
(2020) 09 SC CK 0052

Supreme Court Of India

Case No: Civil Appeal No. 3284 Of 2020

Nilanjan Bhattacharya

APPELLANT

Vs

State Of Karnataka And
Others

RESPONDENT

Date of Decision: Sept. 23, 2020

Acts Referred:

- Constitution Of India, 1950 - Article 32

Citation: (2020) 13 Scale 80

Hon'ble Judges: Dr. Dhananjaya Y Chandrachud, J; Indu Malhotra, J; K.M. Joseph, J

Bench: Full Bench

Advocate: Vibha Datta Makhija, Gaurav Khanna, Prabhjit Jauhar, Tulika Bhatnagar, Ranveer Talwar, S. S. Jauhar

Final Decision: Allowed

Judgement

,

Dr. Dhananjaya Y Chandrachud, J",

1. Leave granted.,

2. This appeal arises from a judgment of a Division Bench of the High Court of Karnataka, on a petition for habeas corpus filed by the appellant, who",

is the father of a three and a half year old child. The appellant is aggrieved by the conditions which were imposed by the High Court while allowing,

him to take the child back to the United States of America.,

3. The appellant married the second respondent on 30 November 2012. The marriage was registered at Aranmula in Kerala on 25 February 2013. The,

appellant and the second respondent who were based in India at the time of the wedding moved to the US in April 2015. The appellant relocated to,

the US at the behest of his employer. Once the couple reached the US, the second respondent found employment as a management consultant in",

New Jersey. The parties resided for a period of three years in New Jersey after which the respondent was employed as a Software Engineer in New,

York. On 25 December 2016, Adhrit was born to the appellant and the second respondent. The child is a US citizen.",

4. In March 2019, the second respondent planned to travel to India for a short period with the child. After reaching India, the second respondent is",

alleged to have informed the appellant of her plans not to return to the US and to continue to reside in India together with the child. The appellant,

came to Bengaluru on 28 March 2019, when he states that he made an effort to contact the second respondent. On 13 April 2019, the appellant met",

the second respondent to explore an amicable resolution of the issues which the couple had faced in the marriage. The appellant was given access to,

the child on 13, 14 and 15 April 2019. The efforts of the appellant to persuade the second respondent to return to the US have not succeeded. On 16",

April 2019, the appellant filed for custody and for the return of the minor child before the Superior Court of New Jersey, Hudson County, Chancery",

Division-Family Part. The second respondent was served on 26 April 2019. On 21 May 2019, the Superior Court of New Jersey granted legal and",

temporary custody of the child to the appellant. The appellant has also filed for divorce on 6 June 2019 before the court in New Jersey.,

5. On 10 July 2019, the appellant filed a petition before this Court under Article 32 of the Constitution seeking writ of a habeas corpus. The petition",

was withdrawn with liberty to move the appropriate forum, which resulted in the filing of a habeas corpus petition before the High Court of Karnataka",

on 13 August 2019. By its judgment dated 7 April 2020, the Division Bench allowed the petition and granted the request of the appellant to allow him",

to take the minor child with him to the US. While doing so, the High Court imposed two conditions in paragraph 18 of its judgment and order dated 7",

April 2020, which form the subject matter of the present proceedings. Paragraph 18 of the judgment is extracted below:",

“Under the circumstances, this writ petition is allowed holding that the minor child - Master Adhrit Bhattacharya is required to be repatriated to",

USA in compliance of the order of New Jersey Court. However, the repatriation shall not be made until normalcy is restored with reference to health",

scenario in USA in the aftermath of COVID - 19 pandemic. Therefore, we would observe as under:",

(a) That the minor child shall be repatriated only after a certificate being issued by the Officer of the rank of District Health Office of Bengaluru in,

certifying that this Country is free of COVID - 19 pandemic and it is safe for the travel of minor child to USA;;

(b) Simultaneously the petitioner herein shall also secure a certificate from the concerned Medical authority at USA in certifying that the condition in,

USA, particularly in the region where the petitioner is residing is congenial for shifting the residence of minor child - Master Adhrit Bhattacharya in",

compliance of the order passed by the Court of New Jersey;;

(c) On production of such documents, the authorities concerned are directed to permit repatriation of the minor child - Master Adhrit Bhattacharya",

from Bengaluru, India to USA;;",

(d) While doing so, it is also observed that in the event if the respondent - wife is reconsidering her decision in relocating herself to USA and settle",

there in the interest of the minor child, all liberties are reserved to her to take the child along with her subject to securing the certificate as referred to",

supra and on reaching USA to approach the competent court which has passed the interim order of custody of minor child to the petitioner and also,

for modification of the same by explaining the circumstances under which she is staking her claim for the custody of the child;”,

6 The appellant has challenged the correctness of conditions (a) and (b) contained in paragraph 18 of the judgment of the High Court.,

7. This Court issued notice on the Special Leave Petition on 4 June 2020. Thereafter, finding that the second respondent had not been served, on 8",

July 2020, fresh service was directed through email. This Court reiterated the direction for service on 20 July 2020, when a direction was also issued",

for grant of video conferencing access to the appellant on every alternate day. Since the second respondent had not entered appearance, an order was",

passed on 28 August 2020, by which Ms. Vibha Datta Makhija, learned Senior Counsel was appointed as amicus curiae. The order of this Court dated",

28 August 2020 is extracted below:.,

“1 The High Court, by its order dated 7 April 2020, allowed the habeas corpus petition filed by the petitioner who is the father of a three and a half",

year old minor child and has permitted the child to be taken to New Jersey, US where the petitioner ordinarily resides. The child is a US citizen.",

2 Though notice has been issued by this Court on two occasions, the second respondent has not appeared. The Special Leave Petition is directed",

against the conditions (a) and (b) which have been imposed by the High Court in its impugned order. While the Court is conscious of the fact that the,

Special Leave Petition merely challenges the conditions subject to which the habeas corpus petition has been allowed, the welfare of a minor child of",

less than five years of age is involved in the present case. Having regard to the nature of the jurisdiction of this Court, we are of the view that the",

ends of justice would be served if an amicus curiae is appointed to assist the Court since the second respondent has not entered appearance through,

counsel. The office report dated 25 August 2020 indicates that service has been effected.,

3 Mr. Prabhjit Jauhar, learned counsel appearing on behalf of the petitioner, states that the child is presently with the maternal grand- parents at",

Vadodara.,

4 We request Ms. Vibha Datta Makhija, senior counsel to assist the Court as amicus curiae. Ms. Makhija would be at liberty to furnish the name of an",

advocate to the Registry who would assist her in the matter. The Registry shall prepare and forward a complete set of papers to the amicus curiae.,

5 List the Special Leave Petition on 9 September 2020.Ã¢â€,â€,

8. On 9 September 2020, on the request of the amicus curiae, we had granted liberty to her to establish contact with the second respondent in order to",

ascertain her desires and to enable a proper representation to be made on behalf of the respondent before this Court. In pursuance of the previous,

order, the amicus curiae has informed the Court that the Advocate-on-Record, Mr. Gaurav Khanna communicated with the second respondent on",

email and, thereafter, the amicus curiae has also had a detailed conversation with the second respondent on telephone. Ms. Makhija has informed the",

Court that the second respondent has informed her that she has no objection to complying with the order of the High Court to enable the child to travel,

with the appellant to New Jersey. The second respondent has informed the amicus curiae that she has no desire to contest a legal battle.,

9. Though the second respondent has not entered appearance despite being served with the proceedings, this Court considered it necessary to take a",

view which is in the overarching interest of the minor child, who is within its jurisdiction. In several recent decisions of this Court bearing on the issue,"

it has been held that when confronted with a habeas corpus petition, the existence of an order of the foreign court is one circumstance which is borne",

in mind by the Court. The Court will have regard to whether the lawful custody of one of the spouses has been disturbed by the other. The most,

significant consideration is the welfare of the child.,

10 In Nithya Anand Raghvan vs. State (NCT of Delhi) (2017) 8 SCC 454, a three judge Bench of this Court, noted that India is not a signatory to the",

Hague Convention of 1980 on Ã¢â€,â€“Civil Aspects of International Child AbductionÃ¢â€,â€, which aims to prevent parents from abducting children across",

borders. With respect to the law applicable to the non-Convention countries, this Court observed:",

“40. 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 the summary jurisdiction in the interests of the child and its prompt return for its welfare.”,

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:",

“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:,

“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 execution court.”,

11. In *Prateek Gupta vs. Shilpi Gupta* (2018) 2 SCC 309, 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 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:"

"49! Though the principle of comity of court and 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."

12. 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 vs.,

Union of India (2010) 1 SCC 174, this Court observed:",

“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.,

“33. There is nothing on record which may even suggest that it would be harmful for the child to be returned to his native country.,

35. 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 interest 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 been filed by Respondent 6, it is apparent that in the last two years Adhitya 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 and the child has been admitted,

in some school in Chennai.,

37. In these circumstances, there has been no occasion for the child developing roots in this country. “

“In these circumstances, there has been no occasion for the child developing roots in this country. “

ALONE VACATIONS/STAY OF MINOR CHILD WITH THE PETITIONER,

30th March 2018 to

2nd April 2018", "Minor child alone went for holiday to Ocean City with Petitioner for petitioner's birthday.

29th May 2018 to

1st June 2018", "Stayed with the petitioner alone including going with the petitioner to his office in the backup day care.

4th June 2018 to

6th June 2018", "Stayed with the petitioner alone including going with the petitioner to his office in the backup day care.

11th June 2018 to

15th June 2018", "Stayed with the petitioner alone including going with the petitioner to his office in the backup day care.

17th June 2018 to

20th June 2018", "Stayed with the petitioner alone including going with the petitioner to his office in the backup day care.

25th June 2018 to

29th June 2018", "Stayed with the petitioner alone including going with the petitioner to his office in the backup day care.

14th July 2018 to

17th July 2018", "Minor child alone stayed with petitioner and did not go to day care after Doctor's appointment in the morning.

25th July 2018 to

28th July 2018", "Minor child alone stayed with petitioner and did not go to day care after

the petitioner took the child for his vaccinations.

31thJuly 2018 to

05th September 2018", "The minor child travelled with the petitioner to India and stayed with

him for 6 weeks.Ã, During this time the petitioner went to Kolkata first and then to Bangalore. Also went to Masangudi forest for a weekend retreat.

30th September 2018

to 2nd October 2018", "Minor Ã, child Ã, alone Ã, stayed Ã, with Ã, petitioner Ã, over Ã, the weekend and did not go to day care on Monday as the petitioner worked from home.

7th October 2018 to

12th October 2018", "The child alone travelled with the petitioner and his visiting Ã, paternal

Ã, grandmother, Ã, aunt Ã, and Ã, uncle Ã, to vacation across the states of Vermont, Massachusetts and New Hampshire.

26th October 2018 to

28th October 2018", "Minor Ã, child Ã, alone Ã, stayed Ã, with Ã, petitioner Ã, over Ã, the weekend and did not go to day care on Friday as the petitioner worked from home.

21st November 2018

to 25th November 2018", "Minor child alone went for holiday to Cape May and Virginia Beach

with petitioner for Thanksgiving holidays.

25th December 2018

to 27th December 2018", "The minor child stayed alone with the petitioner on the child's 2nd

birthday when the petitioner threw a big birthday party.

12th February 2019

to 16th February 2019", "Stayed with the petitioner alone including going with the petitioner to his

office in the backup day care as the respondent A, was A, supposedly

A, preparing/appearing A, for interview.

20th February 2019

to 24th February 2019", "Stayed with the petitioner alone including going with the petitioner to his

office in the backup day care as the respondent A, was A, supposedly

A, preparing/appearing A, for interview.

27th February 2019

to 2nd March 2019", "Stayed with the petitioner alone including going with the petitioner to his

office in the backup day care as the respondent A, was A, supposedly

A, preparing/appearing A, for interview.

14th March 2019 to

15th March 2019", "Stayed with the petitioner alone including going with the petitioner to his

office in the backup day care as the respondent A, was A, supposedly

A, preparing/appearing A, for interviews.

17th March 2019 to

18th March 2019", "Stayed with the petitioner alone including going with the petitioner to his

office in the backup day care as the respondent was packing for a trip

to Bengaluru for some wedding a week before the petitioner was

supposed to go to Bengaluru himself

Ã,,

15. Moreover, it has been stated that the appellant, who is employed as a Vice President with Goldman Sachs in New Jersey on a remuneration of",

US\$ 164,000 per annum, has sufficient time at his disposal to look after the welfare of the child. Mr. Jauhar has also stated before the Court that the",

appellant's mother would be accompanying him to New Jersey to provide additional care and support for the welfare of the child. However, the",

Court been apprised of the fact that the appellant is ready and willing to provide financial assistance to enable the second respondent to travel to New,

Jersey, if she is so inclined and if she does so, the appellant would make arrangements for her residential accommodation and stay, close to the place",

of the residence of the child. Alternatively, it has been submitted by Mr. Jauhar that if the second respondent is not desirous of living in the US, the",

appellant would be ready and willing to abide by such directions as may be issued by the Court to ensure that the second respondent has continued,

access to the child. During the course of the hearing, the Court has been apprised of the fact that should the second respondent not be willing to",

relocate to the US, the appellant shall:",

(i) provide access through video conferencing on Fridays, Saturdays and Sundays to the second respondent for at least a duration of thirty minutes and",

even more, should the child and the second respondent so require;",

(ii) the appellant would be ready and willing to bear the expenses of the second respondent for travel to the US for a period of ten days once in a year,

for the purpose of meeting the child; and,

(iii) the appellant would bring the child to India for a period of ten days on an annual basis when access would be provided to the second respondent.,

16. Before we address ourselves to the two conditions, we must at the outset determine as to whether the arrangement which has been envisaged by",

the High Court in its judgment is in the interest of the welfare of the child. Though the appellant only challenges the two conditions, we are still inclined",

to enquire into this issue having regard to the *parens patriae* jurisdiction of this Court. After hearing Mr. Prabhjit Jauhar, learned Counsel for the",

appellant and Ms. Vibha Datta Makhija, Senior Counsel appearing as *amicus curiae*, we are of the view that the interest and welfare of the child",

would be subserved by affirming the direction of the High Court to enable the appellant to take the child with him to the US. The child was born in the,

US. Undoubtedly, the child is less than four years of age today. Equally, the Court has borne in mind the fact that the second respondent has not",

shown any particular inclination to retain the child with her in India. The appellant has provided extensive details of his association with the child and,

the steps which he has taken since the birth of the child to be associated with the upbringing of the child. In fact, during the course of the hearing Mr.",

Jauhar, learned Counsel for the appellant even offered that the appellant would share on the video conferencing platform, the videos which the",

appellant has of his association with numerous activities of the child.,

The Court has come to the conclusion that the welfare of the child would best be served by his accompanying the appellant to the US. The child was,

born in the US and is a citizen of the US by birth. The appellant has taken the responsibility for shared parenting while the child was in the US. The,

respondent left US shores for a brief sojourn but has unilaterally resolved not to return. Both the appellant and the respondent are qualified,

professionals who have been employed in the US and the appellant continues to be employed there. Faced with the departure of his spouse and child,",

the appellant moved the court of jurisdiction in New Jersey for orders of temporary custody. He has followed their tracks to India and invoked judicial,

remedies here. The child has remained here for a short period and it would not be contrary to his interest to allow the appellant to take him back.,

Hence, independent of the desire communicated by the respondent to the *amicus curiae* that she does not wish to contest the proceedings, the Court",

has concluded that the direction of the High Court to allow the child to return to the US is in the interest of his welfare. We have enquired into this,

aspect though the Special Leave Petition by the petitioner is only as regards the conditions for return imposed by the High Court. This Court has an,

overarching duty to ensure and preserve the welfare of a minor child within its jurisdiction.,

17. The principal challenge in the appeal relates to the two conditions which have been imposed by the High Court while allowing the appellant to take,

the child with him to the US. The conditions which have been imposed by the High Court have been assailed on the ground that they are,

unenforceable. Condition (a) requires the appellant to obtain a certificate from an officer of the rank of the District Health Officer of Bengaluru,

certifying that "this country, that is to say, India is free of the Covid-19 pandemic and it is safe for the minor child to travel to the US. Requiring",

the appellant to obtain a certificate of this nature that India is free of the Covid-19 pandemic serves no purpose. In the Special Leave Petition that has,

been filed before this Court, the appellant has, in fact, tendered an undertaking that it is only if and when the Government of India and the Government",

of Karnataka lift the lock down and permit international travel that the appellant would venture to take the child to the US. Moreover, it has been",

stated that the appellant would comply with all prevailing regulations including public health regulations facilitating the journey to the US. The second,

condition which has been imposed in the judgment of the High Court, similarly requires the appellant to secure a certificate from "the concerned",

medical authority in the US certifying the condition in the US, particularly in the region where the appellant is residing and of its being congenial for",

shifting of the residence of the minor child to New Jersey. The appellant has submitted, and with justification, that it will be impossible to obtain a",

certificate of this nature in the absence of any particular authority being entrusted with the jurisdiction to issue a certificate of this kind. Moreover, the",

appellant has filed on the record a statement indicating that at present there are only nine positive cases of Covid-19 in Bayonne, New Jersey where",

the appellant has his ordinary place of resident. The conditions which were imposed by the High Court were the consequence of a well-meaning,

exercise. But that does not render them proper or correct.,

18. Before concluding, the Court record its appreciation of the objective assistance rendered by Ms Vibha Datta Makhija, Senior Counsel as amicus",

curiae.,

19. Having thus heard Counsel for the appellant and the amicus curiae, we are of the view that the conditions which have been imposed by the High",

Court in clauses (a) and (b) of paragraph 18 of the judgment and order dated 7 April 2020, do not sub-serve the interests of justice. The conditions",

shall accordingly stand set aside. We, however, record the undertaking of the appellant that in traveling to the US with the child, the appellant shall",

make all necessary arrangements in accordance with the prevailing regulations prescribed by the Indian and US governments for international travel,

between India and the US.,

20 We, accordingly, allow the appeal, in terms of the following directions:",

(i) Conditions (a) and (b) in paragraph 18 of the judgment and order of the High Court dated 7 April 2020, shall stand set aside and condition (c) shall",

in consequence not be enforced;,,

(ii) The direction in (i) above is subject to the undertaking of the appellant that the appellant shall comply with the regulations in force for facilitating,

travel between India and the US on the date of travel;,,

(iii) In order to ensure the interest and welfare of the child, the following arrangement shall remain in place until modified by a court of competent",

jurisdiction in regard to the custody of the child:,,

(a) In the event that the second respondent desires to relocate to the US, the appellant shall provide for her expenses for travel and for her lodging and",

boarding at a place conveniently situated to the residence of the appellant and the child in New Jersey or at such other place where it becomes,

necessary subsequently;,

(b) In the event that the second respondent is not desirous of relocating to the US, the following arrangement shall remain in place:"

(i) The appellant shall allow the child to communicate with the second respondent on a suitable video conferencing platform on Fridays, Saturdays and",

Sundays of every week for at least thirty minutes and beyond it, subject to the mutual convenience of the mother and the child."

(ii) Should the second respondent be desirous of traveling to the US to meet the child, the appellant shall once every year, meet the expenses of the",

second respondent for travel to and residence in the US close to the place of residence of the child for a period not exceeding ten days on each,

occasion;,

(iii) The appellant agrees and undertakes to bring the child to India once a year for a period of at least ten days when the child will have access to the,

second respondent and the family at her ordinary place of residence in India; and,

(iv) Condition(d) which has been set out in paragraph 18 of the judgment and order of the High Court is maintained and the arrangement which has,

been made above shall abide by such final directions as may be issued by the appropriate court in matters of custody, access and visitation."

21. The second respondent shall, in compliance with the present order, extend all necessary cooperation to implement the terms of the above order,"

inter alia, by handing over the passport and other relevant documents as required to facilitate the travel and onward journey of the child with the",

appellant to the US.,

22. The appeal is allowed in the above terms.,

23. Pending applications, if any, stand disposed of."