Anil Malhotra

AMICUS CURIAE ASSISTANCES IN HIGH COURT

1. Appointed Amicus Curiae by Punjab & Haryana High Court in CWP 3131/ 2011, Harvinder Singh vs. State of Punjab, to assist in investigating disappearance of one Shaminder Singh @ Shera from police custody by visiting his Punjab hometown village. Submitted report leading to his eventual tracing. However, on account of his death later, petition was disposed off on November 15, 2011 and Rs. 1 lac compensation was awarded. **Furnished suggestions & measures for compensation & protection given to petitioner & family members of deceased.**

2. In CWP 15041/ 2012 - Mr. Justice (Retd.) Amar Dutt vs. Union of India & Ors., represented Mr. Justice Amar Dutt probono for appropriate **directions for fixing responsibility of Indian missions abroad to look after interests of Indian citizens detained in foreign jails due to offences and illegal immigration**. Petition disposed off on March 26, 2012 with appropriate directions to Union of India.

3. In CWP 7698 / 2012 - Mr. Justice (Retd.) Amar Dutt vs. Union of India & Ors., represented Mr. Justice Amar Dutt probono for directions to **implement provisions of Emigration Act, 1983 (EA), to prevent public from being misguided, cheated or illegally smuggled to foreign jurisdictions by unauthorised recruiting agents**. Petition disposed off on July 31, 2012 with directions that **no recruiting agent shall function without complying with provisions of Emigration Act.**

4. In CWP 5567/2009- World Human Rights Protection Council & Anr. vs. State of Punjab & Ors., appointed as Amicus Curiae to assist court, to suggest effective ways and helpful means to trace missing children. **Submitted report giving suggestions on the basis of which directions were issued by the High Court on July 24, 2012 to trace missing children**. **Law Finder Doc Id** # 384902, 2012(3) R.C.R.(Criminal) 939 **:** 2012(4) Cri.CC 180.

5. In CWP 1787 / 2011- World Human Rights Protection Council vs. UT Administration and Ors., appointed as Amicus Curiae to assist court, to suggest effective ways and helpful means to trace missing children. **Submitted written suggestions and Supreme Court judgment for issuing comprehensive directions for tracing missing children** & matter was disposed off by the High Court on July 24, 2012 to trace missing children. **Law Finder Doc Id** # 384902, 2012(3) R.C.R.(Criminal) 939 **:** 2012(4) Cri.CC 180.

6. In CWP 3897/2011- Lawyers for Human Rights International (Regd.) vs. State of Punjab and Ors., appointed as Amicus Curiae **to assist court, to give comprehensive suggestions in tracing missing children**. Furnished report which was shared with all stake holders including States of Punjab, Haryana and U.T. Chandigarh **for evolving a joint mechanism to coordinate efforts in locating missing children**. Disposed off on July 24, 2012 with elaborate directions to set up unified police command. **Law Finder Doc Id** # 384902, 2012(3) R.C.R.(Criminal) 939.

7. In CWP 10318/ 2012, Utsav Singh Bains vs. State of Haryana, **appointed Court Commissioner to enquire into conditions of inmates in "Apna Ghar" shelter home at Rohtak and other shelter homes in State of Haryana**. After intensive enquiry submitted report dated June 11, 2012 to High Court where after case was entrusted to C.B.I. for further action. **CWP was disposed off on July 19, 2012 with directions to protect identity of abused children, provide medical aid and complete investigation in three months.**

8. In CR No.3130 of 2013, Rupak Rathi Vs. Anita Chaudhary, appointed Amicus Curiae to assist Court in elucidation and interpretation of Supreme Court judgment in Y. Narasimha Rao, 1991(3) SCC 451, **with respect to applicability of foreign matrimonial judgments dissolving Hindu marriages on grounds of irretrievable breakdown of marriage**. Submitted written suggestions with compendium of judgments taken on record leading to guidelines for matrimonial Courts when foreign divorce decrees are presented. The judgment was circulated to all matrimonial Courts in Punjab, Haryana and Chandigarh. **Law Finder Doc Id** # 542104, 2014(2) R.C.R.(Civil) 697 **:** 2014(2) CivCC 824 **:** 2014(2) HLR 96 **:** 2014(3) PLR 407 **:** 2014(3) Law Herald 2632 **:** 2014 AIR CC 2231 **:** 2014(3) ICC 630.

9. In C.W.P No. 15348 of 1999, Mr. Zuber Ahmed Vs. The Union of India & others, appointed as Amicus Curiae by the High Court in interpretation of the provisions of The CRPF Act, 1949 with regard **to imposition of punishment by the Commandant, who is the Disciplinary Authority, Enquiring Authority and Punishing Authority. Submitted written suggestions for issues involving trial and intermingling of service law issues with criminal law of sentencing**. Writ petition allowed setting aside orders of conviction, dismissal and appeal, with directions to discharge petitioner with pension and pensioniary benefits. **Judgment sent to Ministry of Law and Justice to examine the CRPF Act and the Rules framed thereunder and to consider devising a mechanism for administration of discipline and imposition of penalties upon CRPF personnel which are the touchstone and mainstream of a disciplined Force as also keeping in mind the current position of law envisaged under the Cr.P.C, 1973 and the Constitution of India. Law Finder Doc Id** # 691434, 2015(3) S.C.T. 385 **:** 2015(3) RSJ 609.

10. In C.R. 6499/2006, Seema Kapoor & Anr. Vs. Deepak Kapoor & Ors., appointed as **Amicus Curiae to assist the Court in seeking recovery of custody of minor child removed to U.K. violating Court orders. Assisted the Court for ten years with various suggestions and measures for effective parental child removal remedies**. **Furnished written report dated January 20, 2016 annexed as part of the reported judgment sent to Law Commission of India for making recommendations to enact a suitable law for signing the Hague Convention on Child Abduction. Efforts as Amicus lauded by Court, placing on record acknowledgment of tireless efforts put in**. Judgment reported as 2016 SCC Online P&H 1225.

11. In FAO NOs. 7399 of 2010 and 1369 of 2011, Meena Dawar Vs. Rajeev Arora & Ors., appointed as Amicus Curiae to assist High Court **in mediating between estranged children and father on custody and visitation rights. Held meetings between grandparents, father and relatives and children for resolving matter** & furnished written report to Court. Case adjourned *sine-die* on November 19, 2015, with status quo orders of custody of children with maternal side & appropriate visitation rights to father.

12. In CWP 14046/2012, Raman Vs. State of Haryana & Ors., appointed as Amicus Curiae to assist the Court in the matter of **awarding relief to a minor electrocution victim in writ jurisdiction, as "the legal and factual issues involved requiring much research of legal principles attached to cases of tortuous liability, negligence, vicarious liability, statutory and strict liability arising for consideration in this case where negligence was denied, and its total impact on assessment of quantum of compensation which may or may not be granted in the facts and circumstances of the case in extraordinary original civil writ jurisdiction exercised by this Court". Submitted extensive written suggestions duly supported by judgments which were graciously accepted by the Court in awarding Rs. 60 lacs compensation and myoelectric limbs to the minor child till he attained the age of 65** by judgment dated July 2, 2013. **Law Finder Doc Id** # 461125, 2013(3) R.C.R.(Criminal) 653 **:** 2013(3) PLR 502**.**

13. In C.M. No. 144-CWP-2015 in C.W.P. 14046 of 2012, Raman Vs. State of Haryana & Ors., application moved as Amicus Curiae for **implementing directions of Supreme Court dated December**

17, 2014, for providing myoelectric limbs to minor electrocution accident victim. On basis of written suggestions as Amicus, directions issued on April 25, 2016 for providing myoelectric limbs for 5 years with liberty to revive application for new limbs with change of technology as case was adjourned *sine-die*.

14. In C.M. No. 6875-2019 in C.W.P. 14046 of 2012, Raman Vs. State of Haryana & Ors., assisting the Court as Amicus **Curiae, got directions dated May 17, 2019, issued to electricity authorities (UHBVNL) in Haryana State to provide transport/ambulance for medical check up of minor electrocution accident victim to visit hospital at New Delhi two days prior to requirement.**

15. In C.M. No. 5390-2020 in C.W.P. 14046 of 2012, Raman Vs. State of Haryana & Ors., decided on August 31, 2020, **assisted the Court as Amicus Curiae in securing myoelectric/bionic prosthesis to minor electrocution victim keeping in view the directions of the High Court and the Supreme Court in the matter. Directions issued appreciating continuous efforts as Amicus to alleviate plight of unfortunate youngster to secure him adequate benefits**.

16. Appointed as Amicus to assist High Court in expounding process to be followed **in inter-country adoptions made under Hindu law in India.** Report rendered as Amicus Curiae in the High Court of Punjab and Haryana at Chandigarh as Court appointed counsel in the matter of Civil Writ Petition No. 10555 of 2019 Jasmine Kaur Vs. Union of India and Others. **Furnished expert report on Inter-country adoptions, applicability of the provisions of the Hindu Adoption and Maintenance Act, 1956 and non applicability of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 as also the Adoption Regulation 2017**. Reported as 2020(3) R.C.R.(Civil) 528 : 2021(1) HLR 399.

17. Appointed as Amicus to assist High Court in elaborating on validity of **adoption deeds under Hindu law for inter-country adoptions. Reports rendered as Amicus Curiae** in the High Court of Punjab and Haryana at Chandigarh as Court appointed counsel in the matter of Criminal Writ Petition No. 820 of 2020, Richa Gupta Vs. Union of India & Others**. Furnished expert report on essential requirements under Hindu Law of a valid adoption under Hindu Adoption and Maintenance Act, 1956,**

its consequences thereto and maintainability of a Habeas Corpus petition in child custody matters by a natural guardian, besides a supplementary report on an "International Adoption." Reported as 2021(2) R.C.R.(Civil) 724.

18. **Appointed as Amicus Curiae to furnish expert report on inter-parental child custody issues and position of validity of foreign court orders in Indian law** giving all possible aspects and position of law in this regard. Report rendered as Amicus Curiae in the High Court of Punjab and Haryana at Chandigarh as Court appointed counsel in the matter of Criminal Writ Petition No. 3440 of 2020, Kiran V. Bhaskar Vs. State of Haryana and Others. **Furnished expert report on Inter-Parental Child Custody Issues and position of Foreign Court Orders** in India supported by precedents in India. Reported as 2021(4) R.C.R.(Criminal) 303.

19. **Appointed as Amicus Curiae to furnish expert opinion on Inter-parental child custody issues under Indian law for sending children abroad and giving all possible aspects and position of law in this regard.** Opinion rendered as Amicus Curiae in the High Court of Kerala at Ernakulam on April 6, 2022, as Court appointed counsel in the matter of OP (FC) 140 of 2022, Smitha Antony V. Koshy Kurian, Reported as 2022 (3) KLT 516. Decided on **April 7, 2022.**

Punjab-Haryana High Court
Harvinder Singh vs State Of Punjab And Others on 15 November, 2011
CWP No.3131 of 2011 1

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

CWP No.3131 of 2011
Date of decision 15.11.2011

Harvinder Singh . Petitioner

Versus

State of Punjab and others .. Respondents.

CORAM: HON'BLE MR. JUSTICE M.M.KUMAR
HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Anil Malhotra, Advocate , Amicus Curiae
Mr. Suvir Sehgal, Addl. AG Punjab.

1. To be referred to the Reporter or not ?
2. Whether the judgement should be reported in the Digest ?

M.M.KUMAR,J.

1. The instant petition was registered by this Court on its own motion on the basis of a news item published in the English Daily Hindustan Times on 3.12.2010. The news item disclosed the dis-appearance of one Shaminder Singh @ Shera from police custody and was eventually traced. He appeared before this Court on 3.1.2011. Further in a separate incident which tookplace on 17.1.2011 he received injuries and eventually succumbed to those injuries in Post Graduate Institute of Medical Science and Research, Chandigarh on 25.1.2011. FIR No. 5 dated 18.1.2011 was registered at PS Pojewal, District Saheed Bhagat Singh Nagar. A separate writ petition bearing CWP No. 3131 of 2011 was filed by the brother of deceased Shaminder Singh @ Shera namely Harvinder Singh with a prayer for issuance of directions for proper investigation of FIR No. 5. It was also prayed that the investigation be carried out by the C.B.I. and further necessary and adequate security be provided to him and family members of deceased Shaminder Singh @ Shera because Harvinder Singh himself was also injured in that freak incident on 17.1.2011. On the file of CWP No. 3131 of 2011 particularly on the death of Shaminder Singh @ Shera , proceedings in CWP No. 21604 of 2010 were closed vide order dated 16.3.2011.

2. In the order dated 16.3.2011, this Court also noticed that no observation with regard to investigation by the police in case FIR No. 5 dated 18.1.2011 (supra) was required to be made yet the Court observed that the investigation undertaken did not disclose any attempt to identify 4/5 other persons who were involved in the assault of Shaminder Singh @ Shera as also the owner of the vehicle namely Manjit Singh in which the accused persons had fled from the place of occurrence.

Accordingly direction was issued to the Investigating Officer to conduct proceedings in an effective and comprehensive manner and to submit status report of the same before this Court within four weeks.

3. This Court also issued directions to Shri Ranvir Singh, Superintendent of Police to provide effective security cover to the petitioner Harvinder Singh and family members of deceased Shaminder Singh @ Shera.The Superintendent of Police was to ensure that no harm was to be caused to any one of them. The order also placed responsibility of the well being and security of Harvinder Singh and family members of deceased Shaminder Singh @ Shera on the Superintendent of Police Shri Ranvir Singh posted of Saheed Bhagat Singh Nagar.

4. It would be relevant to mention that on 30.10.2010 Shaminder Singh @ Shera is alleged to have been taken in police custody by the police belonging to Police Station, Balachaur and he was kept there till 18.10.2010. He was taken to CIA Staff, Nawanshahar and was brutally tortured. He alleged escaped from the police custody on 25.11.2010 fearing his death in a stage managed encounter. Accordingly news about his illegal custody was published which was treated as Public Interest Litigation by this Court. On 20.12.2010 the Punjab Police admitted that Shaminder Singh @ Shera was alive and his family apprehended his elimination in police custody. On 3.1.2011, as already noticed, Shaminder Singh @ Shera was produced before the High Court and was allowed to go as a free person because no case was registered against him. Even on behalf of State of Punjab a statement was made that he would not be harassed and would be protected. A sum of rupees one lac as compensation was awarded by this Court for the torture and illegal custody suffered by him.

5. On 14.1.2011, Harvinder Singh and his brother Shaminder Singh @ Shera were called to the office of S.P. (Operation) Shri Dharam Singh Uppal at Nawanshahar. The petitioner met the Superintendent of Police at around 2/2.30 PM and was asked to withdraw the case pending in the High Court. Eventually on 17.1.2011 at about 8/8.30 PM, petitioner Harvinder Singh Singh and his brother Shaminder Singh @ Shera were attacked. However, Shaminder Singh @ Shera died at the PGI on 25.1.2011.

6. In the status report dated 19.4.2011, Deputy Superintendent of Police, Police Station Sub Division, Balachaur has stated that all the directions issued by this Court in the order dated 16.3.2011 were complied with and investigation was carried in an effective and comprehensive manner. It was stated that the Special Investigation Team requires more time as certain new facts have come to light only on 16.4.2011. It was assured that the investigation is being conducted with full vigor and would be taken to its logical end.

7. In the separate status report dated 19.4.2011 filed by the Deputy Superintendent of Police, Sub Division, Balachaur it has been alleged that following FIRs were registered against Shaminder Singh @ Shera in different police stations in the State of Punjab.

> " 1. FIR 57, dated 23.4.2008 under Sections 452/323/506 IPC PS Ropar- pending trial'

2. FIR 67, dated 29.5.2008 under Sections 323/341 IPC PS City Nawanshar- pending trial'

3. FIR 20, dated 15.11.2008 under Sections 326/325/506/34 IPC PS Sahnewal- pending trial'

4. FIR 100, dated 7.9.2010 under Sections 382/34 IPC PS Chamkaur Sahib- under investigation; The following cases stand registered against the present petitioner.

1. FIR No.42 dated 20.3.2009 under Section 353/186 IPC, PS Division No.2, Ludhiana- Under investigation."

8. In para 5 of the aforesaid status report it has been revealed that during enquiry of complaint No.547, dated 20.12.2010 father of the petitioner Harvinder Singh and his brother Shaminder Singh @ Shera were summoned by the S.P,(Operation) SBS Nagar for 13.1.2011 by issuing notices under Section 160 Cr.P.C. in connection with some enquiry in the complaint made by Jagan Nath s/o Bishan Dass but none of them appeared before the Police and the notices issued to them were received back with the report that they have refused to accept service of the notice. The allegation regarding pressuring Harvinder Singh for withdrawal of the case has also been controverted by stating that those allegations were false and concocted. It has also been asserted that there is no cause made out for handing over the investigation to the CBI and that the petitioner Harvinder Singh and family members of deceased Shaminder Singh @ Shera have been provided adequate protection. It has also been stated that on 20.12.2010, the petitioner was asked to take security but the same was refused. Likewise, the security was again refused on 3.1.2011 and on 27.1.2011 , DDR No.28 registered at PS Pojewal. Vide DDR Nos. 29 dated 28.1.2011 and DDR No.20 dated 29.1.2011 two PSOs were deputed with the petitioner and family members of Shaminder Singh @ Shera to ensure their protection. There are general averments controverting the allegations of pressuring and of unfair treatment.

9. Affidavit of Shri Parveen Kumar, Deputy Superintendent of Police, Balachaur has been filed on 7.11.2011. It has been stated in para 1 of the affidavit that during the course of investigation of case FIR No.5 dated 18.1.2011 registered under Sections 302, 307, 382, 212, 323, 324 and 148 read with Section 149 IPC, PS Pojewal, District Shaheed Bhagat Singh Nagar registered on the statement of Harvinder Singh against four accused namely, Chaman Lal @ Tony, Naresh Kumar @ Nikku, Ajay Kumar @ Ajju and Narinder Kumar @ Bhoda, challan against the aforesaid accused was presented before the Sub Divisional Judicial Magistrate, Balachaur. On 16.4.2011, the complainant petitioner made a statement to the effect that three other assailants namely Sanju s/o Chaman Lal, sonu s/o Mehar Chand both residents of village Makhupur and Devinder Kumar @ Rinku s/o Jagdish Rai, r/o village Chuharpur, PS Pojewal and 6/7 unidentified assailants had caused serious and grievous injuries to him and his brother Shaminder Singh @ Shera who subsequent succumbed to his injuries and died in the PGI Chandigarh. On the directions issued by this Court on 23.5.2011, progress report regarding investigation conducted by the police was to be submitted. Accordingly report was filed on 21.7.2011 and supplementary challan under Section 212 IPC against Manjit Kumar s/o Parshottam Lal r/o village Chandiani Khurd, PS Pojewal, District Shaheed Bhagat Singh Nagar and challan

under Sections 302, 307, 302, 324, 148 read with Section 149 IPC against Devinder Kumar alias Rinku son of Jagdish Rai, r/o village Chuharpur, PS Pojewal was presented before the Sub Divisional Judicial Magistrate, Balachaur on 23.8.2011. The case was already been committed to the Court of Sessions on 13.10.2011 which is now fixed for 17.11.2011.

10. We have heard learned counsel for the parties at some length and are of the view that the investigation has been taken to its logical end and challan stand presented in the Court. The matter is now committed to the Sessions Court which is fixed for 17.11.2011. The trial Court shall proceed in accordance with law and conclude the trial expeditiously and preferably within a period of one year from today.

11. The writ petition stands disposed of with the aforesaid directions. The protection given to the petitioner Harvinder Singh and family members of deceased Shaminder Singh @ Shera vide DDR No. 28 dated 10.2.2011 registered at Police Station Pojewal shall continue and it shall be the duty of the Superintendent of Police, Saheed Bhagat Singh Nagar to ensure safety of the petitioner Harvinder Singh and family members of deceased Shaminder Singh @ Shera. The family members of Shaminder @ Shera be paid a compensation of rupees one lac by the State of Punjab-respondent no.1. The compensation be paid by the Deputy Commissioner after obtaining report from the police. The payment shall be made by a negotiable instrument payable to the widow. The needful shall be done within one month from the date of receipt of a copy of this order. We further make it clear that in case the petitioner or family members of Shaminder Singh @ Shera feels the necessity of any further direction then liberty is granted to them to move appropriate application before this Court or before the trial Court.

(M.M.Kumar)
Judge

(Rajiv Narain Raina)
Judge

15.11.2011

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 7778 of 2010
Date of decision:- 26.03.2012

Lawyers for Human Rights International (Regd.) through Tejinder Singh Sudan, Advocate, President Chandigarh Unit, r/o H. No. 1727, Phase-5, Sector 59, SAS Nagar, Mohali.

..... Petitioner

Vs

Union of India and another.

.....Respondents

CWP No. 8138 of 2010
Date of decision:- 26.03.2012

Hari Singh Nagra, Advocate, Vice President of All India Lawyers Union and also Non-Resident Indian, now r/o Flat No. 358, Sector 49-A, Chandigarh.

..... Petitioner

Vs

The Union of India and others.

.....Respondents

CWP No. 15041 of 2010
Date of decision:- 26.03.2012

Mr. Justice (Retd.) Amar Dutt, resident of H. No. 3025, Sector 19-D, Chandigarh.

..... Petitioner

Vs

The Union of India and others.

.....Respondents

CORAM:- **HON'BLE MR. JUSTICE RANJAN GOGOI, CHIEF JUSTICE**
HON'BLE MR. JUSTICE MAHESH GROVER

Present: Mr. Navkiran Singh, Advocate,
for the petitioner,
in CWP No. 7778 of 2010.

Mr. Surinder Singh Siao, Advocate,
for the petitioner,
in CWP No. 8138 of 2010.

Mr. Anil Malhotra, Advocate,
for the petitioner,
in CWP No. 15041 of 2010.

Mr. Onkar Singh Batalvi, Advocate,
for the Union of India.

Mr. Alok Jain, Additional Advocate General, Punjab.

Mr. A.K. Gupta, additional Advocate General, Haryana.

* * * *

RANJAN GOGOI, C.J.

All the three writ petitions filed as Public Interest Litigations have raised the same issues on more or less similar facts. Accordingly, all the three cases were heard together and are being disposed of by the present common order.

CWP Nos. 7778 of 2010, 8138 of 2010 and 15041 of 2010 raises the issue of the duties and responsibility of the Indian Missions abroad to look after the interests of Indian citizens who have been detained in foreign jails for their alleged involvement in the different kinds of offences. According to the petitioners, there are over one lac persons from the States of Punjab and Haryana, who are presently under detention in different foreign jails. Most of them are languishing

in such prisons without consular access. In some cases even when the period of imprisonment is over such persons still languish in the jails for want of valid travel documents which can only be issued by the Indian Missions in those countries. However, in many cases the Missions are not aware of the detention of Indian citizens as a result of which the travel documents do not get issued. In fact, according to the petitioners, due to dearth of information of the names and particulars of Indian citizens who are languishing in foreign jails the concerned Indian Missions have not been able to look after such citizens and ensure that their health, safety etc. is adequately protected. According to the petitioner in CWP No. 7778 of 2010 which is a human rights organization, adequate legal aid and assistance is not being provided by the Indian Missions who also do not have complete details of the Indian nationals in the various jails in UAE thereby jeopardizing the welfare and interests of the Indian nationals in custody in the foreign jails. The petitioner has further claimed that it should be allowed to visit the various countries in the UAE and provide legal aid to the Indian nationals who are languishing in jails.

In so far as CWP Nos. 7778 of 2010 and 8138 of 2010 are concerned, common replies have been filed on behalf of the Union of India (Ministry of External Affairs). There is also an affidavit of one Rakesh Aggarwal, Regional Passport Officer of the Regional Passport Office, Chandigarh on record in both the cases which would require to be noticed in some details.

The affidavit of Rakesh Aggarwal, Regional Passport Officer states that there are over 25 million overseas Indians living in more than 110 countries across the globe. The vast majority of the Indian nationals are temporary migrants and 90 per cent of them work in the gulf region. In the affidavit filed it has been stated that as per information provided by Indian Missions abroad, in November, 2010, there were over 6500 Indian prisoners lodged in different foreign jails for commission of a wide variety of crimes including over-stay and illegal entry. The affidavit recites that Indian Missions abroad are easily accessible to all Indian citizens and all Indian Missions have designated Nodal Officers who could be contacted during emergencies. The affidavit of the Regional Passport Officer also states that the Indian Missions abroad regularly keep in touch with the host countries with regard to detention/arrest of an Indian national and as soon as such information is received the Indian Missions get in touch with the local foreign office and other local authorities to gain consular access to the detained/arrested Indian nationals. After verification of the nationality of the person, the Missions abroad make all possible efforts with the foreign governments to provide necessary assistance to the Indian nationals in foreign jails including requests for speedy trials; remission of sentences and advice and guidance in legal and other matters besides ensuring fair and humane treatment. In the affidavit filed, it has also been stated that assistance for repatriation to India in cases of released Indian nationals is also provided. However, various welfare activities

such as boarding, lodging, emergency medical care, legal assistance, air passage and transportation of mortal remains, wherever required, are funded from the Indian Community Welfare Fund (ICWF) which exists in all Indian Missions abroad. The money into the Welfare Fund comes from levy of service charges by the Indian Missions on consular services, besides contribution by the Indian community and also budgetary support from the Ministry of Overseas Indian Affairs. The affidavit of the Regional Passport Officer specifically mentions the steps taken by the Ministry of Overseas Indian Affairs in countries like the UAE, Kuwait, Oman etc. where there is a large concentration of Indian nationals. Bilateral Memorandum of Understandings have been signed with some of the countries and negotiations for signing similar Memorandum of Understandings with other countries have been stated to be going on. In the affidavit filed it has further been stated that during the year 2010, over 10,000 Indian nationals were repatriated from different countries details of which are available in para 12 of the affidavit. The aforesaid affidavit of the Regional Passport Officer is dated 31.10.2011.

Taking note of the aforesaid affidavit, the Court had passed two separate orders dated 18.01.2011 in the writ petitions requiring the Union of India to file a specific affidavit with regard to the steps taken by the various Missions abroad to keep track of persons who are likely to be released from detention; to contact them while they are in detention and arrange for the travel documents etc. By the other order

passed on the same date in the connected writ petition, the Court desired to know whether a policy similar to the one indicated in the affidavit filed with regard to the Emirates of Dubai, Sharjah etc. had been introduced in other countries. In terms of the said policy followed in Dubai, Sharjah etc., weekly visits to jails by the consulate officials have been organized whereas in the case of other countries in the Emirates such visits are on a monthly basis. During the course of such visits Indian prisoners are free to approach the consulate officials and valuable information concerning the welfare of the Indian nationals is obtained by the consulate officials.

Pursuant to the aforesaid orders of this Court, additional affidavits have been filed on behalf of the Union of India in all the three cases. The said affidavits are dated 14.03.2011 and have been filed by a responsible officer of the Ministry of External Affairs. In the aforesaid affidavits it has been stated that all Indian Missions abroad do keep track of Indian nationals who are likely to be released from detention; contact them while in detention and arrange for their travel documents after verification of the nationality of the detained person(s) from the concerned authorities in India. In the aforesaid affidavits, it is also mentioned that in certain countries e.g. Canada, USA and certain Western European countries strict privacy laws are in force which do not permit the local authorities to inform the Indian Missions about the arrest/detention of Indian nationals without the consent of the detainees. The said affidavits also recite that so far as the UAE and

other gulf countries are concerned, Consulate officials from the Embassy of India, Abu Dhabi and officials from the office of the Consulate General of India, Dubai regularly visit the jails to inquire about the welfare of the Indian nationals detained there.

Apart from the aforesaid affidavits, details of which have been mentioned above, we find that affidavits have been filed on behalf of the Director General of Police, Haryana mentioning the number of requests received for verification of the Indian nationality of persons detained in foreign prisons and the action taken on such requests. Elaborate suggestions, on behalf of the petitioners, as to what should be the proper steps that should be taken to effectively redress the situation have also been filed before the Court.

We have considered the facts of the case as revealed by the affidavits on record as well as the several documents enclosed thereto. The stand taken by the Union of India, as evident from the affidavits details of which have been discussed above, would go to show that within the framework of the laws of the foreign countries where the Indian nationals are in custody for alleged commission of various offences, adequate steps have been taken by the Indian Missions to keep track of the Indian citizens detained in foreign prisons and to look after their welfare while they are in custody. Such steps also extend to providing legal advice and assistance and request to the host country to expedite the trials. The Indian Missions, whenever contacted, also provide travel documents to the released Indian nationals to enable

them to come back home. In the gulf countries, particularly, Dubai, Sharjah etc. periodic visits to the jails are organized by the Consulate and Embassy officials and in the course of such visits Indian nationals who are detained in prison in those countries are contacted and steps are taken to ensure their well being. The role of the Indian Missions in foreign countries will naturally be circumscribed by the laws and other norms prevailing in such countries. All steps that are taken to ensure the well being of Indian citizens who are detained in foreign prisons have to be carefully taken so that no displeasure of the host country is occasioned much less any violation of the established procedures or practices is caused. The extent to which permissible action can be taken and the manner thereof should naturally be left to the concerned Ministry and any direction in this regard by the Courts would be wholly misplaced. It is from the above perspective that the offer of the petitioner-organization in CWP No. 7778 of 2010 to visit foreign countries and to offer legal aid to the Indian nationals detained in the prisons of such countries will have to be viewed. After taking into account the stand of the Union of India in this regard that such visits may not be welcomed by many of the foreign countries we are of the view that the said request should not be entertained by us.

Having dealt with the issues arising in the writ petitions in the manner indicated above, we are of the view that none of these writ petitions will call for any specific direction from the Court. On the contrary, we are of the view that all the three writ petitions should be

ordered to be treated as closed in terms of our observations as noted above.

(RANJAN GOGOI)
CHIEF JUSTICE

(MAHESH GROVER)
JUDGE

26.03.2012
Amodh

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

*****

CWP No. 7698 of 2012 (O & M)
Date of decision : 31.7.2012

Mr. Justice (Retd.) Amar Dutt .....Petitioner

Vs.

The Union of India through the Ministry of External Affairs, Government of India and others

.....Respondents

CORAM: Hon'ble Mr. Justice Jasbir Singh, Acting Chief Justice
Hon'ble Mr. Justice Rakesh Kumar Jain

Present:- Mr. Anil Malhotra, Advocate, for the petitioner
Mr. O.S. Batalvi, Special Senior Standing Counsel for UOI
Mr. Alok Jain, Addl. AG, Punjab
Mr. B.S. Rana, Addl. AG, Haryana
Mr. Sanjay Kaushal, Senior Standing Counsel, UT, Chd.
Mr. Gurjeet S. Randhawa, Advocate, for the applicant

Jasbir Singh, Acting Chief Justice (oral)

CM No. 10000 of 2012:

Allowed as prayed for. Notification dated 12.8.2008 is taken on record.

CWP No. 7698 of 2012 :

This petition has been filed by making a prayer that directions be issued to respondents No.1 to 8 to implement the provisions of Emigration Act, 1983, so that members of general public can be saved from being mis-guided, cheated or illegally smuggled to foreign jurisdiction by the un-authorised recruiting agents.

Upon notice, reply was filed.

Taking note of the facts mentioned in the reply, this Court passed the following order on 30.5.2012 :-

> "Learned counsel for the respondents requests for some time to file reply.
>
> However, Mr. Anil Malhotra, learned counsel for the petitioner has drawn our attention to the problem of illegal emigrants agency mushrooming in the areas of Punjab, Haryana and U.T. Chandigarh to allure gullible public by showing them greener pastures. According to averments made in paras 11 to 18 of the writ petition, the Protector General of Emigrants, Ministry of Overseas Indian Affairs-respondent No.3 maintain a list of registered recruiting agents/ employers who are authorized to operate in Punjab, Haryana and U.T. Chandigarh. According to Mr. Anil Malhotra, learned counsel for the petitioner, if a direction is issued to respondent No.3 to furnish the names of licensed recruiting agency/ employers who are authorized to operate in the respective area of Punjab, Haryana and U.T. Chandigarh then the job of enforcement agency would become easier because other operators who do not find mention in the list would be deemed to be operating illegally. These illegal agents also attract their business in the name of consultancy firm to elude the enforcement agency and to hide their real faces.
>
> In view of the above, we deem it appropriate to direct respondent No.3 to send the list of registered recruiting agencies / employers who are entitled to operate in the areas of Punjab, Haryana and U.T. Chandigarh by email or by any other method expeditiously preferably within two weeks. The respective States and the U.T. Chandigarh i.e. respondent Nos. 5 to 8 shall highlight the list in Electronic and Print Media so that general public may come to know about the registered agents. Respondent Nos. 5 to 8 shall also undertake suitable operation through respective Deputy Commissioner/ SSP to close down the unauthorized recruiting agents/ employers who are operating under the name of emigrant agency.
>
> Let a status report be filed within four weeks with a copy in advance to learned counsel for the petitioner.
>
> Respondent Nos. 5 to 8 would also be authorized to scrutinize the advertisement which are being issued by the so called emigrant consultancy and check their antecedents. If they are found wanted then suitable action may also be initiated against them."

Pursuant to the aforesaid order, a status report has been put on record wherein it is stated that the necessary steps, indicated in the order dated 30.5.2012, have been taken to prevent the un-authorised agents to

recruit individuals to send them to the foreign countries.

We hope and expect that the concerned authorities will continue to take the steps mentioned in the above status report in future also. However, it is directed that no recruiting agent shall be allowed to function without complying with the provisions of Emigration Act, 1983.

With the aforesaid direction, this writ petition is disposed of.

CM No. 9393 of 2012 (O & M):

In view of the order passed above, this application has become infructuous and disposed of accordingly.

(Jasbir Singh)
Acting Chief Justice

(Rakesh Kumar Jain)
Judge

31.7.2012
Ashwani

World Human Rights Protection Counsel v. State of Punjab (P&H)(D.B.) : Law Finder Doc Id # 384902

2012(3) R.C.R.(Criminal) 939 : 2012(4) Cri.CC 180 : 2012(4) Crimes 319

PUNJAB AND HARYANA HIGH COURT

(D.B.)

Before :- Jasbir Singh, A.C.J. and Rakesh Kumar Jain, J.

C.W.P. No. 5567 of 2009. D/d. 24.7.2012.

World Human Rights Protection Counsel and another - Petitioners

Versus

State of Punjab and others - Respondents

For the Appearing Parties :- Mr. Ranjan Lakhanpal, Advocate, Mr. Navkiran Singh, Advocate, Mr. Anil Malhotra, Advocate (amicus curiae), Mr. J.S. Sidhu, Sr. Addl. A.G. Punjab for respondent Nos. 1 to 3, Mr. Randhir Singh, Additional Advocate General, Haryana, Mr. R.S. Rai, Senior Advocate with Mr. Sukant Gupta, Advocate for UT Chandigarh, Mr. S.S. Sandhu, Advocate for CBI and UOI, Mr. Sanjay Kaushal, Senior Standing Counsel for UT Chandigarh.

NUTSHELL

Situation with regard to missing persons/children is alarming - Police directed to register FIR instead of enter only a DDR.

Criminal Procedure Code, Section 154 - Problem of missing persons/children - Situation with regard to missing persons/children is alarming - Procedure to trace out missing persons - Following directions issued in this respect :-

(i) As per practice as and when missing report is made, the police officials enter only a DDR and not an FIR - As and when any report is made regarding missing of any individual, immediately an FIR should be registered.

(ii) To monitor the entire process of tracing out the missing individuals, the States of Punjab and Haryana shall set up a Cell headed by an officer of the rank of Inspector General, known as Nodal Officer - Whereas in UT Chandigarh, the Nodal Officer of the Cell, to be set up, shall be of the rank of Superintendent of Police.

(iii) The States to immediately sent a copy of the FIR, as and when registered to the office of Nodal Officer who shall then contact all other States so that criminals may not escape with the child/person - The Nodal Officer shall also supervise the investigation - He shall also immediately send an intimation to the special cells set up by the CBI to

trace out the missing persons.

(iv) The above directions including the directions issued by Supreme Court in Hari Lal v. Commissioner of Police, Delhi, WP (Cr.) No. 610 of 1996 be complied with/implicated forthwith.

[Paras 10 and 11]

Cases Referred :

Hori Lal v. Commissioner of Police, Delhi, WP (Cr.) No. 610 of 1996.

JUDGMENT

Jasbir Singh, Acting Chief Justice (Oral) - This order shall dispose of CWP Nos. 5567 of 2009, 3897 and 1787 of 2011, involving similar facts and law. However, for facility of reference, facts are being mentioned from CWP No. 5567 of 2009.

2. By filing this writ petition, attention of this Court has been drawn towards problem of missing of persons/children in the States of Punjab, Haryana and Chandigarh, who could not be traced despite efforts made by their nears and dears.

3. Taking note of alarming number of missing persons, in this case, notice of motion was issued on 23.11.2009.

4. Thereafter many directions were issued so that missing persons can be traced. Status reports were placed on record by both the States showing as to in how many cases the police was successful in tracing out the missing individuals.

5. Notice was also issued to the C.B.I. to know the procedure being adopted by it to locate the missing persons. Reply was filed by C.B.I. in CWP No. 3897 of 2011 17.2.2012. Paragraph Nos. 8 and 9 of the reply read thus :-

"8. That CBI has created a Data Bank known as Criminal Intelligence Cell (CIC) in the Special Crime-I Branch of CBI to collect, collate and disseminate date relating to the criminal syndicates/ gangs operating in India which are involved in trafficking of women and children for the purpose of prostitution, ransom and begging. In addition to the above, the CIC also gathers information about the missing women and children from the Indian States and flash the same on the CBI website i.e. www.cbi.gov.in on all India basis for seeking cooperation from the Nodal Officers of Indian States for recovery of the same.

9. That the CBI has designated one of its unit namely Special Crime Unit-II of Special Crime-I Branch of its unit namely Special Crime Unit-II of Special Crime-I Branch of CBI based at New Delhi as "Anti-Human Trafficking Unit" to investigate the cases of organised crime relating to human trafficking having interstate and international ramifications."

6. It is stated that the C.B.I. has created a Data Bank and on getting information regarding any missing women/children from within India, the information is flashed on the CBI website. It is also stated that a special unit known as Special Crime Unit-II has been established to stop the trafficking of human beings.

7. This Court appointed Mr. Anil Malhotra, Advocate as amicus to suggest effective ways and means which may be helpful, if adopted, to trace out the missing persons. He has submitted his report giving various suggestions.

8. On the last date of hearing, after going through an affidavit filed by CBI and the suggestions of Mr. Anil Malhotra, Advocate, following order was passed by this Court :-

"The data has been provided by the Union of India, Ministry of Home Affairs, New Delhi as depicted in the photocopy of the Tribune dated 16.05.2012 and a copy of the same is taken on record as Mark 'A'. According to data, in the State of Haryana, the total missing children for the year 2009- 2011 were 3237 and 1,517 have remained untraced. Out of untraced children, 899 were boys and 618 were girls.

Mr. Anil Malhotra, learned Amicus Curiae has placed on the record a copy of order dated 14.11.2002, passed by Hon'ble the Supreme Court in the case of Hori Lal v. Commissioner of Police, Delhi, where comprehensive directions were issued, which is the foundation of the advisories issued by the Central Government. In the last order, this Court had required the respondent-State of Haryana to file status report. However, learned DAG has relied upon an old affidavit dated 6.12.2011 of Director General of Police, State Crime Branch, Haryana, Panchkula. In para 3(i) of the affidavit, it has been recorded that FIR is registered in respect of missing children/boys and girls only when it is found that cognizable offence is committed and the investigation is entrusted to the Investigating Officer. However, in case cognizable offence is not found to be committed then the DDR is registered in the concerned Police Station. This is wholly against the direction issued by Hon'ble the Supreme Court on 14.11.2002 in Hori Lal's case (supra) and the various advisory which have been issued later on by the Central Government. Once the boys and girls are missing then there is no question of recording a DDR in the matter. Recording of DDR would not result in setting in motion the machinery of criminal justice. Therefore, the State of Haryana has to comply with the directions issued by Hon'ble the Supreme Court in Hori Lal's case (supra) as well as in various advisory on realistic basis.

Likewise, the data available in respect of State of Punjab is that 599 missing children were reported during the same period and 544 has remained untraced. Out of them, 363 were boys and 181 were girls. Similar affidavit has been filed by Sh. Amrit Brar, Assistant Inspector General of Police, Crime Punjab. There are no details available on the same lines, which are expected to be revealed in the status report.

In respect of the U.T. Chandigarh, the data suggests that 286 children were missing during the same period and 131 children have remained untraced. Out of them,58 were boys and 64 were girls. No status report with regard to steps taken and investigation made, has been filed by the U.T. Chandigarh.

The suggestions given by Sh. Anil Malhotra, learned Amicus Curiae and Sh. Sukant Gupta, learned Addl. P.P. for U.T. Chandigarh may be shared with all the stakeholders including the State of Punjab, Haryana, U.T. Chandigarh and CBI. The possibility of exploring a joint mechanism in coordination with each other may also be worked out.

Let a status report by State of Punjab, Haryana, U.T. Chandigarh and CBI be filed a week before the adjourned date with a copy in advance to the learned counsel for the petitioner as well as learned Amicus Curiae."

In response to above order, status reports again have been filed, which are taken on record.

We have heard counsel for the parties.

9. It is not in dispute that the Hon'ble Supreme Court on 14.11.2002 has already issued elaborate directions to deal with such like situations, in the case of Hori Lal v. Commissioner of Police, Delhi and others, WP (Cr.) No. 610 of 1996. The relevant part of the order reads thus :-

"(1) Publish photographs of the missing persons in the Newspaper, telecast them

on Television promptly, and in case not later than one week of the receipt of the complaint. Photographs of a missing person shall be given wide publicity at all the prominent outlets of the city/town/village concerned that is at the Railway Stations, Inter state bus Stands, airport, regional passport office and through law enforcement personnel at Border checkpoints. This should be done promptly and in any case not later than one week of the receipt of the complaint. But in case of a minor/major girl such photographs shall not be published without the written consent of the parents/guardians.

(2) Make inquiries in the neighborhood, the place of work/study of the missing girl from friends colleagues, acquaintance, relatives etc. immediately. Equally all the clues from the papers and belongings of the missing person should be promptly investigated.

(3) To contact the Principal, class teacher and Students at the missing persons most recent school/educational institutions. If the missing girl or woman is employed somewhere, then to contact the most recent employer and her colleagues at the place of employment.

(4) Conduct an inquiry into the whereabouts from the extended family of relatives, neighbours, school teachers including school friends of the missing girl or woman.

(5) Make necessary inquiries whether there have been past incidents or reports of violence in the family.

There after the investigation officer/agency shall:

(a) Diligently follow up to ensure that the records requested from the parents are obtained and examine them for clues.

(b) Hospitals and Mortuaries to be searched immediately after receiving the complaint.

(c) The reward for furnishing clues about missing person should be announced within a month of her disappearance.

(d) Equally Hue and Cry notices shall be given within a month.

(e) The Investigation should be made through women police officers as far as possible.

(f) The concerned police commissioner or the DIG/ IG of the State Police would find out the feasibility of establishing a multitask force for locating girl children women.

(g) Further, in the Metropolitan cities such as Delhi, Mumbai, Kolkata and Chennai the Investigating Officer should immediately verify the red light areas and try to find out the minor girls. If any minor girl (may or may not be recently brought there) is found her permission be taken and she may be taken to the children's home (sec. 34 of the Juvenile Justice (Care and Protection of the Children) Act 2000, and the I.O. to take appropriate steps that all medical/other facilities are provided to her."

10. It is also not disputed before us that these directions are binding on the States of Punjab, Haryana and UT Chandigarh. An assurance has been given by counsel, appearing for the above states and UT Chandigarh that those directions shall be complied with in letter and spirit in future, to trace out the missing persons.

11. It has also come on record that as per practice as and when missing report is

made, the police officials enter only a DDR and not an FIR. This practice has been deprecated by this Court in various orders passed from time to time observing that such a procedure is not correct and justified.

12. Under the circumstances, we direct the States of Punjab, Haryana and UT Chandigarh that as and when any report is made regarding missing of any individual, immediately an FIR should be registered. It is further directed that to monitor the entire process of tracing out the missing individuals, the States of Punjab and Haryana shall set up a Cell headed by an officer of the rank of Inspector General, known as Nodal Officer, sufficient staff be placed at his command. Whereas in UT Chandigarh, the Nodal Officer of the Cell, to be set up, shall be of the rank of Superintendent of Police. Further, directions be issued to all the S.H.O.s in the States to immediately send a copy of the FIR, as and when registered regarding missing of any person, to the office of the Nodal Officer, who shall then contact all other States so that criminals may not escape with the child/person. The Nodal Officer shall also supervise the investigation. He shall also immediately send an intimation to the special cells set up by the C.B.I. to trace out the missing persons.

13. It is made clear that all the directions issued above, including those issued by the Hon'ble Supreme Court in Hori Lal's case (supra), be complied with/implemented forthwith.

14. In view of directions issued above, we feel that at this stage, it will not be proper to ask the States to form a unified police command for the cities of Chandigarh, Panchkula and Mohali, to locate the missing individuals.

All the three writ petitions stand disposed of with the aforesaid directions.

Petition disposed of.

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.1787 of 2011
Date of decision: 24.07.2012

World Human Rights Protection Council

…..Petitioner

versus

U.T. Administration and others

……Respondents

CORAM: Hon'ble Mr.Justice Jasbir Singh, Acting Chief Justice
Hon'ble Mr.Justice Rakesh Kumar Jain

Present: Mr.Ranjan Lakhanpal, Advocate for the petitioner
Mr.Anil Malhotra, Advocate (amicus curiae)
Mr.R.S.Rai, Senior Advocate with
Mr.Sukant Gupta, Advocate for respondent No.1, 4 and 7
Mr.J.S.Sidhu, Sr.Addl.A.G. Punjab for respondent No.2 and 5
Mr.Randhir Singh, Additional Advocate General, Haryana
for respondent No.3 and 6
Mr.S.S.Sandhu, Advocate for respondent No.7

Jasbir Singh, Acting Chief Justice (Oral)

For order, see order of even date passed in CWP No.5567 of 2009 titled as *World Human Rights Protection Counsel and another* versus *State of Punjab and others.*

(Jasbir Singh)
Acting Chief Justice

24.07.2012
gk

(Rakesh Kumar Jain)
Judge

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.3897 of 2011
Date of decision: 24.07.2012

Lawyers for Human Rights International (Regd.)

…..Petitioner

versus

State of Punjab and others

……Respondents

CORAM: Hon'ble Mr.Justice Jasbir Singh, Acting Chief Justice
Hon'ble Mr.Justice Rakesh Kumar Jain

Present: Mr.Navkiran Singh, Advocate for the petitioner
Mr.Anil Malhotra, Advocate (amicus curiae)
Mr.J.S.Sidhu, Sr.Addl.A.G. Punjab for respondent Nos.1 to 2
Mr.Randhir Singh, Additional Advocate General, Haryana for respondent Nos.3 and 4
Mr.R.S.Rai, Senior Advocate with
Mr.Sukant Gupta, Advocate for respondent Nos.5 and 6
Mr.S.S.Sandhu, Advocate for respondent No.7

Jasbir Singh, Acting Chief Justice (Oral)

For order, see order of even date passed in CWP No.5567 of 2009 titled as *World Human Rights Protection Counsel and another* versus *State of Punjab and others.*

(Jasbir Singh)
Acting Chief Justice

24.07.2012
gk

(Rakesh Kumar Jain)
Judge

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

*****

CWP No. 10318 of 2012 (O & M)
Date of decision : 19.7.2012

Utsav Singh Bains .....Petitioner

Vs.

State of Punjab through its Chief Secretary and others .....Respondents

CORAM: Hon'ble Mr. Justice Jasbir Singh, Acting Chief Justice
Hon'ble Mr. Justice Rakesh Kumar Jain

Present:- Mr. Utsav Singh Bains-petitioner in person
Ms. Puneeta Sethi, Advocate
Mr. Anil Malhotra, Advocate
Ms. Ms. Sudeepti Sharma, Advocate
(all members of team constituted by this Court)
Mr. Randhir Singh, Addl. AG, Haryana
Mr. S.S. Sandhu, Special Prosecutor for CBI

Jasbir Singh, Acting Chief Justice (oral)

Taking serious note of the averments made in a writ petition filed, drawing attention of the Court towards torture and abuse of the inmates in 'Apna Ghar' shelter home at Rohtak, notice of motion was issued, thereafter, various orders have been passed.

At one stage a Committee consisting of four advocates was constituted to enquire into the conditions of the inmates of above named shelter home and other similar institutions in the State of Haryana. Report prepared by the Committee is on the record. Taking note of the grave situation as depicted in the report, it was felt desirable by this Court that

the investigation in the matter should be handed over to the CBI. On the last date of hearing following order was passed by this Court :-

> "In this writ petition Court's attention has been drawn towards torture and abuse of children in various shelter homes established in the State of Haryana, especially, the malpractice going on in a shelter home namely 'Apna Ghar' at Rohtak.
>
> While issuing notice of motion on 28.5.2012, this Court had directed the respondent- State to get the medical of all the inmates of the above mentioned shelter home, run by one Jaswanti, conducted at PGIMER, Chandigarh. Pursuant to order dated 28.5.2012 a status report was filed on 1.6.2012. Medical examination reports of 8 children were also produced before the Court in a sealed cover which was opened. After going through the said report, the Court appointed a team of 4 advocates of this Court directing it to visit different shelter homes as found mentioned in para 10 of the affidavit, filed by Deputy Superintendent of Police (City) Rohtak, to know the condition of the children in the shelter home. The above team was allowed to interview the children housed in various shelter homes and then submit its report.
>
> The team of the two members submitted its report on 13.6.2012 and the remaining two submitted their report on 15.6.2012. On perusal of the reports on 15.6.2012, the Court felt desirable that medical examination of remaining inmates housed in "Apna Ghar" at Rohtak be also got conducted. In the reports submitted by team of the advocates it was also recommended that investigation be got done through an independent agency from outside the State of Haryana. Concern was also shown to the security of all the inmates.
>
> The Law Officer who represented the State of Haryana did not oppose the suggestion of handing over the investigation to an independent agency like CBI, rather he informed the Court that the transfer of investigation to a competent agency is under active consideration.
>
> On 3.7.2012 when this case again came up for hearing, the State counsel was directed to ascertain whether any decision has been taken by the Central Government on the communication sent by the State of Haryana.
>
> Today photocopies of three letters dated 6.7.2012, 9.7.2012 and 10.7.2012 have been put on record wherein request has been made to the competent authority of Central Government to hand over the investigation of the case to CBI. It appears that nothing has been done by the concerned authority of Central Government.
>
> The members of the special team appointed by this Court, vehemently argued that the Investigating Agency, now probing the matter, is bent upon to destroy the evidence.
>
> We are not expressing any opinion regarding the same at this stage. However, taking note of the grave situation, safety and security of the children/inmates of such houses and also, the fact that the evidence may not be destroyed as alleged by the members of the special team, we direct the Secretary, Ministry of Personal Public Grievance and Pensions, Government of India to take an appropriate decision on request made by State of Haryana to hand over the investigation to CBI in FIR No. 236 dated 10.5.2012 registered at Police Station Civil Lines, Rohtak. We put a word of caution on record that it is a matter which needs to be investigated by an independent agency because serious allegations have been levelled against those who are sitting at the helms of affairs and if investigation is not handed over to an independent agency, there is every likelihood that investigation conducted may not be fair.

> It is made clear that if any medical check-up of the inmates is required, the same shall be done with a promptitude and report be submitted on the next date of hearing.
> Adjourned to 19.7.2012.
> The needful shall be done by the next date of hearing.
> Counsel for the State of Haryana is directed to keep in his custody two sealed covers containing medical record and the status report prepared by the police special investigation team. He shall place on record the above said documents on the next date of hearing.
> Counsel for the State of Haryana shall also file an affidavit of Secretary, Women and Child Development as to what steps have been taken to rehabilitate the inmates of 'Apna Ghar' at Rohtak.
> Copy of this order be supplied to the Counsel for UOI under signatures of the Court Secretary.
> We have made a request to Senior Standing Councel for UOI to convey the order passed today to the Ministry concerned forthwith."

In response thereto Special Prosecutor appearing for the CBI has placed on record a copy of the notification issued to hand over investigation of the case to CBI. It is further stated that on the basis of above notification, the investigation has already been taken over by the CBI and an FIR bearing No. RC-5-S of 2012 has been registered. We appreciate the action taken by the Government of Haryana. It is a matter where immediate action was required.

On the last date of hearing, we had directed Mr. Randhir Singh, Addl. AG, Haryana to keep in his custody the record in two sealed covers, containing medical record of the inmates of above named shelter home and status report prepared by Special Investigation Team of the police of Haryana. One more sealed packet was also handed over to him by the above team on that very date. Mr. Randhir Singh, Addl. AG, Haryana, under the order of the Court, has handed over that record, in sealed covers to Mr. S.S. Sandhu, Special Prosecutor appearing for the CBI in Court.

Some inmates of the above named shelter home were medico

legally examined in PGIMER, Chandigarh and their reports are also on record in a sealed cover. We direct Registrar (Judicial) of the Court to hand over those reports after detaching from the file to Mr. S.S. Sandhu, Special Prosecutor, CBI. The needful be done within two days.

This matter pertains to the children especially the girls who were allegedly abused in the above named shelter home, we trust that the CBI team when investigating the above FIR will deal with the inmates in a very polite and kind manner and will try to protect privacy of the inmates to the extent it is possible. We dispose of this writ petition with a hope that the CBI will complete its investigation within two months from today.

The Department of Women and Child Welfare, Government of Haryana shall provide medical aid or any other help needed by the inmates of above named shelter home and shall also make all efforts whenever it is needed, to rehabilitate these children.

Copy of this order be supplied to Mr. S.S. Sandhu, Special prosecutor, CBI under the signatures of Court Secretary.

Disposed of.

(Jasbir Singh)
Acting Chief Justice

(Rakesh Kumar Jain)
Judge

19.7.2012
Ashwani

Judgment located by a hyperlink.

Rupak Rathi v. Anita Chaudhary (P&H) : Law Finder Doc Id # 542104

2014(2) R.C.R.(Civil) 697 : 2014(2) CivCC 824 : 2014(2) HLR 96 : 2014(3) PLR 407 : 2014(3) Law Herald 2632 : 2014 AIR CC 2231 : 2014(3) ICC 630

PUNJAB AND HARYANA HIGH COURT

Before :- Rajiv Narain Raina, J.

Civil Revision No.3130 of 2013(O&M). D/d. 09.04.2014.

Rupak Rathi - Petitioner

Versus

Anita Chaudhary - Respondent

For the Petitioner :- J.S. Bedi, Advocate.

For the Amicus Curiae :- Anil Malhotra, Advocate.

For the Respondent :- Jitender Dhanda, Advocate.

VERY IMPORTANT

Hindu Couple settled in a foreign country - Foreign court can grant decree of divorce on grounds available under Hindu Marriage Act with consent of parties.

VERY IMPORTANT

A decree of divorce by a foreign Court on ground of irretrivable breakdown of marriage is not valid in India.

A. Hindu Marriage Act, 1955, Section 13 - Hindu Couple settled in a foreign country - Foreign court can grant decree of divorce on grounds available under Hindu Marriage Act with consent of parties.

[Para 17]

B. Hindu Marriage Act, 1955, Section 13 - Civil Procedure Code, Section 13 - A decree of divorce by a foreign Court on ground of irretrivable breakdown marriage is not valid in India.

ON FACTS

A Hindu couple married in India according Hindu rites and set up matrimonial home in United Kingdom - Decree of divorce granted by U.K. Court on ground of irretrieable breakdown of marriage - The decree is not valid in India - Under Hindu Marriage Act irretrivable breakdown of marriage is no ground of divorce - held :-

(i) No decree of divorce obtained from the English Court on a ground not available under the HMA can be sustained on ground of irretrievable break down of marriage.

(ii) Where parties confer jurisdiction on the foreign Court the said Court will assume jurisdiction available to the Matrimonial Court in India but would remain confined to adjudicate the action in accordance with the matrimonial law of the parties i.e. HMA and the grounds available therein.

(iii) The legal position is that when a Hindu couple tied by the nuptial knot according to Hindu rites travel abroad with intention to settle down and reside there is to set up matrimonial home, they carry their personal laws on their back, off loading it in a foreign court for adjudication. 2003 (2) RCR (Civil) 197, relied.

[Paras 16, 17, 18, 22 and 23]

C. Hindu Marriage Act, 1955, Section 13 - Civil Procedure Code, Order 7 Rule 11 - Civil Procedure Code, Section 13 - Petition for divorce -

A party producing foreign Court matrimonial decree to contend that foreign court had already granted divorce - Following guidelines issued to Court to deal with such applications to safeguard interest particularly of Hindu Woman married to NRI - Guides be applied from case to case basis as it is not prudent to lay down strait jacket formula :-

(i) If the spouse aggrieved by the foreign matrimonial decree has not submitted to the jurisdiction of the foreign court or consented to the passing of the foreign Court judgment, it ought not to be recognised being unenforceable under Section 13 CPC - This position of law ought to be applied to the facts of the individual case.

(ii) There may be occasions that a spouse relying upon the judgment of a foreign matrimonial court, upon receipt of a summon or notice from a court of competent jurisdiction under the HMA, may not choose to file a written statement in response to a petition seeking a matrimonial cause under HMA in Punjab, Haryana of Chandigarh - Instead, the contesting spouse may prefer to move an application under Order 7, Rule 11 CPC seeking to rely upon or invoke the provisions of Section 13 CPC - Thus, it may be contended before the court of competent jurisdiction under the HMA that since the matrimonial action between the parties has already been decided and concluded by a Court in the foreign jurisdiction, the adjudication in the matter in issue between the same spouses based on the same matrimonial cause of action is barred by the principle of rs judicata and spouses are estopped in law from agitating the same again.

(iii) It is respectfully contended that wherever both or any spouse arrayed in a matrimonial cause in a matrimonial action under HMA contest, dispute, question or oppose any above such application under Order 7, Rule 11 , CPC involving interpretation of the principles laid down under Section 13 CPC thereby necessitating requirement of detailed pleadings and evidence of spouses, no summary decision may seem possible to decide the matter in the preliminary stage.

(iv) In the above situation, there may also be circumstances involving application of issues of domicile as also applicability of Sections 1 and 2 of the HMA regarding extra territorial application of the provisions of HMA - Determination of these issues may also require parties to put their pleadings and testimony as well as the record of the Court of

competent jurisdiction under the HMA.

(v) The application of the provisions of the CPC finding mention under Section 21 HMA, the Court of Competent jurisdiction under the HMA in Punjab, Haryana or Chandigarh may than be guided by the procedural law of pleadings contained in the Orders and Rules of the CPC and Punjab and Haryana High Court amendments, if any, for further proceedings in the matter - Accordingly, filing of a written statement, courter claim, rejoinder and/or other pleadings may be necessitated for having the factual matrix on record leading to the settlement of issues under Order 14 CPC which can only be framed upon allegations made by parties to be read along with the contents of documents produced by spouses - Hence, this procedure may be necessary to be adopted to decide upon the warring claims of spouses relying on averments in support or against the judgment of the foreign matrimonial court between the parties.

(vi) Based on the above procedural requirements, the Court of competent jurisdiction under the HMA may then examine the process, pleadings, grounds and other details in the passing of the judgment/decree of the matrimonial court of foreign jurisdiction to test it on the anvil of Section 13 CPC and based on the principles laid down by the Apex Court in Y. Narasimha Rao v. Y. Venkata Lakshmi, 1991(3) SCC 451 and exception (iii) as understood in the present opinion - Hence, in the event of a contest, dispute, opposition to the applicability of the foreign matrimonial judgment in the Indian jurisdiction, a summary disposal may not be possible - To do complete justice to both the spouses and to ensure that prejudice has not been caused to either of them as also that issues of maintenance, settlement of matrimonial property, child custody etc. arising in India have been completely settled between spouses based on provisions of HMA, the Court of competent jurisdiction under the HMA may examine the matter on the lines suggested above.

(vii) Therefore, if the issue relating to the jurisdiction of Competent Court under the HMA as also any bar to the matrimonial cause created by any existing law appears to be established, the matrimonial court in Punjab, Haryana or Chandigarh may upon the facts and circumstances of the case take an appropriate decision under Order 14, Rule 2 CPC whether it needs to pronounce judgment on all issues or decide the issue of jurisdiction or maintainability as a preliminary issue - In such circumstances, the Competent Court under the HMA may after forming an opinion take an appropriate decision on the facts of the case as to whether the issue of jurisdiction or maintainability is to be decided as a preliminary issue or pronounce judgment together on all the issues - Accordingly, based on the individual facts and circumstances, the Court ought to take a decision whether to decide the preliminary issue of jurisdiction or maintainability or postpone the settlement of other issues after such preliminary issues has been determined.

[Para 24]

D. Hindu Marriage Act, 1955, Section 13 - A Hindu Couple married in India according to Hindu rites and set up matrimonial home in United Kingdom - U.K. Court granted decree of divorce on ground of irretrivable breakdown of marriage - Wife seeking divorce of India on the ground of cruelty - It was contended that irretrievable breakdown of marriage was no ground to grant divorce under Hindu Marriage Act - Application by Husband seeking rejection of plaint on the ground that marriage had already been dissolved by U.K. Court - Application of husband rightly dismissed by trial judge - Judge to decide divorce petition by wife on merits. Y. Narasimha Rao v. Y. Venkata

Lakshmi, 1991(3) SCC 451, relied.

[Para 35]

Cases Referred :

Y. Narasimharao v. Y. Venkata Lakshmi, (1991) 3 SCC 451.

Neerja Saraph v. Jayant V. Saraph, 1995(1) R.R.R. 74 : 1994 (6) SCC 461.

Sondur Gopal v. Sondur Rajini, 2013(3) R.C.R.(Civil) 979 : 2013(4) Recent Apex Judgments (R.A.J.) 615 : 2013(7) SCC 426.

Pritam Ashok Sadaphule v. Hima Chugh, 2013(4) R.C.R.(Civil) 615 : CRP No. 148 of 2011. D/d. 22.01.2013.

Harmeeta Singh v. Rajat Taneja, 2003(2) R.C.R.(Civil) 197 : (2003) DMC 443.

Mrs. Veena Kalia v. Dr. Jatinder Nath Kalia, 59 (1995) Delhi Law times 635.

Navin Chander Advani v. Leena, 2005(3) R.C.R.(Civil) 446 : 2005 (2) HLR 582.

Monia Khosla v. Amardeep Singh Khosla, AIR 1986 Delhi 399.

Neelam Kumar v. Dayarani AIR 2011 SC 193.

Vishnu Dutt Sharma v. Manju Sharma 2009(2) R.C.R.(Civil) 506 : 2009(2) R.A.J. 542 : (2009) 6 SCC 379 : JT 2009 (7) SC 5.

JUDGMENT

Rajiv Narain Raina, J. - This is a rather strange and awkward case to deal with. The petition has been filed under Article 227 of the Constitution of India challenging the order dated 5th April, 2013 passed by the learned District Judge, Panchkula declining an application under Order 7, Rule 11 of the Code of Civil Procedure, 1908 ('CPC' for short) filed by Rupak Rathi in a divorce petition instituted by his wife Anita Chaudhary under Section 13 of the Hindu Marriage Act, 1955 ('HMA') praying for dissolution of marriage. Nevertheless, the issues involved have a wide import on other cases of the kind with serious ramifications on the applicability of the last of the three exceptions carved out by the Supreme Court in Y. Narasimharao and others v. Y. Venkata Lakshmi and another; (1991) 3 SCC 451 in para. 20 of the ruling on recognition of foreign matrimonial decrees sought to be enforced in India and where the three exceptions for the first time have been carved out from the basic rule that the jurisdiction assumed by the foreign Court as well as the grounds on which the relief is granted by a foreign court must be in accordance with the matrimonial law under which the parties are married. I would come to those three exceptions and especially exception (iii) in the course of the discussion on which the fate of this case turns, but not before noticing a few seminal facts which are not disputed by the parties and which would influence later events as they happened, impacting the view ultimately taken in concluding this case.

2. The complexity of the matter has arisen from divorce proceedings instituted by Rupak Rathi, husband of Anita Chaudhary, the respondent in this petition, in Brentford County Court ('BCC' for short) in the United Kingdom on 17th March, 2011. While those proceedings were pending, Anita Chaudhary filed a divorce petition in the Court of the learned District Judge, Panchkula through her father holding her general power of attorney to file a petition under Section 13 of the HMA on her behalf on the ground of cruelty practiced by Rupak Rathi upon her. The pendency of the proceedings in the English Court is duly mentioned in the divorce petition instituted on 17th May, 2011. In

such circumstances, both the proceedings ran parallel for sometime, the first concluding in a decree of divorce in the English court on 31st January, 2012. The other is from which the present petition arises.

3. The decree nisi was passed by the BCC on 7th June, 2011 and made absolute on 31st January, 2012 vide P-7. It may be noted that the decree nisi was passed by the BCC on the ground that the marriage of the parties had broken down irretrievably. The proceedings were concluded without any adjudication on the merits of the case. Rupak Rathi calls it a consent order. He made use of the decree of divorce secured before the English Court in the presence of Anita Chaudhary, who then indisputably was living in her temoprory matrimonial home in the United Kingdom, and approached the matrimonial court at Panchkula through an application of 18th July, 2012 under Order 7, Rule 11 CPC praying for rejection of the divorce petition on the ground that the UK divorce decree passed on 31st January, 2012 was binding between the parties. Therefore, the divorce petition filed by the wife on grounds of cruelty was barred by the principles of both res judicata and estoppel and the learned District Judge, Panchkula had no jurisdiction to entertain the divorce petition as the matter inter-parties stood settled by the English decree. The application was contested by Anita Chaudhary by filing a reply alleging that the BCC had no jurisdiction to pass the decree of dissolution of marriage on the impermissible ground of irretreivable breakdown of marriage not available in HMA and further still, that both the parties are domiciled in India and are governed by the Hindu law under which they were married in Panchkula in the State of Haryana, India on 7th March, 2010.

4. A few more relevant facts are necessary for the narration of events overarching the case. After the couple were married in Panchkula according to Hindu rites and ceremonies, they re-located in the United Kingdom in September, 2010 and set up matrimonial home in the foreign jurisdiction. The marriage did not last long and turned sour.

5. The ensuing matrimonial discord led Rupak Rathi to file for divorce in BCC on 17th March, 2011 on the ground that the marriage had irretrievably broken down. In para. 13 of the petition presented in the English Court, the husband alleged in sub para. 4 that throughout the marriage and whilst in United Kingdom, the respondent wife has had an improper relation with a man, namely, the landlord of the property where the parties resided as tenants. This had caused the petitioner great hurt. The BCC following its local law and procedure in matrimonial actions, issued a Certificate of Entitlement to a decree on the petition on account of irretrievable breakdown of marriage as a ground for divorce by issuing such certificate on 19th May, 2011. On 7th July, 2011, the BCC issued decree nisi holding that the marriage had broken down irretrievably and called upon the parties to show sufficient cause in six weeks as to why the decree be not made absolute. In the Ancillary Relief Application filed before the BCC, an order was made on 18th October, 2011 staying the application for decree absolute until final orders were passed in the aforesaid application. When the matter was taken up on 31st January, 2012 before the BCC, the Minutes of Consent Order on ancillary relief application, were decided in directing that it is "ordered by consent subject to decree absolute".

6. In the meantime, Rupak Rathi filed an application on 8th December, 2011 requesting BCC to consider issuing an order that the consent order and the decree absolute be endorsed and signed by the Judge for it to be used in foreign jurisdictions. This request was made in para. 3 of part-3 of the application. The Minutes of Consent Order in laminated form are produced at page 76 of the paperbook. An order was made in the printed format of Minutes of Consent Order with pen noting that "Applicant's Application of 08.12.11 at Paragraph 3 Part-3 is Hereby Dismissed". It may be noted that in the intervening period between the issuance of the Minutes of Consent Order and making the decree nisi absolute, parties according to English law were given time to settle ancillary matters between the parties to crease out issues of custody, property, inheritance, pension, welfare reforms etc. and for them to arrive freely at mutual settlements. The issue of custody does not arise in this case as no child was born of the marriage. It is not discernible from the record as to what

transpired in the intereggnum but the decree was made final and absolute and the said marriage was thereby dissolved on 31st January, 2012 for the reason of irretrievable breakdown of marriage. It was also, in the Certificate of Entitlement, the laminated copy of which is placed on record at page 73 of the paperbook (P-7), recorded by the BCC that the Court certifies that the petitioner (Rupak Rathi) has sufficiently proved the contents of the petition and is entitled to a decree of divorce on the grounds that the marriage has irretrievably broken down. The fact found proved being the respondent's unreasonable behaviour. Nevertheless, it may be further noted that on 7th June, 2011 the Deputy District Judge Gittens sitting at BCC held on 7th June, 2011, while issuing decree nisi, that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. This appears to me to be inter alia a bone of contention as conclusion was reached without any reasons recorded after contest. I should record that when the decree was made absolute on 31st January, 2012, Anita Chaudhary was a signatory to the orderin which the specific prayer of Rupak Rathi to allow the decree absolute to be used in foreign jurisdictions was rejected as prayed for by the husband on 18th December, 2011. However, it is not possible to comment any further on Certificate of Entitlement to a decree of divorce dated 19th May, 2011 and the order dated 7th June, 2011 as produced in this petition in the original with the stamp of BCC. These are the facts leading to the decree made absolute by the English Court.

7. Two days before the English Court issued the certificate of entitlement to a decree on 19th May, 2011, Anita Chaudhary, acting through her father, had already instituted a divorce proceedings before the Matrimonial Court at Panchkula on 17th May, 2011 when notice was issued to the respondent-Rupak Rathi. The present petition was filed before this Court by Rupak Rathi as seen from the stamps of the Registry dated 13th May, 2013. It was re-filed on 15th May, 2013. The matter came up, for the first time for hearing on 16th May, 2013 when the learned counsel for the petitioner made a request to place on record the certified copy of the order and the decree passed by the Court in England. The matter was adjourned to 3rd July, 2013 for the purpose. On 3rd July, 2013, after arguing before the Bench for sometime, counsel sought an adjournment to show that the Court in England which passed the decree (P-7), dissolving the marriage between the parties had jurisdiction to pass the said decree. The matter was adjourned to 15th July, 2013. On 15th July, 2013, the counsel for the petitioner sought further adjournment to search relevant case law in support of the case, for which reason last opportunity was granted, and the matter stood posted for 29th July, 2013. On the next date of hearing, the learned counsel relied upon the decision of the Supreme Court in Y.Narasimha Rao's case (supra) contending that the respondent had consented to divorce in the foreign Court and the parties were residing within the jurisdiction of the foreign Court and therefore the judgment and decree passed by BCC dissolving the marriage between the parties by divorce is binding on the parties. On this submission, notice of motion was issued for 20th September, 2013. The respondent on due service appeared before this Court on 20th September, 2013. When the matter came up for hearing on 31st January, 2014 and sensing the far reaching consequences of the case, this Court requested Mr. Anil Malhotra, an Advocate of this Court to act as amicus curiae since he is well versed with subject matter law on matrimonial actions arising out of the decrees passed by foreign Courts and as to the nature and scope of their binding effect on an Indian Court since he has co-authored books on the subject, including "Acting for Non-resident Indian Clients" (London 2005), Jordan Publishing Limited, Bristol, UK and "India, NRIs and the Law", Universal Law Publishing Company, New Delhi, 2009. Both the learned counsel graciously accepted the presence of Mr.Malhotra to assist as a neutral amicus principally for elucidation and the interpretation of Y.Narasimha Rao with respect to exception (iii) carved out for the guidance of Indian Courts therein by the Supreme Court and its applicability to the case at hand.

8. Learned amicus curiae has presented his submissions in writing together with a compendium of judgments on the subject which were taken on record on 17th February, 2013. Hard copies of the same were supplied to both the learned counsel appearing for the parties and soft copies were sent through e-mail as directed on 7th March, 2014. Since the application filed in the BCC, U.K. praying for allowing the

decree in foreign jurisdictions was rejected but was not on record, counsel was requested to place the same on record to help the court to take a view at the final hearing. The arguments were heard at length on all sides and the judgment was reserved on 13th March, 2014 which are being pronounced today.

9. At the outset, the learned counsel informed the Court that since no stay was granted in the present proceedings against the order declining the application under Order 7, Rule 11 CPC, the proceedings continued and have reached culmination, meaning thereby, the evidence stands recorded. Since Mr.J.S. Bedi, learned counsel appearing for the petitioner has insisted that he wants a decision on the law involved on the application under Order 7, Rule 11 CPC and to test the correctness of the order impugned rejecting the aforesaid application, and that this Court should remain free to opine not only on the application under Order 7, Rule 11 CPC but on the legal issues arising out of interpretation of the exceptions carved out in para. 20 of Y.Narasimha Rao and to lay the matter at rest between the parties without touching upon the merits of the case, I have taken up the matter for due consideration of the issues involved. However, one thing is certain that both the parties want divorce; one, on the ground of the binding nature of the divorce decree granted by the BCC, U.K. on the Indian Court, while the wife presses her petition under Section 13 of the HMA on the grounds available therein which does not include as at present, irretrievable break down of marriage as a ground of divorce under the Hindu marriage law. In view of the submissions pressing decision, this Court cannot possibly hold that culmination of evidence before the learned Matrimonial Court at Panchkula renders the present petition only an academic exercise. Therefore, I venture to express an opinion on the subject matter in the peculiar facts of this case.

The view of the learned District Judge in dismissing the application under Order 7, Rule 11 CPC.

10. Before I deal with the case law on the subject, it would not be out of place to examine the view broadly of the learned District Judge, Panchkula in passing the impugned order but before I do so, a few words on the defence taken by Rupak Rathi in the Panchkula Court praying for dismissal of the divorse petition instituted by his wife would be in order and are thus briefly outlined. In the application suplemmented by written arguments submitted before the Matrimonial Court at Panchkula, it was stated that the petition is not maintianable and is barred by the law of res judicata and the principle of estoppel by conduct. Section 11 of the Code of Civil Procedure was pressed into service to contend that no Court shall try any suit or any issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court shall be agitated. It is urged that the UK decree was passed in the presence of the wife and with her consent. The claims between the parties are taken to be settled before the decree nisi was made absolute. It is submitted that the wife could have availed remedy against the order dated 7th June, 2011 passed by the Deputy District Judge Gittens adversely commenting on the behaviour of the respondent being such that the petitioner cannot reasonably be expected to live with her. That order is final and binding. I may record here that the adverse comment did not flow from findings of fact recorded through adversarial adjudication before BCC.

11. It was further contended that the law in India is crystal clear regarding the applicability of a foreign judgment or the conclusiveness of a foreign judgment as prescribed under Section 13 CPC. Section 13 reads as follows : -

> "Section 13When Foreign Judgment not conclusive: A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same 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]."

12. On the strength of these provisions, it is urged that if the foreign judgment is marred by any of the disqualifications mentioned in the Section, then only it is not conclusive but if it passes all the litmus tests for its conclusiveness, the same is applicable and cannot be termed as not conclusive. In the present case, it is urged that the judgment passed by the County Court in UK has been passed by taking into consideration the applicable laws, the financial and social background of the parties and thus, is applicable in India also. The decree being legal and valid and not having been challenged in any way, attains finality and is good enough reason for dismissal of the divorce petition. It was further submitted that notice on the matrimonial action suffers from suppressio veri and suggestio falsi and the conduct of the petitioner prima facie amounts to gross contempt of Court and therefore she is not entitled to be heard on merits. If the wife has unconditionally subjected herself to the jurisdiction of the Court in the United Kingdom in a petition for decree of divorce with mutual consent, it does not lie in her mouth to invoke the jurisdiction of the Court at Panchkula or that the foreign court had no jurisdiction to decide the dispute. The decision of the Supreme Court in Y. Narasimha Rao cited in support of the respondespondent husband.

13. To turn to the view taken by the learned District Judge on the moot application under Order 7, Rule 11 CPC in the impugned order dated 5th April, 2013 I find valuable reason and the same is best put in the District Judge's own words without any gloss or add-ons: -

"A perusal of the record shows that after the petition was filed, the present application was filed. The issue can only be examined when the parties have completed the pleadings and they are given an opportunity to formally lead evidence and show that the case falls or does not fall under any of the clauses of Section 13 of the Civil Procedure Code. Section 14 of the Civil Procedure Code places a presumption regarding foreign judgment which are purported to be certified copy. The applicant had taken the plea that the proceedings were barred by resjudicata. The plea can only be examined when there is a plea. The applicant is yet to file his written statement. Therefore, it is held that the question cannot be examined at this stage and can be decided only after the pleadings are completed and evidence has been led. The application is dismissed."

In short, what the learned District Judge, Panchkula has held is that whether the case falls or does not fall under any of the clauses of Section 13 CPC read with Section 14 thereof, a plea of res judicata is such a plea which can be examined only on receiving written statement and the issue is not capable of being examined before the pleadings are completed and the evidence led by the parties. It is this order which has brought the petitioner to this Court. The ratio of exception (iii) in Y. Narasimha Rao case.

14. Both the learned counsel for the parties have placed strong reliance on the judgment of the Supreme Court rendered in the aforesaid case. It is the case of the petitioner that the matter falls in exception (iii) carved out by the Supreme Court, while the learned Amicus Curiae on the other hand and, therefore, the learned counsel for the respondent adopting the submissions of Mr.Malhotra, has relied on the rule laid

down by the Supreme Court in para. 20 of the judgment and that exception (iii) has to be read in the context of the primary rule from which the exceptions flow. Before proceeding any further with the discussion, para. 20 of the judgment, in which the heart of the case lies, is reproduced : -

> "20. From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties." (emphasis supplied).
>
> (underlined for emphasis)

15. There can be no gainsaying that the parties married at Panchkula in the State of Haryana according to Hindu rites and ceremonies and are governed by the provisions of the Hindu Marriage Act, 1955 and in the normal circumstances, only the District Court within the local limits of whose original civil jurisdiction, the marriage was solemnized or the respondent, at the time of the presentation of the petition resides or the parties to the marriage last resided together or the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at the time, residing outside the territories to which the Act extends or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive, has jurisdiction to entertain the petition. This position is borne by statutory law.

16. Under Section 13 of the Code of Civil Procedure , 1908, a foreign judgment is not conclusive as to any matter directly adjudicated upon between the parties if (a) it has not been pronounced by a court of competent jurisdiction; (b) it has not been given on the merits of the case; (c) it is 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) the proceedings are opposed to natural justice; (e) it is obtained by fraud; (f) it sustains a claim founded on a breach of any law in force in India. Therefore, Section 13 CPC is the major premise, upon which, the matrimonial actions have to be tested with respect to cases where foreign judgments obtained by a party are pressed in India to act as res judicata, estoppel, waiver, acquiescence and the like. It is trite that no decree of divorce obtained from the English Court on a ground not available under the HMA, which personal law is applicable to the marriage between the parties, can be sustained on ground of irretrievable break down of marriage. In order to first understand and then resolve the issue in the facts presented in this case, it would be necessary to refer to paragraphs 7, 16, 17, 20 to 22 of the judgment in Y. Narasimha Rao as urged by Mr Malhotra. These paragraphs are reproduced by repeating core para. 20 in the setting in which it lies in the judgment : -

> "7. The Circuit Court of St. Louis County, Missouri had, therefore, no jurisdiction to entertain the petition according to the Act under which admittedly the parties were married. Secondly, irretrievable breakdown of marriage is not one of the grounds recognised by the Act for dissolution of marriage. Hence, the decree of divorce passed by the foreign court was on a ground unavailable under the Act.
>
> 16. Clause (b) of Section 13 states that if a foreign judgment has not been given on the merits of the case, the courts in this country will not recognise such judgment. This clause should be interpreted to mean (a) that the decision of the

foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the court either in person or through a representative for objecting to the jurisdiction of the court, should not be considered as a decision on the merits of the case. In this respect the general rules of the acquiscence to the jurisdiction of the court which may be valid in other matters and areas should be ignored and deemed inappropriate.

17. The second part of clause (c) of Section 13 states that where the judgment is founded on a refusal to recognise the law of this country in cases in which such law is applicable, the judgment will not be recognised by the courts in this country. The marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and no other law. When, therefore, a foreign judgment is founded on a jurisdiction or on a ground not recognised by such law, it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in this country. For the same reason, such a judgment will also be unenforceable under clause (f) of Section 13, since such a judgment would obviously be in breach of the matrimonial law in force in this country.

20. From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

21. The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to bypass it by subterfuges as in the present case. The rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction and merits based variously on domicile, nationality, residence - permanent or temporary or ad hoc, forum, proper law etc. and ensuring certainty in the most vital field of national life and conformity with public policy. The rule further takes account of the needs of modern life and makes due allowance to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and servile rule that wife's domicile follows that of her husband and that it is the husband's domiciliary law which determines the jurisdiction and judges the merits of the case.

22. Since with regard to the jurisdiction of the forum as well as the ground on which it is passed the foreign decree in the present case is not in accordance

> with the Act under which the parties were married, and the respondent had not submitted to the jurisdiction of the court or consented to its passing, it cannot be recognised by the courts in this country and is, therefore, unenforceable." (underlined for emphasis)

17. A close analysis of para. 20 leaves no manner of doubt that the major premise or what we may call the rule which is clearly statutory in nature with reference to both Section 13 CPC and Section 13 HMA, that if a foreign Court enters upon a matrimonial action brought by a Hindu husband against a Hindu wife married under the Hindu Law, then both the jurisdiction and grounds have deservedly to be in accordance with HMA. Here, the word jurisdiction refers to the right, power, as well as authority to interpret and implement the law, or simply put in a nut shell, the authority and power to decide a lis. Court jurisdictions are limited by physical boundaries as well as by subject matter. The original jurisdictional court in the present case by all means is the court of the District Judge exercising territorial jurisdiction in India and the grounds on which the action can be brought, must be one which are mentioned in Section 13 of HMA. But that is not the end of the matter. There can be cases where parties confer jurisdiction on the foreign Court and the said Court will assume jurisdiction available to the Matrimonial Court in India but would remain confined to adjudicate the action in accordance with the matrimonial law of the parties i.e. HMA and the grounds available therein. The legal principle being that when a Hindu couple tied by the nuptial knot according to Hindu rites travel abroad with intention to settle down and reside there to set up matrimonial home, they carry their personal laws on their back, off loading it in a foreign court for adjudication in the event parties intend to litigate for dissolving the marriage, mutually or by contest on one or more of HMA recognised principles. A foreign Court can then grant a valid decree of dissolution of marriage but the adjudication must be upon one of the available grounds in the Indian law. Since irretrievable breakdown of marriage is not available in HMA, the twin test of forum jurisdiction and relief based grounds would remain unsatisfied and the foreign Court decree would not be binding in India nor recognized. From this major premise or fixed point anchored and rooted in Section 13 of both HMA and CPC, the exceptions carved out by the Supreme Court would need to be examined.

18. Admittedly, exceptions (i) and (ii) do not apply to the facts of this case and should not detain us except to understand their interconnectivity with the rule and exceptions. The controversy here centres around exception (iii) where the respondent consents to the grant of relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law between the parties. The word, "relief" and "grounds" has been employed in the major premise or what we may call the statutory rule. In exceptions (i) and (ii) the words "grounds" or "ground" have been used in the rule and also in exceptions (i) and (ii) but not in exception (iii). The word, "relief" has been used in the rule and in exceptions (i) and (iii) but not in exception (ii). The first exception talks of 'forum' where the respondent is domiciled or habitually and permanently resides and this is clarified by the conjunction "and" to mean that the "relief" is granted on a ground available under HMA. The second exception, as I see, falls in the category of cases contested by the respondent spouse based on grounds available under HMA. After such contest on one of the grounds mentioned in Section 13, the final decree though rendered by a foreign Court may be binding. Exception (iii) applies in cases which are not contested and are based on consent. It follows that when 'contest' and 'consent/s' are referable to grounds available under HMA, only then can relief flow. This is for the reason that there is no estoppel against the statute. What is meant by consent to the grant of relief even though the English Court's jurisdiction is contrary to HMA is the moot point presenting some difficulty. The rule in para. 20 confers and recognizes jurisdiction by assumption conferred on a foreign Court to act in accordance with the mandate of Indian matrimonial law. The Supreme Court chose not to use the word "grounds" in exception (iii) and this is how some ambiguity is felt after the heated debate on the interpretation of exception (iii) vehemently argued by the respective counsel and the learned amicus from many angles and prisms or points of view. It is, however, well settled that the words used in a judgment cannot be read as one would read words used by the legislature in enactments which latter have to be given their ordinary and plain meaning. In cases of

ambiguity in the statutory rule and of the words used by the Parliament, then the court can step in to harmonise the provisions in a way which is in consonance with the objects and reasons for which the Act was passed and to further the intention of the law. If we were to read exception (iii) in isolation as interpreted by Mr.Bedi appearing for the husband, it would destroy the rule itself, the rule as delineated in Y. Narasimha Rao itself in para. 20 and the foreign Court would wrongly have assumed jurisdiction in passing a decree of dissolution of a Hindu marriage de hors the grounds available in HMA on which the relief was not sought. It is another matter whether it is granted or denied on merits. There is a difference between the words "relief" and "jurisdiction" of the "forum" in exception (iii). Even in the rule, the forum has no jurisdiction but is assumed to have one when it acts on a principle permitted by Section 13 HMA to be the grounds for dissolution of marriage by a decree of divorce. It is for this reason the Supreme Court used the word "may" when it observed while carving out the three exceptions that the "exceptions to this rule may be as follows". To my mind, if any other interpretation is placed on the word 'relief'' in exception (iii), it may result in grant of an illegal decree of dissolution of marriage made available to a party on the ground of irretrievable breakdown of marriage which is an impermissible ground of divorce not so far heralded into the Hindu law of marriage. Exception (i) no doubt gives sufficient latitude to a foreign court to grant matrimonial relief on foreign soil to a Hindu seeking divorce from Hindu spouse in accordance with HMA principles. Exception (ii) requires voluntary submission to foreign jurisdiction but relief is contested on HMA grounds. Exception (iii) is consent based for relief to the respondent but not to the petitioner in forum conveniens; "although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties". When the Supreme Court carved out this last exception it avoided introducing the word 'grounds'. If it were employed, the meaning then would have admitted no further debate and full effect would have to be given to the declaration under Article 141 of the Constitution of India and for this Court to act in aid. However, since an exception cannot be seen to obliterate the rule itself or to rewrite it, then what the Supreme Court, in my humble view, in fact meant was a consent based decree obtained on foreign soil on HMA grounds and not otherwise. Therefore, HMA law would have to be read into exception (iii) to align it with the rule and not create a new rule since then it would not qualify as an exception to a rule. Reading the exception in isolation, will, in my considered view, be in violation of the rule itself. Thus, in cases of contested and consented decrees both would suffer HMA standards, failing which, the foreign court will be overstepping Parliamentary mandates in India and the decrees so obtained cannot be recognised in India unless falling in exceptions (i) and (ii). This is more so, as I see, when exception (i) talks neither of contest nor consent. Otherwise, there would hardly be any visible distinction between exception (i) and exception (iii) because even in exception (i) the assumed jurisdiction of the foreign court was not in accordance with the provisions of the matrimonial law of the parties or the relief granted was not in accordance with the matrimonial law under which the parties are married. This would be the 'just and equitable' rule to follow for the protection of women who are the most vulnerable sections of society as observed in para. 21 of Y. Narasimha Rao itself. Besides, consent to a foreign decree not questioned or litigated in court by parties makes no lis and remains good till it lasts. However, this is not a matter of law but of personal choice where the arms of law may not reach. But consent itself is a question of evidence if the mode and manner in which it was given is taken to a court of law for determination.

19. It was to guard against such eventualities besetting transnational marriages among migrating Hindu couples, the overseas dispora of Hindus and its expatriate community living abroad while retaining domicile in India as per the provisions of HMA and facing matrimonial divorce proceedings or threatened by foreign court decrees, ex parte, contested or by consent that the Supreme Court in Neerja Saraph v. Jayant V. Saraph, 1995(1) R.R.R. 74 : 1994 (6) SCC 461 a few years later cautioned, observed and hoped as follows:-

> "But the rule of domicile replacing the nationality rule in most of the countries for assumption of jurisdiction and granting relief in matrimonial matters has resulted in conflict of laws. What is this domicile rule is not necessary to be gone into. But

feasibility of a legislation safeguarding interests of women may be examined by incorporating such provisions as-

(1) No marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court;

(2) Provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.

(3) The decree granted by Indian courts may be made executable in foreign courts both on principle of comity and by entering into reciprocal agreements like Section 44-A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court.

The appeals are disposed of accordingly. Any observation made shall not be taken as expressing of any opinion when the case is decided on merits."

20. Other than Neerja Saraph's case (supra), the learned amicus curiae has placed reliance on paragraphs 14, 19, 20, 28 to 30 of the judgment of the Supreme Court rendered in Sondur Gopal v. Sondur Rajini, 2013(3) R.C.R.(Civil) 979 : 2013(4) Recent Apex Judgments (R.A.J.) 615 : 2013(7) SCC 426 after noticing the provisions of section 1(2) HMA in which it has been laid down:-

"14. Bearing in mind the principle aforesaid, when we consider Section 1(2) of the Act, it is evident that the Act extends to the Hindus of whole of India except the State of Jammu and Kashmir and also applies to Hindus domiciled in India who are outside the said territory. In short, the Act, in our opinion, will apply to Hindus domiciled in India even if they reside outside India. If the requirement of domicile in India is omitted altogether, the Act shall have no nexus with India which shall render the Act vulnerable on the ground that extra-territorial operation has no nexus with India. In our opinion, this extra-territorial operation of law is saved not because of nexus with Hindus but Hindus domiciled in India.

19. Section 2(1) provides for the application of the Act. The same reads as follows :-

2. Application of Act.- (1) This Act applies -

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed."

20. This section contemplates application of the Act to Hindu by religion in any of its forms or Hindu within the extended meaning i.e. Buddhist, Jaina or Sikh and, in fact, applies to all such persons domiciled in the country who are not Muslims, Christians, Parsi or Jew, unless it is proved that such persons are not governed by the Act under any custom or usage. Therefore, we are of the opinion that Section 2 will apply to Hindus when the Act extends to that area in terms of Section 1 of the Act. Therefore, in our considered opinion, the Act will apply to Hindu outside the territory of India only if such a Hindu is domiciled in the territory of India."

> 28. ...For all these reasons, we are of the opinion that both the husband and wife are domicile of India and, hence, shall be covered by the provisions of the Hindu Marriage Act, 1955. As on fact, we have found that both the husband and wife are domicile of India, and the Act will apply to them, other contentions raised on behalf of the parties, are rendered academic and we refrain ourselves to answer those.
>
> 29. In the result, we do not find any merit in the appeal and it is dismissed accordingly but without any order as to costs.
>
> 30. In view of our decision in 2013(3) R.C.R.(Civil) 979 : 2013(4) Recent Apex Judgments (R.A.J.) 615 : Civil Appeal No. 4629 of 2005 (Sondur Gopal v. Sondur Rajini) holding that the petition filed by the appellant for judicial separation and custody of the children is maintainable, we are of the opinion that the writ petition filed by the respondent for somewhat similar relief is rendered infructuous. On this ground alone, we allow this appeal and dismiss the writ petition filed by the respondent." (underlined for emphasis)

21. The next reliance of the learned amicus is on the following decisions of the Supreme Court, Bombay High Court and of Delhi High Court : -

> The Delhi High Court in 2013(4) R.C.R.(Civil) 615 : CRP No. 148 of 2011, Pritam Ashok Sadaphule v. Hima Chugh decided on 22nd January, 2013 has held as follows : -
>
> "13. It is admitted position that both the parties are Indians and marriage between them was solemnised at New Delhi according to Hindu rites and ceremonies and both are governed by Hindu Marriage Act, 1955. Their marriage has been dissolved by Ilford County Court in UK on the ground of having been broken down irretrievably which is not a ground for divorce under the Hindu Marriage Act. The Supreme Court in Y. Narasimha Rao and Ors. v. Y. Venkata Lakshmi and Anr. (supra) has already held that foreign decree of divorce granted on a ground which is not recognised in India.
>
> 16. The reliance placed by learned counsel for the petitioner on the judgment of Harbans Lal Malik v. Payal Malik (supra), is of no help to him. The facts of the said case are entirely different. The learned trial court has also considered the judgment of this court in Harmeeta Singh v. Rajat Taneja reported in 2003 (2) R.C.R.(Civil) 197 : (2003) DMC 443 and Mrs. Veena Kalia v. Dr. Jatinder Nath Kalia and anr reported as 59 (1995) Delhi Law times 635 in coming to the conclusion that decree of dissolution of marriage granted by the Ilford County Court, Essex, UK cannot be recognised as the facts of the case fall within the purview of the exceptions of Section 13 of CPC. In view of the above discussion, no illegality is seen in the impugned order which calls for interference of this court. Petition is dismissed."

The Delhi High Court in para. 18 of the Judgment in Harmeeta Singh v. Rajat Taneja, 2003 (2) RCR (Civil) 197, has ruled as follows:

> "18. .. In the event that the marriage is dissolved by a decree in America, in consonance with principles of private international law which are embodied in Section 13 of the Civil Procedure Code, 1908, inter alia, this decree would have to be confirmed by a Court in this country. Furthermore, if the Defendant (Husband) were to remarry in the United States of America on the strength of the Decree of Divorce granted in that country, until this Decree is recognised in India he would have committed the criminal offence of bigamy and would have rendered himself vulnerable to be punished for bigamy. The confusion would be confounded insofar as the parties are concerned."

The Bombay High Court in Navin Chander Advani v. Leena, 2005(3) R.C.R.(Civil)

446 : 2005 (2) HLR 582, laid down:

> "2. . Thus, from reading these averments it appears that the husband and wife both are Indian citizens, domiciled in India. However, they have performed their marriage according to Hindu rites on 19th July, 1998 in U.S.A. Let the fact as it is what we find that since the parties are Indian citizens and domiciled in India, the courts in India will have jurisdiction. The family court has jurisdiction to deal with the matters under the Special Marriage Act and equally under the Hindu Marriage Act. It has even jurisdiction to deal with matrimonial matters where the parties are Muslims. Except, the Parsi Marriage Act for all other marriages the Family Court is having jurisdiction. While deciding the matter the Family Court is only expected to look into personal law of the parties."

Again the Delhi High Court in Monia Khosla v. Amardeep Singh Khosla, AIR 1986 Delhi 399, observed:

> "11. It is well settled that strong proof is required for the purposes of establishing that the domicile of origin has been abandoned and a new one has been acquired. For this purpose, the best evidence, in fact the only evidence, during the life time of a person who is said to have abandoned his domicile of origin, would be the evidence of such person, the respondent husband. There was no evidence in this case before the Additional District Judge by the husband. The proceedings were ex parte. There was no suggestion and no question was put to the wife that the domicile of origin of the husband had been abandoned. Soon after the marriage the husband had declared his intention of the Registrar of Marriages that his intention was to retain D-249, Defence Colony, New Delhi, as his permanent home. In view of this declaration before an authority functioning under the Hindu Marriage Act strong evidence was required from the husband to say that he had abandoned the Indian Domicile which is suggested by the name he bore, a name which would be borne by a person born in India. There was no evidence that a Canadian Passport had been acquired by the husband.
>
> 12. In this view of the matter I set aside the finding of the Additional District Judge that the domicile of the respondent husband was not an Indian domicile, and therefore, the court had no jurisdiction to try this matter, in view of Section 1(1) of the Act."

The Supreme Court in Vishnu Dutt Sharma v. Manju Sharma, 2009(2) R.C.R. (Civil) 506 : 2009(2) Recent Apex Judgments (R.A.J.) 542 : JT 2009 (7) SC 5, laid down the following dicta:

> "10. On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.
>
> 11. Learned counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned counsel for the appellant."

(underlined for emphasis)

Again the Supreme Court in Neelam Kumar v. Dayarani AIR 2011 SC 193, held as follows:

> "13. We are not impressed by this submission at all. There is nothing to indicate that the respondent has contributed in anyway to the alleged breakdown of the marriage. If a party to a marriage, by his own conduct brings the relationship to a point of irretrievable breakdown, he/she cannot be allowed to seek divorce on the ground of breakdown of the marriage. That would simply mean giving someone the benefits of his/her own misdeeds. Moreover, in a later decision of this Court in Vishnu Dutt Sharma v. Manju Sharma 2009(2) R.C.R.(Civil) 506 : 2009(2) R.A.J. 542 : (2009) 6 SCC 379, it has been held that irretrievable breakdown of marriage is not a ground for divorce as it is not contemplated under section 13 and granting divorce on this ground alone would amount to adding a clause therein by a judicial verdict which would amount to legislation by Court. In the concluding paragraph of this judgment, the Court observed :
>
> "If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts." (underlined for emphasis)

22. Based on the aforesaid judgments, to sum up his submissions in the special facts and circumstances of the case, learned amicus has the following to say : -

> 1. "that interpreting paragraph 20 of the judgment of the Apex Court in Y. Narasimha Raos case cited above, it may be humbly submitted that the present matter does not fall within the ambit of the principle stated by the Apex Court in the aforesaid judgment that "the jurisdiction assumed by the Foreign Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married". The requirement that the matrimonial action is based on the ground available in the matrimonial law under which the parties are married, when the respondent consents to the grant of the relief, is squarely attracted to the case. Hence, the non applicability of the principle is attracted in the facts of the present case and since there is no adjudication by the English Court of the matter on merits as also because the English Divorce is based on a ground not available under HMA, the non applicability clause would be per se attracted rendering the judgment of the English Court unacceptable under Indian law. If however, the petitioner herein alleges to the contrary and can prove otherwise, he would have to establish the same by appropriate pleadings duly supported by cogent evidence before the District Judge, Panchkula now adjudicating the matter. No summary procedure can be sought to be invoked to by pass this determination.
>
> 2. "The Judgment and decree of divorce of the English Court has to be tested on the anvil of Section 13 CPC which provides as to when a foreign judgment shall not be conclusive. In so far the present case is concerned, Section 13 (b) and Section 13 (c) CPC are attracted to the facts of the present case. As per the Judgment of the Apex Court in Y. Narasimha Raos case cited above, interpreting Section 13 (b) CPC, the decision of the foreign Court should be on a ground available under law of marriage of the parties and the decision should be as a result of contest between the parties. Furthermore, the judgment in Y. Narasimha Raos case also holds while interpreting Section 13 (c) CPC that where the judgment is founded on a refusal to recognise the law of this Country, the Judgment will not be recognised by Courts in India. Since the judgment of the English Court, per se, can be stated to be in breach of the matrimonial law in force in India, the decree of divorce passed by the English Court on the ground of irretrievable breakdown of marriage, cannot be a bar to prevent an adjudication by a Court of competent jurisdiction under the HMA. Therefore, the

impugned order of the District Judge, Panchkula cannot be said to suffer from any infirmity.

3. "On another stream of thought, it may be stated that both parties are Hindus by religion, Indians by nationality and have a permanent domicile in India. Following the dictum of the Apex Court in Sondur Gopals case settled in 2013, it can be safely stated that the HMA will apply to parties in the present case. The parties were married according to HMA and have a permanent domicile of India. Even viewed from this angle, it would be difficult to stretch the application of English law of divorce to the parties who are Hindus by religion and have a permanent domicile in India. Moreover, as rightly observed by the District Judge in the impugned order, all the issues involved would need determination by appropriate pleadings and recording of evidence. Consequently, any alleged ground of lack of jurisdiction cannot be summarily dismissed in an application under Order 7, Rule 11 CPC without any pleadings on record. Therefore, there is no merit, at the present stage in the contentions of a summary dismissal of the divorce petition before the District Judge which will require adjudication.

4. "As a last concluding submission and suggestion the impugned order passed by the District Judge, Panchkula rightly requires determination upon pleadings and evidence of parties to test the applicability of Section 13 CPC to the facts of the case .Unless and until, pleadings are put before the District Judge and the matter is examined on merits after parties are afforded opportunity to lead evidence as to whether the case falls under Section 13 CPC or not, no summary dismissal of the alleged relief sought by the present petitioner is possible. All the contentions advanced by the present petitioner will be required to be put on the anvil for being established by pleadings to be corroborated by cogent testimony. A summary process for such adjudication is not possible. If the present petitioner alleges that his averments be accepted, they have to be first proved. It is accordingly, submitted that until and unless pleadings are placed on record and are substantiated by evidence of parties, it does not appear that the impugned order of the District Judge, Panchkula dated 5.4.2013 seems to suffer from any infirmity."

23. There is merit in the submissions of the learned amicus curiae. I accept them as fair, reasonable and pragmatic. An adjudication cannot be foreclosed simply on account of presence of the foreign court decree. In the present case moreso as both the parties pursued parallel matrimonial reliefs in different jurisdictions thereby giving rise to conflict on the issue of consent. Accordingly, it was imperative to resolve the issues arising out of such a consent and settle the matter. For the guidance of the courts below and on the valuable suggestions of the learned amicus, which after much thought and deliberation and by weighing all pros and cons emerging from the illuminating debate are accepted by this Court as workable solutions for trial courts to follow when confronted by foreign court matrimonial decrees produced within the jurisdiction of this Court in order to safeguard the interests particularly of Hindu women married to NRIs living in India and abroad.

24. These principles are summarised for guidance of matrimonial courts functioning within the territories over which this court exercises jurisdiction but with a word of caution that they should be applied on a case to case basis while dealing with applications under Order 7, Rule 11 , CPC in the context of HMA and section 13 CPC as it is not prudent to lay down any strait jacket formula of universal application and some free play in the joints of matrimonial courts should be left while dealing with different fact situations presented before them:-

(i) If the spouse aggrieved by the foreign matrimonial decree has not submitted to the jurisdiction of the foreign court or consented to the passing of the foreign Court judgment, it ought not to be recognised being unenforceable under Section 13 CPC. This position of law ought to be applied to the facts of the individual case.

(ii) There may be occasions that a spouse relying upon the judgment of a foreign matrimonial court, upon receipt of a summon or notice from a court of competent jurisdiction under the HMA, may not choose to file a written statement in response to a petition seeking a matrimonial cause under HMA in Punjab, Haryana or Chandigarh. Instead, the contesting spouse may prefer to move an application under Order 7, Rule 11 CPC seeking to rely upon or invoke the provisions of Section 13 CPC. Thus, it may be contended before the court of competent jurisdiction under the HMA that since the matrimonial action between the parties has already been decided and concluded by a Court in the foreign jurisdiction, the adjudication in the matter in issue between the same spouses based on the same matrimonial cause of action is barred by the principle of res judicata and spouses are estopped in law from agitating the same again.

(iii) It is respectfully contended that wherever both or any spouse arrayed in a matrimonial cause in a matrimonial action under HMA contest, dispute, question or oppose any above such application under Order 7, Rule 11 , CPC involving interpretation of the principles laid down under Section 13 CPC thereby necessitating requirement of detailed pleadings and evidence of spouses, no summary decision may seem possible to decide the matter in the preliminary stage.

(iv) In the above situation, there may also be circumstances involving application of issues of domicile as also applicability of Sections 1 and 2 of the HMA regarding extra territorial application of the provisions of HMA. Determination of these issues may also require parties to put their pleadings and testimony as well on the record of the Court of competent jurisdiction under the HMA.

(v) The application of the provisions of the CPC finding mention under Section 21 HMA, the Court of Competent jurisdiction under the HMA in Punjab, Haryana or Chandigarh may then be guided by the procedural law of pleadings contained in the Orders and Rules of the CPC and Punjab & Haryana High Court amendments, if any, for further proceedings in the matter. Accordingly, filing of a written statement, counter claim, rejoinder and/or other pleadings may be necessitated for having the factual matrix on record leading to the settlement of issues under Order 14 CPC which can only be framed upon allegations made by parties to be read along with the contents of documents produced by spouses. Hence, this procedure may be necessary to be adopted to decide upon the warring claims of spouses relying on averments in support or against the judgment of the foreign matrimonial court between the parties.

(vi) Based on the above procedural requirements, the Court of competent jurisdiction under the HMA may then examine the process, pleadings, grounds and other details in the passing of the judgment/decree of the matrimonial court of foreign jurisdiction to test it on the anvil of Section 13 CPC and based on the principles laid down by the Apex Court in Y. Narasimha Rao v. Y. Venkata Lakshmi, 1991 (3) SCC 451 and exception (iii) as understood in the present opinion. Hence, in the event of a contest, dispute, opposition to the applicability of the foreign matrimonial judgment in the Indian jurisdiction, a summary disposal may not be possible. To do complete justice to both the spouses and to ensure that prejudice has not been caused to either of them as also that issues of maintenance, settlement of matrimonial property, child custody etc. arising in India have been completely settled between spouses based on provisions of HMA, the Court of competent jurisdiction under the HMA may examine the matter on the lines suggested above.

(vii) Thereafter, if the issue relating to the jurisdiction of Competent Court under the HMA as also any bar to the matrimonial cause created by any existing law appears to be established, the matrimonial court in Punjab, Haryana or Chandigarh may upon the facts and circumstances of the case take an appropriate decision under Order 14, Rule 2 CPC whether it needs to pronounce judgment on all issues or decide the issue of jurisdiction or maintainability as a

preliminary issue. In such circumstances, the Competent Court under the HMA may after forming an opinion take an appropriate decision on the facts of the case as to whether the issue of jurisdiction or maintainability is to be decided as a preliminary issue or pronounce judgment together on all the issues. Accordingly, based on the individual facts and circumstances, the Court ought to take a decision whether to decide the preliminary issue of jurisdiction or maintainability or postpone the settlement of other issues after such preliminary issues has been determined.

25. For the reasons recorded above, this petition is dismissed as I find no legal infirmity in the impugned order passed by the learned District Judge, Panchkula declining the application under Order 7, Rule 11 CPC. However, since the evidence has already been adduced by the parties, the learned District Judge, Panchkula would be free to pass final orders on the merits of the case and whether the grounds of divorce pleaded in the petition and available under Section 13 of the HMA are made out or not warranting grant or refusal of a dissolution of marriage between the parties and other incidental and ancilliary matters thereto. However, nothing said in this order, touching upon the merits of the case, would be taken as an expression of opinion or would influence the trial Court in any manner since purely legal issues have been attempted to be resolved in this opinion with respect to applicability and interpretation of exception (iii) in paragraph 20 of Y. Narasimha Rao and of Order 7, Rule 11 , CPC.

A copy of this order be brought to the notice of the matrimonial courts in Punjab, Haryana and Chandigarh for guidance.

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This judgement ranked 1 in the hitlist.

Zuber Ahmed v. Union of India (P&H) : Law Finder Doc Id # 691434

2015(3) S.C.T. 385 : 2015(3) RSJ 609

PUNJAB AND HARYANA HIGH COURT

Before :- Rajiv Narain Raina, J.

Civil Writ Petition No. 15348 of 1999. D/d. 30.4.2015.

Zuber Ahmed - Petitioner

Versus

Union of India and others - Respondents

For the Petitioner :- Surinder Sharma, Advocate.

For the Respondents :- Puneeta Sethi, Addl. C.G.S.C., Anil Malhotra, Advocate, Amicus Curiae, R.S. Cheema, Senior Advocate, Special Amicus Curiae, with Anil Malhotra, Advocate.

A. Central Reserve Force Act, 1949, Section 16, 10(n) - Central Reserve Force Rules, 1955, Rule 27(a) - Circumstantial evidence - Conviction - Punishment - Plea of false implication - Finding by the trial Court that since the petitioner did not lead defence evidence to rebut false implication in the case this is material circumstance against him - Held that prosecution has to depend on its own strength to bring home the charge and not to depend on the strengths or weaknesses of the case of the accused when law permits him a right of silence - Burden of proving guilt in common law cannot be shifted on an accused who is not to prove his innocence - Mere suspicion however strong cannot take the place of proof.

[Para 19]

B. Central Reserve Force Act, 1949, Section 16, 10(n) - Central Reserve Force Rules, 1955, Rule 27(a) - Conviction - Sentence - Punishment - Dismissal - Doctrine of necessity - Section 16 of the Act empowers the Central Government to vest powers of a criminal court on either the Commandant or the Assistant Commandant to deal with offences committed by a member of the Force - Disciplinary Authority is Commandant - In case at hand the Commandant acted as criminal Court and convicted and sentenced the petitioner and also acted as Disciplinary Authority and imposed punishment of dismissal from service - In view of Section 16 of the Act Assistant Commandant could have acted as criminal Court - Doctrine of necessity cannot be applied in the face of availability of choices, one to be Court the other to act as the designated disciplinary authority under the rules.

[Para 25]

C. Constitution of India, 1950 Articles 14, 16, 21 and 226 Central Reserve

Force Act, 1949, Section 16, 10(n) - Central Reserve Force Rules, 1955, Rule 27(a) - Conviction - Sentence - Punishment - Dismissal - Writ jurisdiction - No appeal filed against the order of conviction and Sentence - Order of dismissal challenged by filing writ petition - Held that while examining the punishment of dismissal from service imposed on the petitioner, based on conviction under the Act, 1949, High Court can go into the basis of such a punishment in proceedings under Article 226 of the Constitution of India which itself rests on a conviction and sentence which are wholly without jurisdiction.

[Paras 45 and 72]

D. Constitution of India, 1950 Articles 14 and 226 Central Reserve Force Act, 1949, Section 16, 10(n) - Central Reserve Force Rules, 1955, Rule 27(a) - Conviction - Sentence - Punishment - Dismissal - Judicial review - Dismissal order passed without assigning any reason for dispensing with the enquiry and that too on a non-existent ground as also dismissing the petitioner on a ground which is not a conviction on a criminal charge, does not stand the test of law and deserves to be set aside.

[Para 48]

E. Central Reserve Force Act, 1949, Section 16, 10(n) - Central Reserve Force Rules, 1955, Rule 27 - Conviction - Sentence - Punishment - Dismissal - Rule 27 of the Rules provides the procedure for award of punishment and is the code on disciplinary proceedings - A formal departmental enquiry is mandatory - Since the charge was not such a grave that could await disciplinary proceedings or brook no delay - Commandant as trial Court also did not think the offence/misconduct serious enough to impose anything beyond simple imprisonment till the rising of the Court.

[Para 53]

F. Central Reserve Force Act, 1949, Section 12 - Central Reserve Force Rules, 1955, Rule 27(cc), 27(1) - Constitution of India, 1950 Articles 14, 16, 21, 311 (2) Disciplinary proceedings - Dispensing with enquiry - Dismissal - Section 12 of the Act is directory in nature and not mandatory - Dismissal from service should normally follow formal departmental enquiry in terms of Rule 27(1) - Distinguishing feature in the CRPF Act is the use of word `may' in Rules 26(cc) which gives a discretion to the punishing authority, whereas Article 311(2) prescribe a mandatory `shall' leaving no discretion to the punishing authority - Invoking of Rule 27(cc) prescribing the use of word, may in the light of the interpretation of Article 14, 16 and 21 of the Constitution, would require reasons to be recorded in exercising any discretion dispensing with an enquiry if any of the three contingencies of this rule when are invoked for dismissing the services of a Member of the Force.

[Paras 75 and 89]

G. Central Reserve Force Act, 1949 - Central Reserve Force Rules, 1955 - Constitution of India, 1950 Article 50 Criminal Procedure Code, 1973 - Separation of Judiciary from executive - Commandant given power of Criminal Court as well as the Disciplinary authority - Directed that an appropriate reference be made to the Law Commission of India suggesting suitable amendments to the CRPF Act, 1949 and the CRPF Rules, 1955 so that these provisions can be brought at par with the provisions of the Criminal Procedure Code and the Constitutional mandate under Article 50 of the Constitution stipulating a legal mandate to separate the judiciary from the Executive in the public services of the State.

[Paras 84 and 88]

H. Central Reserve Force Act, 1949, Section 12 - Central Reserve Force Rules, 1955, Rule 27(a), 36 - Conviction - Sentence - Simple imprisonment till rising of the Court - Punishment - Dismissal - Dispensing with enquiry - On cumulative reading of Section 12(1) and 12(2) of the Act and Rules 27(a) and 36(a) and (b) of the Rules it flows that actual physical imprisonment in a prescribed prison is a condition precedent for dismissal from service - Prescribed prison is the nearness jail but not the Court room where the petitioner was sentence to simple imprisonment till the rising of the Court.

[Para 92]

I. Constitution of India, 1950 Article 226 Central Reserve Force Rules, 1955, Rule 29 - Writ jurisdiction - Alternative remedy - Plea that petitioner had remedy of Revision under Rule 29 which he did not avail and writ petition not maintainable - Held that it is too late in the day to consider such a defence plea after admission of the matter - No period is prescribed in Rule 29 within which a revision is to be decided - An alternative remedy is not an absolute bar to the maintainability of a writ petitioner, when the authority has acted wholly without jurisdiction or in abuse of authority or in its colourable exercise of power.

[Para 93]

J. Central Reserve Force Act, 1949, Section 10(n), 11 - Central Reserve Force Rules, 1955, Rules 27(a), 36 - Conviction - Sentence - Simple imprisonment till rising of the Court - Punishment - Dismissal - Dispensing with enquiry - Charge framed makes out an offence under Section 10 (n) of the Act by alleging that the petitioner had caught hold of the mouth of Smt `G' with mala fide intention - Order of conviction and sentencing dated only holds the petitioner guilty of swapping places of duty without any other alleged charge being proved or established - Held that the petitioner was at the most guilty of neglect of duty or remissness of Section 11 neither contemplates a trial nor award of any sentence of imprisonment - Order of conviction and sentence is wholly without jurisdiction and contravenes the provisions of the CRPF Act as the entire process of trial and conviction is vitiated - Therefore, it deserves to be struck down unconditionally.

[Para 94]

K. Constitution of India, 1950 Articles 14, 16 and 226 Central Reserve Force Act, 1949, Section 10(n), 11 - Central Reserve Force Rules, 1955, Rule 27(a), 36 - Conviction - Sentence - Simple imprisonment till rising of the Court - Punishment - Dismissal - Dispensing with enquiry - Discrimination - Moulding of relief - Even though a departmental enquiry and not judicial trial was recommended against the petitioner - 6th respondent chose to act excessively - As against Constable `H' a full-fledged departmental enquiry was conducted by the 6th respondent - Guard Commander L/NK `U' and Sub Inspector `M' were awarded punishment of severe censure - Under what circumstances, and on what basis the 6th respondent proceeded to discriminate against the petitioner is not known - No reasons assigned or forthcoming from record as to why no departmental enquiry was held against the petitioner in the very same case where the same was done against Constable `H' - No reasons were recorded in dispensing with such a departmental enquiry - Impugned action of the 6th respondent in passing the orders at Annexures P-4 and P-5 and the appellate order, at Annexure P 6 in not noticing this injustice are contrary to Articles 14 and 16 of the Constitution deserve to be set aside - Petitioner would be deemed to have retired on completion of 20 years' service counted from the date of discharge thereby entitling the petitioner therein to qualifying service for pension and pensionary benefits but without any arrears of pay or benefit of seniority - This order will not preclude the CRPF from reinstating the petitioner to service if it is still feasible or possible to do

so.

[Paras 97 and 98]

Cases Referred :

Bhagat Ram v. State of Himachal Pradesh, A.I.R. 1983 SC 454.

Bhaskar Chandra v. Union of India, 2012 Lab.I.C. 4583.

Charanjit Lal Chowdhury v. The Union of India, AIR 1951 SC 41.

Commandant, 22 Battalion, CRPF Srinagar v. Surinder Kumar, 2012(1) S.C.T. 228 : (2011) 10 SCC 244.

Council of Civil Service Unions v. Minister for The Civil Service, (1984) 3 Weekly Law Reports 1174 (HL).

Des Raj Shanwal (Lt. Col.) v. Union of India, 2004 (1) SCT 191.

Ex. Sepoy Sube Singh v. Union Of India, 140 (2007) DLT 26.

Kartar Singh v. State of Punjab, 1994(2) R.C.R.(Criminal) 168 : (1994) 3 SCC 569.

Leela Ram v. Union of India, Writ Petition Civil No. 3357A of 2000.

M. Nagaraj v. Union of India, 2007(4) S.C.T. 664 : (2006) 8 SCC 212.

Major General H.M. Singh v. Union of India, 2014(2) S.C.T. 1 : (2014) 3 SCC 670.

Managing Director, ECIL, Hyderabad v. B. Karunakar, 1994(1) S.C.T. 319 : AIR 1994 SC 1074.

McNabb v. United States, 318 U.S 332.

Mohd Zakir v. Union of India, 1997(1) S.C.T 531 : 1996 (5) SLR 788.

Musser v. Utah, 92 L. Ed. 562.

P. Arvindan Ex Constable GD, CRPF v. Union of India, (2005) RD-AH 1385 : Civil Misc. Writ Petition No. 2997 of 2002. D/d. on 23.5.2015.

Radha Ram v. Municipal Committee, Barnala, 1983 PLR 21.

Ranjit Thakur v. Union of India, (1987) 4 SCC 611.

Rex v. Sussex Justices; Ex parte McCarthy, (1924) 1 KB 256 : (1923) All ER Rep 233.

Richard Grayned v. City of Rockford, 1972 SCC online US SC 157 : 408 US 104 (1972).

Shiv Narayan Singh v. Commandant 32 Bn, WP No. 10430 of 1992.

Shreya Singhal v. Union of India, 2015(2) R.C.R.(Criminal) 403 : 2015(2) Recent Apex Judgments (R.A.J.) 326 : WP (Crl.) 167 of 2012. D/d. 24.3.2015.

State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

Suresh Kumar Koushal v. NAZ Foundation, 2014(1) R.C.R.(Criminal) 286 : 2014 (1)

SCC 1.

Surinder Singh v. Union of India, 1999 (1) SCT 726.

Union of India v. Parma Nand, AIR 1989 SC 1185.

Union of India v. R.K. Sharma, 2001(4) S.C.T. 828 : AIR 2001 SC 3053.

Union of India v. Tulsiram Patel, AIR 1985 SC 1416.

JUDGMENT

Rajiv Narain Raina, J. - This writ petition is by Zuber Ahmed, an ex-constable of the Central Reserve Police Force against a punishment order dated March 19, 1993 inflicted by the Commandant, 84th Battalion, CRPF, Faridkot, Punjab dismissing him from service following an order passed earlier in the day awarding him sentence of simple imprisonment till the rising of the Court in a judicial trial held by the same Commandant-6th respondent concluding it in ten days. The sentence was imposed on the petitioner by the Commandant after trial by virtue of powers vested in him by the Central Government under s. 16 of the Central Reserve Police Force Act, 1949 read with GSR-43 (F) dated January 26, 1978 ('CRPF Act' for short) which authorised him to act as the Chief Judicial Magistrate to try the commission of offences committed by a member of the Force including the one under the residuary clause in sub-section (n) of s. 10 of the Act under which the petitioner was charged and tried for what in pith and substance amount to an attempt to molest and to outrage the modesty of a woman by leaving his call of duty for about 10 minutes by change of guard post with another constable though the charges are not exactly worded thus. This petition was admitted by the Division Bench on November 29, 2001 to be heard within one year but could not be for reasons beyond control of this Court in the face of mounting arrears of cases. Before he approached this Court the petitioner had already lost six years in pursuing his remedy in the Calcutta High Court only to be told at the end of the day that it lacked territorial jurisdiction in the matter. That is how he came to this Court in 1999 being the proper forum for vindication of his rights asserted against the CRPF for alleged wrongful dismissal from service in the year 1993 when the petitioner was a young constable aged about 24 years. His date of birth recorded in the dismissal order is December 14, 1967 which makes him about 48 years of age.

2. The Act reveals that S. 10 lists sixteen less heinous offences which invite imprisonment for a term which may extend to one year, or with fine which may extend to three months' pay, or with both. Under s.10 (n) a member of the Force is punishable if he:"is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline;" The sentence till the rising of the court was imposed on the petitioner for committing offences defined in s. 10 (n) of the Act vide judgment of conviction and sentence dated March 19, 1993 on the following charge:-

> "I, Pushkar Singh, Chief Judicial Magistrate, do hereby charge you Zuber Ahmed as follows:-
>
> Firstly- That you on 19.10.92 at about 2320 hrs. while on duty, left your duty place and entered in the house of Shri Kala Singh, Security aide of Shri P.S.Badal, Ex-Chief Minister of Punjab and caught hold of mouth of Smt Gurdev Kaur wife of Shri Kala Singh with malafide intention and ran away from the scene after hearing alarm from the children of Smt Gurdev Kaur and thereby, committed an offence punishable under s. 10(n) of CRPF Act, 1949 and within cognizance of this court. I, hereby direct that you be tried by me in this court on the above charge."

3. What followed was dismissal from service based on judgment of conviction on the charge framed by virtue of recording of finding of guilt and order of sentence of

imprisonment till the rising of the court. The Office Order dismissing the petitioner from service carried further burdens. The period of suspension from October 22, 1992 to March 19, 1993 was ordered to be treated as period not spent on duty. The pay and allowances were restricted to the subsistence allowance already drawn. The period described as desertion from November 16, 1992 to January 1, 1993 (56 days) was treated as dies non. However, no charge was framed against Zuber Ahmed for desertion from duty during any period including the period of suspension, which could have been a serious charge, if laid, on a member of the Force.

4. The statement of the history of facts, briefly put, are on the following lines: The petitioner was enrolled as a Constable in CRPF on April 30, 1987 and was allotted the 84th Battalion, CRPF. He served at different places in Pinjore and Jammu etc. and was, ultimately, posted to the 84th Bn., then stationed in Police Lines, Faridkot, Punjab. While posted on field duty at the CRPF Headquarters at Faridkot, the petitioner was deployed on guard duty to the private residence of Shri Parkash Singh Badal, the then former Chief Minister, Punjab to stand security and escort duty at his private residence in Chandigarh.

5. On the intervening night of 19th/20th October, 1992, the petitioner was deputed on guard duty at the front gate of the residence along with one Constable Himmat Singh posted on the fateful day to guard the backyard of the house. The case set up against the petitioner was that while the two guards were on duty from 2200 hours to 2350 hours, on the night of the occurrence, an unidentified person entered the servant quarters of one Kala Singh, a personal aide [in the charge framed on March 5, 1993 the nomenclature 'Security aide' is used] of the then ex-Chief Minister, Punjab who lived with his family in the servant quarters at the rear of the house. While the then ex-Chief Minister and Kala Singh were away on tour, it was alleged by Smt Gurdev Kaur wife of Kala Singh that a person whose face was covered had trespassed into her private family quarters and had tried to outrage her modesty by muffling her mouth and threatening her with dire consequences if she did not keep her mouth shut. She alleged that the intruder was in 'CRP dress' holding a rifle.

6. On October 22, 1992, the Commandant, 84th Bn., CRPF placed the petitioner, Constable Himmat Singh and Lance Naik U.N.Gaikwar, Guard Commander, also posted at the residence for security duty, under suspension in exercise of powers conferred by r. 27(a) of the CRPF Rules, 1955 in contemplation of departmental proceedings. A preliminary enquiry/investigation was ordered vide office order dated October 27, 1992 for misbehaviour/manipulation of records regarding incident dated October 19, 1992 with Smt Gurdev Kaur. It was conducted by Shri P. Sivanandan, Assistant Commandant, CRPF who went into the incident and found that on the intervening night of 19th/20th October, 1992, Constable Himmat Singh was on guard duty on the rear side of the house where Smt Gurdev Kaur lived with her family. The petitioner is alleged to have approached and requested Constable Himmat Singh for swapping duties for a few minutes, which were agreed to by Constable Himmat Singh and accordingly, they exchanged places for a while. The incident is timed to the period as said before from 2200 hours to 2350 hours. Both the guards allegedly reported the incident to their senior officer/s thereafter. When the petitioner reported the matter to his Platoon Commandant, his demeanour was recorded by the Force official as in a "...fearsome state of mind and was unable to speak due to fear of the consequences of the act committed by him, which would ultimately point out that he was the person who had entered the room of Shri Kala Singh with bad motives". The intention of Constable Himmat Singh in exchanging duties was seen as one without ill motive. However, it was found that he should not have done what he did without knowledge of his Guard Commandant. The then Platoon Commandant posted at the residence on that day/night was found to have concealed facts from his superiors and was said to have tried to hush up the matter. Till that time, nor thereafter was a CRPF police case or first information report under the criminal law registered on the incident against the petitioner.

7. The Commandant, 80th Bn. CRPF, Mr M.S. Sethi, who was not the petitioner's Commandant considered the preliminary enquiry report authored by Mr Sivanandan,

Assistant Commandant, and recommended dispassionately on November 13, 1992 that "No judicial trial is recommended as this will pave the way to unwanted publicity of the incident as well as there is a likelihood of tarnishing the fidelity of a woman through cross-examination etc". I should imagine that there was wisdom in this line of thinking. It was recommended by the officer that a departmental enquiry be conducted against the petitioner for gross negligence of duties in entering the house of Kala Singh with bad motive. Constable Himmat Singh was also recommended to be dealt with departmentally for swapping duties without permission of superiors. Constable Himmat Singh is said to have apologized to Smt Gurdev Kaur even though he was not at fault. Lance Naik U.N.Gaikwar was recommended to be absolved of the charges although he was posted on the spot as Guard Commandant but could not be imputed knowledge of the private arrangement between the two guards. It is the stand of the respondent CRPF in paragraph 7 of the written statement that the preliminary enquiry report was examined and considered by superior authorities who ordered departmental enquiry against the defaulters vide office order "dated 30.1.1992 except Constable Zuber Ahmed as he had deserted the Force. The petitioner reported at his own on 11.1.1993 after desertion of 56 days and he was tried judicially". The reason stated for departure from domestic enquiry was by assumption of acts of desertion which would have been rather serious in nature with respect to a member of the disciplined force. But the charge framed was not of desertion.

8. It is the further case that on the intervention of the Personal Assistant to the then ex-Chief Minister, Punjab on October 20, 1992 the matter was decided to be reported to the 84th Bn., being the petitioner's parent battalion. This is how the matter fell to the lot of the 6th respondent/Commandant who would later on sentence and dismiss the petitioner from service on the same day. On February 12, 1993 the Comdt. 84 Bn. CRPF passed an order on the preliminary enquiry report, recommending suitable disciplinary action against Constable Zuber Ahmed in accordance with the rules on the subject for his gross negligence for entering the house of Kala Singh with bad motive while on duty. It was as a result of the said preliminary enquiry report that Sub Inspector M.J. Kujur and Lance Naik U.N Gaikwar were awarded minor punishment of "Severely Censure" while the regular departmental enquiry was pending against Constable Himmat Singh, which ended in the revocation of his suspension w.e.f April 28, 1993 and infliction of the punishment of confinement to quarter guard for 28 days with forfeiture of pay and allowances for the period besides treating his suspension period not spent on duty. The mitigating factor in his case as recorded is: "The Constable has taken earnest efforts to avoid any bad name to the Force and apologized to Smt Gurdev Kaur, even though he was not at fault. This act had reduced the publicity to a great extend."

9. The petitioner was alleged to have confessed to entering the house of Smt Gurdev Kaur and of later asking for her pardon. He is alleged to have given a written admission of having committed the offence by way of a 'confessional statement'. The recommendation against holding a judicial trial and instead a departmental enquiry was not accepted by the Commandant, 84th Bn., CRPF, who decided to put the petitioner to judicial trial by invoking s.10 (n) in exercise of powers conferred by sub-section (2) of s.16 of the Act, 1949 read with GSR-43 (F) dated January 26, 1978. S.16 (2) empowers the Central Government to invest the Commandant or Assistant Commandant with the powers of a Magistrate to try an offence committed by a member of the Force punishable under the Act notwithstanding anything contained in the Code of Criminal Procedure. The Central Government has invested such power in the Commandant to act as the Chief Judicial Magistrate, duly authorised by law to convict and pass sentence of imprisonment in a prescribed place as by warrant of the regular criminal courts of the land. Then on, vide order dated March 5, 1993, the Commandant/Chief Judicial Magistrate framed charge against the petitioner which read that the petitioner had left his place of duty and had entered in the house of Smt Gurdev Kaur and caught hold of her mouth with mala fide intention and on an alarm raised by the children of Smt Gurdev Kaur, he ran away from the spot. Thereby, he committed an offence punishable under S. 10 (n) of the Act within the cognizance of that Court. Introducing the children of Smt Gurdev Kaur in the wording of the charge sheet, the handiwork of the Commandant/Chief Judicial magistrate, was perhaps ill

thought out being potentially sinister and insidious in their context and therefore Mr Sethi's advise I should think was the more practical in not creating a situation which might subject the lady's fidelity to the vagaries of cross examination when produced in the witness box in a criminal trial. The children were never produced at the trial. Be that as it may, the charge sheet was framed and served on Zuber Ahmed who pleaded not guilty on March 9, 1993 and claimed trial.

10. Mere acquaintance with the bare Act manifests that s. 10 prescribes less heinous offences while s. 9 enumerates the more heinous ones. S. 10 (n) of the Act prescribes that a member of the Force shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to 3 months or with both, if he is guilty of any act or omission which, though not specified in the Act, is prejudicial to good order and discipline. Ten days after claiming innocence by pleading not guilty the trial was rushed through concluding it by conviction. The petitioner was then 24 years of age and had put in about 5 years of service as a constable in the Force. Today he is about 48 years of age. What is used against the petitioner in recording judgment of conviction by the Chief Judicial Magistrate is a confessional statement in writing given when the preliminary fact finding enquiry was conducted.

11. The prosecution examined Constable Himmat Singh PW1, Lance Naik U.N. Gaikwar PW2, Sub Inspector M.J.Kujur PW3 while Smt Gurdev Kaur, the prime witness testified as PW4. The petitioner was not identified by Smt Gurdev Kaur in court. The statement of Smt Gurdev Kaur recorded on solemn affirmation during the trial in the petitioner's case titled Union of India v. Zuber Ahmed reads as follows:-

> "I, Gurdev Kaur W/o Shri Kala Singh, stay in the back portion in servant quarter of Shri P.S. Badal with my children. On 19.10.92 my husband had gone on duty along with Sh. P.S. Badal. On 19.10.92 night at about 2330 hrs, I felt that there is someone in my room. I saw one person with his mouth covered standing near t o my cot. H e did not touch me or tried to tease or manhandle me. Immediately my son also got up and raised an alarm. The man ran out. I or my son could not recognise the person. When this man was running, he had fallen down. After that I informed CPP Comdr present for Sh. P.S. Badal's Kothi protection. Next day morning around 0800 hrs S.I. came and enquired and narrated the whole story. Then around 1100 hrs on 19.10.92 S.I. brought 4 persons including who were on duty last night. I could not recognise nor any person as who had entered last night i n my room. Then I told Sub Inspector that whosoever had entered in my room should ask pardon so that I do not report the matter to Sh. P.S. Badal. After this S.I. told two persons who were on duty to ask pardon. On this both the sentry including Zuber Ahmed asked me the pardon. After that one CRP officer had come to enquire the matter.
>
> Read over, explained in the language understood by her and admitted correct."

12. The muffling 'squeezing' glossing given to the occurrence is mythical and stands belied by the statement on oath of Smt Gurdev Kaur herself that the man neither touched her nor teased her nor manhandled her in the room by the cot in the servant quarter. Though she deposed that the intruding man's 'mouth' was covered but she did not say that his head was also covered as is the view of the 6th respondent formed in the judgment of conviction. The confession or admission was clearly in the backdrop of pressure or duress seeking pardon on the condition of not reporting the matter to Sh. P.S. Badal himself as borne out from the deposition of Smt Gurdev Kaur in court. She sought pardon from the alleged culprits under veiled and extreme threat and on this insistence did the Sub Inspector ask the two persons [Constable Zuber Ahmed and Constable Himmat Singh] who were on duty to seek pardon anyhow. And if they did not confess to the crime/misconduct worse would follow, over which no one would have any control.

13. When the petitioner stepped into the witness box after conclusion of the prosecution evidence it is recorded by the 6th respondent in the trial proceedings that: "The prosecution has led certain evidence against you to the following effect what have

you to say about it?" The following questions inter alia were put to Zuber Ahmed by the Commandant/CJM though there is no evidence on record that the petitioner knew or was made aware of what was recorded in writing in English by the court or that he was made to understand it in the language known to him:-

> "Q1- That on 19.10.92, you were on sentry duty from 2200 hrs to 2359 hrs on the main gate of Shri Prakash Singh Badal Ex-C.M. Punjab at Chandigarh. At about 2320 hrs Ct. Himmat Singh who was on sentry duty from 2300 hrs to 0100 hrs of 20.10.92 at the rear of the kothi of Shri P.S. Badal, had come to you to have contact with another sentry and you had asked him to stand at your duty place and you left your duty place without any reason?
>
> Ans.1- It is incorrect. I had just gone in the back side of kothi as I was feeling dizziness.
>
> Q.2 - That on 19.10.92 at about 2320 hrs after leaving your duty place, you went to rear side of the kothi of Shri. P.S. Badal for about 10 minutes and entered in the house of Shri Kala Singh security aide to Shri P.S. Badal who was away from Chandigarh and squeezed the mouth of Smt Gurdev Kaur W/o Shri Kala Singh with some malafide intention and after hearing alarm from the children of Smt Gurdev Kaur you ran away from there and came to main gate?
>
> Ans.2- It is incorrect.
>
> Q.3- That upon interrogation by your guard Comdr and Pl. Comdr, you disclosed having left your duty place and having entered in the house of Smt Gurdev Kaur statement Ex-PA signed by you on 20.10.92 and another statement written in your own hand writing dated 20.10.92?
>
> Ans.3- It is incorrect. On 20.10.92 I had given in writing to save me."

14. A combined reading of the first question and its answer would reveal that when Constable Himmat Singh came to the front gate only then the petitioner left the sentry post as he was 'feeling dizziness'. It cannot be expected that at that moment the petitioner would seek permission to take a little rest when Constable Himmat Singh came as replacement on the alleged personal interchange of duty. The position may have been different had the petitioner left the front sentry post by abandoning it and would come later on to his post. Although in his statement, the petitioner did not depose or admit that he exchanged duty with Constable Himmat Singh.

15. On closing of the prosecution evidence the petitioner in his statement under s. 313 Cr.P.C. denied having given in writing any writing construable as a mean culpa of offence attributed to him and defended himself stating that he did not enter the house of Smt Gurdev Kaur nor had she recognised him as the intruder of her privacy. In this statement the petitioner also pleaded in defence that only after he left the 84th Bn. CRPF, Faridkot and during his absence, one Head Constable Ram Karan had incited Smt Gurdev Kaur to name him due to his personal quarrel with him. However, no defence evidence was led despite opportunity. But he had a right to keep silent and leave the prosecution to the prosecution.

16. There is no witness to the incident except to the extent of the deposition of Smt Gurdev Kaur and, therefore, the key prosecution witness who could not say with any absolute certainty as to who was the one who had tried to commit an offence upon her person. On his part Constable Himmat Singh deposed as follows at the trial :-

> "The accused CT Zuber Ahmed was also on duty from 2200 hrs to 2359 hrs on the main gate of Khoti. At abut 2320 hrs, I came to main gate to contact sentry CT Zuber Ahmed who was present there. CT Zuber told me that I should remain at main gate for some time to enable him to go behind in the lawn for sometime as he was feeling dizziness. After abut 8 to 10 minutes, I head some loud sounds

> from the back portion of Khoti. Immediately I saw CT Zuber Ahmed coming running to me. I asked him as what has happened behind, CT Zuber Ahmed told me of hearing 'CHORCHOR' voices from back portion of Kothi. I rushed to Khoti adjoining to Shri P.S.Badal to see and check if someone has entered the kothi or coming out of kothi to which we were protecting. I saw nothing and returned back to main gate of Sh.P.S.Badal where CT Zuber Ahmed standing. Later sent Gurdev Kaur w/o Sh.Kala Singh with her children came to main gate and asked me as to who was sentry of the back portion of kothi. I told her that I was the sentry at back but had come to contact main gate sentry. Smt.Gurdev Kaur further told me that one person in CRP dress with rifle had come to my room and caught hold of my mouth but when children raised alarm that person has run away. She asked me to call Pl Comdr and guard commander. I called both of them. I along with CT Zuber Ahmed, Guard Comdt and Pl Comdr and Smt.Gurdev Kaur whet to scene and after seeing the place, Pl Comdr, SI M.S.Khujur asked me and CT Zuber Ahmed to line up and after that SI asked Smt.Gurdev Kaur to recognise if some body out of two had entered in your house. Smt.Gurdev Kaur repleid that she do not recognise but she only knows that person who had entered in his house was wearing uniform and was having rifle with him. Later all uniform and was having rifle with him. Later all we went to our respective place. Next day morning Pl. Comdr collected up again and enquired the matter. Then we all went to Smt.Gurdev Kaur where PS to Sh.Badal and her children were there and told her that we don not know who had come last night in your room. Then Smt.Gurdev Kaur told us either to tell or else she will report the matter to Shri Badal. Then I and CT Zuber Ahmed thinking that we may be punished told her that thought did not come to your room and since we both were on sentry duty that time, we both apologies to end the matter. Then CT Zuber Ahmed and I apologized and Smt.Gurdev Kaur pardoned us. I still do not know as to who had entered in her house."

Most certainly, the case is one of circumstantial evidence. The Chief Judicial Magistrate has relied solely on the handwritten statement of the accused [s. 161, Cr.P.C.] signed by him 'ROAC' though contents were not scribed by the accused, as found in the case papers of his allegedly admitting guilt before the police personnel investigating the incident. But the Chief Judicial Magistrate has held that since Smt Gurdev Kaur testified that the person was in uniform, therefore, it gave rise to suspicion on the accused of having entered her house. The Commandant/CJM reasoned as under in his judgment of conviction:-

> "7. None of the said P.W.S is alleged or proved to be in any way hostile towards the accused and as such there is no ground to discard their sworn testemony. From their statements having left the duty place by the accused is fully proved and accused failed to prove that he left his duty place with some permission of the competent authority. He did not had any defence evidence that he was falsely implicated in this case. Regarding entering in the house of Smt.Gurdev Kaur and squeezing her mouth, the P.W.S. could not say any thing as to who had entered in the house of Smt.Gurdev Kaur. There is no eye witness also to have seen the accused entering in the house except the accused's hand written statement given in the preliminary enquiry. But the accused having his duty place with rifle at 2320 hrs on 19.10.92 and at the same time some uniformed person with rifle entering in the house of S mt.Gurdev Kaur at 2330 hrs gives suspicion o f the accused having entered in the house of Smt.Gurdev Kaur."

17. On this facile reasoning based on suspicion, the petitioner was held guilty of the charge. The order of sentence was also pronounced on the same day i.e. on March 19, 1993. The petitioner was sentenced by a flea bite punishment to undergo simple imprisonment on March 19, 1993 till the rising of the court. In this manner, the petitioner stands convicted of the offence attributed. It is common case that no appeal was filed against the judgment and order of conviction and sentence dated March 19, 1993. On March 19, 1993 itself, the petitioner was dismissed from service vide P-5 as a result of recording a judgment of conviction and order of sentence. The order of dismissal has been passed under s. 12 (1) of the CRPF Act. The provision reads as

follows: -

> "12. Place of imprisonment and liability to dismissal on imprisonment.- (1) Every person sentenced under this Act to imprisonment may be dismissed from the Force, and shall further be liable to forfeiture of pay, allowance and any other moneys due to him as well as of any medals and decorations received by him.
>
> (2) Every such person shall, if he is so dismissed, be imprisoned in the prescribed prison, but if he is not also dismissed from the Force, he may, if the Court or the Commandant so directs, be confined in the quarter guard or such other place as the Court or the Commandant may consider suitable."

18. In the present case the Commandant/6th respondent has acted as both Chief Judicial Magistrate and Disciplinary Authority which may not be legally impermissible in terms of s. 16 read with r. 27 but at the same time raises a cause of serious concern of impartiality and bias in the mind of this Court of such dual exercise of jurisdiction, one fine evening, for the court to thoroughly satisfy itself on the question whether the punishment fits the offence or the offence the punishment or whether it was committed at all as alleged and whether there has been any miscarriage of justice in dealing with the petitioner and to apply extensively the rule against bias which ensures that no one should be a judge in his own cause. Here was a prosecutor, a judge and a disciplinary authority all rolled into one dynamite stick with three pins. The cause of worry really is whether such a triad of absolute, unbridled power of such wide amplitude may result in prejudice per se or a reasonable likelihood of bias or a substantial loss of probity and impartiality in the eyes, so to speak, of twelve good men and true who might always expect dispassionateness and non-arbitrariness in acts of holders of public office which if led astray may cause a permanent scar on the judicial mind leaving a bad taste in the mouth. But we can also not discount, as is equally well settled, that mere possibility of abuse of a provision of law cannot be a ground to declare the provision invalid and to say this while we are not on the vires of the provision. Yet, what disturbs this Court even more radically than anything else is that the so called 'confessional statement' before the police has solely been used against the petitioner as a ground for conviction which was stoutly denied at the trial while claiming innocence of the charge framed. Smt Gurdev Kaur could not say with any certitude as to who the man was who trespassed into her privacy at night. It also seems rather peculiar that Smt Gurdev Kaur did not raise an alarm herself when her mouth was muffled [in the charge framed on March 5, 1993 read as: ''... 'by an unidentified man 'in uniform'], face covered, holding a rifle and it was her 'children' to raise the alarm, as picturesquely recorded in the judgment of the Chief Judicial Magistrate. It is more plausible that a woman, whose modesty is being outraged, would herself raise the alarm, more so, the wife of none other than the personal aide of the then ex-Chief Minister, Punjab and residing in the rear side of the private residence in a servants quarter. However, since this Court is not exercising appellate jurisdiction against the order of the Chief Judicial Magistrate, nothing further can or should be said at least till the present stage of the discussion on facts. This Court has gone thus far to examine the case of the petitioner to satisfy itself that grave injustice has not been visited upon the petitioner and whether he is to be condemned for all times to come with an order of dismissal based on moral turpitude. It may be remembered all the time that the right to impose a penalty carries with it the duty to act fairly, justly and reasonably.

19. The issue of interposing duties is largely the statement of Constable Himmat Singh. The Chief Judicial Magistrate holds that since the petitioner did not lead defence evidence to rebut false implication in the case, this is a material circumstance against him. Trite it is to say that the prosecution has to depend on its own strengths to bring home the charge and not depend on the strengths or weaknesses of the case of the accused when law permits him a right of silence. Burden of proving guilt in common law jurisdictions cannot be shifted on an accused who is not to prove his innocence. The reasoning adopted by the Chief Judicial Magistrate while recording the finding of guilt is based on the facile and wrong assumption that it must have been the petitioner

alone who committed the offence since he was in 'uniform' with 'rifle' duly posted on guard duty and this lent credence and "gave suspicion of the accused having entered the house of Gurdev Kaur." It is well settled that mere suspicion however strong cannot take the place of proof. To this extent the judgment is seriously flawed as it inverts onus which is not how our law works.

20. It would not be out of place to mention that the petitioner's statutory service appeal against the dismissal order was rejected by the DIGP, CRPF, Ferozepur vide order dated May 15, 1993. In the written statement filed by the CRPF on notice issued by this Court, an objection has been raised and pressed at the hearing that against the appellate order, a statutory remedy was available under r. 29 by a revision petition presented before the next superior authority to the appellate authority, which alternative remedy has not been availed of before approaching court in writ jurisdiction. I would keep my findings on this point for later discussion in this order.

21. It deserves a mention that the petitioner had earlier approached the Calcutta High Court against the order of dismissal in CO No. 10503 (W) of 1993. The writ petition was dismissed on June 29, 1999 for lack of territorial jurisdiction in the Calcutta High Court since the cause of action had accrued in Punjab though the alleged occurrence had taken place at Chandigarh. The Calcutta High Court found that the writ could not be entertained only because the appellate order passed in Ferozepur, Punjab was communicated to the petitioner at Calcutta. The appellate order may have given right of action but not cause of action to the petitioner. Liberty was granted to the petitioner to approach the appropriate forum of redress of his grievances but in the meanwhile the petitioner had spent six years before the Calcutta High Court without being told off in the first hearing that the writ did not lie for want of territorial jurisdiction. That is how the petitioner approached this Court by way of the present petition. The petitioner had impleaded Shri Pushkar Singh, Commandant/Chief Judicial Magistrate who was arrayed as the 6th respondent in the Calcutta proceedings under Article 226/227 of the Constitution, and in this petition as well he has impleaded him by name but he has not caused appearance and filed a response to the petition.

22. In view of the complexities of the matter emerging from the case papers and the original record of the trial, involving intermingling of service law issues with the criminal law of sentencing and in order to command full assistance, this Court appointed Mr Anil Malhotra to be the learned amicus which request he gracefully accepted. Since I found some thorny but significant issues involving criminal law interpretation which required due expert deliberation of a learned senior criminal practitioner as well, I requested Mr Malhotra on January 14, 2015 to request Mr R.S. Cheema, Senior Advocate, learned Senior Counsel of this Court if he could find time from his current professional preoccupations at New Delhi to provide his valuable insights in the matter through the good offices of the learned amicus curiae for the consideration of this Court. This Court expresses its gratitude to Mr Cheema to have not only supplied inputs in writing through the amicus upon discussion held between them and reduced in writing per kind hand of the amicus but I am even more thankful that Mr Cheema has taken out his precious time on his own to address the Court as well on February 6, 2015 on the specific query posed by this Court as to the implications of the conviction and sentence imposed in criminal law till the rising of the Court of Chief Judicial Magistrate in the light of the charge framed in the criminal trial faced by the petitioner and further as to what were its implications on the punishment of dismissal from service separately imposed. Earlier, in addition to his detailed written submissions the amicus placed on record further additional written submissions dated January 21, 2015 containing the view point of the learned Senior Counsel as also the further supplementary submissions of the learned amicus. On January 28, 2015, the amicus also placed on record of this Court a 90 pages compilation comprising of 6 Judgements, extracts of the Criminal Procedure Code, 1898 (Cr.P.C., 1898) as also relevant parts of the 41st Report of the Law Commission of India, Volume 1, September 1969, suggesting changes to be made in the Cr. P. C., 1898. The learned senior counsel urged his thoughtful views on the aspects of criminal law and writ jurisdiction rolling into one before this Court lending considerable clarity on the intermingled proposition arising in the present case whereby dismissal from service

was based solely on a conviction till the rising of the court to which views I will refer at the appropriate place in the discussions in this judgment, and for which sagacious advice this court is indeed grateful.

23. The matter was thus re-heard at length on the contentions canvassed on either side and judgment was reserved for pronouncement and is being released today.

24. First of all, Mr Surinder Sharma, the learned counsel appearing for the petitioner in his opening gambit submitted that his client has been denied a fair criminal trial which concluded in ten days without following due procedure established by law. No complaint by Smt Gurdev Kaur was served on him. None was made in writing for him to reply to. None exists on record. Had such an opportunity been afforded he could have cleared doubts and suspicions in the minds of his superior officers. Many other apparent flaws have been pointed out by the learned counsel in the trial record with reference to due process established by law in the Code of Criminal Procedure, 1973 which was mandatory for the trial court to follow even acting as Commandant-cum-Chief Judicial Magistrate under special powers conferred on him by the CRPF Act. He submits that there is no eye witness to the occurrence. He says that Constable Himmat Singh was awarded only 28 days quarter guard for involvement in the same occurrence and is still in service. He submits that the story does not appear plausible or believable where a person who is under threat of an alleged criminal assault, which charge is not laid, in the security of a private quarter in the private residence of an ex-Chief Minister and the wife of a close personal aide would not bring the house down herself wailing but wait for her children to raise the alarm. He points out that the conviction is based on suspicion and suspicion has no place in the criminal law although it may have a hand in domestic proceedings. But no departmental enquiry was held on the charge before ordering the severest penalty of dismissal from service. On the same day i.e. on March 19, 1993, the trial was concluded; finding of conviction recorded; sentence of simple imprisonment imposed till the rising of the court followed ruthlessly by the dismissal order passed by the same person that held the trial and wore three hats. Such measures would not appear to be a fair, objective, proportionate or judicious exercise of disciplinary authority protected by the shield of what disciplined forces may do while the law courts have traditionally been perceived reluctant to enter into defence thickets. This may lend support to the action being dubbed rather vindictive, excessive and pre-meditated giving rise to a reasonable likelihood of bias, given that bias is inferential from a sequence of events and actions of a person vested with such potent power which appears to go almost unchecked unless there was a reasonable exercise by the appellate authority to do justice in rationalising punishment in appeal, which element is also found is lacking in the order upholding the order of dismissal from service. The facts of the case and the lack of conclusive evidence did not warrant such magnitude of harm to be visited on a young constable only to deprive him of his livelihood. That justice must not only be done but should be seen to be done is not paying lip service to a platitude but is verily the cornerstone of the edifice of justice-in-action. Every judge, unless he is a bad judge, knows that the right thing to do is to apply the oft-repeated saying of Lord Chief Justice Hewart in Rex v. Sussex Justices; Ex parte McCarthy, [1924] 1 KB 256: [1923] All ER Rep 233: "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

25. Section 16 of the CRPF Act empowers the Central Government to vest powers of a criminal court on either the Commandant or the Assistant Commandant to deal with offences committed by a member of the Force. These are two different people. The choice of the Central Government has fallen on the Commandant. But the Assistant Commandant is not the disciplinary authority of a constable under r. 27 which remains the Commandant. The question which then surfaces is where the Commandant is a persona designata of both the Trial Court/Chief Judicial Magistrate and the designated disciplinary authority and then would his actions while discharging functions of disciplinary authority be protected by the doctrine of necessity or would the principles of natural justice, natural law, fair procedure, fairness-in-action etc. stand above the doctrine of necessity and be the governing principle separating the two. If the Assistant Commandant were the designated trial court notified under s. 16 then there

would be automatic separation of the disciplinary authority under r. 27 in the Commandant making exercise of both jurisdictions free of doubt and acquitting admirably the charge of partiality and reasonable likelihood of bias. This would be the ideal situation and the cherished goal. The legislature perhaps must have foreseen such a crisis when it included a choice in delegation of authority between the Commandant and the Assistant Commandant in s. 16 of the Act. Therefore, to my mind the doctrine of necessity cannot be applied in the face of availability of choices, one to be the court, the other to act as the designated disciplinary authority under the rules. A rational via media may have to be found to avert such anomalous situations in the future. If a judicial trial were to be held it could easily have been entrusted to some other independent Commandant or Assistant Commandant to exercise powers of the Chief Judicial Magistrate. There would have been more transparency and less finger-pointing in such executive choice by delegation or sub-delegation of power to do acts and things for altogether purposes and intendments. Such a division of power would have been more in accord with Glasnost, openness, transparency and fairness-in-action which is an accepted facet of reasonableness in Article 14 of the Constitution. If it was known from day one that conviction and sentence may result in dismissal and the trial court would unhappily also be the disciplinary authority of Zuber Ahmed such a path ought to have been avoided. The more I ponder on this dual or rather triple role, the more my judicial conscience gets disturbed. One could fix a fellowman just like that in true Kafkaesque style at the trial by a surreal distortion of facts. Franz Kafka in The Trial tells the story of a man arrested and prosecuted by a remote, inaccessible authority, with the nature of his crime revealed to neither him nor the reader. But this hindsight to make the future safer for the CRPF man in the dock is for the legislature to visit, examine and debate or at any rate at the highest echelons in CRPF to think over, re-visit and introspect that it may always be better that justice is seen to be done evenhandedly and judiciously to avoid a situation altogether which may not recur by depositing uncontrolled authority in a single person and instead apply tenets of separation of powers, following the separation of the executive and the judiciary in the refurbished Code of Criminal Procedure, 1973 which ushered in an era where the last codified signs of the police State were dismantled forever leaving justice to be dispensed with by the judicial officers working under the control of the various High Courts, the rank and file of officers not employed under the State but discharging sovereign duties in connection with the affairs of the State, the Court itself qualifying as 'State' within Article 12 of the Constitution.

26. Here is thus a case where two irreconcilable stories were recounted by Mrs Gurdev Kaur in her two statements, one during 'investigation' in a preliminary enquiry, the other at the trial which twin have haplessly led to the conviction of Zuber Ahmed on account of the predetermined mindset of the Commandant/Judicial Magistrate 1st Class who may have had scant judicial training albeit insufficient to handle a free and fair trial by applying established and rudimentary principles of the criminal law and procedure which only can guarantee a man not be dunked in the pool of crime without any probative evidence to fall on and the onus duly discharged by the prosecution beyond a reasonable doubt and to the satisfaction of the court, the court of law as known to the modern world judicial trial. Therefore, the Central Government and the CRPF ought to examine this issue threadbare to see whether it is any longer safe and proper to leave a Commandant to conduct a judicial trial empowered to record findings of conviction and awarding of sentence to imprisonment on a member of the Force, even of till the rising of the Court. And whether the Commandant can be permitted to don the robes of a Chief Judicial Magistrate and disciplinary authority simultaneously, when holders-of office should ever stand high above the trial in pursuit of truth and justice in making a disinterested, calm and rational judgment on facts and circumstances available and to desist from casually and callously passing orders which tend to visit terrible civil consequences on a fellow citizen with compassion and proportion so that no man in the dock goes away feeling he short-changed and wronged.

27. To return to the other facts of the case, the learned counsel for the petitioner admits that an appeal against the conviction was not filed and, therefore, the judgment is final. The conviction and sentence till the rising of the court is substantive

imprisonment within the meaning of s.12 of the Act. The punishment awarded is the minimum in the range available even without looking to the mechanics of the Act and when the punishments described therein are read the sentence imposed is not found among the provisions of the Act and this flea bite sentence of till the rising of the court by itself shows that the charge, not to speak of a criminal charge, was not taken seriously in terms of penal measurement in sentencing. Nevertheless, Mr Sharma extricates his case from the criminal law angle and brings it within the fold of the limitations provided in r.27 of the CRPF Rules, 1955. Rule 27 falls in Chapter VI of the rules which deals with discipline and procedure for holding departmental enquiries and enumerates the disciplinary authorities competent to impose punishment on persons in various ranks. This rule prescribes the procedure for award of civil punishment. In the Table under r.27, it is provided that dismissal or removal from the Force can be inflicted on a Constable by a Commandant but only after formal departmental enquiry. It is so expressly stated in column No. 1 which lists out punishments and column No. 7 of the Table pays due regard to the due process required to be followed; "Dismissal or removal from the Force"- "To be inflicted after formal departmental enquiry." In the present case, no formal departmental enquiry was conducted. He submits that the 6th respondent seems to have pre-determined the end and then found means to justify the end. Therefore, it is urged that the dismissal order is legally bad and biased based on a fallacious conviction and sentence till the rising of the court only to somehow get rid of the petitioner. While r. 27 lays down the procedure for holding regular enquiries, s. 12 of the Act leaves it to the discretion of the disciplinary authority in which cases dismissal should follow sentence. This obviously means a careful reading of the judgment of conviction and the gravity of the misconduct arising from it by proper application of mind before proceeding further in the matter and making up the mind on conduct which led to conviction. But then the author of the judgment of conviction himself wears the glove of the disciplinary authority which may cloud objectivity in assessing the quantum of punishment and the correctness of taking the extreme step of dismissal from service.

28. A combined reading of s. 12 and r. 27 leaves serious doubt in this Court whether r.27 can be avoided altogether as unlike Article 311 (2) (a) of the Constitution which affords public servants certain protections on conviction and the statutory limitations prescribed therein but s.12 of the Act, which is pre Constitution, does not speak of conduct which led to conviction to be the operating rule of dismissal when it is discretion based by the use of the word 'may' therein. Mere incantation of the words "conduct which led to the conviction" is not constitutionally sufficient. There is more to it. Disciplinary authority cannot divorce itself from duty to disclose reason which weighed in its mind and led it to inflict the severest civil punishment of dismissal. The contours of criminal and civil liability by virtue of those words get merged in the final dispensation and remain inseparable. Toward this end there is nothing clearly noticeable in the impugned order of dismissal whether dismissal was alone the best choice or facts demanded so for the court to apply the well recognised principle of non-interference in the choice of punishment imposed by the executive authority. Even Article 311 (2) (a) does not confer automatic power to dismiss simpliciter on mere conviction except when conduct which led to conviction justifies the action taken. These words have been used in the dismissal order passed by the 6th respondent when he refers to conduct which led to conviction but then the order is bereft of reasoning, however brief they could have been, but surely indicative of process of reasoning and due application of mind. But substantive provisions of S. 12 do not speak of such express words as "conduct which led to conviction" and limit themselves to the following expressions:

> "12. Place of imprisonment and liability to dismissal on imprisonment.-
>
> (1) Every person sentenced under this Act to imprisonment may be dismissed from the Force, and shall further be liable to forfeiture of pay, allowance and any other moneys due to him as well as of any medals and decorations received by him.
>
> (2) Every such person shall, if he is so dismissed, be imprisoned in the

prescribed prison, but if he is not also dismissed from the Force, he may, if the Court or the Commandant so directs, be confined in the quarter-guard or such other place as the Court or the Commandant may consider suitable."

29. S. 12 has not been amended to fine tune it with Article 311 (2) (a) of the Constitution. It stands where it was in 1949, though the rules are post Constitution framed in 1955. However, the concept of misconduct in its constitutional protections and conduct which led to conviction on a criminal charge was introduced for the first time after more than three decades by sub rule (cc) to r.27 and inserted in r.27 of the CRPF, Rules by S.O 3117 dated July 15, 1971 through rule making power avoiding amendment process through Parliament. To appreciate its newfound setting in r.27 it would be profitable to reproduce the text of r.27 (cc) as it stands:-

"27 (cc) Notwithstanding anything contained in this rule:

(i) Where any penalty is imposed on a member of the Force on the ground of conduct which has led to his conviction on a criminal charge: or

(ii) Where the authority competent to impose the penalty is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an enquiry in the manner provided in these rules: or

(iii) Where the Director General is satisfied that in the interest of security of the State, it is not expedient to hold any enquiry in the manner provided in these rules, the authority competent to impose the penalty may consider the circumstances of the case and make such order thereon as it deems fit."

30. In my humble view the CRPF Act is a special law and a complete code in itself governing the relationship between the parties, where in the rules lies enacted substantive law in its procedural part in r.27 (cc) echoing the theme of Article 311 of the Constitution which is rare to find. It is also not known or understood as to how the disciplinary authority views the word `may' in s.12 and why the Commandant would not suffer limitations prescribed by r.27 and whether he could completely sidetrack, by pass or circumvent the provision. The rule is part of the Act and is supplemental in nature. It appears to fill a gap left in s.12. Rule 27 by itself creates a substantive procedural right to due process incorporating a valuable safeguard against arbitrary action. Criminal conviction and disciplinary action are severable and are not ipso facto mother and child that cannot be separated in their relationship except by event of death. Having conducted the trial and concluded it and recorded sentence of imprisonment till the rising of the Court, fairness-in-action then demanded that the petitioner should have been heard before dismissal on his rights protected by r. 27. While passing the dismissal order on his administrative side, the 6th respondent was acting as a disciplinary authority and not as Chief Judicial Magistrate. He would, therefore, suffer restrictions on his powers as are imposed by law or available to him to exercise in a reasonable manner. He could act only within the limitations of the statutory framework of which he was a creature, both as court and administrator.

31. The learned counsel for the respondents Union of India, on the other hand submits, that s. 12 itself authorizes and justifies dismissal from service since sentence till rising of the Court is substantive criminal sentence and it matters little if a person has not suffered actual physical imprisonment in a 'prescribed prison' under s. 12 (2) of the Act. For this, insofar as sentence of simple imprisonment till the rising of the Court is concerned he relies on a decision of the learned Single Judge of the Delhi High Court in Writ Petition Civil No. 3357A of 2000, Leela Ram v. Union of India and others, to submit that this is part of jurisprudentially recognised minimal power of sentencing which is within the jurisdiction of the Commandant acting as the Chief Judicial Magistrate. This was also a case involving imprisonment till the rising of the Court inflicted upon a paramilitary Force personnel. He submits that there can be no doubt that a person convicted and sentenced to undergo only a simple imprisonment till the rising of the Court would come within the ambit and purview of the word `imprisonment' found in s.12 and the Commandant is empowered to pass such order.

S. 12 is structured somewhat akin to Article 311 (2) (a) which provides that any person holding a civil post who is convicted and sentenced by a criminal court can be dismissed, removed or reduced in rank on the ground of conduct which led to the conviction on a criminal charge.

32. That it may be significant here to quote the valuable insights of Mr R.S. Cheema, learned Senior counsel, as contained in the written submissions of the amicus presented before this Court in January 2015 and emphasised in his oral address to the Court:

33. [1] Submissions of learned senior counsel -Mr Cheema.

> I. Whether the question of the conviction/punishment of the petitioner resulting from the trial can be raised and examined in the present writ petition under Article 226 of the Constitution of India?
>
> (i) Mr Cheema contends that in the peculiar facts and circumstances of this case, it needs to be appreciated that the order of conviction as also the order of dismissal impugned in the present petition were passed by the same authority, though in different capacities, on the same date. The order of conviction which became the sole basis for the order of dismissal from service passed without a formal departmental enquiry. The order of sentence passed, following the order of conviction on the same day, was for imprisonment till the rising of the court. In other words, upon the sentence being pronounced, the petitioner had already undergone the punishment for the purported offence, irreversibly.
>
> (ii) It is beyond cavil that the order of dismissal is justiciable and is under challenge in appropriate proceedings before the appropriate Writ Court. Any scrutiny of the order of dismissal shall require examination of the order of conviction on which the former is based. Therefore, in exercise of its jurisdiction under Article 226 this Court shall be required to examine the validity of the order of dismissal and the basis thereof. It shall not be just and fair to permit the Union of India to raise a hyper technical objection regarding the order of conviction and sentence not having been challenged separately. It is submitted that since the order of sentence had already run itself out simultaneously with the pronouncement of the order of conviction and dismissal, the petitioner may have not felt the necessity to challenge the same under the impression that having suffered the sentence, nothing could be undone subsequently faced with a fiat accomplish. To that extent, the limited period of notional punishment of imprisonment cannot be brought back. However, while challenging the order of dismissal from service, it is necessary and open to the petitioner to question the basis of his dismissal which is essentially an order of conviction. Hence, in the totality of the present facts and circumstances, it is well within the scope of the present petition to raise the question of conviction for determination as the dismissal from service is solely based on the premise. Accordingly, it would be apt for this Court to examine the validity of the trial, the judgment of conviction, as also the order of sentence closely. In exercise of such a process of law, the validity and legality of the order of conviction can be gone into by this Court in its extraordinary jurisdiction under Article 226 of the Constitution to act ex debito justatiae. Hence, the question of conviction can be raised and examined in the present petition for the first time while the order of dismissal from service is under examination and scrutiny before this Court. Resort in writ proceedings can be had to principles of justice, equity and good conscience.

34. [II]. The view taken by the Commandant that the alleged misconduct falls within the purview of s. 10(1) (n) of The Central Reserve Police Force Act, 1949, is apparently incorrect. The reasons for the same are stated as under:-

> 2(i) A careful scrutiny of s. 10 would show that the same deals with 15 kinds of transgressions of the Code of Discipline and Conduct, excluding clause (p), which deals with some of these acts of misconduct when the same are commissioned

by an accused while he is not on active duty. Barring clause (n) and (o) of s. 10, all the clauses deal with specific situations which are described with sufficient precision so as to give the accused a clear notice. Clause (o) of s. 10 specifically deals with conduct involving contravention of any provision of the Act for which no punishment is expressly provided. Therefore, even when an accused is stated to fall under clause (n), it shall have to be spelt out as to which provision of the CRPF Act has been contravened. In other words, there shall be a specific charge which would satisfy the test of definiteness and which a criminal charge must necessarily satisfy.

2(ii) The pertinent question here is as to the correct interpretation of s. 10 clause (n) of the Act. Senior counsel reasons that s. 10 clause (n) shall essentially derive its colour and support from the other clauses in the section. Accordingly, any correct interpretation thereof would have to fall within the four corners of the perspective, boundaries and parameters of the provisions of s. 10 as a whole and in entirety. No other interpretation is possible in this regard.

2(iii) It is a well settled principle of interpretation of statutes that the words in a statute must be given their plain meaning unless the same either lead to a perverse inference or an absurd result or militates against the other provisions in the Statute. The words "good order" and "discipline" essentially deal with the conduct of an employee of CRPF as a Member of the Force. It is for this reason that clauses (a) to (m) of s. 10 clearly and precisely deal with the fact situations touching upon the facets of the Code of Discipline or self regulation in relation to the duties of an accused as a Member of the Force. In other words, all these alleged acts of misconduct, though transgressions are conducted in the purported discharge of official duties.

2(iv) Even clause (p) of s.10, which creates an exception, making the offences specified in clauses (e) to (l) of s. 9 punishable as "less heinous offences" u/s 10, essentially deals with the Code of Duty and the Rules of Conduct as a Member of the Disciplined Force and envisage consequences which reflect by the said conduct. It is noteworthy that even though these offences directly fall u/s 9 if the delinquent employee is on duty, the same fall u/s 10 if they are committed while the employee is not on active duty. Hence clauses (e) to (l) of s. 9 which are covered u/s 9 when committed on duty and u/s 10 while off duty are directly and closely related with duties as a Member of the Disciplined Force and the Code of Conduct applicable to a person as a Member of the Disciplined Force.

2(v) Then there is clause (n) of s. 10 with which we are directly concerned, which has to be interpreted in the context and within the parameters of the other clauses of s. 10 on the principle that a Jackdaw always sits by a jackdaw or the latin noscitur a sociis. As a necessary corollary, the words "good order" would mean adherence to discipline or Code of Duty or Rules of Conduct as a Member of the Force. Similarly, the words "discipline" has to be similarly interpreted to mean discipline as Member of a Disciplined Force. Therefore, under clause (n), we should not adopt and accept an unduly wide interpretation which could include any unbecoming behaviour by a Member of the Force at any time while on or off duty; at any place whether within the precincts of an office or official residential area; or with any person, private or official. If we choose to adopt such interpretation, we are reading into the words `good order' and `discipline' much more than the statute stipulates and the rules of interpretation provide.

35. It is a settled principle of criminal jurisprudence that the crime being a matter of strict liability, a provision should be capable of concise interpretation and ought to be read to look for a precise meaning and to further ensure that the alleged misconduct falls within the four corners of the mischief contemplated by such a precise interpretation. It is also settled by binding precedent that vagueness renders a penal provision void and, therefore, the Court must adopt a course so as to read the provision eliminating the element of vagueness.

36. For illustrative purposes, it would be interesting to enquire as to whether a brawl between a constable and another citizen when he is visiting his village on leave could be covered by s. 10 clause (n). Similarly, a situation may arise where a constable living in a colony has an altercation with his neighbour. It appears to be reasonable to argue that such instances of misconduct or misbehaviour as a citizen shall not be covered by s. 10, clause (n). In the facts of the present case, an argument may be raised by the other side to the effect arising out of s. 10 (n), notwithstanding the nature of the misconduct. The petitioner had switched off his duties and was allegedly away from duty for a short while. It is essential to appreciate that all such cases of dereliction from duty are covered in precise terms in various clauses of s. 9 and 10. In fact, the situations contemplated there are much more serious in nature. Had it been the legislative intention to cover the slightest dereliction from duty in either s. 9 or 10, the residuary clause would have explicitly referred to other derelictions or deviations from duty. It, therefore, again appears that in its natural meaning and following the principles of legal interpretation, the alleged misconduct would not be covered under the residuary clause incorporated in clause (n) of s. 10 of the Act.

37. It is then urged by Mr Cheema that the authority in the present case has interpreted the provision too widely, rather loosely, to include good behaviour and conduct as a citizen beyond any specific facet of an Offence under the CRPF Act. In other words, the authority has given it an ethical complexion in making it so wide so as to transcend beyond the permissible boundaries of the provisions of s. 10 (n). Thus, the applicability of s. 10 (n) is wholly unwarranted and uncalled for in the present case.

38. In support of the above contentions advanced, reliance is placed by Mr Cheema on the following decisions, and for purposes of ready reference, a relevant extract of the judgments are extracted and reproduced. 39. In re: Richard Grayned v. City of Rockford, 1972 SCC online US SC 157 : 408 US 104 (1972) the Supreme Court of the United States of America in para. 11 succinctly laid dicta which can be profitably applied to the present case on the expansive sweep of s. 10 (n) with no controlling guidance on the universe it may encompass on good order and discipline. The relevant passage in the judgment reads:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statue `abut(s) upon sensitive areas of basic First Amendment freedoms', it `operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked."

40. The illuminating passage from the above judgment has been touched up by the Supreme Court in Kartar Singh v. State of Punjab, 1994(2) R.C.R.(Criminal) 168 : (1994) 3 SCC 569 and applied to local conditions and is found in para. 130, though without acknowledgement and has, therefore, become a part of our living law. The Supreme Court rephrased the American precedent delivered in 1972, observing that:

> "130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that

> he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basis policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly marked"

41. These judgments have been applied recently by the Supreme Court in the celebrated case in re. Shreya Singhal v. Union of India, 2015(2) R.C.R. (Criminal) 403 : 2015(2) Recent Apex Judgments (R.A.J.) 326 : WP (Crl.) 167 of 2012 pronounced on March 24, 2015 striking down s. 66A of the Information Technology Act, 2000 as amended in 2008 as foul in its 'overbreath' and unconstitutional as it infringes the right to free speech protected by Article 19 (1) (a) of the Constitution and is not saved by Article 19(2). The Court also noticed, among the many past global precedents, the following passage from a US precedent holding, and which can profitably be quoted in the present context, which reads as follows:-

> "52. The U.S. Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. Thus, in Musser v. Utah, 92 L. Ed. 562, a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down."

42. Supplementary submissions on the legality of criminal charge, conviction and sentence.

Still further and more importantly, Mr Cheema submits before this Court on the question of the legality of the charge, conviction and sentence imposed by the 6th respondent acting as Chief Judicial Magistrate under the CRPF Act that a reading of the charge sheet dated March 5, 1993 shows that as per the charge, Zuber Ahmed allegedly entered the house of Kala Singh, Security Aide of Shri P.S. Badal, then former Chief Minister of Punjab and caught hold of the mouth of Smt Gurdev Kaur with mala fide intention and ran away from the scene upon hearing the alarm from children of Smt Gurdev Kaur and, therefore, committed offence punishable u/s 10 (n) of the Central Reserve Police Force Act, 1949.

> (ii) A reading of the trial judgment shows that while dealing with the facts of the case in para. 2 of the judgment, the Commandant, exercising the powers of Chief Judicial Magistrate, stated that Constable Zuber Ahmed had asked Constable Himmat Singh to stand for some time in his place for his duty at the main gate and left his place of duty without any permission from the competent authority and remained absent for about 10 minutes. During this period of 10 minutes, he allegedly entered the house of Kala Singh and squeezed the mouth of Smt Gurdev Kaur. It is noteworthy that the charge sheet was clearly defective and did not specifically mention that the delinquent Constable was being prosecuted for having remained absent from duty for a short period of 10 minutes after having deputed another official to stand in his place.
>
> (iii) A reading of the findings recorded in para. 7 of the judgement make an interesting reading. As per the findings recorded therein, it stood proved that the accused had left his place of duty for some time without due permission from the competent authority. This significantly was not a part of the charge sheet though such conduct would be implicit for what he was charged with, namely, entered into another house and misbehaved with a woman. Be that as it may, the charge was not framed for absence from duty presumably because some other competent person was put in place and the post was not abandoned.
>
> (iv) That while dealing with the charge as framed in the charge sheet, the

> Commandant, exercising the powers of Chief Judicial Magistrate, did not record a finding of guilt in conformity with the formal charge incorporated in the charge sheet. In other words, he did not record a finding that Zuber Ahmed had trespassed into the house of Kala Singh and he was the person who had misbehaved with his wife in the manner alleged. The finding is extracted hereunder:-
>
> " ...But the accused having his duty place with rifle at 2320 hrs on 19.10.92 and at the same time some uninformed person with rifle entering in the house of Smt Gurdev Kaur at 2330 hrs gives suspicion of the accused having entered in the house of Smt Gurdev Kaur..."

43. It is, therefore, patently clear that the charge as framed was not proved. The finding recorded was that a suspicion arose that the accused had entered the house of Smt Gurdev Kaur. Therefore, the charge purportedly framed u/s 10 (n) of the Act was not proved as per the judgment.

> B. There is another angle which is relevant to the present controversy. Section 11 of the Act deals with minor punishments. It spells out the acts of omission or commission which would attract these punishments. It is stated therein that where the Commandant or any other authority or person as may be prescribed, considers the delinquent official guilty of disobedience, neglect of duty, remissness in the discharge of duty or other misconduct, he was competent to award minor punishments. In the present case, what has been finally found on the conclusion of the trial is temporary absence of 10 minutes from duty having deputed somebody else to hold the charge, though without due authority. It is apparent from reading of s. 11 that such misconduct is specifically punishable u/s 11 and is not covered either under sub-clause (n) of s. 10 as earlier submitted or under sub-clause (o) thereof.

44. Once this interpretation is accepted, the conviction and the sentence awarded are without jurisdiction as s. 11 of the Act neither contemplates a trial nor award of any sentence of imprisonment."

45. The above thoughtful and considered submissions of the learned Senior counsel, have contributed significantly in assisting this Court to come to a consensus, and I would tend to agree, that while examining the punishment of dismissal from service imposed on the petitioner, based on the conviction under the CRPF Act, this Court can go into the basis of such a punishment in proceedings under Article 226 of the Constitution of India which itself rests on a conviction and sentence which are wholly without jurisdiction. Be that as it may, to do complete justice under the powers vested in this Court under Article 226, the legality and validity of the order of conviction and sentencing dated March 19, 1993 has to be necessarily examined as issues relating to the violation of Articles 14, 16 and 21 of the Constitution directly arise for determination in these intermingled and cross dependent orders of conviction/sentence and dismissal from service. Thus, this Court is not fettered by any limits or boundaries in testing the legality of the conviction/sentence order, which not only infringe the protection of Articles 14 & 16 of the Constitution, but also jeopardise the protection of life and liberty guaranteed to the petitioner under Article 21 by not following the due process of law and procedure established by law. In such a process of constitutional inquisition, there are no barriers on the powers of this Court exercised under Article 226 of the Constitution where rules of prudence preside. In a criminal court a charge has to be proved beyond any reasonable doubt. This means, a charge which is specifically laid, worded and framed for trial. We are not dealing with probabilities in this case since the subject matter is not a departmental enquiry. Suspicion must be reasonable with all links in the chain pointing to the guilt of a person in the dock. Mere suspicion is of no consequence and has no place in a criminal court.

46. I am reminded of the indelible mark left on criminal jurisprudence by the famous passage in the argument of Sir Geoffrey Lawrence, then King's Counsel, remembered in legal memory as a fine judge appointed on the King's Bench Division, to be later

elevated as Lord Justice of Appeal in 1944 and who later was destined to Preside over the Tribunal set up to try war crimes at the Nuremberg Trials in 1946-1947 and who remarkably was a relative stranger to the criminal court but was engaged as defence counsel in his first murder trial to defend Dr John Bodkin Adams, a notorious serial killer of his age and accused of murder of a patient in "one of the greatest murder trials of all times" in his concluding address to the jury explained with startling simplicity and clarity how reasonable doubt operates in a criminal case:

> "Justice is of paramount consideration here, and the only way in which this can be done is for you to judge the matter on what you have heard in this court and in this court only. What you read in the papers, what you hear in the train, what you hear in the cafis and restaurants, what your friends and relations come and tell you; rumour, gossip, all the rest of it, may be so wrong. The possibility of guilt is not enough, suspicion is not enough, probability is not enough, likelihood is not. A criminal matter is not a question of balancing probabilities and deciding in favour of a probability. If the accusation is not proved beyond reasonable doubt against the man accused in the dock, then by law he is entitled to be acquitted, because that is the way our rules work. It is no concession to given him the benefit of the doubt. He is entitled by law to a verdict of not guilty."

I should imagine this profound statement to be the quintessence of much that composes the criminal law.

47. In Union of India v. Tulsiram Patel; AIR 1985 SC 1416 the Constitution Bench of the Supreme Court in partly overruling Challappan case held that when the provisions of Article 311 (2) (b) are invoked, there is no place for opportunity of hearing to a delinquent since the punishing authority is only to examine the conduct which led to the conviction. However, the Court held that if penalty imposed by the impugned order is arbitrary or grossly excessive or out of proportion to the offence committed or unwarranted by the facts and circumstances of the case or the requirement of that particular Government service, the Court will strike down the impugned order. Therefore, the Court can examine the adequacy of the penalty imposed in the light of the conviction and sentence inflicted on the person and that if the penalty imposed is apparently unreasonable or uncalled for in a given case, having due regard to the nature of the criminal charge, the Tribunal or the Court may step in to render substantial justice. The Court may remit the matter to the competent authority for reconsideration or by itself substitute one of the penalties provided. In Tulsi Ram Patel it has been held as follows:

> "Where a disciplinary authority comes to know that a Government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal Court and consider all the facts and circumstances of the case and the various factors set out in Challappan's case. This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the Government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too has to be done by itself and without hearing the concerned Government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned Government servant having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A Government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review as the case may be that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the Government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in the departmental remedies and still wants to pursue the matter, he can invoke the Court's power of judicial

> review subject to the Court permitting it. If the Court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the Court finds that the penalty imposed by the impugned order is arbitrary grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular Government service the Court will also strike down the impugned order."

48. Following the above dictum of law, the impugned dismissal order passed without assigning any reasons for dispensing with the enquiry and that too on a non-existent ground, as also dismissing the petitioner on a ground which is not a conviction on a criminal charge, does not stand the test of law and deserves to be set aside. For being guilty of an alleged act which is prejudicial to good order or discipline, the petitioner could not have been dismissed from service without a formal enquiry under r. 27 (c) of the rules framed under the Act.

49. In the decision of the Delhi High Court in Leela Ram v. Union of India and others, supra relied upon by the respondent/UOI, the peculiar issue arising under r.27 alongside the power under s.12 was neither noticed nor dealt with. Counsel submits that not only Constable Himmat Singh but Sub Inspector M.G.Kujur have also been punished. Mr Kujur has been awarded severe censure. Himmat Singh was confined in quarter guard for 28 days with forfeiture of pay and allowances with effect from April 27, 1993. The order against Constable Himmat Singh was passed on April 27, 1993 and the punishment order against M.J.Kujur on December 30, 1992. Lance Naik U.N.Gaikwar was reverted to the rank of Constable from Lance Naik for one year with severe censure.

50. Ms Puneeta Sethi appearing for the CRPF/UOI has then relied on a decision of the High Court of Andhra Pradesh at Hyderabad in WP No. 10430 of 1992; Shiv Narayan Singh v. Commandant 32 Bn and others, in which, it was observed as under: -

> "CRPF Act is a special enactment by the parliament under the constitution of India to regulate the various conditions of service of CRPF personnel like Pay & allowances etc. s. 12 (1) of the Act authorizes the dismissal of a person who is found guilty of any offence prescribed u/s 9 & 10 of the Act. Undoubtedly, the petitioner was found guilty of an offence u/s 10 (m). s. 1 of the Act does not exclude the punishment of dismissal from service, depending on the nature of the offence committed by the delinquent. Though the act makes a distinction between more heinous and less heinous offences which are categorized under Ss. 9 & 10 respectively, it is for the authority to decide whether to retain such a delinquent into service or not. No doubt, the authority is vested with discretion while exercising such a power. As such discretion cannot be interfered with, unless it is established that such discretion is exercised absolutely arbitrarily and no arbitrariness is found in the present case. It is a question of discipline of an Armed Force and it is settled principle that the court should go very slow to interfere with administration of the Armed Forces."

51. Counsel for the official respondents, points out to the affidavit filed by the respondent CRPF explaining the factual position as was called for by interim order dated September 12, 2013. In para. 14 five instances have been given where Constables, Naiks and Lance Naiks have been sentenced to imprisonment till the rising of the Court and were dismissed from service for justifiable reasons and those orders stand implemented and are final.

52. Counsel for the petitioner in rebuttal places reliance on a decision of the Uttarakhand High Court in Bhaskar Chandra v. Union of India, 2012 Lab.I.C 4583, in which both s. 12 and r.27 (1) of the CRPF rules were considered and dealt with. The Court interpreted s. 12 as directory and not mandatory. In this case, the police constable was convicted and sentenced by the Commandant exercising the powers of the Chief Judicial Magistrate for picking up a quarrel after consuming liquor.

The sentence had become final and irrevocable. The dismissal order based on sentence was set aside being contrary to the provisions of r. 27(1) of the CRPF Rules which provides that penalty of dismissal or removal from service can be imposed after formal departmental enquiry.

53. Rule 27 provides the procedure for award of punishment and is the code on disciplinary proceedings. A formal departmental enquiry is mandatory. After all the charge was not such a grave that could not await disciplinary proceedings or brook no delay. The Commandant as trial court also did not think the offence/misconduct serious enough to impose anything beyond simple imprisonment till the rising of the Court.

54. In Mohd Zakir v. Union of India and others; 1997(1) S.C.T 531 : 1996 (5) SLR 788, the Allahabad High Court while dealing with the provisions of the CRPF Act and rules in question held that no order of dismissal can be passed in a routine manner. A dismissal order can be passed only if the charges are serious in nature. It was held as under: -

> "17. The authority awarding the punishment under s. 12 of the Act, it appears did not consider this aspect of the matter and without applying his mind in a routine manner dismissed the petitioner from service, merely because an action under s. 10(m) was taken against him. It may also be considered that the use of word `may' is also significant in s. 12(1) of the Act which indicates that the authority must apply his mind objectively before awarding the punishment of dismissal from the Force. The action of dismissal being very severe major punishment has to be awarded only if there are very serious charges and the action of dismissal from service should be commensurate to the gravity of the charges. Merely because a person h as been directed for imprisonment would not automatically mean that his services are liable to be dismissed from the Force or he would be deemed to be dismissed from service in view of the provisions of s. 12 of the Act. The authority has to apply his mind and provide reasons as to why in case he is dismissing the incumbent from service on the ground that he was imprisoned and an action of dismissal from service was necessary on the facts and circumstances of the case."

55. In Surinder Singh v. Union of India; 1999 (1) SCT 726, Jammu & Kashmir High Court while dealing with conviction under s. 10 of the CRPF Act, 1949 has held that where a dismissal order is based on the conviction, an opportunity is required to be given to the personnel concerned to show cause since he would be required to be given consideration and hearing on the issue of conduct which led to conviction. Failure to do so would render the order bad. The Court applied the principle evolved by the Supreme Court in Managing Director, ECIL, Hyderabad v. B. Karunakar, 1994(1) S.C.T. 319 : AIR 1994 SC 1074 to return the parties to where the error occurred and to call for a reply from the delinquent and to proceed further. 56. In re. P. Arvindan Ex Constable GD, CRPF v. Union of India, [2005] RD-AH 1385 (23 May 2005) [Civil Misc. Writ Petition No 2997 of 2002, Allahabad High Court] is also a case of conviction till the rising of the court and dismissal from service under s. 12 (1) of the Act. The Commandant found Arvindan guilty of misconduct in leaving the camp without permission; entering the office/residence of the Commandant; shouting and threatening him, which is a minor offence, punishable with imprisonment up to one year and fine for three month's salary under s. 10 (n) of the C.R.P.F. Act 1949. However taking into account his past seven years services, and taking a humanitarian view he was sentenced under s. 10 (n) of the Act, till the rising of the Court. Allowing the petition the learned single judge of the Allahabad High Court held:-

> "The question raised in this writ petition is whether such a small sentence for a 'less heinous offences', could be a ground for extreme penalty of dismissal from service. In the reply to the show cause notice the petitioner pleaded for pardon. The observations that his conduct shows that he is not inclined to be a disciplined soldier, does not take into account his past services and the circumstances which led him to have reacted in a manner which breached the

> good order and discipline. Every sentence of imprisonment may not call for dismissal from service, otherwise the discretion given under s. 12 (1) of the Act will have no meaning at all. This discretion must be exercised fairly and reasonably after taking into account all the attending circumstances in which the offence was committed and the quantum of sentence awarded. The disciplinary authority, the appellate and revisional authority have not taken into consideration these circumstances and have mechanically applied the provisions of s. 12 (1) in dismissing the petitioner from service only on the ground that he was subjected to a sentence for imprisonment. It has indeed shocked conscience of the Court. I find that in the facts and circumstances no reasonable person could have taken a view to dismiss the petitioner from service."

Discrimination suffered by the petitioner.

57. In his address to the court Mr Malhotra, the learned amicus submits, as in writing, that even though a departmental enquiry was recommended to be conducted against the petitioner by the Commandant 18 Bn. on November 13, 1992 it is a matter of record that no departmental enquiry was conducted against the petitioner. This is despite the fact Constable Himmat Singh, Lance Naik U.N. Gaikwar and Sub Inspector M.J. Kujur were proceeded against departmentally and accordingly punished commensurate to their offences as is confirmed at page 62 of paper book and in the written statement dated March 28, 2000. Hence, no departmental enquiry was conducted against the petitioner and a "Judicial Trial" was conducted against him resulting in his conviction and consequent dismissal from service without conducting any separate enquiry. No reasons or justification was given for this arbitrary and discriminatory treatment meted out to the petitioner leading to the presumption that it was preconceived to dismiss the petitioner from service after convicting him. Hence, the protection of Articles 14 and 16 was not afforded to the petitioner and he was the only one singled out to face judicial trial without any departmental enquiry even though the other three personnel were not tried judicially and especially Constable Himmat Singh who exchanged duty which led to the alleged occurrence.

Bias meted out to the petitioner:

58. Mr M.S. Sethi, the Commandant 18 Bn CRPF by his order dated November 13, 1992 Annexure R-1 at page 78 had recommended that no "Judicial Trial" is recommended. However, Sh. Pushkar Singh i.e. the 6th respondent, as Commandant 84 Bn decided unilaterally to conduct a "Judicial Trial" and framed a charge sheet against the petitioner as Chief Judicial Magistrate on March 5, 1993. No reasons, assigned or recorded, find mention in pleadings on record as to why a departmental enquiry was not preferred in comparison to a "Judicial Trial", as was done in the case of the other three Force personnel. This clearly amounts to selective invidious bias and discrimination with mala fide intentions violating Articles 14 and 16 of the Constitution of India. The punishment of dismissal from service at the hands of the 6th respondent who dominated the proceedings to dispose of the matter with a preconceived mind to punish the petitioner with an unreasonable attitude clearly establishes bias. Mr Malhotra places reliance on the judgment of the Supreme Court in Ranjit Thakur v. Union of India & Ors., (1987) 4 SCC 611 in support of this contention. In this case the court considered the legality of punishment imposed upon trial by court martial. The court held that judicial review was directed against the decision making process while the choice of quantum of punishment was within the jurisdiction and discretion of the court martial. The court held that sentence must suit the offence and the offender, and should not be so disproportionate to the offence so as to shock the conscience of the court and amount to conclusive evidence of bias or in outrageous defiance of logic then the sentence would not be immune from correction. The court observed in para. 25 of the report:

> "Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not

> be A vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court- Martial, if the decision of the Court even as to sentence is an outrageous defiance of B logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In Council of Civil Service Unions v. Minister for The Civil Service, [1984] 3 Weekly Law Reports 1174 (HL) Lord Diplock said:
>
> "... Judicial Review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality'. the second irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community.

In Bhagat Ram v. State of Himachal Pradesh, A.I.R. 1983 SC 454 this Court held:

> "It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution.
>
> The point to note, and emphasise is that all powers have legal limits."

Dismissal from service without enquiry is illegal and unwarranted:

59. That the dismissal from service of the petitioner by orders dated March 19, 1993 is not in accordance with s. 12 CRPF Act read with r. 27 of the CRPF Rules. This dismissal without conducting a departmental enquiry which is mandatory under r. 27(c) could not have been dispensed with since the petitioner had not been convicted on a "Criminal Charge" stricto sensu as carefully urged by Mr Cheema to take the trial out of the charge framed against the accused. Therefore, any power exercised of dismissing the petitioner without an enquiry and invoking r. 27 (cc) is not permissible since the petitioner was convicted of an offence under s. 10 (n) i.e. of an act or omission "prejudicial to good order and discipline". Hence, the impugned order passed without enquiry only on the ground of conviction under s. 10 (n) cannot be sustained since the petitioner has not been convicted on a criminal charge by a Court of a criminal offence under the Indian Penal Code.

60. Mr Malhotra submits that under s. 4 Cr.P.C. all offences under the IPC shall be investigated, inquired into, tried and dealt with according to the provisions contained in the Cr.P.C., 1973. Section 26 prescribes that any offence under the IPC may be tried by a Court, which such offence is shown in the First Schedule of the Cr.P.C. to be triable. Under the First Schedule to the Cr.P.C., any offence under s. 354 IPC i.e. assault or use of criminal Force upon a woman with intent to outrage her modesty, is triable by a Magistrate which as per the explanatory note No. 2 to the First Schedule means a Magistrate of First Class/Metropolitan Magistrate, but not an Executive Magistrate. Hence, the petitioner could neither be tried nor was he tried or punished under s. 354, IPC by the 6th respondent acting as Chief Judicial Magistrate by virtue of being a Commandant in CRPF. Therefore, the petitioner was not convicted on a criminal charge under the IPC. Hence, r.27(cc) of the CRPF Rules was wrongly invoked by the 6th respondent in passing the impugned order dated March 19, 1993 as the petitioner was neither charged, nor tried or convicted of any offence under the IPC, much less s. 354, IPC. Therefore, the petitioner could not have been dismissed from service without compliance of r. 27(a) and r. 27(c) requiring holding of a departmental

enquiry.

61. Submits that the order of dismissal from service has been passed by the 6th respondent in a routine manner without any application of mind. The action of dismissal being a severe major punishment, it has to be awarded only if there are very serious charges and the action of dismissal from service should be commensurate to the gravity of the charges. In the case of the petitioner, he was not tried or convicted of a more heinous offence under s. 9 of the CRPF Act. In fact, even under s. 10 stipulating less heinous offences, a residuary charge i.e. s. 10 (n) prescribing an act or omission, which, though not specified in this Act, which is prejudicial to good order and discipline, was levelled against the petitioner. The 6th respondent did not level any serious allegations against the petitioner under s. 9 CRPF Act. Therefore, dismissing the petitioner from service, which is a major punishment for a less heinous offence without holding any departmental enquiry which is mandatory under rls. 27 (a) and (c), clearly shows non-application of mind and evidence of bias. See Ranjit Thakur and Mohd. Zakir cases supra. Therefore, the impugned order of dismissal from service of petitioner cannot be sustained in law.

Disproportinate and excessive punishment imposed on petitioner:

62. That the punishment of dismissal from service is grossly disproportionate, excessive and is not commensurate with the alleged charge which does not establish any proved misconduct which is defined or identified under the CRPF Act. There is no charge proved which is remotely made out alleging use of criminal force with intent to outrage the modesty of a woman. Hence, an undefined act which is stated to be prejudicial to good order and discipline is highly subjective. The opinion of the 6th respondent in alleging this charge as prosecutor, judge and disciplinary authority is highly opinionated and biased. The powers given to one individual to judge the parameters for this offence as a residuary clause without any reasons being given or justification to support it, makes of award of punishment of dismissal highly inequitable and unjust. It was unfair to impose this punishment without even giving a hearing or holding a departmental enquiry in the service matter. Therefore the punishment imposed shocks the conscience of any individual and in terms of the law laid down in Union of India v. Parma Nand, AIR 1989 SC 1185 and also reiterated in Commandant, 22 Battalion, CRPF Srinagar v. Surinder Kumar, 2012(1) S.C.T. 228 : (2011) 10 SCC 244, the punishment of dismissal from service on the petitioner is strikingly disproportionate and warrants interference by this Court as being perverse and irrational having regard to the nature of the charge of misconduct which was not a criminal charge, molestation attempt not having being established when the complainant resiled from her previous statement and failed to recognise Zuber Ahmed as the person charged. For judicial treatment of difference between 'strikingly disproportionate' punishment and 'merely disproportionate', see Union of India v. R.K. Sharma, 2001(4) S.C.T. 828 : AIR 2001 SC 3053. Hence, the dismissal from service of the petitioner cannot be sustained for this reason as well.

Impermissible concurrent exercise of powers by respondent No 6:

63. That the simultaneous exercise of power in three different capacities by Sh. Pushkar Singh i.e. the 6th respondent in his separate official positions as Chief Judicial Magistrate and Commandant is unjustified, impermissible and legally untenable in accordance with the prevailing provisions of the Cr.P.C., 1973 on account of the following reasons which are supplemented by the description in written submissions.

64. Even though there is no formal amendment incorporating the provisions of Cr.P.C., 1973 in the CRPF Act, 1949 and the CRPF Rules, 1955, the provisions of Cr.P.C., 1973 may have to be read into the various provisions of the CRPF Act and Rules as a substitute to the Cr.P.C., 1898, which stands repealed by S. 484 of the Cr.P.C., 1973. Hence, by necessary implication, the 1973 Code shall stand automatically substituted.

65. That in terms of the judgment of the Supreme Court in Suresh Kumar Koushal & Anr. v. NAZ Foundation & Ors., 2014(1) R.C.R.(Criminal) 286 : 2014 (1) SCC 1,

in respect of any pre-Constitutional law, the Court has laid down the following principles:

> "31. From the above noted judgments, the following principles can be culled out :
>
> (i) The High Court and Supreme Court of India are empowered to declare as void any law, whether enacted prior to the enactment of the Constitution or after. Such power can be exercised to the extent of inconsistency with the Constitution/contravention of Part III.
>
> (ii) There is a presumption of constitutionality in favour of all laws, including pre-Constitutional laws as the Parliament, in its capacity as the representative of the people, is deemed to act for the benefit of the people in light of their needs and the constraints of the Constitution.
>
> (iii) The doctrine of sever ability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the Legislature and should be avoided where the two portions are inextricably mixed with one another.
>
> (iv) The court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable."

66. Following the aforesaid settled position of law, and keeping in view that Article 50 of the Constitution clearly prescribes that "the State shall take steps to separate the judiciary from the executive in the public services of the State" and bearing in mind that the CRPF Act, 1949, is a pre-Constitutional law, as also the detailed scheme in the Cr.P.C., 1973, requiring that Judicial trials shall only be conducted by Judicial Magistrates duly appointed by the High Court concerned, any existing provisions in the CRPF Act designating powers of Judicial Magistrates on Commandants, as was permissible under the Cr.P.C., 1898, may no longer be legally tenable under the Cr.P.C., 1973.

67. That the authority and powers of Chief Judicial Magistrate exercised by the 6th respondent as a Commandant of CRPF by virtue of s. 16 CRPF Act in accordance with Ss. 30, 32, 34, 36 and 37 of the Cr.P.C., 1898, can no longer be exercised in view of the provisions of sections 11, 12, 13, 20, 24, 26, 29 of Cr.P.C., 1973. Section 3 Cr.P.C., 1973 clearly defines that unless the context requires otherwise, any reference in any enactment passed before the commencement of this Court to a Magistrate, shall be construed as a reference to a Judicial Magistrate. It is further stated in S. 3 of the Criminal Procedure Code, 1973 that, "where under any law, other than this Court, the functions exercisable by a Magistrate relate to appreciation of evidence, formulation of any decision which exposes any person to penalty or punishment pending investigation, enquiry or trial or would have the effect of sending him for trial before any Court, they shall be, subject to the provisions of the 1973 code, be exercisable by a Judicial Magistrate". Hence, the exercise of powers of the Chief Judicial Magistrate by the 6th respondent is not permissible or legally tenable in view of the current provisions of the Cr.P.C., 1973.

68. The petitioner was dismissed from service in the year 1993 without holding an enquiry for a less heinous offence, on the basis of simple imprisonment till the rising of the Court, and his unwarranted period of suspension w.e.f October 22, 1992 to March 19, 1993 was treated as period not spent on duty, the fundamental rights guaranteed under Articles 14 and 16 to the petitioner were severely curtailed. Provisions of Article 33 of the Constitution falling in Chapter III [Articles 12 to 35] with special application to armed and para-military Forces etc. in their relation to precious and fundamental human rights secured by the remaining provisions of Part III of the suprema lex, I am inclined to think must admit minimal protections against arbitrary and unreasonable

action with arbitrariness, unreasonableness, classification and discrimination as explained in the all time classic verdicts of the Supreme Court in its formative years in Charanjit Lal Chowdhury v. The Union of India and others, AIR 1951 SC 41 and State of West Bengal v. Anwar Ali Sarkar and another, AIR 1952 SC 75 securing such far reaching rights for citizens in young India that secured a democratic nation. If those cases did not deal with Article 33 is of no moment. It does not mean that rights of countrymen declared in those decisions should not be revisited in understanding the scope and dimensions of human rights available to men in fatigues, faceless but protecting our country and people. Article 33 is thus revisited and is reproduced for ready reference:-

> "33. Power of Parliament to modify the rights conferred by this Part in their application etc.-
>
> Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,-
>
> (a) the members of the Armed Forces; or
>
> (b) the members of the Forces charged with the maintenance of public order; or
>
> (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or
>
> (d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

Needless to say that Parliament has not yet modified the pre Constitution CRPF Act, 1949 by an amendment of the statutory law on the subject which still refers to antiquated Criminal Procedure Code, 1898 which I would necessarily have to read down to mean the present law, 1973 to save the Act from being declared ultra vires the established law. Parliament not having intervened, the extent of rights in Part III stand curtailed. The argument is slim but meritorious which should be tilted towards the ex member of the Force in upholding his inalienable rights under the Constitution when the Supreme Court declares in a coram of a 9 Judge Bench in M. Nagaraj v. Union of India & Ors., 2007(4) S.C.T. 664 : (2006) 8 SCC 212 holds that:- " A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges. This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens." The Constitution gives no gifts to anyone in its generosity; it gives no gifts for the asking, with a beggars bowl in the hands of a citizen who happens to be a person dressed in fatigues 'charged with the maintenance of public order' in Article 33 read with Chapter 10 of the Cr.P.C., 1973 which provides measures for "Maintenance of Public Order and Tranquillity"; it gives no solace to a man wronged, in fatigues or in civil clothes, what it gives is a very precious right to knock at the open doors of the constitutional court asking for redressal redemption and determination of relief for a percieved constitutional or statutory tort committed upon him. At any rate, Article 33 is an enabling provision while it uses the word 'may' in its text in relation to restrictions and abrogation of rights for proper discharge of duties and the maintenance of discipline among the membership. Archaic laws must need be refurbished with modern ideas keeping pace with changing times and changing value systems evolving constantly, often imperceptibly. But most certainly men in muftis and in fatigues should not be viewed with the same spectacles. There is a qualitative difference between the two classes but it should not be too wide off the mark inhibiting Articles 14, 16 and 21 of the Constitution. Marginal protections of law and equity account for foolscap liberty of the individual against excessive and unreasonable invasion. That is

the cherished goal of the Constitution and the laws established.

69. To turn back again to the mainstream debate, the petitioner surely was unjustly deprived from continuing in service contrary to the due process of law and was deprived of his right to life and right to a livelihood. Furthermore, the confinement of the petitioner during his period of suspension by the respondents under purported exercise of powers under the Cr.P.C, 1898 clearly amounted to violation of guarantees of personal liberty of the petitioner by the Constitution for inadequate and insufficient reasons and that too on a mere suspicion of commission of crime as recorded in the judgment of conviction and sentence inflicted till the rising of the court without due thought paid.

70. The petitioner was unduly penalised by process unknown to law and victimised at the hands of the 6th respondent, who despite impleadment and notice issued to him long ago, has by court office reportedly chosen to remain unrepresented an without appearance on due notice of pending proceedings. In such peculiar facts and circumstances, the petitioner ought to be compensated for wrongs done to him in violation of the protection of Articles 14, 16 & 21 of the Constitution of India.

71. I am inclined to accept the view of the learned Senior counsel as canvassed on the criminal law issues involved in this service matter that the entire process of the alleged criminal trial is vitiated, illegal and a gross abuse of the process of law and that the petitioner was not strictly held guilty on a 'criminal charge'.

72. The writ court is not without jurisdiction in an appropriate case to read and set aside the order/judgment of criminal conviction and sentencing by a Commandant in CRPF exercising powers of a Chief Judicial Magistrate, which brings untold grief, ruin and grave harm upon a citizen, such as the twin orders dated March 19, 1993 passed in this case appear to be with any worthy legs to stand on and if they defy logic, common sense and standards of reasonableness and proportionality then interference would be called for and justified. It follows that where the twin acts of conviction and dismissal are inextricably bound and are found on judicial review wholly unsustainable in law and they form the basis of the impugned dismissal order then the writ court can examine threadbare the judgment of the criminal/trial court empowered in the special Act in replacement of the ordinary criminal courts exercising competent jurisdiction. In cases where the sentence imposed is till the rising of the court the duty of the writ court would be even greater to prevent injustice to see if such a sentence was used for oblique purpose of packing off home a member of the force with the line of least resistance on a hapless victim of arbitrary and colourable exercise of power to dismiss.

73. That from a larger perspective, the issue of separation of powers of the executive and the judiciary envisaged under the new deal of criminal procedure code amended extensively separating two limbs of the troika and the existing provisions of the Constitution of India and upon amendments made by the recommendation of the Law Commission of India there is something radically repulsive and abhorrent in the archaic system of dispensation of justice under a pre constitutional law of CRPF enforcing to this day the repealed Criminal Procedure Code, 1898 which has to be read down to mean the Code of Criminal Procedure Code, 1973. In this regard, the amicus had made the following written submissions which are set down as hereunder:

Re-visiting the CRPF Act, 1949 and C RPF Rules, 1955:

74. The CRPF Act published in the Gazette of India (Extraordinary) on December 30, 1949 after it received the assent of the Governor General on December 28, 1949. It is an Act to provide for the constitution and regulation of an Armed Central Reserve Police Force to replace the old Crown Representative's Police Force Law, 1939 which ceased to have effect on India's independence on August 15, 1947. The Central Reserve Police Force is a reserved Force to aid in the maintenance of law and order in times of emergency as was the function of the Crown Representative's Police Force.

75. The CRPF Act runs into 19 sections and contains 111 rules in the CRPF Rules

framed by the Central Government in exercise of powers conferred by s. 18 of the CRPF Act. A brief summary of the relevant provisions is set down as hereunder:

(i) Ss. 9 and 10 of The CRPF Act prescribe and contain "more heinous offences" and "less heinous offences". s. 10 (n) contains a residuary punishment clause, "which, though not specified in this Act, is prejudicial to good order and discipline" and entails punishment as for other "less heinous offences". No provision in the Act defines or prescribes a determination process of any such "less heinous offence" though r. 27 stipulates the authority and the procedure provided for conducting enquiries and punishments to be inflicted after a formal departmental enquiry.

(ii) Section 11 of The CRPF Act prescribe that the "competent authority" may, subject to the Rules under the Act, "award in lieu of, or in addition to, suspension or dismissal anyone or more of the following punishments to any member of the Force" which have been stipulated as reduction in rank, fine, confinement to quarters/quarter guard or removal from distinction/special emolument in the Force. S. 12 states that, "every person sentenced under this Act to imprisonment may be dismissed from the Force" and every such person shall, if so dismissed, be imprisoned in the prescribed prison, or be confined in the quarter-guard or such other place as the Commandant or the Court may consider suitable. Section 2 (b) of the Act defines, "close arrest and s. 2 (e) defines "open arrest" as specified in s. 15.

(iii) That under s. 16 of the Act, "Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898) the Central Government may invest the Commandant or an Assistant Commandant with the powers of a Magistrate of any Class for the purpose of enquiring into or trying any offence committed by member of the Force and punishable under this Act, or any offence committed by a member of the Force against the person or property of an another member."

(iv) Rule 27 (cc) is part of a provision which deals with procedure to be adhered to in disciplinary enquiries, prescribes three grounds where the competent authority, 'may' impose a departmental penalty considering the circumstances of the case, to make such orders thereon as it deems fit. Thus, this provision of the rules, if invoked, do not require any notice, hearing, opportunity of rebuttal or defence before any penalty is imposed on a delinquent member of the Force. It may be pointed out at the outset that if r. 27 (cc) is compared and contrasted with Article 311 (2) of the Constitution, then, r. 27 (cc) is differently worded. Rule 27 (cc) dispenses with the applicability and requirement of a Departmental enquiry in three contingencies and states that, "the authority competent to impose the penalty may consider the circumstances of the case and make such orders thereon as it deems fit." In so far Article 311 (2) is concerned, it provides that if a person is dismissed, removed or reduced in rank, "this clause shall not apply," inter alia, "where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge."

(v) Hence, the distinguishing feature in the CRPF Act is the use of the word 'may' in r. 27 (cc) which gives a discretion to the punishing authority, whereas Article 311 (2) prescribes a mandatory 'shall' leaving no discretion to the punishing authority as explained by the Supreme Court in past precedents. Hence, invoking of r. 27 (cc) prescribing the use of word, "may" in the light of interpretation of Articles 14, 16 and 21 of the Constitution, would require reasons to be recorded in exercising any discretion dispensing with an enquiry if any of the three contingencies of r. 27 (cc) when are invoked for dismissing the services of a Member of the Force.

(vi) Rule 36 of the CRPF Rules prescribes that, "all trials in relation to any one of the offences specified in s. 9 or 10 shall be held in accordance with the procedure laid down in the Code of Criminal Procedure Code, 1898." Though, there seems to be no formal amendment replacing it with the Code of Criminal Procedure,

1973, a note in the Bare Act indicates "see now the Code of Criminal Procedure, 1973" which is merely editorial and not the voice of Parliament.

(vii) Rule 36 (B) of the CRPF Rules enjoins that for the purposes of Chapter VI-A dealing with place of trial and adjustment of jurisdiction of ordinary Courts, "Magistrate" means a Magistrate other than the Commandant or an Assistant Commandant on whom the powers of a Magistrate have been conferred under sub-section 2 of s. 16.

76. From a collective reading of the above provisions, it can be understood that a Commandant under s. 16 of the CRPF Act, whilst acting as a Magistrate and conferred with the powers under the Code of Criminal Procedure Code, 1898 ("see now the Code of Criminal Procedure, 1973") can sentence a person to more or less heinous offences under Ss. 9 and 10 of the Act. Thereafter, under Ss. 11 and 12, further punishments including dismissal from service of the Force can be imposed by the Commandant as the Disciplinary Authority for which under r. 27 (cc), discretion can be exercised to make such orders as deemed fit. Therefore, if a member of the Force is convicted on a criminal charge, he can be removed from service without any notice, enquiry or hearing under r. 27 (cc) in the discretion of the Commandant as the Disciplinary Authority. However, the provisions in s. 12 using the words that "every person sentenced under this Act to imprisonment may be dismissed" are different from the words " conviction on a criminal charge" used in s. 12 of the Act. Thus, the different wording, may lead to a conclusion that dismissal from service would require a formal departmental enquiry prescribed under r. 27 in respect of a person sentenced under this Act to imprisonment. The protection of Articles 14 and 16 available to all citizens necessitates the requirements of equality of treatment even to members of a disciplined Force as the CRPF.

77. Thus it may be seen that departmental enquiries in the CRPF are conducted under s. 11 (1) of the CRPF Act read with r. 27 (c) of the CRPF Rules since s. 11 is subject to rules made under the Act. In contrast, judicial trials are also held under Ss. 9 and 10 of the CRPF Act read with r. 36 and r. 36 E to 36 J of the CRPF Rules. Section 11 deals with minor punishments and contains overlapping of jurisdictions and requires to be read in its principles since it establishes a connection with rules:

"11. Minor punishments. - (1) The Commandant or any other authority or officer as may be prescribed, may, subject to any rules made under this Act award in lieu of or in addition to, suspension or dismissal any one or more of the following punishments to any member of the force whom he considered to be guilty of disobedience, neglect of duty, or remissness in the discharge of any duty or of other misconduct in his capacity as a member of the force, that is to say:-

(a) reduction in rank;

(b) fine of any amount not exceeding one month's pay and allowances;

(c) confinement to quarters, lines or camp for a term not exceeding one month;

(d) confinement in the quarter-guard for not more than twenty eight days with or without punishment drill or extra guard, fatigue or other duty; and

(e) removal from any office of distinction or special emolument in the force.

(2) Any punishment specified in clause (c) or clause (b) of sub-section (l) may be awarded by any gazetted officer when in command of any detachment of the force away from headquarters, provided he is specially authorised in this behalf by the Commandant.

(3) The Assistant Commandant, a Company Officer or a Subordinate Officer, not

being below the rank of Subedar or Inspector commanding a separate detachment or an outpost, or in temporary command at the headquarters of the force, may, without a formal trial, award to any member of the force who is for the time being subject to his authority any one or more of the following punishments for the commission of any petty offence against discipline which is not otherwise provided for in this Act or which is not of a sufficiently serous nature to require prosecution before a Criminal Court that is to say:-

(a) confinement for not more that seven days in the quarter-guard or such other place as may be considered suitable, with forfeiture of all pay and allowances during its continuance;

(b) punishment drill, or extra guard, fatigue or other duty, for not more than thirty days, with or without confinement to quarters, lines or camp.

(4) A Jemadar or Sub-Inspector who is temporarily in command of a detachment or an outpost may in like manner and for the commission of any like offence award to any member of the force for the time being subject to his authority any of the punishment specified in clause (b) of sub-section (3) for not more than fifteen days"

The Commandant 6th respondent opted out of s. 11 without applying mind or acting under it when he could have for good measure. Be that as it may, judicial trials are conducted under Ss. 9 and 10 by Commandants who are conferred the powers of Judicial Magistrates under s. 16 of the CRPF Act. Even though there is no formal amendment incorporating the provisions of the Code of Criminal Procedure, 1973, they may have to be read into various provisions of the CRPF Act and Rules as a substitute to the Code of Criminal Procedure, 1898 which stands repealed under s. 484 of the Cr.P.C. Hence, by necessary implication, the 1973 Code shall stand substituted. I am inclined to think that t h e provision in s.16 in the CRPF Act has outlived its shelf life. I would not like to hold that the trial court should also be the disciplinary authority and to put the imprimatur of the Court on such fusion of powers. This would be an antithesis of the rule of law and the benign principle of separation of powers with a right upon a third agency recognised by parliament to override and veto. If not, it would be putting much too much paid on unfettered powers vested in one person to enthral his captive audience to suffer his personal whims without a system of checks and balances in place. We should not let anyone get too powerful and centralized if the laws are to be worked properly without causing undue injury on a fellow human being. The nightmare that man has always faced from times immemorial without a permanent and abiding solution is man's inhumanity to man. If nature is written in tooth and claw, officialdom is equally brutal. The horribly dominating spirit of officialdom in a police State subjugates the weaker mortal of whose neck they are given the leash to pull or release as they wish. I think the 6th respondent was resplendent in such extreme power which neither his industry, caliber, education, judicial experience or merit justified holding the high office of a Chief Judicial Magistrate, almost visibly power drunk but kneeling before and kowtowing to the powers that be, given the formidable location of the alleged occurrence and the overwhelming position of the complainant who ultimately made no complaint whatsoever to put the criminal law into motion or to be taken criminal cognizance of, the entire episode rather murky.

Code of Criminal Procedure, 1898/1973:

78. However, since the functions of a Judicial Magistrate are conferred upon a Commandant of the CRPF by virtue of s. 16 of the CRPF Act, it may be necessary to examine certain provisions of the Cr.P.C., 1898 as also the present Cr.P.C., 1973, to test the authorisation and exercise of judicial powers by CRPF Commandants, as also to simultaneously exercise powers of a disciplinary authority.

79. That under s.s 30, 32 and 34, 36 and 37 of the Cr.P.C 1898, as it originally stood, Deputy Commissioners or Assistant Commissioners were invested with powers to try

as a Magistrate all offences not punishable with death. Hence, under Chapter III dealing with power of Courts under the old Cr.P.C., 1898, where the Executive Officers were invested with wide powers to exercise judicial functions as Magistrates.

80. That to make criminal procedure more comprehensive, the Law Commission undertook a detailed examination of the Cr.P.C., 1898 and submitted its report on February 19, 1968. Thereafter, since the Law Commission was reconstituted, another detailed 41st Report was submitted by the Law Commission in September 1969. Thereafter, Bill 41 of 1970 was introduced in the Rajya Sabha on December 10, 1970. The Bill was referred to a Joint Select Committee of both Houses of Parliament. Incorporating the recommendations of this Committee, the Cr.P.C Bill was taken up for consideration by Parliament. This Bill having been passed by both the Houses of Parliament, received the assent of the President on January 25, 1974 and came into Force on April 1, 1974 as the Cr.P.C., 1973. One of the main recommendations of the Law Commission was to provide for the separation of the Judiciary from the Executive on an All India basis to ensure improvement in the quality and speed of all Judicial Magistrates who would be legally qualified and trained persons within the control of and under the different High Courts. Further, to do away with the scope of arbitrary exercise of power and to dispense with discretionary powers and act in a manner consistent with known principles of law, this conscious decision was taken in view of the provisions of Article 50 of the Constitution providing for the separation of the judiciary from the Executive in public services.

81. That it may also be pertinent to point out that according to Schedule II of the Law Reforms Ordinance, 1978 (Ordinance XLIX of 1978) s. 34 was omitted. The Law Commission in the 41st Report took note of the Union Territories (Separation of Judicial and Executive Functions) Bill, 1968 as introduced in Parliament containing the following clause;

> "Where under any law, the functions exercisable by a Magistrate relating to matters which involves the appreciation or shifting of evidence or formulation of any decision which exposes any person to any punishment, or penalty, detention in custody pending investigation, enquiry or trial or would have the effect of sending him for trial before any court, such functions shall, subject to the provisions of this Act and the Code of Criminal Procedure, 1898, as amended by this Act, be exercisable by Judicial Magistrate; and where such functions relate to matters which are administrative or Executive in nature, such as granting of a license, the suspension or cancellation of a license, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid be exercised by an Executive Magistrate."

Based on the above proposal, the Law Commission made a broad classification of the functions of Judicial and Executive Magistrates in the 41st Report.

82. That in Chapter II dealing with the Constitution of criminal courts and offices, the Law Commission in its 41st Report has specifically suggested that Judicial Magistrates shall be appointed by the High Court at such places as the State Government may in consultation with the High Courts duly notified in the official Gazette. Further, Special Judicial Magistrates may be appointed by the High Court by conferring upon any person a Judicial post if he possesses such qualifications as may be prescribed by the High Court. Likewise, the Law Commission also suggested appointment of Executive Magistrates by the State Government to exercise Executive functions in their jurisdiction.

83. That the above provisions of constitution of Criminal Courts and offices find their statutory place in Chapter II of the Cr.P.C from Ss. 6 to 25. Judicial Magistrates exercising judicial functions are appointed by the High Court and Special Judicial Magistrates can be appointed for a term not exceeding one year at a time, under s. 13 if a person possesses such qualification or experience in relation to legal affairs as the High Court may by rules specify. Likewise, public prosecutors who have been practicing as an Advocate for not less than 7 years can be appointed by the Central Government

or the State Government for every High Court. Executive Magistrates can be appointed by the State Government under s. 20 of the Cr.P.C. Thus, there is a clear separation of powers as contemplated by Article 50 of the Constitution and Judicial powers are not exercised by Executive Magistrates. The amicus had also placed on record on January 28, 2015 the relevant extract of the provisions of the Cr.P.C., 1898 as also the relevant extract of the 41st report of the Law Commission of India, September 1969 where upon the changes were made in the Cr.P.C., 1898 given rise to the current Cr.P.C., 1973.

84. Bearing in mind that the CRPF is the main counter insurgency Force in India serving at all sensitive locations and borders in India, and is also the largest Central Armed Police Force comprising about 230 battalions and reported over 3 lac personnel, it is suggested that an appropriate reference be made to the Law Commission of India for suggesting suitable amendments to the CRPF Act, 1949 and the CRPF Rules, 1955 so that these provisions can be brought at par with the provisions of the Cr.P.C 1973 and the constitutional mandate under Article 50 of the Constitution stipulating a legal mandate to separate the Judiciary from the Executive in the public services of the State. Hence, CRPF Personnel ought to be administered by a law which is in agreement with the provisions of the Constitution without infringing Cr.PC, 1973.

85. It may be useful to quote that the Army Act, 1950 read with the Army Rules, 1954, the Air Force Act, 1950 and the Navy Act, 1957 which are post Constitutional laws conforming to existing laws do prescribe a proper procedure in accordance with law to regulate disciplinary and penal punishments for offences committed in service through a process of Court Martial and other legal procedural methods devised and employed in accordance with law and rules of natural justice.

86. Likewise, the Border Security Force Act, 1968 read with the BSF Rules, 1969, provides a Security Force Court for dealing with offences for members of BSF which conform to the Constitution and do not infringe other existing statutory laws.

87. Since, CRPF is the largest armed Central Reserve Police Force, it can no longer be continued to be administered by an archaic pre- Constitutional law whose provisions are not in accordance with the protections guaranteed under the Constitution of India as also the principle of separation of judicial powers under the Cr.P.C., 1973. It may no longer be legally tenable to conduct judicial trials by the CRPF under the Cr.P.C, 1898."

88. Accordingly, a copy of this judgment is remitted to the Law Commission of India and the Ministry of Law and Justice, New Delhi to contemplate upon devising a mechanism for administration of discipline and imposition of penalties upon CRPF personnel which are the touch stone and main stream of a disciplined Force and by separation of judicial and executive power and to consider points in para. 84 above. The Law Commission may also deliberate the issue where the minimum sentence is not prescribed by law then what should be the bare minimum sentence. In other words, how would " minimum" sentence be quantified. This phrase whether requires to be qualified? Whether judicial discretion requires to be rationed and rationalised when awarding sentence of "till the rising of the Court" on a criminal charge. This is for the Commission and the Parliament to debate.

89. That when s. 12 of the Act is directory in nature and not mandatory then dismissal from service should normally follow formal departmental enquiry in terms of the procedure prescribed under r. 27(1). That due process established by law was departed from and straight away, on the same day three major events with lifelong consequences were synchronised and inflicted by the Commandant; the conviction, the sentence and the dismissal. Even assuming arguendo that a regular enquiry was not necessary under r. 27, even then, the petitioner should have been served with a show cause notice to hear him out if he had anything to say against dismissal or proposed dismissal in view of discretion under s. 12 and in absence of the mantra of the words "conduct which led to the conviction" employed therein as in Article 311 of the Constitution on which Tulsiram Patel case is founded and Chellapan case overruled on point of hearing. That opportunity was not given and the principles of natural justice

were breached. Rule 27 is a rule of natural justice. Section 12 (1) is an enabling provision. Therefore, the limitation on exercise of power of the Commandant while acting as the disciplinary authority in relation to a constable in CRPF stands circumscribed by r. 27. The dismissal order has undoubtedly been passed under s. 12 (1) of the Act which does not contain the words exactly as are found in Article 311(2) (a) of the Constitution. Therefore, none can be imported into s. 12 which is special law for CRPF personnel traceable to what is now Article 33 of the Constitution of India. History has it that the CRPF was a successor to the The Crown Representative's Police Force raised in British India under an enactment called The Crown Representative's Police Force Law, 1939, which was made under the Foreign (Jurisdiction) Order, 1937 to provide for the constitution and regulation of the Force, which automatically ceased to have effect from the August 15, 1947. However, the Government of India Act, 1935 continued to operate till it was transformed into the Constitution of India, 1950. The CRPF Act, 1949 was legislated by the Dominion from Paragraph 1 of List 1 of the Seventh Schedule to the Government of India Act, 1935 falling in the category of "any other armed Forces raised or maintained by the Dominion' which is now replaced by the Union of India administered through the Central Government.

90. Section 12 (1) of the Act enables the punishing authority to choose one of the minor punishments specified in s. 11 for one or more of the heinous offences specified in s. 9 or for less heinous offences enumerated in s. 10. I find no cogent or good enough reason not to read Serial No. 1 of the Table under r. 27 as part of the substantive mandatory procedure required to be followed, though falling in rules with no power drawn from the provisions of the Act directly or impliedly. A reading of r. 27 appears not to leave any discretion in the Commandant when not only the proposed choice of punishment is dismissal or removal from the Force, but for any reason whatsoever, for any of the misconducts specified in Ss. 9 and 10 of the Act except to visit after a regular departmental enquiry is held and in no other manner even after sentencing for an offence under s 10 (i) (c) of the Act. It is well settled that if a thing is required to be done in a particular manner, it should be done in that manner or not at all. Otherwise, the action would be open to criticism as one being arbitrary and unreasonable. I would repeat the famous words of Justice Felix Frankfurter of the United States Supreme Court in McNabb v. United States, 318 U.S 332 that the ''history of liberty has largely been the history of the observance of procedural safeguards''. Rule 27 is an absolute procedural safeguard while S. 12 (1) is enabling and directory in nature, it enables but does not command the Commandant to do what he wishes and as he likes. When the disciplinary authority/Commandant forms opinion under s. 12 (1) as to what has to be done after awarding sentence, then the word `may' used in s. 12 comes into play and would goad and guide him to resort to fair procedure of domestic enquiry recognised by r. 27 of the CRPF Rules, 1955 to arrive at the truth or the most probable truth, when law does not and is not intended to deal with absolutes while reconstructing today of events in the past based on the limitations of admissible evidence, principles of hearsay etc. and lack of direct facts proved in a trial.

91. There appears to be yet another fundamental reason which persuades me to hold that due procedure was not followed in ordering dismissal without enquiry. That reason lies in sub section (2) of s.12 of the Act. The sub-section lays down that: "Every such person shall, if he is so dismissed, be imprisoned in the prescribed prison...". A priori imprisonment follows dismissal. It is not the other way round. Dismissal is an inherent right of the employer reflected in the General Clauses Act, 1897. Provisions of s. 12 do not speak of 'conviction' but speak of 'sentencing' a 'person' 'to imprisonment'. It is axiomatic in criminal law that sentence follows conviction. Thus, conviction on a criminal charge has to be read into s. 12 of the CRPF Act, 1949 even if the word is not found in the statutory enactment and only 'person sentenced'. But an order of dismissal based on sentence passed on a proven criminal charge is to be visited with imprisonment in view of the word 'shall' used in s. 12 (2). This part is apparently mandatory leaving no elbow room or discretion in the trial judge, the Commandant, CRPF to act to the contrary. However, if dismissal is not selected as penalty following sentence then the "Court or the Commandant" can order confinement in quarter-guard. I think that dismissal cases cannot go to quarter-guard. The 'place of

imprisonment' under s.12 (2) is the 'prescribed prison". The expression 'prescribed prison' is not defined in the Act nor was required as it is procedural and penal result of criminal consequences. It is r. 36 (2) which tell us that it is the place which is the nearest jail. This means where a sentence of imprisonment shall be served. Court is not a jail but can be a place of imprisonment and a person sentenced can be imprisoned in a court room for the working day. Section 389, Cr.P.C. does not speak of jail sentence but of imprisonment. The ordinary meaning of the word 'sentence' is 'punishment given by a law court'. A direction by the court that a person shall be confined in court premises till the court rises constitutes imprisonment within the meaning of the Penal Code and the Code of Criminal Procedure as it is a confinement and curtailment of civil liberty imposed by authority of law. But the CRPF Act is a special statute and is differently worded in r. 36 (b) which leaves no discretion except to confine a person sentenced under the Act in the nearest jail depending on feasibility of transport and escort either to the nearest jail or Quarter-Guard. This was not done to Zuber Ahmed. The provision reads:

> "36. Judicial Trials
>
> (a) All trials in relation to any one of the offences specified in s. 9 or' s. 10 shall be held in accordance with the procedure laid down in the Code of Criminal Procedure, 1898. (1973)
>
> (b) All persons sentenced to imprisonment under the Act shall be confined in the nearest jail. Provided that if the sentence of imprisonment is for one month or less, or where the Commandant is satisfied that due to the difficulty of transport and escort of the person sentenced to imprisonment, to the nearest jail, it is so desirable, such persons shall be confined in the Quarter Guard of the Force."

92. Flowing from the statutory framework and on a cumulative reading of Ss. 12(1) and 12(2) of the CRPF Act, 1949 and rls. 27 (a) and 36 (a) and (b) of the CRPF Rules, 1955 it follows, and this court is inclined to think that actual physical imprisonment in a prescribed prison is a condition precedent to dismissal from service. The prescribed prison is the nearest jail but not the Court room where the petitioner was sentenced to simple imprisonment till the rising of the Court. This appears to me to be the legal position. I may say and not without some trepidation that sentencing left in the hands of a layperson who is not trained in the criminal law as a Judge in ordinary courts may lead to manifestly disastrous and dangerous results in the quest of truth and justice. The platidunious expression of justice being delivered from the 'temple of justice' should not be mixed up with or converted into sentencing a person arraigned in the dock to be incarcerated to jail in a mock judicial trial. If the offender belongs to the paramilitary force it does not mean that the scales of justice will tilt against him anyhow. The true value of procedural safeguards in criminal law cannot be undermined in matters involving the constabulary in the paramilitary forces. They may be special citizens though serving under reasonable curtailments of rights enjoyed by civil society but their fundamental rights can be seen restricted or abrogated by Parliament under Article 33 of the Constitution being charged with maintenance of public order but still they deserve to be dealt with under the overarching constitutional scheme of fundamental freedoms and guarantees of cherished rights in Part III of the Constitution, if not by all of them, but at least some of those protected by Articles 14, 16, 20 (3) and 21 of the Constitution which permeate through the interstices of the criminal justice dispensation system. One may see a facet of Article 14 and 16 in relation to armed forces subjected to court interference in the recent decision of the Supreme Court in Major General H.M.Singh v. Union of India & Anr.; 2014(2) S.C.T. 1 : (2014) 3 SCC 670. The CRPF Act and its provisions, as I see them, neither restrict nor take away such minimal protections from a constable, namely, of a fair and independent trial, fair disciplinary action, fair conviction, fair sentence and fair application of the rule of law. They have a right not to be tried and convicted by a Kangaroo court, where the rudimentary principles of criminal jurisprudence and its fair procedure established by law are thrown to the winds and constables in CRPF made scapegoats on the altar of good order and discipline without just and sufficient cause or probative evidence to prove a criminal charge laid by the Commandant criminal

court palming them off as pariahs by a whimsical order of sentence of "till the rising of the court"; which to put shortly was thought to be quod erat demonstrandum. It is something akin to what appears to have happened in this case when one sees the original record of the trial proceedings which look more like a lopsided departmental enquiry than a full-fledged and fair criminal trial, a difference which is clearly noticeable from the Commandant/CJM's file. It is less of justice and more of self-serving a predestined and predetermined end, the trial motions gone through mechanically without help of defence counsel to the undertrial and the checks and balances of fair procedure. I would agree with Mr Sharma's lament that a fair deal was not given to Zuber Ahmed at the trial and on the other hand was dealt with rather roughly. Therefore, the impugned dismissal order and the appellate order confirming that order deserve to be set aside being non est and ab initio voidable being based on no evidence with the complainant not supporting the case of the prosecution. The sentence imposed on an offender/delinquent should after all reflect the true crime/misconduct they are alleged to have committed duly proven beyond a shadow of reasonable doubt or even on a preponderance of probabilities, as the case may be, from criminal trial to disciplinary proceedings and the result in either case has to be proportionate to the seriousness of the alleged offence. Always in passing sentence, the Court has not only to bear in mind the nature and the limit of the punishment prescribed for the offence of which the accused is found guilty, but also the nature and the limit of the punishment which it is empowered to impose.

A sentence till the rising of the court should normally only be for trivial offences. If offence is not considered trivial or is heinous then there must be reason recorded in writing as to why the least punishment was chosen from the range available in law of where there may be minimum prescribed by statute. If the offence is trivial in nature and sentencing would justify the severest penalty of dismissal from service then the minimal sentence should be avoided as not one authorised by law in CRPF Act as that would be disproportionate and strikingly excessive to the gravity of the offence charged or misconduct imputed, as the case may be, and duly proved for swapping duties for short duration. It should not be used in a sense that because the authority empowered can and wants to dismiss a subordinate then resort should readily be had to the line of least resistance only to add colour of law to justify the dismissal based solely on conviction even when the charge was not stricto sensu criminal in nature. Changing duties may be misconduct but certainly not a criminal charge and I wholeheartedly agree with Mr Cheema on the fine distinction made to help this Court in understanding the boundaries of criminal and service law and where they could meet to shape relief even when the petitioner failed to appeal against the conviction. It would not be a proper exercise of jurisdiction in the Commandant, CRPF acting with a double edged sword, one to convict and sentence by a flea bite, the other to swat a fly with a cannonball, firing the man from service and sending him packing home with bags and all, stripped off self esteem, self respect, to be shunned and despised by his family and community. Stung by the stigma of dismissal from service. The power to sentence till the rising of the court cannot be allowed to be abused by applauding the hand that strikes the match on the ignition stick, the inflictor watching in mirth, reassured by law which shields and protects the authority empowered to sentence and dismiss. No reasons have been recorded by the Commandant 6th respondent in the judgment of conviction and sentence, justifying punishment imposed arbitrarily till Zuber Ahmed rose for the day to walk into the sunset. This is characteristic of judicial tyranny that civil society ought not to tolerate or support and instead to abjure. Lives, livelihoods and careers are very precious things which ought not to be cut short or prematurely destroyed except for compelling reasons and which, if truncated, then even the man of ordinary intelligence or the man on the street would start a whispering campaign if not revolt against what has been visited upon a fellow citizen.

93. To turn now to the respondent/Union of India's objection as to alternative remedy, it is found that since this Court entertained the petition in the year 1999 and admitted the matter for regular hearing without relegating the petitioner then to avail his remedy under r. 29 of the rules it would not appear to me fair or just after such long lapse of time to dispose of the petition directing the petitioner to avail the remedy of further revision against the appellate order which would unnecessarily reverse the

clock and prolong the litigation much to his agony. It is too late in the day to consider such a defence plea after admission of the matter. Besides, no period is prescribed in r. 29 within which a revision is to be decided. At any rate, it is well embedded in law and judicial practice that an alternative remedy is not an absolute bar to the maintainability of a writ petition, when an authority has acted wholly without jurisdiction or in abuse of authority or in its colourable exercise, the High Court should normally not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy. After all, this Court remains a Court of hope where justice can be easily had without land mines laid out for litigants. Its doors are always ajar to equity, hope, trust, love, faith in mankind, and concern for fellow-beings by avoiding booby traps, not falling prey to subterfuges of jurisdiction or its esoteric innards and subterranean catacombs built to deny relief. There may be an element of restorative justice also to be read in the dispensation, in shaping the ultimate, reasonable and adequate relief grantable, say as in this case, where the man has been kept out of service for eternity and not for the best reasons. The violation of the protections guaranteed by Articles 14, 16 and 21 of the Constitution to the petitioner and in invoking the extraordinary jurisdiction under Article 226 of the Constitution leaves no manner of doubt, to my mind, that this Court in exercise of its high prerogative powers, informed reason and freedom of action, will have jurisdiction to quash both the impugned orders dated March 19, 1993 [P-4 and P-5] and the appellate order [P-6] dated May 15, 1993 being violative of the rights of the petitioner under the Constitution of India.

Conclusions in summary:

94. After giving my thoughtful consideration to the respective points of view canvassed by the learned counsel for the parties and the valuable assistance rendered by the learned Senior Counsel Mr R.S. Cheema and the learned amicus in the matter and after perusing the papers and the original record of the criminal trial proceedings produced before this Court by the respondent CRPF, I summarise what is said before and hold:

(i) That though the charge framed on March 5, 1993 makes out an offence under s. 10 (n) of the CRPF Act by alleging that the petitioner had caught hold of the mouth of Smt Gurdev Kaur with mala fide intention, the order of conviction and sentencing dated March 19, 1993 only holds the petitioner guilty of swapping places of duty without any other alleged charge being proved or established. Consequently, the petitioner was at the most guilty of neglect of duty or remissness of discharge of duty under s. 11 of the CRPF Act as a member of the Force. Therefore, the alleged charge framed under s. 10(n) is wholly without jurisdiction as s. 11 neither contemplates a trial nor award of any sentence of imprisonment. Hence, the order of conviction and sentence dated March 19, 1993 is wholly without jurisdiction and contravenes the provisions of the CRPF Act as the entire process of trial and conviction is vitiated. Therefore, it deserves to be struck down unconditionally.

(ii) That presuming that the petitioner had been convicted and sentenced under the CRPF Act, he could have been dismissed from the Force as prescribed in s. 12 of the CRPF Act. However, this could not have been possible without complying with the procedure for award of punishment of dismissal to be inflicted after formal departmental enquiry as stipulated in r. 27 (c) of the CRPF Rules. The enquiry could have been dispensed with under r. 27 (cc) of the CRPF Rules, if the petitioner had been convicted of a "criminal charge" as prescribed in r. 27 (cc) (i) of the CRPF Rules. Since, the petitioner was not convicted under s. 354 IPC which was possibly invoked in the allegation made against the petitioner; r. 27 (cc) was not applicable. The petitioner was merely convicted of an offence under the CRPF Act and not of a criminal charge under the IPC. Hence, the punishment of dismissal from service vide order dated March 19, 1993 is illegal, invalid and in contravention of the CRPF Act and the Rules.

(iii) I find that the petitioner was made a victim of discrimination, bias, vendetta

and unlawful action disproportionate to the charge at the hands of the 6th respondent. Even though a departmental enquiry and not judicial trial was recommended against the petitioner, the 6th respondent chose to act excessively. The Judge became the prosecutor. To the contrary, as against Constable Himmat Singh a full-fledged departmental enquiry was conducted by the 6th respondent and Guard Commander L/NK U.N Gaikwad and Sub Inspector M.J Kujur were awarded punishment of severe censure. Under what circumstances, and on what basis the 6th respondent proceeded to discriminate against the petitioner is not known. No reasons are assigned or forthcoming from record as to why no departmental enquiry was held against the petitioner in the very same case where the same was done against Constable Himmat Singh. No reasons were recorded in dispensing with such a departmental enquiry. Hence, the impugned action of the 6th respondent in passing the orders at Annexures P-4 and P-5 and the appellate order, at Annexure P 6 in not noticing this injustice are contrary to Articles 14 and 16 of the Constitution and thus the same deserve to be set aside.

(iv) That the disproportionate and excessive punishment imposed by the 6th respondent in concurrent exercise of his powers as Chief Judicial Magistrate and disciplinary authority was not condign and leaves no manner of doubt for this Court to come to the conclusion that the petitioner was punished for a charge which was not made out and not even remotely proved in the light of evidence on record. In view of the submissions made before this Court by the learned Senior counsel, Mr Cheema and supported by the contentions of the learned amicus curiae, this court is fortified in its conclusion that the impugned orders Annexures P-4, P-5 and P-6 are wholly illegal, without jurisdiction and thus deserve to be set aside. The right to impose a penalty carries with it the duty to act justly, fairly and honestly. The flea bite sentence was shockingly disproportionate to the offence, assuming it was committed and punishable in s. 10 (n) of the Act. Neither the conviction nor the sentence imposed can legally act as a barrier to relief as it is found far too harsh, oppressive and violative of Article 14 of the Constitution on both unfair discrimination and unreasonableness which are both facets of the same protection against excessiveness and disproportionateness in administrative action. The decision making process inspires no confidence and to the contrary appears contrived to suit an event foreseen, blurring vision and rationality. It appears writ large that the status and address of the protected personality blinded and overwhelmed an objective decision. Subjective satisfaction of the disciplinary authority in choice of punishment is required to bear a jural relationship compatible with an objective criteria applied in making a fair assessment of all attending circumstances and attaching true weight to evidence collected at the trial by the prosecutor which in the present case is hardly anything more than a mere needle of suspicion of guilt. The 6th respondent/Chief Judicial Magistrate administered a homeopathic dose on the criminal side and then quickly injected fatal poison on the administrative side into the bloodstream which has taken the petitioner 22 years in search of an antidote to cure the malady inflicted.

(v) This Court deems it appropriate to hold that CRPF personnel ought to be governed by constitutional standards and the protections and procedural safeguards envisaged under the amended Cr.P.C, 1973 and the Constitution of India currently, as it may no longer be tenable to conduct judicial trials by the CRPF under the Cr.PC, 1898. Accordingly, as prayed for by the amicus, this Court requests the Law Commission of India to consider examining the CRPF Act and the Rules framed thereunder and to consider devising a mechanism for administration of discipline and imposition of penalties upon CRPF personnel which are the touchstone and mainstream of a disciplined Force as also keeping in mind the current position of law envisaged under the Cr.P.C, 1973 and the Constitution of India. Let a copy of this judgment be sent by the office to be placed before the Hon'ble Law Commission of India at New Dehi for its kind consideration of the matter to make, if desirable, appropriate recommendations accordingly.

(vi) For the variety of reasons and the arguments advanced on either side this Court is inclined to think that the dismissal order of March 19, 1993, is not legally sustainable as it is shockingly harsh, extremely oppressive, arbitrary and per se discriminatory and, consequently, the appellate order dated May 15, 1993 dismissing the appeal in a summary manner without any opportunity of hearing or reflection or thought duly paid at the appellate stage following the dotted line, thus cannot be maintained and deserve to be set aside as infringing the protection afforded by Articles 14, 16 & 21 of the Constitution which cannot be denied to the petitioner, even though he was a member of the disciplined Force. The damage done then deserves to be repaired.

95. Consequently, this writ petition is allowed. The Order of conviction/sentence Annexure P-4, Order of dismissal Annexure P-5 and appellate order Annexure P-6, stand quashed upon a writ of certiorari issued. It is, however, found too late on account of passage of 22 years to grant liberty to the respondents to follow due process of holding a domestic enquiry under r. 27 of the CRPF Rules, 1955. The wisdom of giving such liberty at this distance of time may be questionable where witnesses may not be available or their memories too jaded for legal recall nor would it be practicably possible to hold an enquiry and for no purpose especially when the complainant did not support the case of the prosecution at the trial by failing to identify Zuber Ahmed as the culprit.

96. It is also found too late now to return the petitioner to the revisional jurisdiction against the appellate order upholding the dismissal. This, when followed would do no credit to this Court and may instead tend to bring the Court to disrepute, if not ridicule by adopting such a course and, therefore, CRPF's objection on alternative remedy is overruled. I may remind that when writ petitions are admitted for regular hearing after hearing parties such an objection loses its sting and becomes history not to be repeated again or the plea entertained with any seriousness at the final hearing.

97. The moot but ticklish question still remains when the dismissal order is set aside then the consequence of quashing of the order of dismissal would ordinarily result in restoring the petitioner to service with all consequential benefits by restoration of the status quo ante. The Full Bench dictum of this Court in vintage but universally pleasant ruling in Radha Ram v. Municipal Committee, Barnala; 1983 PLR 21 informs and has been followed since once the relief of setting aside of the order of termination is granted it follows sequitur that the employee in the eyes of law continues to be in service and as a necessary consequence thereof would be entitled to all the past emoluments flowing from declaration of that right by decree. He must be deemed to be in a position identical with that existing prior to the passing of the order of termination of his service. The emoluments of the post are a logical consequence of setting aside the order of termination. But this case has special features, particularly when the court is dealing with a former member of a uniformed force where demands of service spent day in and day out is of its own peculiar value on which parameters required for career progression and promotions etc. are based on active service not found usually in ordinary civil service. The petitioner by now would have lost his skills forever. Then what relief should the petitioner take? He was dismissed long ago in the year 1993 and twenty two years have gone by of which six of them were misspent in the Calcutta High Court on bad legal advice hoping for justice. Are there any clues in past precedents to meet such exigencies in terms of relief? Happily, those are not far to search. In Ex. Sepoy Sube Singh v. Union Of India And Ors, 140 (2007) DLT 26 a Division Bench of the Delhi High Court speaking through Hon'ble T.S.Thakur, J. [when His Lordship adorned the Bench of the Delhi High Court] when the Hon'ble Bench had occasion to deal with such a situation when confronted by one such a piquant situation faced with an unlawful discharge order of a Major in the Indian Army ventured to cull out the admissible relief in a special way but refrained from awarding reinstatement to service where the adjudicatory process had widened the gap from the date of discharge from service by seven years making return to service difficult by reason of the peculiar nature of duties involved in the Armed Forces, with the Army authorities strongly resisting reinstatement, the Court thus admirably moulded the relief by awarding service pension instead of reinstatement to service in the changed

and supervening circumstances in the following manner, to quote:

> "This Court could, therefore, mould the relief in such a manner that the petitioner gets his service pension without even directing the petitioner's reinstatement in service or granting any other pensionary benefit to him. We see no reason to decline that limited prayer. We are of the view that the minimum which the petitioner must be held entitled to, is the service pension and other benefits due upon completion of the 15 years of service in the Indian Army. This can be achieved by directing that instead of the petitioner's discharge taking effect on the date mentioned in the impugned order, the same shall take effect on the date he would have completed 15 years of pensionable service. Consequently, the petitioner's discharge pursuant to the impugned order of discharge shall be deemed to have taken effect from 21st October, 2002. The extended period of service will not however entitle the petitioner to any arrears of salary, but for purposes of all retiral/pensionary benefits, the petitioner shall be deemed to have completed his pensionable service as on the date of his discharge. The respondents shall in consequence of the above, process the petitioner's case for payment of pension and ensure that the same is released to the petitioner expeditiously but not later than six months from the date of the pronouncement of this order."

In this special way relief was granted even while the Court was "...conscious of the fact that in matters relating to Armed Forces, courts adopt a liberal approach in accepting as valid, orders, even when they are not reasoned. Some amount of latitude is in the very nature of military customs, discipline and hierarchy due to the armed forces. That latitude cannot however extend to upholding an order which does not on the face of it show due and proper application of mind by the authority passing the same." Later, the principle enunciated in the precedent was followed and applied in deciding the case B.P. Sinha v. Union of India and Ors. rendered by a subsequent co-ordinate Division Bench of the Delhi High Court in WP (C) No. 1763/1979 rendered on 30 July, 2008 in the case of a Constable in CRPF, denying reinstatement but entitling by issue of mandamus the right to pension by directing that the petitioner would be deemed to have retired on completion of 20 years service counted from the date of discharge thereby entitling the petitioner therein to qualifying service for pension and pensionary benefits but without any arrears of pay or benefit of seniority. In making the order by way of alternative relief the court relied on its earlier dicta in Des Raj Shanwal (Lt. Col.) v. Union of India and Ors., 2004 (1) SCT 191 passed on similar lines where such relief was granted. Therefore, I see no reason why this practical and pragmatic course should not be adopted in this case in the alternative in order to secure the ends of justice. It is accordingly so ordered. Compliance be made within three months from the date of receipt of a certified copy of this order by respondent CRPF Headquarters, New Delhi duly served by the petitioner.

98. However, this order will not preclude the CRPF from reinstating the petitioner to service if it is still feasible or possible to do so. It would examine if the petitioner can be adjusted on a suitable field or non-field post if available and if it is found just and meet in the light of this judgment then the same can be resorted to holistically so as to bring about a right to work on current salary and entitlement to future pension in accordance with rules, but if such course is adopted then without payment of arrears of back salary; given the petitioner is still of an employable age. To this end an order would be passed and communicated to the petitioner within the time set for compliance as above.

99. Nonetheless, the petitioner shall have costs of litigation assessed at L 50,000/- paid by respondent CRPF, in any of the above two situations, in the first instance but costs may be recovered from the unpaid official dues to the 6th respondent, if any remaining, as he was issued summons by this Court duly served upon him, as recorded in the interim order dated May 18, 2000, but who chose not to appear or contest the case for reasons best known to him even when malice was personally imputed against the 6th respondent which only he could answer and could not be responded to by the official respondents in view of the nature of the averments made in the petition. He is

thus proceeded ex parte, however, with the liberty to apply to this Court for waiver of costs, if such prayer is supported by sufficient cause, then the request, if made, may be entertained and considered on merits in the disposed of matter by the appropriate roster Bench.

100. It was rather strange, when the Court was informed at the last hearing by the learned counsel for the petitioner that Sh Pushkar Singh rose to be an Inspector General in CRPF and while posted in Bihar was arrested on being booked by the police and remanded to police and then judicial custody, with bail once rejected by court, and was thereafter dismissed from service in a cash-for-job recruitment scam involving crores of rupees which surfaced in the year 2009. He was tried by the Special Court (CBI), Patna, as one of the main accused in the complaint/FIR on criminal charges spending time in jail. But unfortunately for him, not till the rising of the Court. I cannot help saying that there is a thing called poetic justice in this world.

Note: Extracts from case law and provisions of Act and Rules wherever quoted and underlined or emboldened are only for emphasis and not part of original text. Where text in the narration is underlined, it is for prominence to locate easily the ratios as presently understood.

Office to deliver a copy of this order per kind hand at the addresses of the special amicus, learned Senior counsel Mr R.S. Cheema and the learned amicus curiae Mr Anil Malhotra, Advocate as an expression of gratitude of this Court for their valuable assistance.

Original files be now returned to Ms Puneeta Sethi by the Court Secretary.

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C.M No. 14931-CII of 2015

Seema Kapoor v. Deepak Kapoor

2016 SCC OnLine P&H 1225

In the High Court of Punjab and Haryana

(BEFORE RAJIVE BHALLA, J.)

Seema Kapoor and another

v.

Deepak Kapoor & Ors.

Mr. Anil Malhotra, Advocate, Amicus Curiae.

Mr. Prateek Gupta, Advocate, for the Union of India.

Mr. P.S Bajwa, Addl. A.G, Punjab.

Mr. S.S Sandhu, Spl. Prosecutor, CBI.

C.M No. 14931-CII of 2015 in CR-6449 of 2006

Decided on February 24, 2016

RAJIVE BHALLA, J.:— A minor child, removed from the dejure custody of this Court, by misusing an interim order, dated 23.12.2006 and the failure of all attempts to restore custody of the minor to this Court, compels me to forward a reference to the Law Commission of India and the Ministry of Women and Child Development, pointing out the ease with which a child can be removed from India for want of any law on "Child removal". Despite the laudable efforts by the Amicus Curiae and the Central Bureau of Investigation, the minor is untraceable.

2. Seema Kpoor and another, filed a revision challenging an order directing them to hand over custody of the minor to the respondents. An interim order, dated 23.12.2006, was passed in favour of the petitioners, allowing them to retain custody of the minor but when Seema Kapoor was directed to produce the minor it transpired that she had fled the country and illegally taken the child to the UK. Mr. Anil Malhotra, Advocate, was appointed as Amicus Curiae to assist the Court, in 2008, and the police was directed to investigate the matter. Thereafter, the investigation was transferred to the Central Bureau of Investigation by this Court. From the replies, filed by the police and the Central Bureau of Investigation, it became apparent that the minor had been spirited away to the United Kingdom on fake passports. The stay order was eventually vacated. An FIR No. 86, dated 12.08.2008 was registered under Sections 363, 193, 209 & 120-B of the Indian Penal Code, at Polcie Station Dasuya for illegal removal of the minor child and FIR No. 119, dated 30.11.2008 was registered under Sections 420, 467, 468, 120-B and Section 12 of the Passports Act, 1967, also at Police Station Dasuya against Rajesh Kapoor and others for obtaining passports on forged documents. Both FIR's were entrusted to the CBI for investigation by this Court.

3. Further directions were issued on 06.11.2008 and the passports of Seema Kapoor and the minor child were impounded. A Special Leave Petition No. 725 of 2009, filed against order dated 14.07.2008 and 06.11.2008, was dismissed on 01.05.2009 by the Supreme Court, but the minor child was not produced. Eventually

after various orders were passed by the High Court at London, the minor child was recovered. The witness statement recorded by British Police Constable, Varinder SOOCH 673XB, at Southall Police Station, UK dated 03.12.2008 records that Seema Kapoor, the minor child and Rajesh Kapoor were apprehended on 03.12.2008, when they were trying to escape. Seema Kapoor and Rajesh Kapoor were held in custody by the British Police till 05.12.2008 The minor child was, however, placed in foster care.

4. By an affidavit dated 11.12.2008, filed before the Family Court of Justice, Family Division, London, Rajesh Kapoor asked the High Court at London not to return the minor to India. A report dated 17.03.2009, reads as follows:-

> *"76. Rajesh has indicated he will continue to support his sister in caring for Aishley. He supports Seema's account of the past and shares her thoughts on the care of Aishley. However, I am concerned that he has prioritised this over his own wife and son who remain in India, and I am not clear as to his motivation. Nor am I clear about his relationship with the father (his brother) to whom he seemed willing to gift his own child in return for Aishley."*

5. Mr. Anil Malhotra, Advocate, Amicus Curiae, had placed on record a report dated 21.03.2009, furnished to the Family Court of Justice, Family Division, London requesting that the minor and Seema Kapoor be returned to India.

6. A detailed judgment dated 21.04.2009, passed by the High Court of Justice, Family Division, London, between Deepak Kapoor and Jyoti Kapoor and the defendants i.e Seema Kapoor, Rajesh Kapoor and Aishley Kapoor, concludes as under:-

> *"23. In conclusion, on the facts before me, I cannot order a return of Aishley to Seema's custody. This would not be in Aishley's best interests. I shall order the summary return of Aishley to India. My order will include arrangements for the return of Aishley to India and a preamble of requests by me to the Punjab and Haryana High Court.*
>
> *24. This order is to be attached to this judgment and emailed to the Amicus Curiae with a view to him moving the Punjab and Haryana High Court and placing the order on the record before Aishley is taken out of this jurisdiction. The papers in this case will be sent to the Indian Court."*

7. An appeal against the above judgment of 21.04.2009 was lodged with the Court of Appeal at London, which was decided on 23.04.2009

8. However, on 24.04.2009, at around 9.30am, Aishley Kapoor left the school from a play ground in the company of an unidentified Asian male. Thereafter, efforts by the British police and various agencies to trace her have met with abject failure.

9. The investigation of the FIRs, which were entrusted to the Central Bureau of Investigation, Chandigarh, has confirmed that Rajesh Kapoor has fraudulently obtained a second passport without disclosing the fact that he already held passport No. A-0544912 on 08.04.1996 The Central Bureau of Investigation has verified that fraudulent passports were prepared with respect to Aishley Kapoor from the Passport Office, Jalandhar, on the basis of a fake parentage and birth certificate and that she was spirited away to London, on 22.12.2007

10. The learned Amicus Curiae and the Central Bureau of Investigation despite their stellar efforts have been thwarted at every step on the way primarily for the reason that India is not a signatory to the Hague Convention on The Civil Aspects of International Child Abduction, 1980. This apart, India does not recognise inter-country child removal as a wrong or an offence, nor is it defined under any specific or particular law. The removal or retention of a child in breach of custody rights is a wrong under the Hague Convention but for want the Union of India acceding to the

Hague Convention and or enacting a domestic law, children will continue to be spirited away from and to India, with courts and authorities standing by in despair.

11. The reference is, therefore, forwarded to the Law Commission of India, 14th Floor, Hindustan Times House, Kasturba Gandhi Marg, New Delhi-110001 and the Ministry of Women and Child Development, Shastri Bhawan, A Wing, Dr. Rajendra Prasad Road, New Delhi-110001, to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law and for signing the Hague Convention on child abduction.

12. A report prepared by Mr. Anil Malhotra, Advocate, Amicus Curiae, appointed by this Court, setting out the law needs to be lauded and forwarded with this reference. I place on record and acknowledge the tireless efforts put in by Mr. Anil Malhotra, Advocate.

13. A copy of this order be handed over to Mr. Anil Malhotra, Advocate, Amicus Curiae and counsel for the Union of India, for communication.

14. Adjourned to 30.03.2016

ANNEXURE-A

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
IN C.R No. 6449 OF 2006

Seema Kapoor and Another .....Petitioners

v.

Deepak Kapoor and Another .....Respondents

REPORT BY ANIL MALHOTRA, ADVOCATE, AMICUS CURAIE

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THE LAW IN RELATION TO THE CUSTODY OF CHILDREN AND CHILD REMOVAL IN INDIA

DATED: 20 January 2016 (ANIL MALHOTRA) ADVOCATE & AMICUS CURAIE

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
IN C.R No. 6449 OF 2006

Seema Kapoor and Another .....Petitioners

v.

Deepak Kapoor and Another .....Respondents

REPORT BY ANIL MALHOTRA, ADVOCATE, AMICUS CURAIE

RESPECTFULLY SHOWETH:

THE LAW IN RELATION TO THE CUSTODY OF CHILDREN AND CHILD REMOVAL IN INDIA;

a. INTRODUCTION

15. Intercontinental abduction of children by parents is now a contemporary legal issue which baffles and mesmerizes different legal systems of nations whose inter-se conflicting positions prevents the return of children to the country of their habitual residence. Solace can be found inter-se between countries which are signatories to The Hague Convention on Civil Aspects of International Child Abduction, 1980. But what happens to those aggrieved parents whose countries are not a part of this global conglomerate of like-minded nations which honor each other's laws. No global family law governs them. Defiant stands in different courts of such jurisdictions create deadlocks. The sufferers are innocent children who are victimized by legal systems.

16. The world is a far smaller place now than it was a decade ago. Inter country and inter continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Logically, the world in which we and our children live has grown immensely complex. It is filled with opportunities and risks. International mobility, opening up of borders, cross border migration and dismantling of inter cultural taboos, all have positive traits but are fraught with a new set of risks for the children caught up in such cross border situations. Caught in a cross fire of broken relationships, with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross frontier child support. In a population of over 1.2 billion Indians, about 30 million are non-resident Indians living across 180 countries, who, by migrating to different jurisdictions, have generated a new crop of spouse related inter parental child removal and international family disputes.

b. DEFINITION OF CHILD REMOVAL

17. Families with connections to more than one country, face unique problems if their relationships break down. The human reaction in this already difficult time is often to return to one's family and country of origin, with the children of the relationship. If this is done without the approval of the other parent or permission from a Court, a parent taking children from one country to another, may, whether inadvertently or not, be committing child removal or inter parental child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of a person, with whom the child normally lives.

18. A broader definition encompasses the removal of a child from his/her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. The Convention on the Civil Aspects of International Child Abduction, signed at the Hague on October 25,

1980 with over 90 contracting countries today as parties from all regions of the globe, however, defines removal or detention wrongful in the following words:

> *"Article 3*
>
> *The removal or the retention of a child is to be considered wrongful where:*
>
> *(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
>
> *(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*
>
> *The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."*

19. Child removal does not find any specific definition in any Indian codified law and since India is not a signatory to The Hague Convention, there is no parallel Indian legislation enacted to give the force of law to The Hague Convention. Hence, in India, all interpretations of the concept of child removal are based on judicial innovation in precedents of case law decided by Indian courts in disputes between litigating parents of Indian and/or foreign origin.

c. GLOBAL SOLUTIONS AND REMEDIES

20. The Hague Convention on Civil Aspects of International Child Abduction came into force on December 1, 1983 and now has about 93 contracting nations to it. The objectives of the Convention are:

- To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. It operates as an effective deterrent, providing real and practical means to restore the status quo prior to the abduction, it also prevents abductors from reaping the benefits of an act opposed to the interests of children, upholds the right of the child to maintain contact with both the parents and introduces harmony where previously chaos prevailed. The Permanent Bureau of The Hague Conference on Private International Law, at The Hague, Netherlands, renders a superb service by monitoring and assisting the development of services to support effective implementation and consistent operation of The Hague Conventions and review their operations. Since there is no centralised system of enforcement or interpretation, the Secretariat of the Hague Conferences guides nations in post convention services. In terms of The Hague Convention on Civil Aspects of international Child Abduction, the Secretariat has published in three parts, guides to good practice, namely Central Authority Practice, Implementing Measures and Preventing Measures which are all approved by contracting States. The Secretariat thus helps to create an international medium of Consenting States who contract with each other to return children who are wrongfully removed.

d. WHY SHOULD INDIA BE INTERESTED IN JOINING THE 1980 CONVENTION.

21. The Hague Convention on the Civil Aspects of International Child Abduction is a remarkable document, which has had significant impact on the Child protection policies in much of the world. In a civilised society where globalisation and free interaction is part of a rapidly changing set up, India is emerging as a major

destination in the developing world. Non-resident Indians have achieved laurels in all walks of life. But, back home, the problems at the family law front are largely unresolved. Times have changed, but laws are still the same. Marriage, divorce, custody, maintenance and adoption laws in India need a workup. Child removal is often treated as a custody dispute between parents for agitating and adjudicating rights of spouses while spontaneously extinguishing the rights of the child. Therefore, in an international perspective, four major reasons can be identified to establish and support the necessity of India's need to sign the Convention.

22. *Firstly,* India is no longer impervious to international inter parental child removal. In the absence of the Convention principles, the Indian Courts determine the Child's best interest whereby any child removal is dealt with like any custody dispute. In this process, the litigation is a fight of superior rights of parties and the real issue of the welfare of the child becomes subservient and subordinate. Clash of parental interests and rights of spouses determine the question of custody. The over powering parent wins to establish his rights and the resultant determination of the best interest of the child is a misnomer and a misconception. Such a settlement is not truly in the best interest of the removed child.

23. *Secondly,* such a determination in India plays into the hands of the abducting parent and usurps the role of the Court which is best placed to determine the long term interests of the child, namely the Court of the country where the child had his or her home before the wrongful removal or retention took place. By contrast, the advantage of The Hague Convention approach is that it quickly restores the position to what it was before the wrongful removal or retention took place and supports the proper role played by the Court in the country of the child's habitual residence. The correct law to be applied to the child would be of the country of the child's habitual residence and so would be the Court of that country. In India, determination of rights, as per Indian law, of a foreign child removed to India by an offending parent may often be bitterly contested and may not be in the best interest of the child and ought to be determined by the law and the Court of the child's origin.

24. *Thirdly,* the fact that India is not a party to The Hague Convention may have a negative influence on a foreign judge, who is deciding whether a child living with his/her parent in a foreign country, should be permitted to spend time in India to enjoy contact with his/her Indian parent and extended family. Without the guarantee afforded by The Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign Judge may be reluctant to give permission for the child to travel to India. As a logical corollary of this principle; membership of The Hague Convention will bring the prospect of achieving the return to India of children who have their homes in India but have been abducted to one of the 93 States that are parties to the Convention.

25. *Fourthly*, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise in Courts of different countries who are equally competent to decide such issues. The recognition and enforcement provisions of the Convention avoid the need for re-litigating custody and contact issues and ensure that decisions are taken by the authorities of the Country where the child was habitually resident before removal.

26. It is thus hoped that India will give a serious consideration to joining the 1980 Hague Convention due to the convincing grounds cited above. However, till date, India has not signed the Hague Convention on Civil Aspects of International Child Abduction, 1980.

e. RELEVANT LEGISLATION AND FORUM FOR CUSTODY PROCEEDINGS

27. As far as the forum for securing the return of the children is concerned, it is important to reiterate that India is not a signatory to The Hague Convention on the Civil Aspects of International Child Abduction 1980. Under Article 226 of the Constitution of India, a parent whose child has been abducted can approach the State High Court to issue a writ of Habeas Corpus against the abducting spouse for the return of the child. Alternatively, a Habeas Corpus Petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Article 32 of the Constitution of India.

28. In so far relating to the relevant legislation, the aggrieved parent (if Hindus by religion) could well seek recourse to the provisions of the Hindu Minority and Guardianship Act, 1956 (hereafter 'HMGA 1956'), which is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The provisions of the HMGA 1956 are supplemental to the earlier Guardians and Wards Act, 1890 (GWA). The HMGA 1956, like the Hindu Marriage Act 1955 (HMA), has an extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir.

29. In so far the law relating to guardianship and custody is concerned, the Guardians and Wards Act, 1890 (GWA) is an Act pertaining to the appointment of guardians and wards, as also for seeking custody of children. It is available to all persons, free of religion or personal laws and can also be invoked by foreigners. The provisions of GWA are independent of personal law and prescribe the procedure, criteria and other details of appointment of guardians as also factors to determine custody issues of children. A guardianship and custody petition under the GWA is also an alternative remedy sought by aggrieved parents in cases of both intra and inter-country parental child removal. This is because there is no other statutory remedy prescribed under the Indian law for seeking sole custody of a child by an aggrieved parent seeking exclusion of the other parent's parental rights. Often, the Supreme Court or the High Court concerned remands the matters to a Guardian Judge or a Family Court or a Trial Court when disputed questions of facts are involved requiring evidence to be led, which is not possible in a writ jurisdiction under Articles 32 or 226 of the Indian Constitution before the Supreme Court or a High Court. Hence, inter-parent, inter-country child custody matters may land up before a Guardian Judge in a Family Court or Trial Court, if the High Court or the Supreme Court in writ jurisdiction is unable to determine the factual aspects requiring evidence to be led by the parties. Therefore, the inter-parental child custody dispute may be remanded to the Guardian Judge in a Family Court or a Trial Court in such a situation, even in cases of inter-country child removal where, despite a foreign court order, summary removal is not directed by the High Court or the Supreme Court.

30. However, precedents of Courts in India indicate that the controlling consideration governing the custody of the children is their welfare and not the rights of the parents litigating before the Indian Court in child custody cases.

f. INDIA AND THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980

31. As of now, India is not a party to The Hague Convention on Civil Aspects of International Child Abduction 1980. Other than the statutory provisions of law quoted above, in which matters of child custody are agitated in different courts in different proceedings, the principles of The Hague Convention cannot be enforced on Indian Courts. Different recent decisions indicate a trend that Indian Courts generally tend to decide the inter-parental child custody disputes on the paramount consideration of the welfare of the child and the best interest of the child. A foreign

Court custody order is only one of the considerations in adjudicating any such child custody dispute between parents. Foreign Court orders of child custody are no longer mechanically enforced and normally the Courts go into the merits of the matter to decide the best interest of the child irrespective of any foreign Court custody order. Hence, the position of law in India varies from case to case and there is no uniform precedent which can be quoted or cited as a universal rule.

32. India, not being a signatory to The Hague Convention of 1980 on the Civil Aspects of International Child Abduction, questions regarding the custody of such children are now considered by the Indian Courts on the merits of each case bearing the welfare of the child to be of paramount importance while considering the order made by the foreign Court to be only one of the relevant factors in such decision.

g. THE POSITION OF INDIAN LAW ON CHILD ABDUCTION

33. India is a vast territorial jurisdiction comprising of 29 States and 7 Union Territories spread over 3.28 million sq. kilometers. Every State in India has an individual High Court which governs the internal District Courts in the particular territory of that State. The High Court is free to frame its procedural rules regarding practices and rules to be followed within its jurisdiction. Depending on the location of a Family Court or Trial Court i.e Guardian Judge, the practices in deciding child custody disputes may vary. Hence, the time frame of deciding an inter-parental inter -country child removal may vary as per local rules, practices and procedures.

34. Even though India has enacted a Family Courts Act, 1984, at the discretion of every Individual State to constitute a Family Court in its Districts in the State, most States in India do not have Family Courts. Hence, majority of the jurisdictions in States in India do not have Family Courts or Specialist Judges trained to handle only Family Court matters. Therefore, a normal Civil Judge in the Trial Court may, in addition to his other duties and judicial functions, also be a Guardian Judge under the Guardian and Wards Act, 1890, upon being so notified and designated by the High Court. Consequently, when a matter is before an ordinary Civil Judge in the Trial Court in his role as a Guardian Judge, the time frame within which he will be able to decide a child custody dispute is impossible to predict since his pre-occupation with other nature of disputes on his board may vary. Therefore, by no stretch of imagination, any time frame can be predicted. Even when the Judge presiding heads a Family Court, a lot may depend on the pre-occupation of the Court with other matters before the Family Court and the workload of the Family Court which again makes it impossible to predict a time frame.

35. The High Courts and the Supreme Court of India entertain petitions for issuance of a writ of Habeas Corpus for securing the custody of the minor at the behest of the parent who lands on Indian soil alleging violation of a foreign Court custody order or seeks the return of children to the country of their parent jurisdiction. Invoking of this judicial remedy provides the quickest and most effective speedy solution as a redressal for violation of fundamental rights.

36. Different High Courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction has been invoked by an aggrieved parent, seeking to enforce a foreign Court custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past over three decades.

37. That if the matter is taken up in a Habeas Corpus writ petition in the High Court or the Supreme Court, it is the pure discretion of that) Court to hold a summary enquiry or a detailed investigation in that particular case. India follows a procedure of detailed bulky written pleadings followed by hearing arguments at

length. Depending on the pre-occupation of a Bench with other matters and the workload of the Court, it may be next to impossible to define a time frame for deciding a child custody dispute. Even at the High Court or the Supreme Court, there are no dedicated Family Judges or any Family Division. Therefore, depending on the entire roster of the Court and its pre-occupation with other matters, every individual Bench will take up an inter-parental child custody dispute depending on other important matters before the Court. This again makes the whole situation unpredictable in point of identifying a time frame.

38. That the issue of effectiveness of the procedure is again a very open ended answer. If the petition before the Guardian Judge is favorably decided in a positive decision favoring a foreign aggrieved parent, the matter may not rest there. For enforcing the foreign court order directing return of a child, the aggrieved foreign parent may still have to invoke the writ jurisdiction of the High Court or the Supreme Court seeking a direction for the return of the child. Meanwhile, if the decision of the Guardian Judge is appealed against by the abducting parent, the matter may be further delayed. Ultimately as and when a decision comes by the High Court, the matter may be appealed against in the Supreme Court. This process may take time and thus the effectiveness of the procedure is open ended till the last appeal is exhausted in the Supreme Court.

h. CONCLUSION OF CASE LAW ANALYSIS

39. An analysis of the Indian case law reveals that until 1997, Indian Courts whenever approached by an aggrieved parent, invariably exercised a power of summary return of a removed child to the country of habitual residence in compliance with a foreign court order to restore parental rights. However, changing the precedent, in 1998, the Indian Supreme Court decided that a custody order of a foreign court shall be only one consideration while determining the matters on merits in which the welfare of the child will be of paramount importance. Thereafter, child removal and custody matters now get decided on merits in India and every individual decision is based on the facts of the case and there is no set pattern of decisions consistently being followed.

40. However, a different trend set by some of the recent decisions above indicates that aggrieved parents who invoke the jurisdiction of the High Court in a writ of Habeas Corpus are not non-suited simply for the reason that the determination of the best interest of the child can be done only by an adjudicatory process in the Family Court or before the Guardian Judge. The Habeas Corpus remedy to enforce the child custody order of a foreign court is proving to be effective and result oriented. These recent decisions also indicate a trend in respecting foreign court orders wherein an aggrieved parent seeks return of the removed child on the strength of such foreign court decisions.

41. Generally, the position varies on the facts and circumstances of each case and no assurance or guarantee can be given that the children will be returned back from India on the strength of a foreign court Order since every matter is determined and decided on its independent merits. This is regardless of the fact that recent Supreme Court decisions have handed down general principles to be observed in inter-parental child removal matters of foreign jurisdictions.

42. Since, inter-country inter-parental child removal is not defined by any statute and is not considered an offence under any existing codified law operating in India, the tendency to go into the merits of the case even on jurisdictional issues, tends to cause delay, prejudice the rights of an aggrieved parent and prevent summary return of a child to its home in a foreign jurisdiction.

43. Since, there is no statute in India defining, recognising or identifying inter-

parental child removal, especially in the international context, the Indian Courts over a passage of time have been adjudicating matters on the basis of individual facts and circumstances to decide as to what relief should be granted to the parties. Hence, there is a variation of decisions and there is no consistent view point. The welfare of the child principle being the paramount consideration, there is a tendency among Indian Courts to digress from a consistent approach and accordingly, precedents may be distinguished or differed depending on the factual matrix and circumstances, which may differ from case to case. Thus, the jurisprudence in child abduction law varies.

i. POSITION OF FOREIGN COURT ORDERS IN INDIA

44. The principles governing the validity of foreign court orders are laid down in section 13 of the Indian Code of Civil Procedure, 1908 (CPC). The CPC is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. The principles in Section 13, CPC have been affirmed in relation to the guidelines laid down by the Supreme Court of India on recognition of foreign matrimonial judgments.

45. It is reiterated, as discussed above, that Indian courts would not exercise summary jurisdiction to return the children to the country of habitual residence. The courts consider the question on the merits of the matter, with the welfare of the children being of paramount importance.

46. Section 14 of the CPC talks presumption as to foreign judgments. It provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

j. NO PROVISION FOR MIRROR ORDERS IN INDIA

47. In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is a concept known to the English law, but not to the Indian legal system. Hence, it is not possible to approach a Court in India for issuing a mirror order on the strength of a foreign Court Order whereby a mechanical return of children can be sought back to the overseas jurisdiction if the foreign court order is violated in India. Accordingly, an independent judicial remedy will have to be invoked in a Court of competent jurisdiction in India for a fresh adjudication and determination on the basis of the principle of the welfare of the child and the best interest rule. The foreign court order granting custody or visitation will form only one consideration before the Indian Court to determine rights of parties. The independent opinion of the children concerned too will be heard in such a process. However, simply seeking return of children on the strength of a foreign court order is not possible. There is no provision in Indian law for mirror orders to be passed.

48. k. A POSSIBLE SOLUTION

49. With the increasing number of non-resident Indians abroad and multiple problems arising, leading to family conflicts, inter parental child removal to India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. Till India does not become a signatory to The Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions. It is equally important that to create a uniform policy of law, some clear, authentic and universal child custody law is enacted within India by

adhering to the principles laid down in The Hague Convention. Divergent views emerging at different times may not be able to cope up to the rising number of such cases, which come up from time to time for interpretation. We in India are thus wanting for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in The Hague Convention. Till such time, India becomes a part of the Hague Convention on Inter-parental Child Removal and enacts an internal legislation to give effect to the Hague Convention by creating a Central Authority or other coordinating body, the inconsistency in judicial decisions will remain. The Indian Courts decide individual matters on the facts and circumstances of every case and are not guided by any statutory or enabling provisions, which interpreted may provide uniformity and consistency. Consequently, issues of custody, removal, inter-parental conflicts and related aspects cannot find any uniform path of judicial interpretation.

l. GENERAL CONCLUSION

50. With the increasing number of non-resident Indians abroad and multiple problems arising leading to family conflicts, inter parental child removal to and from India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. Till India does not become a signatory to the Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions. It is equally important that to create a uniform policy of law some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in The Hague Convention. Divergent views emerging at different times may not be able to cope up to the rising number of such cases, which come up from time to time for interpretation. We in India are thus wanting for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in The Hague Convention. Let us not delay the path to resolution of these disputes. Removed children cannot be allowed to live on a no man's island.

51. In the light of the above detailed position of law on inter-parental child removal issues in India, the following two conclusions can be said to emerge. They are identified and stipulated as follows:

1. Firstly, India not being a signatory to the Hague Convention on Civil Aspects of International Child Abduction, Courts in India do not take judicial notice of the definition of "Child Removal" which finds mention in the Hague Convention. Inter-Parental Child Removal is not defined as an offence under any Civil or Criminal law in India. Hence, to establish it as a wrong within the meaning of The Hague Convention is extremely difficult. Consequently, deprivation of parental rights on the strength of a foreign court order from a convention country will not find an easy interpretation. Such parental rights will have to be established and proved afresh to step on the threshold of violations resulting thereupon. Again, these may depend on an independent assessment of the Indian Courts on the best interest and the welfare of the child principle on the basis of evidence before the Court.
2. Secondly, the practical difficulties in seeking implementation of a foreign court order if the children are not returned from India, may vary in different jurisdictions in India. To start with, the choice of the petition (Habeas Corpus under the Constitution of India or a Guardianship petition under the Guardian and Wards Act), the time frame for its decision, delays in hearing of the

matter, time to be consumed in establishing evidence, and ultimately remedies of further appeals besides executing the Indian Court order, are all time consuming factors. It may be impossible to lay down any straight jacket formula of prescribing a defined time frame for an expeditious decision in seeking the return of the child from India. Further, if the matter is appealed to a Court of superior jurisdiction in India, it may again set off a final conclusion in the matter. Also, seeking implementation of visitation rights may require frequent visits to India since it will be practically impossible to seek temporary return to the foreign jurisdiction from India as long as the matter remains pending final decision before an Indian Court. The legal battles in India may thus be cumbersome, time consuming and requiring procedural formalities.

52. Hence, in the totality of the aforesaid situation, the need for India to have a codified and statutory law on the subject of inter-country, inter-parental child removal is the dire need of the hour. Despite the recommendation of the Law Commission of India in Report no. 218 of March 2009, that India should become a signatory to the Hague Convention to resolve the problem of inter-country child removal, the same has not happened and no domestic law defines or governs this problem till date. The deadlock continues and children suffer in silence in inter-country parental conflicts.

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Meena Dawar & ors. Vs. Rajeev Arora & ors.

Present: Mr. Siddhant Kant, Advocate,
for the appellants.

Mr. Siddharth Sharma, Advocate,and
Mr. Gautam Pathania, Advocate,
for respondent No.1.

Mr. Anil Malhotra, Amicus Curiae.

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Mr. Vikram Dawar (appellant No.2), his wife Ms. Palavi Dawar and Mr. Rajeev Arora (respondent No.1) assisted by their respective learned counsel, along with Mr. Anil Malhotra, learned Amicus Curiae, are present in Court and have explained at length the events of the outings monitored by Mr. Malhotra and the accompanying learned counsel for both the parties. There has not been much success in the first and second efforts at attempting a bonding process tried on 22nd July, 2015 and 27th September, 2015 between the minor daughters and their estranged father. Parties will continue with the effort to build trust and faith however tedious the process may be.

Parties are at liberty to move applications to sort out any differences as may arise between them with respect to the best interests of the two minor daughters of Mr. Arora. Mr. Arora will have visitation rights at Pathankot as and when he thinks best to try to bond with his children but such visitations will not disturb the children's schooling or their examination at their school at Pathankot. The maternal side i.e. the appellants will cooperate with Mr. Arora and mutually fix up meetings at Pathankot between him and his children at a jointly agreed venue, date and time at Pathankot and to ensure that the children are accompanied by their cousin/s, aunt/s, Nani etc. living in the joint family at Pathankot. Similarly, Mr. Arora can associate members of his family to win the

hearts of the minors. He may devise the process of bonding with his daughters by thinking out of the box. If he needs any help from the Court, he is free to approach the Court by moving an application to try and smoothen relations of both sides keeping the best interest and welfare of the children uppermost. If the passports are applied for the two minor daughters, Mr. Arora will cooperate and make compliances of the law to facilitate the issuance of the passports to the minor girls. Before the children proceed abroad for vacations/holidays, the permission of the Court will be sought beforehand with prior intimation of the country/place of visit with the itinerary and duration of stay and addresses Ex-India. The Court is informed that Ms. Kashish Arora's birthday falls on 27.11.2015. Mr. Arora would be free to celebrate the birthday with his daughter in Pathankot as is mutually agreed by both the sides.

Till the minor girls Kashish Arora (Date of Birth 27th November, 2003) and Gayatri Arora (Date of Birth 30th November, 2006) both attain the age of 21 years respectively, they shall remain in the joint interim custody of the maternal grandmother Smt. Meena Dawar i.e. Appellant No. 1 and the maternal uncle Mr. Vikram Dawar i.e Appellant No. 2, at their joint family home at Pathankot, where the said minor girls have been residing w.e.f 23rd August, 2007 after the death of their mother Late Preeti Arora at Amritsar on 22nd August, 2007.

Parties are free to make applications for further directions as the future may demand or the need arises.

The Trial Court record will remain in this Court till further orders. It is not thought fit in the interest of the minor children to subject them to trial proceedings till they become major to take their own decisions.

The custody of the children will remain in the status quo with the maternal side of the family in the meanwhile.

Adjourned sine-dine.

A photocopy of this order be placed on the connected file.

19.11.2015 **(RAJIV NARAIN RAINA)**
monika **JUDGE**

Raman v. State of Haryana (P&H) : Law Finder Doc Id # 461125

2013(3) R.C.R.(Criminal) 653 : 2013(3) PLR 502 : 2013(4) R.C.R.(Civil) 425 : 2013(4) ICC 55 : 2013 AAC 3147

PUNJAB AND HARYANA HIGH COURT

Before :- Rajiv Narain Raina, J.

C.W.P. No. 14046 of 2012 (O&M). D/d. 2.7.2013.

Raman - Petitioner

Versus

State of Haryana and others - Respondents

For the Petitioner :- Mr. Rahul Jaswal, Advocate for Mr. Vivek K. Thakur, Advocate.

For the Respondent :- Ms. Tanisha Peshawaria, DAG, Haryana, Mr. Anil Malhotra, Amicus Curiae.

For the Respondents No. 2 to 4 :- Mr. K.S. Malik, Advocate.

IMPORTANT

Accident by electrocution - Both arms and one leg of victim amputated - Compensation of L 60 lakhs awarded.

A. Electricity Act, 2003, Section 68 - Electricity Rules, 1956, Rules 29, 45, 46 and 91 - Tort - Accident by electrocution - Both arms and one leg of victim amputated - Compensation of L 60 lakhs awarded.

ON FACTS

A four year old child came in contact with naked High tension electric wire which passed over the roof of his house - Both arms and one leg of the child were amputated which rendered him completely invalid for whole of life - There was criminal negligence of Haryana Bijli Vitran Nigam as it failed to make periodical check of wire which was installed 30 years ago - Following compensation awarded :-

(i) L 60 lakhs to be paid by the Nigam and State of Haryana - Directions given where to keep and how to utilise the amount.

(ii) L 2 lakhs to be paid to mother of victim for trauma, mental shock, pain and agony caused to her.

(iii) Nigam to provide employment to victim when he came of age.

(iv) Principles how to work out compensation in cases other than under motor accidents stated.

(v) Writ petition under Article 226 of constitution is maintainable for grant of exemplary monetary compensation - Victim cannot be sent to civil court where long time is taken.

[Paras 21, 22, 37, 38 and 39]

B. Electricity Act, 2003, Section 68 - Electricity Rules, 1956, Rules 91, 29, 45 and 46 - Tort - Accidents other than motor accidents (electrocution in the instant case) - How to quantify compensation in such case.

[Paras 21, 22, 37, 38 and 39]

Cases Referred :

A. Krishna Patra v. Orissa State Electricity Board, AIR 1997 Ori. 109.

A. Subramani v. Tamil Nadu Electricity Board, W.P. (MD) No. 14011 of 2010, D/d. 23.2.2012.

Abati Bezbaruah v. Dy. Director General, Geological Survey of India, (2003)3 SCC 148.

Bhim Singh v. State of J&K, (1984) Supp. S.C.C. 504 : (1985)4 S.C.C. 677.

Cambridge Water Co. Ltd. v. Eastern Counties Leather Plc., 1994(1) All England Law Reports (HL) 53.

Dano Bai v. Punjab State, (P&H) (DB), 1997(1) R.C.R.(Civil) 695 : 1997(1) PLR 414.

Dr. Mehmood Nayyar Azam v. State of Chhattisgarh, 2012(3) R.C.R.(Criminal) 925 : 2012(4) Recent Apex Judgments (R.A.J.) 168 : JT 2012(7) SC 178.

General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.), (1994) 2 SCC 176.

Jyoti Kaul v. State of M.P., (2002)6 SCC 306,.

Kaushnuma Begum (Smt.) v. New India Assurance Co. Ltd., 2001(1) R.C.R.(Civil) 559 : (2001) 2 SCC 9.

Kaushnuma Begum v. New India Assurance Co. Ltd., 2001(1) R.C.R.(Civil) 559 : (2001)2 SCC 9.

Kharti (II) v. State of Bihar, (1981)1 S.C.C. 627.

Kharti (TV) v. State of Bihar, (1981)2 S.C.C. 493.

Madhya Pradesh Electricity Board v. Shail Kumari, 2002(1) R.C.R. (Criminal) 433 : AIR 2002 SC 551.

Maya Rani Banik v. State of Tripura, (Gauhati) (DB), AIR 2005 Gauhati 64.

Mushtaq Ahmed v. State of J. & K., AIR 2009 J&K 29.

N. Nizhalkodi v. The Chairman TNEB, W.P. (MD) No. 6634 of 2007, D/d. 16.8.2012.

New India Assurance Co. Ltd. v. Shanti Pathak (Smt.), 2007(3) R.C.R.(Civil) 593 : 2007(4) Recent Apex Judgments (R.A.J.) 131 : (2007)1 SCC 1.

Nilabati Behera v. State of Orissa, 1994(1) R.C.R. (Criminal) 18 : 1993(2) SCC 746.

Paramjit Kaur v. State of Punjab (P&H) (DB), 2008 (4) RCR (Civil) 772.

Patel Maganbhai Bapujibhai v. Patel Ishwarbhai Motibhai, AIR 1984 Guj. 69.

Ramesh Singh Pawar v. M.P. Electricity Board and others, 2004(3) R.C.R.(Criminal) 428 : 2004(3) R.C.R.(Civil) 452 : AIR 2005 MP 2.

Reshma Kumari v. Madan Mohan, 2013(2) R.C.R.(Civil) 660 : 2013(2) Recent Apex Judgments (R.A.J.) 664 : C.A. No. 4646 of 2009, D/d. 2.4.2013.

Rudul Sah v. State of Bihar, (1983)3 S.C.R. 508.

Rylands v. Fletcher 1868 Law Reports (3) HL 330.

Saheli, A Women's Resources Centre v. Commissioner of Police, Delhi Police Headquarters and Others, 1990(1) R.C.R.(Criminal) 299 : (1990)1 S.C.C. 422.

Sarla Dixit (Smt.) v. Balwant Yadav, 1996(2) R.R.R. 90 : (1996)3 SCC 179.

Sarla Verma v. DTC, 2009(3) R.C.R.(Civil) 77 : 2009(3) Recent Apex Judgments (R.A.J.) 373 : (2009)6 SCC 121.

Sebastian M. Hongray v. Union of India, (1984)1 S.C.R. 904 and [1984] 3 S.C.R. 544,.

Smt. Aunguri Devi v. Haryana Vidyut Prasaran Nigam Ltd. (P&H) (DB), 2002 (2) RCR (Civil) 414.

Smt. Rajani Devi v. Chairman, Orissa State Electricity Board, (1996)81 Cut LT 353.

State of J&K v. Mohd. Iqbal, AIR 2007 J&K 1.

State of Maharashtra v. Ravikant S. Patil, 1992(2) S.C.T 439 : (1991)2 S.C.C. 373.

The Kerala State Electricity Board v. Suresh Kumar, AIR 1986 Ker. 72.

U.P. Power Corporation v. Bijendra Singh, AIR 2009 Allahabad 56.

U.P. Rajya Vidyut Parishad v. Chandra Pal, 2002(3) RCR (Civil) 154.

U.P. State Road Transport Corporation v. Trilok Chandra, (1996) 4 SCC 362.

Union Carbide Corporation v. Union of India, (1991)4 S.C.C. 584,.

United India Insurance Co. Ltd. v. Patricia Jean Mahajan, 2002(3) R.C.R.(Civil) 534 : (2002)6 SCC 281.

Uttam Sahu v. Chairman, Orissa State Electricity Board, (1996)2 OLR 99.

JUDGMENT

Rajiv Narain Raina, J. - In a tragic and heart rending accident caused by electrocution, a four year old child Raman on coming into contact with a naked 11KV transmission line passing over the roof of his father's house built in village Sanoli

Khurd, District Panipat has suffered as a consequence triple amputation of the limbs, a rare condition, leading to something even worse than 100% permanent disability.

2. The injured Raman has filed this petition under Article 226 of the Constitution through his father, Manoj Kumar claiming compensation from the respondents-Uttar Haryana Bijli Vitran Nigam Limited (for short "the Nigam") and the State of Haryana for loss of both arms and the left leg severed leaving stumps at a tender age with almost all avenues open to earn and support himself in the future shut and so also to be denied the small pleasures of growing up to manhood and to do ordinary things that children do, and left to face life completely dependent on others till he lives. He may never find a bride or start a family. He may never be able to feed himself both literally and metaphorically until the magic world of modern science intervenes through prosthetic limbs, robotics and futuristic stem cell technology at unforeseeable cost. The old proverb goes -God helps those who help themselves- but that may not be apt in this case, since this Court exists and exists to bring succour to the helpless, the downtrodden, the disabled and the invalid who are forsaken by destiny. To visualise and understand the magnitude of the plight of the petitioner his photographs are the best testimony of what is left of him and which are made part of the order as Appendix 1.

3. Notice of motion was issued on the petition by this Court on 26.7.2012. The Nigam has contested the case by filing a written statement. Injury by electrocution suffered on 3.11.2011 has not been disputed or that the child came in contact with an 11KV naked wire passing over the roof of the house built by the petitioner's father in village Sanoli Khurd, District Panipat where he lives with his family. It is explained that the 11KV transmission line was erected and installed three decades ago then passing over agricultural fields. Over a period of time, as is the historical necessity, many constructions have come up outside the abadi deh or lal lakir of the village where the petitioner's father constructed a house for his family about a decade ago where the unfortunate incident happened.

4. Of the cluster of electricity transmission lines which pass over the house of the petitioner from one electricity pole to the other, one of them hangs dangerously close to one corner of the roof. It has been transfixed with an insulator installed on an angle iron to hold it up and keep it out of harm's way. To understand the situation nothing would serve better than the photograph of the insulator with the angle iron which is appended with this order as Appendix 2.

5. The house of the petitioner's father is a shop-cum-residence where he works out from to do his spare part business. The house lies amidst a large number of dwellings which have come up apparently without legal sanction or permission of any competent authority or before informing the electricity department-the Nigam- power corporation respondent, that the passing wires may injure man being drawn much prior in time to the coming of the affected family on the land.

6. It has been explained in the written statement filed by the SDO (Operations) Sub Division, UHBVNL, Chhajpur, District Panipat that the insulator/angle iron seen in the photograph (P-4 to the petition and Appendix 2 to this order) was not installed by any employee of the electricity department. The father of the petitioner is blamed squarely in installing the insulator himself on the edge of the roof of the house to keep at bay the high tension live wire so as not to touch brick and mortar. Therefore, there is no negligence on the part of the department or its agents and servants in the performance of its duties, and so therefore, neither the Nigam nor its employees can be held responsible or accountable for the mishap, much less for damages or monetary compensation.

7. When this matter came up for hearing on 10.1.2013, this Court requested Mr. Anil Malhotra, an Advocate of this Court to assist it as amicus curiae on the legal and factual issues involved requiring much research of legal principles attached to cases of tortuous liability, negligence, vicarious liability, statutory and strict liability arising for consideration in this case where negligence was denied, and its total impact on

assessment of quantum of compensation which may or may not be granted in the facts and circumstances of the case in extraordinary original civil writ jurisdiction exercised by this Court. The task was graciously accepted by Mr. Malhotra and he was then requested to assist the court in the light of precedents involving award of compensation in writ proceedings and of the legal principles involved emanating from the statutory provisions found in the Indian Electricity Act, 2003 (for short "the Act"). The young learned counsel Mr. Rahul Jaswal for the petitioner happily accepted this position to help Mr. Malhotra in the preparation of the case.

8. The learned amicus curiae has by the fruit of his labour placed on record a large number of decisions of the Supreme Court and of the various High Courts and has also filed accompanying illuminating written submissions for the consideration of this Court without posturing himself for any side in his oral address. Before adverting to that material, the factual background may be necessary to advert to, to take the matter forward.

9. The injured boy, Raman was electrocuted on 3.11.2011 resulting in severe electric burns which unfortunately later led to amputation of three limbs, a little beyond the joints. A Daily Diary Entry was recorded at Sr.No.15 on the same day in the rapat roznamcha of Police Post Sanauli Khurd, Panipat. The boy was taken for first aid at the local RM Anand Hospital, Panipat which referred the case to PGIMS, Rohtak. The final treatment was given at Safdarganj Hospital, New Delhi where the doctors were left with no option but to carry out the simultaneous triple amputation, leaving Raman a cripple.

10. The father of the petitioner visited the police post on 9.1.2012 to get his statement recorded before ASI Om Parkash who had earlier visited the spot and narrated before him that his four year old son had accidentally come in contact with the high voltage live wire passing over the roof of his building. It was given that from PGIMS, Rohtak, the victim was treated at Safdarjang Hospital, New Delhi. The police recorded Daily Diary Entry No.7 on 9.1.2012 at Police Post Sanauli Khurd, Panipat on the statement of Manoj Kumar. On 19.9.2012, the SSP, Panipat directed the DSP, Head Quarters, Panipat to enquire into the matter and submit a report by visiting the place of occurrence and recording the statement of persons etc. vide his Office Memo of even date. The Enquiry Officer, DSP HQ Panipat recorded the statement of Manoj Kumar the father of the victim, Lal Chand, Assistant Foreman, Sahib Singh, Assistant Lineman, Rameshwar, Lineman and Shashi Kumar, Sub Divisional Officer, UHBVN at Chajhpur, Panipat. During enquiry, it has been found by the police that no complaint had been received at the Complaint Centre, Sanauli Khurd, Panipat or in the office of SDM, Chhajhpur from the petitioner's father or any other person regarding 11 KV high tension wires. It was reported that the 11KV high tension electricity lines were installed about 30-32 years ago passing over agricultural fields where a decade ago, Manoj Kumar had constructed his house amidst a sea of other buildings. The police enquiry revealed that the Insulator was not installed by officials of the Electricity Department, and therefore, they were not found negligent in performance of their duties with respect to the accident on 3.11.2011.

11. The photocopy of the discharge summary issued by the Safdarjang Hospital, New Delhi would reveal that the procedure adopted by the attending doctor was by amputation and stump reduction of both upper limbs. Since the injuries suffered were not curable, triple amputation followed in the presence of gangrene having set in both the upper arms and left leg. Raman remained an indoor patient at Safdarjang Hospital from 28.12.2011 to 31.12.2011 for treatment of electric burn injuries. It is pleaded that Raman was referred to PGIMS, Rohtak by R.M. Anand Hospital, Panipat on 3.11.2011 itself. The child was issued a disability certificate by the Office of the Civil Surgeon, Panipat on 8.2.2012 in which his disability has been medically certified to be one hundred percent.

12. The question of negligence in tort is hotly disputed by the Licensee inasmuch as it disclaims that it had anything to do with the incident or of any vicarious liability by any act or omission of its agents. To put it bluntly, the learned counsel for the respondent

Nigam Mr. K.S. Malik submits that the human hand that put the conductor on an iron angle to keep the potentially dangerous wire from coming into contact with the roof of the house was not theirs.

13. The father of the petitioner asserts in paragraph 10 of the writ petition that he approached the SDO, Sub Division, Chhajpur, Panipat-respondent no.4 before the accident took place through a representation dated 16.8.2011 requesting him to remove the angle from the roof of the house, but no action was taken. A true translated copy of this representation has been placed on record as Annexure P-3 and photocopy of its original is found in the docket. The same has been signed by Manoj Kumar and some other residents. The contents of paragraph 10 of the writ petition have been rebutted by the Nigam, respondents No.2 to 4 in the common written statement. It is submitted that the petitioner never approached the SDO for removing the angle iron from his house nor was any such representation received at the Complaint Centre of Village Sanoli Khurd. A combined reading of the contents of paragraph 10 of the writ petition and its corresponding paragraph in the written statement shows that there is no specific denial of the existence or submission of the representation dated 16.8.2011. What is said is that such representation was not received at the Complaint Centre of Village Sanouli Khurd. It is not the assertion of the petitioner that he dropped the representation in the Complaint Centre. In fact the assertion is that he approached the 4th respondent before the accident through the representation which assertion of fact remains unrebutted on record. Therefore, it would be necessary to reproduce paragraph 10 of the writ petition and its response in the written statement :-

> Paragraph 10 of the writ petition:-"That the petitioner also approached the SDO, Sub Division, Chhajpur, Panipat i.e. respondent no.4 before the accident through representation dated 16.8.2011 to remove the iron angle from the roof of the house but no action has been taken by the respondent no.4. A copy of the representation dated 16.8.2011 is annexed herewith as Annexure P-3."
>
> Paragraph 10 of the written statement of respondents no.2 to 4:- "That the contents of para no.10 of the writ petition are wrong and as such denied. In reply thereto it is submitted that the petitioner never approached the SDO i.e. respondent no.4 or any other official of the Nigam for removing iron angle from his house nor any such representation received at the complaint centre of village Sanoli Khurd. It is further submitted that as per sale circular of the Nigam, if any person wants to remove electric wire from at any place, he will submit the application alongwith affidavit and he will also deposit the estimate expenses in the office of concerned SDO."

14. In the additional affidavit filed by Manoj Kumar, the father of the petitioner in response to the order of this Court dated 2.3.2013 he has asserted in paragraph 6 of the affidavit as under :-

> "6.The deponent submitted that the iron angle on the roof of the house from which the live 11 KV high power Tension line passes were installed by the employee of the Electricity Department in the year 2006."

This Court passed the following order on 2.3.2013 :-

> Learned counsel for the petitioner prays for time to file an additional affidavit of the petitioner disclosing the date of birth of the victim, the status of the family, the avocation of the father of the injured; whether the mother of the child is employed; number of siblings and their ages and schools, if any, attended by them. The affidavit should disclose the total family income i.e. the combined income of parents and not of their brothers and sisters etc.; the date of construction of the building where the child was electrocuted; whether parents are owners or tenants; whether the building is within the lal dora of village abadi deh; if outside the lal dora, whether NOC of the Gram Panchayat was obtained; who installed the angle iron on the roof of the house from which the live 11 KV

high power tension line passes; when was the angle iron and by whom installed; the density of constructions disclosing as to how many houses in the immediate neighbourhood of the house in question fall below the 11 KV high power tension line; photographs depicting the position obtaining at site be also furnished.

Ms. Peshawaria, on her part would seek instructions with respect to the scheme, if any, framed under Section 357-A of the Code of Criminal Procedure, 1973 promulgated by the Haryana Government with respect to victim compensation. She would also file an affidavit of the SDM/Executive Magistrate, Panipat of any exercise carried out under Section 68 of the Electricity Act, 2003. The affidavit would also indicate whether the construction on which the child was injured is an authorised colony and whether the construction plans have been sanctioned by any authority including Gram Panchayat village Sanoli Khurd, Panipat. The affidavit would also indicate what steps have been taken by the District administration with respect to safety and protective devices put in operation in compliance of Rule 91 of the Indian Electricity Rules, 1956 or of any counter-part rules operating in Haryana in the said village.

Mr. Malik, appearing for the Corporation prays for time to file a more detailed and comprehensive affidavit outlining the steps taken by the respondent-Corporation in discharge of duties under Section 68 of the Indian Electricity Act, 2003 and the rules framed thereunder and steps taken by its officers/officials in discharge of statutory duty of making safe overhead lines so that they do not endanger life and to speak on justification in the written statement that the lines were laid 30 or 32 years ago, thus shirking responsibility on the ground that habitation has grown outside lal dora and beneath the 11 KV high power tension line passing through the abadi.

Let the above be responded to as requested by the counsel for the respondent within four weeks.

List on 02.04.2013."

15. It is in response to this order that the petitioner's father has filed the above mentioned affidavit dated 30.3.2013 in which he has sworn to the following facts :-

"1. That the son of the deponent namely Raman Kumar s/o Manoj Kumar was born on 10.9.2007 and deponent has two children namely Raman Kumar Boy and Girl Khushi.

2. That the deponent is sole bread earner of the family as his wife is a housewife and two children, one is injured Raman and second is girl namely Khushi studying in the 4th class in Sarswati Shiksha Mandir, Sanoli Khurd.

3. That the deponent is having the spare-part shop in the village and combined income of his family is about 35,000 per year.

4. That the building where the child was electrocuted has been constructed in the year 2000 and deponent is the owner of the same as he purchased about 30 yards of land.

5. That the building is outside the Lal dora of village Abadi Deh and NOC from Gram Panchayat has not been obtained as the same is not given or obtained in the villages.

6. That the deponent submitted that the iron angle on the roof of the house from which the live 11KV high power Tension line passes were installed by the employee of the Electricity Department in the year 2006.

7. That the house of the deponent is surrounded by at least 40 to 60 houses and

it is densely populated area and all the houses falls below or near the 11KV High Power Tension Line. Photographs showing the actual position of the site are attached."

16. There is no rebuttal of this affidavit though paragraph 6 contains material and verifiable particulars. There is no reason to discard the same on any ground much less on the ground of being self serving. When the version of the petitioner is accepted on the ground of non-traverse then the case comes within the fold of negligence and therefore, tortuous liability in addition to strict liability.

17. The first issue which arises for consideration is as to the duty of care cast on the respondent Nigam-Licensee of the State in maintaining transmission lines which is owner and the supplier of electricity under the Electricity Act, 2003 (for short 'the Act''). Section 68 of the Act contains provisions relating to overhead lines that carry live electrical energy. The provision stipulates that an overhead line shall, with the approval of the appropriate Government, be installed or kept installed above ground, in accordance with the provisions of Section 68(2) of the Act. Section 68 gives authority to a District Magistrate to remove trees, structures or objects near an overhead line. The Electricity Board/Nigam should be thus vigilant for maintenance of live electrical lines at all times. Section 68 of the Act reads as follows :-

"68.(1) An overhead line shall, with prior approval of the Appropriate Government, be installed or kept installed above ground in accordance with the provisions of sub-section (2).

2. The provisions contained in sub-section (1) shall not apply -

(a) in relation to an electric line which has a nominal voltage not exceeding 11 kilovolts and is used or intended to be used for supplying to a single consumer;

(b) in relation to so much of an electric line as is or will be within premises in the occupation or control of the person responsible for its installation; or

(c) in such other cases as may be prescribed.

(3) The Appropriate Government shall, while granting approval under sub-section (1), impose such conditions (including conditions as to the ownership and operation of the line) as appear to it to be necessary

(4)The Appropriate Government may vary or revoke the approval at any time after the end of such period as may be stipulated in the approval granted by it.

(5) Where any tree standing or lying near an overhead line or where any structure or other object which has been placed or has fallen near an overhead line subsequent to the placing of such line, interrupts or interferes with, or is likely to interrupt or interfere with, the conveyance or transmission of electricity or the to interrupt or interfere with, the conveyance or transmission of electricity or the accessibility of any works, an Executive Magistrate or authority specified by the Appropriate Government may, on the application of the licensee, cause the tree, structure or object to be removed or otherwise dealt with as he or it thinks fit.

(6) When disposing of an application under sub-section (5), an Executive Magistrate or authority specified under that sub-section shall, in the case of any tree in existence before the placing of the overhead line, award to the person interested in the tree such compensation as he thinks reasonable, and such person may recover the same from the licensee.

Explanation. - For purposes of this section, the expression "tree" shall be deemed to include any shrub, hedge, jungle growth or other plant."

18. Rule 91 of the Electricity Rules 1956 (for short "the Rules") lays down the procedure of Safety and Protective Devices of overhead electric lines erected over any part of a street or other public place or any consumer's premises and mandates that those shall be protected with a device approved by the Inspector for rendering the line electrically harmless in case it breaks. These safeguards are required to be provided by Electricity authorities statutorily. Rule 91 reads as under :-

> "91. Safety and protective devices :- (1) Every overhead line, (not being suspended from a dead bearer wire and not being covered with insulating material and not being a trolley-wire) erected over any part of street or other public place or in any factory or mine or on any consumers' premises shall be protected with a device approved by the Inspector for rendering the line electrically harmless in case it breaks.
>
> (2) An Inspector may by notice in writing require the owner of any such overhead line wherever it may be erected to protect it in the manner specified in sub-rule (1).
>
> (3)The owner of every high and extra-high voltage overhead line shall make adequate arrangements to the satisfaction of the Inspector to prevent unauthorised persons from ascending any of the supports of such overhead lines which can be easily climbed upon without the help of a ladder or special appliances. Rails, reinforced cement concrete poles and pre-stressed cement concrete poles without steps, tubular poles, wooden supports without steps, I-sections and channels shall be deemed as supports which cannot be easily climbed upon for the purpose of this rule]."

19-20. Rules 29, 44, 45 and 46 of the Electricity Rules 1956 are statutory in nature and require the electricity authorities to conduct periodical inspection of lines maintained by them and are required to take all such safety measures to prevent accident and maintain the lines in such a manner that life and property of the general public is protected. The Board/Nigam is duty bound to carry out activities in such a manner that safety and security provisions are enforced in accordance with the statutory rules. The aforesaid Rules are reproduced for rapid reference :-

> "29. Construction, installation, protection, operation and maintenance of electric supply lines and apparatus. - (1) All electric supply lines and apparatus shall be of sufficient ratings for power, insulation and estimated fault current and of sufficient mechanical strength, for the duty which they may be required to perform under the environmental conditions of installation, and shall be constructed, installed, protected, worked and maintained in such a manner as to ensure safety of [human beings, animals and property].
>
> (2) Save as otherwise provided in these rules, the relevant code of practice of the [Bureau of Indian Standards] [including National Electrical Code] if any may be followed to carry out the purposes of this rule and in the event of any inconsistency, the provision of these rules shall prevail.
>
> (3) The material and apparatus used shall conform to the relevant specifications of the [Bureau of Indian Standards] where such specifications have already been laid down."
>
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> 44. Insturctions for restoration of persons suffering from electric shock. - (1) Instructions, in English or Hindi and the local language of the district and where Hindi is the local language, in English and Hindi for the restoration of persons suffering from electric shock, shall be affixed by the owner in a conspicuous place in every generating station, enclosed sub-station, enclosed switch-station and in every factory as defined in clause (m) of Section 2 of the Factories Act,

1948 (63 of 1948) in which electricity is used and in such other premises where electricity is used as the Inspector or any officer appointed to assist the Inspector may, by notice in writing served on the owner, direct.

(2) Copies of the instructions shall be supplied on demand by an officer or officers appointed by the Central or the State Government in this behalf at a price to be fixed by the Central or the State Government.

(3) The owner of every generating station, enclosed substation, enclosed switch-station and every factory or other premises to which this rule applies, shall ensure that all authorised persons employed by him are acquainted with and are competent to apply the instructions referred to in sub-rule (1).

(4) In every manner high voltage or extra-high voltage generating station, sub station or switch station, an artificial respirator shall be provided and kept in good working condition.

45. Precautions to be adopted by consumers, [owners, occupiers], electrical, contractors, electrical workmen and suppliers - (1) No electrical installation work, including additions, alterations, repairs and adjustments to existing installations, except such replacement of lamps, fans, fuses, switches, low voltage domestic appliances and fittings as in no way alters its capacity or character, shall be carried out upon the premises of or on behalf of any [consumer, supplier, owner or occupier] for the purpose of supply to such [consumer, supplier, owner or occupier] except by an electrical contractor licensed in this behalf by the State Government and under the direct supervision of a person holding a certificate of competency and by a person holding a permit issued or recognised by the State Government :

Provided that in the case of works executed for or on behalf of the Central Government and in the case of installations in mines, oil fields and railways, the Central Government and in other cases the State Government may, by notification in the Official Gazette, exempt, on such conditions as it may impose, any such work described therein either generally or in the case of any specific class of [consumers, suppliers, owners or occupiers] from so much of this sub-rule as requires such work to be carried out by an electrical contract licensed by the State Government in this behalf.

(2) No electrical installation work which has been carried out in contravention of sub-rule (1) shall either be energised or connected to the works of any supplier.]

46. Periodical inspection and testing of installation, - (1)(a) Where an installation is already connected to the supply system of the supplier, every such installation shall be periodically inspected and tested at intervals not exceeding five years either by the Inspector (or any officer appointed to assist the Inspector) or by the supplier as may be directed by the State Government in this behalf or (in the case of installation belonging to, or under the control of the Central Government, and in the case of installations in mines, oil fields and railways by the Central Government.

(aa) the periodical inspection and testing of high voltage and extra high voltage installations belonging to supplier, shall also be carried out at intervals not exceeding five years by the inspector or any officer appointed to assist the inspector.]

(b) Where the supplier is directed by the Central or the State Government as the case may be to inspect and test the installation he shall report on the condition of the installation to the consumer concerned in a form approved by the Inspector and shall submit a copy of such report to the Inspector or to any officer appointed to assist the Inspector and authorised under sub-rule (2) of the

rule 4A.

(c) Subject to the approval of the Inspector, the forms of inspection report contained in Annexure IXA may, with such variations as the circumstances of each case require, be used for the purposes of this sub-rule.

(2)(a) The fees for such inspection and test shall be determined by the Central or the State Government, as the case may be, in the case of each class of consumers and shall be payable by the consumer in advance.

(b)In the event of the failure of any consumer to pay the fees on or before the date specified in the fee-notice, supply to the installation of such consumer shall be liable to be disconnected under the direction of the Inspector. Such disconnection, however, shall not be made by the supplier without giving to the consumer seven clear days' notice in writing of his intention so to do.

(c)In the event of the failure of the owner of any installation to rectify the defects in his installation pointed out by the Inspector or by any officer appointed to assist him and authorised under sub-rule (2) of Rule 4A in the form set out in Annexure IX and within the time indicated therein, such installation shall be liable to be disconnected [under the directions of the Inspector] after serving the owner of such installation with a notice :

Provided that the installation shall not be disconnected in case an appeal is made under rule 6 and the appellate authority has stayed the orders of disconnection:

Provided further that the time indicated in the notice shall not be less than 48 hours in any case:

Provided also that nothing contained in this clause shall have any effect on the application of rule 49.

(3)Notwithstanding the provisions of this rule, the consumer shall at all times be solely responsible for the maintenance of his installation in such condition as to be free from danger."

(underlining for emphasis)

21. On the position of law for awarding compensation in writ jurisdiction, Mr. Malhotra in his illuminating written submissions to this Court has the following to say :-

"2. That the position of law for awarding compensation in writ jurisdiction has been recognised by the Apex Court in Nilabati Behera v. State of Orissa & Ors., 1994(1) R.C.R. (Criminal) 18 : 1993(2) SCC 746 and in Dr. Mehmood Nayyar Azam v. State of Chhatisgarh, 2012(3) R.C.R. (Criminal) 925 : 2012(4) Recent Apex Judgments (R.A.J.) 168 : JT 2012 (7) SC 178, wherein the principle enunciated is that the Supreme Court and the High Court being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution. Award of compensation in writ jurisdiction for contravention of human rights and fundamental freedoms is thus recognised by the Supreme Court.

3. That the Apex Court has recognised that where victims whose fundamental rights under Article 21 of the Constitution are flagrantly infringed, the State can be called to repair the damage done by its officers to the fundamental rights of the aggrieved person, notwithstanding the right of the citizen to the remedy by way of civil suit or criminal proceedings. Hence, monetary relief can be awarded in writ jurisdiction to the aggrieved party for infringement of fundamental rights under Article 21 of the Constitution by awarding compensation and penalising

the wrong doer as also fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen/aggrieved person.

4. Thus, following the above dictum of law, this Hon'ble Court can grant compensation by moulding the relief in writ jurisdiction by way of penalising the wrong doer and fixing the liability for the public wrong on the respondents who have failed to perform their public duties. In the view of the Supreme Court, the payment of compensation is not to be understood as a civil action for damages but of making "monetary amends" under Public law for wrong done for breach of public duty. As per the law laid down by the Apex Court, this is independent of the rights of the aggrieved party to claim compensation under private law in an action based on tort through a suit instituted in a court of competent jurisdiction or/and prosecution of the offender under the penal law. Thus, this claim for "exemplary damages" is maintainable before this Hon'ble Court under the above settled position of law and monetary compensation can be awarded to the victim."

22. On the position of law for awarding compensation specifically in electricity matters, Mr. Malhotra's research has resulted in the following submissions and supporting case law :-

"6. That upholding the principle of "strict liability" and consequential negligence in awarding compensation for breach of statutory duties/obligations on the part of State Electricity Boards, the Apex Court and the High Courts of Madras, Madhya Pradesh, Orrisa, Kerala and Gujarat have awarded compensation to victims in writ/appellate jurisdiction by holding that electricity authorities are duty bound to observe precautions/safeguards under the provisions of the Indian Electricity Act, 2003 (previously the Indian Electricity Act 1910, the Electricity Supply Act, 1948 and the Rules made thereunder). Failure of such statutory functions/duties tantamounting to negligence cannot be overcome by alleged statutory obligations on the part of the consumer of electricity. Electrocution by live wires necessitates "Strict liability" and differs from liability arising on account of negligence and is not relevant in cases of "Strict liability". Thus, electricity authorities are liable irrespective of whether the harm could have been avoided by the consumer taking precautions. The following judgments granting compensation for injuries/loss of life caused on account of mishaps arising out of electrocution and liability arising under the statutory enactments quoted above, are cited hereunder in support of the above settled principles of law :

a. Madhya Pradesh Electricity Board v. Shail Kumari, 2002(1) R.C.R. (Criminal) 433 : AIR 2002 SC 551

b. N. Nizhalkodi v. The Chairman TNEB./W.P. (MD) No. 6634 of 2007 decided on 16.08.2012 - S.B. of Madras High Court

c. A. Subramani v. Tamil Nadu Electricity Board, W.P. (MD) No. 14011 of 2010 decided on 23.02.2012 - S.B. of Madras High Court

d. Ramesh Singh Pawar v. M.P. Electricity Board and others, 2004(3) R.C.R.(Criminal) 428 : 2004(3) R.C.R.(Civil) 452 : AIR 2005 MP 2

e. A. Krishna Patra v. Orissa State Electricity Board, AIR 1997 Ori 109

f. The Kerala State Electricity Board v. Suresh Kumar, AIR 1986 Ker. 72

g. Patel Maganbhai Bapujibhai v. Patel Ishwarbhai Motibhai, AIR 1984 Guj. 69"

"That in the aforestated situation, the settled position of law indicates that the

> rule of strict liability and the theory foreseeable risk makes the electricity authorities primarily liable to compensate the sufferer. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimensions, the managers of its supply have the added duty to take all safety measures to prevent escape of such energy which causes electrocution. Thus, it is the statutory obligation, duty and responsibility of the electricity authorities to provide safety and protective devices for rendering safeguards and failure to do so entails award of compensation on account of any mishap which occurs by lack of safeguards."

23. On the applicability of the settled position of law to the present case, Mr. Malhotra has the following to say :-

> "8. That from a reading of the averments made in the petition, the minor child Raman was electrocuted on 03.11.2011 by the live overhead line/wire on the open roof of his house provided by respondent Nos. 1 to 4 by installing an angle iron on the roof of the house of the petitioner. This mode and method of providing electrical energy to the residential premises of the petitioner through a live overhead line/wire by installing it through an angle iron contrary to the provisions of Section 68 of the Electricity Act, 2003, clearly establishes its flagrant violation. No precautions, safeguards, safety measures or other steps were taken to ensure that the live overhead line/wire was at a reasonable and sufficient distance to avoid human contact. Hence, by installing the live overhead line/wire and keeping it exposed clearly establishes that no measures were taken to avoid mishap by contact with the wire transmitting high voltage electrical energy. Hundred percent permanent disabilities have been suffered by the minor 4 year old child on this count. 9. That in the aforestated situation, applying the principles in the judgments quoted above and upon the doctrine of strict liability being fully attracted to the present case and keeping in view the negligence of the respondents in not providing any safeguards, checks, balances, there is a clear statutory obligation upon the respondents to pay compensation for the loss caused to the petitioner. Furthermore, the respondents did not exercise care and caution in doing any periodic checks in ensuring that the live wire installed through an angle iron should have been detected and immediately removed. As suppliers of electrical energy, the respondents are fully liable for not ensuring the removal of the live overhead line/wire which was a potentially dangerous and volatile risk situation. Therefore, even on account of negligence, the respondents are fully liable for compensation."

24. I think that on failure to use all reasonable means to prevent escape of an inherently dangerous thing, which by nature electricity is, the standard of care will be very high and the onus would be on the supplier to show that there was no negligence. In this case, the respondent-Nigam has not successfully discharged the onus to the satisfaction of this Court.

25. Though Nilabati Behera (supra) dealt with a case of custodial death, but the principles of award of compensation in cases of contravention of the fundamental right to life and liberty based on "strict liability" laid down are of universal application in other fact situations demanding intervention. In cases where there is a factual controversy of the kind which cannot be addressed in writ jurisdiction, should a petitioner be relegated to the ordinary remedy of civil suit if his claim to compensation is actually controversial in nature which requires admitting evidence to establish such rights. The distinction between rights based on "strict liability" remediable in writ proceedings where there is public law element involved and tortuous liability would have to be kept in mind. Sovereign immunity does not apply to "strict liability" and can be used as defence in private law in an action based on tort. In paragraph 10 of Nilabati Behera the Supreme Court held as under :-

> "10. In view of the decisions of this Court in Rudul Sah v. State of Bihar and Another, [1983] 3 S.C.R. 508, Sebastian M. Hongray v. Union of India and Others, [1984] 1 S.C.R. 904 and [1984] 3 S.C.R. 544, Bhim Singh v.

State of J&K. [1984] Supp. S.C.C. 504 and [1985] 4 S.C.C. 677, Saheli, A Women's Resources Centre and Others v. Commissioner of Police, Delhi Police Headquarters and Others, 1990(1) R.C.R.(Criminal) 299 : [1990] 1 S.C.C. 422 and State of Maharashtra and Others v. Ravikant S. Patil, 1992(2) S.C.T 439 : [1991] 2 S.C.C. 373, the liability of the State of Orissa in the present case to pay the compensation cannot be doubted and was rightly not disputed by the learned Additional Solicitor General. It ,would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in an action on tort. It may be mentioned straightaway that award of compensation in a proceeding under Article 32 by this court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings. We shall now refer to the earlier decisions of this Court as well as some other decisions before further discussion of this principle."

In paragraphs 17, 18, 19 and 22 of the report there are contained guiding principles for Courts to follow and apply. They read as follows :-

"17. It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is `distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right.

The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in Rudul Sah and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights.

18. A useful discussion on this topic which brings out the distinction between the remedy in public law based on strict liability for violation of a fundamental right enabling award of compensation, to which the defence of sovereign immunity is inapplicable, and the private law remedy, wherein vicarious liability of the State in tort may arise, is to be found in Ratanlal & Dhirajlal's Law of Torts, 22nd Edition, 1992, by Justice G.P. Singh, at pages 44 to 48.

19. This view finds support from the, decisions of this Court in the Bhagalpur blinding cases: Kharti and Others (II) v. State of Bihar and Others, [1981] 1 S.C.C. 627 and Kharti and Other (TV) v. State of Bihar and Others, [1981]2 S.C.C. 493, wherein it was said that the court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared to forge new tools and devise new remedies' for the purpose of vindicating these precious fundamental rights. It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the inquiry, needed to ascertain-the necessary facts, for granting the relief, as the

available mode of redress, for enforcement of the guaranteed fundamental rights. More recently in Union Carbide Corporation and Others v. Union of India and Others, [1991]4 S.C.C. 584, Misra, C.J. stated that 'we have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future..... there is no reason why we should hesitate to evolve such principle of liability .... ." To the same effect are the observations of Venkatachaliah, J. (as he then was), who rendered the leading judgment in the Bhopal gas case, with regard to the court's power to grant relief.

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22. The above discussion indicates the principles on which the Court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in Rudul Sah and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in Rudul Sah and others in that line have to be understood and Kasturilal distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son."

(underlined for emphasis)

26. In Dr. Mehmood Nayyar Azam v. State of Chhattisgarh and others, 2012(3) R.C.R.(Criminal) 925 : 2012(4) Recent Apex Judgments (R.A.J.) 168 : JT 2012 (7) SC 178, the Supreme Court while dealing with the question of compensation in a case of torture and harassment in police custody, observed that when the matter is of public law remedy, the compensation can be allowed as it is an independent right available to an aggrieved party under private law. The interfacing appears to be between private law injuries adjudicated through public law remedy.

27. In Madhya Pradesh Electricity Board v. Shail Kumari and others, 2002(1) R.C.R. (Criminal) 433 : AIR 2002 SC 551, the factual situation obtaining was that a live electric wire had snapped and was lying on a public road partially inundated with rain water when the deceased unwittingly rode over the wire on a bicycle which then twitched and snuffed his life instantaneously. The Supreme Court held :-

"7. It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human being, who gets unknowingly trapped into it the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension the managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defence on the part of the management of the Board that somebody committed mischief by siphoning such energy to his private property and that the electrocution was from such diverted line. It is the look out of the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps.

8. Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is

liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of the negligence or fault in this way i.e. the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions.

9. The doctrine of strict liability has its origin in English Common Law when it was propounded in the celebrated case of Rylands v. Fletcher (1868 Law Reports (3) HL 330). Blackburn J., the author of the said rule had observed thus in the said decision :

"The rule of law is that the person who, for his own purpose, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does so he is prima facie answerable for all the damage which is the natural consequence of its escape."

10. There are seven exceptions formulated by means of case law to the doctrine of strict liability. It is unnecessary to enumerate those exceptions barring one which is this. "Act of stranger i.e. if the escape was caused by the unforeseeable act of a stranger, the rule does not apply". (vide Page 535 Winfield on Tort, 15th Edn.)

11. The rule of strict liability has been approved and followed in many subsequent decisions in England. A recent decision in recognition of the said doctrine is rendered by the House of Lords in Cambridge Water Co. Ltd. v. Eastern Counties Leather Plc., {1994(1) All England Law Reports (HL) 53}. The said principle gained approval in India, and decisions of the High Courts are a legion to that effect. A Constitution Bench of this Court in Charan Lal Sahu v. Union of India and a Division Bench in Gujarat State Road Transport Corporation v. Ramanbhai Prabhatbhai had followed with approval the principle in Rylands v. Fletcher. By referring to the above two decisions a two Judge Bench of this Court has reiterated the same principle in Kaushnuma Begum v. New India Assurance Co. Ltd., 2001(1) R.C.R. (Civil) 559 : (2001)2 SCC 9}.

12. In M.C. Mehta v. Union of India this Court has gone even beyond the rule of strict liability by holding that "where an enterprise is engaged in a hazardous or inherently dangerous activity and harm is caused on any one on account of the accident in the operation of such activity, the enterprise is strictly and absolutely liable to compensate those who are affected by the accident; such liability is not subject to any of the exceptions to the principle of strict liability under the rule in Rylands v. Fletcher."

(underlining for emphasis)

28. The defense of the supplier of electricity in the aforesaid case was that the death caused by electrocution was due to the clandestine pilferage committed by a stranger of unauthorized siphoning the electricity energy from the supply line and hence the wrongdoer alone should be mulcted with the burden of damages. The Supreme Court did not accept this defence and upheld compensation awarded by the High Court.

29. In A.Krishna Patra (supra), the Division Bench of the Orissa High Court in a case of death by electrocution observed as follows :-

"8. The question relating to the liability of the Orissa State Electricity Board in case of death by electrocution due to snapping of transmission line or the like reason, came up for consideration before this Court in two recent cases, namely, Smt. Rajani Devi v. Chairman, Orissa State Electricity Board, (1996)81 Cut LT 353, and Uttam Sahu v. Chairman, Orissa State Electricity Board, (1996)2 OLR 99. In both these cases, the cause of death was electrocution due to coming in contact with a snapped line which remained charged. While dealing with the question in Rajani Devi's case (supra), after referring to Rule 91 of the Indian Electricity Rules which relates to safety and protective devices and paragraphs 35 and 36 contained in Volume 37 of the Halsbury's Laws of England, 4th Edition, it has been held that the law is clear that the O.S.E.B. must take special precautions in the operations connected with the transmission of energy through over-head lines. It was further indicated therein that in such cases, the burden will be heavy on the Board to establish that they could have prevented the escape of electric current as such things do not happen, if those who have the management use proper care. In the case at hand, it is the plea of the O.S.E.B. that neither they were negligent nor was the snapping of the live conductor due to lack of supervision, However, this is belied by the report of the Electrical Inspector which indicates that one of the phased Conductors snapped as it had outlived its utility and had become mechanically weak. This clearly indicates the lack of care, caution and proper supervision on the part of the opposite parties. Nay, it indicates a clear case of object indifference, for it was the bounden duty of the opposite parties to see that a mechanically unsound and weak conductor is replaced, looking to the very serious consequences which are likely to follow, which indeed have happened in this case. Permitting transmission of electrical energy through conductors which have outlived their utility and have become mechanically weak and unsound would itself be an indication of negligence. If such a conductor snaps and the line does not become electrically harmless and thereby results in the death of a person, this would by itself be a ground for imputing negligence to the O.S.E.B. In such a case, the burden would, we feel, be on the O.S.E.B. to explain and not on the claimant to establish negligence of the O.S.E.B. The petitioner need show nothing more.

9. The plea of an inevitable accident or an act of God advanced at the stage of hearing, cannot come to the aid of the opposite parties. While considering the question of inevitable accident or an act of God, it will be useful to reproduce a passage from the Law of Torts, 22nd Edition, by Justice G. P. Singh, which reads thus :

"All causes of inevitable accidents may be divided into two classes: (1) those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause; and (2) those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, non-feasance or mis-feasance, or in any other causes independent of the agency of natural forces. The terms `act of God' is applicable to the former class."

An inevitable accident is an event which happens not only without the concurrence of the will of the man, but in spite of all efforts on his part to prevent it. It means, an accident physically unavoidable something which cannot be prevented by human skill or foresight. We have already referred to the report of the Electrical Inspector which indicates that the conductors snapped as it had outlived its utility and had become mechanically weak and unsound. Had the Board exercised proper care and supervision, it could have taken proper and prompt steps to replace the mechanically unsound and weak conductor in time, but that was not done. Thus, it cannot be said that the O.S.E.B. could not have prevented the incident by exercise of ordinary care, caution and proper supervision. Thus, it is not a case where the accident took place in spite of all efforts on the part of the O.S.E.B. to prevent it. In other words, it can be said that the accident was solely due to lack of care and caution on the part of the O.S.E.B. and its functionaries. Thus, it follows that the plea of an inevitable

accident is wholly misconceived and cannot come to the aid of the opposite parties for getting out of its liability.

10. An `act of God' is an inevitable or unavoidable accident without the intervention of the man; some casualty which the human foresight could not discern and from the consequence of which no human protection could be provided. This is not a case where the incident was due to unexpected operation of natural forces free from human intervention which no reasonable human foresight could be presumed to anticipate its occurrence or to prevent it. On the contrary, the material on record clearly indicates that but for indifference and inaction - negligence of the O.S.E.B. in not replacing the mechanically unsound and weak conductor which had outlived its utility, the incident may not have occurred.

11. Thus, though under the Electricity Act 1910 and the Electricity Supply Act, 1948, transmission of electric energy may absolve the O.S.E.B. from liability for nuisance for the escape of electric energy but in a case of negligence or, we may say, due to lack of care, inasmuch as the O.S.E.B. fails to use all reasonable means to prevent such escape, the O.S.E.B. will be liable, for in view of the inherently dangerous nature of electricity, the standard of care will necessarily be very high and it would be for the O.S.E.B. to show that there was no negligence in a case like the one at hand.

12. As a reference was made to the case of Rylands v. Fletcher, (186S-LR 3HL 330) (supra), the same may be dealt with briefly. In that case, the defendants had constructed a reservoir upon their land, in order to supply water to their mill. On the site that was chosen for the reservoir, there existed some shafts of a coal mine which was not in use. However, the passages also led to the adjoining mine which was owned by the plaintiff. This, however, was not discovered at the time of construction with the result that when the reservoir was filled, the water went down to the shaft and flooded the plaintiff's mine. Under these facts, the plaintiff instituted a suit for damages and succeeded. Dismissing the defendants' appeal, it was held by the House of Lords :

"The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings his land something which, though harmless while it remains there, will naturally do mischief if it escapes out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keep there, in order that it may not escape and damage his neighbours; but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it at his peril or is, ... merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more ...

We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep in at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiffs default; or, perhaps, that the escape was the consequence of `vis major' or the act of God; but as nothing of this sort exists here, it is unnecessary to enquire what excuse would be sufficient."

(underlining for emphasis)

30. In Suresh Kumar (supra), a Division Bench of the Kerala High Court while dealing with a case of compensation for injuries caused to a child on coming in contact with the 11 KV line live electric wire, upheld award of compensation for injuries sustained. The facts of the case were that a stay wire which supported the electric pole holding the 11 KV line had been cut two days prior to the incident by some workers of the defendant- Board. As a result, the pole gradually leaned and the wire sagged to a

height of about one meter above the paddy field, the child came in contact with the wire resulting in severe injuries and burns resulting in amputation of his right arm below the elbow.

31. In the 11th Edition of Winfield and Jolowicz on Tort by Sweet and Maxwell, it has been observed by the learned authors at page 352 and at page 889 as under :-

> "Electricity, is a dangerous thing and consequently the duty of those who own or control it is that laid down in Rylands v. Fletcher ((1868) LR 3 HL 330). The liability for electricity is precisely the same as for gas.
>
> "Liability for electricity is the same as for gas. It has been decided that the principle of Rylands v. Fletcher, ((1868) LR 3 HL 330) applies to electricity, and consequently the owners of wires or cables through which an electric current is passing must keep them innocuous at their peril."

32. In U.P. Rajya Vidyut Parishad v. Chandra Pal, 2002(3) RCR (Civil) 154, the Allahabad High Court held that failure of Electricity Board to maintain proper height of transmission wires was a per se negligent act and the doctrine of res ipsa loquitur was applicable. Merely putting up a notice or danger sign would not absolve the Board from its liability for injuries suffered or death caused. In this strain, see also cases of electrocution; State of J&K v. Mohd. Iqbal, AIR 2007 J&K 1; Smt. Aunguri Devi v. Haryana Vidyut Prasaran Nigam Ltd. (P&H) (DB), 2002 (2) RCR (Civil) 414; Mushtaq Ahmed v. State of J. & K., AIR 2009 J&K 29; Ramesh Singh Pawar v. M.P.E.B (M.P.), 2004(3) R.C.R.(Criminal) 428 : 2004(3) R.C.R.(Civil) 452 : AIR 2005 M.P. 2; Paramjit Kaur v. State of Punjab (P&H) (DB), 2008 (4) RCR (Civil) 772; Dano Bai v. Punjab State, (P&H) (DB), 1997(1) R.C.R.(Civil) 695 : 1997(1) PLR 414; Maya Rani Banik v. State of Tripura, (Gauhati) (DB), AIR 2005 Gauhati 64 and U.P. Power Corporation v. Bijendra Singh, AIR 2009 Allahabad 56 etc.

33. On a reading of the above case law the real question in this case which arises to my mind is whether the supplier of electricity can excuse himself by showing that the escape was owing to the petitioner's default. There is, however, little doubt on the other issues arising out of strict liability; burden of proof of escape of potentially dangerous thing causing injury wittingly or by surprise; standard of care required from Licensee which is circumspect statutorily under the Act and rules to do certain acts and things in the manner specified; jurisdiction of this court to award compensation in appropriate cases in writ jurisdiction and the connected issue of quantification of compensation so that it is neither under compensation nor overcompensation etc.; that in the present case such factors tilt in favour of the injured and need not detain us. The claim made in the petition is an actionable claim and the case is an eminently fit one for grant of compensation in exercise of powers under Article 226 of the Constitution.

34. The legal issues done, the only remaining concern of the Court is as to what extent relief is to be granted in this case. What guiding principles are to be followed in a case of a minor whose future itself is left dark and dreary filled with uncertainty? The principles of loss of income, loss to the estate, chances of employability in the future etc. remain intangible in the case of a minor child.

35. In cases of motor accidents, the issue of compensation has largely been evolved by case law, before and after introduction of the 2nd Schedule appended to the Motor Vehicles Act, 1988, and under the repealed 1937 Act and compensation granted according to the multiplier specified in the Schedule on a case to case basis. Some of the important cases of the Supreme Court on the subject are General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors, (1994) 2 SCC 176, Sarla Dixit (Smt.) and Anr. v. Balwant Yadav and Ors, 1996(2) R.R.R. 90 : (1996) 3 SCC 179, U.P. State Road Transport Corporation and Ors. v. Trilok Chandra and Ors., (1996) 4 SCC 362, Kaushnuma Begum (Smt.) and Ors. v. New India Assurance Co. Ltd. and Ors.,

2001(1) R.C.R.(Civil) 559 : (2001) 2 SCC 9, United India Insurance Co. Ltd. & Ors. v. Patricia Jean Mahajan & Ors, 2002(3) R.C.R.(Civil) 534 : (2002)6 SCC 281, Jyoti Kaul & Ors. v. State of M.P. & Anr, (2002)6 SCC 306, Abati Bezbaruah v. Dy. Director General, Geological Survey of India & Anr, (2003) 3 SCC 148, New India Assurance Co. Ltd. v. Shanti Pathak (Smt.) & Ors, 2007 (3) R.C.R.(Civil) 593 : 2007(4) Recent Apex Judgments (R.A.J.) 131 : (2007)1 SCC 1.

36. The Supreme Court has recently considered the issue of compensation in motor accident cases in a comprehensive judgment rendered in 2013(2) R.C.R.(Civil) 660 : 2013(2) Recent Apex Judgments (R.A.J.) 664 : C.A. No. 4646 of 2009 (Reshma Kumari and others v. Madan Mohan and another) on 2.4.2013 by a three Judges Bench. R.M.Lodha, J, speaking for the Bench has summarised the law on the subject in paragraph 40 of the judgment which reads as under :-

> "40. In what we have discussed above, we sum up our conclusions as follows :
>
> (i) In the applications for compensation made under Section 166 of the 1988 Act in death cases where the age of the deceased is 15 years and above, the Claims Tribunals shall select the multiplier as indicated in Column (4) of the table prepared in Sarla Verma {Note: Sarla Verma v. DTC, 2009(3) R.C.R.(Civil) 77 : 2009(3) Recent Apex Judgments (R.A.J.) 373 : (2009) 6 SCC 121} read with para 42 of that judgment.
>
> (ii) In cases where the age of the deceased is upto 15 years, irrespective of the Section 166 or Section 163A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the table in Sarla Verma should be followed.
>
> (iii) As a result of the above, while considering the claim applications made under Section 166 in death cases where the age of the deceased is above 15 years, there is no necessity for the Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act.
>
> (iv) The Claims Tribunals shall follow the steps and guidelines stated in para 19 of Sarla Verma for determination of compensation in cases of death.
>
> (v) While making addition to income for future prospects, the Tribunals shall follow paragraph 24 of the Judgment in Sarla Verma.
>
> (vi) Insofar as deduction for personal and living expenses is concerned, it is directed that the Tribunals shall ordinarily follow the standards prescribed in paragraphs 30, 31 and 32 of the judgment in Sarla Verma subject to the observations made by us in para 38 above.
>
> (vii) The above propositions mutatis mutandis shall apply to all pending matters where above aspects are under consideration.

37. Since the present is not a motor accident case, the quantification of compensation in the special and peculiar facts of this case cannot be subjected to any straight jacket formula. The formulas based on multiplicands/multiplier system would not guide the Court in this case. But the broad and underlying principles of compensation evolved by Courts in motor accidents would remain guidance for the Court. In cases of electrocution, the Court may grant compensation depending on the facts and circumstances of each case. However, the different Heads under which compensation can be granted have been largely determined by judicial precedents in cases involving award of compensation in mishaps caused either on account of death or injury in a motor accident or in a case of electrocution caused by contact with live electrical wires and overhead transmission lines.

38. I agree with Mr. Malhotra that this is an eminently fit case for award of special compensation and damages as a freak and an unparalleled case in the magnitude of injury caused by electrocution. Though I do not agree to his quantification of compensation under different heads which is rather conservative and does not satisfy the conscience of the Court or the extent of injury, I am inclined to think that principles of strict liability go to Article 21 of the Constitution of India and invade the battle ground in fighting for the protection of life and liberty of our people. There is an element of criminal negligence as well on the part of the Nigam when viewed from the standpoint of Section 68 of the Indian Electricity Act, 2003 read with Rules 29, 44, 45, 46 and 91 of the Electricity Rules 1956 which I dare say require periodic or constant vigil by the agents and servants of the Nigam. The Nigam having drawn active transmission lines 30 years ago cannot sit complacently and claim no fault because construction activity has spilled beyond the lal lakir or phirni of the village. It is also not the case of the Nigam that it has not given lawful domestic electricity connections through meters to the residents of the area falling under the sag of the 11 KV transmission line or to the parents of the petitioner. If they have given connections and meters have been installed and they charge tariff through bills then they cannot complain of unauthorized constructions. Furthermore, even assuming arguendo that the father of the petitioner had a hand in placing the angle iron to keep at bay a potentially offending live wire he should be understood as doing so as an act of self preservation, an instinct as primitive as man and his innate desire to stay alive. This may be seen also as akin to the right of private defence in criminal law. In absence of help forthcoming from the Nigam and to protect himself and his family from harm any reasonable man may have acted accordingly. This by itself should not be allowed to defeat a just claim for compensation. However, to the contrary there is no specific denial, as discussed above, that the angle iron (P-4) was installed by the agents of the Nigam in 2006. The frontiers of strict liability and negligence in tort thus get clubbed together and run in tandem to the peril of the Nigam.

39. In this case, the first focus in most certainly on urgent medical treatment of Raman including prosthetic or artificial/robotic limbs so that the child is able as soon as possible to perambulate and carry out his daily chores and perform survival tasks and to make it real for him to attend the nearest school so that his education may not suffer or remain disrupted. The focus would then shift to secure Raman's financial future in the background of 100% permanent disability and to try and make him employable through some avocation which may be consistent and possible with his condition. There is also a huge question mark whether Raman would find employment to secure his own future after he attains majority. With one leg left and the three amputations leaving stumps being just below the three joints prosthetic or artificial limbs may be difficult without robotic technology which may be frightfully expensive which certainly Raman's family would never be able to afford. In the future, Stem Cell Therapy/Technology may become a reality for Raman who is presently little over five years old. Something may happen during his life time which may liberate him, but these are presently imponderables but surely factors for the court to consider for in the present in shaping relief looking to the foreseeable future. The question really is what is to be done to guard his future today. No amount of compensation can undo what has befallen. The petitioner is a total invalid who cannot survive on his own physical exertion. He cannot feed himself. He may become a huge burden on the limited financial and emotional resources of his immediate family. The mother's love may be the only fond hope but that too might wane for the arduous care needed and may not be really sufficient succour to meet the constant help required for sheer living every day. Her special diversion of labour to one of her two children would need to be compensated in terms of money towards partial expenditure involved in nursing care day in and day out. A twenty four hour vigil from within family resources may not be possible. A plaintive call for help at odd hours by the petitioner may escape attention of the parents and the sibling sister who are also involved in living their own lives. Who would wake and respond to nature's call, call of hunger, food, water etc. forever till it lasts. Hygiene and bathing are also serious and major issues to be addressed. Who would do it day in and day out? No, it may not be effectively possible without outside help on payment to make life as bearable as possible in the circumstances. Desperation of all and sundry is writ large in this case. Most certainly, outside help would have to be enlisted at considerable expense, which may vary currently from Rs.

7,000/- wages per month for eight hours a day to about Rs. 10,000/- odd for 8 PM to 8 AM stint to tide over the night, of which judicial notice can be taken. Family help would not be available to the petitioner for the whole day, throughout his life. I think at least Rs. 15,000/- 17,000/-plus a month would be involved on a permanent basis towards expenditure likely to be spent on paid caregivers to look after the petitioner throughout his life. The mother's labour is also quantifiable in terms of wages for the work involved towards at least one third of the working day. Loss of future employment also deserves to be paid attention too. One day the petitioner would be left alone to fend for himself battling out his life alone trying to do simple chores and things which mean nothing to the physically advantaged. I feel only a substantial monetary head start alone can best serve the enormity of the physical handicap in the present and the future. If the petitioner is not taken care of by the intervention of this Court at present he may never actually be justly compensated. In case the petitioner is relegated to his civil remedy of a suit as suggested by the learned counsel for the Nigam he would be doomed by delay alone.

Keeping the totality of the circumstances in mind and the balance to be struck between under-compensation and overcompensation, this Court issues, in its considered view, the following directions in quantification of monetary compensation, damages and other ancillary and incidental matters involved, as are essentially required in order to secure the ends of justice :-

i) The respondent-Nigam being a licensee of the State and the State of Haryana shall remain jointly and severally liable for compensation awarded under this order.

ii) The Engineer-in-Chief or his nominee representing the respondent Licensee and the Director General of Health Services, Haryana or his nominee representing the State together with the natural parents of Raman will be joint guardians of the minor Raman for the purpose of execution of monetary compensation and administration of this order.

iii) The Engineer-in-Chief representing the Nigam shall immediately tie up with the Director General of Health Services, Haryana to consider the case for immediate medical treatment of minor Raman to make him mobile through artificial limbs etc. The father of Raman would be associated with the process of finding immediate solutions to make the minor as little dependent on his parents, sibling and others as possible. The Director General of Health Services, Haryana would initiate the process and remain the executor of the medical treatment of the minor and to certify the expenditure involved to be paid by the Nigam whenever due. The PGI, Rohtak, the PGIMER, Chandigarh and the AIIMS, New Delhi and other specialist medical institutes may be consulted for making recommendations on the line of treatment. Those institutions are requested by this order to share their expertise on humanitarian principles free of cost with the Director General of Health Services, Haryana with a view to help minor Raman in all ways possible.

iv) All expenses incurred in securing artificial/robotic limbs etc. for the minor presently and in the future including stem cell technology/therapy, if a reality during lifetime would be certified by the Director General of Health Services, Haryana in effective consultation with the Director PGI Rohtak or his nominee and paid by the respondent Nigam under the Head of this order to avoid red tape.

v) In order to secure the financial and monetary future of the minor Raman, it is directed that the respondent-Nigam would pay compensation of Rs. 30 lacs to him immediately for loss of enjoyment of life, trauma suffered and to act as a guard against neglect and dependence on others, loss of future employability and the agony of it all, pain and mental shock suffered and continue to be suffered by an irreconcilable event that has completely changed the life of a family. This amount would when made available with interest on reaching the

age of 21 years act as a financial security and building block for the future. The amount will be deposited in a fixed deposit account in the name of the petitioner (minor) under joint guardianship of the parents of Raman and the Engineer-in-Chief or his nominee representing the respondent-Nigam, in a nationalised bank, preferably in the State Bank of Patiala, Branch at Punjab and Haryana High Court, Chandigarh. The amount is directed to be so deposited within 60 days of receipt of certified copy this order failing which the amount will carry 8.5% interest till deposit in the Bank where after the principal amount will earn interest at bank rates for fixed deposits fixed from time to time. However, the amount awarded under this head will only be available to the minor Raman on attaining the age of majority i.e. 21 years. In case the minor Raman does not survive till the age of majority, this amount with all interest accrued shall revert to the respondent-Nigam with no claim on it by any third party or the parents or siblings of Raman. This would ensure that the child is valued and cared for till he attains majority.

vi) Since the above amount of Rs. 30 lacs would remain inaccessible to the petitioner for his use he would require running income to meet his daily expenses for paid caregivers/attendants or family help/labour equivalent to such expenses and other bare and sundry expenses which are quantified at about Rs. 20,000/- plus per month for life as at present. To earn interest of Rs. 20,000/- per month a corpus of Rs. 30 lacs is required to be invested in the Bank to earn interest @ 8.5% being current rates on long term fixed deposits. Therefore, in addition to Rs. 30 lacs as awarded in direction (v), the respondent-Nigam would pay and deposit compensation of a further amount of Rs. 30 lacs to be kept in a separate interest bearing account in the same bank as directed under point no. (v), under the same joint guardianship arrangement. This will be an interest accruing account with interest proceeds available to meet the day-to-day needs of the petitioner. The interest so accrued will be transferred in a separate savings bank account to be opened in the same branch in minor Raman's name to be operated jointly by the parents payable to the petitioner on regular monthly basis to be applied for the care of the child by the parents, his educational expenses, nutritious food, costs of attendants/care givers to minister to him day after day etc. The above amount of Rs. 30 lacs from which interest will be used for the petitioner from month to month will also not be allowed to be withdrawn for any purpose, till the petitioner attains the age of 21, without obtaining orders from this Court, if circumstances so warrant, except the monthly interest as directed. The State Bank of Patiala, Branch at Punjab and Haryana High Court, Chandigarh would open the said Savings Bank Account in the name of the minor under the guardianship of mother and father and transfer the said savings Bank Account to the Branch nearest to the residence of the petitioner and the bank would remit the interest accrued thereon every month to the said savings account at Panipat Branch, to be auto-renewed till the petitioner reaches the age of 21 years. The amount is directed to be so deposited within 60 days of receipt of certified copy this order failing which the amount will carry 8.5% interest till deposit in the Bank where after the principal amount will earn interest at bank rates for fixed deposits from time to time.

vii) The District Social Welfare Officer, Panipat or his nominee is directed to make periodic visits to the house of the petitioner to know of his care and well being, to offer any support available with the department and report his/her findings periodically to the Nigam and the Director General Health Services, Haryana for their record and action if necessary or required after obtaining acknowledgement of either or both the parents of the petitioner as the case may be, of the visit and if anything further is required to be done to inform the Nigam and the Director General Health Services, Haryana accordingly and, if required, this Court for further orders. In case of death of guardian/s, the parties would have the liberty to move this Court for appropriate orders to make necessary change to give effect to this order.

viii) Since interest component on the aforesaid amounts would constitute income

and therefore exigible to income tax, the Bank where the amounts will sit is directed to take all such steps by itself to remit tax due/deduct TDS on behalf of Minor Raman and furnish details of tax paid to the parents of the petitioner and the respondent-Nigam for their record. The mother/father of the petitioner would apply for and obtain a Permanent Account Number from the Income Tax Department so that the interest income does not suffer 20% deduction. In case the mother/father of the petitioner applies for PAN card then the Income Tax Authorities are directed to expeditiously issue a PAN Card in favour of the mother and the father of the petitioner, in case they do not have one already, to facilitate payment of tax on behalf of the minor as part of his/her/their income. This order is directed to be sent to the Commissioner of Income Tax, Haryana Circle, Haryana for action, if any, required under this order for purposes of PAN card and tax implications.

ix) The respondent-Nigam would pay compensation of Rs. 2 lacs immediately to the mother of the minor Raman for trauma, mental shock, pain and agony caused to her, the minor injured child and the family members.

x) The petitioner would also be entitled to cost of litigation quantified at Rs. 20,000/- payable to the father of the petitioner. xi) In case, in the future, when the minor Raman comes of employable age and if the respondent-Nigam finds that Raman is qualified for any post in accordance with the rules, it may offer permanent employment to Raman on compassionate grounds as an exception in terms of this order. In case permanent employment is offered to Raman by the Nigam in the future and up till the age of 21 years, then Rs. 30 lacs compensation awarded by this Court under directive (v) supra shall be put in his Provident Fund Account/pension account or by whatever alternate name called as an exception to rules or in any manner found fit by the Nigam either in lump sum or periodically as the case may be and to be ultimately available to him on retirement or in case of death during employment then to his nominee. In case this last direction is not put in motion, Rs. 30 lacs compensation awarded by this Court under the present direction would go to Raman on attaining majority at the age of 21 years but without interest consumed. However, in case the petitioner does not survive till attaining the age of majority then Rs. 25 lacs, or any deducted amount as a consequence of any order of this Court, would revert to the Nigam and Rs. 5 lacs would become immediately due and payable to both the parents of the petitioner for their grievous loss, pain and suffering, expenses already spent on the child including medical expenses incurred and loss of a future income generator/ bread winner.

xii) Since this Court has awarded substantial monetary compensation on principles of both strict and vicarious liability and on tortuous liability based on negligence it is ordered that no civil suit would lie claiming further compensation in any Court.

viii) A direction is also issued to the Nigam to immediately raise the height of the offending 11 KV transmission lines above the abadi to make it safe and render them electrically harmless to habitation and take them beyond the reach of man below or to devise such other alternatives so as to by-pass the colony altogether in village Sanoli Khurd, District Panipat to start with.

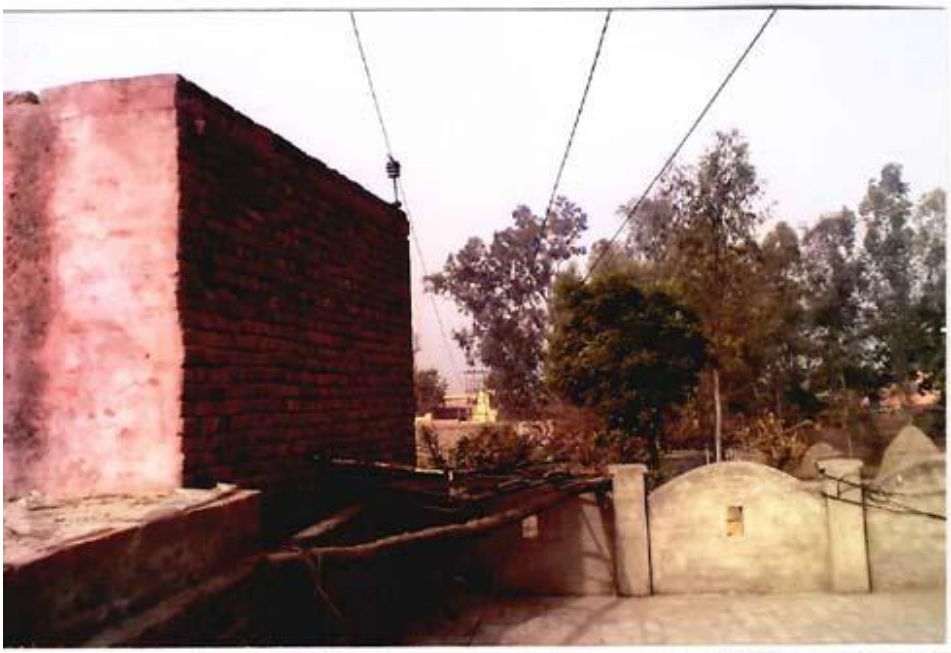
For the foregoing reasons, this petition is allowed with the above directions and observations and the same stands disposed of, however, with the liberty to the parties to seek any other or further direction in the present matter that passage of time may necessitate and which is not foreseen at present.

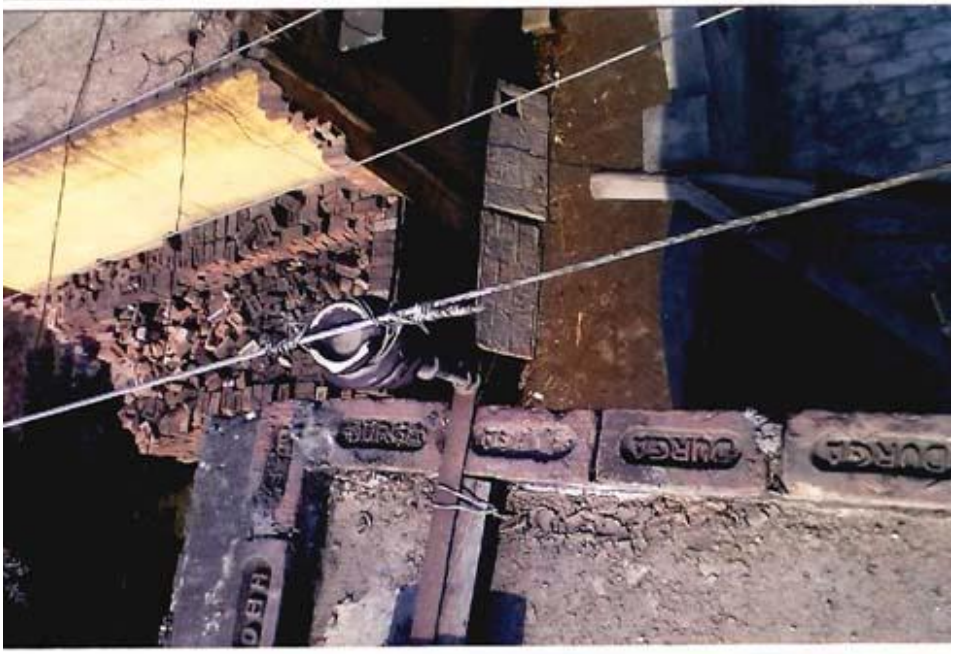
In signing off, this court records its appreciation on the clarity brought to bear by Mr. Anil Malhotra, learned amicus curiae on the subject and also affirms its thanks to my Secretary, Mr. M.F. Khan to suggest attaching Appendices 1 & 2 to this judgment to make it self contained and comprehensive and for the Nigam to realise in one glance the magnitude of the disablement and the problems that lie ahead for which really no

amount of monetary amends are good enough.

Appendix '1'

Appendix '2'

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CM No.144 & 7034 of 2015 in
CWP No.14046 of 2012

Date of decision:25.04.2016

Raman ...Petitioner

Versus

State of Haryana and others ...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. Anil Malhotra, Amicus Curiae,
for the applicant-petitioner.

Mr. Ashok K. Chaudhary, Addl. A.G., Haryana.

Mr. K.S.Malik, Advocate,
for respondent Nos.2 to 4.

Mr. Vikrant Sharma, Advocate,
for the respondent-PGI.

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Rakesh Kumar Jain, J.

This application is filed by the *amicus curiae,* appointed for the petitioner, for compliance of the directions of the Apex Court contained in its order dated 17.12.2014.

In brief, when petitioner Raman was 4 years of age, he came into contact with a naked 11KV transmission line passing over the roof of his house and suffered triple amputation of his limbs which was computed as 100% disability. The writ petition filed by the petitioner was disposed of on 02.07.2013 with the following directions:-

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"i) The respondent-Nigam being a licensee of the State and the State of Haryana shall remain jointly and severally liable for compensation awarded under this order.

ii) The Engineer-in-Chief or his nominee representing the respondent Licensee and the Director General of Health Services, Haryana or his nominee representing the State together with the natural parents of Raman will be joint guardians of the minor Raman for the purpose of execution of monetary compensation and administration of this order.

iii) The Engineer-in-Chief representing the Nigam shall immediately tie up with the Director General of Health Services, Haryana to consider the case for immediate medical treatment of minor Raman to make him mobile through artificial limbs etc. The father of Raman would be associated with the process of finding immediate solutions to make the minor as little dependent on his parents, sibling and others as possible. The Director General of Health Services, Haryana would initiate the process and remain the executor of the medical treatment of the minor and to certify the expenditure involved to be paid by the Nigam whenever due. The PGI, Rohtak, the PGIMER, Chandigarh and the AIIMS, New Delhi and other specialist medical institutes may be consulted for making recommendations on the line of treatment. Those institutions are requested by this order to share their expertise on humanitarian principles free of cost with the Director General of Health Services, Haryana with a view to help minor Raman in all ways possible.

iv) All expenses incurred in securing artificial/robotic limbs etc. for the minor presently and in the future including stem cell technology/therapy, if a reality during lifetime would be certified by the Director General of Health Services, Haryana in effective consultation with the Director PGI Rohtak or his nominee and paid by the respondent Nigam under the Head of this order to avoid red tape.

v) In order to secure the financial and monetary future of the minor Raman, it is directed that the respondent-Nigam

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would pay compensation of Rs.30 lacs to him immediately for loss of enjoyment of life, trauma suffered and to act as a guard against neglect and dependence on others, loss of future employability and the agony of it all, pain and mental shock suffered and continue to be suffered by an irreconcilable event that has completely changed the life of a family. This amount would when made available with interest on reaching the age of 21 years act as a financial security and building block for the future. The amount will be deposited in a fixed deposit account in the name of the petitioner (minor) under joint guardianship of the parents of Raman and the Engineer-in-Chief or his nominee representing the respondent-Nigam, in a nationalized bank, preferably in the State Bank of Patiala, Branch at Punjab and Haryana High Court, Chandigarh. The amount is directed to be so deposited within 60 days of receipt of certified copy this order failing which the amount will carry 8.5% interest till deposit in the Bank where after the principal amount will earn interest at bank rates for fixed deposits fixed from time to time. However, the amount awarded under this head will only be available to the minor Raman on attaining the age of majority i.e. 21 years. In case the minor Raman does not survive till the age of majority, this amount with all interest accrued shall revert to the respondent-Nigam with no claim on it by any third party or the parents or siblings of Raman. This would ensure that the child is valued and cared for till he attains majority.

vi) Since the above amount of Rs 30 lacs would remain inaccessible to the petitioner for his use he would require running income to meet his daily expenses for paid caregivers/attendants or family help/labour equivalent to such expenses and other bare and sundry expenses which are quantified at about Rs.20,000/- plus per month for life as at present. To earn interest of Rs.20,000/- per month a corpus of Rs.30 lacs is required to be invested in the Bank to earn interest @ 8.5% being current rates on long term fixed deposits. Therefore, in addition to Rs.30 lacs as

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awarded in direction (v), the respondent-Nigam would pay and deposit compensation of a further amount of Rs.30 lacs to be kept in a separate interest bearing account in the same bank as directed under point no. (v), under the same joint guardianship arrangement. This will be an interest accruing account with interest proceeds available to meet the day-to-day needs of the petitioner. The interest so accrued will be transferred in a separate savings bank account to be opened in the same branch in minor Raman's name to be operated jointly by the parents payable to the petitioner on regular monthly basis to be applied for the care of the child by the parents, his educational expenses, nutritious food, costs of attendants/care givers to minister to him day after day etc. The above amount of Rs.30 lacs from which interest will be used for the petitioner from month to month will also not be allowed to be withdrawn for any purpose, till the petitioner attains the age of 21, without obtaining orders from this Court, if circumstances so warrant, except the monthly interest as directed. The State Bank of Patiala, Branch at Punjab and Haryana High Court, Chandigarh would open the said Savings Bank Account in the name of the minor under the guardianship of mother and father and transfer the said savings Bank Account to the Branch nearest to the residence of the petitioner and the bank would remit the interest accrued thereon every month to the said savings account at Panipat Branch, to be auto-renewed till the petitioner reaches the age of 21 years. The amount is directed to be so deposited within 60 days of receipt of certified copy this order failing which the amount will carry 8.5% interest till deposit in the Bank where after the principal amount will earn interest at bank rates for fixed deposits from time to time.

vii) The District Social Welfare Officer, Panipat or his nominee is directed to make periodic visits to the house of the petitioner to know of his care and well being, to offer any support available with the department and report his/her findings periodically to the Nigam and the Director General

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Health Services, Haryana for their record and action if necessary or required after obtaining acknowledgment of either or both the parents of the petitioner as the case may be, of the visit and if anything further is required to be done to inform the Nigam and the Director General Health Services, Haryana accordingly and, if required, this Court for further orders. In case of death of guardian/s, the parties would have the liberty to move this Court for appropriate orders to make necessary change to give effect to this order.

viii) Since interest component on the aforesaid amounts would constitute income and therefore exigible to income tax, the Bank where the amounts will sit is directed to take all such steps by itself to remit tax due/deduct TDS on behalf of Minor Raman and furnish details of tax paid to the parents of the petitioner and the respondent-Nigam for their record. The mother/father of the petitioner would apply for and obtain a Permanent Account Number from the Income Tax Department so that the interest income does not suffer 20% deduction. In case the mother/father of the petitioner applies for PAN card then the Income Tax Authorities are directed to expeditiously issue a PAN Card in favour of the mother and the father of the petitioner, in case they do not have one already, to facilitate payment of tax on behalf of the minor as part of his/her/their income. This order is directed to be sent to the Commissioner of Income Tax, Haryana Circle, Haryana for action, if any, required under this order for purposes of PAN card and tax implications.

ix) The respondent-Nigam would pay compensation of Rs.2 lacs immediately to the mother of the minor Raman for trauma, mental shock, pain and agony caused to her, the minor injured child and the family members.

x) The petitioner would also be entitled to cost of litigation quantified at Rs.20,000/- payable to the father of the petitioner.

xi) In case, in the future, when the minor Raman comes of employable age and if the respondent-Nigam finds that Raman is qualified for any post in accordance with the

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rules, it may offer permanent employment to Raman on compassionate grounds as an exception in terms of this order. In case permanent employment is offered to Raman by the Nigam in the future and up till the age of 21 years, then Rs.30 lacs compensation awarded by this Court under directive (v) supra shall be put in his Provident Fund Account/pension account or by whatever alternate name called as an exception to rules or in any manner found fit by the Nigam either in lump sum or periodically as the case may be and to be ultimately available to him on retirement or in case of death during employment then to his nominee. In case this last direction is not put in motion, Rs.30 lacs compensation awarded by this Court under the present direction would go to Raman on attaining majority at the age of 21 years but without interest consumed. However, in case the petitioner does not survive till attaining the age of majority then Rs.25 lacs, or any deducted amount as a consequence of any order of this Court, would revert to the Nigam and Rs.5 lacs would become immediately due and payable to both the parents of the petitioner for their grievous loss, pain and suffering, expenses already spent on the child including medical expenses incurred and loss of a future income generator/ bread winner.

xii) Since this Court has awarded substantial monetary compensation on principles of both strict and vicarious liability and on tortuous liability based on negligence it is ordered that no civil suit would lie claiming further compensation in any Court.

xiii) A direction is also issued to the Nigam to immediately raise the height of the offending 11 KV transmission lines above the abadi to make it safe and render them electrically harmless to habitation and take them beyond the reach of man below or to devise such other alternatives so as to by-pass the colony altogether in village Sanoli Khurd, District Panipat to start with.

For the foregoing reasons, this petition is allowed with the above directions and observations and the same stands disposed of,

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> however, with the liberty to the parties to seek any other or further direction in the present matter that passage of time may necessitate and which is not foreseen at present."

The intra-court appeal bearing LPA No.1631 of 2013 titled as "UHBVN Ltd. and others vs. Raman and others" was allowed on 30.10.2013, modifying the order of the learned Single Judge dated 02.07.2013. The petitioner filed Civil Appeal No.l1466 of 2014 titled as "Raman vs. UHBVN Ltd. and others" before the Apex Court, which was allowed on 17.12.2014 and the order dated 02.07.2013 passed by the learned Single Judge was restored after setting aside the order dated 30.10.2013, with the following directions:-

> "21. In view of the foregoing reasons, after considering rival legal contentions and noticing the 100% permanent disability suffered by the appellant in the electrocution accident on account of which he lost all the amenities and become a deadwood throughout his life, and after adverting the law laid down by this Court in catena of cases in relation to the guiding principles to be followed to award just and reasonable compensation in favour of the appellant, we pass the following order:-
>
> (I) The appeal is allowed after setting aside the substituted paragraph No.4 of the impugned judgment and order of the Division Bench of the High Court particularly, in place of sub para (vi) of the judgment and order of the learned Single Judge with modifications made by us in this judgment in the following terms.
>
> (II) We restore the compensation awarded at sub-paras (v) and (vi) of the order of the learned single Judge:
>
> (a) in the modified form that the compensation is awarded with direction to the respondents to keep Rs.30 lakhs in the Nationalised Bank in the name of the appellant represented by his father as a natural guardian till the age of attaining majority of the

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appellant.

(b) The further direction contained in the judgment of the learned Single Judge that if the appellant is not alive at the time of attaining the age of majority, the deposit amount shall be reverted to the respondents, is set aside.

(c) We further declare that the said amount of compensation of Rs.30 lakhs exclusively belongs to the appellant and after his demise it must go to the legal heirs or representatives as it is the exclusive estate of the appellant as it is the compensation awarded to him for the 100% permanent disability suffered by him due to electrocution on account of the negligence of the respondents. The monthly interest that would be earned during the period of his minority shall be withdrawn by the appellant's guardian and spend the same towards his monthly expenses and after he attains the majority, it is open for him either to continue the deposit or withdraw the same and appropriate for himself or his legal heirs or legal representative, if he does not survive.

(d) The deposit of Rs. 30 lakhs as corpus amount as directed at sub-para(vi) of the judgment of the learned Single Judge shall be in the name of the appellant exclusively represented by his natural guardians/parents till he attains majority, the income that would be earned on such deposit amount can be drawn by the parents every month to be spent for personal expenses. The Bank in which the deposit is made in the name of Chief Engineer shall be deleted and the name of the appellant shall be entered as directed above. After attaining the age of majority, the appellant is at liberty to withdraw the above said amount also. If for any reason the appellant does not stay alive, his heirs/legal representatives can withdraw the said amount.

(e) The other directions in the judgment of the learned

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> Single Judge to the respondents for compliance shall remain intact, the same shall be complied with and the report shall be submitted before the learned Single Judge."

The present application has, thus, been filed for compliance of the order dated 17.12.2014 in which notice was issued on 29.01.2015 for 13.02.2015 and on the said date, the following order was passed:-

> "Counsel appearing on behalf of the respondents states that matter for payment of the balance amount as per the order of the Hon'ble Supreme Court is under process and the same amount will be deposited within a period of 5 weeks.
>
> The respondents will also take the decision on the directions given by the Court as regards the treatment to be given to the minor child injured in accident and other details as such in judgment.
>
> Adjourned to 20.03.2015.
>
> The petitioner shall also be at liberty to provide tentative assessment of the expenses and provide the basis for such assessment through appropriate certification from Hospital Authorities to enable the Court to give appropriate directions to the State, if it is found to be lax to carry out the rehabilitative initiatives for the child for whom, the responsibility of the guardianship is attached by the orders of the Court on the Engineer in Chief and the Director General Health Services."

On 06.05.2015, this Court passed the following order:-

> "Learned *amicus curiae* has supplied a copy of the application to Mr. Sushil Gautam, Deputy Advocate General, Haryana, who is directed to seek instructions from the Director, Health Services in this regard apart from other authorities, who have to give effect to the judgment passed by this Court, which has been reiterated by the Hon'ble Supreme Court.
>
> Adjourned to 19.09.2015."

The petitioner filed CM No.7034 of 2015 in order to place on

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record tentative assessment of expenses in terms of the order dated 13.02.2015 provided by the P&O International Inc., Vimhans Artificial Limbs Centre, Vimhans Hospital, New Delhi, calculated upto the age of 65 years.

This Court passed a detailed order on 03.11.2015, which reads as under:-

> "These applications have been filed by the petitioner through Amicus Curiae for taking on record copies of the assessment of expenses for providing him artificial limbs and also with a prayer that an appropriate direction may be issued to the respondents in terms of the orders passed by this Court on 02.07.2013, 13.02.2015 and 06.05.2015.
>
> The petitioner, who was injured and suffered triple amputation of the limbs, suffered 100% permanent disability and was awarded monetary compensation of ₹60,00,000/- by the learned Single Judge vide order dated 02.07.2013, in which as many as 13 directions were issued, with liberty to the parties to seek any other further direction which may require the attention of the Court with the passage of time. The amount of compensation was, however, reduced by the Division Bench to the tune of ₹30,00,000/- but ultimately it was restored by the Supreme Court in the appeal filed by the petitioner, reported as **Raman vs. Uttar Haryana Bijli Vitran Nigam Ltd. and others,** 2015(1) R.C.R. (Civil) 353, with certain directions in which it was categorically observed that *"the other directions in the judgment of the learned Single Judge to the respondents for compliance shall remain intact, the same shall be complied with and the report shall be submitted before the learned Single Judge"*.
>
> It is needless to mention that the balance sum of ₹30,00,000/- has been paid by the respondents to the petitioner with the intervention of the Court. On 13.02.2015, the following order was passed by this Court:-
>
> "Counsel appearing on behalf of the respondents

states that matter for payment of the balance amount as per the order of the Hon'ble Supreme Court is under process and the same amount will be deposited within a period of 5 weeks.

The respondents will also take the decision on the directions given by the Court as regards the treatment to be given to the minor child injured in accident and other details as such in judgment.

Adjourned to 20.03.2015.

The petitioner shall also be at liberty to provide tentative assessment of the expenses and provide the basis for such assessment through appropriate certification from Hospital Authorities to enable the Court to give appropriate directions to the State, if it is found to be lax to carry out the rehabilitative initiatives for the child for whom, the responsibility of the guardianship is attached by the orders of the Court on the Engineer in Chief and the Director General Health Services."

Since the respondents, namely, the Director General Health Services, Haryana and the Engineer-in-Chief of the UHBVNL were not allegedly coming forward to comply with the other directions issued by the learned Single Judge, therefore, they were directed to be present in the Court vide order dated 20.10.2015.

Today, Dr. D.P.Lochan, Director General Health Services, Haryana and S.K. Bansal, Engineer-in-Chief of the UHBVNL are present in the Court.

Learned Amicus Curiae appearing on behalf of the petitioner has submitted that as per his research, it has been found that the petitioner, who is expected to live upto 70 years and had suffered electrocution at the age of 5 years, requires Bilateral Shoulder Dis-articulation Prosthesis and the Knee Prosthesis from time to time upto the age of 65 years. According to his calculation, the Bilateral Shoulder Dis-articulation Prosthesis, starting from the age of 7 years upto the age of 65 years, would cost ₹1,49,40,178/- and would also incur an expenditure of ₹57,86,289/- towards annual maintenance charges and for the Knee Prosthesis for the same period, the expenses would be of ₹37,83,562/- with annual

maintenance charges of ₹19,96,140/-. Thus, the total expenses for both would be ₹2,65,06,169/-, as per the rates quoted by P&O International Inc., a Super Specialized Hi- Technology Rehabilitation Services Centre.

Shri K.S. Malik, learned counsel appearing on behalf of the UHBVNL, has submitted that a Special Board at PGIMS, Rohtak has examined the petitioner and opined that the petitioner has permanent disability to the extent of 100% on account of amputation of bilateral upper limbs through upper one third of arm and left lower limb through lower thigh and for the treatment of amputated limbs, in order to achieve the maximum mobility, appropriate latest and state of the art prosthetic appliances will not be feasible in PGIMS, Rohtak, therefore, for these latest state of art prosthetic appliances, the respondents were suggested to contact Endolite (Prosthetic and Orthotic Centre), A-4, Naraina Industrial Area, Phase-I, New Delhi. It is stated that the Endolite India Ltd. Delhi has quoted an amount of ₹4,06,200/- for the upper limbs and ₹1,66,000/- for the lower limb. Thereafter, the respondents have allegedly constituted a committee of three Orthopaedic Surgeons to examine the aforesaid proposal which suggested that the estimates may be obtained from other private establishments also and in pursuance thereof, the Deep Artificial Limbs Centre, Chandigarh has given the estimate for Endolite Artificial upper limbs of ₹4,00,000/- and for lower limb of ₹1,64,000/-, whereas the Navedic Prosthetic Centre has given an estimate of ₹3,66,200/- for upper limbs and of ₹1,53,100/- for lower limb, but it does not mention about the trademark. Since the Board at PGIMS, Rohtak referred to the Endolite, Delhi for the state of art artificial limbs for survival of the patient, therefore, the Director General Health Services, Haryana requested the department to negotiate the price of Endolite Prosthesis from any of the above two Centres.

Counsel for the petitioner has argued that the limbs cannot be procured without examination of the petitioner and also that the price, which has been quoted, is only for the present, whereas the limbs will have to be changed periodically with the age of the petitioner who is to grow up in life and for that, the respondents have not sought any quotation.

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It is also submitted that until and unless a comprehensive order is passed at this stage for the rest of the life of the petitioner, this petition has to be kept alive for another 65 years for passing orders from time to time.

Counsel for the respondents, both the Department of Health and the UHBVNL, have taken an unequivocal stand that they have to comply with the order passed by the learned Single Judge and to provide rehabilitation to the petitioner who has suffered massive injuries.

In view of the aforesaid, at present, the respondents, namely, the Director General Health Services, Haryana and the Engineer-in-Chief, UHBVNL are directed to take the petitioner, under their supervision, to the Endolite India Limited, Delhi for the purpose of exploring the feasibility of providing the upper limbs and lower limbs to him, as required. This exercise shall be done within a period of two weeks from today and result of the exercise shall be produced before the Court on the next date of hearing.

Adjourned to 17.11.2015.

A copy of this order be given to the counsel for the parties under signatures of the Special Secretary attached to this Bench, for compliance."

Thereafter, the following orders were passed on 17.11.2015 and 07.12.2015:-

Order dated 17.11.2015

"Pursuant to the order dated 03.11.2015, Master Raman was examined by the Prosthetic and Orthotic Centre, namely, Endolite India Ltd., Delhi for the assessment of the fitness of artificial limbs.

The said company has observed that the petitioner is 8 years of age (i.e. growing age), and shall require replacement of prosthetics after every 2-3 years to restore his normal function and mange his height. The prosthetics will be replaced after 2-3 years due to volumetric changes and shall be upgraded and made available at that time at the running price list.

Learned counsel for the petitioner, however, submits that in

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order to provide the best facilities to the petitioner, the respondents shall also look into the artificial limbs provided by P&O International Inc., Vimhans Hospital, 1, Institutional Area, Nehru Nagar, Near PGDAV College, New Delhi.

This Court would consider the request made by amicus curiae also. But before this, in the interest of the petitioner as he is of the opinion that the artificial limb being provided by Endolite are not very much functional whereas artificial limbs provided by P&O International Inc. are Myo electric waterproof shoulders, the Court has to look into the convenience of the petitioner while providing him the artificial limbs. It would be in the interest of justice if the Court provides a hearing to the company namely Endolite and for that purpose Mr. Gaurav Sainger, Branch Manager, Endolite P&O Centre, A-4, Naraina Indl. Area Ph.-1, New Delhi is requested to be present in Court on 07.12.2015.

The Director General, Health Services, Haryana and Engineer-in-Chief, UHBVNL shall also remain present in Court on the next date of hearing.

Adjourned to 07.12.2015.

A copy of this order be given to the counsel for the parties under signatures of the Special Secretary attached to this Bench, for compliance."

Order dated 07.12.2015

"Pursuant to the order dated 17.11.2015, Dr. D.P.Lochan, The Director General, Health Services, Haryana and Sh. S.K.Bansal, Engineerin-in-Chief, UHBVNL are present in Court. The Court is primarily concerned with the rehabilitation of minor child Raman. Amicus Curiae has suggested that he should be provided Myo electric waterproof shoulders and similar limbs for his legs. Amicus Curiae had a discussion with Dr. Lochan and Mr. Bansal, on the asking of the Court and it is proposed that another opinion may be obtained from HOD Orthopaedic Department, PGI, Chandigarh who would co-opt two more doctors from his department or from any other Government hospital in Chandigarh to suggest as to which company could better provide the Myo electric waterproof shoulders and limbs for the legs. At present Dr. Dhillon is the HOD, Orthopaedic Department, PGI, Chandigarh

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who is requested by this Court to look into this matter and send his suggestion through empanelled counsel of PGI on or before the next date of hearing.

Registry is directed to supply a copy of this order to Dr. Dhillon, HOD, Orthopaedic Department, PGI, Chandigarh along with complete paper book of this case for study.

Adjourned to 5.01.2015.

Amicus Curiae may also inform the father of the child and if so advised may accompany them to the HOD, Orthopaedic Department, PGI, Chandigarh for the petitioner/child's personal examination.

Presence of Dr. D.P.Lochan and Shri S.K.Bansal is exempted."

In compliance of the order dated 07.12.2015, the PGI, Chandigarh has submitted its report in the following manner:-

"- Committee reassessed the case of Raman, 8 year old child with triple amputation (bilateral above elbow and left above knee) and following recommendations were made:-

- The child may be provided with Upper extremity myoelectric prosthesis on both sides and left lower extremity prosthesis with pneumatic knee and carbon fibre foot for the left leg.
- Both upper extremities stumps were "Very Short Transhumeral" (right stump shorter than left). Hence, practically both would require Shoulder disarticulation type of prosthesis.
- The recurring cost of annual maintenance of prostheses annually and change of socket with the child growth might be necessary with time; this cost should also be included in the proposal to ensure complete rehabilitation.
- The Prosthetic Manufacturer should ensure post-fitment rehabilitation and training in prosthetic use to the satisfaction of the user. They should also ensure that prosthesis would be adjusted according to the age of the patient so that functionality is not affected. Full complete training of child by prosthetic manufacturer leading up to

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complete adaptability and functional rehabilitation to the satisfaction of the user should be ensured and should be included in the cost.

- The Prosthetic Manufacturer should ensure usage for life or as determined by court.
- Prosthesis manufacturing company should give assurance that the price quotation given and the rates would be frozen till the age of 65 years for the patient and all cost increments and maintenance should be factored in the price."

Pursuant thereto, the Director General Health Services, Haryana, has filed the affidavit dated 15.03.2016, in which the following averments have been made:-

"2. That in pursuance of directions of the Hon'ble Court, the deponent office contacted Haryana Medical Services Corporation Limited for tendering and said corporation vide reference no.3/3-HMSCL-16/TEND/2015-16 invited e-tendering on 20.02.2016. Pre-bid meeting was held on 25.02.2016 and M/S P&O International and M/S Ideal Artificial Limbs Solution participated in the meeting, however, on meeting facilitated between the intending department and representative of UHBVN, only P&O International participated in the meeting. It is pertinent to mention that the bidding was for providing artificial limbs up to age of 65 years on technical specifications fixed by PGIMER, Chandigarh. As on day, no company comes-out with the specifications, except P&O International, however, other companies which were contacted during the course were in making of the technology. In view of financial regulations regarding bidding, in case one company participates in tender, the item has to be re-tendered for atleast three times before finalizing tender. However, deponent is aware of its responsibilities and committed to provide the limbs to the petitioner (child) at earliest, so to overcome the procedural aspect and advancement of the technology with time, including stem cell, the further tendering could be corresponding with present age of i.e. 8 year of child till further requirement of full

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> change of appliances is required with advancement of age. Also, by that time there is possibility of other companies coming out with this technology or with updation in that span of time, ranging from 4-8 years. It is pertinent to mention that the expert group of PGIMER, Chandigarh took the period up to age of 65 years and is assured it for providing facility lifetime by the Department, hence, it is submitted before this Hon'ble Court to devise a concrete plan for mobility of child it is submitted that further short term tendering may be allowed, restricting for only regarding present age of the child with comprehensive maintenance. Thereafter, on change of artificial limbs with advancement of age, fresh tendering thereafter could be made out on growth of child. It is submitted that on re-tendering, even if one company applies, the procedural aspect of three times bidding would be waived off keeping in view the urgent mobility of child, after relaxing the rules. The said corporation has invited the re-looking of the specification in this regard vide letter no.3/3-35-HMSCL-2016/1461 dated 11.03.2016 which is annexed as Annexure R-I/I."

I have considered the entire matter in detail.

The Court is quite sensitive about rehabilitation of the minor petitioner so as the respondents, which is evident from the averments made in the affidavit of the Director General Health Services, Haryana, dated 15.03.2016, in which he has averred that no other company has come forward with the same technical specifications fixed by the PGI, Chandigarh, except for P&O International Inc. and the financial regulations regarding bidding provides that in case one company participates in tender, the item has to be re-tendered for at least three times before finalizing the tender but still the respondents are ready and willing to tender Myo electric prosthesis from the P&O International Inc., which may be provided upto a particular age.

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The Court has also felt that the technology will keep on changing with the passage of time including the stem cells therapy, as averred by the respondents, and there may be a possibility that other companies, who are in the process of developing such type of limbs, may come out with better technology in future than the one which is to be provided by the P&O International Inc., therefore, the Court is of the view that the respondents shall resort to short term tender keeping in view the present age and requirement of the petitioner with comprehensive maintenance which shall be taken from P&O International Inc. forthwith and issue fresh tender for the change of limbs with the advancement of the age of the petitioner, as required from time to time, with the prior permission of the Court.

These directions are issued for the time being and application bearing CM No.144 of 2015 is adjourned *sine die* for its revival, on an application filed, either on behalf of the petitioner or the respondents for the purpose of fresh tender of the limbs, as required with the growth of the petitioner so that the best artificial limbs available at that time may be considered for providing to the petitioner.

April 25, 2016 (**Rakesh Kumar Jain)**
vinod* **Judge**

207 **CM No. 6875 of 2019 in**
CWP No. 14046 of 2012

RAMAN VS STATE OF HARYANA AND OTHERS

Present : Mr. Anil Malhotra, Advocate and
Mr. Sahil Nayyar, Advocate,
for the petitioner.

Mr. S. K. Vashisth, DAG, Haryana.

Mr. K. S. Malik, Advocate,
for respondents No.2 to 4.

Learned State counsel, under instructions of Dr.Nirmal Singh Sidhu, Deputy Director, Health along with Mr. Harcharan Singh, Assistant, who are present in Court, as also learned counsel appearing on behalf of respondents No.2 to 4 (UHBVNL) submit that as and when the petitioner required transport/ ambulance for his minor child, the same was provided to him in the past. They further submit that in case the petitioner gives two days' prior notice for making the transport/ambulance available for the medical check-up of his minor child at Vimhans Hospital, New Delhi, the transport/ambulance shall be provided to him.

Learned counsel for respondents No.2 to 4 submits that petitioner may submit his application to respondent No.3/ XEN for the said purpose and the said XEN shall ensure that needful is done to enable the petitioner to get the medical check up of his minor child done.

Learned State counsel submits that night stay facility for providing the transport/ambulance is currently not available and therefore, the same can only be provided for the same day.

Learned counsel for the petitioner submits that there is no difficulty in the same as he would go early morning to the hospital and return the same day.

In the premise, the present application is disposed of with a direction to respondent No.3 to provide the transport/ ambulance on receipt of request of the petitioner two days prior to his requirement.

(ARUN MONGA)
JUDGE

MAY 17, 2019
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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

CM-5390-CWP-2020 in
CWP-14046-2012
Date of Decision : August 31, 2020

Raman

..... PETITIONER(S)

VERSUS

State of Haryana and others

.... RESPONDENT(S)

CORAM : HON'BLE MR. JUSTICE SANJAY KUMAR

Present: Mr. Anil Malhotra, *Amicus Curiae*,
for the applicant-petitioner.
Mr. Rajesh Gaur, Additional Advocate General, Haryana and
Mr. Minderjeet Yadav, Deputy Advocate General, Haryana.
Mr. K.S. Malik, Advocate, for respondents No.2 to 4.

...

Sanjay Kumar, J.

This application was filed by Mr. Anil Malhotra, learned *Amicus Curiae*, seeking suitable directions.

Heard Mr. Anil Malhotra, learned *Amicus Curiae;* Mr. Rajesh Gaur, learned Additional Advocate General, Haryana, assisted by Mr. Minderjeet Yadav, learned Deputy Advocate General, Haryana, and Dr.Nirmal Singh Sidhu, Deputy Director, Health Services, Haryana; and Mr. K.S. Malik, learned counsel appearing for the Uttar Haryana Bijli Vitran Nigam Limited (for short, 'the UHBVNL').

The applicant/writ petitioner in this case is a minor, aged about 13 years, represented by his father. He was electrocuted when he was just 4 years of age and in consequence, both his arms and his left leg had to be amputated. The electrocution occurred due to negligence and laxity on the part of the authorities concerned. He accordingly filed this writ petition

seeking various reliefs and compensation. The writ petition was allowed on 02.07.2013 by a learned Judge with various findings and directions. More important amongst those, for the purposes of this application, are the following: The UHBVNL and the State of Haryana were held jointly and severally liable for the compensation payable and for the treatment of the applicant. The UHBVNL was directed to immediately tie up with the Director General, Health Services, Haryana, to consider the medical treatment to be given to the applicant and to make him mobile, through provision of artificial limbs. The PGI, Rohtak; the PGIMER, Chandigarh; the AIIMS, New Delhi; and other specialised medical Institutes were directed to be consulted for making recommendations on the line of treatment. These Institutes were requested to share their expertise on humanitarian principles, free of cost, with the Director General, Health Services, Haryana, to help the applicant in all ways possible. The expenses incurred for the artificial/robotic limbs presently and in the future, including stem cell technology/therapy, were to be borne by the UHBVNL, upon certification by the Director General, Health Services, Haryana, in effective consultation with the Director, PGI, Rohtak. The learned Judge also granted liberty to the parties to seek any other or further directions that passage of time may necessitate.

This order was tested in appeal before a Division Bench of this Court in LPA-1631-2013, decided on 30.10.2013, and thereafter, before the Supreme Court in Civil Appeal No.11466 of 2014, decided on 17.12.2014. The sum and substance of the order dated 02.07.2013 however remained unchanged.

Thereafter, applications in CM Nos.144 and 7034 of 2015 were filed by the applicant for appropriate directions and to take on record copies of the assessment of expenses for providing him artificial limbs. On 03.11.2015, the Director General, Health Services, Haryana, and the Engineer-in-Chief of the UHBVNL were both present before the Court and they were directed to take the applicant to Endolite India Limited, Delhi, for the purpose of exploring the feasibility of providing him artificial upper and lower limbs. On 17.11.2015, another order was passed on the applications, taking note of the assessment made by Endolite India Limited, Delhi, to the effect that, as the applicant was 8 years of age at that time, he would require replacement of prosthetics after every 2-3 years to restore his normal functions and to manage his height. The company opined that the prosthetics were to be replaced after 2-3 years due to volumetric changes and were to be upgraded periodically. At that stage, Mr. Anil Malhotra, learned *Amicus Curiae*, brought it to the notice of the Court that the artificial limbs provided by Endolite India Limited, Delhi, were not very functional while the Myoelectric artificial limbs provided by P&O International Inc. were more suitable. The matter was adjourned to enable exploration of other viable options.

Orders were thereupon passed on the applications on 25.04.2016. This Court took note of the report submitted by the PGI, Chandigarh, to the effect that the applicant may be provided with upper extremity Myoelectric prosthesis on both sides and left lower extremity prosthesis with pneumatic knee and carbon fibre foot for the left leg. The PGI further opined that both the upper extremities would require shoulder

disarticulation type of prosthesis. This Court also noted the contents of the affidavit dated 15.03.2016 filed by the Director General, Health Services, Haryana, to the effect that pursuant to the *e*-tender dated 20.02.2016, only P&O International Inc. had come forward. The Director General stated that further tendering could correspond to the requirements and change of appliances concerned, with advancement of the applicant's age and as there was a possibility of companies coming out with new technology. The Director General accordingly suggested that short term tendering may be allowed, limiting it to the present age of the child with comprehensive maintenance. He further stated that with change of artificial limbs with advancement of age, fresh tendering could be initiated. Thereupon, this Court recorded its opinion that technology would keep on changing with passage of time and there was a possibility that other companies may come out with better technology in developing such limbs in future, when compared to those provided by P&O International Inc. The authorities were accordingly directed to resort to a short-term tender, keeping in view the age and requirement of the applicant, with comprehensive maintenance which would be provided by P&O International Inc. and to issue a fresh tender for change of limbs with the advancement of the age of the applicant, as required from time to time, with the prior permission of the Court. CM No.144 of 2015 was adjourned *sine die* for revival upon an application filed either on behalf of the applicant or the authorities, for the purpose of a fresh tender as required by the growth of the applicant so that the best artificial limbs available at that time could be provided to him.

It appears that after completion of the tender process in the year 2016, the Haryana Medical Services Corporation Limited, Panchkula, placed a supply order with P&O International Inc. and the applicant was provided with Myoelectric artificial limbs. These limbs were to serve him for a period of 5 years, i.e., from 2016 to 2021. As per the letter dated 28.08.2017 of the Director General, Health Services, Haryana, the process for replacement of these limbs in 2021 had to start a year in advance, i.e., in the year 2020. However, it seems that the upper limbs provided to the applicant practically ceased to be of use more than a year ago, as they did not fit him any longer due to his physical growth over the years.

As it was high time that the exercise for replacement of all the limbs be initiated, the present application was filed by Mr. Anil Malhotra, learned *Amicus Curiae*, seeking suitable directions. Be it noted that CM No.144 of 2015 is still kept pending and there was no necessity, as such, for filing a fresh application. CM No.144 of 2015 could as well be revived for this purpose. Be that as it may.

A short reply was filed by the Additional Director General, Health Services, Haryana, on 05.07.2020 in response to this application. It reads to the effect that the Civil Surgeon, Panipat, was directed, *vide* letter dated 03.07.2020, to consider the latest technology/developments in the field of artificial limbs/prosthesis and formulate the new specifications as per the age and size of the limbs of the applicant. Thereafter, affidavit dated 27.08.2020 was filed by the Director General, Health Services, Haryana, stating that the Civil Surgeon, Panipat, had addressed letter dated 17.08.2020 (Annexure R-6) informing that two Orthopedic

Surgeons had a detailed discussion with a technical expert from P&O International Inc. and concluded that Myoelectric prosthesis would be most suitable for the upper limbs of the applicant at the present age.

The Director General, Health Services, Haryana, obviously wishes to act upon this recommendation as nothing to the contrary was indicated in his affidavit. However, perusal of Annexure R-6 reflects that the applicant, who is presently aged about 13 years, was examined on 13.07.2020 by the Orthopedic Surgeon, Civil Hospital, Panipat, and the technical expert from P&O International Inc. All possibilities were stated to have been discussed thereafter with the technical team of P&O International Inc. with regard to advancement in prosthesis and it was opined that Myoelectric prosthesis would be the most suitable option for the upper limbs and Bionic hand prosthesis (robotic functional hand), which is the latest and most advanced prosthesis, could be considered after the applicant attained the age of 17 years. The reason being that the Bionic hand prosthesis is complex, sophisticated and heavy while Myoelectric hand prosthesis is lightweight, strong and simple. It was further stated therein that the lower limb prosthesis could be upgraded with hydraulic knee. Both the prosthesis, upper and lower limbs, could be further upgraded after the applicant attained the age of 17 years according to physical demand and advancement of technology. Annexure R-6 was signed by two Orthopedic Surgeons of the Civil Hospital, Panipat, and the Civil Surgeon, Panipat. It ended with their opinion that Myoelectric hand upper limb prosthesis and above knee prosthesis with carbon socket with hydraulic knee with veri-flex with Evo foot would be the best option

in the present scenario.

As rightly pointed out by Mr. Anil Malhotra, learned *Amicus Curiae*, this decision taken at the level of the medical authorities at Panipat is neither in keeping with the directives of this Court, set out *supra*, nor is it conclusive as to the best options available. The earlier orders passed by this Court specifically required medical authorities at various levels to be consulted on the line of treatment. That being so, there is no reason why the Director General, Health Services, Haryana, should rely only upon the opinion of the Panipat medical authorities.

Be it noted that this is not an adversarial litigation of the usual sort and it should be the honest and sincere endeavour of all concerned to strive to provide the best possible medical care and infrastructure to the applicant, a long-term victim and sufferer of State negligence. In terms of the earlier orders passed by this Court, it would be appropriate that there is wider consultation at a higher level of medical experts to decide as to what would be the best viable option, given the advancement of science and technology in the field of artificial limbs. Further, consultation with the experts of P & O International Inc., which had provided artificial limbs to the applicant in 2016, would not be of much use in this regard as an unbiased and trustworthy opinion cannot be expected from an interested party, which would naturally want to advance its own interests. Significantly, the final order passed in this writ petition required officials of PGI, Rohtak; PGIMER, Chandigarh; and AIIMS, New Delhi, apart from other specialist medical Institutes, to offer their advice on consultation basis *pro bono*.

The Director General, Health Services, Haryana, is accordingly directed to constitute a team of medical experts in the field of orthopedics who would, in turn, consult experts from these medical Institutes and thereafter take a decision as to the best viable artificial limbs as on date that can be provided to the applicant. It is for the medical experts to consider as to whether Bionic hand prosthesis of a lighter weight are available and as to whether the same would be a better viable option for the applicant, given the fact that they admittedly allow more motor functions and enable greater flexibility. The consultations amongst these medical experts can as well be conducted online, through a video conference, given the prevailing situation caused by the COVID-19 pandemic. However, given the urgency in the matter of selecting and procuring new artificial limbs for the applicant, who is presently without upper limbs and has been so for more than a year now, the entire exercise should be completed as soon as possible so that a tender notification can be issued inviting interested eligible producers of the selected form of artificial limbs to come forward and participate in a competitive bidding process. This exercise shall be completed with utmost expedition and the Director General, Health Services, Haryana, shall ensure that, in any event, the tender notification is issued within 6 weeks from today.

It is also made clear that this exercise cannot be undertaken once in every 5 years. The applicant is 13 years of age as on date and is bound to grow substantially over the next few years. Any limbs provided to him at this age would not, by any stretch of imagination, serve the intended purpose for a continuous period of 5 years from now. As already

noted earlier, the upper limbs provided to the applicant in 2016 ceased to be of use more than a year ago. Significantly, the assessment made in the first instance in 2015 was that such artificial limbs would have to be changed every 2-3 years. Therefore, the artificial limbs that will now be provided to the applicant can only be retained till such time that they remain useful to him and it would be incumbent upon the State and the UHBVNL to undertake the exercise afresh as and when the applicant outgrows the limbs now provided.

The application is disposed of with the above directions.

This Court also records its appreciation of the continuous efforts being made by Mr.Anil Malhotra, learned *Amicus Curiae*, to alleviate the plight of this unfortunate youngster and to secure him his just benefits, inadequate as they are.

August 31, 2020 (Sanjay Kumar)
Kang Judge

This judgement ranked 1 in the hitlist.

Jasmine Kaur v. Union of India (P&H) : Law Finder Doc Id # 1733651

2020(3) R.C.R.(Civil) 528 **:** 2020(3) Law Herald 1990 **:** 2021(1) HLR 399

PUNJAB AND HARYANA HIGH COURT

Before:- Nirmaljit Kaur, J.

CWP No. 10555 of 2019. D/d. 28.7.2020.

Jasmine Kaur - Petitioner

Versus

Union of India and others - Respondents

For the Petitioner :- Sukhvinder Singh Nara, Advocate.

For the Respondent Nos. 1 to 3 :- Satya Pal Jain, Addl. Solicitor General of India with Ms. Shweta Nahata, Advocate, Anil Malhotra, Advocate as Amicus Curiae.

IMPORTANT

Juvenile Justice Act 2015 in respect of adoption is applicable only to special children - Same cannot be made applicable to other children being directly given by parents, whether to, in country adoptive parents or outside country.

IMPORTANT

Adoption - No Objection Certificate from Central Adoption Resource Authority - Not a requirement for Indian parents or Overseas Citizen of Indian.

A. Hindu Adoptions and Maintenance Act, 1956 Sections 2 and 5 Juvenile Justice (Care and Protection of Children) Act, 2015 Section 56(3) Adoption - Legality - Adoption given and taken by persons who were Sikhs, therefore, have right to adopt petitioner under HAMA, Act - Even though, they are British citizens, their religion remains same and, therefore, their right to adopt under HAMA, Act cannot be taken away - Adoption would be considered as valid - Once having applied under HAMA and adoption having been registered said adoption cannot be challenged on ground that same should have been made under J.J. Act, 2015.

[Para 17]

B. Hindu Adoptions and Maintenance Act, 1956 Sections 2 and 5 Juvenile Justice (Care and Protection of Children) Act, 2015 Section 56(3) Adoption - Legality - J.J Act 2015 applicable only to special children - Same cannot be made applicable to other children being directly given by parents, whether to, in country adoptive parents or outside country.

[Paras 19 and 20]

C. Hindu Adoptions and Maintenance Act, 1956 Sections 15 Passports Act, 1967 Section 6 Adoption - Denial to issue passport - Petitioner adopted by adoptive parents living in United Kingdom - Petitioner was denied passport being minor due to lack of No Objection Certificate from Central Adoption Resource Authority - Petitioner was adopted by sister of biological mother of petitioner - Adoption made under Hindu Adoption and Maintenance Act and there was no violation of any condition prescribed in Section 11 of Act - After ceremonial adoption and registered adoption deed, new birth certificate issued in name of adoptive parents - Passport authorities cannot go into validity of adoption of minor child - Respondent authority directed to issue passport.

[Paras 28 to 33]

D. Hindu Adoptions and Maintenance Act, 1956 Sections 15 Passports Act, 1967 Section 6 Adoption - Denial to issue passport - Indian parents' are not required to provide 'No Objection Certificate' from Central Adoption Resource Authority - Requirement is for foreign parents - Indian or Overseas Citizen of Indian with British Passport, i.e. with British Citizenship will not loose their identity of being Indian parent or Indian especially when they are called Overseas Citizen of India.

[Para 39]

Cases Referred :

Amruta Vijay Vora v. Union of India, AIR 2004 Gujarat 51.

Anokha (Smt.) v. State of Rajasthan, (2004) 1 Supreme Court Cases 382.

Lakshmi Kant Pandey v. Union of India, (1984) 2 Supreme Court Cases 244.

Patel Mukesh Kumar Karshanbhai v. Regional Passport Authority, AIR 2012 (Gujarat) 188.

Pawandeep Singh v. UOI, 2004(1) RCR Civil 459.

Satinder Pal Singh Sibia v. UOI, 2006(4) RCR Civil 514.

Shabnam Hashmi v. Union of India, 2014(1) RCR (Civil) 1052.

Sivarama K. v. The State of Kerala, 2020(1) Kerala Law Journal 641.

JUDGMENT

Nirmaljit Kaur, J. - The present petition has been filed seeking a direction to respondent Nos.1 and 2 to issue a passport to the petitioner by dispensing with the requirement of 'No Objection Certificate' from respondent No.3, i.e. the Central Adoption Resource Authority (hereinafter referred as 'the CARA') which is being taken up through Video Conferencing due to COVID-19.

2. The petitioner-Jasmine Kaur was born on 15.11.2017 in India to her natural parents Mr.Manohar Lal & Mrs. Gian Kaur. It is significant to mention here that twin daughters were born to Mr.Manohar Lal & Mrs. Gian Kaur. Gian Kaur is the real sister of Mrs.Balbir Kaur, an NRI, OCI card holder and citizen of United Kindgom, aged 53 years, wife of Paramjit Singh, is a permanent resident of 250, Park Avenue, Southhall Middlesex UB 13AW UK. The petitioner was adopted by above mentioned Balbir Kaur and Paramjit Singh from her natural parents as per Sikh rites and ceremonies which were performed at Gurudwara Shaheedan Singhan Ji, Village Thalla, Tehsil Phillaur, District Jalandhar and a certificate to this effect was also issued. Pursuant to the adoption ceremony, a registered adoption deed was also executed on 16.11.2018 between the natural and adoptive parents of the petitioner. The petitioner was adopted as per the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred as 'the HAMA,1956'). The petitioner has applied for issuance of passport vide Passport Application No. JA2063095726618 alongwith all the relevant documents but the same was refused by the Passport Authority, i.e. respondent No.2 on the ground that NOC from CARA/FERA or photocopy from Recognized Indian Placement Agency (RIPA) is required.

3. It is inter-alia contended by learned counsel for the petitioner that passport is being denied to the minor petitioner primarily due to the lack of a No Objection Certificate from CARA. It is argued that section 56(3) of the Juvenile Justice (Care and Protection of Children) Act 2015 (hereinafter referred as 'the J.J. Act, 2015') very clearly states that the provisions of the said Act would not be applicable to the adoption of children made under the provisions of the HAMA,1956. It is contended that the petitioner-Jasmine Kaur has been adopted under the adoption deed which is a duly executed document and the said adoption is under the provisions of HAMA, 1956 and, therefore, the question of getting a 'No Objection Certificate' from CARA would not arise.

4. Per contra, learned counsel appearing on behalf of the UOI states that it is a mandatory procedure for the adoption to be ratified by CARA, even though Section 56(3) of the J.J. Act 2015 states that the Juvenile Justice (Care and Protection of Children) Act 2015 would not be applicable to an adoption under the HAMA, 1956.

5. Thereafter, vide order dated 10.06.2020 passed by the Coordinate Bench of this Court, Mr.Anil Malhotra, Advocate was appointed as Amicus Curiae in this case to assist the Court on account of his experience in dealing with such issues.

6. In pursuance to the said order, Mr.Anil Malhotra, learned Amicus Curiae filed his report. Reply has also been filed by respondent Nos.1 and 2, i.e. Union of India and Regional Passport Office. Separate reply has also been filed by respondent No.3-CARA.

7. After hearing learned counsel for the parties at length, three issues arise in the present writ petition:

1. Whether the adoption under HAMA, 1956 is valid and whether Section 56 of the J.J. Act, 2015 is applicable in the facts of the present case and the adoption in the present case can only be made under the J.J. Act, 2015?

2. Whether an NOC from CARA, i.e. respondent No.3 is mandatory as per the mandate of Section 60 of the J.J. Act, 2015 for direct inter-country relative adoption?

3. Whether respondent No.2 can refuse to issue a passport beyond the statutory provisions of section 6 of the Passports Act, 1967?

8. In order to adjudicate upon Issue No.1, it is necessary to reproduce Sections 2 & 5 of the HAMA, 1956 and Sections 1(4), 56 and 60 of the J.J. Act, 2015 which read as:

"Section 2 & 5 of HAMA, 1956:

2. Application of Act- (1) This Act applies-

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion,and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation- The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:-

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(bb)any child, legitimate or illegitimate, who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jaina or Sikh; and

(c) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh, religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

5. Adoptions to be regulated by this Chapter- (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth."

9. A perusal of HAMA, 1956 shows that it regulates adoption by Hindus, Buddhist, Jains and Sikhs by religion and lays down certain strict conditions for adoption. Those, who do not fall under the definition of Hindu are barred from adopting under this Act.

"Sections 1(4), 56 and 60 of the J.J. Act, 2015:

1(4). Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection

and children in conflict with law, including-

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) Procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection."

56. Adoption - (1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority.

(2) Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority.

(3) Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956.(78 of 1956).

(4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.

(5) Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the Court, shall be punishable as per the provisions of section 80."

60 Procedure for inter-country relative adoption:(1) A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Authority shall on receipt of the order under subsection (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child.

(3) The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time."

10. A perusal of the J.J. Act, 2015 shows that it is a special provision for a limited class of children, those who are in conflict with law, in need of care and protection, orphaned, surrendered or abandoned. In the present case the adoptive parents are Sikhs. The child is being given over by the biological parents of sound mental health. The biological mother is the real sister of the adopted mother. The child is neither an orphaned nor surrendered nor in conflict with the law. Thus, the J.J.Act 2015 does not apply for adoption of the particular child in question.

11. The argument of learned Senior Counsel, Mr.Satya Pal Jain, Additional Solicitor General of India that Section 56(4) shows that in case of adoption relating to inter-country, i.e. when the parents adopting the child belong to or citizens of another country, the said adoption shall be as per the provisions of the J.J. Act, 2015 was met by Mr.Anil Malhotra, learned Amicus Curiae, who referred to Sub Section (3) of Section 56, according to which, provisions of the J.J. Act, 2015 will not apply in case the adoption of the children is made under the provisions of the Hindu Adoption and Maintenance Act, 1956 and that Section 60 of the J.J. Act, 2015 has to be read in conjunction with Section 56 of the J.J. Act, 2015 which is an inbuilt of the Hindu Adoption and Maintenance Act, 1956 and adoption code in itself and, therefore, the supremacy of Section 56(3) over-rides the remaining provisions of Section 56 of the J.J. Act, 2015. The submission made by learned Amicus Curiae makes sense as it is not understood as to how an Act, which is applicable to a special class of children, namely, orphans, abandoned, surrendered and in conflict with the law, be also applied alongwith all its tedious procedures to children being given in adoption by able, mentally sound parents and that too to a relative directly by the adoptive parents. More so, when they are close relatives.

12. One of the issue as herein came up for hearing before the Division Bench of High Court of Kerala at Ernakulam in the case of ***Sivarama K. and others v. The State of Kerala and others, 2020(1) Kerala Law Journal 641***. Questions which emerged for consideration before the Kerala High Court were detailed in para 9 of the said order, which read thus:-

"(i) Whether P-1 adoption effected as per the provisions of the HAM Act can be said to be in contravention of the J.J Act?

(ii) Whether the J.J Act overrides the HAM Act.

(iii) Whether the child is in the unlawful detention of respondents 4 to 6."

13. In the said case also, the biological parents and the adoptive parents decided to execute an adoption deed and in pursuance to the said adoption deed, the child was handed over by the biological parents to the adoptive parents in accordance with the provisions of the HAMA, 1956. However, the child was forcibly taken away by the Child Welfare Committee as being followed by the Juvenile Justice (Care and Protection of Children) Act, 2015. The Court while allowing the writ petition, directed the child to be handed over to the adoptive parents by holding in para 29 as under:-

"29. On the giving of the child by the biological parents and the taking of the child by the adoptive parents, which is evidenced by Ext.P-1 registered adoption deed, the child can never be labelled as an orphan, abandoned or surrendered child, as interpreted by the fourth respondent. If such a view is taken, it would render the HAM Act otiose and redundant and make it appear that the former enactment is repugnant with the J.J Act, which never is the intention of the lawmakers. Such a narrow and oppressive interpretation cannot be given, particularly when the legislature has consciously included Section 56(3) in the J.J Act, the later enactment, with the intention to permit adoptions under the HAM Act. There may be instances where a person may qualify to adopt a child under the provisions of both the HAM Act and the J.J Act. In such an eventuality, especially where is no repugnancy between the two statutes, it would be the choice of such person to opt for the HAM Act or the J.J Act, 2015, adoption. No authority can compel such person to resort to only the J.J Act, 2015."

14. The argument of learned Additional Solicitor General of India, Mr.Satya Pal Jain, that the judgment pertains to a period before the amendment of the J.J. Act, 2000 and is before the enactment of J.J. Act, 2015, came into operation is correct but the same does not help in any manner as the applicability of the Act under the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Juvenile Justice (Care and Protection of Children) Act, 2015 remains the same. In fact, its application under J.J. Act, 2015 is even more specific to only special children.

15. No doubt, here it is an inter-country adoption and as per Section 56(4) of the J.J. Act, 2015, inter-country adoption shall be done only as per the provisions of this Act and the Adoption Regulations framed by the Authority but the same has to be read with its applicability as per Section 1(4) of the JJ Act, 2015, reproduced above, which lays down very clearly, and for the sake of repetition applies only "to all matters concerning children in need of care and protection and children in conflict with law, including - (i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law; (ii) procedures and decisions or orders relating to rehabilitation, adoption, reintegration, and restoration of children in need of care and protection."

16. Further, the aim and object of the J.J. Act, 2015 was formulated for protection of such children who are found to be in conflict with law or required rehabilitation. Thus, Section 56(4) and (5) of the J.J. Act, 2015 is only for such children. Sub Section (2) of Section 56 of the J.J. Act, 2015, which talks of adoption of a child by a relative from another relative, is an option/remedy provided to those to whom HAMA, 1956 will not apply, i.e. they are neither Hindu, Buddhist, Jain or Sikh, as the case may be or is not Muslim, Christian, Parsi or Jew by religion, although it does not bar and in a way gives option even to a Hindu, Sikh, Jaina etc. to apply under this Act. Therefore, it also does not mean that those religions covered under the definition of a 'Hindu' as per the HAMA, 1956 cannot apply under the J.J. Act, 2015. Here, it needs to be emphasized that J.J. Act, 2015 is a secular Act and rather gives choice to even those covered under the HAMA, 1956 to apply for adoption under the J.J. Act, 2015, as also clarified by the Apex Court in the case of ***Shabnam Hashmi v. Union of India and others 2014(1) RCR (Civil) 1052*** holding that Juvenile Justice (Care and Protection of Children) Act, 2000 has been enacted for adoption of children irrespective of their religion/caste and the said Act cannot be negated by any other personal law and the individuals are free to either submit to their personal law or adopt children under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. Para 11 of the said judgment reads thus:

"11. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date."

17. In the present case, there is no dispute that the adoption has been taken by the persons who are Sikhs and, therefore, have a right to adopt the petitioner under the HAMA, 1956. Even though, they are

British citizens, their religion remains the same and, therefore, their right to adopt under the HAMA, 1956 cannot be taken away. In these circumstances, their adoption would be considered as valid. Their adoption is also protected by Section 56(3) of the JJ Act, 2015 itself, which clearly stipulates that the provisions of the Act shall not be applied for the adoption of the children under the HAMA, 1956. Once having applied under HAMA & adoption having been registered under HAMA, 1956, the said adoption cannot be challenged on the ground that the same should have been made under J.J. Act, 2015 as also in view of Section 15 of HAMA, 1956 which clearly states that a valid adoption of a minor child is irreversible and cannot be revoked. Thus, it was neither mandatory nor necessary to apply for adoption of the child in question under the J.J.Act, 2015.

18. The next issue is whether this J.J. Act, 2015 would apply even in those cases of inter-country adoption of children which are being given directly by parents to relatives and known people under HAMA, 1956.

19. Section 1(4) of the J.J. Act, 2015, as discussed above applies only to special children. Thus, the other provisions of the said Act including the Rules framed under it or the adoption regulations issued by the Ministry of Women and Child Development which are specifically notified in exercise of the powers conferred by section 68 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and are also framed under the Juvenile Justice (Care and Protection of Children) Act, 2015 will have to be read alongwith the applicability of the said Act, which is only to children specified under Section 1(4) of the J.J. Act, 2015. Once the applicability is only of the special children, it is not understood as to how the same can be made applicable to other children being directly given by the parents, whether to, in country adoptive parents or outside the country. In case the Legislative Authority had intention to apply the said Act even to such children who were given directly in adoption, the necessary amendment would have followed in the Juvenile Justice (Care and Protection of Children) Act, 2015 especially when the old Juvenile Justice (Care and Protection of Children) Act, 2000 was replaced by the J.J. Act, 2015. In fact, while replacing Juvenile Justice (Care and Protection of Children) Act, 2000 by the J.J. Act, 2015, the same was passed by the Parliament of India with the following aims and objects:-

> "An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto. WHEREAS, the provisions of the Constitution confer powers and impose duties, under clause (3) of article 15, clauses (e) and (f) of article 39, article 45 and article 47, on the State to ensure that all the needs of children are met and that their basic human rights are fully protected;
>
> AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations, which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of the child; AND WHEREAS, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993), and other related international instruments."

20. The Juvenile Justice (Care and Protection of Children) Act, 2015 has introduced the concepts of adoption child from the Hague Convention on protection of Children and Cooperative in respect of intercountry Adoption, 1993, which were missing in the previous Act of 2000. The amended Act also made the adoption process of orphaned, abandoned and surrendered children only. Thereafter, Central Adoption Resource Authority (CARA) respondent No.3, which is a statutory Authority too was established only under Section 68 of the J.J. Act, 2015, which is applicable to special children.

21. Thereafter, the adoption Regulations 2017 were framed by the Ministry of Women and Child Development vide notification dated 04.01.2017 and that too was once again in exercise of the powers under Section 68 read with Clause (3) of section 2 of the Juvenile Justice (Care and Protection of Children) Act 2015 and as stated above, the J.J. Act, 2015 pertains only to special Children as mentioned in Section 1(4) of the J.J. Act, 2015 and not to children being directly adopted. The fact that the said Act is not applicable even to the inter-country adoption of children adopted directly, from biological parents is also evident from the judgment rendered by the Supreme Court in the case of ***Lakshmi Kant Pandey v. Union of India (1984) 2 Supreme Court Cases 244***. The Supreme Court in the said case, while reviewing the inter-country adoption, held in para 11 as under:-

> "11. We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are

> living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare."

22. Thereafter, the Apex Court in the case of ***Anokha (Smt.) v. State of Rajasthan and others (2004) 1 Supreme Court Cases 382*** while analysing the Juvenile Justice (Care and Protection of Children) Act, 2000 held that inter-country direct adoptions are not amenable to the rigorous procedures and safeguards since the natural parents are the best to judge what is the best interest of the child and held in no uncertain terms that where the child is living with her biological parents and who seek to give their child in adoption to a foreign couple, who are known to them, need not to follow the guidelines prescribed for adoption of Indian children being applicable, only to children who are orphans and destitute or whose biological parents are not traceable or relinquished or surrendered their children for adoption. Paras 12 and 15 of the said judgment read as under:

> "12.The Guidelines have formulated various directives as given by this Court in the several decisions and do not relate to regulation of the adoption procedure to be followed in respect of third category of children, namely, children with their biological parents who are sought to be given in adoption to a known couple as is the situation in this case. It is only where there is the impersonalized attention of a placement authority that there is a need to closely monitor the process including obtaining of a no objection certificate from the Central Adoption Resource Agency (CARA), Ministry of Welfare, the sponsorship of the adoption by a recognised national agency and the scrutiny of the inter-country adoption by a recognised Voluntary Coordinating Agency (VCA). Indeed CARA has been set up under the guidelines for the purpose of eliminating the malpractice indulged in by some unscrupulous placement agencies particularly the trafficking in children.
>
> 15 None of these provisions in the several decisions of this Court impinge upon the rights and choice of an individual to give his or her child in adoption to named persons, who may be of foreign origin. The Court in such cases has to deal with the application under section 7 of the Guardians And Wards Act, 1890 and dispose of the same after being satisfied that the child is being given in adoption voluntarily after being aware of the implication of adoption viz. that the child would legally belong to the adoptive parents family, uninduced by any extraneous reasons such as the receipt of money etc; that the adoptive parents have produced evidence in support of their suitability and finally that the arrangement would be in the best interest of the child."

23. The learned Additional Solicitor General of India while placing reliance on the judgment rendered by the Bombay High Court in the case of Adoption of Payal @ Sharinee Vinay Pathak and his wife Sonika Sahay @ Pathak, 2010(1) BomCR 434 submitted that the Juvenile Justice (Care and Protection of Children) Act, 2000 is a special Act and over-rides the general provisions of the HAMA 1956. The said judgment does not help as the same was passed in the facts of a case wherein the issue arose whether a Hindu couple governed by Hindu Adoption and Maintenance Act, 1956 with the child of their own, can adopt a child of a same gender under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and it was in those circumstances that the Court observed in para 17 as under:-

> "17.The Hindu Adoptions and Maintenance Act, 1956 regulates adoptions by or to a Hindu. The Act spells out requisites of valid adoptions, defines capacities for men and women professing the Hindu religion to take in adoption and to give in adoption, for persons who may be adopted and the conditions for adoption. The Act enunciates consequences or effects of a valid adoption in law. The Act establishes rules of general applicability to Hindus in specific areas of family law - adoption and maintenance. The Juvenile Justice (Care and Protection of Children) Act, 2000 is beneficent secular legislation. The Act makes special provisions for a limited sub class of children - those juveniles in conflict with law and children in need of care and protection. Adoption under the Act of 2000 is an instrument of legislative policy to rehabilitate and provide social integration to children who are in need of care and protection. The Preamble to the Act emphasizes that the legislation was enacted to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection. Rehabilitation and social integration of orphaned, abandoned and surrendered children is a matter of legislative regulation by the Juvenile Justice Act. Adoption is a technique contemplated by the law in order to facilitate rehabilitation and reintegration of children of a particular class governed by Chapter IV. The mission of the law is to provide special rules to govern the adoption of a narrow sub class of children namely, those who are orphaned, surrendered or abandoned. In construing the provisions of the Juvenile Justice Act the effort of the Court must be to ensure that the beneficent object with which the legislation was enacted must be facilitated and furthered. Beneficial legislation, it is a trite principle of interpretation, must be construed liberally."

24. Moreover, the child in the said case was surrendered by the mother four days after the child was born by duly recording reasons why they wanted to surrender the child to a nursing home where the child was born. Therefore, the child was a 'surrendered child' and duly covered under the Juvenile Justice (Care and Protection of Children) Act, 2000 where the restrictions of a Hindu as to adopt a child under the HAMA, 1956 were not applicable. Thus, it was adoption of a surrendered child in that case and not a direct adoption from the parents. Therefore, the answer to this issue is in the negative, i.e. the J.J. Act, 2015 alongwith the adoption Regulations 2017 will not apply to the children adopted directly from the biological parents under HAMA 1956.

25. The next question is as to whether the Regional Passport Officer can decline to issue a passport under

the provisions of the Passports Act, 1967 (hereinafter referred as 'PA') and NOC was necessary from CARA on the ground that :

> "(I) That the adoption of the petitioner is invalid or illegal.
>
> (II) That it does not confirm to the conditions prescribed in the check-list, Annexure P-4 of respondent Nos.1 and 2, inter alia as follows:
>
> (i) NOC from Central Adoption Resource Authority (CARA).
>
> (ii)Legal and valid adoption deed declared by Court of law.
>
> (iii) Details of children of both natural and adoptive parents.
>
> (iv) Medical certificate of adoptive parents in case no child is born.
>
> (v) Marriage certificate of adoptive parents. It may be submitted that the requirement of the above documents is specified in the affidavit dated 13.10.2019, filed in the present case by Assistant Passport Officer, Regional Passport Office, Jalandhar."

26. In terms of Section 6 of the PA, a passport can be declined or refused to an applicant under Section 5 PA, on four grounds stated in Section 6(1) PA, and on nine grounds stated in Section 6(2) PA.

27. It is not disputed that the child was adopted under the HAMA 1956 and from the facts on record, there is no violation of any condition prescribed in Section 11 of the HAMA, 1956.

28. The previous birth certificate dated 17.08.2016, Annexure P-6, was issued in the name of natural parents, i.e. Manohar Lal and Gian Kaur. After the ceremonial adoption on 09.11.2018, and registered adoption deed dated 16.11.2018, being drawn up, the new birth certificate dated 29.11.2018, Annexure P-1, has been issued in the name of adoptive parents, i.e. Paramjit Singh and Balbir Kaur, as per the record of SDMC, NCT of Delhi. A deed, Annexure P-3 dated 16.11.2018 has been duly executed, witnesses, notarised & registered by the Sub Registrar, Phillaur on 16.11.2018. In terms of Section 12 HAMA, 1956, the petitioner child shall be deemed to be child of the adoptive parents, i.e. Paramjit Singh and Balbir Kaur w.e.f. 09.11.2018, and from this date, all the ties of the petitioner child shall stands severed from her natural parents i.e. Manohar Lal and Gian Kaur. Under Section 15 HAMA, 1956, the valid adoption of the petitioner cannot be cancelled, nor can the adopted child be returned to the family of her birth. The adoption of the minor child is irreversible and cannot be revoked which reads as under:

> **"15. Valid adoption not to be cancelled.-** No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth."

29. Hence, under Section 16 HAMA, 1956, a presumption shall be drawn that the said adoption has been made in compliance with the provisions of HAMA & there is a presumption in law as to what is recorded in the said deed.

30. For convenience of the Court, Section 16 of the HAMA, 1956 reads as under:-

> **"16 Presumption as to registered documents relating to adoption. -** Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

31. Gujarat High Court in the case of ***Amruta Vijay Vora v. Union of India and another AIR 2004 Gujarat 51*** held that when any adoption deed is registered under Section HAMA 1956, a presumption shall arise that the adoption has been made in compliance of the provisions of the said Act unless it is dis-proved. Para 6 of the said judgment reads as under:-

> "6. Even otherwise also, as per Section 16 of Hindu Adoptions & Maintenance Act, 1956 (hereinafter referred to as "the Act") when any adoption deed is registered there shall be a presumption for documents relegating to the adoption and the presumption shall be that the adoption has been made in compliance with the provisions of Act unless and until it is disproved. Such presumption can be made applicable only in Court proceedings, but such presumption in view of Section 16 can also reasonably be made applicable even at the time when the authority has to consider the matter for issuance of passport because the passport authority while considering the matter for issuance of passport is also acting as a quasi-judicial authority."

32. While dealing with Section 16 of the HAMA, 1956, learned Single Bench of Gujarat High Court in the case of ***Patel Mukesh Kumar Karshanbhai v. Regional Passport Authority, AIR 2012 (Gujarat)***

188 held in para 11 that:-

> "11. The said provision of law makes it clear that a legal presumption is attached to any registered document pertaining to an adoption, and it shall be presumed that such adoption has been made in compliance with the provisions of the Hindu Adoptions and Maintenance Act, 1956 "unless and until" it is disproved. The adoption of the petitioner has been effected by a Registered Deed. It is not the case of the respondent that the adoption of the petitioner has been disproved, therefore, the presumption envisaged by Section 16 will come into play and it is not open to the said respondent to pronounce upon the legality, or otherwise, of the adoption of the petitioner, which has not been disproved by a competent court of law."

33. Thus, the respondents cannot question the validity of the registered adoption deed in the application for issuance of a passport by a minor child. Further more, adoption being irreversible in view of Sections 15 and 16 of the HAMA, 1956, there is no scope for the respondents to question the validity of the registered adoption deed.

34. The issue whether the passport authorities can go into the validity of an adoption of a minor child under Section 6 of the PA further stands decided by a Full Bench decision of this Hon'ble Court in ***Pawandeep Singh v. UOI & Anr. 2004(1) RCR (Civil) 459***, and followed in ***Satinder Pal Singh Sibia v. UOI and another 2006(4) RCR (Civil) 514***. It has been conclusively held, that it is not open to the passport officer to go into the validity of an adoption at the time of the issuance of a passport, as the officer could decline a passport only for the reasons set out in Section 6 PA.

35. Accordingly, this Court would have had no hesitation in directing the respondents to issue the passport but for the provisions of Passport Manual, 2016 which was brought to the notice of this Court by the learned Additional Solicitor General of India, Mr.Satya Pal Jain, which is issued by the Ministry of External Affairs. As per Section 5.2 of Chapter X of the Passport Manual, 2016, the following documents are required for issuance of a passport for inter-country adoption case.

> "No objection Certificate from CARA (if the original NOC of CARA is not available with the applicant due to the reason that it has been submitted in the Court, a copy of the same duly certified/Attested by CARA may be accepted by the Passport Authority for the issue of passport);
>
> (i) Court order on adoption; and
>
> (ii) All other documents required for issue of passports to minor children."

36. Further, as per Rule 5 of the Passports Rules 1980, an application has to be filed for issuance of a passport in the appropriate form set out in part I of Schedule III. Rule 5 reads as under:

> "*5. Form of applications.*-1[(1)] An application for the issue of a passport or travel document or for the renewal thereof or for any miscellaneous service shall be made in the appropriate Form set out therefore in Part I of Schedule III and in accordance with the procedure and instructions set out in such form:
>
> 2[Provided that every application for any of the aforesaid purposes shall be made only in the form printed and supplied by-
>
> (a) Central Government; or
>
> (b)Any other person whom the Central Government may by notification specify, subject to the condition that such person complies with the conditions specified by that Government in this behalf:
>
> Provided further that in the course of any inquiry under sub-section (2) of section 5, a passport authority may require an applicant to furnish such additional information, documents or certificates, as may be considered necessary by such authority for the proper disposal of the application.

37. As per the said schedule, the relevant list of application categories and documents to be submitted, is reproduced below:-

Case No.	Passport Services	Documents to be submitted	
	Fresh Passport	Document No.-Normal Application	Document No.- Tatkal Application
6.	Children adopted by Indian Parents	(i) 1(of Adopter parents, 2, 21, 27 (if any -with spouse name endorsed) (ii) 51 (signed by both adoptive parents) or 50 (one parent	

		not given consent)	
7.	Children adopted by foreign parents	1 (of parents), 2, 21, 23, 24, 27	Cannot apply under Tatkal Scheme

38. The documents at Sr.No.1, 2, 21, 23, 24 and 27 read as under:-

Document No.	List of documents
1.	**Proof of Present Address.** For Proof of Address attach one of the following documents:
a.	Water/Telephone (landline or post-paid mobile bill)/Electricity bill/ Statement of running bank account (Scheduled Commercial bank excluding Regional Rural banks and local area banks)/Income-Tax Assessment Order/Election Commission Photo ID card/Gas connection bill/Certificate from Employer of reputed and widely known companies on letter head
b.	Spouse's passport copy (First and last page including family details), (provided the applicant's present address matches the address mentioned in the spouse's passport)
c.	Parent's passport copy, in case of minors (First and last page)
d.	Applicant's current and valid ration card NOTE 1: If any applicant submits only ration card as proof of address, it should be accompanied by one more proof of address out of the given categories.
2.	**Proof of Date of Birth.** For Proof of Date of Birth attach one of the following documents:
	For applicants born on or after 26-1-89, only Birth Certificate issued by the Municipal Authority or any office authorized to issue Birth and Death Certificate by the Registrar of Births & Deaths is acceptable. The Birth Certificate should ordinarily contain the name of child, name of father and mother, date of birth, place of birth, sex, registration number and date of registration. If the Birth Certificate doesn't contain the name of child, a declaration on plain paper signed by parents, is required to be submitted specifying the name of the child.
a.	Birth certificate issued by a Municipal Authority or any office authorized to issue Birth and Death Certificate by the Registrar of Births & Deaths
b.	School leaving certificate/Secondary school leaving certificate/ Certificate of Recognized Boards from the school last attended by the applicant or any other recognized educational institution
c.	Affidavit sworn before a Magistrate/Notary stating date/place of birth as per the specimen in Annexure"A" by illiterate or semi-illiterate applicants (Less than 5th class).
21	Valid adoption deed with photo of the child duly attested by the Court (in the case of Christians, Muslims and Parsis, a court decree/order granting adoption/guardianship and allowing the child to be taken out of the Country).
23.	CARA No Objection Certificate
24.	Copy of the guarantee executed before the Court concerned
27.	Attested photocopy of Passport of both or either parent.

39. From the above, it is evident that 'Indian parents' are not required to provide the 'No Objection Certificate' from CARA. The requirement is for foreign parents. Although, the Court is of the view that an Indian or OCI with a British Passport, i.e. with British Citizenship will not loose their identity of being an Indian parent or Indian especially when they are called 'Overseas Citizen of India', nevertheless, the said debate is left open as no argument was raised qua the same by either side.

40. The petitioner too has not challenged the above Rules and the requirement as incorporated in the Passport Manual and the Passport Rules. Thus, it would be in the interest of the adoptive parents as well as the child in question to obtain a simple 'No Objection Certificate' from CARA in order to ensure a clean transition from one country to another lest they face any difficulty for the purpose of Visa or any other requirement. Accordingly, in view of the earlier discussion holding the adoption to be valid with no right either to CARA and J.J Act, 2015 to question the same on account of the adoption under HAMA, 1956 was a direct adoption by the adoptive parents from the biological parents between close relatives, the detailed tedious procedure prescribed under the J.J. Act, 2015 and CARA is not required. Therefore, CARA is simply required to issue a 'No Objection Certificate', in the same form as seems to have been issued to a child by the name of Sai Himaja(F), copy of which has been handed over by learned Amicus Curiae and is taken on record as document as Annexure A-1.

41. Accordingly, it is summarized that valid adoption under HAMA 1956 of a minor child cannot be revoked until disproved. It is not mandatory to invoke the J.J.Act, 2015 in the facts of the present case where the adoption is a direct adoption by the parents to the known adoptive parents/relatives under HAMA. As per Section 5.2 of Chapter X of the Passport Manual, 2016 and in view of Part I of Schedule III

under Rule 5 of the Passports Rules, 1980, NOC from CARA is required only by foreign parents and not Indian parents.

42. In view of the above, it is directed that:

(1) The respondent No.3-CARA shall issue a 'No Objection Certificate' (NOC) to the adoptive parents of the petitioner for taking their child to U.K. within two weeks.

(2) The Ministry of External Affairs/Regional Passport Office shall immediately thereafter issue the passport to the petitioner within two weeks of the receipt of NOC from CARA.

43. Allowed in the above terms.

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This judgement ranked 1 in the hitlist.

Richa Gupta v. Union of India (P&H) : Law Finder Doc Id # 1772597

2021(2) R.C.R.(Civil) 724

***PUNJAB* AND HARYANA HIGH COURT**

Before:- Amol Rattan Singh, J.

CRWP No.820 of 2020. D/d. 12.10.2020.

Richa Gupta - Petitioner

Versus

Union of India and others - Respondents

For the Petitioner :- S.P.S. Mann and Vikas Lochab, Advocates.

For the Respondent No. 1 (UOI) :- Arvind Seth, Advocate.

For the Respondent Nos. 1, 2 and 4 :- None.

For the Respondent No. 3 :- Dr. Sukant Gupta, Addl. PP, UT, Chandigarh.

For the Respondent Nos. 5 and 6 :- Sunil Garg, Advocate.

For the Respondent Nos. 7 to 10 :- Kanwaljit Singh, Sr. Advocate with C.M. Munjal, Advocate.

For the Amicus Curiae :- Anil Malhotra, Advocate.

IMPORTANT

Adoption - Writ petition maintainable when enquiry involves validity of adoption.

IMPORTANT

Adoption - Juvenile Justice (Care and Protection of Children) Act, 2015, applicable for inter-country adoption.

IMPORTANT

Adoption - Adoption deed not valid when done in unstable mental condition and under mental stress.

A. Hindu Adoptions and Maintenance Act, 1956 Sections 12 and 15 Release of son to natural mother and validity of adoption - Writ of Habeas Corpus - Maintainability - Held, in view of case AIR 2011 Supreme Court 1952, despite proceedings in petition seeking issuance of a writ in nature of habeas corpus being summary in nature, High Court can still embark upon detailed enquiry for welfare of the minor in question and can invoke its extraordinary jurisdiction to determine validity of detention and to even direct repatriation of minor child to country from where he or she may have been removed by a parent or some other person - Therefore, petitioner maintainable even though enquiry involves validity of adoption.

[Para 115]

B. Hindu Adoptions and Maintenance Act, 1956 Sections 12 and 15 Validity of adoption - Held, adoption deed cannot be said to be valid in view of fact that petitioner not in a fully stable mental condition and under mental stress of having lost her husband only 1= months earlier, and with her holding a 3 month old baby - Further, petitioner therefore having changed her mind as regards adoption subsequently and not having come to Patiala, to sign adoption deed.

[Para 115]

C. Hindu Adoptions and Maintenance Act, 1956 Sections 12 and 15 Inter-country adoption - Whether HAMA 1956 or JJ Act 2015 would apply to adoption, with adoptive parents, admittedly, presently being residents of USA for more than one year and therefore they not being resident Indians, though they are Indian citizens? - Held, JJ Act of 2015,applicable for

inter-country adoption, adoptive mother and her husband admittedly being Indian citizens residing abroad for more than one year - Thus, certificate from Central Adoption Resource Authority' essential to validate any adoption - Therefore, adoption not legally valid even in terms of the Act of 1956 - Custody of child to be returned immediately to natural mother, i.e. petitioner.

[Para 115]

Cases Referred :

Ajay Kumar v. Rishalo Devi 2019(1) RCR (Civil) 148.

Ghisalal v. Dhapubai (Dead) by Lrs. (2011)2 SCC 298.

Jasmine Kaur v. Union of India, CWP No. 10555 of 2019. D/d. 28.07.2020.

Jeshy C.O. v. Union of India Rep. by the Secretary, 2019 (1) KLT 57.

K. Laxmanan v. Thekkayil Padmini (2009) 1 SCC 354.

Laxmi Kant Pandey v. Union of India.

M. Vanaja v. M. Sarla Devi, AIR 2020 Supreme Court 1293.

M/s Brightstar Telecommunications India Ltd. v. M/s I world Digital Solutions Private Ltd., 2019 (173) DRJ 191.

Manohar Lal v. State of Punjab, LPA No. 476 of 2020. D/d. 05.08.2020.

Master Param Pal Singh v. M/s National Insurance Company, 2013 (2) RCR (Civil) 480.

Mausami Moltra Ganguli v. Jayant Ganguli, 2008(4) RCR (Civil) 551.

Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42.

Mst. Param Pal Singh through Father v. M/s National Insurance Co., 2013(2) (Recent Apex Judgments (R.A.J.) 440.

Nil Ratan Kundu v. Abhijit Kundu, 2008(3) RCR (Civil) 936.

P. Sivasuryanarayana Chetti v. P. Audinarayana Chetti, AIR 1937 Madras 110.

Ruchi Majoo v. Sanjeev Majoo, AIR 2011 Supreme Court 1952.

Shabnam Hashmi v. Union of India, 2014(1) RCR (Civil) 1052.

Shilpa Aggarwal v. A viral Mittal, (2010) 1 SCC 591.

Sivarama K. S/o Venkattaramana Bhat v. State of Kerala, 2020 (1) KLT 294.

Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698.

Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, 2019 (7) SCC 42.

Vijay Bhushan Arora v. Dipak Arora, 2016(6) AD (Delhi 56.

Yashita Sahu v. State of Rajasthan, 2020 AIR (SC) 577.

JUDGMENT

Amol Rattan Singh, J. - All cases listed today have been taken up for hearing by way of video conferencing because of the situation existing due to the COVID-19 pandemic.

By this petition, the petitioner seeks the issuance of a writ in the nature of habeas corpus to secure the release of her son, Advait Gupta, who is allegedly in the illegal custody of respondents no.5 to 9, specifically respondent no. 7, Minakshi Gupta, who claims to have legally adopted the child, with the consent of her husband, Sai Kiran (who is not a respondent in the petition).

It is pertinent to mention here that the petitioner unfortunately having been widowed in July 2019, respondents no.5 and 6 are her father-in-law and mother-in-law, respectively.

However, the actual grievance of the petitioner as regards the custody of her son, is with respondents no.7 to 9, with the custody of the minor child, who is stated to have been born on 31.05.2019, being with respondent no.7, i.e. Minakshi Gupta.

2. It being a case of the custody of a small child, it is appropriate to notice here itself the proceedings before this court, before arguments were actually addressed by all learned counsel, as also to notice the residential status of respondent no. 7 and her husband.

Notice of motion having been issued, the respondents all appeared on January 31, 2020, with the matter adjourned for hearing to 12.02.2020, to enable the respondents to file a reply.

(All dates of hearing are also being referred to, in view of the fact that the case has taken about 8 months for a decision, it initially having gone before different benches and not one bench).

It is also to be noticed that on January 31, 2020, one Inspector Haroon Ahmad of Police Station, Shalimar Bagh, New Delhi, appeared before this court, though at the time that notice of motion was issued, there was no such direction issued; but seemingly it was through him that the notice issued was effected upon respondents no.8 to 10, who are shown to be residents of Shalimar Bagh, New Delhi.

On that date too, all learned counsel in the petition made a request for an adjournment, with the matter therefore having been adjourned to March 03, 2020, on which date an issue seems to have been raised on whether or not jurisdiction under Article 226 (seeking a writ in the nature of habeas corpus), can be invoked, seeking custody of a minor child.

Eventually however, after the COVID-19 pandemic set in, the matter was taken up for hearing on June 05, 2020, for effective hearing.

3. In fact on that date, all learned counsel for the parties had stated that if the parties were directed to attempt mediation, the matter may actually be settled between them.

Consequently, the parties appeared before the learned Mediator in the Mediation and Conciliation Centre of this court on 15.06.2020 but no settlement having been reached, it was ordered to be put up for final consideration (vide an order dated 08.07.2020), on August 07, 2020; but even on that date, the turn of the matter having come up late, counsel for respondents no.5 and 6 had sought an adjournment.

4. On 14.08.2020, Mr. Munjal, learned counsel for respondents no.7 to 10, had brought to the notice of this court documents annexed with the written statement of the said respondents, including what was stated to be an adoption deed (dated 03.12.2019), to submit that the petitioner having willingly given the child in adoption to respondent no.5 and her husband, Saikiran (he not being a respondent in the petition), she could not repudiate that adoption even in terms of Sections 12 and 15 of the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as the Act of 1956 or as HAMA).

5. Countering that contention, learned counsel for the petitioner, on that date itself, had stated that the "adoption deeds" (including an affidavit dated 05.09.2019-Annexure R-7/3 with the reply of respondents no.7 to 10), having been signed by the petitioner under pressure, and she having approached the police immediately thereafter, the said deeds could not be said to be legal and valid.

6. That in fact, is the essence of the entire controversy, i.e. as to whether the said documents and giving of the child to respondent no. 9 (sister of respondent no.7), would constitute a valid adoption or not and whether, in the light of those documents, the petitioner is entitled or not to get the custody of her natural born son, back from respondent no.7.

However, the facts are differently depicted by both sides and therefore the contentions raised with regard thereto, would obviously need to be referred to in detail; but before that, the issue of the residential status of respondent no.7 and her husband needs to be seen.

7. At that stage, Mr. Munjal, learned counsel appearing for respondents no.7 to 10, had stated (on query by the court), that the adoptive parents are U.S. citizens, after which another query had been put to him, as to whether the procedure for 'an international adoption' had been followed or not. He had then sought time to take instructions and to cite the law on that issue.

In view of the aforesaid statement of Mr. Munjal, it had been considered necessary by this court to request Mr. Anil Malhotra, Advocate, who has more than fair knowledge on the issue of international adoption, to assist this court as amicus curiae.

8. On the next date of hearing, i.e. 25.08.2020, Mr. Anil Malhotra had submitted his report to this court, with Mr. Kanwaljit Singh, learned senior counsel having put in appearance for respondents no.7 to 10.

He had, in fact brought to the notice of this court that it was inadvertently stated by Mr. Munjal (learned counsel appearing for the said respondents on the previous dates), that respondent no.7 and her husband were US citizens, whereas actually they are Indian citizens residing in the US, whose passports would be produced in court on the next date of hearing.

An affidavit to that effect was also filed by respondent no.7 (dated 20.08.2020), in which it is stated that her husband works with M/s Accenture Services Pvt. Ltd. (which is described in the affidavit to be a multi-national company though otherwise is shown to be a Private Limited Company). He is stated to be working as a Senior Manager in the said company, with he and respondent no.7 both residing in Los Angeles, California.

They are stated to have been issued an H-1 B and an H-IV visa respectively by the US authorities, with

the former visa stated to have been issued to the husband of respondent no.7 to October 2014 and with both presently renewed till March 04, 2021.

Thus, respondent no. 7 Minakshi Gupta and her husband, Sai Kiran, are both Indian citizens living in the US on visas presently valid till March 2021.

9. Before referring to the pleadings of the parties, it is also appropriate to briefly notice that there was a change of counsel for the petitioner, thrice, uptil 07.08.2020. Mr. Dilpreet Singh Gandhi, Advocate, (with him having filed the petition along with S/Shri Vaibhav Mittal and Arvin Sekhon, Advocates), appeared till 07.08.2020. However, on 14.08.2020 Mr. Vikas Lochab, Advocate, appeared for the petitioner with Mr. Gandhi having at that stage appeared and submitted that he had no objection to Mr. Lochab appearing (though that had not been recorded in the said order).

Thereafter, with Mr Lochab having appeared in all hearings up-til 09.09.2020, Mr. S.P.S. Mann, Advocate, appeared for the petitioner, submitting that in fact the petitioner had obtained "a no objection" from Mr. Lochab. The latter had stated that he had no objection to Mr. Mann appearing.

However, since at that stage only arguments in rebuttal were to be addressed on behalf of the petitioner, Mr. Malhotra, learned Amicus Curiae, had been requested to assist the court also on the issue of change of counsel at such a belated stage (with neither Mr. Gandhi nor Mr. Lochab being designated senior counsel); after which Mr. Malhotra had referred to section 49(1)(c) of the Advocates Act, 1961, as also to Rule 39 of Chapter II, contained in part VI of the Bar Council of India Rules, 1975, (framed under the provisions of Section 49), to submit that there would be no specific bar on any change of counsel at any stage. Learned amicus curiae also referred to Rule 2 contained in Part B of Chapter VI of the High Court Rules and Orders, Volume V (of this court), to submit essentially to the same effect.

Those provisions having been referred to, all learned counsel for the respondents had submitted that they had no objection to Mr. Mann appearing for the petitioner even at the stage of rebuttal, with a specific query in that regard having been put to them by this court.

However, since Mr. Mann would not have known the exact arguments addressed by Mr. Lochab and counsel for the respondents up-til that stage, Mr. Lochab had been asked by this court to continue to assist in the matter along with Mr. Mann, so that there was no confusion of any kind, to which request he very fairly and readily agreed.

It is also necessary to notice that Mr. Mann had informed this court that he had uploaded a power of attorney executed by the petitioner in his favour, by way of a communication to the Reader of this court and that he would also file it in the Registry.

10. In that background, before going on to the arguments raised on both sides, as also by the learned Amicus Curiae, the pleadings of the parties naturally need to be referred to.

11. Coming to the petition, as per the petitioner, she was married to the late Adesh Gupta on 27.05.2017 and after his unfortunate death on July 22, 2019, allegedly, respondents no.5 and 6, i.e. the petitioners' 'in-laws', started harassing her, asking her to leave the house. Eventually she is stated to have left the house, leaving behind her son; but by then (as per the petition) she had been introduced to respondents no.8 and 9, i.e. Ashwani Jain and Manisha Gupta respectively, (the sister and brother of respondent no.7, Minakshi Gupta), as also to respondent no.10, i.e. Jenender Gupta, who as per learned counsel for the parties, is a common friend/relative of respondent no.7 and the petitioners' in-laws, i.e. respondents no.5 and 6.

As per the writ petition, she had been assured that her son would be legally adopted and that she would be called to meet the adoptive parents and only upon her being satisfied, would the adoption take place.

12. The petition thereafter 'jumps on' (in paragraph 5 thereof) to say that a few days prior to the filing of the petition, the petitioner came to know that an illegal adoption was being executed and in fact she was never called for the same, with her therefore not knowing the whereabouts of her son. As per her contention, when she rung up her in-laws they refused to tell her the whereabouts of her son, other than the fact that they had already given him in adoption to respondent no.7, who would be taking the child out of India by the last week of January 2020.

Respondents no. 5 & 6 (her in laws) are stated to be residing at Patiala, whereas the petitioner, after leaving her matrimonial home, is stated to be residing with her parents at Chandigarh.

13. The petitioner thereafter made a representation/complaint to the Department of Social Welfare, Child & Womens' Development, Union Territory Chandigarh, as also to the Senior Superintendent of Police, Chandigarh, with copies of those representations having been annexed as Annexure P-2 collectively, dated 18.12.2019 (as regards the complaint to the police).

The police is eventually stated to have acted on 08.01.2020, by summoning respondents no.5 and 6 (who live in Patiala) to the Police Station, Sector-34, Chandigarh, where the petitioner was also called and where the said respondents are said to have made a statement that the child would be handed over to the petitioner on January 13, 2020.

However, that not having been done, the petition came to be filed on 23.01.2020.

14. As regards the respondents, no replies having been filed on behalf of respondents no.1, 2 and 4, i.e. the Union of India, the Director General of Police, Punjab, and the Commissioner of Police, Delhi respectively, with a 'short reply' filed on behalf of the SSP, Chandigarh, i.e. respondent no.3, by Inspector Baldev Kumar, Station House Officer, Police Station Sector-34, Chandigarh, essentially stating therein that as per the complaint of the petitioner dated 18.12.2019 (Annexure P-2 with the petition), she was forced to sign adoption papers on 05.09.2019, with her contention being that as the adoptive couple itself was not present, the child was handed over to the siblings of respondent no.7, i.e. to respondents no.8 and 9, Ashwani Gupta and Manisha Gupta.

The reply of the Station House Officer further states that, "prima facie the Chandigarh Police did not have jurisdiction to look into the matter", with the alleged adoption papers also executed in Patiala, but "as per practice" the parties and the complainant were called to the police station to record their statements and to 'apprise them' on the lack of jurisdiction.

The SHO further states that in the interest of the minor child, the parties were spoken to, with a joint undertaking having been given by the petitioner and her in-laws, i.e. respondents no.5 and 6, as also her father and two other persons, stating therein that respondents no.5 and 6 would hand over the minor child to the petitioner on 13.01.2020, at the police station itself.

However, despite that joint statement having been signed on 08.01.2020 (Annexure R-3/2 with that affidavit), thereafter on 11.01.2020 a letter was received from respondent no.5, seeking extension of time to restore the custody of the child to the petitioner by 20.01.2020, after which "a detailed written statement" dated 13/16.01.2020 was received by the SHO from respondent no.5, stating therein that the decision to give the minor child in adoption was a voluntary one by the petitioner and that respondents no.5 and 6 (the in-laws of the petitioner) would have no objection to either the custody of the child being given back to the petitioner or with it remaining with respondent no.7 and her husband.

The child was thereafter never handed over to the petitioner and upon the SHO having obtained legal opinion, he was informed that in fact the petitioner should be asked to approach the District Police, Patiala, as the Chandigarh Police would have no jurisdiction to deal with the matter.

15. It is to be specifically noticed here that the reply of the SHO does not state that respondents no.7 to 10 were also present at the time that the aforesaid statement was signed, and in fact the statement itself is not seen to be signed by any of them.

Eventually it is stated that the Chandigarh Police would abide by whatever directions are given by this court.

16. In the reply filed by respondents no.5 and 6, i.e. the petitioners' father-in-law and mother-in-law respectively, preliminary objections have first been taken that a petition filed under the provisions of Article 226, seeking the issuance of a writ in the nature of habeas corpus, is not maintainable as it is not "a legal remedy to challenge an adoption or adoption deed", with the appropriate forum for proving/disproving any such deed being the civil court.

It has further been stated that the petitioner herself gave her son in adoption without any coercion and pressure and that in fact the entire story given in the petition is only an attempt to extort money from the respondents, whereas everything had been settled between the families on 05.09.2019, with the petitioner having in fact executed an affidavit on that date and also having executed a deed of adoption in the presence of witnesses including her father.

The reply on merits is also essentially to the same effect, with the factum of the parties being called to the police station also admitted.

Importantly, along with the reply of respondents no.5 and 6, is annexed an application addressed (via e-mail) to the SSP, Chandigarh ("hand-dated" 16.01.2020) and a statement dated 13.01.2020 of respondent no.5, sent via e-mail to the (SHO) Police Station Sector-34, Chandigarh (both collectively annexed as Annexure R-5/2 with the reply of respondents no.5 and 6)

However, as regards the custody of the child not being handed over, it is stated in the reply that such custody not being with respondents no.5 and 6, they obviously could not hand over the child to the petitioner.

17. Coming then to the reply filed on behalf of respondents no.7 to 10, with the affidavit in fact being that of respondent no.7, Minakshi Gupta.

Again the same preliminary objection on maintainability of the present petition has been raised, with it further stated that the adoption ceremonies were held in the presence of at least 20 relatives on both sides and therefore, once it is established that the petitioner herself handed over custody to respondent no.7, of her free will and consent, the petition is also not maintainable.

18. In the reply of the said respondents, on the merits of the petition, it is stated that respondent no.10 (Jenender Gupta) is the "maternal brother-in-law" of Minakshi Gupta and is a common relative even to the petitioner because Jenender Guptas' sisters' husband is the brother of the petitioners' mother-in-law.

The details of other relatives and witnesses as are stated to have been present, are also given in paragraph 1 of the reply on merits.

It is further stated therein that both, the petitioner as also her parents, had stated at that time that the petitioner wished to leave the house of her in-laws at Patiala and wished to come back Chandigarh, where she would be re-married and that the minor child would not be taken by her as it would hinder the prospects of such re-marriage.

19. It has further been stated that in fact initially it was respondent no.10 who was being persuaded to take the child in adoption as he had no son (though he had a daughter), but with the said respondent being reluctant "at that time", it then came to his mind that his relatives were searching to take a child in adoption for respondent no.7 who was in the US for the past 6 to 7 years, with that suggestion eventually having been accepted by the petitioner, her parents as also her parents-in-law.

Therefore, on 05.09.2019 about 20 people gathered (at the house of respondents no.5 and 6 as stated in court by learned counsel for the respondents), but with respondent no.7 and her husband unable to come in India on that date due to a visa issue (as contended).

Therefore, the child was given by the petitioner to respondent no.9 in the presence of the petitioners' parents as also her brother, who is a signatory to the affidavit dated 05.09.2019. A photograph of the child being handed over to respondent no. 9 was also taken (Copy Annexure R-7/1 with the said reply).

[A photograph showing the petitioner, her father and respondent no.9 (as commonly stated by all learned counsel), is also annexed as Annexure R-7/2 with the petition, with the same photograph also affixed on the deed of adoption dated 03.12.2019 (Annexure R-7/4).

The said deed also carries individual photographs of two other persons, stated to be respondent no.7 and her husband, Saikiran.]

20. Thus, as per respondents no.7 to 10, the child was willingly handed over by the petitioner to the sister of respondent no. 7 on 05.09.2019, with an affidavit also executed by her on that date, clearly stating that she intended to re-marry after the death of her husband and therefore was giving her son without any "hitch or pressure to Ms. Minakshi Gupta wife of Mr. Saikiran Gupta of Delhi, as also they have shown their willingness and consent to adopt the child". (Reference paragraph 4 of the said affidavit, Annexure R-7/3 with the written statement of respondents no.7 to 10).

Further, the affidavit states that as per the mutual understanding and settlement amongst the family, the petitioner would be going to her parental home at Chandigarh without any pressure and therefore she or her son would have no right in her husbands' and her in-laws' moveable or immovable properties. Paragraph 7 of the affidavit also states that she would not "claim or file any suit against my in-laws with regard to any things".

21. The reply of respondents no.7 to 10 further goes on to state that the child thereafter remained with respondent n.9, Manisha, who looked after him on behalf of respondent no.7 and ultimately, when respondent no.7 came back to India on 22.11.2019, she took the child into her custody after which she (respondent no.7) approached the petitioner and her parents, as also respondent no.10, to complete the "formality of the adoption".

Hence, it is further stated that accordingly, on 03.12.2019, all again gathered at the house of Ms. Rajni Gupta sister of respondent no.10 at Patiala, where respondent no. 9, Minakshi Gupta, and her husband M. Sai Kiran, were also present. Thereafter, a deed of adoption was reduced into writing on stamp paper worth Rs. 1000/-, which was purchased on 05.09.2019 when the affidavit Annexure R-7/3 was executed.

The reply goes on to state that in the said adoption deed, along with the petitioner, her father was a witness, as was respondent no.10, with the deed duly notarised at Patiala.

The petitioner is also stated to have handed over her Aadhar card and the birth certificate of the minor child to respondent no.7, with all terms and conditions of the adoption reduced to writing, after which again the custody of the child is with respondent no.7.

22. The reply on behalf of respondents no.7 to 10 thereafter goes on to state that therefore, in the aforesaid circumstances, the adoption is completely legal, with the petitioner in fact having signed the adoption deed herself along with her father, which she had concealed from this court (in the writ petition), she also having concealed the factum of the affidavit executed and the photographs taken of the gathering on 05.09.2019.

23. Thereafter, the petitioner being harassed by her in-laws is denied by respondents no.7 to 10 in paragraph 4 of the reply (though obviously the 'in-laws' are respondents no.5 and 6 and not amongst respondents no.7 to 10).

Finally, it has been stated in the reply that the welfare of the child would be of paramount consideration for this court or "the Guardian Court".

In that context, it is stated that the child would be brought up "in a very decent manner" in the USA, whereas on the re-marriage of the petitioner, 'the future of the child will be dark' and that in any case the parents of the petitioner were very reluctant to get the child right from the beginning.

Hence, it is contended that for the betterment and the welfare of the child, his custody should remain with respondent no.7.

24. Thereafter, on a query having been made by this court as regards the capacity of respondent no.7 and her husband to look after the child, especially with respondent no.7 stated to be 52 year old, an additional affidavit of the said respondent, dated 20.08.2020, was also filed [as has also been referred to in paragraph 8 (supra)]. Copies of the bank statements of the husband of respondent no.7 were also subsequently presented in court (by way of 'Whatsapp' communication to the Reader of this court), as regards the bank balance of the said respondents' husband which will be referred to further in this judgment.

25. Coming then to the arguments actually addressed by parties. Arguments were raised by learned counsel for the petitioner to the effect that the adoption was not valid because it was done under pressure, inasmuch as the affidavit dated 05.02.2019 as also the adoption deed dated 03.12.2019, were both signed under pressure by the petitioner and further, there was no handing over ceremony of the child to the adoptive mother and in any case the natural guardian of a child under five years of age is his natural mother.

Thus, the following arguments had been recorded in the order dated 19.08.2020, addressed by Mr. Lochab:-

> (i) That the adoption is not valid because the petitioner was under pressure, with the affidavit dated 5.9.2019, as also the adoption deed dated 3.12.2019 (notarised), both signed under pressure by her;
>
> (ii) That there was no 'handing over' ceremony of the child from the natural mother to the adoptive mother, i.e. to respondent no.7, Minakshi Gupta, with even the photographs annexed with the reply filed by respondents no.7 to 10 showing the child being handed over by the natural mother only to the sister of the adoptive mother (and not to the adoptive mother) and consequently, again for that reason, it was not a valid adoption; and
>
> (iii) That the natural mother is the natural guardian of a child less than 5 years of age and consequently, with her having gone to the police within 15 days of the (alleged) adoption deed having been signed and having stated that she had signed it under pressure, the custody of the child deserved to be handed back to her, with the 'so called adoption' to be declared to be illegal and not binding.

Thereafter, both he and Mr. Mann (subsequently appearing for the petitioner), had pointed to the photographs (Annexures R7/1 and 7/2), to submit that the petitioner obviously had a tearful face while handing over the child and therefore she cannot be said to have done so of her own free will.

26. In reply to the aforesaid contentions, Mr. Munjal (who had earlier been appearing 'independently' for respondents no. 7 to 10), had referred to the affidavit dated 05.09.2019 (Annexure R-7/3 with the reply of respondents no. 7 to 10) and had specifically pointed to paragraphs 4 and 5 thereof, to submit that the petitioner had very willingly agreed to give the child in adoption, with the said affidavit having been witnessed by her brother, Karan Aggarwal, and therefore to say that it was signed under pressure was a wholly misconceived and false contention.

As already noticed in paragraph 4 herein above, he had earlier brought to the notice of this court the deed dated 03.12.2019, with him submitting that the said deed and the affidavit dated 05.09.2019 both showed that the child had been willingly given in adoption by the petitioner to respondent no.7 and therefore the adoption was irreversible.

He had further submitted that as regards handing over the child at that time, it was handed over to the sister of the adoptive mother because the adoptive parents were in the U.S., who came to India only for the adoption and when the deed dated 3.12.2019 was signed, the child was handed over to them as is admitted in the last three lines of the adoption deed and consequently, simply because there are no photographs of the child being handed over to the adoptive mother, that does not make the adoption invalid. He further pointed to the fact that the said adoption deed has been signed not just by the petitioner but also witnessed by her own father, Shri Babu Ram, as also by one more witness.

27. The aforesaid arguments having been addressed by Mr. Munjal, thereafter from 19.08.2020, Mr. Kanwaljit Singh, Senior Advocate had addressed arguments, appearing for respondents n.7 to 10.

However, prior to hearing learned senior counsel appearing for respondents no. 7 to 10 addressing arguments, it was considered appropriate to hear Mr. Anil Malhotra, learned Amicus Curiae, because his report (as he had submitted by then), was essentially to the effect that the adoption was not valid and therefore his contentions were essentially in favour of the petitioner (though obviously from a wholly objective stand point as amicus).

28. Mr. Malhotra first referred to paragraph 2 of the reply of respondents no. 5 and 6 (the parents-in-law of the petitioner), to submit that the only date mentioned as regards the alleged adoption, was 05.09.2019 and not 03.12.2019, which is the date shown to be stamped (with a rubber stamp), on the adoption deed annexed as Annexure R-7/4 with the reply of respondents no. 7 to 10 and therefore it seemed to be pretty obvious that though the petitioner gave away her child to respondent no. 9 (the sister of the adoptive mother) on 05.09.2019, as would also seem to be obvious from the photograph annexed with the same reply, yet she (the petitioner) does not seem to have been actually present on 03.12.2019, which would also seem to be so from the statement made by the petitioners' father-in-law (respondent no. 5) via email to the SHO, Police Station Sector 34, Chandigarh, the said statement having been annexed with the reply of respondents no. 5 and 6 themselves, and therefore obviously admitted.

From that long statement, he pointed specifically to the fact that it is stated therein that a deed of adoption was got prepared on 05.09.2019, after it was finalized at Patiala in the presence of a large number of people (including respondents no. 5, 8, 9 and 10) and it was decided, that since respondent no. 7 and her husband were in the US at that time, the child would be handed over to respondent no. 9, and that ".....the said adoption deed was signed by Richa Gupta and Babu Ram in presence of all the persons and said minor child Advait was handed over by Richa Gupta to Manish Gupta on 05.09.2019. However, since Richa Gupta was going back to her parents' house at Chandigarh forever thus all the matter with regard to her marital rights were also settled....."

In the same statement, respondent no. 5 has also stated that ".....then Sai Kiran and his wife namely Minakshi Gupta came to India from USA and made a call to me that they are coming to Patiala on 03.12.2019 for execution of Adoption deed and Richa Gupta be also called for this purpose, on which my wife Sunita Gupta made a telephonic call to Richa Gupta to come to Patiala as Sai Kiran and Minakshi Gupta are coming to Patiala to execute the Adoption deed, but Richa Gupta refused to come to Patiala and then my wife Sunita Gupta made call to cousin brother of Richa Gupta namely Dharampal also who also shirked to get into the matter, and then the entire things were communicated to Neelam Gupta wife of Jenender Gupta, but still Sai Kiran and his wife namely Minakshi Gupta along with Janender Gupta and Ashwani Gupta came from Delhi to Patiala on 03.12.2019 and it was told to them to talk to Richa Gupta directly but they said we will see matter on our own level and after some time they left our place".

(All emphasis applied in terms of
the stress laid by learned amicus curiae).

29. Hence, the contention of learned amicus was that the adoption deed relied upon by respondents no.7 to 10, dated 03.12.2019, was obviously not signed by the petitioner (Richa Gupta) on 03.12.2019 but on 05.09.2019 itself, after which she had in fact refused to sign any papers, though she obviously signed the affidavit dated 05.09.2019, agreeing to give the child away at the first instance to the sister of the adoptive mother, i.e. to respondent no. 9.

However, Mr. Malhotra further submitted that, firstly, the adoption deed never actually having been signed in the presence of both parties together, very obviously the petitioner had changed her mind by the time that respondent no. 7 and husband came from the US; and she had decided not to give the child in adoption and consequently, with there being no actual giving and taking of the child by the natural mother to the adoptive mother or her husband, there is no valid adoption and therefore, the custody of the child would need to be restored to the natural mother, i.e. the petitioner.

30. Mr. Malhotra next referred to the photograph on the adoption deed, showing the petitioners' father (stated to be Babu Lal by the petitioners' counsel), respondent no. 10 Janender Gupta, and the petitioner (all standing together), to submit that admittedly the said photograph was taken in Patiala on 05.09.2019 and therefore, again obviously, that photograph was used even on 03.12.2019 on the adoption deed shown to be executed on that date, because the petitioner obviously refused to come to Patiala after 05.09.2019, which is why a rubber stamp has been fixed on the adoption deed, showing the date '03.12.2019'; and that is also the reason why the adoption deed has not been registered, for which there would otherwise be no reason, especially to authenticate the adoption, though of course registration of an adoption deed is not compulsory even under the provisions of the Registration Act, 1908.

In that context Mr. Malhotra further submitted that since presumption is in favour of a registered adoption, any educated person would normally resort to that process after an adoption deed has been signed, especially if the child is to be taken abroad, and simply because the adoption deed is shown to be notarized, it would not actually prove the presence of the petitioner at Patiala on 03.12.2019, even as per the statement of respondent no. 5 in his email to the SHO of the police station.

31. Mr. Malhotra therefore submitted that very obviously the petitioner had actually signed even the adoption deed actually on 05.09.2019 itself with it later shown to have been executed on 03.12.2019, and that she had handed over the child not to the adoptive mother but to her sister, i.e. respondent no.9, Manisha Gupta, with respondent no.7 and her husband admittedly not being present in India on 05.09.2019.

He further submitted that thereafter the petitioner having changed her mind to actually give the child in adoption to a middle aged/elderly couple living in the USA, she had therefore refused to actually come to Patiala to hand over the child to respondent no.7, or to get the adoption deed registered, which earlier had been decided to be registered upon the arrival of respondent no.7 and her husband from the USA.

He next submitted that that was probably the reason that respondents no. 5 and 6 agreed that the custody of the child would be handed over back to the petitioner on 13.01.2020, as is also stated in the reply of the SHO (annexing therewith the joint statement signed by respondents no. 5 and 6 and the petitioner).

32. Next, Mr. Malhotra submitted that the giving of the child to the sister of the adoptive mother, with the child remaining with the sister and not with the adoptive mother from 05.09.2019 till at least the time that respondent no. 7 arrived from the USA, would also therefore not make it a valid adoption; because if the adoption deed dated 03.12.2019 is not found to be actually genuine by this court, then the simple giving of the child to a person other than the adoptive mother, would not comply with the provisions of Section 11 (vi) of the Act of 1956.

Thus the contention of learned Amicus Curiae is that only on 05.09.2019 perhaps, willingness was shown

at that stage by the petitioner, but there actually being no giving of the child to the adoptive mother, consequently, the legal necessity as stipulated in clause (vi) of Section 11 is not fulfilled.

He also drew attention to the fact that even in the written statement of respondents no. 5 and 6, and respondents no.7 to 10, it is not stated anywhere that Richa Gupta actually came to Patiala on 03.12.2019 to sign the document, with a very evasive reply given by respondents no.7 to 10 that "Accordingly on 03.12.2019 all again gathered at the house of Ms. Rajni Gupta, sister of respondent no. 10 at Patiala, where the answering respondent Minakshi Gupta and her husband M. Sai Kiran were also present." (reference a part of paragraph 1 of the reply on merits of respondents no. 7 to 10).

33. He then submitted that even in the affidavit dated 05.09.2019, the petitioner simply stated that she was "willing to give my son without any hitch or pressure to Mrs. Minakshi Gupta, wife of Sai Kiran Gupta of Delhi, as also they have their willingly and consent to adopt the child," with there being no actual giving of the child to Minakshi Gupta or her husband.

Mr. Malhotra also submitted that simply because the last three lines of the adoption deed state that ....."have signed on the adoption deed and hand over the child baby son to the adopter in the presence of witnesses....", that does not mean that the said handing over actually took place, with the petitioner not present in Patiala on that date, as per the petitioner herself as also per her in-laws, i.e. respondents no. 5 and 6, who otherwise have stated throughout in their written statement that she had willingly given the child to respondent no. 9 on 05.09.2019.

34. Mr. Malhotra next submitted that even as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, (hereinafter referred to as the 'JJ Act' or the Act of 2015), an inter-country adoption has to be as per the provisions of the said Act, though of course sub-section (3) of Section 56 of that Act provides that nothing in the said Act would apply to the adoption of children made under the provisions of the Act of 1956.

He submitted that, however, the adoption cannot be held to be valid in circumstances where the petitioner was very obviously under pressure to sign the affidavit dated 05.09.2019, at a time when her husband had just passed away less than one and half months earlier (on July 22, 2019), and with her in any case denying having come to Patiala at all on 03.12.2019, and with that also being the stand of her in-laws, i.e. respondents no.5 and 6, though they otherwise stated that she gave the child willingly.

Consequently, he submitted that the adoption cannot be held to be valid even in terms of Act of 1956, firstly because there was no actual giving and taking of the child by the natural mother to the adoptive mother/father and further, because the deed showed a wrong date of its signing by both parties, when it is very highly doubtful and in fact almost proved that the petitioner did not sign it on 03.12.2019 (though she may possibly have signed it in the absence of respondent no.7 and her husband on 05.09.2019), and with her definitely having changed her mind to give the child in adoption before 03.12.2019.

35. Mr. Malhotra also referred to Section 5 (2) of the Act of 1956 to submit that an adoption that is void would not create any rights in the adoptive family in favour of any person, if such person could not acquire such rights except by reason of the adoption.

He also referred to sub-section (1) of Section 5 to submit that no adoption could be made after 1956 by a Hindu, except in accordance with the provisions contained in Chapter II of the said Act, and that any adoption made in contravention of the provisions thereof would be void.

36. Thus, the contention of learned Amicus Curiae is that the adoption deed dated 03.12.2019 is not a valid adoption deed, it not having been actually signed by the petitioner on 03.12.2019, though it may have been signed by her earlier on 05.09.2019 at the time that she executed the affidavit; but nonetheless, she thereafter having actually changed her mind and never having come to Patiala to give the child to the adoptive mother on the date that the adoption deed is shown to be executed (03.12.2019).

37. The next contention of learned amicus curiae was that to safeguard a child who would be going outside the jurisdiction of India, the procedure to be adopted for international adoption must be resorted to, without which the adoption cannot be held to be valid.

He referred to Section 61 of the Act of 2015, wherein the procedure to be adopted by a court in issuing an adoption order, is postulated.

He also referred to sub-sections (6) and (7) of Section 2 of the said Act, wherein the term "Authority" is defined to state that it means the 'Central Adoption Resource Authority' (CARA), constituted under Section 68 of the said Act [(sub-section 7)].

Sub-section (6) defines an "authorised foreign adoption agency" to mean a Foreign Social or Child Welfare Agency authorised by CARA on the recommendation of the Central Authority or Government of such foreign country, to sponsor the application of non-resident Indians/Overseas Citizens of India/Persons of Indian Origin/foreign prospective adoptive parents, for adoption of a child from India.

38. Mr. Malhotra submitted that in fact it would be CARA that would determine whether the provisions of the Act of 2015 or the Act of 1956 have been complied with as regards the adoption being a valid adoption, with him further submitting that in any case no country would grant a visa to a child for entering that country without clearance from CARA, in view of the fact that India is a signatory to the United Nations Convention on the Rights of the Child (UNCRC), with our country having ratified that

convention/treaty on December 11, 1992, and in fact with the Juvenile Justice (Care and Protection of Children) Act, 2000, having been enacted pursuant to that ratification, with the said Act of 2000 now replaced with the Act of 2015.

39. He then referred to Regulation 2(14) of the Adoption Regulations framed under the provisions of clause (c) of Section 68 read with sub-section (3) of Section 2 of the Act of 2015, to submit that a 'no objection certificate' needs to be issued by the Authority (CARA), permitting the child to be placed in adoption with a foreign citizen or an overseas citizen of India, or Non-Resident Indians, which would be a provision applicable in the present case, in view of what is contained in sub-section (4) of Section 56 of the Act of 2015.

40. As regards maintainability of a writ petition seeking issuance of a writ in the nature of habeas corpus, Mr. Malhotra relied upon various judgments, with him specifically pointing to paragraph 36 of the judgment in ***Ruchi Majoo v. Sanjeev Majoo AIR 2011 Supreme Court 1952***, wherein their Lordships, after discussing the law on the subject, held that such a writ petition was in fact, maintainable.

Learned Amicus had thus submitted that with the writ petition itself being maintainable qua custody of the child, in terms of the ratio of the aforesaid judgment, which is also in the context of the custody of a child (though between two natural parents), there would be no need to resort to the remedy of a petition either under the provisions of the Guardians and Wards Act, 1890, or by way of any other civil proceedings.

41. Mr. Malhotra also referred to provisions of the Hindu Minority and Guardianship Act, 1956, to submit that the natural guardian of the minor child, in the aforesaid circumstances in any case, would be the natural mother.

He also cited various judgments on the issue of guardianship of a child being with his/her natural mother.

[Those however are not considered necessary to be really gone into in this case because if the adoption deed is not found to be legally valid by this court, or at least for the purpose of return of custody of the child to the natural mother it is not found to be valid, then naturally, the custody would be with the natural mother. If, on the other hand, the adoption is found to be valid, then (equally naturally) the right of custody would be with the adoptive mother.]

42. Last, Mr. Malhotra submitted that it would also not be in the interest of the child at all to be adopted by a 52 year old mother and a 43 year old father because obviously bringing up an infant and a child takes lot of energy, with respondent no.7 obviously not gaining energies as she goes older, like any other person.

Hence, he submitted that in view of all the above, the custody of the child needs to be given back to the petitioner, i.e. the natural mother.

43. After learned Amicus Curiae had addressed arguments, Mr. Kanwaljit Singh, learned senior counsel appearing for respondents no.7 to 10, first reiterated what Mr. Munjal had submitted, to the effect that with the petitioner having been unfortunately widowed, she was desirous of re-marrying as even stated by respondents no.5 and 6 in their statement before the police (admitted by them in their written statement), and therefore she agreed to give her son in adoption and consequently, willingly handed over the child on 05.09.2019 to the sister of respondent no.7, i.e. to respondent no.9, and also executed an affidavit to that effect, further stating therein that she was willing to give her child to respondent no.7, Minakshi Gupta, and her husband Saikiran Gupta of Delhi, and that she was doing so without any pressure.

Hence, learned senior counsel submitted that the intention to give her child in adoption was very clear right since 05.09.2019 and with the handing over taking place to the sister of the adoptive mother, there was no violation of clause (vi) of Section 11 of the Act.

He therefore submitted that with the child having been actually handed over on September 05, 2019 and the adoption deed also thereafter having been signed on December 03, 2019, simply because the petitioner thereafter decided to withdraw from her consent, by going to the police and to the Social Welfare Department on December 18, 2019, the adoption could not be reversed even in terms of Section 15 of the Act.

In that context Mr. Kanwaljit Singh next stressed on the fact that as per Section 11 of the Act, it is the intent of the natural parents/guardian to give the child away which is to be considered and consequently, the intent of the petitioner by admittedly giving the child away on 05.09.2019, with her also executing an affidavit on that date, was very clear, especially as even the adoption deed has been thereafter executed on 03.12.2019.

44. Learned senior counsel next referred to the written statement of respondents no.5 and 6, i.e. the 'in-laws' of the petitioner, to submit that even they specifically stated that the petitioner had told them that she wished to give the child in adoption so that her chances of re-marriage would be better.

He further submitted that the child remained with respondent no.9 from 05.09.2019 to 22.11.2019, after which, upon the arrival of respondent no.7 from the USA, the child was handed over to her by respondent no.7, after which the adoption deed dated 03.12.2019 was executed at Patiala..

45. He next submitted that registration of an adoption deed not being compulsory either under the Act of 1956 or under the Registration Act, 1908, the adoption deed dated 03.12.2019, read with the affidavit dated 05.09.2019, would make the adoption completely legal and valid, with therefore the petitioner having no right to get the custody of the child back.

Learned senior counsel also reiterated that in such circumstances, the writ petition seeking custody of a child, in the face of a valid adoption deed, was not maintainable.

46. As regards the contention of learned counsel for the petitioner as also learned Amicus Curiae, to the effect that the petitioner was not in fact present at Patiala on 03.12.2019 when the adoption deed is shown to have been executed, learned senior counsel submitted that admittedly it is stated in paragraph 1 of the reply (on merits) of respondents no.7 to 10, that "all again gathered" at Patiala, which meant that the petitioner as also her family were present along with other witnesses at the time that the adoption deed was executed on December 03, 2019.

Mr. Singh further reiterated that with there being no replication to the written statement and respondents no.7 to 10 having specifically stated therein that "all again gathered" at Patiala on 03.12.2019, showed that the petitioner was also present there on that date.

47. Further, as regards Mr. Malhotras' contention that the adoption deed dated 03.12.2019 was actually signed by the petitioner at Patiala on 05.09.2019 and thereafter was simply got notarised by respondent no.7 on 03.12.2019 after her arrival from USA; and her having signed it without the presence of the petitioner at Patiala on that day, Mr. Kanwaljit Singh pointed to the fact that the font on the affidavit dated 05.09.2019 is different from the font on the deed dated 03.12.2019 and therefore they could not have been typed at the same time, i.e. on 05.09.2019.

He again reiterated that the affidavit dated 05.09.2019 is also witnessed by the petitioners' brother, with the deed dated 03.12.2019 having been witnessed by her father as one of the witnesses.

He next submitted in that context that even the copy of the Aadhar card of the petitioner was duly notarised on 03.12.2019.

48. Mr. Kanwaljit Singh next referred to the order recorded by this court (this very Bench) on August 14, 2020, wherein it is stated as follows:-

> "Learned counsel for the petitioner on the other hand counters that the said adoption deeds having been signed by the petitioner under pressure and she having approached the police immediately thereafter, would show that she actually signed under pressure and therefore they cannot be said to be valid adoption deeds, and she being the natural mother of the child, deserves that the child be returned to her."

He also pointed to the order dated 19.08.2020, to submit that the said order also did not say that the petitioner was not present on 03.12.2019, but only stated that she had signed the adoption deed under pressure, which was otherwise duly notarised.

Learned senior counsel next referred to the fact that even in the complaints dated 18.12.2019, made by the petitioner to the police and the Social Welfare Department, she did not say that a fraud had been committed upon her, (though of course she had stated that she was forced to sign the adoption papers, with the adoptive couple not present and the child handed over to the siblings of respondent no.7).

49. As regards the contention of learned Amicus Curiae that even respondents no.5 and 6 (the petitioners' in laws) have admitted in their reply that she was not fully reconciled to giving her child after 05.09.2019 and therefore she did not come to Patiala thereafter, learned senior counsel submitted that actually she was not cooperating with her in-laws but had directly come to a relatives' house on 03.12.2019, in Patiala, and hence that statement made by respondents no.5 and 6 has no meaning (who otherwise admit that she willingly gave her child on 05.09.2019).

50. Mr. Singh next submitted that the petitioner admittedly never made any complaint or representation for a period almost 3 and half months, between 05.09.2019 to 18.12.2019, which shows that the subsequent withdrawal from the adoption is only an after-thought, with a valid adoption therefore not being reversible.

51. Next, learned senior counsel submitted that in view of the aforesaid written documents dated 05.09.2019 and 03.12.2019, oral arguments/statements in the pleadings, to the contrary, would not be sustainable even in terms of sections 91 and 92 of the Indian Evidence Act, 1872.

52. As regards the contention of learned counsel for the petitioner and learned Amicus Curiae that it is not in the interest of the child to be adopted by a lady who is 52 years of age and her husband who is 43 years of age, Mr. Kanwaljit Singh submitted that the husband of respondent no.7, i.e. the adoptive father, has an excellent job in the US, drawing about $13000 per month and that he has a fairly good bank balance also, in support of which a bank statement has been sent by way of 'Whatsapp communication' (court being held by video conferencing), to the Reader of this court, with a print out thereof having been sent to me, showing that Saikiran Madhavan has a net standing balance of $8111.61 cents in the Accenture LLP (Bank) in San Antonio, Texas as on 21.07.2020, as also a balance of $50647.67 cents in the American Express National Bank in the town of Sandy, Utah.

He thus submitted that in fact, on the other hand, the petitioner not having any steady income at all and being dependent on her father and brother, at least presently, she would not be able to provide as good a future to the child.

He next submitted in the context of the age of the adoptive parents, that even as per the complaint made to the Social Welfare Department (Annexure P-2 with the writ petition), it is obvious that the petitioner knew that she was giving her child actually to a 50 year old couple who was living abroad, with her affidavit dated 05.09.2019 giving their names as Sai Kiran and Minakshi Gupta, though therein she stated that they were residents of Delhi.

Mr. Singh submitted that that was for the reason that the adoptive mother is actually a permanent resident of Delhi, presently staying in the USA.

53. Learned senior counsel next submitted that in fact the petitioner having concealed even the factum of having signed the affidavit dated 05.09.2019 and there being no replication filed to the written statement of any of the respondents, therefore the contents of the written statements would have to be taken to be admitted even in terms of Rules 2 & 3 of Order 8 of the Code of Civil Procedure, 1908, other than the fact that non-disclosure of the affidavit executed by her and her signing the adoption deed, being a concealment of facts, the writ petition deserves to be dismissed on that ground alone.

54. He next argument was that even as per Article 57 of the Schedule to the Limitation Act, 1963, any suit seeking a declaration that an adoption is invalid or never took place, can be filed within 3 years of the time from which the alleged adoption became known to the petitioner.

The contention therefore is that this court would not, in a petition seeking issuance of a writ in the nature habeas corpus, declare the adoption deed to be invalid, without any evidence led in that regard.

Hence, he further submitted that if it is not declared to be illegal or invalid, the question of restitution of the child to the natural mother does not arise.

55. To conclude on his afore recorded arguments, Mr. Kanwaljit Singh, learned senior counsel appearing for respondents no.7 to 10, submitted that thus, with the adoption deed having been very much signed by the petitioner and because she admittedly handed over the custody of the child to respondent no.9 for passing that custody on to respondent no.7, i.e. the adoptive mother, the adoption has to be held to be valid and therefore the natural custody of the child would be with the adoptive mother and not the natural mother and consequently the writ petition deserves to be dismissed.

56. As regards Mr. Malhotras' contention that the adoption would actually be governed by the provisions of the JJ Act, Mr. Singh submitted that with the adoptive parents being Indian citizens who are simply in the USA on a visa presently valid till March 2021, it would not be an "international adoption", and consequently the provisions of the Juvenile Justice Act, 2015 would also not be applicable mandatorily, requiring permission of the Central Adoption Resource Authority (CARA); and therefore the contention of learned Amicus Curiae to that effect is misconceived, because even if the US embassy would require a certificate from CARA before granting a visa to the child to go to the US, CARA would not refuse such a certificate once a valid adoption deed under the provisions of the Act has been enacted.

He submitted that hence, even as per Section 56 (3) of the JJ Act, it would only be the Act of 1956 (HAMA) that would be applicable.

In this context, Mr. Singh relied very heavily upon a judgment of a co-ordinate Bench of this court in ***Jasmine Kaur v. Union of India (CWP No. 10555 of 2019, decided on July 28, 2020)***, wherein it was held that once there is a valid adoption under the Act of 1956, it is then not mandatory to invoke the provisions of the JJ Act, 2015.

Thus, he submitted that with the JJ Act not being applicable at all and the adoption deed being valid under the provisions of the Act of 1956, no prior permission of CARA is required.

57. Last, Mr. Kanwaljit Singh submitted that in fact at this stage the adoptive mother, i.e. respondent no.7, has even offered to transfer her entire monetary savings of Rs. 50,00,000/- in the name of the child till he attains majority and further, she has also offered that the petitioner can visit her in the USA for one month every year to meet the child, if of course, the petitioner gets a visa for that purpose.

Alternatively, if she is not granted a visa, then respondent no.7 has also offered to bring the child for one month to India every year and to allow the petitioner to meet him/even let the child stay with her, during that period of one month.

58. To support his arguments as recorded herein above, Mr. Kanwaljit Singh relied upon a large number of judgments (some of which learned Amicus Curiae has also relied upon), which are cited herein under:-

1) ***Mausami Moltra Ganguli v. Jayant Ganguli 2008(4) RCR (Civil) 551***:

2) ***Nil Ratan Kundu & Anr. v. Abhijit Kundu 2008(3)RCR (Civil) 936***;

3) ***Vijay Bhushan Arora v. Dipak Arora & Ors. 2016(6) AD (Delhi 56***;

4) ***M/s Brightstar Telecommunications India Ltd. and others v. M/s I world Digital***

Solutions Private Ltd. and others 2019 (173) DRJ 191;

5) ***Ajay Kumar v. Rishalo Devi 2019(1) RCR (Civil) 148***;

6) ***Mst. Param Pal Singh through Father v. M/s National Insurance Co. and another 2013 (2) (Recent Apex Judgments (R.A.J.) 440***;

7) ***Shabnam Hashmi v. Union of India and others 2014(1) RCR (Civil) 1052***;

8) ***Jeshy C.O. and others v. Union of India Rep. by the Secretary, Ministry of Law and Justice, Cabinet Secretariat, Raisina Hill, New Delhi-110-001 and others 2019 (1) KLT 57***;

9) ***Sivarama K., Aged 39 years S/o Venkattaramana Bhat, Residing At Hari Nilaya Bhat Compound, Kumbla, Koyipady Village, Kasaragod District and others v. State of Kerala, Represented by its Secretary to Government, Home Department, Government Secretariat, thiruvananthapuram - 695001, and others 2020 (1) KLT 294***;

10) ***Tejaswini Gaud and others v. Shekhar Jagdish Prasad Tewari and others 2019 (7) SCC 42***; and

11) ***Yashita Sahu v. State of Rajasthan & Ors. 2020 AIR (SC) 577***.

Out of the judgments that have been cited in the written arguments submitted by his instructing counsel, (with the title of most of the judgments actually not given, only their citations having been given), two judgments were not actually found by this court on any software or website and consequently are not being referred to, their citations (as given in the written arguments) being 2016(6) AD 56 and 2016(6) RAJ 20.

59. After Mr. Kanwaljit Singh had addressed arguments, Dr. Sukant Gupta, learned Addl. P.P., U.T., appeared for respondent no.3, i.e. the SSP, Chandigarh, and first pointed to paragraph 3 of the affidavit dated 05.09.2019, to submit that nowhere in that document, or in the adoption deed dated 03.12.2019, is any address of respondents no.7 and 8, in the USA, given; and in fact paragraph no.4 of the affidavit states that they are "of Delhi", with him further pointing out that it was very obvious that the petitioner had also never met them as per the said affidavit.

He otherwise submitted that, naturally the said respondent has nothing to say in the matter as regards the adoption, except to the extent of the statements made by the parties before the police as detailed in the reply of the SHO, Police Station Sector-34, Chandigarh.

Dr. Gupta also referred to a judgment of a Full Bench of the Madras High Court in ***P. Sivasuryanarayana Chetti v. P. Audinarayana Chetti and another AIR 1937 Madras 110***.

60. Mr. Sunil Garg, Advocate, who appears for respondents no.5 and 6, i.e. the father-in-law and mother-in-law of the petitioner, submitted that though as per the said respondents the adoption took place with the natural mother giving the child willingly on 05.09.2019 at that stage, however, respondents no.5 and 6 have nothing to say in the matter, as to whether the child should continue to be with respondents no.7 and 8, or with the petitioner, i.e. the natural mother, with the prime consideration being the welfare of the child, who is their grandson.

He next pointed to the complaint made by the petitioner to the Department of Social Welfare of Child & Womens' Development, U.T., Chandigarh (copy Annexure P-2), to submit that though therein she has stated that she was forced to sign adoption papers on 05.09.2019, that is not so and that though the adoptive couple was not present, she had however handed over her son to the siblings "of said couple" willingly, i.e. to Ashwani Gupta and Manisha Gupta (respondents no.8 and 9 herein).

60.A It may be noticed here that though counsel for the Union of India (respondent no. 1) came present on a few occasions, no arguments at all were addressed by him, with no reply having been filed by the said respondent.

61. In rebuttal to the arguments raised, Mr. S.P.S. Mann, Advocate, appeared for the petitioner (along with Mr. Vikas Lochab, Advocate, who had appeared through out the time that effective arguments were addressed, as already noticed towards the beginning of this judgment).

Mr. Mann drew specific attention to the following part of paragraph 4 of the reply on merits contained in the written statement of respondents no.7 to 10:-

> "It is pertinent to mention here that after execution of the adoption deed the petitioner as well as her parents assured the answering respondent that the said adoption deed will be registered in order to make more authentic and legal within a few days as it will take some time for the petitioner to reconcile."
>
> (Emphasis added in this judgment only in terms of the argument of learned counsel).

62. He submitted that therefore it is very obvious that though the petitioner undoubtedly had handed over her child to respondent no.7 on 05.09.2019, however, as has been already stated by her in the writ petition itself, it was due to pressure from her in-laws, i.e. respondents no.5 and 6; and obviously

because she was in a confused state of mind so soon after the death of her husband on July 22, 2019, within about two years of her marriage, and with a child just 3 months old with her.

As such, she actually was not fully reconciled to the idea of giving away the child in adoption, though she did give him to respondent no.9 in that confused stage of mind, though not to the adoptive mother.

Hence, he submitted that such giving of the child, not to respondent no.7 at that stage but to her sister, i.e. respondent no.9, without an adoption deed actually signed on that day, would not make it a valid adoption, especially as her uncertainty of mind in tragic circumstances, is very obvious even from the afore reproduced stand taken by respondents no.7 to 10 in their reply, which is signed by respondent no.7 herself, i.e. by Minakshi Gupta.

He further submitted (as already argued by learned amicus curiae), that from the aforesaid stand, it is equally obvious that the intention was that once the adoption deed was signed, it would be registered, which would be also natural and prudent for any educated person to do, especially if they wanted to take the child abroad, especially when they were adopting a child at a late age when respondent no.7 is already 52 years old.

63. Thus, as per learned counsel, the very fact that the deed dated 03.12.2019 was not registered, though it was intended to be (as per what is quoted herein above from the reply of respondents no. 7 to 10), shows that the petitioner was not present on 03.12.2019, which would be equally obvious from the fact that even respondents no. 5 and 6 have stated that she never came to Patiala after 05.09.2019 and that even the adoption deed (as also an affidavit) were signed on 05.09.2009 itself.

He submitted that therefore, the petitioner thereafter having made up her mind not to give the child in adoption, especially when she fully understood the implications of giving the child to an elderly couple who were living abroad, the adoption cannot be held to be valid even if it is to be presumed that the petitioner signed the adoption deed dated 03.12.2019 on 05.09.2019, with it also admitted even in the same reply of respondents no. 7 to 10, (paragraph 1 at internal page 7 thereof), that the stamp paper for the adoption deed, worth Rs. 1000/-, was purchased on 05.09.2019 itself.

64. Hence, he concluded that in the aforesaid circumstances, the custody of the child deserves to be returned to the petitioner, i.e. the natural mother.

65. Having considered the arguments raised on both sides as also by learned Amicus Curiae, first of all it needs to be again noticed by this court that a large number of the judgments cited by Mr. Kanwaljit Singh, learned senior counsel for the respondents as also by learned Amicus Curiae, are on the issue of guardianship of a child, i.e. with whom such guardianship would lie in terms of the provisions of the Hindu Minority and Guardianship Act, 1956, or the Guardian and Wards Act, 1890.

However, as already said, those judgments are not being referred to in detail in view of the fact that if this court holds that on the basis of the affidavit dated 05.09.2019 and deed dated 03.12.2019 alone, coupled with the fact that the petitioner actually handed over her child to respondent no.9, i.e. the sister of respondent no.7, on 05.09.2019, a valid adoption has taken place, then very obviously the natural guardian of the child would be the adoptive mother and adoptive father; whereas if it is held herein that the said documents and the giving of the child to respondent no.9 do not constitute a valid adoption for any reason, or that a doubt is cast on the complete intention of giving the child in adoption, then, equally obviously, the custody and guardianship of the child would rest with the natural mother, i.e. the petitioner.

Hence, the dispute with regard to the custody of the child in this petition seeking issuance of a writ in the nature of habeas corpus, being one between the adoptive mother one side (as she is contended to be by respondents no.7 to 10), and the natural mother, there would not be much point in going into as to whose custody the child should be in, almost all the judgments cited being those where the custody battle of the child was between the natural mother and father.

66. All arguments having been noticed as above, in the light of the pleadings and the arguments addressed, what first needs to be crystalised are the essential questions to be determined in this petition; which are:-

i) The maintainability of a petition under Article 226 of the Constitution, seeking a writ in the nature of habeas corpus, to restore the custody of a child to its natural mother, in the face of what is contended (by respondents no.7 to 10), to be a valid adoption deed;

ii) Whether the adoption of the child, i.e. the boy Advait, can be accepted to be valid, for the purpose of granting his custody to the petitioner, either under the provisions of HAMA or the JJ Act?;

iii) Whether it would be actually HAMA 1956 or the JJ Act 2015 that would apply to such adoption, with the adoptive parents, admittedly, presently being residents of the USA for more than one year and therefore they not being resident Indians, though they are Indian citizens?

67. Before going on to considering those questions, the issue raised by Mr. Kanwaljit Singh on the effect of non-filing of a replication to the written statement, needs to be dealt with.

According to the learned Senior Counsel, with no replication having been filed by the petitioner to the

written statements filed by respondents no.5 and 6 and respondents no.7 to 10 respectively, the contents of the said written statements are deemed to have been admitted by her and consequently, no argument refuting the contents thereof can be accepted, in terms of Order 8 Rules 3, 4 and 5 of the CPC.

However, that is an argument which is to be rejected as per law settled on the issue, with only one judgment of the Supreme Court needed to be referred to in that context, i.e. ***K. Laxmanan v. Thekkayil Padmini and others (2009) 1 SCC 354***, wherein their Lordships, after considering the issue, held that the word "Pleadings" is defined under the provisions of Rule 1 or Order 6 of the CPC, which consists of a plaint and a written statement; and therefore a plaintiff can file a replication in respect of any plea raised in the written statement, and if allowed by the court do so, such replication would become a part of the pleadings but "Mere non-filing of a replication does not and could not mean that there has been admission of the facts pleaded in the written statement". (Reference paragraph 29 of that judgment, SCC Edition).

In fact, even Order 8 of the said Code (as has been referred to by Mr. Singh), only deals with the written statement, set off and counter claim to be filed in a suit, with no reference to a replication. Prior to that, Order 7 refers to a plaint, again with no reference to a replication.

Learned Senior Counsel specifically referred to Rules 2, 3 and 4 of the Order 8, to submit that facts must be specifically pleaded or denied and that an evasive denial would not be a sufficient denial.

However, these provisions obviously pertain only to a written statement and not to a replication and consequently, specifically read with the judgment of the Supreme Court in Laxmanan, the said provisions cannot be held applicable to a replication, as Order 8 itself applies only to a written statement in reply to a plaint/petition.

Hence, in view of the above, simply because the petitioner in the present case did not file a replication to any of the written statements filed by the respondents in this case, that would not mean that she accepted the pleadings in those written statements, or that she has no right to argue against the contents thereof.

68. Coming then to the first question framed herein above, i.e. the maintainability of a petition under Article 226 of the Constitution, seeking issuance of a writ in the nature of habeas corpus to restore the custody of a child to its natural mother, in the aforesaid circumstances.

On that question, as already noticed in paragraph 40 herein above, Mr. Malhotra had relied upon a judgment of the Supreme Court in ***Ruchi Majoo v. Sanjeev Majoo AIR 2011 Supreme Court 1952***, from which he specifically pointed to paragraphs 3, 4, 14, 36 and 37.

Essentially, what is eventually held in paragraph 37, is with regard to the first question out of the three framed in paragraph 4 by the Supreme Court; that question being:-

> "i) Whether the High Court was justified in dismissing the petition for custody of the minor on the ground that the court had no jurisdiction to entertain the same;"

69. That was a case where a tussle for custody of the child was between the natural mother and father, with the father being a resident of the USA and the mother having come to India with the child, the child otherwise being an American citizen by birth, who at the relevant time was aged about 11 years.

In fact, the father in that case had approached a court in the USA, alleging that the child had been abducted by the mother, and eventually even a red corner notice was issued (at the instance of the American court), with the mother, however, having taken shelter of the order passed on April 04, 2019 by the Additional District Judge, Delhi, under the provisions of the Guardians and Wards Act, by which interim custody of the child was given to her.

Aggrieved of that order, the father approached the Delhi High Court by filing a petition under the provisions of Article 226 of the Constitution, with that petition having been allowed, thereby setting aside the order of the learned Additional District Judge and holding that the court at Delhi had no jurisdiction to entertain the petition filed by the mother because the minor was not actually ordinarily residing at Delhi and that all issues relating to the custody of the child needed to be agitated before a competent court in America, not only because that court had already passed an order in favour of the father, but also because the parents as well as the minor were actually American citizens.

The Delhi High Court had also based its decision on the principle of comity of courts.

70. In that background, after discussing the entire case law on the issue, including the earlier judgments of the Supreme Court in ***Shilpa Aggarwal v. A viral Mittal and another (2010) 1 SCC 591***, ***Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and another (1984) 3 SCC 698*** and ***Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and another (1987) 1 SCC 42***, it was held by their Lordships as follows:-

> ".....Proceedings in the nature of Habeas Corpus are summary in nature, where the legality of the detention of the alleged detenue is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extra ordinary

jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the court views the rival claims, if any, to such custody. The Court may also direct repatriation of the minor child for the country from where he/she may have been removed by a parent or other person; as was directed by this Court in Ravi Chandran's & Shilpa Agarwal's cases (supra) or refuse to do so as was the position in Sarita Sharma's case (supra). What is important is that so long as the alleged detenue is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenue is within its territorial jurisdiction."

71. Consequently, in the opinion of this court, with it having been held as above, the law enunciated in Ruchi Majoos' case (supra), would be wholly applicable to the present case, even though the battle for custody of the child in the present case is not between the natural mother and father of the child but between the natural mother and the lady who on the basis of an adoption deed (contended by her to be a valid one), states that she is the adoptive mother.

Nonetheless, the tussle is one for custody of the child and hence I would see no reason to hold that a writ petition seeking such custody is not maintainable.

In fact, that is what has also been held by a Division Bench of this court in ***Manohar Lal & another v. State of Punjab & others (LPA no.476 of 2020, decided on 05.08.2020)***, though of course it was held therein that where there are competing claims between parties who purport to have an authority to retain/claim custody of a child, that may require evidence to be led and a "full scale inquiry."

Yet, obviously the judgment in Ruchi Majoos' case was not brought to the notice of their Lordships of the Division Bench and consequently, once it has been held in Ruchi Majoo that despite proceedings in a petition seeking issuance of a writ in the nature of habeas corpus being summary in nature, the High Court can still embark upon a detailed enquiry for the welfare of the minor in question and can invoke its extraordinary jurisdiction to determine the validity of the detention and to even direct repatriation of a minor child to the country from where he or she may have been removed by a parent or some other person, therefore I see no ground to hold that the present petition is not maintainable, even though the enquiry in the present case involves the validity of the adoption.

72. Having held so, then comes the all important question of whether or not the petition deserves to succeed, or must be dismissed on the merits of it.

In the opinion of this court, in terms of the provisions of both, the Act of 1956 as also the Act of 2015, the custody of the child needs to be returned to its natural mother, for the reasons as are enumerated hereinafter:

73. Looking therefore at the second question framed in paragraph 66 herein above, as to whether the adoption in question can be considered to be valid (for the purpose of granting custody of the child), either under the provisions of the Act of 1956, or of the Act of 2015.

First, the relevant provisions of the Act of 1956 would need to be looked at in detail, the first of those being that in terms of Section 2 thereof, the Act is applicable to any Hindu by religion (as defined in the Act), and consequently would apply, on that criterion, to both, the petitioner as also respondent no.7 and her husband.

74. Sections 4, 5 and 6 of the Act of 1956 need to be seen in detail, which read as follows:-

"4. **Overriding effect of Act**- Save as otherwise expressly provided in this Act,- (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act; (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

5. **Adoptions to be regulated by this Chapter**- (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

6. **Requisites of a valid adoption-No adoption shall be valid unless**-

(i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter."

Since respondent no.7 is a lady who sought to take the child in adoption, Section 8 of the said Act is also essential to be seen and is reproduced as follows:-

> "8. **Capacity of a female Hindu to take in adoption-Any female Hindu**-
>
> (a) who is of sound mind,
>
> (b) who is not a minor, and
>
> (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption."

It is necessary to mention here that Section 7 of the Act of 1956 refers to the capacity of a male Hindu to take a child in adoption, which provision is essentially to the same effect (conversely), as Section 8.

Section 9 (1) stipulates that no person other than the father, mother or guardian of a child would have the capacity to give him/her in adoption, though both would have an equal right to do so, but only with the consent of the other, unless one of them has renounced the word or has ceased to be a Hindu or is of unsound mind [reference sub-sections (1) and (2) and the proviso thereto].

Sub-sections (4) and (5) would have no application in the present case.

What may be necessary to refer to however, is the first explanation to Section 9, which states that the term 'father' and 'mother' do not include an 'adopted father and an 'adopted mother', meaning thereby obviously that a child once adopted cannot be given in adoption again. Section 10 of the Act of 1956 stipulates that a Hindu who has not already been adopted and is not married (subject to custom or usage) and has not completed the age of 15 years (again subject to custom or usage), may be adopted.

75. Section 11 stipulates the other conditions for a valid adoption and therefore is very significant, with it being reproduced herein below:-

> "11. **Other conditions for a valid adoption**- In every adoption, the following conditions must be complied with:
>
> (i) if any adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
>
> (ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
>
> (iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;
>
> (iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;
>
> (v) the same child may not be adopted simultaneously by two or more persons;
>
> (vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption.
>
> Provided that the performance of datta homan, shall not be essential to the validity of an adoption."

76. The relevant part of Section 12, as applicable to the present case, states that a child once adopted, shall be deemed to be the child of the adoptive mother or father for all purposes, with effect from the date of the adoption and that from such date, the child would be deemed to have severed all ties with the family of his birth.

Sections 14 and 15 of the HAMA read as follows:-

> "14. **Determination of adoptive mother in certain cases**- (1) Where a Hindu who has a wife living adopts a child she shall be deemed to be the adoptive mother.
>
> (2) Where an adoption has been made with the consent of more than one wife, the senior most in marriage among them shall be deemed to be the adoptive mother and the others to be stepmothers.
>
> (3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be

deemed to be the stepmother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the stepfather of the adopted child.

15. **Valid adoption not to be cancelled**- No adoption which had been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth."

Section 16 postulates to the following effect:-

"16. **Presumption as to registered documents relating to adoption**- Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

77. The last relevant provision of the Act of 1956 is Section 17, which is being noticed in view of the fact that it is averred in paragraph 4 of the preliminary objections raised in the reply of respondents no.5 and 6 (i.e. the in-laws of the petitioner), that she herself had given the child in adoption without any pressure or coercion, and that the whole story given in the petition is only an afterthought to extort money from the respondents, with everything having been settled between the families on 05.09.2019, and with the petitioners' own affidavit also executed on that date.

It is to be again noticed that the said argument, though contained in the said reply, was never raised during arguments by any counsel for the respondents and in fact, even in the reply filed by respondents no.7, i.e. the mother who is claiming a valid adoption, no such allegation has been made, the allegation (contained in paragraph 4 in the reply on merits by respondents no.7 to 10), being that the petitioner has now made up a concocted story, with an intention to back out from her affidavit and the adoption deed.

Hence, in the opinion of this court, actually Section 17 would not be applicable at all to the present case but since that allegation has been made by respondents no.5 and 6 in their reply, though not by respondent no.7, the said provision is also being reproduced below:-

"17. **Prohibition of certain payments**-

(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

(2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both. (3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorized by the State Government in this behalf."

78. In the light of the aforesaid provisions, first of course it is to be observed that there is no legal bar under the Act of 1956, on either the petitioner giving her son in adoption, nor is there any prohibiting respondent no.7 and her husband to take the child in adoption, even though respondent no.7 is 52 year old.

Though learned Amicus Curiae had argued that the age of the said respondent and her husband would be an issue in terms of the JJ Act of 2015 and the rules framed therein, however as regards the Act of 1956, there is no bar on them adopting the child, [the bar regarding age only being the one contained in clauses (iii) & (iv) of Section 11, stipulating that for adoption of a child of the opposite sex, there must be a minimum age gap of 21 years between the child and such adoptive parent].

79. That having been said, Sections 6 and 11 of the Act of 1956 now need to be looked at carefully, as to whether the conditions of a valid adoption would seem to be fulfilled even for the purpose of determining whether the custody of the child should be returned to the petitioner, i.e. his natural mother, or not.

Having already noticed that as regards the capacity of giving and taking the child is concerned, the petitioner and respondent no.7 (and her husband), are not found to be barred, as obviously clauses (i) (ii) and (iii) of Section 6 (as reproduced herein above in paragraph 74), are not seen to be violated.

As regards clause (iv) of Section 6, stipulating that an adoption must be made in compliance also with the other conditions mentioned in Chapter 2 of the said Act, the said Chapter is one that encompasses Sections 5 to 17 (both inclusive).

80. First of all it needs to be observed here that registration of an adoption, or more correctly, registration of a deed of adoption, is not found to be compulsory in terms of Section 16 of the Act of 1956 (reproduced herein above).

However, sub-section (3) of section 17 of the Registration Act, 1908, reads as follows:-

"17. **Documents of which registration is compulsory**.-

> (1) xxx xxx xxx
>
> (2) xxx xxx xxx
>
> (3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered."

The question therefore is whether sub-section (3) would read to mean that adoption of son, or any deed of adoption of a son, executed after January 1, 1872, is compulsorily register able?

Though at first blush that may appear to be so, however, what the said provision stipulates is that an authority executed to adopt a son after that date (if that authority is not conferred by a will), must be registered.

In other words, if a father or a mother or a guardian was giving/granting authority to any person to give a son in adoption after that date, other than by way of a will, such document granting such authority would be compulsorily register able. Obviously, the said provision is existent in the Act of 1908 almost 48 years prior to the enactment of the Hindu Adoption and Maintenance Act, 1956.

In this context, clause (vi) of Section 11 needs to be again read very carefully, wherein it is stipulated that the child to be adopted must be actually given and taken in adoption by the parent or guardian concerned or under their authority with intent to transfer the child from the family of it birth to the family of its adoption.

Thus, the child can be given in adoption even under authority bestowed in that regard by the natural parent or guardian, and to that extent therefore, it would seem in the context of this petition, that the petitioner had given her child to respondent no. 9 on 05.09.2019, further giving her authority to give the child to respondent no. 7 upon her arrival in India.

Yet, what cannot be ignored, in the opinion of this court, is sub-Section (3) of section 17 of the Registration Act, 1908, which, as seen herein above, stipulates that if a son is to be given in adoption by way of authority (other than by a will), then such document granting such authority, must necessarily be registered.

It may be observed here that, as seen now, the Supreme Court, in ***Master Param Pal Singh v. M/s National Insurance Company and others, 2013 (2) RCR (Civil) 480***, has in fact briefly drawn that distinction between a deed of adoption and an authority given for adoption (Reference paragraph 12, Law Finder edition).

Though as to why that should apply only to a son and not also to a daughter, in terms of Article 14 of the Constitution, would be subject matter of debate in appropriate proceedings, the said provision being one incorporated in an Act which came into effect about 48 years before the commencement of the Constitution of India. However, for the purpose of this petition, the child being a boy, I would hold that any such authority, even given by way of the affidavit executed by the petitioner on 05.09.2019, would be necessary to have been registered and therefore, once a compulsorily register able document is not registered, the consequences thereof would naturally flow.

(In the present context, it would also be need to be seen that, the petitioner thereafter obviously changed her mind to give the child in adoption and therefore, in all probability, did not actually sign the adoption deed on 03.12.2019, which issue shall be discussed further ahead in this judgment).

81. Presently coming then to the other conditions that are required to be complied with in respect of a valid adoption, in terms of clause (iv) of Section 6 of the Act of 1956, (with such other conditions being contained in Section 11 reproduced herein above).

All learned counsel appearing on both sides, as also learned Amicus Curiae, had specifically brought attention to clause (vi) of Section 11, giving their own interpretations thereof. As per the learned Amicus Curiae and counsel for the petitioner (echoing the argument in that respect of learned Amicus), since a child is required to be necessarily given in adoption by the parents or guardian concerned to the adoptive parents, and the child in the present case having only been given to the sister of the adoptive mother by his natural mother, it cannot be held to be a valid adoption, even though datta homam is not an essential ceremony to be performed.

In that context, learned Amicus had laid specific stress on a recent judgment of the Supreme Court in ***M. Vanaja v. M. Sarla Devi, AIR 2020 Supreme Court 1293***, from which he referred to paragraphs 12 and 13, which read as follows:-

> "12. A plain reading of the above provisions would make it clear that compliance of the conditions in Chapter I of the Act of 1956 is mandatory for an adoption to be treated as valid. The two important conditions as mentioned in Sections 7 and 11 of the Act of 1956 are the consent of the wife before a male Hindu adopts a child and proof of the ceremony of actual giving and taking in adoption. The Appellant admitted in her evidence that she does not have the proof of the ceremony of giving and taking of her in adoption. Admittedly, there is no pleading in the plaint regarding the adoption being in accordance with the provisions of the Act. That apart, the Respondent who is the adoptive mother has categorically stated in her evidence that the Appellant was never adopted though she was merely brought up by her and her husband. Even the grandmother of the Appellant

who appeared before the Court as PW-3 deposed that the Appellant who lost her parents in her childhood was given to the Respondent and her husband to be brought up. PW 3 also stated in her evidence that the Appellant was not adopted by the Respondent and her husband. Therefore, the Appellant had failed to prove that she has been adopted by the Respondent and her husband Narasimhulu Naidu.

13. The Appellant relied upon a judgment of this Court in L. Debi Prasad (Dead) by Lrs. (supra) to submit that abundant evidence submitted by her before Court would point to the fact that she was brought up as the daughter of the Respondent and her husband (Late) Narasimhulu Naidu. Such evidence can be taken into account to draw inference that she was adopted by them. The facts in L. Debi Prasad (Dead) by Lrs. (supra) case are similar to those in the instant case. In that case, Shyam Behari Lal was adopted by Gopal Das in the year 1892 when he was an infant. Shyam Behari Lal was unable to establish the actual adoption but has produced considerable documentary evidence to show that he was treated as the son of Gopal Das for a quarter of century. This Court accepted the submission of Shyam Behari Lal and held that there was sufficient evidence on record to infer a valid adoption. Though the facts are similar, we are unable to apply the law laid down in L. Debi Prasad (Dead) by Lrs. (supra) to the instant case. L. Debi Prasad (Dead) by Lrs. (supra) case pertains to adoption that took place in the year 1892 and we are concerned with an adoption that has taken place after the Act of 1956 has come into force. Though the Appellant has produced evidence to show that she was treated as a daughter by (Late) Narasimhulu Naidu and the Defendant, she has not been able to establish her adoption. The mandate of the Act of 1956 is that no adoption shall be valid unless it has been made in compliance with the conditions mentioned in Chapter I of the Act of 1956. The two essential conditions i.e. the consent of the wife and the actual ceremony of adoption have not been established. This Court by its judgment in ***Ghisalal v. Dhapubai (Dead) by Lrs. & Ors, (2011)2 SCC 298*** held that the consent of the wife is mandatory for proving adoption."

(All emphasis provided in this
judgment only, in terms of the stress
laid on those lines by the learned Amicus).

82. Mr. Kanwaljit Singh, learned Senior Counsel appearing for respondents no.7 to 10, on the other hand had argued that even the bare provision of clause (vi) of Section 11 stipulates that a child can be given in adoption by either of his parents or the guardian "or under their authority" with intent to transfer the child from the family of his birth to the family of his adoption and no datta homam ceremony being mandatory, therefore, the handing over of the child by the petitioner to respondent no.9, i.e. the sister of respondent no.7, on 05.09.2019, shows that she had intended the child to be given away, under her authority, by respondent no.9 to respondent no.7, (with the child actually thereafter handed over to respondent no.7 by respondent no. 9).

Learned Senior Counsel appearing for the adoptive mother, had relied upon a judgment of the Supreme Court in Master Param Pal Singh (supra), wherein the Supreme Court held as follows:-

"15. Conspectus consideration of the deed of adoption and the oral evidence led on behalf of the appellant, we find that there was a simple ceremony though not a mantra ceremony held in which the deceased participated wherein it was expressed that the deceased being a bachelor thought it fit to take the appellant in adoption for which the biological parents of the appellant were also willing to give him in adoption. In the Adoption Deed it was specifically mentioned that the process of adoption was carried out in the presence of respected persons of the Panchayat in a ceremony where goods and sweets were distributed in commemoration of the function of adoption. It has come in evidence that the Adoption Deed was written by Gurbux Singh on 15.02.1999 who was the Sarpanch of the village at that point of time. The left thumb impression of the deceased was found affixed in the Adoption Deed which was signed both by the biological parents apart from three witnesses, namely, Nishan Singh s/o Dayal Singh of village Chhina Retwala, Tarsem Singh s/o Bawa Singh r/o Dhariwalkalan and Karnail Singh Nambardar of village Kallu Soha. It was stated that about 15 to 20 persons apart from women folk were present at the time when the adoption ceremony was held. The suggestion, that the deed was written later on, was duly denied by the witnesses. It was also stated that the appellant was just three years old at the time when the adoption took place. Further Exhibits AW1/5 and AW1/6 are the copies of ration cards in which it is mentioned that the father of the appellant is Ajit Singh.

16. All the above factors which are born out by records as well as in the oral version of the witnesses, examined on behalf of the appellant, in our considered opinion conclusively proved that the appellant was the adopted son of the deceased having been adopted as early as on 15.02.1999 i.e. long before the death of the deceased, namely, 17.07.2002. Unfortunately, the learned Judge in the impugned judgment has completely misled himself by rejecting the claim of adoption by holding that the document was not registered with the Tahsildar, that no ceremony was held, that the adoptive father was not present, that there was no giving and taking of the adopted son and, therefore, the adoption of the appellant by the deceased not proved. On the contrary, as stated above, we find that everyone of the prescription required for a valid adoption were very much present in the form of both oral and documentary evidence on record and consequently the conclusion of the learned Judge in having held that the appellant was not the adopted son of the deceased cannot be sustained and the same is set aside. Having reached the above conclusion, we proceed to deal with the claim of the appellant on merits."

(Emphasis again applied as per stress laid by learned senior counsel, in this judgment only).

83. It is of course to be noticed that the circumstances of both the cases (the one relied upon by the learned Amicus and other by the learned Senior Counsel for the adoptive mother and others), were different, inasmuch as the child in that case was actually handed over to the adoptive father (and not to a relative); but nevertheless, the judgments having been cited in each case and what has been reproduced from each having been held as it is (though in the circumstances of each case), what is to be now seen is as to whether the ratio of either judgment would apply in the present case.

Looking at what has been held in Param Pals' case, it would seem that once giving of the child by the petitioner to respondent no.9 on 05.09.2019, is obviously admitted, then seen with the fact that it is the intent behind such giving that is to be seen, it would appear that the adoption would be valid, by way of handing over of the child by the natural mother to the immediate family of the adoptive mother, for the onward handing over of the child to the adoptive mother, once she came to India.

As a matter of fact, on a plain reading of clause (vi) of Section 11, I would tend to agree with learned Senior Counsel appearing for respondents no.7 to 10, because what would seem to flow from the said provision is that the natural mother/father/guardian should intend to transfer custody of the child, from them to the family of adoption.

Hence, at least on 05.09.2019 very obviously the petitioner did hand over the child to respondent no.9 for further handing him over to respondent no.7, i.e. her sister and the adoptive mother, upon the adoptive mother reaching India from the USA.

Whether or not the petitioner handed over the child to respondent no. 9 on that date, with a tearful face (as contended by counsel for the petitioner), or with a smiling face, would not be commented upon by this court on the basis of only a photocopy of a picture that has been uploaded, though learned counsel for the petitioner has stated that it was obviously a sad face; yet, that would not really change the fact that the child was admittedly given to respondent no. 9 on that date and a natural mother may in any case have become emotional, even if she was giving the child away willingly.

However, as already discussed in paragraph 80 herein above, in view of the fact that she did not execute a registered document granting authority to respondent no. 9 to further hand over the child to respondent no. 7 [in terms of sub-section (3) of section 17 of the Registration Act], and thereafter, at least in the o pinion of this court at this stage more than prima facie (though not e x facie), she did not sign the document dated 03.12.2019 in the presence of and along with respondent no. 7 (as would be discussed further ahead), though she is purported (by respondents no.7 to 10) to have done so, naturally the document becomes wholly 'suspect'.

84. Even holding so, what obviously this court cannot ignore is that though the affidavit dated 05.09.2019 is a document not signed by respondent no.7, it is one signed by the petitioner and witnessed by her brother and one Rajinder Kumar and another person (Seema). Therefore, can it be held that the said document alone suffices as proof of adoption given?

In my opinion, though otherwise it may have, even though it is not a formal adoption deed but an affidavit showing the intent of the petitioner who also handed over of the child to the sister of the adoptive mother, yet, it cannot be held to constitute a valid adoption, for three reasons.

85. The first reason, as discussed herein above, is that the said affidavit is not a registered document even though it is one effectively conferring authority on respondent no. 9 to further hand over the child to respondent no. 7.

As already discussed, sub-section (3) of section 17 of the Registration Act, would require compulsory registration of such a document, conferring such authority.

86. The 2nd reason to not hold that the adoption may not be valid, is one based on circumstance, which however would need to be proved by way of evidence led before a civil court in appropriate proceedings.

Although respondents no.7 to 10 in the affidavit have stated that "all again assembled on 03.12.2019" at Patiala (though not at the house of respondents no.5 and 6), it is nowhere stated in either that written statement, nor in the written statement of respondents no.5 and 6, that the petitioner was actually present there, though respondents no.7 to 10 tend to imply that.

This is despite the fact that otherwise, in the written statement of respondents no. 5 and 6, as also in terms of the arguments made by their counsel, they are very clear that the child had been given by the petitioner to respondent no.9 on 05.09.2019, as per her own will and they have even stated that respondent no.5, i.e. Arun Gupta, father-in-law of the petitioner, in his statement (vide email to the SSP on 13.01.2020, copy a part of Annexure R-5/2 with the reply of the said respondent), had said that:-

> "....then Sai Kiran and his wife namely Minakshi Gupta came to India from USA and made a call to me that they are coming to Patiala on 03.12.2019 for execution of Adoption deed and Richa Gupta be also called for this purpose, on which my wife Sunita Gupta made a telephonic call to Richa Gupta to come to Patiala as Sai Kiran and Minakshi Gupta are coming to Patiala to execute the Adoption deed, but Richa Gupta refused to come to Patiala and then my wife Sunita Gupta made call to cousin brother of Richa Gupta namely Dharampal also who also shirked to get into the matter, and then the entire things were communicated to Neelam Gupta wife of Jenender Gupta, but still Sai Kiran and his wife namely Minakshi Gupta along with Jenender Gupta and Ashwani Gupta came from Delhi to Patiala on 03.12.2019 and it was told to them to talk to Richa Gupta directly but they said we will see matter on our own level and after some time they left our place."

Also, earlier in the said statement itself, respondent no.5 stated as follows:-

> "...all the person concerned and present satisfied themselves with regard to future of child and then it was finalized that since Sai Kiran and his wife namely Minakshi Gupta were at USA at that time thus the necessary documentation may be got ready so that the adoption of child may be given effect legally and thus a deed of adoption was got prepared by Jeneder Gupta, Manisha Gupta and Ashwani Gupta in consultation with Sai Kiran and his wife name;y Minakshi Gupta and their own lawyer of Delhi and the same was handed over to Richa Gupta and her father babu Ram to agree with the same or not and after going through with the said Adoption deed Richa Gupta consented voluntarily with the said Adoption deed and the said adoption deed was signed by Rich Gupta and Babu Ram in presence of all the persons and said minor Advait was handed over by Richa Gupta to Manisha Gupta on 05.09.2019. However since Richa Gupta was going back to her parents house at Chandigarh forever thus all the matter with regard to her marital rights were also settled."
>
> (All emphasis applied in this judgment only)

87. Thus, with respondent no.5 having specifically stated in his statement to the police, (which statement he and respondent no.6 have annexed with their own reply and have in fact stated in paragraph 8 thereof that it should be read as a part of the reply), that the adoption deed itself was signed by the petitioner on 05.09.2019, and with the stamp paper also admittedly purchased on 05.09.2019 even as per the adoptive mother in her reply (in paragraph 1, at page no.7 of the reply), it would be very difficult for this court to accept that the date given on the adoption deed, i.e. 03.12.2019, which is a rubber stamped date, is actually the date on which the petitioner signed the document.

Though the impression given in the said paragraph of the reply of respondent no.7 is that the reference to the registration was after the adoption deed was signed on 03.12.2019, however, seen with the stand taken by respondents no.5 and 6, to the effect that in fact the petitioner had refused to come to Patiala to sign the adoption deed, and that it was also signed on 05.09.2019, it would seem very obvious that actually it was not signed by her on 03.12.2019 but on 05.09.2019, as has already been admitted by respondents no.5 and 6, with the petitioner also having actually stated to that effect in her complaint to the Department of Women and Child Development and Social Welfare, Chandigarh (copy Annexure P-2 with the petition); though subsequently in her statement before the police, (Annexure R-3/1, with the reply of the SHO, Police Station Sector-34, Chandigarh), she stated that she had not signed it and was being forced to sign it.

88. Thus, even though Mr. Kanwaljit Singhs' contention that the font on the affidavit dated 05.09.2019 is different to that on the deed shown to be dated 03.12.2019 is one good argument to be considered, however, seen with the fact that the petitioners' in-laws (respondents no.5 and 6) also stated that in fact the adoption deeds were signed by the petitioner (and therefore seemingly by her father) on 05.09.2019, and with respondents no.7 to 10 also having admitted that the stamp papers were purchased on that date (though that of course could be so even if the deeds were to be signed later), and the petitioner also in her statement made to the police and in her complaint to the Social Welfare Department, has stated that all deeds were got signed on 05.09.2019 itself, and further, because even as per her in-laws she did not actually come to Patiala after that, simply the font on the affidavit and on the adoption deed being different, would not negate the other statements made, with regard to it having actually been signed by her on 05.09.2019 (and not on 03.12.2019).

89. One important aspect that needs to be considered however, is the contention of the learned Senior Counsel with regard to concealment of facts by the petitioner, which obviously is not entirely incorrect, inasmuch as, in the body of her petition, she has not even referred to the affidavit signed by her on 05.09.2019, nor has she stated that she had actually signed the adoption deed on 05.09.2019, though that deed is shown to be one dated 03.12.2019 by the said respondent.

Yet, firstly, in a petition in which the custody of a child is involved, such petition cannot be thrown out on the ground of any concealment by the childs' mother; and secondly, it is seen that in the representation of the petitioner made to the Social Welfare Department, she has stated that on 05.09.2019 she was forced to sign the adoption papers at home under suspicious circumstances, with the (adoptive) couple itself not present and therefore she "handed over my son to the sibling... of said couple".

The said representation has been annexed as Annexure P-2 with her petition itself and consequently it cannot be taken to be a complete concealment of facts, though of course, as said, in the main body of the petition, she has not referred to the adoption deed or even the affidavit executed by her on 05.09.2019.

However, as already said, with her having stated as above in the representation Annexure P-2, and it in any case being a petition seeking custody of a child, the interest of the child (or even of the other parties involved), cannot be negated by this court due to the fact that the said document has not been referred to in the main petition.

90. Therefore, considering all factors as have been discussed in paragraphs 86 to 88 herein above, I would accept that she actually signed the adoption deed on 05.09.2019, i.e. the date on which she executed the affidavit, but she did not sign it on 03.12.2019 in the presence of respondent no.7 and her husband and other witnesses, with her father also having seemingly signed that deed on 05.09.2019, which is why the photograph of the petitioner, her father and respondent no.10, Jenender Gupta, would appear to be one that was taken on 05.09.2019 in the house of respondents no.5 and 6 (as contended).

Hence, once a document, even if signed by the petitioner on 08.09.2019, is however shown to be

subsequently signed by her in the presence of respondent no.7 on 03.12.2019, it cannot be accepted to be an authentic document, with the petitioner seemingly not present at Patiala on that date and therefore, she obviously having decided after 05.09.2019, not to give the child in adoption to respondent no.7, whom she had not even met till then, it cannot be, in the opinion of this court, held to be a valid adoption, seen especially with the fact that the petitioner on 05.09.2019 was seemingly still under the shock of having been widowed at a very young age, only 1 = months earlier, with her whole life in front of her.

91. Even having observed herein above to the effect that the adoption deed dated 03.12.2019 would not seem to be a valid adoption deed, yet, I would not actually hold so as a final opinion (as regards it having been signed in the presence of all parties as it purports to show), in the absence of any extensive evidence led on oath before this court and consequently, would leave that to be a matter of trial in appropriate proceeding before a competent court where evidence can be led in extenso (if any of the parties institute any such proceedings), by proving the presence/non-presence of the petitioner at Patiala on 03.12.2019, either by phone call details or otherwise.

Even so, for the purpose of this petition, by which the petitioner seeks custody of her natural born son, I would still hold that the adoption deed dated 03.12.2019 being very suspicious as regards its authenticity of having been signed in the presence by both parties, on 03.12.2019, and with the petitioner being under mental pressure and therefore not having signed it (even on 05.09.2019) in a balanced state of mind and the adoption therefore not being valid, hence even in terms of the Act of 1956 I would not hesitate in directing that custody of the child be handed over back to the petitioner at this stage, subject to any proceedings being instituted before a competent 'trial' court, with extensive evidence to be taken by that court, as may be led by each party.

92. In fact, the third reason for holding that the adoption would not be valid, with therefore the petitioner entitled to the custody of her child, is that in such adverse circumstances of her having become widowed at a young age with an infant in her arms and with (possibly) advice coming from her parents-in-law (as alleged by her though she has termed it as "pressure" and not "advice"), her confused state of mind can be easily understood.

Further, with respondent no.7 in her reply (reference paragraph 4 thereof), having admitted that after execution of the deed, the petitioner as well as her parents assured that it would be registered to make it more authentic and legal, and that it would take some time for the petitioner to reconcile to that fact, it becomes all the more obvious that the petitioner was not fully reconciled to actually giving her child in adoption even on 05.09.2019 and was doing it under emotional and mental pressure.

Next, to repeat, with her in-laws also stating that she had refused to come to Patiala to sign the document, very obviously she had already changed her mind about giving the child in adoption.

Hence, all other things apart, the giving of the child in the circumstances of her being under emotional stress of losing her husband one and a half months earlier, with a three month old baby in her hands, the adoption cannot be held to be of her free will in a sound emotional and mental state.

On that ground alone, in my opinion, the adoption cannot be held to be a valid one, she thereafter having approached even the police and the Social Welfare Department in the middle of December 2019.

93. In view of the aforesaid discussion, even if the JJ Act of 2015 were to be held to be not applicable in the present case, with only the Act of 1956 to be applicable, this court would still hold that the petitioner is entitled to the custody of her child, with his adoption by respondent no.7 being highly questionable for the detailed reasons given herein above in paragraphs 84 and 86 to 91; and it not being a valid deed in any case, for the reasons given in paragraph 92.

In a nutshell:-

Firstly, keeping in view the ratio of the judgment of the Supreme Court in Ruchi Majoos' case (supra), this court would be within its jurisdiction in such a petition to go into the issue in depth;

2nd, it is held, more than just prima facie at least, that the adoption deed dated 03.12.2019 would not seem to be an authentic deed signed by both parties on that date;

3rd, the authority given to respondent no.9 by the petitioner, cannot be held to be proved in the absence of the registration of any document conferring such authority, as per the requirement of section 17(3) of the Registration Act;

4th, in any case the giving of the baby to respondent no.9 not being in a sound emotional and fit mental state by the petitioner, it cannot be held to be a valid adoption, and therefore with the petitioner having changed her mind thereafter with regard to giving the child given in adoption before an authentic adoption deed was signed by both parties in each others' presence with the natural mother handing over the child to the adoptive mother/father, the custody of the child needs to be handed over to the petitioner.

94. Coming then to the third question framed in para 66 supra, of whether actually it is the Act of 1956 or the Act of 2015 that would be applicable in the case of an adoption of the child by respondent no.7 and her husband.

In the opinion of this court, in fact, it would be the Act of 2015 that would be applicable and not the Act of 1956, in view of the fact that the petitioner and her husband are presently (and admittedly), ordinarily residents of the USA and not of India, for more than one year even on the date that they decided to take the child in adoption. (Further discussion on that is in para 100 ahead).

In that context, the relevant provisions of the Act of 2015, are reproduced herein below, in extenso.

95. Firstly, it is to be noticed that the said Act is applicable to the whole of India and was brought into effect w.e.f. 15.01.2016, vide a notification issued to that effect.

The preamble to the Act reads as follows:-

"The Juvenile Justice (Care And Protection Of Children) Act, 2015

An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto.

WHEREAS, the provisions of the Constitution confer powers and impose duties, under clause (3) of article 15, clauses (e) and (f) of article 39, article 45 and article 47, on the State to ensure that all the needs of children are met and that their basic human rights are fully protected;

AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations, which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of the child;

AND WHEREAS, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter country Adoption (1993), and other related international instruments.

BE it enacted by Parliament in the Sixty-sixth Year of the Republic of India as follows:"

Sub section (4) of Section 1 of the said Act, 2015, reads as follows:-

"1. (1) This Act may be called the Juvenile Justice (Care and Protection of Children) Act, 2015.

(2) x x x x x x x x x x x x x x x x x x x x

(3) x x x x x x x x x x x x x x x x x x x x

(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including -

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection.

Definitions.2. In this Act, unless the context otherwise requires,-

(1) "abandoned child" means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Committee after due inquiry;

(2) "adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child;

(3) "adoption regulations" means the regulations framed by the Authority and notified by the Central Government in respect of adoption;

(4) x x x x x x x x x x x x x x x x x x x x

(5) x x x x x x x x x x x x x x x x x x x x

(6) "authorised foreign adoption agency" means a foreign social or child welfare agency that is authorised by the Central Adoption Resource Authority on the recommendation of their Central Authority or Government department of that country for sponsoring the application of non-resident Indian or overseas citizen of India or persons of Indian origin or foreign prospective adoptive parents for adoption of a child from India;

(7) "Authority" means the Central Adoption Resource Authority constituted under section 68;

(8) x x x x x x x x x x x x x x x x x x x x

(9) "best interest of child" means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development;

(10) x x x x x x x x x x x x x x x x x x x x

(11) "Central Authority" means the Government department recognised as such under the Hague Convention on Protection of Children and Cooperation in Inter-country Adoption (1993);

(12) "child" means a person who has not completed eighteen years of age;

(13) x x x x x x x x x x x x x x x x x x x x

(14) "child in need of care and protection" means a child-

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person-

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;

(15) "child friendly" means any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child;

(16) "child legally free for adoption" means a child declared as such by the Committee after making due inquiry under section 38;

(17) to (27) x x x x x x x x x x x x x x x x x x x x

(28) "fit person" means any person, prepared to own the responsibility of a child, for a specific purpose, and such person is identified after inquiry made in this behalf and recognised as fit for the said purpose, by the Committee or, as the case may be, the Board, to receive and take care of the child;

(29) x x x x x x x x x x x x x x x x x x x x

(30) x x x x x x x x x x x x x x x x x x x x

(31) "guardian" in relation to a child, means his natural guardian or any other person having, in the opinion of the Committee or, as the case may be, the Board, the actual charge of the child, and recognised by the Committee or, as the case may be, the Board as a guardian in the course of proceedings;

(32) x x x x x x x x x x x x x x x x x x x x

(33) x x x x x x x x x x x x x x x x x x x x

(34) "inter-country adoption" means adoption of a child from India by nonresident Indian or by a person of Indian origin or by a foreigner;

(35) x x x x x x x x x x x x x x x x x x x x

(36) x x x x x x x x x x x x x x x x x x x x

(37) "no objection certificate" for inter-country adoption means a certificate issued by the Central Adoption Resource Authority for the said purpose;

(38) "non-resident Indian" means a person who holds an Indian passport and is presently residing abroad for more than one year;

(39) to (42) x x x x x x x x x x x x x x x x x x

(43) "overseas citizen of India" means a person registered as such under the Citizenship Act, 1955;

(44) "person of Indian origin" means a person, any of whose lineal ancestors is or was an Indian national, and who is presently holding a Person of Indian Origin Card issued by the Central Government;

(45) to (48) x x x x x x x x x x x x x x x x x x

(49) "prospective adoptive parents" means a person or persons eligible to adopt a child as per the provisions of section 57;

(50) & (51) x x x x x x x x x x x x x x x x x x

(52) "relative", in relation to a child for the purpose of adoption under this Act, means a paternal uncle or aunt, or a maternal uncle or aunt, or paternal grandparent or maternal grandparent;

(53) "State Agency" means the State Adoption Resource Agency set up by the State Government for dealing with adoption and related matters under section 67;

(54) to (59) x x x x x x x x x x x x x x x x x x

(60) "surrendered child" means a child, who is relinquished by the parent or guardian to the Committee, on account of physical, emotional and social factors beyond their control, and declared as such by the Committee;

(61) all words and expressions used but not defined in this Act and defined in other Acts shall have the meanings respectively assigned to them in those Acts.

Chapter II

General Principles Of Care And Protection Of Children

3. The Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely:-

(i) to (iii). x x x x x x x x x x x x x x x x x x x

(iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

(v) **Principle of family responsibility**: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

(vi) **Principle of safety**: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

(vii) **Positive measures**: All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

(viii) x x x x x x x x x x x x x x x x x x x x

(ix) **Principle of non-waiver of rights**: No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

(x) x x x x x x x x x x x x x x x x x x x x

(xi) **Principle of right to privacy and confidentiality**: Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

(xii) to (xv) x x x x xx x x x x x x x x x x x x x

(xvi) **Principles of natural justice**: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.

XXX XXX XXX XXX XXX

Chapter VIII

Adoption

56. (1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority.

(2) Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority.

(3) Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956.

(4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.

(5) Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the Court, shall be punishable as per the provisions of section 80.

57. (1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority.

58. x x x x x x x x x x x x x x x x x x x x

59. (1) to (11) x x x x x x x x x x x x x x x x x x

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

60. (1) A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as

provided in the adoption regulations framed by the Authority.

(2) The Authority shall on receipt of the order under sub-section (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child.

(3) The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time.

62. (1) The documentation and other procedural requirements, not expressly provided in this Act with regard to the adoption of an orphan, abandoned and surrendered child by Indian prospective adoptive parents living in India, or by non-resident Indian or overseas citizen of India or person of Indian origin or foreigner prospective adoptive parents, shall be as per the adoption regulations framed by the Authority.

(2) The specialised adoption agency shall ensure that the adoption case of prospective adoptive parents is disposed of within four months from the date of receipt of application and the authorised foreign adoption agency, Authority and State Agency shall track the progress of the adoption case and intervene wherever necessary, so as to ensure that the time line is adhered to.

63. A child in respect of whom an adoption order is issued by the court, shall become the child of the adoptive parents, and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy, with effect from the date on which the adoption order takes effect, and on and from such date all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by the adoption order in the adoptive family:

Provided that any property which has vested in the adopted child immediately before the date on which the adoption order takes effect shall continue to vest in the adopted child subject to the obligations, if any, attached to the ownership of such property including the obligations, if any, to maintain the relatives in the biological family.

64. Notwithstanding anything contained in any other law for the time being in force, information regarding all adoption orders issued by the concerned courts, shall be forwarded to Authority on monthly basis in the manner as provided in the adoption regulations framed by the Authority, so as to enable Authority to maintain the data on adoption.

(65 to 67) x x x x x x x x x x x x x x x x x x x x x

68. The Central Adoption Resource Agency existing before the commencement of this Act, shall be deemed to have been constituted as the Central Adoption Resource Authority under this Act to perform the following functions, namely:-

(a) to promote in-country adoptions and to facilitate inter-State adoptions in co-ordination with State Agency;

(b) to regulate inter-country adoptions;

(c) to frame regulations on adoption and related matters from time to time as may be necessary;

(d) to carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption;

(e) any other function as may be prescribed.

(All emphasis applied in this judgment only).

96. Of the aforesaid provisions as have been reproduced, first of all sub sections (3) and (4) of Section 56 need to be referred to, the first of which postulates that the Act of 2015 shall not apply to any adoption of children made under the provisions of the Act of 1956.

Immediately thereafter however, sub section (4) stipulates that all inter-country adoptions shall be done only under the provisions of the Act of 2015, and the adoption regulations framed by the authority. (Authority has been defined in Section 2(7) to mean the CARA, constituted under Section 68 of the Act).

What is very essential to notice is that despite sub section (3) of Section 56 stipulating that the Act of 2015 would not be operative in the case of an adoption to which the Act of 1956 applies, however, sub section (4) still goes on to say that all inter-country adoptions would be governed by the Act of 2015.

Learned senior counsel appearing for respondents no.7 to 10 had laid stress on what has been held by a co-ordinate bench in Jasmine Kaurs' case (supra), to the effect that the question of an inter-country adoption applying to an adoption that takes place in respect of a Hindu "giving party" and "adoptive party" would not arise, as the Act of 2015 applies only to the adoption of orphaned, abandoned and surrendered children.

Thus, it was held that where the natural parents and the adoptive parent are both Hindus (or Budhists, Jains or Sikhs), who have mutually agreed to give and take (respectively) a child, with that adoption conforming to the conditions stipulated in the Act of 1956, then even in terms of Section 56(3) of the Act of 2015, it would be the Act of 1956 that would prevail and not the JJ Act, 2015. This was held to be so even in a case where the adoptive parents are foreign citizens (as was the case in that petition).

97. In brief, in that case the natural mother was giving her child in adoption to her sister who was a British citizen, with the adoption deed duly registered and there being no conflict between the natural and adoptive parents as regards either the validity of the adoption deed or the custody of the child.

The problem arose because, after the deed had been registered and the child had been taken in adoption, the adoptive parents applied for an Indian passport for the child, which was refused by the concerned passport authority, on the ground that no certificate had been obtained from CARA though the adoption was an international adoption.

Such refusal by the passport authority was challenged by the adoptive parents and eventually it was held by this court (co-ordinate Bench), that in fact there was no need for obtaining such a certificate from CARA. Yet, to facilitate the smooth transition of the child from one family to another and one country to another, CARA was directed to issue that certificate.

The Union of India opposed that petition, and in fact, I have been informed that CARA has appealed against the said decision before a Division Bench of this court, with that appeal (LPA No.517 of 2020) to be finally adjudicated upon as yet.

98. It has been held in the penultimate paragraph of that judgment (Jasmine Kaur) that:-

> "...it is not mandatory to invoke the JJ Act, 2015, in the facts of the present case, where the adoption is a direct adoption by the parents of the non-adoptive parents/relatives under HAMA. As per Section 5.2 of X of the Passport Manual of 2016, and in view of Part-I of Schedule-III under Rule 5 of the Passport Rules of 1980, NOC from CARA, is required only by a foreign parents and not by Indian parents."

Though it has been stated in the aforesaid paragraph that it was not mandatory to invoke the JJ Act, 2015, in the facts of that case, yet, a reading of the entire judgment shows that the ratio thereof is to the effect that even when Indian parents/parents of Indian Origin are living abroad but are those as would be governed by the provisions of the Act of 1956, adopt a child from Hindu parents in India, especially in the case of relatives, the Act of 2015 would have no application at all, even in terms of sub section (3) of Section 56 thereof.

In fact it is to be noticed that Mr. Anil Malhotra, who assisted as amicus curiae in the present case, was also appointed as amicus in that case, and it was his stand there, that in fact the JJ Act may not apply in view of Section 56 (3). That, in fact, is what he had also initially argued before this Bench (in the present petition) but subsequently he had also submitted that the JJ Act would still apply in view of the fact that the said Act is a beneficial legislation in ratification of the Hague Convention (on the Rights of the Child), adopted by the General Assembly of the United Nations, on December 11, 1992, and therefore, the Act would apply to all such international adoptions.

99. With the utmost respect to what has been held by the Hon'ble co-ordinate bench, I am in agreement with that argument of Mr. Malhotra, for the reasons set out hereinafter.

100. In that context, first of all, the definition of "inter-country adoption" as given in sub section (34) of Section 2 of the Act of 2015, is that it means adoption of a child from India by a Non-resident Indian or by a person of Indian origin or by a foreigner.

Thereafter, sub section (38) of Section 2 defines a "Non-resident Indian" to be a person who holds an Indian passport and is presently residing abroad for more than one year.

In the present case, admittedly, respondent no.7 and her husband are residing in the USA since 2014, and therefore, as on the date shown in the 'adoption deed' (which has already been held herein above to be a very questionable one), they had been residing abroad for about 5 years. Hence, they are Non-resident Indians for the purposes of the Act of 2015.

101. Coming then to what has also been held in Jasmine Kaurs' case (supra), to the effect that the Act of 2015 is an Act actually enacted to take care of either juveniles in conflict with law, or for the purpose of adoption of those children who are abandoned, orphaned or surrendered (to the Committee constituted under Section 27 of that Act), with sub-section (60) of Section 2 defining a surrendered child).

> (a) Though that may seem to be so from a reading of the Statement of Objects and Reasons for enactment of the said Act, paragraph 5 of which only refers to adoption of orphaned or surrendered children; however, firstly, the Preamble to the Act states that it is one to consolidate and amend the law "relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic need through proper care and protection, development, treatment, social reintegration, by adopting a child friendly approach in the adjudication and disposal of matters....".
>
> Thus, it does not restrict itself to the care of only abandoned/orphaned/surrendered children, or

those in conflict with law, but extends its wings to protect all children who are in need of care and protection.

Hence, in my opinion, a child who is being taken to a far off country by way of adoption, is definitely a child who needs to be protected and cared for, which is why inter country adoptions are one category of adoptions that must adhere to the provisions of the Act of 2015 and the Adoption Regulations framed thereunder, with CARA being the authority that is required to go into the question of the appropriateness of any couple/person living abroad, to adopt a child from India.

It also cannot be forgotten that the need for protection of children being taken to a foreign country becomes all the more necessary with there having been too many unfortunate cases of child abuse in the past (sexually or for purposes of labouring in houses etc.)

Hence, background checks by CARA and its equivalent authority in a foreign country becomes imperative in the case of an inter country adoption.

For that purpose, CARA is necessarily required to be in communication with the equivalent authority set up in the other country, with that authority to furnish a Home Study Report, in terms of Rule 1 of Regulation 15 of the said Adoption Regulations (as would be discussed further ahead also in paragraph 108).

(b) The next reason on account of which I find myself (again with due respect to the learned co-ordinate Bench which painstakingly has passed a detailed judgment in that case), unable to agree with that view point, is the fact that sub section (1) of Section 60 of the Act of 2015 postulates as follows:-

"60. (1) A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Authority shall on receipt of the order under sub-section (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child.

(3) The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time."

102. Hence sub section (1) of Section 60 obviously visualises a situation where a relative living abroad would adopt a child from a relative living in India.

Equally obviously, if a child is being adopted from a relative in India, i.e from his/her natural parents in India, that child cannot be described to be either orphaned or abandoned or surrendered.

103. However, Section 62 of the Act of 2015 again requires to be looked at, with sub-section (1) thereof reading as follows:-

"62. **Additional procedural requirements and documentation**.-- (1) The documentation and other procedural requirements, not expressly provided in this Act with regard to the adoption of an orphan, abandoned and surrendered child by Indian prospective adoptive parents living in India, or by non-resident Indian or overseas citizen of India or person of Indian origin or foreigner prospective adoptive parents, shall be as per the adoption regulations framed by the Authority."

One interpretation of Section 62 (1) could be that the said provision would apply only to adoption of orphaned/abandoned/surrendered children in India, by either a person living in India or by a person living in another country [whether that person be a foreign citizen or an Oversees Citizen of India (OCI) or a Non-Resident Indian (NRI)].

The other interpretation could be that it applies not only to adoption of abandoned/orphaned/surrendered children by Indian adoptive parents, but also to all adoptions of children in India, by foreign citizens, Oversees Citizens of India and Non-Resident Indians [as defined in Section 2(38)].

However, even if the first interpretation is to be accepted, still in any case, with sub-section (1) of Section 60 specifically referring to adoption of a child b y a relative living abroad, from his relative in India, then, as already observed said herein above, that child would, naturally, not be an orphaned/abandoned/surrendered child.

104. Hence, though undoubtedly the Statement of Objects and Reasons for enacting the Act does not specifically talk of inter country adoptions, and refers mainly to children who are juveniles in conflict with law or are abandoned/orphaned/surrendered, yet the Preamble to the Act, as already seen, states that the Act is one relating to children in conflict with law and children in need of care and protection, by catering to their basic needs of proper care and protection etc.

Further, even clause 5 of the Statement of Objects and Reasons states that reenactment of the old Act was necessary to bring about a comprehensive legislation to "...provide for general principles of care and protection of children and for procedure in the case of children who are in need of such care and

protection and children in conflict with law.....adoption of orphaned/abandoned/surrendered children..."

(All emphasis applied here only)

Thus, though again adoption is spoken of only in relation to orphaned/abandoned/surrendered children, the objective of the new Act was to provide for general principles of care and protection of all children.

Hence, with there also being a provision in the Act, i.e. Section 60, specifically talking of adoption of a child from a relative in India (thereby obviously not being an abandoned/orphaned/surrendered child), it cannot be said, in the opinion of this court, that it would be an Act only applicable to the adoption of abandoned/orphaned/surrendered children.

This is to be further seen again with the fact that though as per Section 56 (3), the Act of 2015 is not to apply where the Act of 1956 is applicable, however, sub-section (4) immediately thereafter holds that all inter country adoptions must be in terms of the provisions of the Act of 2015.

105. Again, it also cannot be lost sight of that an inter country adoption is specifically defined in the Act of 2015; and the said Act being one that was enacted in pursuance to 'ratification' of India being a signatory to the Hague Convention of 1992, then simply because the preamble to the Act has 'missed out' specifically mentioning inter country adoptions, it would not be possible to ignore the substantive provision as has been discussed herein above, i.e. what is contained in Section 60, (with sub-section (1) thereof obviously not applying to abandoned/surrendered/orphaned children as already said), also with sub sections (34) & (38) of Section 2 defining an inter-country adoption and a non-resident Indian, as they do, respectively. Therefore, sub-section (4) of Section 56 would mean that all inter-country adoptions would be governed by the Act of 2015.

106. Though nothing extra can be read into a statute as per law well settled, equally obviously, a substantive provision contained in a statute cannot be ignored and therefore, to achieve the aims and objective of the Act, not only what is contained in its Statement of Objects and Reasons and Preamble is to be looked at, but the substantive provisions contained therein also have to be read in entirety, with the substantive provision naturally taking precedence over the preamble, even if a particular substantive provision does not find a reference in the preamble.

Ignoring such a substantive provision would render it completely otiose, which cannot be so, because the said provision has been actually incorporated in the Act, consciously.

Hence, in my opinion, the Act of 2015, as regards its application to adoption of children, does not apply only to orphaned, abandoned and surrendered children, but also to all children who are being adopted from India by non-resident Indians or foreign citizens.

107. Having observed as above, it is of course to be noticed that Sections 58, 59 and 60 are applicable to procedure for inter-country adoptions by prospective adoptive parents living in India, for inter-country adoptions of an orphaned/abandoned/surrendered child, and for inter-country adoptions by a relative (respectively), with there seemingly being no specific provision [other than Section 62 (1)], catering to an inter-country adoption from a person other than a relative.

That would not, in the opinion of this court, obviate the need for approval by CARA, of such adoption by adoptive parents living abroad, as regards a child being adopted from India.

In fact the implication would seem to be that no person living abroad for more than one year, can adopt a child from India unless the child is that of her/his relative, or is an orphaned/abandoned/surrendered child.

In fact, the term "relative" has also been defined in Section 2(52) of the Act, to mean a paternal or a maternal aunt or uncle, or a paternal or maternal grandparent.

Admittedly, though respondent no.7 is stated to be in some distant relation to respondent no.6 (i.e. the mother-in-law of the petitioner), she is neither a paternal or maternal aunt to the child, nor obviously his grand-mother, and consequently, she cannot be adopting the child in such capacity of a relative.

108. Of course, if an orphaned/abandoned/surrendered child is to be adopted, then even a non-resident Indian or a foreign national can adopt such a child from India, subject to approval of CARA, which is an authority set up in India under Section 68 of the Act of 2015, with sub section (a) to (e) thereof stating that the authority is specifically to promote and frame regulations etc. for inter-country adoptions.

In this context, of the provisions of the Adoption Regulations, 2017, as have been enumerated in detail by learned amicus curiae in his supplementary report, Regulation 15 needs to be referred to, which lays down the procedure for inter-country adoption from India. Rules 1 and 2 of Regulation 15 are reproduced herein below:-

> "15. **Registration and Home Study Report for prospective adoptive parents for inter-country adoption**.-(1) Any Non-Resident Indian, Overseas Citizen of India or foreign prospective adoptive parents, living in a country which is a signatory to the Hague Adoption convention and wishing to adopt an Indian child, can approach the Authorised Foreign Adoption Agency or the Central Authority concerned, as the case may be, for preparation of their Home Study Report and for their registration in Child Adoption Resource Information and Guidance System."

(2) In case, there is no Authorised Foreign Adoption Agency or Central Authority in their country of habitual residence, then the prospective adoptive parents shall approach the Government department or Indian diplomatic mission concerned in that country for the purpose.

(3) to (16) xxxxx xxxxx xxxxx

(Emphasis applied here only).

(The remaining rules of the said regulation are not being reproduced in extenso as they only enumerate the process of registration and the procedure for CARA to follow, in the case of adoption of a child from India).

109. Hence, a perusal of the said regulation and others contained in Chapter IV of the Adoption Regulations, would show that in fact non-resident Indians living abroad can only adopt by the said procedure, and obviously only through CARA. It would also indicate that since non-resident Indians etc. cannot adopt any child from India except through CARA, that would mean that they can adopt only orphaned/abandoned/surrendered children, unless such adoption is from a relative (as defined in Section 2 (52), in which case the procedure stipulated in Section 60 of the Act of 2015 would need to be followed.

110. As regards the judgment cited by Mr. Kanwaljit Singh in Shabnam Hashmis' case (supra), though undoubtedly in paragraph 11 thereof (Law Finder edition), it has been stated that the JJ Act of 2000 does not mandate any compulsory action for any prospective parent, thereby leaving such person with the liberty of 'accessing the provisions of the Act' if he so desires; however, firstly, that judgment describes in detail the background of enactment of that Act, i.e. it being for the welfare of the children and in paragraph 3 it also states that it deals with inter country adoptions for which elaborate guidelines had been laid down by the Supreme Court in ***Laxmi Kant Pandey v. Union of India***, with a regulatory body, i.e. CARA, having been created by the Central Government thereafter.

Secondly, that judgment refers to the JJ Act 2000 and not the subsequent Act of 2015, the judgment itself having been pronounced on 19.02.2014.

Thus, even though the Act of 2000 otherwise may be largely pari materia to the Act of 2015, however, obviously Section 60 of the Act of 2015 could not have been taken into consideration in that judgment, wherein procedure for adoption of children in India from a relative has been stipulated.

Hence, in my opinion a single reference in Shabnam Hashmi to the Act of 2000 being an optional Act to be resorted to by anybody who wishes to do so, cannot be relied upon by the learned Senior Counsel for respondents no.7 to 10 herein to pursuade this court to hold that the Act of 2015 would not mandatorily apply to all inter country adoptions, with it again to be noticed that even in the said judgment, the objectives of enactment of the Act of 2000 were extensively referred to, i.e. it is for the benefit and welfare of children.

This is to be seen with the fact that thereafter the new Act of 2015 has come into existence repealing the old Act, with, naturally, each provision of the new Act to be looked at to arrive at a conclusion with regard to its applicability.

111. Consequently, I would hold that for all inter-country adoptions, even by those who are otherwise governed by the Act of 1956, i.e. Hindus, Budhists, Jains or Sikhs by religion and those who are not Muslims, Christians, Parsis or Jews, it would be the JJ Act of 2015 that would apply and therefore, sub-section (3) of Section 56 can only be read to mean (in the opinion of this court), that where the adoption is not of an abandoned/orphaned/surrendered child, and is not an inter-country adoption of any child, then it would be the Act of 1956 that would apply (in the case of Hindus, Sikhs, Jains and Budhists) and not the Act of 2015.

But if it is an inter-country adoption, or an adoption even within India in the case of an orphaned or abandoned child (as per Section 58), it would necessarily be the Act of 2015 that would be applicable, with all the safeguards and procedures provided therein to be necessarily followed.

Therefore, it would be the Act of 2015 and not that of 1956, as would apply to the present case.

Obviously, the above provisions of the Act are to ensure that the child is well protected and looked after even after his exit from India to a foreign country, because prior to CARA granting any certificate for care and adoption by a person living outside India (for more than one year), necessarily has to obtain a study report even from the authority constituted for such purpose in the country to which the child is to be taken, i.e. the "authorised foreign adoption agency" defined in sub section (6) of Section 2 of the Act of 2015.

Hence, all such adoptions must first be approved by the authority constituted under Section 68 of the said Act, i.e. CARA, after which only, an adoption even by Indian parents living outside India for more than one year, can be legally and validly made.

112. However, since the conclusion arrived at by this bench, on the application of the Act of 2015, is contrary to what has been held by a co-ordinate bench in Jasmine Kaurs' case (supra), the matter needs to be referred to a larger bench on the following question formulated by this court:-

"As to whether in terms of sub sections (6), (34), (37) and (38) of Section 2, read with what is contained in Sections 60 and 68 and other provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, as also the Adoption Regulations framed under the provisions of Sections 68 (c) and 2 (3) of that Act, would respondent no.7 require a certificate from the authority constituted under Section 68 of the Act, before adopting a child from India, with respondent no.7 being a non-resident Indian as defined in Section 2(38) of the said Act?"

Since a Division Bench is already seized of the issue in LPA No. 517 of 2020, this matter, as regards that question, be placed before their Lordships of the Division Bench, after obtaining necessary orders from Hon'ble the Chief Justice.

113. Yet, firstly, in view of the fact that this court has formed an opinion, more than just prima facie (though not ex facie in the absence of any detailed evidence led), that the adoption deed shown to be executed on 03.12.2019 is a highly suspicious document as regards its authenticity; and secondly, the intention to give the child in adoption being at a time when the petitioner cannot be said to be in a stable mental and emotional state, due to the recent death of her husband (and therefore it not being a valid adoption), custody of the child is directed to be returned immediately to the petitioner by respondent no.7, even pending further adjudication on the issue either by the Division Bench as regards the applicability of the JJ Act, 2015 and the consequences of not having obtained a necessary certificate from CARA by respondent no.7.

114. As regards whether it would be in the interest of the child to be left, even in the interregnum, with respondent no.7 as his adoptive mother, or with the petitioner who is his natural mother, though undoubtedly it would seem that, looking at the financial aspect at least, it would be respondent no.7 and her husband who are better off than the petitioner, yet, as has also been held by the Supreme Court in ***Mausami Moltra Ganguli v. Jayant Ganguli 2008(4) RCR (Civil) 551***, it is not just a single factor of financial betterment, nor even of natural love etc. alone, that is to weigh with the court while granting custody to any particular person, but the overall benefit of the child and the entire circumstances of the case.

In the present case obviously, if the petitioner had not decided (in a not fully fit emotional and mental state), to give the child in adoption at all, his custody would have continued with her, she being his natural mother, and the question of being given away in adoption would not have arisen in the first place.

[Of course, it may also be noticed here that counsel for the petitioner had submitted that the petitioners would always continue to receive support from her father and brother, and in any case, she being an educated person, would be able to secure a job too].

Albeit, once this court has held that the validity of the adoption itself is highly questionable and not valid even in terms of the Act of 1956, (for all the reasons given, especially in paras 91 and 92), then naturally, whether or not the child enjoys a better future anywhere else, his natural guardian would be the petitioner, i.e. his natural mother, even in terms of section 6 of the Hindu Minority and Guardianship Act, 1956, which lays down that the natural guardian of a boy and an unmarried girl is the father, and after him the mother, with the custody of a child who has not completed 5 years of age to be ordinarily with the mother.

Therefore, with the child being now about 1 year and 3 months old, and his father having already died on July 22, 2019, it would be his natural mother who would be his natural guardian, i.e. the petitioner, once the adoption by respondent no.7 is held to be questionable and not valid.

Further, what this court also cannot overlook, is the fact that respondent no.7 is 52 years old, with her husband being 43 years old, and though, as already said, there is no legal bar under the Act of 1956 on her adopting a child at that age, yet, in the opinion of this court their age also would be a factor to be gone into as regards the upbringing and welfare of the child.

115. To sum up, the conclusions reached in this judgment with regard to the three questions framed in paragraph 66 herein above, are as follows:-

(i) That this petition is maintainable (in view of what has been discussed in paragraphs 68 to 71, supra);

(ii) That the adoption does not seem to be valid (as regards (b) below, and in any case not valid as per (a) and (c) below), even under the provisions of the Act of 1956, in view of the fact that:-

(a) the giving of the child by the petitioner to respondent no.9, though is backed by her affidavit dated 05.09.2019, that affidavit being only an authority to respondent no.9 to further hand over the child to respondent no.7, such document of authority is required to be compulsorily registered in terms of sub section (3) of section 17 of the Registration Act, 1908 (as discussed in paragraphs 80, the last part of para 83, and para 85 supra);

(b) the adoption deed dated 03.12.2019, would not seem to be a valid document as it purports to show that the petitioner signed it on that date in the presence of respondent no.7 and her husband, whereas even as per respondents no. 5 and 6 that document was signed by the petitioner on 05.09.2019 (and not 03.12.2019) and therefore, the presence of the petitioner on 03.12.2019 in Patiala as the document purports to show, is highly doubtful thereby making it a very questionable deed (as discussed in paragraphs 86 to 90 supra);

(c) that even otherwise the adoption deed cannot be said to be valid in view of the fact that the petitioner was not in a fully stable mental condition and was under mental stress of having lost her husband only 1= months earlier, and with her holding a 3 month old baby and further, she therefore having changed her mind as regards the adoption subsequently and not having come to Patiala, to sign the document on 03.12.2019 (as discussed in paragraphs 91 and 92 supra);

(iii) That in any case, in the opinion of this court, it would be the JJ Act of 2015, as would apply for an inter-country adoption, the adoptive mother and her husband admittedly being Indian citizens residing abroad for more than one year; and consequently a certificate from CARA would be essential to validate any such adoption (as discussed in paragraphs 94 and 96 to 111 supra).

116. Thus, for the sake of repetition, it is again stated that for the reasons already discussed in detail, this court having firstly reached a finding that the said adoption is not legally valid even in terms of the Act of 1956, the custody of the child needs to be returned immediately to the natural mother, i.e. the petitioner.

It needs to be observed here that though the issue of applicability of the Act of 2015 is being referred to a larger bench, however, even so, with the opinion expressed on the adoption being highly questionable as regards the authenticity of its proposed date of signing and presence of all parties together; and in any case it being not valid even under the Act of 1956, because of the mental condition of the petitioner, the custody of the child needs to be returned to the mother (as regards the outcome of this petition, which is one seeking such custody).

117. It further needs to be observed that any person would understand that respondent no.7 would obviously have developed an attachment to the child in the past about nine months that she has had his custody (stated to be since 22.11.2019), which would also reflect from her willingness to transfer her entire savings of Rs. 50 lakhs to him. However, her sentiments are to be weighed against the sentiments of the petitioner who is the natural mother of the child, who legally would be entitled to his custody in view of what has been held in extenso herein above; and who nurtured him for nine months in her womb and thereafter even held him for more than three months, and consequently, her natural attachment to her own borne child, and her sentiments towards him, obviously cannot be undermined, once she is held to be legally entitled to his custody.

Therefore, it would be highly appreciated if respondent no.7, who, to repeat, obviously would have developed attachment to the child, ensures that the transition of the child from her custody to that of the petitioner is made absolutely 'easy', with the child being firstly familiarised with his natural mother again.

It would in fact be appropriate in the interest of the child if respondent no.7 hands over the child by first familiarising him with his natural mother.

The needful be done over a period of two weeks.

118. The petition is allowed as aforesaid, as regards the custody of the child being handed over to the petitioner, even pending consideration of the legal question referred to the Hon'ble Division Bench herein above, as would eventually be considered and adjudicated upon by their Lordships.

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This judgement ranked 1 in the hitlist.

Kiran V. Bhaskar v. State of Haryana (P&H) : Law Finder Doc Id # 1874307

2021(4) R.C.R.(Criminal) 303

***PUNJAB* AND HARYANA HIGH COURT**

Before:- Mr. Arun Kumar Tyagi, J.

CRWP-3440 of 2020. D/d. 31.08.2021.

Kiran V* . *Bhaskar - Petitioner

Versus

State of Haryana and Others - Respondents

For the Petitioner:- Mr. Shadan Farasat, Advocate with Mr. Arjun Sheoran, Advocate and Ms Neha Sonawane, Advocate.

For the Respondents No. 1-State:- Mr. Munish Dadwal, Asstt. A.G., Haryana.

For the Respondents Nos. 2 to 4:- Mr. Satish Tamta, Sr. Advocate with Mr. Animesh Sharma, Advocate and Mr. Vikramaditya Bhaskar, Advocate.

For the Amicus Curiae:- Mr. Anil Malhotra, Advocate.

IMPORTANT

Custody of Child - Repatriation of minor child cannot be declined on ground of lack of requisite personal care and attention to minor child in USA and return of minor child to USA would result in psychological physical or cultural harm to him.

Constitution of India, 1950 Articles 226 and 227 - Criminal Procedure Code, 1973 Section 482 - Hindu Minority and Guardianship Act, 1956 Section 6(a) Writ of Habeas Corpus - Illegal custody of mother and her parents - Repatriation of minor who came for surgery - Admittedly, minor child is U.S. Citizen - Held, no cogent and reliable material to hold that in view of mental health and suicidal tendency of father, repatriation of minor child to USA will not in best of his interest and welfare - Repatriation of minor child cannot be declined on ground of lack of requisite personal care and attention to minor child in USA - No material to show that return of minor child to USA would result in psychological physical or cultural harm to him - No undue and unreasonable delay in filing of present petition so as to disentitle petitioner to relief claimed - Therefore, petition allowed with directions :-

(i) Mother directed to return to USA along with minor child on or before 30.09.2021;

(ii) In case mother opts to return to USA, father shall bear travel and incidental expenses of wife and minor child for return to and also expenses for their stay in USA till decision of custody petition and father shall not initiate any criminal/contempt proceedings against mother for inter country removal of minor child;

(iii) If mother fails to comply with aforesaid direction, mother shall hand over custody of minor child and his passport to father on 01.10.2021 or on such other date as may be agreed to by the petitioner;

(iv) In case mother fails to hand over custody of the minor child and her passport to the petitioner on 01.10.2021 or on such other date as may be agreed to by the petitioner, respondent No.1 shall take over the custody and passport of the minor child from mother and hand over custody and passport of minor child to father on such date as may be agreed to by the petitioner;

(v) On custody of minor child and his passport being handed over to father, father entitled to take minor child to USA;

(vi) In case passport of minor child not handed over to father by mother on ground of loss/damage etc., father shall be entitled to get duplicate passport issued from concerned authority; and

(vii) On such return of minor child to USA, either of parties shall be at liberty to revive proceedings before US Court for appropriate orders regarding appointment of guardian and grant of custody of minor child.

[Paras 50, 53 and 55]

Cases Referred :

Dr. V. Ravi Chandran v. Union of India 2020 (1) SCC 147

Elizabeth Dinshaw v. Arvand M. Dinshaw (1987) 1 SCC 42

Gaurav Nagpal v. Sumedha Nagpal 2008(4) R.C.R.(Civil) 928

Gohar Begam v. Suggi alias Nazma Begam (1960) 1 SCC 597

Howarth v. Northcott 152 Conn 460 208A 2nd 540 17 ALR 3rd 758

Kanika Goel v. State (NCT of Delhi) 2018 (9) SCC 578

Lahari Sakhamuri v. Sobhan Kodali 2019 (7) SCC 311

Manju Tiwari v. Rajendra Tiwari AIR 1990 Supreme Court 1156

Nil Ratan Kundu v. Abhijit Kundu 2008(3) RCR (Civil) 936

Nilanjan Bhattacharya v. State of Karnataka 2020(4) RCR (Civil) 660

Nilanjan Bhattacharya v. The Station House Officer Koramagla 2020 (2) DMC 220

Nithya Anand Raghavan v. State (NCT of Delhi) (2017) 8 SCC 454

Nithya Anand Raghavan v. State of NCT of Delhi (SC) 2017(3) R.C.R.(Civil) 798

Parminder Kaur Brar v. State of Punjab decided on 17.12.2020, CRWP No. 7400 of 2020

Prateek Gupta v. Shilpi Gupta 2018(2) SCC 309

Rosy Jacob v. Jacob A. Chakramakkal (1973) 1 SCC 840

Roxann Sharma v. Arun Sharma 2015 (8) SCC 318

Ruchi Majoo v. Sanjeev Majoo 2011 (6) SCC 473

Sandeep Kaur Dhillon v. State of Punjab AIR 2016 (NOC 707) 328

Smriti Madan Kansagra v. Perry Kansagra decided on 28.10.2020, Civil Appeal No.3559 of 2020

Surya Vadanan v. State of Tamil Nadu 2015 (5) SCC 450

Syed Saleemuddin v. Dr. Rukhsana 2001(2) R.C.R.(Criminal) 591

Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari (SC) 2019(3) R.C.R.(Civil) 104

Veena Kapoor v. Varinder Kumar Kapoor 1981 (3) SCC 92

Vivek Singh v. Romani Singh 2017 (1) RCR (Civil) 1063

Walker v. Walker & Harrison (1981) New Zealand Recent Law 257

Yashita Sahu v. State of Rajasthan 2020 (3) SCC 67

Yashita Sahu v. State of Rajasthan decided on 20.01.2020, Crl. Appeal No.127 of 2020 SLP (crl.) No.7390 of 2019

JUDGMENT

Mr. Arun Kumar Tyagi, J. - (The case has been taken up for pronouncement of judgment through video conferencing.)

The petitioner has filed the present petition under Articles 226 and 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973 (herein after referred as 'the Cr.P.C.') for issuance of a writ in the nature of habeas corpus directing the respondents to ensure the release of

minor child-Aaditya Kiran (herein after referred as 'minor child'), minor son of the petitioner (aged about four years at the time of filing of the present petition) from illegal custody of respondents No.2 to 4 and hand over his custody to the petitioner. The petitioner also sought interim relief that respondent No.1 be directed to ensure that respondents No.2 and 4 allow and facilitate the petitioner to communicate with his son over phone and video call on a daily basis, at a time convenient to both the petitioner and his son.

Repatriation claim of the petitioner-father of the minor child.

2. Briefly stated, the petitioner has averred in the petition that the petitioner, who is Post Graduate in Computer Science, is currently employed as a Senior Software Engineer in Walmart Labs, Bentonville, United States of America (herein after referred as 'USA'). The petitioner is a permanent resident of Benton Country, Arkansas, USA.

2.1 The petitioner solemnized marriage with respondent No.2 on 13.01.2011 in New York City, USA. Minor child-Aaditya Kiran was born on 21.01.2016 in Bentonville, Arkansaa, USA and is a citizen of USA. The petitioner purchased house in Centerton, Arkansas, USA for settlement of the family. Minor child was admitted for pre-schooling in 'Bright Beginnings' in Bentonville, Arkansas, USA.

2.2 As per report dated 31.01.2019 of Mana Medical Associates, minor child was diagnosed with a congenital condition called hydronephrosis which affects the kidneys which required correction by surgery. Due to non-availability of dates for surgery in Arkansas, the petitioner and respondent No.2 decided for a surgery to be done in India by Dr. Anurag Krishna at Max Hospital, Saket, New Delhi.

2.3 In view of increasing number of cases of International Parental Child Abduction consent of the petitioner was necessary for his son to travel with respondent No.2 alone. The petitioner gave consent for the same and signed the international travel consent form dated 04.02.2019 for stay outside USA only up to 26.09.2019. Respondent No.2 along with minor child came to India on 05.02.2019 and was to return to USA on 26.09.2019 for which date the return tickets were booked. The petitioner had also paid the requisite expenses for meeting the expenses of surgery and stay in India.

2.4 The surgery took place on 14.03.2019. The petitioner joined respondent No.2 and minor child in March, 2019 but went back to USA for attending his job. The petitioner remained in regular communication with respondent No.2 and minor child till July, 2019 when respondent No.2 ceased regular communication with respondent No.2 and also ceased providing updates about the health and progress of minor child and did not allow the petitioner to interact with the minor child.

2.5 Respondent No.2 failed to return to USA along with minor child on 26.09.2019 in violation of the travel consent given by the petitioner. Respondent No.2 claimed that she was staying back with the minor child for further medical follow-ups but did not respond to his request to provide details regarding minor child's medical condition. Due to concerns arising from his inability to communicate with respondent No.2, the petitioner made independent enquiries and came to know that respondent No.2 is engaging in excessive alcohol use and was having extra marital affair and respondent No.2 was living in separate apartment in Ivory Towers, Gurugram where she left the minor child to the care of a maid whole day. Respondent No.2 had found employment in the Venkateshwar Hospital, Dwarka, Delhi.

2.6 The petitioner sought assistance of the U.S. Embassy which conducted a welfare visit to the residence of parents of respondent No.2 on 17.12.2019 and the report of the visit showed that respondent No.2 had made several misleading statements. The officials of the U.S. Embassy also sent photograph of a certificate dated 17.09.2019 purportedly signed by the doctor who had conducted the surgery. The petitioner submitted his detailed reply to the report vide email dated 14.01.2020. Vide e-mail dated 25.12.2019 respondent No.2 demanded amount of Rs.10,00,000/- as reimbursement of expenses already incurred by her father but did not mention about her return with the minor child to USA.

2.7 The petitioner filed petition dated 30.01.2020 for separate maintenance before the Circuit Court of Benton County, Arkansas seeking primary care, custody and control of the child on account of wrongful detention of the minor child outside USA. The above-said Court passed ex-parte order dated 03.02.2020 holding that the above-said Court had jurisdiction over the parties and subject matter and was the proper venue for adjudication of the claim of custody and awarded primary care, custody and control of the child to the petitioner and directed respondent No.2 to hand-over minor child to the petitioner immediately noting that the alienation of the father from the son would be harmful to the well-being of the son. The order was delivered on 24.02.2020. The minor child is being kept away from the petitioner, who is the legal guardian, by respondent No.2 who is will-fully disobeying order of the US Court.

No reply filed by respondent No.1-State of Haryana

3. No reply to the petition has been filed by respondent No.1- State of Haryana.

Rival claim of respondent No.2-mother and respondents No.3 and 4-maternal grandparents of the minor child.

4. The petition has been contested by respondents No.2 to 4 in terms of reply dated 12.07.2020. In the reply respondents No.2 to 4 have submitted that the petitioner has not disclosed that the minor child

has undergone a serious medical surgery and he has not fully recovered. The surgery has only been performed on the right kidney whereas surgery of left kidney was also required but due to young age of the minor child his left kidney has not been operated on. The same is being closely monitored by the entire team of doctors in India. The minor child requires regular follow ups and constant monitoring which can only be done by respondent No.2 as she is thoroughly updated about the problem and is constantly in touch with the doctors of the minor child. The standard medical care and ease of availability of medical advice is better in India. No early dates were being given in USA for the urgent surgery of the minor child and he had to be rushed to India. Given the current scenario it would be extremely difficult to get even decent medical care facility in USA. The fact that the family of respondent No.2 has doctors is extremely beneficial. Respondent No.4, mother of respondent No.2, with whom the minor child resides is a doctor. Her brother is also a known doctor and stays close to respondents No.2 to 4. The brother of respondent No.2 is also a doctor. It is in the interest of the minor child to stay in Gurugram, India.

4.1 The minor child is living in happy household, surrounded with loving family and friends, as is evidenced from the US Embassy report. In USA, the petitioner hardly had any family and friends and the minor child was devoid of the company that he needed for proper growth and development. The minor child has friends in Delhi and Gurgaon. He has a wonderful opportunity to celebrate a variety of poojas and festivals in India which could never have been done in USA. He goes every day to the temple at his maternal grandparents home where he stays. He has strong roots in India. He has travelled with respondent No.2 more to India and had extended stays in India. The minor child was previously enrolled in a pre-school in 2018 and then in 2019 and now nursery school in 2020 with the prior consent of the petitioner. The petitioner and respondent No.2 had all along been planning that respondent No.2 and minor child would be shifting to India. The minor child has attended pre-schools in India in 2018 and now would be going to nursery at Shri Ram School, Gurugram, India as decided between the petitioner and respondent No.2 much before.

4.2 The petitioner has subjected respondent No.2 to mental torture, dowry harassment and domestic violence and abused constantly coaxing her for funds to be invested in land. Petitioner became so violent once that respondent No.2 had to call the Women's Shelter in Arkansas, USA on 02.11.2018. The petitioner wrongly arrayed respondents No.3 and 4 as party to the petition to pressurise respondent No.2 not to demand back the funds given to him. Travel consent clearly stated that any change to the travel plan shall be discussed and consented by both the parents and the same did not give the petitioner complete authority over the minor child. The petitioner has admitted both in writing and orally that he was diagnosed to have suicidal tendencies which continue to remain unaddressed. The same would have a serious adverse impact on the minor child.

4.3 All the expenses from her marriage till date and also expenses of surgery of minor child were born by respondents No.3 and

4. The petitioner has not even bothered to have the decency to take care of his own expenses and his own air tickets had also been taken care of by respondents No.3 and 4. The petitioner has consistently demanded and has been paid money by respondents No.3 and 4 for purchasing property in India with a view to settle in India. The money and expenditure incurred by respondents No.3 and 4 has not been repaid to them by the petitioner.

4.4 The petitioner always tried to keep the minor child away from his grandparents. Even after surgery of the minor child on 14.03.2019, the petitioner or his mother did not visit him and no concern was shown for his well being. The petitioner has cast aspersions on character of respondent No.2 which lead to irrevocable break down of a sacrosanct relationship.

4.5 Respondents No.2 to 4 have also taken preliminary objections that the writ petition is a gross abuse of the judicial process and the writ petition does not lie for the custody of minor child as no right has been infringed. Indian Courts have jurisdiction to deal with custodial disputes of minor child even if a foreign Court has passed an order in favour of either of the parents. The minor child is in legal custody of respondent No.2 with consent of the petitioner. The writ petition has been filed with considerable delay.

4.6 The ex-parte interim order has been passed by the Court in USA in violation of principles of natural justice, without hearing respondent No.2. Respondent No.2 is yet to receive official summons from the Court in USA and will contest the matter there. In any case, an ex-parte interim order of custody in violation of principles of natural justice is not the kind of order envisaged by the comity of Courts doctrine. Under section 6(a) of the Hindu Minority and Guardianship Act, 1956, respondent No.2 is natural guardian of the minor child, who is four and half years old.

4.7 In their written statement respondents No.2 to 4 have also given brief history of events including Indian wedding of the petitioner and respondent No.2 on 08.08.2011 in Gurugram and taking of loan by the petitioner from respondents No.3 and 4 for purchase of land etc. and strained relations between the petitioner and respondent No.2.

4.8 In their written statement/reply on merits respondents No.2 to 4 have submitted that the petitioner is not entitled to invoke the extra-ordinary jurisdiction of this Court. The petitioner is H-1B visa holder and does not have citizenship of USA. There is no certainty that petitioner will get permanent citizenship. Respondent No.2 is natural guardian of minor child till the age of five years. The minor child has been residing in India with the consent of the petitioner who himself wanted minor child and respondent No.2 to go back to India and settle there so that he could save more money and buy land. In his e-mail dated 04.09.2019 the petitioner had clearly written that "we decided this sacrifice of being

away is a must for you to start your physical therapy career". In WhatsApp message dated 11.01.2019 the petitioner wrote "go to India, work your ass off, make money, and we will build a wonderful house". In his email dated 26.10.2019 the petitioner had admitted that "you recommended that after couple of months of staying with your parents, you will move to an apartment, so I can come visit you guys whenever - that never happened." In his WhatsApp message dated 11.07.2019 the petitioner has clearly stated that he wanted respondent No.2 to go to India and work. The allegations of excessive use of alcohol and extra marital affair are baseless and without any proof.

4.9 In January, 2019 the minor child was diagnosed with Hydronephrosis. It was only after coming to Delhi that numerous diagnostic tests were got done (like DTPA, MCU and Ultrasounds) and it was found that the minor son suffered from Uretero-Pelvic Junction Obstruction (UPJ) which in his case was a congenital problem since he has 'Horse shoe Kidneys' which caused Hydronephrosis. The petitioner travelled to Banglore, India from USA to conclude a land deal and then came to visit Delhi for the minor child's surgery. He reached one day before the minor son was to be admitted in the hospital for the surgery. After the surgery he stayed for a few days and again left for Bangalore and later again re-visited Delhi before he finally left for USA via Bangalore. The petitioner left no money with respondent No.2 before leaving for USA. Till date, the petitioner has not taken any financial responsibility of respondent No.2 and the minor child as all their expenses have been borne by respondents No.3 and 4. All the expenses of international as well as domestic travel of respondent No.3 and her minor child were borne by respondent No.3. Respondents No.2 to 4 accordingly prayed for dismissal of the petition.

5. The petitioner has filed rejoinder to the reply filed by respondents No.2 to 4 reiterating his claim.

6. I have heard arguments addressed by Mr. Shadan Farasat Advocate assisted by Mr. Arjun Sheoran, Advocate and Ms Neha Sonawane, learned Counsel for the petitioner, Mr. Munish Dadwal, Asstt. A.G., Haryana for respondent No.1-State and Mr. Satish Tamta, Sr. Advocate with Mr. Animesh Sharma, Advocate and Mr. Vikramaditya Bhaskar, learned Counsel for respondents No.2 to 4 and Mr. Anil Malhotra, learned Amicus Curiae and have gone through the relevant record.

Submissions by learned Counsel for the parties.

7. Mr. Shadan Farasat, learned Counsel for the petitioner has made the following submissions:-

Factual Background

7.1 The petitioner and respondent No. 2 were married in New York, USA on 13.01.2011.

7.2 The minor child was born in Benton County, Arkansas, USA on 21.01.2016. The petitioner's son is a citizen of the U.S.A by birth, and holds a U.S.A. passport which is valid up to 13.10.2021.

7.3 The petitioner's son was diagnosed with hydronephrosis, a kidney condition that required correction by surgery, in January, 2019.

7.4 Due to unavailability of surgery slots in the U.S.A., the petitioner and the respondent No. 2 decided to have the surgery conducted in India by Dr. Anurag Krishna at Max Hospital Saket. Accordingly, an international travel consent form was executed between the petitioner and respondent No. 2, permitting the child to travel with respondent No.2 to India between the dates of 05.02.2019 and 26.09.2019. The travel consent expressly mentions that "any changes to this plan shall be discussed and consented upon by both parents".

7.5 The minor child travelled to India with respondent No.2 on 05.02.2019, in terms of the travel consent. He underwent corrective surgery on 14.03.2019 at Max Hospital, Saket, for which the petitioner flew down to India. Subsequently, after the surgery, the petitioner returned to the U.S.A. to rejoin work.

7.6 The child recovered from the surgery, and is doing well. This is recorded in the certificate dated 17.09.2019 of the surgeon Dr. Anurag Krishna. Consequently, there remains no medical exigency necessitating the child's continued stay in India.

7.7 Respondent No.2 violated the international travel consent by not returning the minor child to the USA by 26.09.2019 (the mutually agreed upon date). Since then, she has detained him in her illegal custody in India despite repeated entreaties by the petitioner to return to the U.S.A.

7.8 The petitioner filed a petition for separate maintenance dated 30.01.2020 before the Circuit Court of Benton County, Arkansas (the appropriate jurisdictional court) seeking primary care, control and custody of his minor child on account of his wrongful detention outside the U.S.A.

7.9 The jurisdictional foreign court i.e. the Circuit Court of Benton County, Arkansas passed an order dated 03.02.2020 awarding primary care, custody and control of the minor child to the petitioner, and directing respondent No.2 to return the child to the petitioner immediately, pending further orders. This is an interim order and is not a final determination of the child's custody. The order specifically notes that the matter shall be taken up at the request of either party.

7.10 The petitioner served a copy of the order dated 03.02.2020 passed by the jurisdictional foreign court via email to respondent No.2, as well as in accordance with the Hague Convention on the Service

Abroad of Judicial and Extrajudicial Documents, 1965.

7.11 Subsequently, due to respondent No. 2 continuing to detain the minor child in her illegal custody in India, in the teeth of the order dated 03.02.2020 passed by the jurisdictional foreign court i.e. the Circuit Court of Benton County, Arkansas, the petitioner has preferred the present writ petition.

Scope of inquiry

7.12 It is settled law in international parental child custody cases that where a foreign court is seized of the custody issue and the child has not spent a very long time in India, the role of the Indian court is limited to making a summary inquiry to examine if any harm will be caused upon return of the child to the native country in terms of the orders of the jurisdictional foreign court. No detailed analysis of who should be granted custody need be carried out as that is the function of the jurisdictional foreign court.

7.13 In the present case, there is no specific pleading by respondents No. 2-4 that the petitioner is a bad father. The factual matrix shows that the minor child was brought to India for a surgery and subsequent recuperation for a limited period of time (05.02.2019- 26.09.2019). Despite this, the child has not been returned to the USA, even though he has recovered and there is no medical exigency requiring his continued stay in India.

7.14 The jurisdictional foreign court i.e. the Circuit Court of Benton County, Arkansas is seized of the custody dispute between the petitioner and respondent No.2, and has passed an order dated 03.02.2020, directing that the child be returned to India. The order is in the nature of an interim order and leaves it open for respondent No.2 to agitate her cause, including the question of custody of the minor child, before the jurisdictional foreign court.

7.15 Consequently, this Court may direct the return of the child to his native country USA on the same terms outlined by the Hon'ble Supreme Court in ***Nilanjan Bhattacharya v. The Station House Officer Koramagla and others : 2020 (2) DMC 220*** as well as this Hon'ble Court in ***CRWP-7400-2020 titled as 'Parminder Kaur Brar v. State of Punjab and others' decided on 17.12.2020***. Baseless claims by respondents No. 2 to 4

7.16 The claim that the child is not fully healthy and requires a second surgery is plainly false, as is evident from the certificate dated 17.09.2019 of the child's surgeon Dr. Anurag Krishna. The petitioner has also spoken to Dr. Anurag Krishna who has stated that there is nothing preventing the child from returning to the USA. The same has been affirmed by the petitioner on affidavit.

7.17 Respondent No.2 has relied on certain out of context Whatsapp extracts to level false allegation that the petitioner is suicidal. The allegation is clearly belied by the petitioner's detailed psychological evaluation report dated 21.10.2020 which concludes that "[the Petitioner] is free of any neurophysiological problems and he has no diagnosable mental health problems at this time. He is free of depression, anxiety and reports no suicidal ideations".

7.18 The US Embassy Welfare Report clearly mentions that the welfare report is not a child custody evaluation and further qualifies it by saying that the visiting consular officer is not trained in child protection or social work as mentioned in the disclaimer.

7.19 The petitioner also has requisite skills to care for his child in the USA, and has put the same on affidavit. He also has the option to work from home permanently, enabling him to care for the child full time when required. Further, the petitioner's mother Smt. Usha Hanumantharayya has a valid US visa till 23.02.2024 and has expressed her willingness to care for the minor child to this Hon'ble Court, which was also a relevant factor in the judgment of the Hon'ble Supreme Court in Nilanjan Bhattacharya (Supra).

7.20 The child is a U.S. citizen; the jurisdictional foreign court in Benton County, Arkansas is already seized of custody proceedings. No proceedings are pending in India in respect of the child's custody. The test that the child will suffer harm if returned to his native jurisdiction is not satisfied. Consequently, this Hon'ble Court may direct the repatriation of the minor child to the USA on the same terms as in Nilanjan Bhattacharya (supra) and in Parminder Kaur Brar (supra), pursuant to exercise of summary jurisdiction.

7.21 In support of his arguments, learned Counsel for the petitioner has placed reliance on the observations in ***Nilanjan Bhattacharya v. State of Karnataka and ors : 2020(4) RCR (Civil) 660***; ***Nilanjan Bhattacharya v. The Station House Officer Koramagla and ors : 2020 (2) DMC 220***; C***RWP-7400-2020 titled as 'Parminder Kaur Brar v. State of Punjab and others' decided on 17.12.2020***; ***Yashita Sahu v. State of Rajasthan : 2020 (3) SCC 67***; ***Surya Vadanan v. State of Tamil Nadu : 2015 (5) SCC 450***; ***Dr. V. Ravi Chandran v. Union of India : 2020 (1) SCC 147***; ***Lahari Sakhamuri v. Sobhan Kodali : 2019 (7) SCC 311***; ***Sandeep Kaur Dhillon v. State of Punjab : AIR 2016 (NOC 707) 328*** and ***Mrs. Elizabeth Dinshaw v. Arvand M.Dinshaw and another : 1987 (1) SCC 42***.

8. Mr. Munish Dadwal, Asstt. A.G., Haryana learned State Counsel has submitted that respondent No.1-State of Haryana will abide by the orders passed by this Court.

9. Mr. Satish Tamta, Learned Senior Counsel for respondents No.2 to 4 has made the following submissions:-

9.1 The petitioner has not approached the Court with clean hands and has also not approached the Court at USA with clean hands. Certain facts that highlight the conduct of petitioner have been concealed by him. The manipulative nature of petitioner is evident, at one end he has filed the present case saying that the minor child has been abducted, whereas it is more than clear from his statements that he was aware and in fact wanted respondent No.2 and minor child to reside with respondents No.3 and 4 at their home, which would help respondent No.2 to start work so that more money could flow into their accounts.

9.2 The custody case in USA was filed immediately after respondent No.2 e-mailed the petitioner requesting him to return the money to respondent No.3, taken for land purchase, the email was sent on 14.01.2020 and the case was filed on 30.01.2020. The petitioner has assumed on the basis of a consent given by both the petitioner and respondent No.2, that he is the best/better guardian to the minor child. From a bare perusal of documents placed by the petitioner, it becomes evidently clear for what purpose respondent No.2 was sent to India and with the minor child.

Medical condition of the minor child.

9.3 The travel to India of respondent No.2 with her minor child pre-planned after the diagnosis of medical condition of minor child known as Hydronephrosis on 31.01.2019 at USA.

9.4 The minor child's one kidney was operated on 14.03.2019 at Max Hospital Saket, Delhi.

9.5 Though there is slight improvement seen in the last report on 31.01.2020, there can be no lapses as that could be extremely fatal for the life of the minor child as he cannot be left alone as he may consume excessive water thereby worsening his condition. It would not be possible to provide such extreme medical care and supervision in USA.

Petitioner's vision of settling in India.

9.6 Ingraining of the minor child to be completely fixed to his Indian roots was one of the reasons why the petitioner took the decision to send respondent No.2 and their minor child to India for permanent settlement. The engagement and wedding all took place in India as per Hindu customs and traditions. Even the minor child's first birthday was celebrated in India.

9.7 Disconnection of the minor child from his roots was a cause of immense concern to the petitioner. He was not satisfied with the level of education imparted in American schools. It was made clear in recorded counselling session dated 24.01.2019 that petitioner desired that his child should study in India.

9.8 Respondent No.2 on the instructions of the petitioner had earlier also travelled to India with the minor child in 2017 and 2018, with the sole aim of permanently settling in India. In 2018 the minor child was also enrolled in preschool in India as per the wishes of the Petitioner. It was the petitioner who himself selected the preschool "Pallavan" while he was here in Indian in April, 2019 and accordingly respondent No.3 made the payment for admission.

9.9 Petitioner consistently purchased more and more land in India, specially in Bangalore, his home town as he constantly wished to settle back in India. In every possible conversation of his with the Respondent No.2 he made sure to push her to ask respondent No.3 for funds to purchase land.

9.10 The emphasis of Indian way of life is stated clearly by the petitioner in his additional affidavit dated 15.06.2020 filed before this Court.

9.11 Planning of travel and settling in India was a joint decision taken by both the parties, in fact the petitioner was the person pushing respondent No.2 to start working in India which has been captured in a WhatsApp conversation dated 11.01.2019 between the parties.

9.12 Due to the financial difficulty being faced by the petitioner he had time and again pushed respondent No.2 to go to India and settle there and start working.

Temperamental/suicidal nature of the petitioner.

9.13 The petitioner has temperamental issues and gets angry over small things, his temper can completely go out of control resulting in respondent No.2 fearing for her life and that of her minor child, once such incident had even forced her to call women's shelter while in USA, on 05.11.2018, which she had informed to her brother and uncle immediately via email.

9.14 Respondent No.2 was constantly living in fear while with the Petitioner. On one or the other pretext he would keep on reminding her of his suicidal tendencies. The same was constantly used a weapon to mentally torture respondent No.2. Multiple times has the same been written in black and white by the petitioner including email dated 22.09.2015 and WhatsApp conversation dated 30.06.2018.

9.15 Various other issues which are hacking/bugging/placing of hidden cameras inside the house when they were living together in USA scare the respondent No.2 as to the extent the petitioner can go to cause harm to her and their child.

Petitioner setting up moles inside the house of respondent No.2 to get information and falsely frame her.

9.16 The calculating nature of petitioner is evident from the fact that he has constantly tried to disrupt their marriage by his own acts and deeds. He has no interest whatsoever in the minor child. Even before there were any issues between the parties, the petitioner in a clandestine manner engaged with old house help of respondents No.3 and 4, gave her a phone and amount of Rs.10,000/- who concocted stories about respondent No.2 being a characterless women having multiple affairs with different men. The petitioner also engaged private detectives to keep track of her every move and shot pictures of random people stating that she is having affairs with all these men.

9.17 The overall well-being of the child is clearly in the hands of respondent No.2 which is in the best interest of the minor child as has been ascertained by the US Embassy, Delhi when they visited the minor child as the Petitioner had complained that the minor child was being held captive by the respondents No.2 to 4. A detailed report was given by them stating that the minor child is a happy, healthy and smart child who is being taken care by respondents No.2 to 4 jointly. The physical and mental well-being of the minor child has been assessed by a foreign agency which has stated him to be in safe hands and being looked after well. The minor child is currently enrolled at Shri Ram School, Aravali, Gurugram, one of the best schools in India. The decision to enrol the child in the school in India was always of the petitioner as he believes that India education system is the best in the world, as he himself was educated in India.

9.18 The mere fact that the petitioner nor any of his family members have visited the minor child till date, after the minor child's surgery and even after the Court had stated in order dated 17.06.2020 that the petitioner is free to come and meet the child, take him out and stay with him. Respondent No.2 had even stated that the petitioner can come and stay with them at respondent No.3 and respondent No.4 house. Still till date no effort has been made by the petitioner or his family members to meet the minor child, not even once. This shows the level of interest of the petitioner or of his family to be involved in the upbringing of the minor child and clearly shows the true intent of the petitioner which is to harass respondent No.2.

Learned Counsel for respondents No.2 to 4 has accordingly prayed for dismissal of the petition.

9.19 In support of his arguments, learned Counsel for respondents No.2 to 4 has placed reliance on the observations in ***Nithya Anand Raghavan v. State (NCT of Delhi) : 2017 (8) SCC 454***; ***Kanika Goel v. State (NCT of Delhi) : 2018 (9) SCC 578***; ***Veena Kapoor v. Varinder Kumar Kapoor : 1981 (3) SCC 92***; ***Prateek Gupta v. Shilpi Gupta : 2018(2) SCC 309***; ***Roxann Sharma v. Arun Sharma : 2015 (8) SCC 318***; ***Lahari Sakhamuri v. Sobhan Kadali : 2019(7) SCC 311***; ***Ruchi Majoo v. Sanjeev Majoo : 2011 (6) SCC 473*** and ***Yashita Sahu v. State of Rajasthan : 2020 (3) SCC 67***.

Report of the Amicus Curiae

10. Mr. Anil Malhotra, learned Counsel appointed as amicus curiae has submitted that on 14.07.2020, this Hon'ble Court had granted time to him to interact with the parties in order to arrive at some logical conclusion. In pursuance thereof, he has interacted with the petitioner and respondent No.2 separately on phone/whats-app calls on a number of occasions from 15.07.2020 to 07.08.2020. After interacting with the petitioner and respondent No.2 to ascertain their view points and hear their respective stands, it transpires that no mutually acceptable stand or neutral position can be arrived at which is agreeable to both sides. Hence, despite best efforts and lengthy conversations by him, no conclusion acceptable to both sides has been arrived at in the best interest and welfare of the child.

11. For rendering assistance to this Court, learned Amicus Curiae has submitted report on inter-parental child custody issues and position of foreign court orders in Indian law giving all possible aspects and position of law in this regard. The relevant part of the said report reads as under:-

> "As per the prevalent position now, irrespective of any foreign Court Order/agreement/ arrangement between parties, it shall be open for the Indian Courts to again independently determine the welfare of the child, in its best interest, and there will be no automatic Order or direction of return to the home country of the foreign child. In this process, the principle of Comity of Courts may have discretionary application and the doctrine of jurisdiction of closest contact to determine ultimate welfare of the child will apply. This is the latest position of law.
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> Since, there is no statute in India defining, recognising or identifying inter-parental child removal, especially in the international context, the Indian Courts over a period of time have been adjudicating matters, on the basis of individual facts and circumstances, to decide as to what relief should be granted to the parties. Hence, there is a variation of decisions and there is no consistent viewpoint. The welfare of the child principle being the paramount consideration, there is a tendency among Indian Courts to digress from a consistent approach and accordingly, precedents may be distinguished or differed, depending on the factual matrix and circumstances which may differ from case to case. Thus, the jurisprudence in child abduction law varies.
>
> The evolving mirror Order jurisprudence in child custody matters in India, wherein the US Court passed mirror Order directions to comply with the judgment of the Delhi High Court, can be a possible way forward to establish a precedent for the return of children to their homes of foreign jurisdictions. Subject to the welfare and best interest of the child determination by a High Court, the mirror Order formula, evolved by judicial mechanisms through the far-sighted wisdom of the

> Indian Courts, to ensure the best interests and welfare of the children, as well as to provide them a family life with love, care and the affection of both parents, can be cited as a possible method, for the return of children to foreign jurisdictions, until a law on the subject is enacted, and some adjudicatory legal resolution process is evolved by any prospective law.
>
> The concept of single parent custody in preference to joint/shared parenting is not in the best interest and welfare of the child. The definition of the best interest of the child has been expounded by the Supreme Court in Lahari Sakhamuri to mean that "...it cannot remain the love and care of the primary care giver, i.e., the mother in case of the infant or the child who is only a few years old. The definition of "best interest of the child" is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identify, social well-being and physical, emotional and intellectual development." Hence, co-parenting, shared or joint custody by any mutually agreeable parenting plan is in the best interest and welfare of the minor child so that he receives the love, care, attention, parenting, besides monetary and other support of both parents."

12. In ***CRWP No.7400 of 2020 titled as 'Parminder Kaur Brar v. State of Punjab and others' decided on 17.12.2020*** this Court, while noticing that the petition for issuance of habeas corpus for custody of child or repatriation of child in case of inter country child removal involves difficult questions, observed as under:-

> "The question of the custody of child, as observed by Hon'ble Supreme Court in ***Lahari Sakhamuri v. 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 v. Romani Singh : 2017 (1) RCR (Civil) 1063***, 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 Hon'ble Supreme Court in ***Rosy Jacob v. Jacob A. Chakramakkal : (1973) 1 SCC 840*** and 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."

13. In the present case also the facts and circumstances are no less puzzling to make difficult for this Court to weigh the conflicting parameters and decide on which side the balance tilts.

Question of maintainability of the habeas corpus petition

14. 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 v. Suggi alias Nazma Begam (1960) 1 SCC 597***; ***Manju Tiwari v. Rajendra Tiwari : AIR 1990 Supreme Court 1156***; ***Syed Saleemuddin v. Dr. Rukhsana : 2001(2) R.C.R.(Criminal) 591*** and ***Tejaswini Gaud and others v. Shekhar Jagdish Prasad Tewari and others (SC) : 2019(3) R.C.R.(Civil) 104***.)

15. In ***Crl. Appeal No.127 of 2020 SLP (crl.) No.7390 of 2019 titled Yashita Sahu v. State of Rajasthan and others decided on 20.01.2020*** while referring to its judgments in ***Elizabeth Dinshaw v. Arvand M. Dinshaw & Ors. : (1987) 1 SCC 42***; ***Nithya Anand Raghavan v. State (NCT of Delhi) & Anr. : (2017) 8 SCC 454*** and ***Lahari Sakhamuri v. 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.

Not the legal rights of the parties but the best of the interest and welfare of the child are the paramount consideration

16. 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 v. 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 v. Sumedha Nagpal : 2008(4) R.C.R.(Civil) 928*** Hon'ble Supreme Court referred to these observations made in ***Howarth v. 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. Whenever a question arises pertaining to the custody of a minor child whether before Family Court/Guardian Judge on a petition for custody of the minor child under the Guardians and Wards Act, 1890, Hindu Minority and Guardianship Act, 1956 etc. or before High Court or Supreme Court on a habeas corpus petition, 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 v. Arvand M. Dinshaw & Ors.(1987) 1 SCC 42*** and ***Syed Saleemuddin v. Dr. Rukhsana : 2001(2) R.C.R.(Criminal) 591***).

Determination of best of interest and welfare of child

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 v. Walker & Harrison (1981) New Zealand Recent Law 257***.)

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

> "42. ....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.
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> 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."

20. Hon'ble Supreme Court in ***Nil Ratan Kundu v. Abhijit Kundu : 2008(3) RCR (Civil) 936*** set out the principles governing the custody of minor children in paragraph 52 as follows:-

> "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 well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

21. In ***Lahari Sakhamuri v. Sobhan Kadali : 2019(7) SCC 311*** Hon'ble Supreme Court observed as under:-

> "43. The expression "best interest of child" which is always kept to be of paramount consideration is indeed wide in its connotation and it cannot remain the love and care of the primary care giver, i.e., the mother in case of the infant or the child who is only a few years old. The definition of "best interest of the child" is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identify, social well-being and physical, emotional and intellectual development".
>
> 49. The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.

22. In ***Civil Appeal No.3559 of 2020 titled as Smriti Madan Kansagra v. Perry Kansagra decided on 28.10.2020*** Hon'ble Supreme Court observed as under:-

> "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."

Inter country child removal and issue of repatriation

23. India is not signatory to the Hague Convention on Civil Aspects of Inter-national Child Abduction, 1980 or the Hague Convention on Parental Responsibility and Protection of Children, 1996. 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 proceedings in USA Court and the order passed by the USA Court

24. In the present case the petitioner approached the Circuit Court of Benton County, Arkansas, USA and the said Court passed the following order dated 03.02.2020 :-

> "Now on the 3rd day of February, 2020, this matter comes before the Court and the Court, being well and sufficiently advised finds and orders as follows:
>
> 1. The Court has jurisdiction over the parties and subject matter and venue is proper herein.
>
> 2. Defendant has removed the parties' minor child to India and remained there without the consent of plaintiff.
>
> 3. Defendant has alienated the child from plaintiff, which is harmful to the child's well being.
>
> 4. Plaintiff is awarded primary care, custody and control of the minor child, Aaditya Kiran pending further orders of the Court.
>
> 5. Defendant shall return Aaditya Kiran to plaintiff immediately.
>
> 6. Hearing will be scheduled promptly upon request by either party."

25. Admittedly, the minor child is a U.S. Citizen. The jurisdictional foreign court in Benton County, Arkansas is already seized of custody proceedings. No proceedings are pending in India either for dissolution of marriage of the petitioner and respondent No.2 or in respect of the custody of the minor child.

26. The fact that there is a pre existing order of the foreign Court in favour of the petitioner is a factor to be reckoned in favour of the petitioner but the same is not determinative of the question of repatriation of the minor child for permitting the same which question has to be decided on the test of best of interest and welfare of the minor child.

27. In ***Lahari Sakhamuri v. Sobhan Kodali : (2019) 7 SCC 311*** Hon'ble Supreme Court observed that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc., cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

Whether to conduct summary inquiry or elaborate enquiry.

28. In ***Nithya Anand Raghavan v. State of NCT of Delhi (SC) : 2017(3) R.C.R.(Civil) 798*** Hon'ble Supreme Court reiterated the law as under:-

> "24..... 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 preexisting 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.

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 preexisting 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."

29. In ***Prateek Gupta v. Shilpi Gupta and others : (2018) 2 SCC 309*** following its earlier judgment in ***Nithya Anand Raghavan v. State of NCT of Delhi (2017) 8 SCC 454*** Hon'ble Supreme Court held as follows:-

"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 attentuation's. 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 fold".

The relief in the present case

30. In the present case, 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 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 child lies in return to USA 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 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 child, I am of the considered view that the questions involved deserve 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.

31. In the present case the minor child, born on 21.01.2016, now aged about five and half years, is citizen of USA by birth. The minor child was living with both of them in USA. The minor child has spent period of more than three years in USA and two and half years in India out of five and half years.

Neither the period of three years spent by the minor child in USA nor the period of two and half years spent by the minor child in India in his formative initial years can be said to have resulted in his complete integration with the social, physical, psychological, cultural and academic environment of USA or India. The petitioner is seeking his repatriation to USA while respondent No.2 is urging for allowing his continued stayed in India and the grounds asserted and controverted in this regard may be adjudicated upon.

Medical condition of minor-Aaditya Kiran

32. Admittedly, in the present case minor child-Aaditya Kiran was diagnosed as a case of bilateral hydronephrosis nephrosis mild on the left and moderate to severe on the right as mentioned in report dated 31.01.2019 of mana Medical Associates. His condition required correction by surgery.

33. Due to unavailability of surgery slots in the U.S.A., the petitioner and respondent No. 2 decided to have the surgery conducted in India by Dr. Anurag Krishna at Max Hospital Saket. Admittedly, respondent No.2 could not travel alone with minor child. Accordingly, international travel consent form was executed between the petitioner and respondent No.2, permitting the child to travel with respondent No.2 to India between the dates of 05.02.2019 and 26.09.2019.

34. Minor child travelled to India with respondent No. 2 on 05.02.2019, in terms of the travel consent. He underwent corrective surgery on 14.03.2019 at Max Hospital, Saket. Dr. Anurag Krishna issued certificate that minor-Aaditya Kiran, who had a horseshoe kidney with bilateral hydronephrosis and right side pelvic ureteric junction obstruction, underwent Rt. pyeloplasty on 14.03.2021. He saw him during follow up on 12.07.2019 and he is doing well he needs to be reviewed 6-7 months post surgery along with a fresh Ultrasound and Renal Scan.

35. A perusal of report dated 31.01.2020 of Mahajan Imaging Centre DTPA shows that in the above said report the impression was recorded as under:-

> "Horseshow kidney with functioning parenchyma connecting the two moieties.
>
> Non-obstructed right moiety showing residual hydronephrosis with mildly impaired cortical function. Partially obstructed left moiety with preserved cortical function.
>
> Compared to the previous DTPA scan done on 13.02.2019, improvement in cortical function and drainage pattern of the right moiety is noted."

36. Respondent No.2 has claimed that though there is slight improvement seen in the last report on 31.01.2020, there can be no lapses as that could be extremely fatal for the life of the minor child as he cannot be left alone as he may consume excessive water thereby worsening his condition. It would not be possible to provide such extreme medical care and supervision in USA, the same reason why a call was taken to get the medical surgery of the minor child done in India. Respondent No.2 has also claimed that respondent No.4, mother of respondent No.2, with whom the minor child resides is a doctor. Her brother is also a known doctor and stays close to respondents No.2 to 4. The brother of respondent No.2 is also a doctor. It is in the interest of the minor child to stay in Gurugram, India.

37. However, respondent No.2 has not produced any further medical report or medical treatment record to show that the minor child requires any further regular medical/surgical treatment apart from usual periodical review which it will not be difficult to arrange for even in the USA without involving any unnecessary delay of any kind. The petitioner has sworn that he had spoken to Dr. Anurag Krishna who had stated that there was nothing to prevent the minor child from returning to USA. Therefore, repatriation of minor child to USA will not be harmful to him on account of his medical condition or discontinuity of his medical/surgical treatment in India and his continued stay in India is not necessary on account of his alleged bad medical condition for his future medical/surgical treatment, if so required and therefore, the fact that grandmother and her brother and maternal uncle of the minor child are doctors is not of much significance to tilt the balance in favour of respondent No.2.

Petitioner's vision of settling in India

38. Respondent No.2 has claimed that the petitioner wanted ingraining of the minor child to be completely fixed in Indian roots and desired that his child should study in India. Respondent No.2 on instructions of the petitioner had earlier visited India in the year 2017 and 2018 with the sole aim permanently settle in India. In 2018 the minor child was enrolled in pre school in India as per wishes of the petitioner. In April, 2019 the petitioner selected pre school 'Pallavan' for the minor child. The petitioner purchased land in Bangalore for settling back in India and pushed respondent No.2 to ask respondent No.3 for funds to purchase land. The petitioner wanted respondent No.2 to start working in India and to make money for building a wonderful house as mentioned in WhatsApp message dated 11.01.2019.

39. Even though e-mails and whatsApp messages have been relied upon by respondent No.2 but admittedly, the petitioner is permanent resident of Benton Country, Arkansas, USA and is currently employed as a Senior Software Engineer in Walmart Labs, Bentonville, USA. The petitioner has sufficient financial resources to maintain respondent No.2 and the minor child. The petitioner had purchased house in Centerton, Arkansas, USA for settlement which negates the claim of respondent No.2 as to the petitioner being desirous of immediately permanently settling in India. The fact that the petitioner asked respondent No.2 to arrange funds for purchase of land and purchased land in

Bangalore does not show his plan in the immediate future to shift and permanently settle in India. On the other hand, the claim of the petitioner of his vision of continuing to live in USA is supported by international travel consent form requiring return of respondent No.2 and minor child on 26.09.2019 agreed and consented to by respondent No.2. Any change to the travel plan was subject to discussion and consent of both the parties. No change in the travel plan was so discussed and consented to by both the parties. Respondent No.2 could not have travelled to India with the minor child alone without the petitioner had there been no such travel consent. Respondent No.2 having travelled thereunder to India but having failed to return in terms thereof cannot be allowed to take advantage of her wrong and must return to USA with the minor child as per her legal and equitable obligation to do so.

Temperamental suicidal nature of the petitioner

40. Respondent No.2 has claimed that the petitioner has temperamental issues and gets angry over small things, his temper can completely go out of control resulting in respondent No.2 fearing for her life and that of her minor child, once such incident had even forced her to call women's shelter while in USA on 05.11.2018 regarding which she had informed her brother and uncle immediately via email. Respondent No.2 was constantly living in fear with the petitioner as on one or the other pretext, he kept on reminding her of his suicidal tendencies. The same was constantly used a weapon to mentally torture the Respondent No.2 which was also mentioned in email dated 22.09.2015 and WhatsApp conversation dated 30.06.2018. Various other issues of hacking/bugging/placing of hidden cameras inside the house when they were living together in USA also scared respondent No.2 that the petitioner can go to any extent to cause harm to her and minor child.

41. However, respondent No.2 has not produced any complaint made to any authority in the USA. Respondent No.2 has not initiated any proceedings for dissolution of her marriage with petitioner on the grounds of mental and physical cruelty. Tendency to commit suicide, which has the factual background mentioned and consequent emotional trauma, cannot be said to involve any tendency to cause harm to others. The petitioner has produced his psychological evaluation report dated 21.10.2020 given by Centre for Psychology which concluded that the petitioner is free of any neurophysiological problems and he has no diagnosable mental health problems at this time. He is free of depression, anxiety and reports no suicidal ideations.

42. Consequently, there is no cogent and reliable material to hold that in view of mental health and suicidal tendency of the petitioner, repatriation of minor child to USA will not in the best of his interest and welfare.

Relevance of report of U.S. Embassy regarding welfare of the child

43. Respondent No.2 has claimed that the overall well-being of the child is clearly in the hands of respondent No.2 which is in the best interest of the minor child as has been ascertained by the US Embassy, Delhi when they visited the minor child as the petitioner had complained that the minor child was being held captive by respondents No.2 to 4. A detailed welfare report was given by them stating that the minor child is a happy, healthy and smart child who is being taken care by respondents No.2 to 4 jointly. The physical and mental well-being of the minor child has been assessed by a foreign agency which has stated him to be in safe hands and being looked after well.

44. On the other hand, petitioner has asserted that the welfare visit report clearly mentioned that the visit is not a child custody evaluation and further qualified it by saying that the Visiting Consular Officer is not trained in child protection or social work as mentioned in the disclaimer.

45. A perusal of the disclaimer to report dated 17.12.2019 shows that the Vienna Convention on Consular Relations authorizes US Embassy and/or Consulate General personnel to visit U.S. citizens to ascertain their whereabouts and general welfare. In cases involving minor children, consular personnel must have the permission of the child's local parent or guardian to conduct a visit. The consular officer, who is generally not trained in child protection, social work or other similar disciplines, writes a report of his or her observations. This report is not a child custody evaluation.

46. In view of the above referred disclaimer, welfare report dated 17.12.2019 cannot be said to be child custody evaluation. Further the report is based on interaction with respondent No.2 and minor child in the presence of respondents No.3 and 4 and is based on personal observations by the visitors who were not trained in child protection, social work or other similar disciplines. Therefore, the welfare report prepared by US Embassy visitors is not of any significance in deciding the question of welfare of the minor child.

Giving of personal care and attention to the minor child.

47. Respondent No.2 has claimed that it would not be possible to provide such personal care and supervision to the minor child in USA as is being given to him by respondents No.2 to 4 in India.

48. However, a perusal of the welfare report dated 17.12.2019 of Visiting Consular of US Embassy shows that respondent No.2 told the Visiting Consular that her aunt picks up minor child from school and brings him home each day and stays with him throughout the day while the mother and grand-parents are at work. The minor child has a domestic helper who takes care of his needs and plays with him. It is evident from the report that even respondent No.2 and her parents are not giving whole day personal care and attention to the minor child.

49. The petitioner has filed affidavit dated 15.06.2020 that the petitioner also has requisite skills to care for his child in the USA. The petitioner has also the option to work from home permanently, enabling him to care for the child full time when required. Further, the Petitioner's mother Smt. Usha Hanumantharayya has a valid US visa till 23.02.2024 and has expressed her willingness to take care of the minor child to this Court.

50. In these facts and circumstances, there is no reasonable ground to believe that the minor child cannot be given due personal care and attention in USA and therefore, repatriation of the minor child cannot be declined on the ground of lack of requisite personal care and attention to the minor child in USA.

Petitioner setting up moles inside the house of the respondent No.2 to get information and falsely frame her.

51. Respondent No.2 has made detailed averments of her mental and physical cruelty and making of false accusation of extra marital affair by the petitioner with detailed allegations regarding installation of cameras, surveillance through maid servants, engagements of private detectives etc. but the petitioner has not filed any petition for dissolution of her marriage on the ground of mental or physical cruelty and did not make any complaint to the police or the Court in India or USA. These averments are required to be adjudicated upon on petition for dissolution of marriage or custody of the minor child. Respondent No.2 must prove the grounds of her entitlement to custody of the minor child before the US Court which had jurisdiction regarding the same and before which the proceedings are pending now particularly when respondent No.2 did not file any proceedings in India for dissolution of her marriage with the petitioner and also for custody of the minor child.

52. The minor child has been living in India for a period of about two and half years which also included the period of about one and half years of lock-down/restrictions/social distancing due to pandemic of Covid-19. Stay of the minor child in India has been far too short a period to facilitate his acclimatization and integration to social, physical, psychological, cultural and academic environment of India. The minor child if repatriated to USA will not be subjected to entirely foreign, system of education divorced from the social circles. No doubt, there is likelihood of the minor child being psychologically disturbed due to his separation from respondent No.2-his mother, who is the primary care giver to him and under whose care he has remained since his birth but his mother (respondent No.2) has already wrongfully deprived him of the love and affection of his father with whom also the minor child lived since his birth till removal to India. The forced company of his maternal grandparents (respondents No.3 and 4) and other relatives away from his father cannot be said to be conducive to his physical and psychological well-being. The minor child being citizen of USA will have better future prospects on return to USA. Unless the minor child is immediately repatriated to USA, his inherent potentialities and faculties would suffer an immeasurable setback. Natural process of grooming in the environment of his native country- USA is indispensable for comprehensive and conducive development of his mental and physical faculties. There are compelling reasons to direct return of the minor child to USA as prayed for by the petitioner and such return is not shown to be harmful to the minor child in any manner. Continuance of the minor child in India will interfere with and will be harmful to his overall growth and grooming and will be prejudicial to his interest and future prospectus. There is no material to suggest that return of the minor child to USA would result in psychological physical or cultural harm to him. 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.

53. 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 child that order be passed for return of the minor child to USA, from where he was removed and it will be appropriate that the question of appointment of guardian/handing over custody of the minor child to either of the parents is left for adjudication by the Court of competent jurisdiction in USA on the basis of paramount consideration of welfare and best of the interest of the child.

54. In these above discussed facts and circumstances of the case, observations in ***Nithya Anand Raghavan v. State (NCT of Delhi) : 2017 (8) SCC 454***; ***Kanika Goel v. State (NCT of Delhi) : 2018 (9) SCC 578***; ***Veena Kapoor v. Varinder Kumar Kapoor : 1981 (3) SCC 92***; ***Prateek Gupta v. Shilpi Gupta : 2018(2) SCC 309***; ***Roxann Sharma v. Arun Sharma : 2015 (8) SCC 318***; ***Lahari Sakhamuri v. Sobhan Kadali : 2019(7) SCC 311***; ***Ruchi Majoo v. Sanjeev Majoo : 2011 (6) SCC 473*** and ***Yashita Sahu v. State of Rajasthan : 2020 (3) SCC 67*** relied upon by learned Counsel for respondents No.2 to 4 are not of any help to respondents No.2 to 4.

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

(i) respondent No.2 is directed to return to USA along with minor child on or before 30.09.2021;

(ii) in case respondent No.2 opts to return to USA, the petitioner shall bear the travel and incidental expenses of respondent No.2 and the minor child for return to and also the expenses for their stay in USA till decision of the custody petition and the petitioner shall not initiate any criminal/contempt proceedings against respondent No.2 for inter country removal of the minor child;

(iii) if respondent No.2 fails to comply with aforesaid direction, respondent No.2 shall hand over custody of the minor child and his passport to the petitioner on 01.10.2021 or on such other date as may be agreed to by the petitioner;

(iv) in case respondent No.2 fails to hand over custody of the minor child and her passport to the petitioner on 01.10.2021 or on such other date as may be agreed to by the petitioner, respondent No.1 shall take over the custody and passport of the minor child from respondent No.2 and hand over custody and passport of the minor child to the petitioner on such date as may be agreed to by the petitioner;

(v) on custody of the minor child and his passport being handed over to the petitioner, the petitioner shall be entitled to take the minor child to USA;

(vi) in case passport of the minor child is not handed over to the petitioner or respondent No.1 by respondent No.2 on the ground of loss/damage etc., the petitioner shall be entitled to get the duplicate passport issued from the concerned authority; and

(vii) on such return of the minor child to USA, either of the parties shall be at liberty to revive the proceedings before US Court for appropriate orders regarding appointment of guardian and grant of custody of the minor child.

56. In ***Criminal Appeal No.127 of 2020 titled Yashita Sahu v. State of Rajasthan and others decided on 20.01.2020*** Hon'ble Supreme Court has observed as under :-

"18. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.

19.A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

22. In addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, email or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each."

57. In view of the observations in Yashika Sahu's case (supra) it is ordered that till filing of any such application by either of the parties for revival of the proceedings before the US Court and passing of any interim/final order by the US Court of competent jurisdiction on the same, respondent No.2 shall be entitled to visit the child and have his temporary custody from 10:00 a.m. to 5:00 p.m. on every Sunday or as agreed upon between the petitioner and respondent No.2 if respondent No.2 returns to and stays in USA or make video calls to the minor child for about half an hour on every day in between 5:00 p.m. to 6:00 p.m. (US time) or as agreed upon between the petitioner and respondent No.2 in case respondent No.2 does not return to and stay in USA and in such an eventuality, the petitioner shall bring the minor child to India to meet respondent No.2 and his maternal grand parents/other relatives once in a year.

58. 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.

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2022 ICO 592

07-04-2022
High Court of Kerala

O.P. (FC) No. 140 of 2022

Justice A Muhamed Mustaque, Justice Sophy Thomas

Smitha Antony *(Represented by, M P Madhavankutty (Adv.) & Mathew Devassi (Adv.) & Ananthakrishnan A Kartha (Adv.))*

Vs.

Koshy Kurian *(Represented by, Manju Antoney (Adv.) & R Anas Muhammed Shamnad (Adv.) & Anil Malhotra (Amicus Curiae))*

Equivalent Citations : 2022 (3) KLT 516

Referred Citations : 2007 ICO 12432

JUDGMENT

Sophy Thomas, J.

1. The mother of four minor children is before us, challenging Ext.P10 order of the Family Court, Pala dismissing her prayer for interim custody, and permission to take the children to Australia.

2. The petitioner and respondent are husband and wife. Four children were born in their lawful wedlock. The parents and the children were all in Australia, as the petitioner was employed there as a Staff Nurse. In the year 2019, the respondent came back to his native along with the four children and since then, the children were under his care and custody. The elder child, Maria Koshy, lodged a complaint before Ponkunnam Police, alleging ill-treatment from the part of her father and a crime was registered against him. Thereafter, the elder child was with the maternal grandmother, and the other children continued with the father. The petitioner came down from Australia to see her children, but she was not permitted by the respondent. So, she filed O.P No.772 of 2021 before Family Court, Pala along with I.A No.2 of 2021 for interim custody of the three children, who were under the custody of the respondent. The Family Court directed the respondent to produce the children before the court on 19.01.2022. But the respondent failed to do so, and so, she approached this Court by filing O.P (FC) No.52 of 2022. This Court gave custody of the three children to the mother subject to visitorial rights of the father, and the O.P (FC) was disposed of directing the Family Court to take a decision on the prayer for interim custody.

3. Meanwhile, the petitioner filed I.A No.5 of 2022 before the Family Court for permitting her to take the children to Australia, as it will be better for their education and well-being. After admitting objections and hearing the rival contentions from either side, the Family Court passed Ext.P10 common order in I.A No.2 of 2021 and I.A No.5 of 2022 granting interim custody of the children to the petitioner only till 22.03.2022 and to return the three children to the respondent, as she goes back to Australia. Her prayer for permission to take them to Australia was also rejected.

4. Assailing Ext.P10 order, petitioner/mother filed above O.P(FC) contending that, the elder daughter is being taken to Australia as permitted by Family Court, Pathanamthitta in O.P No.762 of 2021 filed by the

respondent herein. The other three children are also having valid visa, so that the petitioner can take, all of them together to Australia now itself. If she is permitted, they can be admitted in Australian school, this academic year itself, so that they can continue their studies there, smoothly. Originally, the children were studying in Australia, and the respondent took them back to his native. He is living in a rented house and he has no job or income. No female members are there in his house to attend the children, especially the two adolescent girl children. Whenever he goes out, he is locking the children inside the rented house. He is not able to provide proper food, dress or education to the children. The girl children, who are in their adolescent age, needs frequent attention, and emotional support of their mother for their welfare and well-being. The petitioner is able to attend all their needs. The elder daughter, who is now 15 years old, is capable of attending the younger children, whenever the petitioner will be out for her job.

5. We tried our level best to have an amicable settlement between the parties and persuaded them to go to Australia together with the children. But, the petitioner would say that, she is unable to bear the ill-treatment, both physical and mental, from the part of the respondent, and she is taking steps to get their marriage dissolved.

6. The O.P filed by the petitioner for getting guardianship and custody of the three children is pending before the Family Court. Only interim custody arrangements were made while the petitioner/mother was available here. It is true that, the petitioner/mother is employed in Australia as a Staff Nurse and she is financially capable to look after the children. She is ready to take the children to Australia and give them proper education and all facilities in life. If the petitioner is permitted to take all the children to Australia, they will grow together sharing the love and care between siblings. According to petitioner, with the money sent by her, the respondent was looking after the children. The younger three children were with the respondent from 2019 onwards and obviously, they are comfortable with their father.

7. Now the question mooted before us is whether this Court exercising supervisory jurisdiction under Article 227 of the Constitution can permit a father or mother to take the children abroad when the dispute is pending between them in Family Court regarding guardianship and custody of the children, and there is no consensus arrived, regarding taking the children abroad.

8. We sought the assistance of Amicus Curiae Advocate Sri.Anil Malhotra who is an expert in the field of child custody matters, to get more insight into this issue. Learned Amicus Curiae appeared before this Court online and submitted that, jurisdictional Family Court is the proper forum to decide on the question of guardianship of the person or the custody of or access to any minor. The High Court exercising supervisory power under Article 227 of the Constitution cannot bye pass the Family Court to decide on the question of guardianship of the person or custody of or access to any minor. Before deciding the question of guardianship and custody, if one party is permitted to take the children abroad, the other party will be non-suited, as there is little scope for enforcing orders of an Indian Court in a foreign land. Moreover, India is not a signatory to the 1980 Hague convention on the civil aspects of international child abduction (Hague Abduction Convention) nor are there any bilateral agreement in force between India and Australia concerning international parental child abduction.

9. Going by Section 7(1) explanation (g) of the Family Courts Act, 1984, and Section 9 of the Guardian and Wards Act, 1890, it is manifestly clear that the suits and proceedings including the suit or proceeding where any question of guardianship of the person of any minor or his custody or access to him arises, whether governed by any personal law, or the provisions to the Guardian and Wards Act, would be cognizable only by the Family Court, if the matter arises within the area over which the jurisdiction is exercisable by the Family Court (*Devilal Bhagat* v. *Rekha Bhagat* (2008 (3) KLT S.N 14 (C.No.16 :: 2007 ICO 12432).

10. O.P No.772 of 2021 filed by the petitioner for guardianship and custody of the three children is still pending before Family Court, Pala. Admittedly, the petitioner got custody and permission to take the elder child Maria Koshy to Australia. The respondent is opposing the prayer of the petitioner for custody of the

three children and also her request to take the children to Australia. Before taking a decision, based on materials and evidence, as to who is more competent to be the guardian of the children, and with whom the custody of the children shall be more safe, taking into account the welfare and well-being of the children, the Family Court could not have permitted the mother to take the children abroad. Pending O.P, if the petitioner is permitted to take the children to Australia, the respondent will be non-suited. So, it is for the Family Court to take a decision regarding the guardianship and permanent custody of the younger three children. The prayer of the petitioner to take them to Australia has to be enquired into and adjudicated upon, taking into account all the aspects of their well-being and welfare, rather than the rival claims put forward by the warring couples. The court while exercising its parens patriae jurisdiction should keep an open eye to the factual aspects, and ground realities to find out what will be the best option available to ensure the welfare of the children rather than the rights asserted by the parties.

11. Now the mother is available in Kerala and so, as long as the mother is available here, she is entitled to keep custody of the children, reserving visitation rights for the father. Since the matter needs an urgent decision, as the children are school going, the Family Court, Pala can be directed to dispose O.P No.772 of 2021 without further delay. Pending that O.P, if the petitioner goes back to Australia, the younger three children has to be returned to the respondent, of course subject to the final decision in the O.P. So, Ext.P10 order needs no interference except to the extent that the children shall be under the care and custody of the petitioner, as long as she is available in Kerala, reserving visitation rights for the father.

In the result, the O.P (FC) is disposed of directing the Family Court, Pala to dispose O.P No.772 of 2021 within a period of four months from today. The petitioner shall be permitted to adduce her evidence through electronic medium, if her physical presence is not possible at the time of evidence.

We place on record our appreciation for the valuable assistance rendered by the Amicus Curiae Adv.Sri.Anil Malhotra.

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