IN THE HIGH Court OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3951 OF 2023

.. Petitioner

Versus

.. Respondents

Mr. Anil Malhotra a/w Mrs. Angha Nimbkar, Ms. Shreya Shrivastav Mr.Gulistan Dubash i/b Mr. Durgesh Jaiswal for the Petitioner.

Mr. S. V. Gavand, Additional Public Prosecutor, for Respondent No.1-State,

Mr. Mihir Desai a/w Mr. Navin P. Sachanandani for Respondent Nos.2 to 5.

Mr. Subodh Desai, learned Advocate appointed as *amicus curiae*.

CORAM : A. S. GADKARI AND
SHYAM C. CHANDAK, JJ.

RESERVED ON : 29th JANUARY 2024

PRONOUNCED ON : 7th FEBRUARY 2024

JUDGMENT [PER: SHYAM C. CHANDAK, J.]

1) Rule. Rule made returnable forthwith and, with the consent of the learned counsel for the parties, heard finally.

2) This is a Writ Petition under Article 226 of the Constitution of India for habeas corpus of Ms.'N', *i.e.* the daughter of Petitioner (hereinafter referred to as '*child N*').

2.1) The Petitioner has prayed for issuance of a writ of habeas corpus to produce minor child 'N', who is alleged to be in an illegal custody of the Respondent Nos.2 to 5, for her custody to be given to the Petitioner and for appropriate directions for the return of child 'N' to the Netherlands; for issuance of any other appropriate writ, order or Direction to ensure the compliance of the Order dated 9th November 2023 passed by the Hague Court at the Netherlands and to direct the Respondent Nos.2 to 5 to provide all necessary aid, assistance and effective implementation of the directions of this Court, in securing the safe return of child 'N' to the Petitioner at Netherlands.

Case of the Petitioner, in brief, is as under:

3) The Petitioner is a Dutch National and permanent resident of the Netherlands. The Respondent No.2 is an Indian National and ex-husband of the Petitioner. Child 'N' is their biological daughter and a Dutch National by birth. The Respondent Nos.3 to 5 respectively are mother and brothers of the Respondent No.2.

3.1) The Respondent No.2 was married to the Petitioner in Netherlands on 5th July 2013, under the Dutch Laws. The Respondent No.2 was granted a residence *VISA* on 14th December 2017 and was registered as a resident of the Netherlands. After the marriage, the parties resided with the parents of the Petitioner. Child 'N' was born on 14th December 2018 out of the said wedlock. Thereafter, the parties moved to a house in Eindhoven, Netherlands on 1st January 2019, which was purchased by the Petitioner. However, due to incompatibility and differences between the Petitioner and the Respondent No.2, they decided to part company. Hence, in a Petition for Divorce, their marriage was dissolved on 28th April, 2023 by a detailed Judgment and Order of divorce passed by the District Court of East Brabant, Hertogenbosch, Netherlands. The said Judgment and Order also decided that, child 'N' shall have main residence with the Petitioner, nevertheless the Respondent No.2 is entitled to contact with child 'N' as more specifically mentioned therein.

3.2) That, the Respondent No.2 wanted to travel to India from 5th August 2023 to 19th August 2023, during the summer vacations of child 'N'. Therefore, the Respondent No.2 filed a Petition in the Court of East Brabant. By an Order dated 11th July 2023, the said Court granted substitute permission in lieu of the mother's permission to the Respondent No.2 to travel to Mumbai, India along with child 'N' for two consecutive weeks *i.e.* from 5th August 2023 to 19th August 2023. The Petitioner was directed to handover OCI Card and passport of child 'N' to the Respondent No.2. Accordingly, the Respondent No.2 booked the Air Tickets for round trip *i.e.* for 7th August 2023 and 16th August 2023.

3.3) Thereafter, the Respondent No.2 approached the competent Dutch Court for a new passport for child 'N' even though her existing passport was already given to him in July 2023. However, the said Court by its Order dated 21st July 2023, granted substitute consent for an urgent application for the passport. Accordingly, the Respondent No.2 got a new passport for child 'N' on 22nd July 2023 which is valid upto 22nd July 2028, but with a *malafide* intention and *mens rea* of not returning to the Netherlands. Then, the Respondent No.2 along with the child 'N' left Netherlands on 8th August 2023 and failed to return from India to the Netherlands on 16th August 2023, violating his undertaking given to the

Dutch Court. Thereafter, the Respondent No.2 did not respond to the telephone/Whats App calls of the Petitioner.

3.4) It is averred that, there was no common intention of the parties to move back to India as child 'N' was studying in Basis school Boschakker, Eindhoven, at Netherlands, in the Session 2022-2023. Thus, child 'N' has been deprived of her life, care and affection of the Petitioner, school friends, grandparents, school attendance and her bonding with her home country due to her non returning to the Petitioner by the Respondent No.2. This uprooting or disrupting of child 'N' is extremely detrimental and damaging to her best interest and welfare. It has also deprived the Petitioner of her right over child 'N', as mother and natural guardian.

3.5) Faced with the aforesaid situation, on 7th September 2023, the Petitioner filed a petition before the District Court of Hague as the Court of First Instance, seeking immediate return of child 'N' to the Netherlands. The Respondent No.2 fully contested this proceedings. After evaluating the relevant material, the said Court by its decision dated 9th November 2023, directed return of child 'N' to the Netherlands not later than 28th November 2023, requiring the respondent No.2 to bring child 'N' back to the Netherlands, failing which, the Respondent No.2 shall deliver child 'N' to the Petitioner with the necessary valid travel documents no later than 28th

November 2023, so that, the Petitioner can return to the Netherlands herself. The Respondent No.2 did not comply this Order. Alternatively, he has refused the request of the Petitioner to deliver child 'N' to her with the necessary travel documents. The legal notice dated 6th December 2023 was also not responded and complied. Thus, by illegally detaining child 'N' in India, the Respondent No.2 has committed the offence of kidnapping and abduction punishable under Section 359, 361 and 362 of the Indian Penal Code, 1860.

3.6) In the facts narrated above present Petition for habeas corpus is filed.

4) The Respondent No.2 opposed the Petition by entering his Affidavit-in-Reply dated 5th January 2024, wherein he has categorically denied all the material averments, allegations and submissions made against him in the Petition and *inter alia* contended as under:

4.1) That, after his marriage with the Petitioner, they performed a ceremony-cum-reception in Mumbai on 23rd December 2013. From 2014, they resided in Mumbai with the Respondent Nos.3 to 5. During this stay period, the Petitioner was treated with love and affection. Meanwhile, the Petitioner was looking for a job in Mumbai. Thus, she was well settled in Mumbai. The Petitioner's mother was not happy with her marriage with the

Respondent No.2 and her stay in India. However, at the instance of her mother, the Petitioner accepted certain job in the Netherlands. Therefore, the Respondent No.2 shifted to the Netherlands temporarily but as a co-operation. Before that, the parties lived in India together for a period of about 3 years. After moving to the Netherlands, the parties resided with the parents of the Petitioner for about one year. However, the parents of the Petitioner subjected the Respondent No.2 with racial discrimination in the form of micro-aggression.

4.2) After birth of child 'N', in January 2019, the parties shifted to a new home in the Netherlands. The Respondent No.2 took the best possible care of child 'N' and showered upon her his love, affection etc. by working from home. As against this, the Petitioner was often out for over-night parties. There was undesired interference in the life of the parties and child 'N' by the parents of the Petitioner. However, the Petitioner always wanted to live in India as social life in the Netherlands is harsh for certain reasons. Therefore, in September 2019, the Petitioner and the Respondent no.2 along with child 'N' returned to India permanently and resided with other Respondents. In short time, the Respondent No.2 bought an apartment in *Andheri*, Mumbai and took an office on rent. Being a lawyer by profession, it was difficult for the Respondent No.2 to continue his profession in the

Netherlands. Gradually, the Petitioner also got certain managerial job in a Dutch firm, at Mumbai. Thus, the parties happily resided in Mumbai. However, the Petitioner's mother still wanted the Petitioner to settle in the Netherlands. Meanwhile, the Petitioner's mother was diagnosed with cancer. Therefore, on 21st January 2021, the parties along with child 'N' returned to the Netherlands, temporarily. However, their return to India delayed due medical treatment of the Petitioner's mother. Meanwhile, the Petitioner resumed her old job and the respondent No.2 attended his work from home. Yet, the Respondent No.2's in-laws daily subjected him and child 'N' to racial discrimination.

4.3) In April 2021, the Respondent No.2 came to India to attend his work and went back to the Netherlands in June, 2021. However, both in-law and brother-in-law of the Respondent No.2 kept distance from him. In August 2021, the Petitioner and the Respondent No.2 were to book tickets for returning to India. However, the mother-in-law refused for that and detained with her the passport and OCI card of child 'N' and kept insulting the Respondent No.2. Meanwhile, the parties were planing a 2nd child, but the Petitioner suffered a miscarriage in October 2021. Then the Respondent No.2 returned to India to meet his ailing father (3rd November 2021 to 4th February 2022). During this period, the relation between the parties were

normal and the Petitioner wanted to return to India but it was cancelled due to intervention by her mother. However, as child 'N' was missing the Respondent No.2 and the Petitioner was delaying their return to India, the Respondent No.2 booked tickets to return to the Netherlands on 18th February 2022.

4.4) That, suddenly on 8th February 2022, the Petitioner sent an *e-mail* to the Respondent No.2 seeking divorce from him. Hence, he returned to the Netherlands on 18th February 2022. On 20th February 2022, the Petitioner's family tried to book the Respondent No.2 in a false crime. The Petitioner did not allow the Respondent No.2 to stay in their own house. This compelled him to register himself as a homeless person and stay in the Netherlands. The Petitioner stopped talking with him and giving access to child 'N'.

4.5) Therefore, the Respondent No.2 filed a Petition in the District Court at East Brabant at' s-Hertegonbosch, Netherlands seeking access to child 'N'. The Petitioner contested this case vehemently and also filed a separate divorce Petition on 4th March, 2022 on false grounds to defeat the aforesaid Petition by Respondent No.2. As a result, the said Petition was dismissed on 16th March, 2022 on technical grounds. Thereafter, the Respondent No.2 met with child 'N' on a couple of occasions in the Day-care.

Thus, since February, 2022 the Petitioner illegally detained child 'N' with her and did not allow the Respondent to meet her.

4.6) Therefore, on 1st April 2022, the Respondent No.2 filed a request in the Court dealing with the divorce proceedings, to allow him to meet child 'N'. Despite resistance from the Petitioner, by Order dated 1st June 2022, said Court allowed the Respondent No.2 to meet child 'N' for two days per week, holding that both parents are in joint custody of child 'N'. By Order dated 18th July 2022, the said Court admitted the divorce petition. The Respondent No.2 had to go through very difficult and tiring journey to meet Child 'N'. Meanwhile, the Respondent No.2 purchased an apartment (in November 2022). Eventually, he was allowed by the Court to keep child 'N' with him on alternate weeks. She was very happy with him and refused to go back to the Petitioner. However, the Petitioner was rude to the Respondent No.2. The Petitioner's parents subjected child 'N' to racial discrimination and abuse on account of her complexion and even told her that the Respondent No.2 has abandoned her. She was not allowed to learn *Hindi/Marathi*. Thus, they wanted to cut her roots from India.

4.7) Ultimately, the divorce Order was passed by the District Court at East Brabant at' s-Hertegonbosch, Netherlands on 28th April 2023. Thereafter, when the Respondent No.2 requested by an *e-mail* to take child

'N' to India, the Petitioner refused it by her *e-mail* dated 4th June 2023. This compelled the Respondent No.2 to file a Petition in District Court at East Brabant at 's-Hertegonbosch, Netherlands seeking permission to take child 'N' to India. The said Petition was allowed on 11th July 2023 despite opposition by the Petitioner on false grounds. However, the Petitioner refused to handover the passport and OCI Card of child 'N' in disregard to the said Court Order. As a result, the Respondent No.2 filed an execution application wherein for absence of the Petitioner the Court directed her to handover the passport and OCI of child 'N', failing which she was to be penalised. The Petitioner thereafter complied the Order.

4.8) The Respondent No.2 then booked return tickets for himself and child 'N' from 7th August 2023 to 16th August 2023, to visit India. However, on a false complaint by the Petitioner alleging that taking child 'N' to India is illegal, Dutch Police illegally detained the Respondent No.2 at the Airport. Thereafter the Respondent No.2 came to India along with child 'N' on 9th August 2023, buying costly tickets.

4.9) That, after coming to India, child 'N' was very happy in the company of Respondent Nos.2 to 5. That, on 14th August 2023, just two days before the return flight to the Netherlands, child 'N' gave various indications that, she is not willing to go to the Petitioner because of the mental abuses

she suffered in her family. Therefore, the Respondent No.2 decided that returning to the Netherlands is not in the best interest of child ‘N’ as she is very much attached to him, it would deprive her love from the Respondents’ family and other social bindings. She has been admitted in a school at Mumbai. The child psychologist’s report countenanced the above. In this background, the undertaking given to the Dutch Court by the Respondent No.2 is not binding on him. The Respondent No2. did not get fair trial in the case heard by the Hague Court, hence it was resisted by him from time to time.

4.10) That, the welfare of child 'N' would be better subserved if she remains in the custody of the Respondents. They are financially well settled. They have the time, resources, manpower and desire to bring up child 'N' in a conducive atmosphere which is very essential for her overall development. If child ‘N’ retained in India, the Respondent No.2 will continue the Petitioner to access her regularly and through video calls as well. As against this, transportation of child ‘N’ to the Netherlands will be harmful to her for various reasons.

5) In the light of the aforesaid pleadings and facts, we have heard Mr. Malhotra, learned counsel for the Petitioner, Mr. Mihir Desai, learned Senior counsel for the Respondent Nos.2 to 5, Mr. S. V. Gavand, learned

Additional Public Prosecutor for the Respondent No.1-State and Mr. Subodh Desai, learned *amicus curiae*. Perused entire record and also the additional Affidavit submitted by the Respondent No.2.

Submissions on behalf of the Petitioner :

6) Mr. Malhotra, learned counsel submitted that, in the matters of inter-parental, inter-country child removal, remedy of the *habeas corpus* is available under Articles 32 and 226 of the Constitution of India, in exercise of *parens patriae* jurisdiction, to determine the best interest and welfare of children. The case in hand is involving the rival claims of custody of the illegally detained child 'N', who is just aged 5 years and Dutch National. Hence, this Petition is maintainable to determine the best interest and welfare of child 'N', holding necessary enquiry on the basis of the Petition and the Affidavit-in-reply etc., to adjudicate the question of return of child 'N' to the Netherlands *i.e.* her jurisdiction of closet contact.

6.1) The learned counsel would submit that, before filing of this Petition, the parties sufficiently litigated before the Dutch Courts without questioning its jurisdiction and laws. The jurisdiction issue was rightly never raised because the Petitioner and child 'N' are Dutch Nationals; the parties married and were governed under the laws prevailing in the Netherlands; the cause of action had arisen in the said Courts' jurisdiction; the parties

ordinarily resided within said territorial jurisdiction when the cause of action arose; the marriage of the parties was fit to be dissolved as per the laws of the Netherlands; the rights of custody over child 'N' were to be determined by the Dutch Court and lastly the said laws are similar to the relevant laws applicable to such disputes in India.

6.2) Taking this Court through the Orders passed by the Dutch Courts, the learned counsel submitted that, as the marriage between the parties was irrevocably broken, it was dissolved at the wish and request by the parties, *vide* Dutch Court Order dated 28th April 2023 (Exh.-I). The issues as to the main residence and custody of child 'N' were also determined in said divorce proceedings. Accordingly, the main residence of child 'N' shall be with the Petitioner. The arrangement as to care and upbringing task of child 'N' has been also finalised by the said Court. Thus, the Respondent No.2 having acquiesced to be governed by the Dutch laws as above, now is estopped from raising the custody issue of child 'N' due to the principle of *res judicata*. However, not only the Respondent No.2 did not return Child 'N' back to the Petitioner in Netherlands after expiry of the vacation of two weeks, he also filed a Petition before the family Court at Mumbai, seeking permanent custody of child 'N'. As such, detention of child 'N' in India is illegal/unauthorised.

6.3) The learned counsel submitted that, when everything was hunky dory, the Respondent No.2 cannot choose to upset such a situation at the cost of inconvenience, physical sufferings, mental harassment and economical loss to everyone in the family of either side and more particularly to child 'N'. This conduct of Respondent No.2 amounts to aprobate and reprobate at the same time, which is unjustifiable in law.

6.4) The learned counsel would submit that, the best interest of child 'N' cannot remain in the sole or exclusive care of her father. For a girl child of 5 years tender age; lap, tender care, love and custody of mother is very essential. The best interest of child has to be determined in accordance with Section 2 (1) of the Juvenile Justice (Care & Protection of Children) Act, 2015 by a competent Dutch Court's jurisdiction of closest contact. By violating the Dutch Court Orders, the Respondent No.2 cannot secure the best interest and welfare of child 'N' using her as pawn to settle his ego issues, disputes and differences with the Petitioner and her parents

6.5) It is submitted that, even though child 'N' had a valid passport expiring in January 2024, the Respondent No.2 obtained a new passport with longer validity. This conduct clearly manifests that, since inception the Respondent No.2 did not intend to return to the Netherlands along with child 'N' and thus wanted to deprive the Petitioner of her rights over her.

This has completely disrupted child 'N' from the Netherlands and it is against her best interest and welfare. This conduct does not suit to the Respondent No.2, being a practicing lawyer.

6.6) Learned counsel lastly submitted that, in so far as the defence taken up by the Respondent No.2 in his Affidavit-in-reply is concerned, the said defence was not taken in the divorce proceeding before the Dutch Court, therefore it is false. Whatever defence was taken by him there in the said proceedings, was dealt with in detail and rejected. As such, child 'N' cannot be refused to be returned. In the backdrop the Petition deserves to be allowed. In that event, the Petitioner will allow the Respondent No.2 to contact/visit child 'N' without any reservation, as it is in the best interest of the child.

6.7) To lend support to the aforesaid submissions, Mr. Malhotra, learned counsel has cited the following decisions : i) Yashita Sahu Vs. State of Rajasthan:AIR 2020 SC 577, ii) Rajeswari Chandrasekar Ganesh Vs. The State of Tamilnadu & Ors: SC WP (CR) No.402/2021, iii) Tejaswini Gaud & Ors. Vs. Shekhar Jagdishprasad Tiwari & Ors.: 2019 (7) SCC 42, iv) Lahari Sakhamuri Vs. Sobhan Kodali: 2019 (7) SCC 311, v) Jasmeet Kaur Vs. State (NCT of Delhi) & Anr.:(2020) 13 SCC 782, vi) Dr. Navtej Singh Vs. State (2018) 2 R.C.R. (Civil) 660, and vii) Rani George Vs. UOI & Ors.: WP (Cri) No.1206/2022.

Submissions on behalf of the Respondent Nos.2 to 5 :

7) In reply, Mr. Mihir Desai, learned Senior counsel submitted that, the Respondent No.2 and child 'N' both were subjected to the racial abuse as pleaded. The child psychologist's reports filed on record confirms that in case of child 'N'. Therefore, she is not mentally prepared to join the company of the Petitioner and her parents.

7.1) Child 'N' is aged just 5 years. She has spent considerable time in India in the company, love and care etc. of the Respondent Nos.2 to 5. She has also spent good amount of time with the Respondent No.2 during his stay in the Netherlands. Presently, child 'N' is studying in a good school, has made friends and acclimatised with the conditions and child friendly environment in India. Thus, child 'N' is deeply rooted in India. The Respondent Nos.2 to 5 are socially and economically well placed. They are capable to provide best care and upbringing to child 'N'. Since child 'N' found her comfortable in India in all respects, her best interest and welfare demands that, she should reside in India only. In such a situation, directing to handover custody of child 'N' to the Petitioner to take her to the Netherlands all of a sudden will take a very heavy toll on her physically and mentally and thus would cause harmful effect on her overall progress. Being father, it is always open for the Respondent No.2 to travel to India along

with child 'N'.

7.2) In this background, just because the Orders of custody passed by the Dutch/foreign Courts are operating against the Respondent No.2 and he did not comply with the Orders of returning to the Netherlands along with child 'N', it is not essential to direct that child 'N' be handed over to the Petitioner to take her permanently to the Netherlands.

7.3) It is submitted that, the passport of child 'N' was to expire on 14th January 2024. Such passport should be valid atleast for six months on the date one wants to fly out of the Netherlands. As such, the Petitioner's claim that the new passport of child 'N' is procured with *malafide* intent, is baseless.

7.4) This Petition and the Petition filed by Respondent No.2 before the Family Court, at Mumbai are in proximity of time and involving rival custody claims. Therefore, according to the learned counsel, an elaborate enquiry is very essential to finally adjudicate the question of custody, best interest and welfare of child 'N'. As such there is no scope to exercise the writ jurisdiction summarily and issue the writ of *habeas corpus* as prayed for in the Petition. At the end, Mr. Mihir Desai submitted that, in case the Petition succeeds, the Respondent No.2 may be allowed to have contact with and custody right of child 'N', as permitted by the Dutch Courts.

7.5) To buttress his submissions, Mr. Mihir Desai, learned counsel has relied upon the following reported decisions : i) Nithya Anand Raghavan Vs. State (NCT of Delhi) & Anr.: (2017) 8 SCC 456, ii) Prateek Gupta Vs. Shilpi Gupta and Othrs.: (2018) 2 SCC 309 and iii) Yashita Sahu Vs. State of Rajasthan:AIR 2020 SC 577.

8) Mr. S. V. Gavand learned APP for the Respondent-State, with a view and in order to assist this Court submitted that, the fear of the Petitioner that the Respondent No.2 will not return to the Netherlands along with child 'N', came to reality when the Respondent No.2 violated the Dutch Court's Order dated 11th July 2023. Thereafter, the Respondent No.2 violated this Court's Order dated 8th January 2024 and tried to vanish with child 'N' disturbing her life, to keep her away from the Petitioner and causing her inconvenience. This conduct supports the case of the Petitioner. He submitted that, there is no substance in the defence taken in the Affidavit-in-Reply. The alleged psychiatrists' reports are taken without the consent of the Petitioner. Hence, according to the learned APP the Petitioner's case is acceptable and Petition may be allowed.

9) Mr. Subodh Desai, learned *amicus curiae,* joined the issue by submitting that, looking at the lengthy hearing given to the parties the object of not only summary enquiry but a detailed enquiry is achieved in this

case. He submitted that the Petition may be accordingly decided in the best interest of the child.

10) We have given our anxious consideration to the submissions canvassed across the bar.

10.1) Mr. Mihir Desai, learned Senior counsel for the Respondent No.2, at the outset, fairly concedes that, having regard to the facts and circumstances of the case, this Petition is tenable in law before this Court, hence this issue needs no finding. Secondly; the learned counsel for the parties submitted that, the question of maintainability or otherwise of the Petition filed by Respondent No.2 in the Family Court, at Mumbai, seeking permanent custody of child 'N', may not be addressed herein.

ANALYSIS :

11) In the case of Tejaswini Gaud (supra), the Hon'ble Supreme Court has held that :

> 19. *Habeas Corpus proceedings is not to justify or examine the legality of the custody. Habeas Corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas Corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the*

law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. …, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

12) In the cases of Nithya (supra) and Syed Saleemuddin Vs. Dr. Rukhsana and others: (2001) 5 SCC 247, the Hon'ble Supreme Court has held that, in an application seeking a writ of *habeas corpus* for custody of minor children, the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that, in a matter of custody of a child, the welfare of the child is of paramount consideration for the Court.

13) In the case of Rajeshwari (supra), in para 84, the Hon'ble Supreme Court referred the decision in Rosy Jacob Vs. Jacob A. Chakramakkal:(1973) 1 SCC 840, wherein it is observed that: "**7**…*the principle on which the Court should decide the fitness of the guardian*

mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors. …… Further, in para 15 thereof it is observed that, "……. . *The children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children, has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society …… "*. In the same Judgment, in para 86, the Hon'ble Supreme Court observed that, "whenever a question arises before a Court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child". In para 90 thereof, the Hon'ble Supreme Court considered the American Jurisprudence, 2nd Edn. Vol. 39, wherein it is stated that, "… *In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment*".

13.1) In view of the aforesaid, in para 91, the Hon'ble Supreme Court held that, "***91***. *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 parens patriae, has in promoting the best interests of the child". In para 92 the Hon'ble Supreme Court considered the following general principle governing the award of custody of minor, as stated in Halsbury's Laws of England, Fourth Edition, Vol. 24, Article 511 at page 217 : "*... Where in any proceedings before any Court the custody or upbringing of a minor is in question, then, in deciding that question, the*

Court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father"."

14) Considering the peculiar facts and circumstances of the case in hand, at this stage, a useful reference can be made to the following decisions of the Hon'ble Supreme Court.

14.1) In the case of Tejaswini Gaud (supra), the Hon'ble Supreme Court held that :

> "***20.*** *In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area on which the Court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ Court which is of summary in nature. What is important is the welfare of the child. In the writ Court, rights are determined only on the basis of*

affidavits. Where the Court is of the view that a detailed enquiry is required, the Court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil Court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

14.2) In the case of V. Ravi Chandran Vs. Union of India and others: (2010) 1 SCC 174, in para 29 and 30 the Hon'ble Supreme Court has held that :

*"**29.** While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the Court where the parties had set up their matrimonial home, the Court in the country to which the child has been removed must first consider the question whether the Court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a Court in his own country. Should the Court take a view that an elaborate enquiry is necessary, obviously the Court is bound to consider the welfare and happiness of the child*

as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign Court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. *However, in a case where the Court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the Court may leave the aspects relating to the welfare of the child to be investigated by the Court in his own native country as that could be in the best interests of the child. The indication given in McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942 (PC)], that there may be cases in which it is proper for a Court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re*

[(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] and the said view has been approved by this Court in Dhanwanti Joshi [(1998) 1 SCC 112]. Similar view taken by the Court of Appeal in H. (Infants), In re [(1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)] has been approved by this Court in Elizabeth Dinshaw, (1987)1 SCC 42 : 1987 SCC (Cri) 13]".

14.3) The Hon'ble Supreme Court then proceeded to consider the issue, whether the facts of the case before it warranted an elaborate inquiry into the question of custody of the minor and should the parties be relegated to the said procedure before an appropriate forum in India. Lastly; the Hon'ble Supreme Court concluded in its judgment that, it was not necessary to relegate the parties to an elaborate procedure in India. Its reasons are found in paras 32 to 35, which read as follows :

*"**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. Initially, on 18.4.2005, a consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court whereunder the Court granted joint custody of the child to the petitioner and Respondent 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a separation agreement entered into between the parties on 28.7.2005, the consent order dated 18.4.2005 regarding custody of minor son Adithya continued.

***33**. In 8.9.2005 order whereby the marriage between the petitioner and Respondent 6 was dissolved by the New York State Supreme Court, again the child custody order dated 18.4.2005 was incorporated. Then the petitioner and Respondent 6 agreed for modification of the custody order and, accordingly, the Family Court of the State of New York on 18.6.2007 ordered that the parties shall share joint legal and physical custody of the minor Adithya and, in this regard, a comprehensive arrangement in respect of the custody of the child has been made.*

***34**. The fact that all orders concerning the custody of the minor child Adithya have been passed by the American Courts by consent of the*

parties shows that the objections raised by Respondent 6 in the counter affidavit about deprivation of basic rights of the child by the petitioner in the past; failure of the petitioner to give medication to the child; denial of education to the minor child; deprivation of stable environment to the minor child; and child abuse are hollow and without any substance. The objection raised by Respondent 6 in the counter-affidavit that the American Courts which passed the order/decree had no jurisdiction and being inconsistent with Indian laws cannot be executed in India also prima facie does not seem to have any merit since despite the fact that Respondent 6 has been staying in India for more than two years, she has not pursued any legal proceeding for the sole custody of the minor Adithya or for declaration that the orders passed by the American Courts concerning the custody of minor child Adithya are null and void and without jurisdiction. Rather it transpires from the counter affidavit that initially Respondent 6 initiated the proceedings under the Guardians and Wards Act, 1890 but later on withdrew the same.

***35**. The facts and circumstances noticed above leave no manner of doubt that merely because the child has been brought to India by Respondent 6, the custody issue concerning minor child Adithya*

does not deserve to be gone into by the Courts in India and it would be in accord with principles of comity as well as on facts to return the child back to the United States of America from where he has been removed and enable the parties to establish the case before the Courts in the native State of the child i.e. the United States of America for modification of the existing custody orders. 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."

14.4) Thus, despite the fact that the aforesaid minor child Adithya had remained in India for over two years, the Hon'ble Supreme Court concluded that, it could not be said that the he had developed his roots in India and therefore directed the respondent mother to take the child, of her own, to the USA and to report before the Family Court of the State of New York. The Apex Court also imposed the condition on the petitioner therein to bear all the travelling expenses of the mother and the minor child and directed him to request the authorities that the warrants issued against the mother be dropped and he was directed not to file or pursue any criminal charge for violation by the mother of the consent order in USA.

15) As observed in the case of Rajeswari (supra), in the case of Nithya (supra) the Hon'ble Supreme Court struck altogether a different note

and gave a new dimension. In the case of Nithya (supra), the couple married on 30.11.2006 at Chennai and shifted to the UK in the early 2007. Disputes between the spouses arose. The wife having conceived in December 2008, came to New Delhi in June 2009 and stayed with her parents and gave birth to a girl child - Nethra on 07.08.2009 at Delhi. After the husband arrived in India, the couple went back to the UK in March, 2010 and following certain unsavoury events, the wife and the daughter returned to India in August 2010. After exchange of legal correspondence, the wife and her daughter went back to London in December 2011, and in January 2012 the daughter was admitted in a nursery in the UK. In December 2012, the child was granted the UK citizenship and the husband was also granted the UK citizenship in January 2013. They bought a home in the UK to which they shifted their family. In September, 2013 the child was admitted in a primary school in the UK and she was around four years old. In July 2014 the wife returned to India along with her daughter. She again returned to the UK along with the child. Between late 2014 and early 2015 the child became ill and was diagnosed with cardiac disorder. On 02.07.2015, the wife returned to India with her daughter due to the alleged violent behaviour of her husband. On 16.12.2015, the wife filed a complaint against the husband at the CAW Cell, New Delhi, and in spite of the notices to the husband and her

parents, neither of them appeared. The husband filed a custody/wardship petition on 08.01.2016 in the UK to seek return of the child. On 23.1.2016, he also filed a Habeas Corpus petition in the Delhi High Court which was allowed on 08.07.2016. The wife carried the case to the Apex Court. The Hon'ble Supreme Court has relied upon its decision in the case of Dhanwanti Joshi Vs. Madhav Unde:(1998) 1 SCC 112, which in turn, referred to Mckee v. McKee, 1951 AC 352 : (1951) 1 All ER 942 (PC), where the Privy Council held that, the order of the foreign Court would yield to the welfare of the child and that, the comity of Courts demanded not its enforcement, but its grave consideration. While taking note of the fact that India is not a signatory to the Hague Convention of 1980, on the "Civil Aspects of International Child Abduction", the Hon'ble Supreme Court [in the case of Nithya (supra)], *inter alia*, held as under : "40. … . *As regards the non-Convention countries, the law is that the Court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign Court as only a factor to be taken into consideration, unless the Court thinks it fit to exercise 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."

15.1) Finally the Hon'ble Supreme Court in Nithya (supra), concluded as under : "***69****. We once again reiterate that the exposition in Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112 is a good law and has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran (supra). We approve the view taken in Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112, inter alia, in para 33 that so far as non-Convention countries are concerned, the law is that the Court in the country to which the child is removed while considering the question must bear in mind the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration. The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child*

is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the Court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child."

15.2) As observed by the Hon'ble Supreme Court in the case of Rajeswri (supra), the essence of the judgment in Nithya (supra) is that, the doctrines of comity of Courts, intimate connect, orders passed by foreign Courts having jurisdiction in the matter regarding the custody of the minor child, the 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. Further, as observed by the Hon'ble Supreme Court in Vivek Singh Vs. Romani Singh: (2017) 3 SCC 231, in cases of this nature, where a child feels tormented because of the strained relations between her parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the Court to decide as to whom the custody should be given. However, even in such a dilemma, the paramount consideration is the welfare of the child. 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.

16) 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. In this regard it is useful to refer the decision in the case of Lahari Sakhamuri (supra), wherein the Hon'ble Supreme Court has held 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" envisaged in Section 2 (9) of the Juvenile Justice (Care & Protection) Act of 2015, is to mean, "the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identify, social well-being and physical, emotional and intellectual development*".

17) In the above context, the observations of the Hon'ble Supreme Court in the case of Rajeswari, in para 87, 88 and 89 are very relevant. The same read as under :

"87. *The question as to how the Court would determine what is best in the interest of the child was considered In Re: McGrath (Infants), [1893] 1 Ch. 143 C.A.*, and it was observed by Lindley L.J., as follows : "… *the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.*

"88. *The issue as to the welfare of the child again arose In re "O" (An Infant), [1965] 1 Ch. 23 C.A., where Harman L.J., stated as follows* : "*It is not, I think, really in dispute that in all cases the paramount consideration is the welfare of the child; but that, of course, does not mean you add up shillings and pence, or situation or prospects, or even religion. What you look at is the whole background of the child's life, and the first consideration you have to take into account when you are looking at his welfare is : who are his parents and are they ready to do their duty*?"

89. *The question as to what would be the dominating factors while examining the welfare of a child was considered in Walker v. Walker & Harrison: 1981 New Ze Recent Law 257 and it was stated as*

follows : "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".

18) In the case of Lahari Sakhamuri (supra), the Hon'ble Supreme Court held that :

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.

19) In the case of Vivek Singh (supra), the Hon'ble Supreme Court held that, "The role of the mother in the development of a child's personality can never be doubted. A child gets the best protection through the mother. It is a most natural thing for any child to grow up in the company of one's mother. The company of the mother is the most natural thing for a child. Neither the father nor any other person can give the same kind of love, affection, care and sympathies to a child as that of a mother. The company of a mother is more valuable to a growing up female child unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The company of the mother is always in the welfare of the minor child".

20) Thus, in the case in hand, we have considered the submissions made by all the parties by keeping in mind the well-established principles of law as laid down in the aforesaid decisions. On such a consideration, we are of the opinion that, the case and counter case is not so poised or the question involved in this Petition is not so complex to make it momentous to direct the parties to go for elaborate enquiry where the Court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and the custody. That apart, the length of hearing given to the

rival parties is indicative of the fact that, by and large, the object of detailed enquiry is also fulfilled in this case. The learned counsels representing the parties have not taken any exception to that.

20.1) It is well accepted that, the summary jurisdiction be exercised if the Court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interest and welfare of the child. That the doctrine 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. The expression “best interest of the child”, which is always kept to be of paramount consideration, is indeed wide in its connotation, and it cannot remain only the love and care of the primary caregiver i.e. the mother in the case of the child who is only a few years old and the basis for any decision taken regarding the child, is to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development. However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The

Court should decide the issue of custody only on the basis of what is in the best interest of the child.

Final Analysis :

21) Now we advert to the question whether child 'N' should be handed over to the Petitioner or be allowed to remain with the Respondent No.2. In this regard, the strength and weaknesses of the parties matter much. And we take notice of the following circumstances emerged from the material on record.

22) First and foremost; child 'N' was born in the Netherlands. Like Petitioner, she is a Dutch National. Presently, she is just aged 5 years. Majority of her life in the Netherlands, she was in the company of her mother i.e. the Petitioner. Prior to filing of this Petition, when the marital tie was sailing smooth, the mother and the child also spent time together in India. As such it is natural that, there is indeed great physical, mental and emotional bonding between them.

23) In this context it is pertinent to state that, on 20th December 2023, the Petitioner desired to meet child 'N'. The Respondent No.2 agreed for that and dropped child 'N' on the same day, at 2:30 p.m., in the hotel where the Petitioner was staying then and picked-up the child at 8:00 p.m. On 21st December 2023, this Court (Coram : Revati Mohite Dere & Gauri

Godse, JJ) interacted with child 'N' first and then with the Petitioner. Since there was no impediment, this Court permitted the Petitioner to take child 'N' from the Court itself for overnight stay with direction to handover the child to Respondent No.2 on 22nd December 2023, between 5:00 p.m. to 5:30 p.m. Both these meetings were uneventful and in conformity with this Court's Orders. These circumstances fortify our conclusion above that, there is good attachment as loving mother-daughter between the Petitioner and child 'N' and both need company of each-other. This is very important for a girl child of tender age of 5 years.

24) The decision in the divorce case dissolving the marriage also dealt with the question of main residence of child 'N' and issues related to the rights of the parties as to contact with child 'N'. It also determined the pecuniary needs/costs of child 'N' and share of the Petitioner and the Respondent No.2 therein.

24.1) About the main residence, the Petitioner requested to stipulate that the main residence of child 'N' shall be with her. The Respondent No.2 initially put up a defence against this request and requested independently to stipulate that, the main residence be with him from the moment he has his own house. However, by letter of 20th March, 2023, the Respondent No.2 withdrew this request. Hence, the decision noted that, child 'N' shall have

her main residence with the Petitioner.

24.2) The Petitioner purchased a house in 2019 and then the parties resided there together. The Petitioner suffered a miscarriage in October 2021. These facts indicate that, the parties were firm to settle in the Netherlands only. Thereafter, the relations between the parties strained and they involved in the litigation. In the year 2022, child 'N' was just aged 4 years. As such the general principles of law governing child custody issue lean in favour of mother. Child 'N' is Dutch National by birth and holds a passport thereof. The Respondent No.2 purchased a house in the Netherlands, in November 2022. In this scenario the Respondent No.2 being lawyer could anticipated that, the Dutch Court will not grant him the main residence. Therefore, he purchased a house there to remain connected with the daughter. All this cumulatively indicate that, the Respondent No.2 was prepared for the main residence of child 'N' in Netherlands.

24.3) Child 'N' and the Petitioner lived in the Netherlands together for majority of the time. Child 'N' has been staying in India just for last 5 months. She has not set her roots in India yet. Therefore, and taking overall view of the matter, natural process of grooming in the environment of her native country in the company of her mother is indispensable for comprehensive development of child 'N'.

25) Now about the aspect of financial and shelter support. The Petitioner claims that her own house is spacious. There is no controversy about it. As to financial capacity, the decree of divorce clearly noted that, the financial capacity of the parties is sufficient to meet the needs of child 'N'. Comparatively, the Petitioner earns more. Hence, the Dutch Court directed the parties to share the costs of child 'N'. Thus, it is crystal clear that, the Petitioner is able to provide both financial and shelter support to child 'N'.

26) The arrangement on the division of care and upbringing tasks were directed by the Dutch Court by its Order dated 28th April 2023, to be as follows :

"The Respondent No.2 is entitled to contact with child 'N' every week on Thursday after school to Friday morning to school and one weekend per fortnight from Saturday 10.00 a.m. to Sunday 5.00 p.m. (17:00 hours) after the 2023 summer holidays, the Respondent No.2 is entitled to contact with child 'N': one week from Thursday after school to Saturday 10.00 a.m., the other week from Thursday after school to Sunday 5.00 p.m. (17:00 hours). During half of the (official) holidays, to be determined in mutual consultation".

26.1) Thus, the rights of the Respondent No.2 as to contact and

custody in respect of child 'N' were safe guarded by the foreign Court.

27) As noted in the Judgment dated 11th July 2023, passed by the East Brabant District Court (Exh.-J), in Case Number/Cause list number: C/01/383853/KG ZA 23-275, for the division of the care and upbringing tasks of child 'N' in the 2023 summer vacations, the Petitioner proposed by her email message of 1st June, 2023 to divide six weeks in the sense that child 'N' stays one week with one parent, and with the other parent the next week. The Respondent No.2 by his email message of 2nd June, 2023, did not agree with the said proposal, as he intended to travel to India with child 'N' from 15th July 2023 to 29th July 2023. In turn, the Petitioner by her email dated 4th June, 2023 conveyed that she would not give consent to travel outside the Netherlands with child 'N'. Hence, the Respondent No.2 filed the Case Number C/01/383853/KG ZA 23-275. The Petitioner resisted this case mainly on the ground of her fear that the Respondent No.2 will not return to the Netherlands with child 'N', as he originates from India, his family still lives there, he has no social network and good job in the Netherlands.

27.1) However, the Preliminary Relief Judge was of the opinion that, the Petitioner's fears seem unrealistic, as the Respondent No.2 had argued, without contradiction that, he has built up his life in Netherlands and when asked, has no intention of not returning to the Netherlands with child 'N'.

The Respondent No.2 explained that, he has built social network around him, has bought a house and applied with his current employer for a position more similar to his level of education. Moreover, child 'N' only has Dutch Nationality and attends school in the Netherlands. In the preliminary opinion of the Court in preliminary relief proceedings, the above shows that the Respondent No.2 is socially and economically settled in the Netherlands so that it cannot be assumed that he will not return to Netherlands with the requested travel permission. In view of the above, the said Court granted a substitute consent in lieu of the Petitioner's consent and allowed the Respondent No.2 to travel with child 'N' to India from 5th August 2023 to 19th August 2023.

28) From the aforesaid Order of the Dutch Court it can be easily seen that, with his submissions the Respondent No.2 convinced the said Court to trust and believe in him that, he will abide by the said Order and return with child 'N' to the Netherlands upto 19th August 2023. However, he did not. Thus, the child's presence in India is only the result of the Respondent's unilateral decision of not returning to the Netherlands.

29) In the backdrop, according to the Petitioner, the Respondent No.2 has unjustifiably violated the Order dated 11th July 2023 passed by East Brabant District Court, Netherlands and detained child 'N' with him illegally.

Therefore, the child deserves return to her country.

29.1) The Respondent No.2 has put a defence that, he and child 'N' were subjected to racial discrimination and therefore child 'N' developed fear against the Petitioner and her parents. Hence, child 'N' is not willing to go back to the Petitioner; the Petitioner and her family members do not cooperate with him in the Netherlands with respect to child 'N'; their behaviour towards him is continuously violent and aggressive. He has no support in the Netherlands. There is possibility of his prosecution and punishment by the Dutch Courts, for violating the Order dated 9th November 2023, whereby he has been directed to return child 'N' to the Netherlands.

30) From the record before us, we find that, the plea of racial discrimination was not raised till the Respondent No.2 filed an Appeal in the Dutch Court on 3rd January 2024 against the Order dated 9th November 2023 thereby requiring him to return with child 'N' to the Netherlands by 28th November 2023 at the latest. Thus, the said defence is taken at a very belated stage. Secondly, the defence of racial discrimination in the pleadings in this proceedings is as vague as possible. Thirdly, the Respondent No.2 willingly agreed for the main residence of child 'N' with the Petitioner only. Fourthly, during the meetings on 20th and 21st December 2023, child 'N' was comfortable in the company of the Petitioner thereby ruling out the so called

racial discrimination. Thus, the said defence is a sheer afterthought by the Respondent No.2 and adopted only to defeat the Orders passed by the Dutch Courts.

30.1) The plea of racial discrimination tried to be countenanced by certain reports allegedly issued by some child psychiatrist after examining child 'N' and on the basis of some photos/videos etc. However, the same are procured one month after child 'N' was brought to India. The Petitioner's permission was not taken for that, which is normally a rule in such cases. There is more to critisise, but we restrict ourselves by just noting that, said reports are devoid of any merit and according to us are procured by the Respondent No.2 to cause prejudice in the mind of Court and none else.

31) By Order dated 8th January 2024, this Court had directed the Respondent No.2 to handover custody of child 'N' to the Petitioner as and by way of *pro-tem* arrangement. On instructions, the learned Counsel for the Respondent No.2 had made a statement that, the later will book a Super Deluxe room upto 13th January 2024 for the Petitioner and child 'N'. However, on 9th January 2024, the Petitioner, moved this Court for directions, as the Respondent No.2 flouted the Order dated 8th January 2024 and tried to vanish with child 'N'. Therefore, this Court was constrained to issue a bailable warrant against the Respondent No.2 with a direction to the

Deputy Commissioner of Police, Zone IX, Mumbai to personally supervise execution of the said warrant.

31.1) The police apprehended the Respondent No.2 at Daman-Union Territory and produced along with child 'N' before this Court on 11th January 2024, at 5:00 p.m. Then, the matter was taken up in Chamber by the Co-ordinate Bench, as this Bench was not available. The Court (Coram : Revati Mohite Dere & Manjusha Deshpande, JJ.) interacted with child 'N' and allowed the Petitioner to interact with her. All the Advocates for the parties were present during the interaction. The Court noted that child 'N' was found comfortable with the Petitioner, hence, the Court permitted her to take child 'N' with her directly from the Chamber. Thereafter, nothing is pointed out requiring to handover child 'N' to the Respondent No.2. Thus, the aforesaid conduct of the Respondent No.2 and what transpired in the Court clearly indicates that the plea of racial discrimination is completely hollow and is a sham plea adopted by the Respondent No.2.

31.2) In contrast to the conduct of the Respondent No.2 noted above, as child 'N' was not returned to the Netherlands on time, the Petitioner immediately swung in action and secured an Order dated 9th November 2023 from the Dutch Court requiring the Respondent No.2 to resume custody of child 'N' with the Petitioner. Soon thereafter, the Petitioner flew

to India along with her parent/s at huge airfare, other expenses and facing lot of inconvenience just to see the child and take her to the Netherlands by filing this Petition promptly on 19th December 2023. This conduct speaks volumes about the Petitioner's sincere interest in child 'N', affection towards her and their warm and compassionate relationships. It also indicates that the Petitioner with her family is caring and deeply concerned for the child. If indeed they were not and there was eminent threat from them to child 'N', neither they would have flown to India and litigated here nor the child would have accepted the Petitioner as evident from this Court's Orders dated 20th and 21 December 2023 and 11th January 2024. All this nullify the entire stance taken by the Respondent No.2 for defending this Petition.

32) Considering the level of differences to which the parties have reached, if return of child 'N' to the Netherlands is declined, then there is possibility of polluting the mind and thoughts of child 'N' about the Petitioner to such an extent that, at one point of time she will think that her own mother is only responsible for deserting her and depriving her the mother's love, affection, care and proper upbringing. This is doctrine of 'Parental Alienation Syndrome' *i.e.* the efforts made by one parent to get the child to give up his/her own positive perceptions of the other parent and get him/her to agree with their own viewpoint. It has two psychological

destructive effects: (1) it puts the child in the middle of a loyalty contest, which cannot possibly won by any parent, and (2) it makes the child to assess the reality, thereby requiring to blame either parent who is supposedly deprived of positive traits. Therefore, the intent of the Court should be to circumvent such ill effects. In this background and considering the observations in the foregoing para 19 of this Judgment, it is necessary to avoid the element of 'Parental Alienation Syndrome', which is presently absent in this case.

33) Last but not least, the Respondent No.2 has his house to stay in the Netherlands. Before the East Brabant District Court, the Respondent No.2 had stated that, he has built social network around him in the Netherlands. As against this, the Petitioner has no residence facility in Mumbai/India. In case child 'N' is not allowed to be taken to the Netherlands, the Petitioner will have to come to India to meet her. Unarguably, she will not come alone and will bring at least one relative. This is too much of a woman to expect as it would unnecessarily burden the Petitioner economically, mentally and physically. The converse will help her save that money and energy, which is ultimately wise to spent for the better care and upbringing of child 'N'.

34) India is undoubtedly known for its zero tolerance policy towards

racial discrimination. The Respondent No.2, however, had the audacity to take the shelter of the defence of racial discrimination; that too against the Petitioner, who once was his wife and spent considerable years with him. This way, the Respondent No.2 has lowered the image of the India and its citizens in the view of Petitioner and her fellow nationals. We record our displeasure for this conduct as according to us, it is unethical.

35) As noted above, the issues related to the main residence, contact and custody etc. of child 'N' have been addressed for the present by the Dutch Court/s of competent jurisdiction. The Respondent No.2 had undertaken to return to Netherlands with child 'N' upto 19th August 2023. However, immediately after passing of the Order dated 9th November 2023 by the Dutch Court requiring return of child 'N' to the Netherlands, the Respondent No.2 filed the Petition before the Family Court, at Mumbai seeking permanent custody. Before that, he admitted child 'N' in the local school. This, the Respondent No.2 did intentionally, because being a lawyer, he knew that, once the Petitioner is caused to litigate in the Family Court, it will take a considerable time to adjudicate the question of the custody. By that time, child 'N' will sufficiently develop her roots in India and her schooling will advance. These circumstances will make it difficult to severe her ties from India. In that case, there will be great possibility of the Court/s

in India allowing child 'N' to stay in India without her mother, even though there was default in complying with the Orders of the Dutch Court. Thus, it is evident that, the Respondent No.2 came to India along with child 'N' with a pre-planned determination not to go back. Therefore he disregarded the Orders of the Dutch Courts and filed the Petition before the Family Court, at Mumbai to thrust an obstacle in the return of child 'N' to her own country. This clearly indicate that, the Respondent No.2 brought child 'N' to India to serve his own purpose *i.e.* to keep child 'N' permanently with him.

36) From the East Brabant District Court's Order dated 21st July 2023, it seems that, the Petitioner consented for the passport but in laborious manner and within terms. This circumstance clearly indicate that, the Petitioner's fear noted in the same Court's previous Order dated 11th July 2023, that the Respondent No.2 would not return to the Netherlands with child 'N', was realistic as he wanted to keep child 'N' permanently with him and deprive the Petitioner the benefits of her custody rights and ultimately, the mother's love and affection to child 'N'. Thus, it is safe to infer that, the Respondent No.2 obtained the new passport with oblique intent.

37) As discussed above, the Respondent No.2 unnecessarily flouted the Orders of the foreign Court and this Court. This conduct of the Respondent No.2 deprived the biological mother of her natural love and

affection for 4-5 months. The learned Advocate for the Petitioner moved a *Praecipe* dated 30th January 2024, with a grievance that, though by an interim order dated 18th January 2024, this Court had directed the Respondent No.2 to continue to make payment of the accommodation charges of the hotel where the Petitioner is presently stationed, the Respondent No.2 did not make the payment on 29th January 2024 and the hotel administration asked the Petitioner to make it good. In this regard, the tax invoice generated by the concerned hotel on 29th January 2024, at 9.45 p.m. was enclosed with the *praecipe*. Learned Advocate for the Respondent No.2 vehemently opposed the pleadings in the said *praecipe* and submitted that, the payment upto 29th January 2024 is made to the concerned hotel, however, no affidavit in support of his contention is placed on record till then. Therefore, this Court directed the Respondent No.2 to deposit the accommodation charges of the Petitioner upto 6th February 2024, with the concerned hotel. Thus, the above conduct of the Respondent No.2 clearly indicates that he has scant regards to the Orders of the Courts.

38) Conspectus of the above discussion is that, the sudden disconnect of child 'N' from her native; the Netherlands, is unjustifiable because she is a Dutch National. She was less than five years of age at that time, as conceded. Her main residence was with the Petitioner and she was

studying in school there. The Petitioner is able to provide necessary conducive atmosphere in the Netherlands for proper care and upbringing of child 'N'. This is assured by the Petitioner's love, affection, caring nature towards child 'N', and capacity to provide adequate financial support and spacious home to her. Even though the Petitioner is working, she is able to devote sufficient time to manage schooling, studies and all other needs of child 'N'. The Petitioner is also capable to instill moral and ethical values in child 'N'. For all this, she has additional support of her parents. Being a Dutch National, eventually child 'N' will get the benefits available to the Domicile of the Netherlands. The above, we are sure, will be certainly in the best interest and welfare of child 'N'. The criteria such as comity of Courts and Orders of the Dutch Courts etc. are also weighing with the Petitioner.

39) In the backdrop, it will be in the best interest and welfare of child 'N' and there will be no harm if child 'N' returns and stays with the Petitioner-mother at the Netherlands. Thus, the Petitioner is entitled to retain child 'N' with her and return to the Netherlands.

40) Now about the interest of the Respondent No.2. Shared parenting is a rule everywhere in such disputes related to children. Therefore, while coming to the conclusion that, in the best interest and welfare child 'N' should be with her mother-the Petitioner, this Court was *qui*

vive of the fact that, the Respondent No.2 has certain contact rights over child 'N' by virtue of the Dutch Court Orders. This favour is granted to the Respondent No.2 because child 'N' is of very tender age, therefore, she requires equal support of her both parents to see that, she grows under the umbrella of diverse tradition and culture of the two countries and steps into the world as a respectable person. This itself is a very unique opportunity and blessing for such child. There cannot be an argument on that. Therefore, we do not think it appropriate to interfere with the rights of contact/custody determined under the Orders of Dutch Court and let the parties get the said issues finally adjudicated before the Court of competent jurisdiction. Otherwise, it will have an ill effect over the best interest and welfare of child 'N' to be achieved. Moreover, as submitted by Mr. Malhotra, the learned counsel, the Petitioner has no objection for the above.

40.1) Therefore, and considering the submissions by Mr. Mihir Desai, learned Senior counsel for the Respondent No.2, it is in the interest of the justice that, the Petitioner seeks an appropriate order/direction in this regard from the competent Court so that, child 'N' is not deprived of the support of the father as it is very essential for her overall development considering her present condition. Otherwise, its consequences will erode the way of the support which child 'N' will receive from and in the company of the

Respondent No.2. Further, not having company of child 'N' on that account, will deprive the father and daughter of their basic human rights.

40.2) In this regard, it is apt to refer the Judgment in the case of Yashita Sahu (supra) wherein the Hon'ble Supreme Court held that, child separated from one parent in custodial controversy faces adverse psychological impact. To minimize such impact, Courts should afford sufficient visitation rights to parent not given child's custody so that the child may not lose social, physical and psychological contact which her/him. The parent denied the child's custody should also be able to contact and talk to child as often as possible. Video calling is best system of contact, especially where both parents live in different States or countries. For this purpose, the parents should reach an arrangement so that the child can live in an environment, reasonably conducive to her/his development.

41) In view of the above deliberation we allow the Writ Petition. Hence, the following Order :-

i) Custody of Child 'N' is already handed over to the Petitioner by Order dated 11th January 2024. Hence, the Petitioner is permitted to take child 'N' with her to the Netherlands.

ii) The Registrar (Judicial-I) of this Court is directed to handover the passport of the Petitioner as well as the passport and OCI card of child 'N' to

the Petitioner forthwith on production of an authenticated copy of this Order.

iii) The Registrar (Judicial-I) also to return the passport of the Respondent No.2 to him on production of an authenticated copy of this Order.

iv) The Respondent No.2 is entitled to talk/meet to child 'N' as may be mutually decided between the parties.

v) The Respondent No.2 is entitled to contact with child 'N', her care and upbringing as permitted in the aforesaid Order dated 28th April, 2023, passed by the Dutch Court which is in force.

vi) Whenever the Respondent No.2 wanted to avail the right of contact, care and upbringing given under the said Order dated 28th April, 2023 of the Dutch Court, he can do so by giving notice of at least two weeks in advance intimating in writing to the Petitioner and if such request is received, the Petitioner to positively respond in writing to allow the Respondent No.2 to contact/meet child 'N'.

vii) If the above Order is terminated, the Petitioner shall seek an appropriate order/direction from the Dutch Court/s to revive/restore the same, so that, child 'N' is not deprived of the support of the father.

viii) Until such revival/restoration of the Order, if the Respondent No.2

visits at the Netherlands, the Petitioner shall allow him to contact/meet child 'N' for two hours per day, thrice a week, at the time and venue prefixed by the parties. The Respondent No.2 shall not be entitled to and will not make any attempt to take child 'N' away from the said venue.

ix) Petitioner will permit the Respondent No.2 to interact with child 'N' on telephone/mobile or video conferencing on every Friday, Saturday and Sunday, between 5:00 p.m. to 6.00 p.m. IST or as may be agreed between the parties.

x) Rule is made absolute in the aforesaid terms.

xi) All parties to act on authenticated copy of this Judgment and Order.

(SHYAM C. CHANDAK, J.) (A. S. GADKARI, J.)

42) At this stage learned counsel for the Respondent No.2 prayed that the operation and implementation of the present order may be stayed for a period of two weeks from today. Learned Counsel for the Petitioner opposed the said prayer.

43) Taking into consideration the observations made by us in the present judgment and the fact that the Petitioner being a Dutch National residing in India for last more than 28 days for pursuing this Petition, the said prayer is rejected.

(SHYAM C. CHANDAK, J.) (A. S. GADKARI, J.)