



**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA

&

HON'BLE SHRI JUSTICE BINOD KUMAR DWIVEDI

WRIT PETITION No. 22416 of 2024

***SAURABH MALPANI S/O SHRI SHYAM MALPANI THROUGH
SHYAM MALPANI***

Versus

***THE STATE OF MADHYA PRADESH THROUGH ITS PRINCIPAL
SECRETARY AND OTHERS***

Appearance:

*Shri Prabhijeet Jauhar – Advocate with Ms. Rosemary Raju and
Firoza Daruwala - Advocates for the petitioner.*

*Shri A.S. Garg – Senior Advocate with Shri Archit Jayakar with Shri
Raunak Choukse – Advocate for the respondents No.4 & 5.*

*Shri Sudeep Bhargava – Dy. Advocate General for the respondents /
State.*

Reserved on : 17.04.2026

Pronounced on : 20.04.2026.

ORDER

Per: Justice Vijay Kumar Shukla

The present petition is filed under Article 226 of the Constitution of India praying following reliefs:

7.1. Direct that Respondent No. 4 hand over custody of Respondent No. 5, the minor daughter, Miraya to the Petitioner so that she may be repatriated to Canada in the custody of the Petitioner in compliance with orders dated 13.07.2022, 07.10.2022, 03.03.2023, 16.02.2024, and 18.03.2024 passed by the Superior Court of Justice, Family Court, Ontario in the Petitioner's urgent motion being Court File No. FS-22-00030079-0000;



7.2. Direct that Respondent No. 4 hand over custody of all of Miraya's original documents such as her USA passport, her birth certificate, her OCI Card, and all other relevant documents;

7.3. Such other and further reliefs which this Hon'ble Court deems fit in the facts and circumstances of the case.

02. Initially, the respondents raised an objection regarding the maintainability of a writ of *habeas corpus* for the custody of minor children on the ground that a Co-ordinate Bench at Gwalior in the case of *Vishnu Gupta V/s State of M.P. & Ors. (Writ Petition No.10746 of 2024, decided on 16.06.2025)* held that a writ of *habeas corpus* in the matter of custody of a minor child is not maintainable.

03. *Per contra*, learned counsel for the petitioner argued that the writ of *habeas corpus* for custody of a minor child is maintainable. In support of his submission, he had placed reliance on the following judgments:

Jeewanti Pandey Vs. Kishan Chandra Pandey, (1981) 4 SCC 517.

Smt. Surindar Kaur Sandhu Vs. Harbax Singh Sandhu & another, (1984) 3 SCC 698.

Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw & another, (1987) 1 SCC 42.

Mr. Paul Mohinder Gahun Vs. Mrs. Selina Gahun, 2006(130) DLT 524.

Aviral Mittal Vs. The State & another, 2009(112) DRJ 635.

Shilpa Aggarwal Vs. Aviral Mittal & another, (2010) SCC 591.

Dr.V.Ravi Chandran Vs. Union of India, (2010) 1 SCC 174.

Sondur Gopal Vs. Sondur Rajini, (2013) 7 SCC 426.

Arathi Bandi Vs. Bandi Jagadrakshaka Rao & Ors, (2013) 15 SCC 790.

Surya Vadanani Vs. State of Tamil Nadu & Ors., (2015) 5 SCC 450.

Nithya Anand Raghavan Vs. State of New Delhi, (2017) 8 SCC 454.



Tippa Srihari Vs. State of AP, 2018 SCC Online Hyd 123.
Ganamukkala Sirisha Vs. Tippa Srihari,
MANU/SCOR/23943/2019.
Lahari Sakhamuri Vs. Sobhan Kodali, (2019) 7 SCC 311.
Varun Verma Vs. State of Rajasthan, 2019 SCC Online Raj
5430.
Yashita Sahu Vs. State of Rajasthan & Ors., (2020) 3 SCC
67.
Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tewari, (2019)
7 SCC 42.
Nilanjan Bhattacharya Vs. The State of Karnataka, 2020
SCC Online SC 928.
Ghadian Harshavardhan Reddy Vs. State of Telangana &
Ors., MANU/TL/1033/2021.
Vasudha Sethi Vs. Kiran Vs. Bhaskar, 2022 SCC Online SC
43.
Rohith Thammana Gowda Vs. State of Karnataka & Ors.,
2022 SCC Online SC 937.
Rajeswari Chandrasekar Ganes Vs. State of Tamil Nadu,
2022 SCC OnLine SC 885.
Abhinav Gyan Vs. State of Maharashtra & Another, Crl.
WP No.693/2021.
Abhay Vs. Neha Joshi & another, 2023 SCC Online Bom
1943.
Neha Joshi Vs. State of Maharashtra & another, SLP (Cri)
No.12866/2023.
Anupriya Vs. Abhinav Gyan, SLP (Crl) No.10381/2022.

04. Counsel for the petitioner further argued that in the case of ***Vishnu Gupta (supra)***, the Gwalior Bench has incorrectly held that the judgment passed by the Larger Bench by a Three-Judge Bench in the case of ***Nithya Anand Raghavan Vs. State (NCT of Delhi) & another, (2017) 8 SCC 454***, ***Kanika Goel Vs. State of Delhi & another, (2018) 9 SCC 578*** and a Two-Judge bench in the case of ***Prateek Gupta Vs. Shilipi Gupta & Ors., (2018) 2 SCC 309*** have not been considered.



05. We had considered all the judgments on the point of maintainability of writ of *habeas corpus* in regard to the custody of a child. We considered it apposite to refer the aforesaid judgments again, in order to consider that if the writ of *habeas corpus* is maintainable in respect of the custody of a child and what are the considerations for passing an order of custody of a child. In the case of ***Yashita Sahu*** (*supra*), the issue that whether a writ of *habeas corpus* is maintainable was considered. Paragraphs 10 to 12 are quoted as under:

"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , Nithya Anand Raghavan v. State (NCT of Delhi) [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] and Lahari Sakhamuri v. Sobhan Kodali [Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.

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

"46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court



against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition)."

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

"34. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom, etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful."

06. In the said judgment, there is reference and consideration of the earlier three-judge judgment in the case of ***Nithya Anand Raghavan*** (*supra*) and also the judgment in the case of ***Lahari Sakhamuri*** (*supra*). Paragraphs No.40 and 45 of ***Nithya Anand Raghavan*** (*supra*) are reproduced as under:-

"40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the



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

45. *In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana [Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247 : 2001 SCC (Cri) 841], has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13], it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in*



examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see Paul Mohinder Gahun v. State (NCT of Delhi) [Paul Mohinder Gahun v. State (NCT of Delhi), 2004 SCC OnLine Del 699 : (2004) 113 DLT 823] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

07. The same issue was considered by another three Judge Bench in the case of **Kanika Goel** (*supra*) wherein it has been held that in a Habeas Corpus Petition, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person and if the Court is called upon to consider the prayer for return of the minor female child to the native country, it must have the option to resort to a summary enquiry or an elaborate enquiry and the court must take into account the totality of the facts and circumstances while ensuring the best interest of the minor child. Various considerations for return to its native country pursuant to the orders passed by the foreign country were laid down in the said case.
08. A similar issue came for consideration again before a Judge Bench in the case of **Nilanjan Bhattacharya** (*supra*), and relevant paras 9 to 11 are quoted as under:-

" 9. This Court observed that in cases where the child is brought to India from a foreign country, which is their native country, the Court may undertake a summary inquiry or an elaborate inquiry. The Court exercises its summary jurisdiction if the proceedings have been instituted immediately after the removal of the child from their State of origin and the child has not gained roots in India. In such cases, it would be beneficial for the child to return to the native State because of the differences in language and social customs. The Court is not required to conduct an elaborate inquiry into the merits of the case to ascertain the paramount welfare of the child, leaving such inquiry to the foreign court. However, this Court clarified that : (Nithya Anand Raghavan case [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] , SCC p. 477, para 40).



“40 ... In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration.”

While discussing the powers of the High Court in issuing a writ of habeas corpus in relation to the custody of a minor child, this Court further observed : (Nithya Anand Raghavan case [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] , SCC pp. 479-80, para 46)

“46. ... Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of executing court.”

10. *In Prateek Gupta v. Shilpi Gupta [Prateek Gupta v. Shilpi Gupta, (2018) 2 SCC 309 : (2018) 1 SCC (Civ) 795] , this Court clarified that even if there is a pre-existing order of a foreign court with respect to the custody of the child, the principles of comity of courts, and “intimate contact and closest concern” are subservient to the predominant consideration of the welfare of the child. In that case, the parents and their minor child were residing in the US. After the separation of the parents, the father left the US with the child to come to India without any prior intimation. A US court passed an order that the mother has the sole physical and legal custody of the child and declared that the father will not have any visitation rights since he had violated an interim order of the Court directing him to return with the child to the Commonwealth of Virginia. Thereafter, the mother invoked the writ jurisdiction of the High Court of Delhi seeking a remedy of the writ of habeas corpus against the father alleging that he has the child in unlawful custody. The High Court observed [Shilpi Gupta v. Union of India, 2016 SCC OnLine Del 2561] that the most intimate contact of the parties and the child was with the US court, which had the closest concern with the well-being of the child and directed the father to hand over the custody to the mother. The decision of the High Court was set aside by this Court. While referring to the doctrines of the principle of comity of courts, and of “intimate contact and closest concern”, this Court observed : (Prateek Gupta case [Prateek Gupta v. Shilpi Gupta, (2018) 2 SCC 309 : (2018) 1 SCC (Civ) 795] , SCC pp. 338-39, paras 49-50)*



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

50. The doctrines of "intimate contact" and "closest concern" are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom, etc. with the portent of mutilative bearing on the process of its overall growth and grooming."

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

"32. Admittedly, Adithya is an American citizen, born and brought up in the United States of America. He has spent his initial years there. The natural habitat of Adithya is in the United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interests, the parties have obtained a series of consent orders concerning his custody/parenting rights, maintenance, etc. from the competent courts of jurisdiction in America. ...

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

36. It is true that the child Adithya has been in India for almost two years since he was removed by the mother—Respondent 6—contrary to the custody orders of the US court passed by the consent of the parties. It is also true that one of the factors to be kept in mind in exercise of the summary jurisdiction in the interests of the child is that application for custody/return of the child is made promptly and quickly after the child has been removed. This is so because any delay may result in the child developing roots in the country to which he has been removed. From the counter-affidavit that has been filed by Respondent 6, it is apparent that in the last two years Adithya did not have



education at one place. He has moved from one school to another. He was admitted in a school at Dehradun by Respondent 6 but then removed within a few months. In the month of June 2009 the child has been admitted in some school in Chennai."

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

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

"89. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for the custody of a minor was examined by this Court in Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari [Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42 : (2019) 3 SCC (Civ) 433], and it was held that the petition would be maintainable where the detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where the ordinary remedy provided by the law is either unavailable or ineffective.

99. Thus, it is well established that in issuing the writ of habeas corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of habeas corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a habeas corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a habeas corpus proceeding brought by one parent against the other for the custody of their child, the Court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the



interest which the State, as parents patriae, has in promoting the best interests of the child."

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

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

13. We held that the Paras 18 & 19 of our order dated 18.09.2025 that the judgment by Gwalior Bench in the case of ***Vishnu Gupta*** (*supra*) is *per incuriam* as the aforesaid finding is incorrect and as in the case of ***Yashita Sahu*** (*supra*), the Court had taken into consideration the judgment of Three-Judges in the case of ***Nithya Anand*** (*supra*), ***Kanika Goel*** (*supra*) and Two-Judges Bench in the case of ***Prateek Gupta*** (*supra*) and it was held that the writ of *habeas corpus* in respect of custody of a minor child is maintainable and the considerations for custody of a child in a writ of *Habeas Corpus* petition. In Para 20 of the order dated 18.09.2025, we held as under:

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

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

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



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

(4) The paramount consideration while exercising the writ of Habeas corpus for the change of custody of a child will be the welfare of the child."

14. *Facts of the case are as under:*

14.1. The petitioner and respondent no.4 were married on 18.01.2014 at Lonavala, Mumbai. Prior to the marriage, the petitioner had been residing abroad since the year 2006, initially in the United Kingdom and thereafter in the United States of America, having shifted to Chicago in 2011. After marriage, respondent no.4 joined the petitioner in Chicago in March 2014, and the parties commenced their matrimonial life there. In July 2016, they jointly purchased a residential apartment in Chicago. Their daughter, Miraya (respondent no.5), was born on 29.08.2016 in Chicago, United States of America and acquired U.S. citizenship by birth.

14.2. During the years 2017–2018, the petitioner, respondent no.4 and the minor child applied for permanent residency in Canada, which was granted on 07.06.2018. However, In August 2018, respondent no.4 commenced her Master's degree in Architecture at the Illinois Institute of Technology, Chicago and In August 2019, the petitioner shifted to Toronto, Canada to pursue an MBA at the Schulich School of Business. During this period, the family continued to reside between the United States and Canada. Owing to the outbreak of the COVID-19 pandemic, the minor child remained in India with the parents of respondent no.4 from December 2019 till September 2020 and in April 2020, respondent no.4 shifted to Canada after completion of her academic programme. In September 2020, the petitioner, respondent no.4 and the minor child returned to Canada as permanent residents and thereafter, respondent no.4 commenced work as an independent contractor in Toronto in November 2020.

14.3. The minor child was enrolled in McKee Public School, Toronto and



attended school physically from September 2021. After completion of his MBA, the petitioner also commenced employment with a pharmaceutical consulting company on a full-time work-from-home basis. During the period July–August 2021, the parties jointly explored purchase of residential property in Ontario and were covered under the Ontario Health Insurance Plan. On 27.01.2022, respondent no.4 informed the minor child's school that she would be travelling to India and would return in April 2022. Respondent nos.4 and 5 thus travelled from Toronto to India with return tickets dated 10.04.2022. The petitioner also travelled to India in March 2022 and had returned to Canada on 06.04.2022. However on the said return date, respondent no.4 communicated to the petitioner that she would not be returning to Canada with the minor child as scheduled. Shortly thereafter, on 11.04.2022, respondent no.4 informed the petitioner of her decision to enroll the minor child in a school at Indore.

14.4. Marital disputes arose between the parties and on 28.04.2022, respondent no.4 issued a legal notice seeking dissolution of marriage, which was replied to by the petitioner on 09.05.2022. Following the minor child's continued stay in India, the petitioner on 20.05.2022 initiated proceedings before the Superior Court of Justice, Ontario, Canada bearing Court File No. FS-22-00030079-0000 seeking, inter alia, return of the minor child to the jurisdiction of Canada. The said proceedings were duly served upon respondent no.4 on 10.06.2022 and Respondent no.4 entered appearance in the said proceedings and sought adjournment. Meanwhile the proceedings before the Canadian Court were pending, the respondent no.4 also instituted proceedings before the Family Court at Indore by filing HMA Case No. 1335/2022 seeking dissolution of marriage along with ancillary reliefs including custody.

14.5. The petitioner further on 21.06.2022 approached this Court by filing Writ Petition No. 14089/2022 under Article 226 of the Constitution of India seeking issuance of a writ of habeas corpus for return of the minor



child to Canada. On 23.06.2022, the Superior Court of Justice, Ontario, while granting an adjournment, passed a reasoned interim order recording a prima facie finding that the minor child was a habitual resident of Canada and that the Canadian Court had jurisdiction to adjudicate upon issues relating to her custody and welfare. Thereafter on conclusion of the detailed hearing before it, the Canadian Family Court passed a detailed order dated 13.07.2022 in Court File No. FS-22-00030079-0000, directing respondent no.4 to return the minor child to the jurisdiction of Ontario within thirty days with assistance of Indian courts and authorities, if required.

14.6. On the same date, i.e., 13.07.2022, the Family Court at Indore dismissed the application filed by respondent no.4 in HMA Case No. 1335/2022 seeking interim custody of the minor child. Subsequently, respondent no.4 filed an application before the Family Court at Indore seeking an anti-suit injunction restraining the petitioner from pursuing proceedings before the Canadian Court. The said application was however dismissed by the Family Court on 04.08.2022. The appeal preferred against the said order before this Court was also dismissed on 28.10.2022. Meanwhile on 07.10.2022, the Superior Court of Justice, Ontario again passed a further order clarifying that its earlier order dated 13.07.2022 directing return of the minor child was final in nature insofar as repatriation was concerned.

14.7. In the meantime, Writ Petition No. 14089/2022 filed by the petitioner came to be decided by the Division Bench of this Court by judgment dated 21.12.2022 whereby the writ petition was dismissed. The petitioner thereafter filed Review Petition No. 75/2023, which was also dismissed by this Court on 03.02.2023. Aggrieved by the dismissal of the writ petition and the review petition, the petitioner approached the Supreme Court of India by filing Special Leave Petition (Civil) Nos. 6638–6639 of 2023. During pendency of the proceedings before the Supreme Court, access



arrangements between the petitioner and the minor child were facilitated pursuant to interim orders passed therein.

14.8. During the subsistence of the proceedings, in October 2023, the petitioner and the minor child acquired Canadian citizenship. Thereafter, on 16.02.2024, the Superior Court of Justice, Ontario, passed an order in Court File No. FS-22-00030079-0000 permitting the petitioner to renew government-issued documents of the minor child, including passport and identity documents, without the consent of respondent No.4. Subsequently, by a final order dated 18.03.2024 passed in the same proceedings, the Ontario Superior Court of Justice granted sole custody and primary parenting rights of the minor child to the petitioner.

14.9. The Special Leave Petition pending before the Supreme Court of India was disposed of by order dated 23.07.2024, wherein the Supreme Court observed that, at the time of dismissal of Writ Petition No. 14089/2022, this Court did not have the benefit of considering the final custody order dated 18.03.2024 passed by the Canadian Court. The Supreme Court noted that the said order continued to hold the field between the parties and granted liberty to the petitioner to seek implementation and compliance of the said order in accordance with law by approaching the appropriate court in India, leaving all contentions of the parties open. The petitioner pursuant to the liberty so granted by the Supreme Court has filed the present writ petition seeking implementation of the custody order dated 18.03.2024 passed by the Superior Court of Justice, Ontario, Canada.

15. Learned counsel for the petitioner argued that the petitioner and respondent No.4 were married on 18.01.2014 at Lonavala, Mumbai. After marriage, they resided in the United States of America and subsequently in Canada. Their daughter, Miraya, was born on 29.08.2016 in Chicago, USA, and acquired U.S. citizenship by birth.



16. The family thereafter settled in Canada as permanent residents. The minor child was enrolled in McKee Public School, Toronto, and was attending school physically since September 2021. Canada thus became the place of 'habitual and ordinary residence' of the minor child.

17. Owing to the COVID-19 pandemic, the child temporarily stayed in India with the maternal grandparents. Subsequently, matrimonial disputes arose between the parties, and respondent no.4 retained the child in India.

18. The petitioner approached the competent court in Canada, which passed 'custody / access orders' in favour of the petitioner, directing return of the child to Canada. Alleging violation of those orders, the present writ petition has been filed.

19. Learned counsel for the petitioner further argued that for the following reasons, it would be in the 'welfare of the child' and in his 'best interest' that the order of return of child to Canada be passed by giving him the custody:

- The child is a habitual resident of Canada.
- Foreign court orders passed by a court of competent jurisdiction deserve due respect.
- Retention of the child in India amounts to 'illegal removal / retention'.
- The child's education, social environment, and emotional stability are integrally connected with Canada.

The order of return of custody of child to the petitioner would not cause any harm to the child.

20. Per contra, learned counsel for respondent no.4 submits that:

- The welfare of the child is paramount.
- Mere existence of a foreign decree is not conclusive and the same cannot be sought to be executed.



- The child has settled in India and is presently studying here.
 - Summary return would be detrimental to the child's well-being.
21. The following issues arise for consideration:
- i. Whether this Court is bound to summarily enforce the foreign court decree?
 - ii. Whether retention of the child in India is illegal?
 - iii. What is in the **paramount welfare of the minor child**, particularly with regard to schooling and overall development?
22. Before adverting to law relating to the custody of a child, it would be apt to consider the role of a mother in Indian mythology and society:

(A). *In Ramayan and Mahabharat period, if we see the role of a mother and her rights for a child in Ramayana: Mother is the First Refuge of the Child:*

(a) Luv-Kush living with Mata Sita

After Mata Sita is separated from Shri Ram, Luv and Kush are raised exclusively by their mother, in the hermitage of Maharishi Valmiki.

Despite Shri Ram being the king of Ayodhya and their father, the children remain with the mother, emphasizing:

Emotional security

Moral upbringing

Maternal guardianship

(Source)

Valmiki Ramayan, Uttara Kanda, Sargas 65-67

(Birth and upbringing of Luv-Kush under Mata Sita)

Valmiki Ramayan, Ayodhya Kanda, Sarga 20

"जननी जन्मभूमिश्च स्वर्गादपि गरीयसी"

Mother and motherland are greater than heaven.

2. Mahabharat: Mother's Custody Beyond Social Legitimacy

(A) Kunti and Karna

Karna is born to Kunti and raised by another woman (Radha), but Kunti remains the moral mother throughout his life.

(Source)

Mahabharat, Adi Parva, Chapter 104

Karna Parva, Chapter 5

This highlights that motherhood is not extinguished by separation, reinforcing the idea that the child's bond with the mother



is intrinsic.

These principles resonate with modern law, such as:

Section 6(a), Hindu Minority and Guardianship Act, 1956

Article 3, UN Convention on the Rights of the Child (UNCRC)

The Ramayan and Mahabharat do not frame custody as a dispute between parents, but as a duty owed to the child.

(B). *In Ancient Hindu Society, the concept of child custody as understood in modern legal terms did not exist. The family structure was deeply patriarchal, governed by dharmashastra texts including the Manusmriti, Yajnavalkya Smriti, and Narada Smriti.*

Spiritual and Moral Role: While mothers were venerated in Hindu philosophy with concepts like "matru devo bhava" (mother is divine), this spiritual reverence did not translate into legal rights. The mother's role was confined to nurturing and early childhood care, but without any legal recognition.

The evolution of Hindu mothers' custody rights in India represents one of the most significant transformations in Indian family law. The journey can be characterized in four phases:

Phase 1 (Ancient Period): *Complete legal invisibility - mothers had moral status but zero legal rights over children.*

Phase 2 (Colonial Era): *Minimal recognition - mothers acknowledged as guardians only in father's absence, with strict conditions.*

Phase 3 (Early Independence): *Statutory discrimination - Hindu Minority and Guardianship Act explicitly placed mothers secondary to fathers, though courts began developing welfare principle.*

Phase 4 (Post-1999 to Present): *Progressive judicial activism - courts have interpreted laws expansively to recognize mothers' equal rights, with strong preference for maternal custody of young children.*

This aligns remarkably with modern legal principles such as:

1. Best Interest of the Child

2. Natural Guardian Doctrine

3. Tender Years Principle

(C). *The mother is portrayed as the first home, first teacher, and first protector, making the child's right to stay with the mother a civilizational norm, not merely a modern legal construct.*

23. Now, we reiterate the law relating to execution of an order of a Foreign Court in respect of custody of a child and consideration, the law relating to foreign custody orders is no longer *res integra*. The Supreme Court has consistently held that **comity of courts** is important but **not**



absolute, and welfare of the child is the paramount consideration.

The same is reiterated as under:

24. In *V. Ravi Chandran (supra)*, the Supreme Court held that where a child is removed from the foreign country in violation of custody orders, Indian courts may direct summary return, unless such return is shown to be harmful to the child.

25. In *Surya Vadanana (supra)*, it was reiterated that if the child's habitual residence is abroad and the foreign court has exercised jurisdiction, Indian courts should normally respect such orders, unless grave risk to the child is demonstrated.

26. However, in *Nithya Anand Raghavan (supra)*, the Hon'ble Supreme Court clarified that :

*"The existence of a foreign court order is only one of the factors.
The welfare of the child remains the paramount consideration."*

27. Recently, in *Lahari Sakhamuri (supra)*, the Supreme Court emphasized the importance of schooling, social roots, emotional security, and stability of the child.

28. As already discussed in the preceding paragraphs we held that in the matters relating to custody of a minor child, the paramount consideration is the 'welfare' and 'best interest' of the child and not the legal rights of the parents. In relation to the impact of an order of a Foreign Court relating to interest, it is well settled that the same is a relevant factor, however, the same is not conclusive. The doctrine of comity of Courts cannot overwrite the paramount consideration of the welfare of the child. The Indian Court is not bound to mechanically enforce a foreign interest order, if such enforcement would be contrary to the child's welfare.



29. In compliance to our order, the child was produced before us and we interacted with him in the chamber. The child, though of tender age, has expressed comfort and emotional attachment towards the respondent mother. He has been residing in India for last four years and at present he is studying in a good school. The child appears well settled in the present environment.

30. We have also taken into consideration the age of the child, the need of maternal care at her formatting stage, the emotional and educational stability of the child and the overall circumstances placed on record, we are of the considered view that the custody of the child cannot be directed to be handed over to the petitioner solely on the basis of a foreign decree, which would not subserve the welfare of the minor as it has been found that it is not in the interest of child to return to the foreign country and the custody to the petitioner.

31. Before parting, it is clarified that this Court has not adjudicated the merits of permanent custody and has confined itself to the issue of 'welfare' and 'best interest' of the child.

32. In view of the above, the Writ Petition is **dismissed**. No order as to costs.

(VIJAY KUMAR SHUKLA)
JUDGE

(BINOD KUMAR DWIVEDI)
JUDGE