts to illegal/improper custody. Habeas corpus petition filed by the petitioner for handing over her custody to the petitioner is maintainable and

this Court can in exercise of its extraordinary writ jurisdiction by recourse to summary inquiry order return of respondent No.4 with the child to

Canada. Learned Counsel for the petitioner has accordingly prayed that respondent No.4 may be directed to return to Canada with the child or to

hand over custody of the child to the petitioner for return to Canada subject to decision of the question of her custody by the Court of competent

jurisdiction in Canada. In support of his arguments learned Counsel for the petitioner has placed reliance on the observations in Jasmeet Kaur Vs.

State (NCT of Delhi) and another (Supreme Court): 2020(1) RCR (Civil) 57;4 Soumitra Kumar Nahar Vs. Parul Nahar (Supreme Court) : 2020(1)

LAWDIGITAL.IN 52; Rubi (Km) and others Vs. Hayat Mohammad (Allahabad High Court) : 1986(1) HLR 604 and Mr. Varun Verma Vs. State of

Rajasthan (Rajasthan High Court) : 2019(2) WLC (Raj.) (UC) 246.

10. On the other hand Mr. Arvinder Singh, learned Counsel for respondents No.4 to 6 has argued that the petitioner had given up custody of the child

and had returned to Canada alone in January, 2020 by retorting respondent No.4 to keep the child and her passport. The petitioner came to India in

March, 2020 to attend a marriage but did not even try to meet respondent No.4 and the child. Respondent No.4 being father is natural guardian of the

child under Section 6 of the Hindu Minority and Guardianship Act, 1956 (for short 'the HMG Act') and custody of the child with respondent No.4

cannot be said to be illegal. The petitioner has the equally efficacious remedy of filing petition under the HMG Act and Guardians and Wards Act,

1890 (for short 'the GW Act'). Therefore, the Habeas Corpus petition is not maintainable. The child is happily living with and is being looked after by

respondent No.4 and his joint family comprising his parents, elder paternal uncle, his cousin and wife and son of his cousin. The child has been

admitted in Iconic International School, Malout Road, Sri Muktsar Sahib which is conducting online classes. In case custody of the child is handed over

to the petitioner, the petitioner cannot properly look after the child during the period when she goes to her office and it will not be safe to leave the

child of tender age of 6 years alone in the house. It will be in the best of interest and welfare of the child that respondent No.4 be allowed to retain her

custody. Learned Counsel for respondents No.4 to 6 has accordingly submitted that the petition may be dismissed. In support of his arguments,

learned Counsel for respondents No.4 to 6 has placed reliance on judgment of Hon'ble Supreme Court inP rateek Gupta Vs. Shilpi Gupta and others :

2018(1) RCR (Civil) 210.

11. The question of the custody of child, as observed by Hon'ble Supreme Court in Lahari Sakhamuri Vs. Sobhan Kodali :2019 (7) SCC 311 ,raises

delicate issues considered by the Courts to be difficult for adjudication particularly where the parents are non-resident Indians. As observed by

Hon'ble Supreme Court in Vivek Singh Vs. Romani Singh : 2017 (1) RCR (Civil) 106,3 in cases of this nature while a child, who ideally needs the

company of both the parents, feels tormented because of the strained relations between the parents, it becomes, at times, a difficult choice for the

court to decide as to whom the custody should be given. The children are not mere chattels : nor are they mere play-things for their parents as

observed by HonÃ¢â‚¬â„¢ble Supreme Court in Rosy Jacob Vs. Jacob A. Chakramakkal : (1973) 1 SCC 84 0and in deciding the question of their custody

paramount consideration is their welfare. 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.

12. Where the parties are Hindus, the HMG Act lays down the principles on which custody disputes are to be decided. As per Section 6 of the HMG

Act, natural guardian of a Hindu Minor in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided

interest in joint family property) is the father, in the case of a boy or an unmarried girl and after him, the mother. Father continues to be a natural

guardian, unless he has ceased to be a Hindu or renounced the world. Section 13 (1) of the HMG Act stipulates that in the appointment or declaration

of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. Section 13(2) of the HMG Act

stipulates that no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage

among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor. Section 7 of the GW Act empowers the

Court to make order as to guardianship. Section 17 (1) of the GW Act provides that in appointing or declaring the guardian of a minor, the Court shall,

subject to the provisions of said section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be

for the welfare of the minor. Section 17 (2) of the GW Act stipulates that in considering what will be for the welfare of the minor, the Court shall have

regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes,

if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. Section 17 (3) of the GW

Act mandates that if the minor is old enough to form an intelligent preference, the Court may consider that preference. No doubt, under Section 6 of

the HMG Act the father is a natural guardian of a minor child and therefore has a preferential right to claim its custody but Section 6 of the HMG Act

cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. (See Surinder Kaur Sandhu (Smt.) Vs. Harbax

Singh Sandhu, (1984) 3 SCC 698). Whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not

on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the

minor. (See Elizabeth Dinshaw Vs. Arvand M. Dinshaw & Ors.(1987) 1 SCC 42).

13. Now, it is well settled that writ of habeas corpus can be issued for restoration of custody of a minor to the guardian wrongfully deprived of it. (See

Gohar Begam Vs. Suggi alias Nazma Begam (1960) 1 SCC 597M; anju Tiwari Vs. Rajendra Tiwari : AIR 1990 SC 1156; Syed Saleemuddin Vs. Dr.

Rukhsana : 2001(2) R.C.R.(Criminal) 591 and Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others (SC) : 2019(3) R.C.R.(Civil)

104.)

14. In Tejaswini Gaud and Ors. Vs. Shekhar Jagdish Prasad Tewari and others : 2019 (3) R.C.R. (Civil) 10,4 Hon'ble Supreme Court observed as

under:-

Ã¢â‚¬Å“13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate

release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when

wrongfully deprived of it..Ã¢â‚¬Â¦.....

18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through

which the custody of the child is addressed to the discretion of the court.Ã¢â‚¬Â¦.....Ã¢â‚¬â€‹

15. In Criminal Appeal No.127 of 2020 SLP (crl.) No. 7390 of 2019 titled Yashita Sahu Vs. State of Rajasthan and others decided on 20.01.2020

while referring to its judgments in Elizabeth Dinshaw Vs. Arvand M. Dinshaw & Ors. : (1987) 1 SCC 42 N; ithya Anand Raghavan Vs. State (NCT

of Delhi) & Anr. : (2017) 8 SCC 454 and Lahari Sakhamuri Vs. Sobhan Kodali : (2019) 7 SCC 311 Hon'ble Supreme Court rejected the contention

that a writ of habeas corpus is not maintainable if the child is in the custody of another parent and held that the court can invoke its extraordinary writ

jurisdiction for the best interest of the child.

16. However, exercise of extra ordinary writ jurisdiction to issue writ of habeas corpus in such cases is not solely dependent on and does not

necessarily follow merely determination of illegality of detention and is based on the paramount consideration of welfare of the minor child irrespective

of legal rights of the parents. In Howarth Vs. Northcott : 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758 it was observed that in habeas corpus

proceedings to determine child custody, 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 infant 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. It was further observed that the employment of the forms of habeas corpus

in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or

by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for

the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights

of no one, including the parents, are allowed to militate. It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an

illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention

as with the welfare of the child. In Gaurav Nagpal Vs. Sumedha Nagpal : 2008(4) R.C.R.(Civil) 92 8Hon'ble Supreme Court referred to these

observations made in Howarth Vs. Northcott : 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758 and held that the legal position in India follows the

above doctrine.

17. In Syed Saleemuddin Vs. Dr. Rukhsana : 2001(2) R.C.R.(Criminal) 591, Hon'ble Supreme Court observed as under:-

Ã¢â‚¬Å“.....in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to

ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that

present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in

a matter of custody of a child the welfare of the child is of paramount consideration of the Court.Ã¢â‚¬â€‹

18. The welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense.

The moral or religious welfare of the child must be considered as well as its physical wellbeing. Nor can the tie of affection be disregarded. (Per

Lindley, L.J. in McGrath, (1893) 1 Ch 143). Welfare is an all-encompassing word. It includes material welfare, both in the sense of adequacy of

resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due

personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability

and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development

of the child's own character, personality and talents. (Per Hardy Boys, J. in Walker Vs. Walker & Harrison (1981) New Zealand Recent Law 257.)

19. In Gaurav Nagpal Vs. Sumedha Nagpal : 2008(4) R.C.R.(Civil) 928 Hon'ble Supreme Court observed as under:-

Ã¢â‚¬Å“42. Ã¢â‚¬Â¦.The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those

issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the

minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment,

health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical

values have also to be noted. They are equal if not more important than the others.

43. The word 'welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare

of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of

the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae

jurisdiction arising in such cases.Ã¢â‚¬â€‹

20. Hon'ble Supreme Court in Nil Ratan Kundu Vs. Abhijit Kundu : 2008(3) RCR (Civil) 93 6set out the principles governing the custody of minor

children in paragraph 52 as follows:-

Ã¢â‚¬Å“Principles governing custody of minor children

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 the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot

be decided solely by interpreting legal provisions. It is a human 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 wellbeing 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.Ã¢â‚¬â€‹

21. In Civil Appeal No.3559 of 2020 titled as Smriti Madan Kansagra Vs. Perry Kansagra decided on 28.10.2020 Hon'ble Supreme Court

observed as under:-

Ã¢â‚¬Å“11.3. To decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the

child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment

and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which

would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child.Ã¢â‚¬â€‹

22. India is not signatory to the Hague Convention on Civil Aspects of Inter-national Child Abduction, 1980. In number of cases filed under Article 32

of the Constitution of India or appeals filed challenging correctness of the order passed by the High Court in exercise of jurisdiction under Article 226

of the Constitution of India, Hon'ble Supreme Court has dealt with the question of issuance of writ of habeas corpus for repatriation of the minor

children, who had been removed from the foreign countries and brought to India, to the country from where they had been removed. Hon'ble Supreme

Court has taken the view that the High Court may invoke the extraordinary jurisdiction to determine the validity of the detention keeping in mind the

paramount consideration of the welfare of the child and even the order of the foreign court must yield to the welfare of the child. The Court may

direct repatriation of the minor child to the country from where he/she may have been removed by a parent or other person.

23. In Nithya Anand Raghavan Vs. State of NCT of Delhi, (SC) 2017(3) R.C.R.(Civil) 798 : 2017(8) SCC 4 5H4on'ble Supreme Court reiterated as

under:-

Ã¢â‚¬Å“26. The consistent view of this court is that if the child has been brought within India, the Courts in India may conduct (a) summary

inquiry or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the Court may deem it fit to order return of

the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the

matter of a summary inquiry, it is open to the Court to decline the relief of return of the child to the country from where he/she was removed

irrespective of a preexisting order of return of the child by a foreign Court. In an elaborate inquiry, the Court is obliged to examine the

merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign Court for

return of the child as only one of the circumstances. In either case, the crucial question to be considered by the Court (in the country to

which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts

and circumstances of each case independently.Ã¢â‚¬‹

24. In Prateek Gupta Vs. Shilpi Gupta and others : (2018) 2 SCC 20 9following its earlier judgment in Nithya Anand Raghavan Vs. State of NCT of

Delhi (2017) 8 SCC 454 Hon'ble Supreme Court held as follows:-

Ã¢â‚¬Å“32. The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded

on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of ""intimate contact and closest

concern"" notwithstanding. Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory

of which a 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. In other words, the invocation of these

principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern

being the welfare of the child, other factors being acknowledgeably subservient thereto. Though in the process of adjudication of the issue

of repatriation, a court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the

applicant/parent is prompt and alert in his/her initiative and the existing circumstances ex facie justify such course again in the

overwhelming exigency of the welfare of the child, such a course could be approvable in law, if an effortless discernment of the relevant

factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological, social, cultural existence, thus exposing it

to visible, continuing and irreparable detrimental and nihilistic attentuations. On the other hand, if the applicant/parent is slack and there is

a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court

would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had

grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its foldÃ¢â‚¬‹.

25. In Dr. V. Ravi Chandaran Vs. Union of India and others : (2010) 1 SCC 174 a writ of habeas corpus for production of minor son from the custody

of his mother was sought for by his father. The child was born in US and was an American citizen and was about eight years of age when he was

removed by the mother from U.S., in spite of her consent order on the issue of custody and guardianship of the minor passed by the competent U.S.

Court. The minor was given in the joint custody to the parents and a restraint order was operating against the mother when it was removed from USA

to India. Prior to his removal, the minor had spent few years in U.S.. All these factors weighed against the mother as is discernible from the decision,

whereupon Hon'ble

Supreme Court elected to exercise the summary jurisdiction in the interest of the child, whereupon the mother was directed to return the child to USA

within a stipulated time.

26. In Shilpa Aggarwal Vs. Aviral Mittal : (2010) 1 SCC 591 the minor girl child involved was born in England having British citizenship

and was only 3Ã‚Â½ years of age at the relevant time. The parents had also acquired the status of permanent residents of U.K. In the facts

and circumstances of the case, Hon'ble Supreme Court expressed its satisfaction that in the interest of the minor child, it would be proper to

return her to U.K. by applying the principle of comity of courts. The Court was also of the opinion that the issue regarding custody of the

child should be decided by the foreign court from whose jurisdiction the child was removed and brought to India. A summary enquiry was

resorted to in the facts of the case.

27. In the present case the minor girl child has been removed from Canada and brought to India. As expounded in the above referred catena of

judgments by Hon'ble Supreme Court, the question of issuance of writ of habeas corpus in exercise of jurisdiction under Article 226 of the Constitution

of India directing or declining return of the minor girl child to the native country, has to be decided, not on the basis of legal rights of the parties, but on

the basis as to whether paramount consideration of the welfare and best interest of the minor girl child lies in return to Canada or continued stay in

India. In determining the said question this Court has the option to resort to a summary inquiry or an elaborate inquiry and the option has to be

exercised and the said question has to be decided by taking into account the totality of the facts and circumstances and judging the same on paramount

consideration of the welfare and best interest of the minor girl child. On taking into account the totality of the facts and circumstances and judging the

same on paramount consideration of the welfare and best interest of the minor girl child, I am of the considered view that the question involved

deserves to be decided by recourse to summary inquiry and the facts and circumstances of the case do not warrant or mandate resort to an elaborate

enquiry.

28. In the present case the minor girl child aged six years is citizen of Canada by birth and has come to India on Canadian passport. Both of her

parents are permanent residents of Canada and are gainfully employed there as nurse and painter having income in Canadian dollars of 5500-6000 and

4506 per month respectively as shown by the documents placed on record by them before this Court. The minor girl child was living with both of them

in Canada since its birth till her journey to land of birth of its parents. Matrimonial differences have propelled her father to prolong his stay with the

minor girl child in India but he has not claimed to have wound up his employment and properties in Canada to permanently return to and settle in his

homeland.

29. The minor girl child has spent period of more than five years out of six years in Canada. The period of more than five years spent by the minor girl

child in her formative initial years in Canada has naturally resulted in her integration with the social, physical, psychological, cultural and academic

environment of Canada. The minor girl child has been living in India for period still falling short of one year and that too during the lock-down/ period

of social distancing. Stay of the minor girl child in India has been for too short a period to facilitate her acclimatization and integration to social,

physical, psychological, cultural and academic environment of India. The minor girl child was brought to Punjab, where language of social interaction is

Punjabi and English, which is native language for social interaction and to which any child born, brought up and studying in Canada would be

accustomed, is not spoken. The minor girl child is also subjected to different, if not entirely foreign, system of education divorced from the social

circles to which she was accustomed. There is every likelihood of the minor girl child being psychologically disturbed due to her separation from her

mother, who was the primary care giver to her and under whose care she remained since her birth. The child, being a minor girl of tender age of six

years, custody and company of her mother, who can provide her motherly love care and guidance and the required upbringing for her desired

grooming of her personality character and faculties, will be of utmost significance. No doubt, the question of company of the child during the period

when the petitioner would go to her office does arise but this aspect of the matter would have also arisen when both the petitioner and respondent

No.4 were living together in Canada and used to leave for their office making some arrangement for care of the minor girl child. Similar kind of

arrangement can be made by the petitioner. There may not be much difficulty in making such arrangement as admittedly, brother of respondent No.4

is permanently settled in Canada. The forced company of her grandparents and other relatives cannot be said to be conducive to her physical and

psychological well-being. The minor girl child being citizen of Canada will have better prospects upon return to her native country. Unless the minor

girl child is immediately repatriated to Canada, her inherent potentialities and faculties would suffer an immeasurable setback. Natural process of

grooming in association of her friends and playmates in Canada is indispensable for comprehensive and conducive development of her mental and

physical faculties. There are compelling reasons to direct return of the minor girl child to Canada as prayed by the petitioner and such return is not

shown to be harmful to the minor girl child in any manner. Continuance of the minor girl child in India will interfere with and will be harmful to her

overall growth and grooming and will be prejudicial to her interest. While there is no material to suggest that return of the minor girl child to Canada

would result in psychological physical or cultural harm to her. In view of the lock-down and restrictions imposed on travel, social interaction etc. to

prevent spread of pandemic of Covid-19, which also affected the working of the Courts, there cannot be said to be any undue and unreasonable delay

in filing of the present petition so as to disentitle the petitioner to the relief claimed.

30. In Prateek Gupta Vs. Shilpi Gupta and others : 2018(1) RCR (Civil) 21,0 relied upon by learned Counsel for respondents No.4 to 6, the appellant

and respondent married on 20.01.2010 in accordance with Hindu rites at New Delhi and shifted to the United States of America where the appellant

was already residing and gainfully employed. Two sons Aadvik and Samath were born out of the wedlock on 28.09.2012 and 10.09.2014 respectively.

As alleged by the respondent due to temperamental differences and cruel behavior of the appellant in front of the child, the parties separated on or

about 15.11.2014. The children continued to live with the respondent. On 24.01.2015 the appellant took Aadvik, representing that he would take him

for a short while to the Dulles Mall but did not return and separated Aadvik from the respondent from 24.01.2015 to 07.03.2015.

The appellant left the United States of America with Aadvik for India on 07.03.2015 and did not return to the United States of America with Aadvik

despite orders dated 28.05.2015 and 20.10.2015 passed by the Juvenile and Domestic Relations Court at Fairfax County directing him to return the

child to the Commonwealth of Virginia and to the custody and control of the respondent. The habeas corpus petition filed by the respondent was

allowed by the Delhi High Court and the appellant was directed to return with Aadvik to the United States of America. On appeal Hon'ble Supreme

Court set aside order of the Delhi High Court and directed retention of Aadvik by the appellant while observing as under:-

Ã¢â‚¬Å“35. Reverting to the present facts, the materials as available, do substantiate lingering dissensions between the parties. They are living

separately since 2014 with one child each in their company and charge. The children are US citizens by birth. Noticeably, the child Aadvik,

who is the subject matter of the lis and custody was barely 2Ã‚Â½ years old when he came over to India and had stayed here since then.

Today, he is a little over 5 years old. In other words, he has spent half of his life at this age, in India. Considering his infant years of stay in

US, we construe it to be too little for the required integration of his with the social, physical, psychological, cultural and academic

environment of US to get totally upturned by his transition to this country, so much so that unless he is immediately repatriated, his inherent

potentials and faculties would suffer an immeasurable set back. The respondent-mother also is not favourably disposed to return to India,

she being a working lady in US and is also disinclined to restore her matrimonial home. The younger son is with her. There is no convincing

material on record that the continuation of the child in the company and custody of the appellant in India would be irreparably prejudicial

to him. The e-mails exchanged by the parties as have been placed on records do suggest that they had been in touch since the child was

brought to India and even after the first order dated 28.05.2015 was passed by the court in US. In the said e-mails, they have fondly and

keenly referred to both the sons staying in each otherÃ¢â‚¬â„¢s company, expressing concern about their illness and general well-being as well.

As has been claimed by the appellant, the child is growing in a congenial environment in the loving company of his grand-parents and other

relatives. He has been admitted to a reputed school and contrary to the nuclear family environment in US, he is exposed to a natural

process of grooming in the association of his elders, friends, peers and playmates, which is irrefutably indispensable for comprehensive and

conducive development of his mental and physical faculties. The issue with regard to the repatriation of a child, as the precedential

explications would authenticate has to be addressed not on a consideration of legal rights of the parties but on the sole and preponderant

criterion of the welfare of the minor. As aforementioned, immediate restoration of the child is called for only on an unmistakable

discernment of the possibility of immediate and irremediable harm to it and not otherwise. As it is, a child of tender years, with malleable

and impressionable mind and delicate and vulnerable physique would suffer serious set-back if subjected to frequent and unnecessary

translocation in its formative years. It is thus imperative that unless, the continuance of the child in the country to which it has been

removed, is unquestionably harmful, when judged on the touchstone of overall perspectives, perceptions and practicabilities, it ought not to

be dislodged and extricated from the environment and setting to which it had got adjusted for its well-being.Ã¢â‚¬â€œ

31. In the present case both the petitioner and respondent No.4 are permanent residents of Canada, are gainfully employed in Canada and have

purchased house in Canada and respondent No.4 has not wound up and left employment in Canada and permanently settled in India. The child has

spent major part of more than five years of her life of six years in Canada resulting in her integration with the social, physical, psychological, cultural

and academic environment of Canada. These facts of the present case besides others as discussed above are evidently different from those in

Prateek Gupta Vs. Shilpi Gupta and others : 2018(1) RCR (Civil) 21.0 Therefore, the observations in Prateek Gupta Vs. Shilpi Gupta and others :

2018(1) RCR (Civil) 210 relied upon by learned counsel for respondents No.4 to 6, which are based on the peculiar facts thereof, are not of any help

to respondents No.4 to 6.

32. In view of the totality of the facts and circumstances of the present case and on the basis of the summary inquiry, I am of the considered view

that it will be for the welfare and in best of interest of the minor girl child that order be passed for return of the minor girl child to Canada, from where

she was removed and it will be appropriate that the question of appointment of guardian/handing over custody of the child to either of the parents is

left for adjudication by the Court of competent jurisdiction in Canada on the basis of paramount consideration of welfare and best of the interest of the

child.

33. In view of the above discussion the writ petition is allowed with the following directions:-

(i) respondent No.4 is directed to return to Canada along with minor girl child on or before 01.01.2021;

(ii) if respondent No.4 fails to comply with aforesaid direction, respondent No.4 shall hand over custody of the minor girl child and her passport to the

petitioner on 02.01.2021 or such other date as may be agreed to by the petitioner;

(iii) in case respondent No.4 fails to hand over custody of the minor girl child and her passport to the petitioner on 02.01.2021 or such other date as

may be agreed to by the petitioner, respondent No.2 shall take over the custody and passport of the minor girl child from respondent No.4 and hand

over custody and passport of the minor girl child to the petitioner on such date as may be agreed to by the petitioner;

(iv) on custody of the minor girl child and her passport being handed over to the petitioner, the petitioner shall be entitled to take the minor girl child to

Canada;

(v) in case passport of the minor girl child is not handed over to the petitioner or respondent No.2 by respondents No.4 to 6 on the ground of

loss/damage etc., the petitioner shall be entitled to get the duplicate passport issued from the concerned authority;

(vi) on such return of the minor girl child to Canada, either of the parties shall be at liberty to file appropriate application/petition for appointment of

guardian, grant of custody of the minor girl child before the Court of competent jurisdiction; and

(vi) till filing of any such application/petition by either of the parties and passing of any interim order by the Court of competent jurisdiction on the

same, respondent No.4 shall be entitled to visit the child and have her temporary custody from 10:00 a.m. to 1:00 p.m. or make video calls to her for

about half an hour on every Sunday and in case respondent No.4 does not return to Canada, the petitioner shall bring the minor girl child to India to

meet respondent No.4 and her grand parents/other relatives once in a year.

34. However, nothing in this order shall prevent the parties from adopting any joint parenting plan as agreed to by the parties for welfare of the minor

child such as by arranging admission of the minor child in some school with hostel facility and by visiting her during holidays and taking her custody

during vacation as may be permitted by the school authorities. It is also further clarified that the observations in the present order have been made for

the purpose of disposal of the present writ petition and shall not bind any Court or authority in disposal of any other case involving question of custody

or welfare of the child.