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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on: 19.03.2019*
Date of pronouncement: 1st .07.2019

\+ **MAT.APP.(F.C.) 244/2018**

J K ..... Appellant

Through: Ms. Malavika Rajkotia & Ms. Rytim Vohra, Advocates

versus

N S ..... Respondent

Through: Mr. Anil Malhotra, Mr. Ranjit Malhotra, Mr. Sarvesh & Mr. Rajat Bhalla, Advocates

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J.

1. This is an appeal under Section 19 (1) of the Family Courts Act, 1984 for setting aside the judgement dated 20.08.2018 by which a petition filed by the appellant seeking guardianship of her two minor children has been dismissed.

2. At the very outset we may note that this is not a first round of litigation between the parties.

3. The necessary facts required to be noticed for disposal of this appeal are that the marriage between the parties was solemnized by a civil marriage at New York on 22.08.2006 and a certificate of registration of

the same date was issued by the Marriage License Bureau, the city of New York, USA under US laws. On 23.12.2007 marriage by way of Anand Karaj was solemnized at New Delhi, India. From this wedlock, two children were born. A daughter was born on 27.08.2012 in the U.S. and a son was born on 12.09.2016 in India. In the year 1998, much prior to her marriage with the respondent, the appellant had gone to USA to study. As per the petition, in the year 2000, she met the respondent in USA while pursuing her study at Hunter College, USA. The appellant was staying in USA on a student visa.

4. As per the appellant, a civil marriage was performed in USA on 22.08.2006, as she was unable to travel to India to solemnize her marriage on the student visa and the civil marriage in New York was never intended to be a solemnized marriage, but was merely a device to enable the appellant to overcome her travel restrictions. Subsequent to the civil marriage, the appellant became a green card holder which allowed her to travel to India for the Anand Karaj ceremony. The marriage at New Delhi was attended by all close family relatives of the parties. It is also an admitted fact that both parties had settled in USA, post their marriage. They both worked together as dentist between the period 2011 to 2016.

5. As per the appeal, the appellant faced immense hostility from the respondent and his family on the ground that it was a love marriage and the appellant belonged to a different caste. Family of the respondent was also upset as she did not bring enough dowry. In December 2011, the appellant conceived the first child. It is alleged that the respondent

and his family members acted with the cruelty and harassment multiplied, when they found that she was bearing a girl child. In March 2012, she called her mother to USA. It is alleged that the respondent was an absentee husband and did not give any love or support at this precarious time of her life. It is also averred in the appeal that in May 2012, the appellant was kicked out from house of the respondent by the father of the respondent in the middle of the night. She decided that she could not bear the maltreatment any more and flew to India with her mother in the sixth month of pregnancy. However, the respondent convinced her to return to USA assuring that things will improve. On her return, she did not find any change in his attitude. She requested her mother to fly to USA to assist her during the advanced stage of pregnancy. In these circumstances a baby girl was born on 27. 08.2012 in USA and thus, she is an American citizen by birth. The mother of the appellant looked after the infant for six months and returned to India thereafter.

6. It is further averred that the marital discord between the parties continued even after the birth of the child. The allegations are that the respondent called escorts/prostitute services. When she would confront the respondent, he tortured her by telling her that it was all her fault. Efforts to resolve the differences did not lead to any result. In March, 2013, the appellant became an American citizen. The torture and torment against the appellant continued till the year 2015. It is also alleged that the appellant found that her husband was inappropriately close to one female co-worker, but in order to maintain peace in the

marriage and to ensure safety of the daughter from Child Protective Services and foster care, the appellant kept quiet. Taking advantage of an opportunity to leave USA, the appellant travelled to India in January 2016 for the marriage of her brother, which was scheduled for February 2016. It is averred in the appeal that on account of the conduct of her husband and his family, she decided to settle down in India permanently. While in India, the appellant took a pregnancy test and came to know that she was expecting a second child. The respondent also travelled to India for his brother-in-law's wedding. It is stated that the appellant informed her husband that she would like to permanently settle in India and she had no intention to go back.

7. In June, 2016, the respondent filed an application in US County Court at Stamford, Connecticut seeking temporary and permanent custody of the minor daughter and the unborn son. The respondent visited India in August, 2016 and insisted that the appellant returns to USA, but the appellant refused. It is averred that filing of the application seeking temporary and permanent custody of the children in USA was concealed by the respondent.

8. A premature baby (son) was born on 15.09.2016 with much complications. After the appellant was discharged from hospital, within minutes of her reaching home, the respondent arrived at the appellant's residence and caused so much stress to her that she almost lost consciousness in her fragile state.

9. Between September 2016 and November 2016, it is alleged that the respondent kept harassing her over phone calls and text messages. Even when he came home on one occasion, he threatened her that he would take the children away and teach her a lesson, instead of spending time with the children.

10. In November 2016, the appellant sent a legal notice to the respondent seeking maintenance under Section 125 Cr.P.C. read with Section 18(1)(b) of Hindu Adoption and Maintenance Act, 1956. The appellant also filed a Guardianship petition being G.P. no.64/2016 under Sections 7, 9, 11 and 25 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'GWA') read with Section 6(a) of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as 'HMGA') and Section 7(g) of the Family Courts Act. Meanwhile on 17.11.2017, the American Court granted temporary custody of the children to the respondent, *ex-parte*.

11. The Family Court by an order dated 26.12.2016 dismissed the Guardianship petition on the ground of lack of territorial jurisdiction on an application filed by the respondent under Order VII Rule 11 CPC. In In January 2017, an appeal being MAT APP (FC) 3/2017 was filed in Delhi High Court by the appellant against this order. On 25.01.2017, the Superior Court of the State of Connecticut, passed an order granting sole physical and legal custody of the children to the respondent with supervised visitation rights to the appellant.

12. The respondent filed a writ of habeas corpus at the Delhi High Court on 06.03.2017. The appellant filed an affidavit deposing that she has applied for Indian citizenship, during the course of habeas corpus proceeding. It may also be noted that on 15.12.2017, the appellant received a letter from the office of SDM Rajouri Garden of taking an oath of allegiance towards the Indian Constitution as part of process of getting Indian citizenship. Meanwhile, on 19.09.2017, the matrimonial appeal being MAT APP (FC) 3/2017, by which, the order of the Family Court dated 26.12.2017 was assailed, was dismissed by a Division Bench of the Delhi High Court and the order of the Family Court was upheld.

13. On 04.01.2018, the appellant filed an SLP impugning the judgement dated 19.09.2017 passed by the Division Bench of Delhi High Court, which was set aside by the Supreme Court of India by an order dated 20.02.2018. The Apex Court observed that paramount consideration is the welfare of the child and the same cannot be the subject matter of final determination in proceedings under Order VII Rule 11 CPC. The application under Order VII Rule 11 CPC was dismissed and the matter was remanded back to the Family Court to decide the matter within six months as far as possible.

14. By an order dated 06.03.2018, the Division Bench of Delhi High Court, hearing the writ of habeas corpus, allowed the writ petition filed by the respondent, and directed the appellant to return to USA with the respondent and the children subject to certain conditions to secure the rights of the appellant. As per the said conditions, the respondent had

to move the superior court at the US for recall of the orders insofar as they had granted custody of the two children to the respondent. It was directed by the Division Bench that when the appellant lands in USA, the children will not be removed from her custody. The two minor children would remain in the custody of the appellant in USA till the competent court in USA passes fresh orders on the custody. The respondent was given liberty to meet the children and to seek interim orders for visitation rights from the court in USA. The respondent was also directed to meet the legal expenses that the appellant was to incur towards the litigation. The Division Bench had imposed these conditions conscious of the fact that when the appellant would land in USA there were chances of adversity or hostility being faced by her and the conditions which the court imposed would perhaps help in a softer landing. The Division Bench had also directed the respondent to file his affidavit of undertaking in terms of the directions, it had given imposing these conditions and the matter was listed for further orders.

15. On 02.04.2018, when the matter was taken up for hearing, the learned counsel for the respondent submitted that the affidavit had been filed. The respondent would move the competent court in USA for variation of the order and also create an ESCROW security in the sum of USD 25,000. It was thus pointed out that both the steps had been taken in terms of the court order. Finally, when the matter came up on 21.05.2018, the Court was informed that the motion of the respondent had been accepted and the American court had incorporated the conditions imposed in the judgment dated 06.03.2018. In view of the

said development, the court expressed its satisfaction that the respondent had complied with the conditions. The Court then directed the appellant to return to USA with the two minor children within three weeks from the date of the order, failing which the children were to be handed over to the respondent with their passports, to be taken to USA. The petition was disposed of in these terms.

16. This order of the Division Bench in *Habeas Corpus* Petition was assailed by the appellant by way of an SLP(Crl.) 4858-4859/2018, which is pending adjudication before the Supreme Court of India.

17. After the order passed by the Guardianship Court was set aside by the Apex Court, the trial in the guardianship petition commenced on 16.04.2018. After recording of evidence, vide judgment dated 20.08.2018, the Family Court dismissed the guardianship petition filed by the appellant, which has led to filing of the present appeal.

18. At this stage, the proceedings instituted by the parties may be summarised as under :

    (i) In June, 2016, the respondent filed an application first seeking temporary custody of the children in USA and thereafter he sought the permanent custody.

    (ii) Guardianship petition being G.P. No.64/2016 was filed by the appellant in November 2016.

    (iii) American Courts on 17.11.2016 granted temporary custody of the children to the respondent, *ex-parte*.

(iv) On 26.12.2016, guardianship petition was dismissed by the Family Court while allowing the application under Order VII Rule 11 CPC filed by the respondent on the ground of lack of jurisdiction.

(v) In January, 2017, MAT APP (FC) 3/2017 was filed by the appellant before the Delhi High Court.

(vi) On 25.01.2017, Superior Court of the State of Connecticut of USA passed an order granting sole, physical and legal custody of the two minor children to the respondent, with supervised visitation rights to the appellant.

(vii) On 06.03.2017, respondent filed a habeas corpus writ bearing No. W.P.(Crl.) 725/2017 in the Delhi High Court.

(viii) On 19.09.2017, Delhi High Court dismissed the matrimonial appeal.

(ix) On 04.01.2018, an SLP was filed in the Supreme Court of India against the order of Delhi High Court upholding the order passed by the guardianship court of dismissal of guardianship petition.

(x) On 20.02.2018, the Supreme Court of India set aside the judgments dated 26.12.2016 and 19.09.2017 and remanded the matter back for hearing on merits.

(xi) The High Court allowed the writ of habeas corpus on 06.03.2018.

(xii) On 20.08.2018, guardianship petition was dismissed by the Family Court, after full trial.

(xiii) SLP filed against the order of the Division Bench allowing the writ of habeas corpus was filed and is pending.

19. The first submission of learned counsel for the appellant is that the learned Family Court has erred in passing the impugned judgment inasmuch as, once the Family Court reached a conclusion that there was no jurisdiction, no finding on merits and welfare of the children should have been returned. It is submitted that despite ruling that the Indian Courts do not have jurisdiction in the matter, the Family Court ruled and adjudicated upon the merits of the case and the welfare of the children. It is prayed that the findings should be expunged and should not be allowed to be used against the appellant in any proceedings pending or in future, inter se between the parties.

20. The second submission of learned counsel for the appellant is that reliance placed by the family Court on the Juvenile Justice Act is misplaced as the provisions of Juvenile Justice Act were not applicable to the facts and circumstances of the present case. It is further contended that the judgements relied upon by the appellant were neither discussed in the impugned judgement nor were any reasons given, as to why the same were not applicable to her case.

21. The third submission of learned counsel for the appellant is that the Family Court has erroneously reached a conclusion that Courts in India lack territorial jurisdiction. It is contended that the Family Court has failed to appreciate Section 9 of the Guardians and Wards Act, 1890 in its correct perspective. The approach of the Family Court is extremely narrow and it has, in fact, lost track of the fact that the second child (boy) was born in India. Ms. Rajkotia contends that 'ordinary resident' is a matter of intention. The son was born in India and is an ordinary

resident of India, while the daughter is in her mother's legal custody and her 'ordinary resident' status would follow her mother's ordinary residence.

22. It is also submitted before us that the Family Court has failed to appreciate the statutory presumption in favour of the appellant under Section 6 of the Hindu Minority & Guardianship Act, 1956, which provides that custody of a child below five years of age is ordinarily to be with the mother. Learned counsel contends that the residence of the appellant/mother is to be taken as the ordinary residence of the children below five years of age. Ms. Rajkotia also contends that the Family Court noted the judgements cited by her but did not deal with them and instead relied upon some other judgements passed by the Supreme Court, which, in fact, were not even applicable to the facts of the present case.

23. In support of her arguments, Ms. Rajkotia, on the basis of a judgement passed in the case of ***Yogesh Bhardwaj Versus State of U.P. and others*** reported at AIR 1991 SC 356, submits that ordinary resident of a child follows the ordinary residence of the mother, but the same was not appreciated by the Family Court referring to a foreign judgement ***Reg. Barnet L.B.., ex. p. Shah***[(1983], which has no relevance to the facts and issues in the present case. With regard to the submission regarding 'ordinary resident', she further contends that 'ordinary resident' has no tenure attached to it. The appellant has made her intention very clear that she wants to stay in India and to give up her USA citizenship. Appellant has already filed an affidavit stating that she had applied for

Indian citizenship and has taken oath of allegiance towards the Indian Constitution. Both these factors would show that her intent is to stay in India. Ms. Rajkotia also contends that 'ordinary resident' is different from 'habitual resident' and 'domicile'. The said terms cannot be used interchangeably. The citizenship of the parties and their children is irrelevant and the same is not related to being a resident. A citizen of one country can be ordinary resident anywhere in the world.

Thus, the words 'ordinary resident' have to be given a wide and elaborate meaning and interpretation to serve the purpose of the Act. In support of her submission that the ordinary resident is a matter of evidence, reliance is placed on ***Central Bank of India Vs. Ram Narain***, AIR 1955 SC 36, ***Ms. Jagir Kaur and Anr. Vs Jaswant Singh***, AIR 1963 SC 1521, ***Ruchi Majoo vs. Sanjeev Majoo***, AIR 2011 SC 1952. Ms.Rajkotia has also contended that ordinary resident of minor children follows the mother, by virtue of the statutory presumption. It is the mother, who has to be given the custody of children of tender age. Reliance is placed on ***Sarbjit v Piara Lal & Ors,*** (2005) 140PLR 692 and ***K.C. Shashidhar v Smt. Roopa***, AIR 1993 Kant 120.

24. She has further argued that the case of the appellant was rejected on grounds which were not argued. The Family Court exceeded its jurisdiction and digressed from the main issue and raised a point of Immigration laws, which was neither raised during the arguments nor was a part of pleadings or evidence. The Family Court thus ventured on an unchartered territory and that too without allowing the appellant an

opportunity to rebut the said issue and erroneously passed the judgment. The appellant is also aggrieved by the fact that it has been held that the children are residing in violation of Immigration laws, without referring to the Immigration laws and this is a serious finding against them. The Family Court has completely lost track of the settled principle of Immigration laws that the children below 16 years of age are not to be considered in conflict with law.

25. Ms. Rajkotia has also assailed the impugned judgement on the ground that the Family Court has placed reliance on a prejudiced report. She submits that the said report of a marriage counsellor namely Ms. Marcia Geller, had been given on the asking of the respondent. A coordinate Bench of this Court has already doubted the credibility of the report and not given any credence to it. She thus submits that the certificate of Ms.Geller as well as that of the Dental Clinic could not have been relied upon by the Family Court, as both have been discounted by a judicial order.

In support of her submission, learned counsel has drawn the attention of this Court to the relevant portions of the judgment of the Division Bench in the habeas corpus petition and we quote the same hereunder:

> "We are not impressed by the certificates produced by the petitioner, which he claims to have obtained from the marriage and family counsellor of the parties Ms. Geller, and the employees at his Dental Clinic. A perusal of the certificate issued by Ms. Geller in its entirety shows that Ms. Geller has issued the same on the asking of the

> petitioner, and she appears to have commented even on those aspects about which professionally she had no personal knowledge or information. In our view, the credibility of the certificate issued by Ms. Geller is doubtful and we, therefore, reject the same. Similarly, the certificate of the employees at the Dental Clinic cannot be given any credence."

26. The next submission of the learned counsel for the appellant is that in the case of ***Kanika Goel Vs. The State (NCT of Delhi***) [2018 SCC online709], ***Nithya Anand Raghavan vs State of NCT***, (2017) 8 SCC454, the Apex Court has observed that the remedy to seek custody and guardianship is not by way of a habeas corpus petition and the parties must resort to a substantive petition in this regard in the appropriate Forum. She submits that the Apex Court observed that in a habeas corpus the High Court could only examine at the threshold whether the minor is in lawful or unlawful custody. However, once it is ascertained that the party having the custody is a biological parent, it can be presumed that the custody is lawful. In such a case, only in exceptional situation, the custody could be taken away from such a parent in a writ jurisdiction. The other parent would then have to resort to a substantive, prescribed remedy for getting the custody. Learned counsel for the appellant further contends that the findings of the court in the habeas corpus petition as regards the custody and welfare of the children could not have been used by the family court in a substantive petition filed by the appellant under the Guardianship Act.

27. Ms. Rajkotia has strongly urged that the appellant has claimed custody based upon the legal doctrines of tender years and matrimonial

preferences. It is submitted that both these doctrines have been developed for the welfare of the children. It would be in the welfare of the children to be with the mother. Reliance is placed on ***Bindu Philip Vs. Sunil Jacob***, (2018) 12 SCC 2003, ***Mohan Kumar Rayana Vs Komal Rayana***, 2010 (5) SCC 657, ***Vivek Singh vs Romani Singh,*** 2017 (3) SCC 231, ***Palmira Vs. Cruz Fernandes***, 1992 MHLJ 1048, ***Dhanwanti Joshi vs. Madhav Unde***, 1998 (1) SCC 112, ***Mrs. Elizabeth Dinshaw vs. Arvand M.Dinshaw & Anr***, 1987 (1) SCC 42, ***Surjeet Singh Vs. State***, 189 (12), DLT 460, ***Surinder Kaur Sandhu Vs. Harbax Singh Sandhu & Anr,,*** 1984 (3) SCC 698, ***Sarita Sharma vs. Sushil Sharma,*** 2000 (3) SCC 14, ***Gaurav Nagpal vs. Sumedha Nagpal,*** AIR 2009 SC 557. In support of her submission, Ms. Rajkotia while placing reliance on ***Bindu Philip*** (*supra*), submits that the role of the mother in child care is greater than the father, based on the tender years' doctrines. It is contended that the appellant is a biological mother and not disqualified in any way and thus her custody is lawful. There is a statutory presumption in her favour under Section 6 of the Hindu Maintenance & Guardianship Act which has not been rebutted. She is the primary care giver of her children. Her intention to make India as her residence is unrevocable, the children are thus, to be ordinary residents with her. It is also submitted before us that in view of the tender years' doctrine and maternal preference as well as the statutory presumption, the custody must continue to be with her. Reliance is placed on ***ABC vs. State (NCT of Delhi)***, 2015 (10) SCC 1.

28. Based on the evidence, Ms. Rajkotia contends that in any case the respondent is not interested in the children or their welfare. Ms.Rajkotia contends that the respondent has not been able to prove that the appellant is incompetent, careless or negligent towards her children or she is an unfit mother. The alleged domestic violence caused by the appellant has not been proved and nor has any bearing in this case. The respondent has not filed any evidence to substantiate that 90% of the blindness in his eye was on account of the injury allegedly caused by the appellant. The appellant, in fact, in her cross-examination on 15.05.2018, had admitted that the eye injury was caused in her self defence. Insofar as the allegation of the skin problem is concerned, the learned counsel for the appellant submits that the photograph placed on record by the respondent to show that the injuries caused by the appellant, resulted in a skin problem, are actually photoshopped. The images do not have any date nor indicate that the injuries were inflicted by the appellant. There is no medical record to show that there was any consultation with the doctor or any other document indicating the cause of the injury. Further, no police complaints were filed in this regard and nor has any suggestion been put to the appellant about these photographs in her cross-examination.

29. Counsel also contends that the family court has shown a complete disregard to a mother's distress and made careless observations that "the respondent has raised a probable defence that the appellant suffered from 'borderline personality disorder'." The following observations are assailed specifically by the appellant:

> "Page 50, Paragraph 112: tine Respondent has raised a probable defence that the Petitioner is suffering from borderline personality disorder. If that be so, the petitioner can be rendered unfit to raise the kids singlehandedly"
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> "Page 55, Paragraph 119: It was the Petitioner who stopped going to the marriage counsellor alleging that the Respondent's conduct was beyond correction. All her behavioural pattern and feeling of low in self esteem and blaming the Respondent for such state of her and clinging to the kids and nurturing insecurity without them, whether corroborative of marriage counsellor's report that the Petitioner is suffering from Borderline Personality Disorder? The injuries suffered by the Respondent at the hands of the Petitioner strengthen such suspicion."
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> " Paragraph 137; Page 52- The present case appears to be of growing mutual incompatibility with which expert intervention can be resolved, more so when a probable defense has been raised by the Respondent that the Petitioner is suffering from borderline personality disorder."

30. It has further submitted by the appellant that whenever the respondent was in India, he met the children as and when he wanted to and thus the allegation that the appellant did not allow access to the children is baseless. The onus was on the respondent to establish that he asked for access, which was denied by the appellant, but the respondent has failed to discharge his onus and no evidence has been led on this behalf.

31. The next submission of learned counsel for the appellant revolves around the interpretation of Section 9 of the Guardians and Wards Act. Learned counsel has submitted that Section 9 of the Guardians and

Wards Act cannot be read in isolation, as the Guardians and Wards Act came into force in the year 1890 and there has been a lot of development in this branch of law. Moreover, Section 9 of the Guardians and Wards Act is to be read with Section 6(a) of the Hindu Minority and Guardianship Act, 1956. We deem it appropriate to reproduce Section 9 of the Guardians and Wards Act, 1890 and Section 6(a) of the Hindu Minority and Guardianship Act, 1956, as under:

> **"Section 9 of the Guardians and Wards Act, 1890**
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> **9. Court having jurisdiction to entertain application.—** (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.
> (2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.
> (3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.
> **Section 6(a) of the Hindu Minority and Guardianship Act, 1956**
> **6. Natural guardians of a Hindu minor.—**The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are— (a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that

> the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;"

32. Ms. Rajkotia contends that the case of the appellant falls within the provisions of Section 9 of the Guardians and Wards Act and 6(a) of the Hindu Minority and Guardianship Act. It is argued that both the children "ordinarily reside" within the jurisdiction of this Court. She submits that as far as second child is concerned, he was born in Delhi on 12.09.2016 and thus, there is no doubt that he is an ordinary resident of Delhi. Counsel further submits that there is a statutory presumption of custody in favour of the appellant in view of Section 6(a) of Hindu Minority and Guardianship Act since the second child is below the age of 5 years.

33. It is further contended that the learned Judge has not appreciated the provisions of Section 9 of the Guardian and Wards Act, 1890 which is invoked to provide justice to the children and the mother in the Court's jurisdiction. It is preposterous for a Court to shut its doors to children who seek help within a Court's jurisdiction seeking that it be their "*parens patriae*".

34. Ms.Rajkotia further contends that the Family court has pre-judged that the children should be with both parents even if it means decimating the rights of one of them, in this case, the mother, who is reduced to a mere chattel. Counsel submits that while balancing competing rights even for welfare of the children, the rights of the mother cannot be destroyed. She is the primary care-giver and a good parent. Parents have the means to have a trans-national parenting arrangement. There is no

reason why this should not be worked out. It is submitted that with an advance in technology and communication, the World has become a smaller place and the respondent would be able to meet the children as and when he wants to and can otherwise also communicate on FaceTime, Skype, WhatsApp etc.

35. Ms.Rajkotia submits that the Family Court has completely erred by taking an extremely technical view that in the petition it is nowhere pleaded that both the children are ordinarily residents in the jurisdiction of this Court, which is an essential requirement as per Section 9 of the Act and further that even after a lapse of more than 1½ years, the petition has been dismissed on lack of jurisdiction.

36. It has also been contended by Ms.Rajkotia that the Family Court has misconstrued the observations of the Court in the case of ***Yogesh Bhardwaj*** (supra), more particularly paragraph 18, that if a man stays in a country in breach of immigration laws, his presence does not constitute "ordinary residence". Ms.Rajkotia submits that the observations contained in the case of ***Yogesh Bhardwaj*** (supra) clearly apply to illegal residence of an adult and not a child, which is apparent from the context of the facts and circumstances of the case. It is submitted that in para 91 of the impugned judgment, the Family court has observed as under:

> "91. Ld.Counsels for both the parties have not referred to the provisions under the US law for renunciation of American citizenship by a minor American citizen. While researching on this issue by this court, it was found on the portal of US Department of State-Bureau

> of Consular Affairs that under the heading "Renunciation for minor children/individuals with developmental or intellectual disabilities" it provides that citizenship is a status that is personal to the US Citizen, therefore, parents may not renounce the citizenship of their minor children."

37. Ms.Rajkotia submits that the court has referred to material which has not been placed before it by either of the two counsels and no opportunity was given to her to clarify the position. It has also been contended that there is an implicit bias of the judge, thus, the judgment is liable to be set aside. Counsel contends that the fact that the respondent has failed to pay maintenance in any case, shows that he has no concern for his children.

38. Ms. Rajkotia submits that two issues were framed by the Family Court. Issue no.2 reads as under:

> "2. Whether petitioner is not entitled to the relief claimed for in view of Section 9 of Guardian and Wards Act, 1890 ? OPR"

She has very strongly urged before this Court that this issue cannot be decided in isolation and based on Section 9 of the Guardians and Wards Act, 1890. Following lines have been quoted by Ms. Rajkotia from five judgments which form the central pillar of her case, and we quote as under:

> *"**1. Annie Besant v. G. Narayaniah and J. Krishna Murti and J. Nityanandanda, reported at AIR 1914 PC 41***
>
> *"the 9th section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the district. It is*

in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingle-put."

2. Poel v. Poel, reported at (1970) 1 WLR 1469

"*I am very firmly of opinion that the child's happiness is directly dependent not only upon the health and happiness of his own mother but upon her freedom from the very likely repercussions of an adverse character, which would result affecting her relations with her new husband and her ability to look after her family peacefully and in a psychological frame of ease, from the refusal of the permission to take this boy to New Zealand which I think quite clearly his welfare dictates.*"

3. Vikram Vir Vohra v. Shalini Bhalla, reported at 2010 (4) SCC 409

"18. *Now coming to the question of the child being taken to Australia and the consequent variations in the visitation rights of the father, this Court finds that the Respondent mother is getting a better job opportunity in Australia. Her autonomy on her personhood cannot be curtailed by Court on the ground of a prior order of custody of the child. Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent-mother cannot be asked to choose between her child and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both*."

4. Ruchi Majoo v. Sanjeev Majoo, reported at AIR 2011 SC 1952

"The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer. We may before doing so examine the true purpose of the expression 'ordinarily resident' appearing in Section 9(1)(supra). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and the foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise the expression. The word 'ordinary' has been defined by the Black's Law Dictionary as follows:

Ordinary (Adj.) : Regular; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual.

15. The word 'reside' has been explained similarly as under:

Reside: live, dwell, abide, sojourn, stay, remain, lodge, (Western-Knapp Engineering Co. v. Gillbank C.C.A. Cal., 129 F2d 135, 136.) To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as quality, to be vested as a right. (State ex rel. Bowden v. Jensen Mo.359 S.W.2nd 343, 349.)

16. In Webster's dictionary also the word 'reside' finds a similar meaning, which may be gainfully extracted:

To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with in. 3. To be vested: within in "

5. B.P. Achala Anand v. S. Appi Reddy and Ors. reported at AIR 2005 SC 986

"Unusual fact situation posing issues for resolution is an opportunity for innovation. Law, as administered by Courts, transforms into justice. "The definition of justice mentioned in Justinian's Corpus Juris Civilis (adopted from the Roman jurist Ulpian) states 'Justice is constant and perpetual will to render to everyone that to which he is entitled.' Similarly, Cicero described justice as 'the disposition of the human mind to render everyone his due'." Justice Markandey Katju, Law in the Scientific Era- The Theory of Dynamic Positivism, p.73 The law does not remain static. It does not operate in a vacuum. As social norms and values change, laws too have to be re-interpreted, and recast. Law is really a dynamic instrument fashioned by society for the purposes of achieving harmonious adjustment, human relations by elimination of social tensions and conflicts. Lord Denning once said: "Law does not standstill; it moves continuously. Once this is recognized, then the task of a Judge is put on a higher plain. He must consciously seek to mould the law so as to serve the needs of the time."

39. Based on these judgments, the argument of Ms. Rajkotia is two-fold. The first submission with respect to issue no.2 is that the appellant has permanently left the United States of America and has decided to make India/Delhi her home. It is thus, her submission that the minors ordinarily reside in Delhi. She supports this submission by pointing out that the appellant has applied for Indian citizenship, a specific affidavit Ex.PW1/11 was filed in the habeas corpus Writ Petition (Crl) no.725/2017 to this effect and she has also taken oath of allegiance to

the Indian Constitution on 30.11.2017. A letter from the SDF in this regard has been proved as Ex.PW1/12. Further PW-5 has also deposed that the appellant has taken oath and the application of the appellant for Indian citizenship has been sent to the Passport Office on 30.06.2018. Her second child was born in India. The children are residing in India. The daughter has been ordinarily residing in New Delhi/India since January, 2016, son was born in New Delhi on 19.09.2016. The children, are therefore, rooted in Indian society. The daughter goes to school in India, has a peer group, besides family members she has a full circle of friends in the school and in neighbourhood.

40. It is submitted that the intention of the appellant to remain in India is also evident from the fact that in terms of a legal notice dated 01.11.2016 sent by the appellant to the respondent, she sought maintenance, settlement of accounts from the Dental practice that the parties had, jointly in the USA. She has also applied for one year residence and the contention of the respondent that applying for Indian citizenship does not show the intention of the appellant to reside in India, permanently, is erroneous. It is clarified by Ms. Rajkotia that the appellant will renounce her U.S. citizenship only in the event of her application for Indian citizenship being accepted.

41. Relying on ***Diggory, Bailey and Luke Norbury, Bennion on Statutory Interpretation, Seventh Edition, page 663***, Ms. Rajkotia submits that an Act will often use broad form of words so as to confer a wide discretion on the Courts which can be exercised depending on the facts and circumstances of the case. According to her, this legislative

approach tends to be particularly useful where it is impossible to anticipate in advance the full range of circumstances in which the Act needs to apply. Ms. Rajkotia submits that words cannot be brought from one Statute into another, which according to her, the family court has done by importing the words from the judgment of Yogesh Bharadwaj and has held that the residence of the children in India is illegal. In her support, she has relied on the judgment in the case of ***Handley v. Handley Lindley LJ***, [1891] P 1224 at 127, in context of the Matrimonial Causes Act, 1859, where the court observed as under:

> "*The discretion, in my opinion, overrides both the common law rules and the Chancery Rules as to the custody of the children which were in force when the Act was passed. The Judge is not bound to follow any of those rules, though he will have regard to them in exercising his discretion, but he will mainly be guided by the facts and circumstances of the case*".

42. Ms. Rajkotia submits that the Family Court has declined relief to the appellant on the ground that the residence of the children is illegal. According to her, the ordinary residence of the child has to follow the ordinary residence of the mother ***(Ram Sarup v. Chimman Lal and Ors., AIR 1952 All 79)*** which is further supplemented by the statutory presumption under Section 6(a) of the Hindu Minority and Guardianship Act, 1956, which provides that the mother is ordinarily the legal guardian of a child below the age of five years. She submits that the children in the instant case are not old enough to form an intention ***(Ramji Yadav. V. Dalip K. Yadav 76(1998) DLT 526)***. Unless, the respondent rebuts the statutory presumption in favour of the appellant, the ordinary residence of the children will continue to be the

ordinary residence of the mother. It is argued that the respondent could not lead in any evidence to rebut the statutory presumption. Judicial discipline demands according to her that the words ordinary residence prior to the enactment of Hindu Maintenance and Guardianship Act must be given its widest meaning.

43. It is submitted that the learned Family Court has erred in presuming that the welfare of the children lies in USA, only because USA is a first-world country. This presumption according to the counsel has arisen on account of the Family Court's implicit bias and her personal preference of living in USA added with the presumption that the father in every circumstance would be the best custodian of the children, without considering the welfare of the children or the emotions and bonding of the mother.

44. She further submits that even otherwise, the removal of the children from their settled environment will cause them grave prejudice. It is further contended that nothing has been placed on record to show that there is grave risk and harm in India to the children or that the continuation of the children in the company and custody of the appellant in India would irreparably harm them. Relying on Section 17 of the Guardians & Wards Act and the Judgment of ***Prateek Gupta vs. Shilpi Gupta*** *2018 (2) SCC 309*, it is submitted that the Courts would have to see if any harm is being caused to the child before shifting the custody of the child to the other parent. She submits that in the present case there is no finding returned by the Family Court that there is any harm being caused to the children in the custody of the appellant.

45. Learned counsel submits that till date, the respondent has not resorted to any substantial remedy to seek sole custody of the children. She has also submitted that India is not a party to the Hague Convention but is a signatory to the Child Rights Convention but to which the US is not a signatory. The argument is that despite exhaustive evidence being led, the respondent has been unable to prove that the appellant has abandoned the domicile of origin. Reliance is placed on the judgment of the Apex Court in ***Central Bank of India*** *(supra)* and para 6 of the judgment of this Court in ***Moina Khosla vs. Amardeep Singh Khosla*** *1986 (10) DRJ 286*.

46. Finally, Ms. Rajkotia has contended that the most important criterion and consideration to decide the custody of the children will be the welfare of the children. She submits that the daughter is about 7 years of age and the son is about 3 years of age. At this tender age, the welfare of the children lies with the primary care giver and which is the mother. The day-to-day needs of the children at this tender age can be best looked after by the mother.

47. *Per contra,* Mr. Malhotra, counsel for the respondent, submits that the appellant is stopped from submitting that once the Family Court had returned a finding that Courts in India would have no jurisdiction, the Family Court could not have ruled and adjudicated upon the welfare of the children. He submits that when the guardianship petition was filed, the respondent had filed an application under Order VII Rule 11 CPC, which was allowed by the Family Court and which order was upheld by a Division Bench of this Court. He submits that the order of Delhi High

Court was, however, set aside by an order dated 20.02.2018 passed by the Supreme Court in Civil Appeal no.2291/2018 and the following observations were made :

> "(4) In view of above, principle of comity of courts or principle of forum convenience alone cannot determine the threshold bar of jurisdiction. Paramount consideration is the best interest of child. The same cannot be subject-matter of final determination in proceedings under Order VII Rule 11 of the C.P.C.
>
> (5) Accordingly, we set aside the impugned order. The application under Order VII Rule 11 is dismissed."

Mr. Malhotra contends that in the order dated 20.02.2018, the Apex Court highlights the paramount consideration being the best interest of the child. The matter was remanded to the Family Court for fresh hearing. The Family Court framed the following issues :

> "1. Whether petitioner is entitled to permanent and sole custody of daughter Ishnoor DOB: 27.08.2012 and son Paramvir Singh (DOB: 12.09.2016) ? OPP
>
> 2. Whether petitioner is not entitled to the relief claimed for in view of Section 9 of Guardian and Wards Act, 1890 ? OPR
>
> 3. Relief."

48. Evidence was led on both the issues. Arguments were heard. The appellant participated in the proceedings and did not raise any such objection. Moreover, the Family Court has decided the matter based on the observations of the Apex Court and in case the matter was only to be decided on the question of jurisdiction, the same had already been

done so on an application filed by the respondent under Order VII Rule 11 CPC, which did not find favour with the Supreme Court of India. He further submits that in view of the directions of the Supreme Court of India dated 20.02.2018 read with provision of Order XIV of the CPC, the judgments sought to be relied upon by the appellant, would not apply to the facts of the present case. He also submits that under Section 10(3) of the Family Court Act, Family Court can devise its own procedures and is not bound by any watertight compartment of other procedural laws.

49. Mr. Malhotra submits that the mandate of Section 9 of the Guardians and Wards Act is crystal clear. Jurisdiction is vested in a Court where the minor ordinarily resides. He submits that this Court has interpreted Section 9 of Guardian and Wards Act in the following cases:

i. ***Paul Mohinder Guhan v.Selina Guhan 130 (2006) DLT 524***
ii. ***Amrit Pal Singh v. Jasmit KaurAIR 2006 Delhi 213***
iii. ***Mukand Swarup v. Manisha Jain 2009(159) DLT 118***

50. Mr. Malhotra further submits that it has been consistently held by Delhi High Court that "Ordinarily resides" under Section 9 GWA does not have the same meaning as "residence at the time of the application." The Legislature's purpose of having this expression is probably to avoid the mischief that a minor may be stealthily removed to a distant place but the law provides that the jurisdiction would lie at the place where the minor would have continued, but for his removal. Temporary shifting or removal of children cannot make a permanent home of the children for purposes of Section 9 GWA. The view of the Delhi High

Court has been consistent without any ambiguity on this proposition and no reported dissenting/different view under Section 9 of Guardian and Wards Act has been cited.

51. In response to the judgment of Punjab & Haryana High Court cited by the appellant, in ***Sarbjit Vs. Piara Lal (2005) 140 PLR 692*** for the proposition that the custody of a child below the age of 5 years has to be "***ordinarily"*** be with the mother; the expression *"where the minor ordinarily resides,"* has to be interpreted to mean the residence of the mother and the residence of the child would follow the residence of the mother, learned counsel for the respondent submits that this judgment has been categorically dissented to by the Andhra Pradesh, Gujarat, Himachal Pradesh and Rajasthan High Courts in the following judgments:

    a. ***Harihar Pershad Jaiswal vs. Suresh Jaiswal and Ors. AIR 1978 AP 13;***
    b. ***Harshadbhai Zinabhai vs. Bhavnaben Harshadbhai AIR 2003 Guj 74;***
    c. ***Himanshu Mahajan Vs. Rashu Mahajan and Ors. AIR2008HP38***
    d. ***Sanjay Agarwal v. Krishna Agarwal, AIR 2008 Raj 194***

52. Mr. Malhotra submits that the appellant has not been able to substantiate as to how the two minor children are ordinary residents of New Delhi. He submits that the elder daughter namely Ishnoor was born in the US and is a US citizen by birth. She holds a US passport. Till date, the appellant has taken no steps to surrender the US passport and to apply for the Indian passport for the child. As far as the younger child is concerned, being born to parents who are US citizen, he is also

not an Indian citizen and the appellant herself has also not surrendered her US citizenship. The contention is that by merely arguing that the children are ordinary residents is of no avail.

53. Mr. Malhotra has contended that the appellant continues to remain a USA citizen, continues to hold property in USA, and continues to hold a license in U.S. to practice dentistry. Elaborating the argument, he submits that there is no intention of the parties to make New Delhi as their matrimonial home, since the appellant has not surrendered her US citizenship, US driving licence etc. and her share of professional practice in Southend Dental Corporation in which the appellant and the respondent are the major stake holders. The matrimonial home of the parties is in USA and the temporary over stay at New Delhi after coming to attend the wedding of her brother at New Delhi on a return ticket does not reflect any intention to set up a permanent matrimonial home at New Delhi. The forcible retention of the children at New Delhi against the wishes of the father does not amount to ordinary residence of the children at New Delhi and their presence at New Delhi on the date of the filling of the Custody petition does not make them ordinary residents of New Delhi.

54. The next submission of Mr. Malhotra is that in seeking permanent sole custody, the appellant is not claiming sole or exclusive guardianship rights so as to divest the respondent of his rights as a natural guardian. The claim of the appellant is thus violative of the rights of the respondent/father as a natural guardian under Sections 6 and 8 of the Hindu Minority and Guardianship Act. It is not in the welfare of the

children to be divested of the love, care and affection of their father as it would amount to a violation of Section 13 of the Hindu Minority and Guardianship Act and Section 17 of the Guardian and Wards Act.

55. Mr. Malhotra submits that in view of the several judgments of the Delhi High Court on Section 9 of the GWA, the residence of the minor may not necessarily follow the residence of the mother and Section 6(1) of the HMGA, "ordinarily" vesting custody of the minor with the mother cannot determine jurisdiction of Court under Section 9 of GWA. He further submits whether the question that the residence of the mother as a natural guardian under Section 6 in respect of a minor, less than five years, would determine the jurisdiction of the Court for purpose of Section 9 has been settled by the Rajasthan High Court in ***Sanjay Agarwal v. Krishna Agarwal, AIR 2008 Raj 194***. We quote the relevant paras as under:

> "*28. The view taken by the Hon'ble Himachal Pradesh High Court in Himanshu Mahajan's case (AIR 2008 Himachal Pradesh 38) that Section 6(a) of the Act of 1956 and Section 9 of 1890 operate in different fields and the issue of natural guardianship of a Hindu minor as provided in Section 6 of the Act of 1956 cannot be imported into the Section 9 of the Act of 1890 for the purpose of territorial jurisdiction to deal with guardianship proceedings appears to be in accord with the scheme and operation of the relevant statutory provisions.*
>
> *29. It may further be pointed out that the Act of 1956 essentially having been enacted to amend and codify certain parts of law relating to the minority and guardianship among Hindus, does not apply to several other class of persons as specified in its Section 3.*

Moreover, the Act of 1956 is only in addition to, and not in derogation of, the Act of 1890, save as otherwise expressly provided.

30. So far jurisdiction to entertain the application for guardianship of a person is concerned, the Act of 1956 does not make any overriding provision in that regard and importing the declaration under Section 6 of the Act of 1956 for the purpose of Section 9 of the Act of 1890 would, in the opinion of this Court, be not in conformity with Section 2 of the Act of 1956 that expressly makes the Act of 1956 only supplemental to the Act of 1890.

31. Having examined the matter from all relevant angles, this Court, with respect, is unable to follow the decisions in K. C. Sashidhar (AIR 1993 Karnataka 120) and Sarbjit (AIR 2005 Punjab and Haryana 237) (supra); and, with respect, agrees with the view as expressed in Himanshu Mahajan's case (AIR 2008 Himachal Pradesh 38) (supra) by the Hon'ble Himachal Pradesh High Court."

56. He also places reliance on the judgment of the Kerala High Court in the case of ***Divya J. Nair Vs. S.K. Sreekanth*** *2018 (4) KLT 620* to state that it is not the place of residence of the natural guardian claiming custody under Section 6 of the HMGA that determines the jurisdiction of the Court under Section 9 of the GMA. He submits that the expression "where the minor ordinarily resides" has been interpreted in many judgments, including the one in Philip David, by a Division Bench of the Delhi High Court. As per Black's Law Dictionary, the word 'ordinary' would mean regular, normal, common and the word 'reside' would mean live, abide, stay, lodge, etc. Thus, what makes residence is a matter of intention and a matter of fact. In his submission, the

conduct of the appellant clearly indicates that there is no intent to make India as a place of ordinary residence for herself and the children.

57. The next submission of Mr. Malhotra is that the position of law as it stands today is that statutory provisions dealing with custody of children under any law cannot and must not supersede the paramount consideration, which is, the welfare of the children. He has relied on the judgment of the Supreme Court in *Perry Kansagra* and ***Ashish Ranjan vs. Anupama Tandon*** *2010 (14) SCC 274*. We quote the paras 18 and 19 of the judgment in ***Ashish Ranjan*** as under

> *"18. It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of stare decisis remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the "moral and ethical welfare of the child must also weight with the court as well as his physical well-being". The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution with love, affection and sentiments applying human touch to the problem. Though, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases. (vide Gaurav Nagpal v. Sumedha*

Nagpal, 2008(4) R.C.R. (Civil) 928 : 2008 (6) R.A.J. 422).

19. Statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. (vide Elizabeth Dinshaw v. Arvand M. Dinshaw, AIR 1987 SC 3; Chandrakala Menon v. Vipin Menon, 1993(2) R.C.R. (Criminal) 5 : (1993) 2 SCC 6; Nil Ratan Kundu & Anr. V. Abhijit Kundu, 2008(3) R.C.R. (Civil) 936 : 2008(5) R.A.J. 48 : (2008) 9 SCC 413; Shilpa Aggarwal v. Aviral Mittal & Anr. 2010(3) R.C.R. (Civil) 433 : (2010) 1 SCC 591; and Athar Hussain v. Syed Siraj Ahmed & Anr., 2010(1) R.C.R. (Civil) 696 : 2010 (1) R.A.J. 247 : (2010) 2 SCC 654)."

58. Reliance is also placed on the judgment of the Andhra Pradesh High Court in the case of ***Tippa Srihari vs. State of Andhra Pradesh*** *2018 SCC Online Hyd 123*, wherein it was held that the 'best interest' and 'welfare of the children' being paramount, cannot be overwritten by the doctrines of comity of courts, intimate connect, citizenship of the parents etc.

He submits that the concerns of the Apex Court on the welfare of the children in a child-centric jurisprudence is clearly expressed in the judgment of ***Vivek Singh vs. Romani Singh*** *2017 (3) SCC 231*. He further submits that the Apex Court has also considered that parental alienation leads to psychological problems in the children. He has specifically relied on paras 9 to 20 of the said judgment.

59. Mr. Malhotra has further contended that the two minor children are not ordinary residents in New Delhi being US Nationals and being born to the parents with US citizenship and cannot acquire Indian Nationality. In support, he has placed reliance on Section 3 (C) of the Citizenship Act, 1955, which we quote as under:

> "3. Citizenship by birth.-(1) Except as provided in sub-section (2), every person born in India, -
> (a) xxx xxx xxx
> (b) xxx xxx xxx
> (c) on or after the commencement of the Citizenship (Amendment) Act, 2003, where-
> (i) both of his parents are citizens of India; or
> (ii) xxx xxx xxx
> shall be a citizen of India by birth."

60. His submission is that the appellant and the respondent are both US citizens and therefore, being born to parents, both of whom are not Indian citizens, the two minor children cannot be Indian citizens.

61. Mr. Malhotra has further placed reliance of the judgment of this Court in the case of ***Amrit Pal Singh v. Jasmit Kaur,*** reported in ***2006 (128) DLT 523***, to contend that inter-parental kidnapping cannot ouster the court of its jurisdiction merely because when the application is made, the place of residence is different. The relevant portion reads as under:

> "9. Inter-parental kidnapping cannot ouster the court of its jurisdiction, merely, because place of residence at the time of application is different. What is to be seen is the larger canvass where the children are ordinarily residing and not where they are temporarily put up. Here the children were removed from Delhi on 17.09.2003 and taken to Guwahati by train. It is only thereafter on 11.05.2004, the

> respondent-mother moved the court in Delhi. Surety, this inter-parental kidnapping cannot ouster the court at Delhi of jurisdiction. Further, to say that the courts at Delhi had no inherent jurisdiction, is to say the least, incorrect.
>
> 10. Inherent jurisdiction is something different from territorial jurisdiction. The Guardianship Court in Delhi cannot be said to lack inherent jurisdiction as it is a court that has power to decide Guardianship matters. It cannot be said that the court at Delhi was incompetent to try the suit of that kind. The objection at the highest can be to its territorial jurisdiction. This does not go to the competence of the court and can also be waived. It is for this reason that law demands that the objection to territorial jurisdiction of a court must be raised at the first instance. It is well settled that the objections as to the local jurisdiction of the court does not stand on the same footing as to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction and where it is lacking. It is a case of inherent lack of jurisdiction."

62. The next submission of Mr. Malhotra is that in cases of transnational marriages, the law is crystalized by the Hague convention which stipulates that when a child is removed by one parent, the courts of the country where the child has his or her habitual residence are best suited to take decisions of the child welfare. He further submits that although India is not a signatory to the Hague conventions but the Apex Court has more or less adopted a similar test in the case of ***Surinder Kaur vs. Harbax Singh*** *(1984) 3 SCC 698*, and we quote as under:

> "10. …… The modern theory of Conflict of Laws recognizes and in any event, prefers the jurisdiction of the State which has the most intimate contact with the

> issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offspring of marriage."

63. Mr. Malhotra contends that the principle that jurisdiction which has the closest contact will determine the welfare of the children. He relies upon the judgment in the case of ***Nithya Anand Raghavan*** *(supra)* for the said proposition. He also places reliance on the judgment of this Court in the Habeas Corpus petition between the parties, where the court has given a categorical finding that the children would return to USA with the mother and the Division Bench has left it to the US Court to take a final decision on the custody of the minor children. He submits that the anti-injunction suit CS (OS) 70/2017 filed by the appellant challenging the jurisdiction of the US Court has been unconditionally withdrawn by the appellant on 17.05.2018. The submission is that the jurisdiction of the US Court is the court of closest contact and competent to decide the welfare of the children.

64. We have heard the learned counsel for the parties.

65. The Family Court has dismissed the petition of the appellant. The Family Court had framed two issues on 28.03.2018, which we have already reproduced above in para 47 aforegoing.

66. The second issue with regard to the entitlement of the appellant to a relief under Section 9 of the Guardian & Wards Act has been decided by the Family Court at the outset. The Family Court has decided issue No. 2 in favour of the respondent and has held that the Family Court in Delhi lacked jurisdiction under Section 9 of the GWA. What has weighed with the Family Court in coming to this conclusion is that the appellant had not pleaded that the children ordinarily resided in the jurisdiction of that Court at the time of filing the application. Further, the appellant had not moved any application before the US court for renouncing her American citizenship and had not applied for Indian citizenship. The appellant is enjoying even as on date her OCI status along with her American passport, which is valid till 2023. The Family Court had noted that the passport of baby Ishnoor has expired in October 2017 and her OCI status has also expired. Relying on the case of ***Yogesh Bhardwaj*** (supra) it has held that to be an ordinary resident, the person should not be living in violation of immigration laws. Since baby Ishnoor has no legal documents for her stay in India, merely because she is in the custody of her mother cannot bestow on her the status of ordinary resident. The Family Court has applied the same analogy to Master Paramvir and observed that he is not an Indian citizen and that apart he has no passport or OCI in his favour as yet. In fact the status of this child is in a limbo according to the Family Court. The Family court has observed that question of jurisdiction under Section 9 of GWA is a mixed question of law and fact and the intention of the parties as gathered from the evidence is important. The appellant has so far not shown any intention to stay in India permanently by any

of her conduct. Her matrimonial home and workplace continues to be in the US. She is not registered with Dental Council of India and cannot practice here. She had only come to India to attend the marriage of her brother, with a return ticket.

67. The Family Court has also decided issue No. 1 against the appellant viz. whether she is entitled to permanent and sole custody of the two minor children. The Family Court has categorically noted that although it lacked jurisdiction to decide the petition but it was proceeding to decide issue No. 1 on merits, in view of the law laid down by the superior courts that Guardian Court acts as *parens patriae* and orders of foreign court, concept of comity of courts etc. take a back seat and the paramount consideration is the welfare of the child.

68. The Family Court has observed that the appellant was unable to discharge the onus that the respondent is an unfit person and therefore, the custody of the children must not go exclusively to the appellant. According to Family Court, a major part of the evidence led by the parties, pertains to spousal embittered relationships and a wrong impression in the mind of the appellant that the civil marriage in USA was a paper marriage, with no consequences in India. In the opinion of the Family Court, there cannot be holistic growth of the children in the sole custody of the appellant and unless the respondent is declared as an unfit father, sole custody cannot be given to the appellant. The cross-examination of the mother of the appellant shows that no quarrel took place between the parties in USA and the appellant is mainly aggrieved by the behavior and conduct of her in laws. There is no evidence to

show that the respondent harassed the appellant during her pregnancy owing to which she came to India with her mother. The Court has taken note of the stand of the respondent that he would not separate the children from the appellant and would indulge in shared parenting which is a bonafide act on the part of the respondent. Parental alienation according to the Family Court would lead to serious psychological problems for the children. In deciding this issue also, the Family Court has given much credence to the fact that the appellant had a settled dental practice jointly with the respondent in the USA. She had, in fact, gone to US in 1998 itself for studies and her career, much before she got married. The Family Court has also emphasized on the fact that the role of a father is often undermined as compared to that of a mother, whilst a father can have a pivotal role in the life of a child and can help in developing several qualities in the child which perhaps a mother may not be able to do. In fact, the Family court has observed that the best interest of the children will be served if they were brought up in the USA and there is joint parenting by the parties. The father according to the Court is well educated, well adjusted person in the society and had shown all signs to be a good father. The stay of the children without valid passports is in the teeth of the immigration laws and is not in their paramount interest as well as overall growth. The Family Court has thus held that the appellant is not entitled to a permanent and sole custody of the children and has dismissed the petition.

69. In order to appreciate the rival contentions of learned counsels for the parties, the following undisputed facts are to be kept in mind :

(i) The appellant went to USA much prior to her marriage in the year 1998. While pursuing her study at Hunter College, she came in contact with the respondent and at that point of time the appellant was on a student visa. The appellant is a dentist by profession. A civil marriage was performed in U.S.A. between the parties on 22.08.2006, although, it is a case of the appellant that this marriage was merely a devise to enable her "to overcome her travelling restrictions". Post the marriage, both the parties settled in U.S.A. Both worked together as dentists between the period 2008 to 2016. The parties resided together till January, 2016.

(ii) In January, 2016, the appellant with her only child travelled to India to attend her brother's wedding, which was scheduled in the month of February, 2016. Not only the husband of the appellant but even his parents travelled to India to attend appellant's brother's wedding. It is the case of the appellant that when she came to India, a pregnancy test was conducted and she came to know that she was expecting their second child and when her husband came to India to attend his brother-in-law's wedding, she informed him that she would like to permanently settle in India.

(iii) Prior to meeting the respondent, the appellant had in fact travelled to USA on a student visa. She is a doctor by

profession. She has property in USA and has remained in USA from 1998 upto 2016 for almost two decades. Her first child was born in USA and her second child was conceived in USA. She did not flee from USA, but visited India on a return ticket only to attend her brother's wedding. She had no intention of staying back in India permanently. The marriage between the parties had not broken down and the relationships between her and her in-laws though not were very cordial but were not even highly restrained. This conclusion is drawn from the fact that not only her husband had attended his brother-in-law's wedding but even her in-laws had travelled to India to attend her brother's wedding.

Crystalizing the above facts, the clear picture that emerges is that the appellant and her husband had every intent to make USA their permanent home. It must also be kept in mind that the present case is not to be equated where uneducated or semi-educated woman has married a foreigner of Indian origin and she lacks financial resources or is unemployed.

70. As far as the submission of learned counsel for the appellant that the Family Court should not have adjudicated on the merits of the case having held that it lacked jurisdiction is concerned, we find no force in the same. At the first instance, the Family Court decided the question of jurisdiction on an application filed by the respondent under Order VII Rule 11 CPC which order was upheld by Delhi High Court, but the

Supreme Court while deciding the SLP by its order dated 20.02.2018 observed that principles of comity by Courts or principles of forum convenience alone cannot determine the threshold bar of jurisdiction. Paramount consideration is the best interest of the child. The Apex Court remanded the matter back to the Family Court. In view of this direction of the Supreme Court, the Family Court decided both these issues on merits. We may also note that during the pendency of the matter before the Family Court, neither at the initial stage of framing of issues nor at the time of arguments, any such plea was raised by the appellant, that the Family Court was required to adjudicate only on the question of jurisdiction. To raise such a plea at this stage is not acceptable. Secondly, as mentioned above, the Apex Court had remanded the matter back to the trial court having held that such questions cannot and should not be decided at the threshold under Order 7 Rule 11 CPC and it was implicit in the said order that the Family Court was required to deal with the merits of the case along with the issue of jurisdiction.

71. We would now decide on the issue of interplay between Section 9 of GWA and Section 6 of HMGA. Section 9 of the GWA vests jurisdiction in a Court where the minor ordinarily resides. Section 6 of HMGA deals with natural guardians of a Hindu minor and 6(a), more particularly, deals with the custody of a minor who is below 5 years of age and provides that ordinarily the custody would be with the mother. We have already quoted Section 9 of GWA and Section 6(a) of HMGA in the earlier part of the judgment.

a. In the case of ***Sarbjit*** (supra), the Punjab & Haryana High Court had held that under Section 6(1) HMGA, it is mandatory that the custody of a child below five years of age should be with the mother and the expression "where the minor ordinarily resides" was held to mean the residence of the mother and thus the residence of the child would follow the residence of the mother. However, we find that the said judgment was categorically dissented to by the High Courts of Andhra Pradesh, Himachal Pradesh, Gujarat and Rajasthan respectively in the cases which have referred to above. What has been held in these judgments is that Section 6(a) of HMGA and Section 9 of GWA operate in different fields. Both are independent of each other. While Section 6 deals with natural guardian of a Hindu Minor, Section 9 lays down the rules with respect to territorial jurisdiction of the Court in which the application for custody of the child has to be filed. The ordinary residence of a child would determine the jurisdiction of the Court under Section 9 and thus, the natural guardianship of a minor will not determine the jurisdiction and the two cannot be superimposed. If the legislature intended that the residence of the mother should determine the ordinary residence of the child, it would have used this expression in Section 9. However, this is not how Section 9 reads. Thus, in our view, HMGA of 1956 does not make any overriding provision, and therefore, provision of Section 6 cannot be imported to interpret Section 9 of GWA. Doing so, we would be holding in the teeth of Section 2 of the HMGA which has made the said Act only supplemental to the Act of 1890. In

this context, we would refer to certain extracts from the judgments mentioned above, namely, ***Himanshu Mahajan Vs. Rashu Mahajan and Ors.*** *AIR 2008 HP 38 (para 16)* and ***Sanjay Agarwal v. Krishna Agarwal,*** *AIR 2008 Raj 194 (para 30 and 31)*

> *"16. Section 6(a) of 1956 Act and Section 9 of 1890 Act operate in different fields. Both are independent of each other. Whereas Section 6 of 1956 Act deals with the issue of the natural guardianships of a Hindu minor, and Clauses (a), (b) and (c) define the natural guardians, Section 9 of 1890 Act lays down the rule with respect to the territorial jurisdiction of the Court where the application for the custody of a child has to be filed. This Section clearly relates to and refers the "ordinary residence" of the child and says that only such Court shall have the jurisdiction to entertain the petition where the child "ordinarily resides". The issue of the natural guardianship of the child being the subject matter of Section 6 of 1956 Act cannot be thrust upon, linked with or imported into Section 9 of 1890 Act. If the Legislature intended that the residence of the mother or the father of the child should determine the ordinary residence of the child himself, it should have used the expression to that effect in Section 9 of 1890 Act. It did not do so. It used and specified the expression "ordinary residence" of the child himself. The expression is unambiguous and totally certain as well as clear. Taking a cue from the observations made by their Lordship of the Supreme court in the case of Smt. Jeewanti Pandey AIR 1982 SC 3 (supra), it can safely be said that the expression "ordinary residence" must mean the actual, physical place and not a legal or constructive residence."*

> *"30. So far jurisdiction to entertain the application for guardianship of a person is concerned, the Act of 1956 does not make any overriding provision in that regard and importing the declaration under Section 6 of the Act of 1956 for the purpose of Section 9 of the Act of 1890 would, in the opinion of this Court, be not in conformity with Section 2 of the Act of 1956 that expressly makes the Act of 1956 only supplemental to the Act of 1890.*
>
> *31. Having examined the matter from all relevant angles, this Court, with respect, is unable to follow the decisions in K. C. Sashidhar (AIR 1993 Karnataka 120) and Sarbjit (AIR 2005 Punjab and Haryana 237) (supra); and, with respect, agrees with the view as expressed in Himanshu Mahajan's case (AIR 2008 Himachal Pradesh 38) (supra) by the Hon'ble Himachal Pradesh High Court."*

72. In fact, the issue that the residence of the mother as a natural guardian under Section 6 in respect of a minor less than five years of age would not determine the jurisdiction of a Court under Section 9 has also been settled by the Rajasthan High Court in the case of ***Sanjay Aggarwal*** etc., which we are persuaded to follow and which we have already quoted above in para 71(a) aforegoing.

73. Similar view has been taken by a Division Bench of the Kerala High Court in ***Divya J. Nair*** *(supra)* holding that it is not the place of residence of the natural guardian claiming custody under Section 6

which determines the jurisdiction of the Court under Section 9 and we quote as under:

> *"16. However, learned counsel for the appellant contended that as per section 6 of the Hindu Minority and Guardianship Act, 1956 the custody of a minor, who has not completed the age of five years, is ordinarily to be with the mother and, therefore, it is the place of residence of the mother that determines jurisdiction in relation to the claim for custody of a minor of tender age. Learned counsel for the appellant contended that at the time when the appellant filed the application for getting custody of the child, the child had not completed the age of five years and therefore, the appellant was then the natural guardian of the child. Learned counsel for the appellant would contend that the mother being the natural guardian of the child who was aged below five years, the ordinary residence of the minor child can only be the residence of the mother.*
>
> *17. section 6 (a) of the Hindu Minority and Guardianship Act provides that the natural guardians of a Hindu minor in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) are, in the case of boy or an unmarried girl, the father and after him, the mother. The proviso to Section 6 (a) states that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.*
>
> *18. We are unable to accept the contention raised by the learned counsel for the appellant that the mother being the natural guardian of the child, who was aged below five years, the ordinary residence of the minor child can only be the residence of the mother. It is not the place of residence of the natural guardian that determines the jurisdiction of the court under Section 9(1) of the Act. It is the place where the minor ordinarily resides which*

determines the jurisdiction. There is no presumption that the minor is deemed to reside at the place where his natural guardian resides. If the expression "the place where the minor ordinarily resides" in Section 9(1) of the Act means only the residence of his natural guardian, the legislature would have specifically provided so. If the legislature intended that the residence of the natural guardian of the child should determine the ordinary residence of the child, it would have used the expression to that effect in Section 9 (1) of the Act. It did not do so.

19. The view which we have taken above gets support from the decisions of various other High Courts also [See Arun kumari v. Jhala Harpal Singh Natwar Singh, AIR 1954 Saurastra 152, Harihar Pershad Jaiswal v. Suresh Jaiswal, AIR 1978 Andhra Pradesh 13, Virabala v. Shah Harichand Ratanchand, AIR 1973 Gujarat 1, Shah Harichand Ratanchand v. Virbbal, AIR 1975 Gujarat 150, Harshadbhai Zinabhai Desai v. Bhavnaben Harshadbhai Desai, AIR 2003 Gujarat 74, Himanshu Mahajan v. Rashu Mahajan, AIR 2008 Himachal Pradesh 38 and Sanjay Agarwal v. Krishna Agarwal, AIR 2008 Raj 194].

20. In Himanshu Mahajan v. Rashu Mahajan (A.I.R. 2008 H.P. 38), the Himachal Pradesh High Court has held as follows:

> *"Section 6 (a) of 1956 Act and Section 9 of 1890 Act operate in different fields. Both are independent of each other. Whereas Section 6 of 1956 Act deals with the issue of the natural guardianship of a Hindu minor, and Clauses (a), (b) and (c) define the natural guardians, Section 9 of 1890 Act lays down the rule with respect to the territorial jurisdiction of the Court where the application for the custody of a child has to be filed. This Section clearly relates to and refers the 'ordinary residence' of the child and says that*

> *only such Court shall have the jurisdiction to entertain the petition where the child 'ordinarily resides'. The issue of the natural guardianship of the child being the subject-matter of Section 6 of 1956 Act cannot be thrust upon, linked with or imported into Section 9 of 1890 Act. If the Legislature intended that the residence of the mother or the father of the child should determine the ordinary residence of the child himself, it should have used the expression to that effect in Section 9 of 1890 Act. It did not do so. It used and specified the expression 'ordinary residence' of the child himself. The expression is unambiguous and totally certain as well as clear."*

74. The expression "*where the minor ordinarily resides"*, has been interpreted by a Division Bench of this Court in the case of ***Philip David Dexter vs. State of NCT of Delhi*** *2013(3) DMC 45.* In the said case, this Court has also referred to the dictionary meaning of the word "ordinary" and "reside". After examining the entire law, it has been held that Section 6 would not control the jurisdiction of a Court, under Section 9. We deem it appropriate to quote some paras from this judgment as under:

> *"28. In the aforesaid factual backdrop we need to consider whether Dr. Neeta Misra has prima facie established a case warranting a summary or a regular inquiry to be held i.e. evidence recorded to determine whether she and her daughter are ordinarily residing at Delhi.*
>
> *29. Ms.Malvika Rajkotia, with reference to the decision of the Supreme Court reported as* ***AIR 2011 SC 1952 Ruchi Majoo v. Sanjeev Majoo****, vehemently urged that a person being ordinarily a resident in a place is primarily a question of intention, which in turn is a question of fact. Thus,*

learned counsel submitted that without holding an inquiry to determine the fact i.e. the intention, the learned Judge of the Family Court could not have non-suited the petitioner.

30. Blacks Law Dictionary defines the word 'ordinary' to mean : Regular; usual; normal; common; often recurring; according to establish order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by or characteristic of, the normal or average individual.

31. The dictionary defines the word 'reside' as : live; dual, abide, sojourn, stay, remain, lodge. The decision ***129 F2d 135, Western Knapp Engineering Co. v. Gillbank CCA****, defined 'reside' : To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have ones residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as a quality, to be vested as a right.*

32. To put it simply, 'reside' means more than a flying visit to, or a casual stay at a particular place.

33. What makes residence a matter of intention and hence a matter of fact is that it relates to a person choosing to make a particular place his/her abode.

34. To wit : A person decides one day to seek premature retirement. In furtherance of the intention, the person applies to the employer, giving notice envisaged by the terms of engagement, to be voluntarily retired from service. Anticipating acceptance, the notice visits a small town where he intends to reside post-retirement and negotiates a lease for a house. He opens an account with the bank in the said small town. He returns to the city of his work place and closes the bank account. He surrenders the gas connection and determines the lease. Voluntary retirement request is

accepted and in the evening the office colleagues give the farewell party. Bag and baggage, the same evening this man leaves for the small town. He becomes an ordinary resident of the small town the moment he reaches the town for the reason the conduct of the person shows his intention to have his abode in the small town.

35. If all these facts are admitted, it would be only a question of law : Whether from the said admitted facts an intention to have the abode in the same town stands evinced. No trial would be needed on said admitted facts.

36. Law recognizes the difference between proof of a fact being a matter of evidence and an inference to be drawn from a fact proved, which would be a question of law.

37. Meaning thereby, it all depends on what facts are projected by a party and whether or not the same are admitted. If all the facts projected by a party are admitted by the opposite party or are not put in dispute, no evidence whatsoever would be required; because no fact in issue arises warranting evidence to be led. Only the question of law would remain : Whether on the admitted facts or on the facts which are not traversed by the opposite party, in law, one can infer that the residence of the person is as claimed.

38. It is with this legal understanding that we proceed to consider the undisputed facts pertaining to Dr. Neeta Misra's claim that she and her daughter were ordinarily residents of Delhi.

39. The facts noted by us hereinabove would reveal that Dr. Neeta Misra had nothing to do with the city of Delhi and nor Hope. The two left Cape Town on September 27, 2011; reaching London the next day on September 28, 2011, the mother and daughter flew the same day to reach Mumbai on September 29, 2011. As deposed to in her affidavit dated March 19, 2013, contents whereof have been noted by us in paragraph 26 above, Dr. Neeta Misra reached Delhi on September 30, 2011 to investigate issues regarding her visa

and engaged a counsel who drafted the petition which was filed on October 05, 2011. Dr. Neeta Misra has disclosed her residential address as 234 West End Marg, Said-ulAjaib, New Delhi, but has furnished no proof of having taken on rent the premises in question. The tax returns filed by her of all these years, and the last one being for the Assessment Year 2011-2012 would reveal that she had been filing the tax returns at Mumbai showing herself to be a resident of Mumbai at the flat where her mother was residing.

40. So telling are the facts which emerge from Dr. Neeta Misra's pleadings and the undisputed documents that no trial is warranted. The conclusion would be that take all the facts in favour of Dr. Neeta Misra, in law it cannot be said that the same evidence an intention to set up the abode at Delhi.

41. Thus, on the facts of the instant case we concur with the view taken by the learned Judge Family Court that Courts at Delhi did not have territorial jurisdiction to entertain the petition because when the petition was filed neither Dr. Neeta Misra nor her daughter Hope were ordinarily residents of Delhi.

42. That would be the end of FAO No.29/2013 filed by Dr. Neeta Misra, which we dismiss."

75. In ***Mehdi A. Attarwala v. State of Gujarat AIR 2016 Gujarat 134,*** a Division Bench of the Gujarat High Court has been pleased to hold in para 20(E) as follows:

"20 (E) The contention on behalf of the respondent No. 2 that the petitioner should file an application under Section 9 of the Guardians and Wards Act, 1890 is also rejected as misconceived. The word "ordinary residence" as defined in the said section cannot be construed in a manner where the residence is by compulsion or it cannot

> *have the same meaning as "the residence at the time of the application" and therefore the contention that the since the minors Aadil and Aamir are residing in Ahmedabad at the moment, the application under section 9 of the Guardian and Wards Act, 1890 is the only remedy, is also without any merit."*

76. Having traversed these judgments, the only conclusion that emerges is that both Sections operate independently. Section 9 only deals with territorial jurisdiction of the Court and to decide the jurisdiction, what is to be considered is only the "ordinary residence of the child". The language of Section 9 is crystal clear and unambiguous and we are persuaded to adopt the view of the various High Courts mentioned above. Once the question of jurisdiction is settled, it is certainly open for a mother to place reliance on Section 6, in a case, where the child is below five years of age. But the converse cannot be accepted i.e. the claim of the mother under Section 6 cannot be used to decide the jurisdiction of the Court under Section 9. We are not persuaded to take a different view from what has been held by the various courts and therefore, we reject the contention of the appellant that the provisions of Section 6 will control the jurisdiction of the Court and since the younger child is below five years of age and is in the custody of the appellant at New Delhi, the courts at Delhi will have the jurisdiction.

77. Having held so, we have to now deal with the issue of ordinary residence in terms of Section 9 to decide whether the children can be said to be ordinary residents of New Delhi. The contention of Ms. Rajkotia that the second child was born at New Delhi that the children are living at New Delhi for the past almost three years; the appellant has

applied for Indian citizenship; she has sworn an affidavit of oath of allegiance to the Constitution of India, and therefore under Section 9 Delhi Courts would have jurisdiction, in our view, deserves to be rejected. As mentioned above, the expression where the minor ordinarily resides, has been interpreted in several judgments. To test the proposition of Ms. Rajkotia, we have examined the point of time when she decided to make Delhi her home. Having examined the facts very carefully what emerges is that in fact, the parties always intended to make USA their home. We say so for the following reasons:

(i) The parties got married in the US. It was a civil marriage duly registered; (ii) They jointly practiced dentistry and had joint accounts; (iii) She purchased properties in USA; (iv) She applied for American citizenship in 2012 obviously with the intention to settle in America. Pertinently, this application was after the birth of the first child, baby Ishnoor, with her free will; (v) Not only that, the first child of the parties was born in USA and even the second child was conceived in America; (vi) She came to India only to attend her brother's wedding with a return ticket. Her husband and her in-laws also attended the said wedding; (vii) Till date the appellant has not surrendered her American citizenship, her driving license and American passport. No efforts having made to renew the passport of baby Ishnoor and obtain an Indian passport.

78. These factors in our opinion are pointers to the intention of the appellant that even today, she does not want to make India her permanent home. In this backdrop, it can hardly be said that the two

minor children are 'ordinarily residing' at Delhi in terms of the law laid down in the case of ***Philip David Dexter*** (supra)

79. In view of the facts of this case, as stated above by us, we have no hesitation in holding that the Courts at Delhi will not have jurisdiction to entertain the petition filed by the appellant in view of Section 9 of GWA. We thus find that the Family Court has not erred in deciding issue No. 2 in favour of the respondent herein.

80. Both parties have cited various judgments in their favour. We have examined the judgments, referred to and relied upon by the parties. In ***Surya Vadanan vs. State of Tamil Nadu*** *(2015) 5 SCC 450,* the spouses were of Indian origin and the husband later became a UK citizen. They were married in India but the daughters were born in UK. Later, the wife also acquired British citizenship. After a matrimonial dispute arose, the wife returned to India with her daughters and filed a divorce petition. The husband filed a petition in UK for custody. The Court at UK passed an order directing the wife to return the children to its jurisdiction in UK. The Apex Court applied the principle of 'first strike' i.e. the first effective and substantial order was by the Courts at UK and also the principle of 'comity of Courts' as well as the 'best interest' and 'welfare of the child'. The Apex Court held that "most intimate contact doctrine" and "closest concern doctrine" laid down in Surinder Kaur Sandhu's case could not be ignored and that the welfare of the child was of paramount importance.

81. After the judgment in ***Surya Vadanan*** (supra), a three Judges Bench of the Apex Court decided the case of ***Nithya Anand Raghavan*** (supra). In that case, the parties had married in India and shifted to UK. The wife conceived in UK, but thereafter returned to India and gave birth to a child at Delhi. Subsequently, the wife went to and fro between India and UK and finally, returned to settle in India with the daughter. The husband filed a custody/wardship petition in UK seeking to return the child. A year later he also filed a habeas corpus petition in this Court. Finally the litigation reached the Apex Court and relying on the judgment in the case of ***Dhanwanti Joshi*** which in turn refers to ***Mckee's*** case, where the Privy Council has held that the order of Foreign court would yield to the welfare of the child, held that the role of the High Court in examining the custody of a minor is on the principle of *parens patriae* jurisdiction as the minor is within the jurisdiction of the Court. Since this was a habeas corpus petition, it was held that the welfare was of utmost importance and that the writ of habeas corpus could not be used for enforcement of the directions by a Foreign Court. The observations in paras 56(a) to (d) in ***Surya Vadanan's case*** (supra) were disapproved and which are as under:

> "56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

> (a) The nature and effect of the interim or interlocutory order passed by the foreign court.
> (b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.
> (c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. [*Arathi Bandi* v. *Bandi Jagadrakshaka Rao*, (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.
> (d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

82. The Apex Court reiterated the exposition in ***Dhanwanti's*** case as good law, i.e. insofar as the non-conventional countries were concerned, the law is that the Court in the country to which the child is removed must bear in mind the welfare of the child as of paramount importance. The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land to another country. The essence of the judgment in ***Nithya Raghavan's case*** is that the doctrines of comity of Court, intimate connect, orders of foreign courts, citizenship of the parents and the child etc. cannot override the consideration of the welfare of the child and the direction to return the

child to foreign jurisdiction must not result in physical or psychological or any other harm to the child.

83. Likewise, in the case of ***Kanika Goel*** also, the Apex Court declined to transfer the custody of the minor child to the father, who had an order of the Foreign Court in his favour till the child attained majority or the Court of competent jurisdiction decided the issue of custody.

84. Having traversed the law on the subject, we find that the jurisprudence that has evolved in matters relating to custody of minor children is that the 'welfare and best interest of the child', are the paramount considerations. Mr. Malhotra is thus right in his contention that the law has drifted towards a 'child welfare' centric jurisprudence. In fact, during the course of the arguments, learned counsel for the respondent has also referred to and relied on the latest judgment of the Apex Court in the case of ***Lahari Sakhamuri vs. Sobhan Kodali*** *2019 SCC OnLine SC 395*. We have perused the entire judgment and we find that the Hon'ble Supreme Court has again reiterated the crucial factors which should be applied to decide the custody cases and has held that the welfare of the child has to be the focal point in deciding the custody. We quote some of the relevant paragraphs from the said judgment:

> "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.

50. While dealing with the younger tender year doctrine, **Janusz Korczar** a famous Polish-Jewish educator & children's author observed "children cannot wait too long and they are not people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they are meant to be - the unknown person inside each of them is our hope for the future." Child rights may be limited but they should not be ignored or eliminated since children are in fact persons wherein all fundamental rights are guaranteed to them keeping in mind the best interest of the child and the various other factors which play a pivotal role in taking decision to which reference has been made taking note of the parental autonomy which courts do not easily discard.

51. The doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc., cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child. Taking a holistic consideration of the entire case, we are satisfied that all the criteria such as comity of courts, orders of foreign court having jurisdiction over the matter regarding custody of the children, citizenship of the spouse and the children, intimate connect, and above all, welfare and best interest of the minor children weigh in favour of the respondent (Sobhan Kodali) and that has been looked into by the High Court in the impugned

> judgment in detail. That needs no interference under Article 136 of the Constitution of India.
>
> 52. Before we conclude, we would like to observe that it is much required to express our deep concern on the issue. Divorce and custody battles can become quagmire and it is heart wrenching to see that the innocent child is the ultimate sufferer who gets caught up in the legal and psychological battle between the parents. The eventful agreement about custody may often be a reflection of the parents' interests, rather than the child's. The issue in a child custody dispute is what will become of the child, but ordinarily the child is not a true participant in the process. While the best-interests principle requires that the primary focus be on the interests of the child, the child ordinarily does not define those interests himself or does he have representation in the ordinary sense.
>
> xxx xxx xxx
>
> 56. In our view, the best interest of the children being of paramount importance will be served if they return to US and enjoy their natural environment with love, care and attention of their parents including grandparents and to resume their school and be with their teachers and peers."

85. We have thus no doubt in our mind that the present case would have to be decided on the touchstone of the principles laid down by the Apex Court and the most important being the best interest and the welfare of the children.

86. The question then arises is as to what is the best interest and welfare of the two minor children in the present case, namely Ishnoor and Paramvir. The expression, 'best interest' is found in Section 2(9) and

Section 3(iv) of the Juvenile Justice (Care and Protection of Children) Act, 2015. The said expression came up for consideration before the Apex Court in the case of ***K.G. vs. State of Delhi***, W.P.(Crl.) 374/2017 decided on 16.11.2017. The relevant discussion by the Hon'ble Court on this aspect is as under:

> *"120. At this stage, we may look at some of the provisions of the Juvenile Justice (Care & Protection) Act, 2015 (JJ Act), which throw some light on the issue as to what is the content of "best interest of the child". We are conscious of the fact that the provisions of the JJ Act may not strictly apply to the present fact situation. However, the said provisions certainly would throw light on the concept of "best interest of the child", as understood by the Parliament in India.*
>
> *121. Firstly, the preamble to the JJ Act takes note of the fact that "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;". Thus, it would be seen that the JJ Act has been enacted by the Parliament to implement its obligations under the Convention on the Rights of the Child, which has been acceded to by India. Consequently, it is the bounden obligation of all State actors - which would include the Courts in India, to implement in letter & spirit the said Convention on the Rights of the Child.*
>
> *122. Section 2(9) of the JJ Act explains the meaning of "best interest of child" to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development;". Thus, to determine the best interest of the child, his/her basic rights and needs, identity, social well-being and*

physical, emotional and intellectual development have to be addressed.

123. Section 3 of the JJ Act lays down the fundamental principles which the Central Government, the State Government, the Board created under the said Act, and other agencies should be guided by while implementing the provisions of the said Act. Clauses (iv), (v) & (xiii) of Section 3 are relevant and they read as follows:

> *"3. x x x x x x x*
>
> *(iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.*
>
> *(v) Principle of family responsibility: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.*
>
> x x x x x x x x x x
>
> *(xiii) Principle of repatriation and restoration: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socioeconomic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest."*

124. Thus, all decisions regarding the child should be based on primary consideration that they are in the best interest of the child and to help the child to develop to full potential. When involvement of one of the parents is not shown to be detrimental to the interest of the child, it goes without saying that to develop full potential of the child, it is essential that the child should receive the love, care and attention of both his/her parents, and not just one of them, who may have decided on the basis of his/her differences with the other parent, to re-locate in a

> *different country. Development of full potential of the child requires participation of both the parents. The child, who does not receive the love, care and attention of both the parents, is bound to suffer from psychological and emotional trauma, particularly if the child is small and of tender age. The law also recognizes the fact that the primary responsibility of care, nutrition and protection of the child falls primarily on the biological family. The "biological family" certainly cannot mean only one of the two parents, even if that parent happens to be the primary care giver.*
>
> *125. The JJ Act encourages restoration of the child to be reunited with his family at the earliest, and to be restored to the same socio-economic and cultural status that he was in, before being removed from that environment, unless such restoration or repatriation is not in his best interest. ... ...*"

87. The Apex Court, after analyzing the provisions of the JJ Act, as well as various Articles of the Convention on the rights of the child, adopted by the General Assembly of the United Nations and ratified by the Government of India, held that the best welfare of the child, normally, would lie in living with both the parents in a happy, loving and caring environment, where both contribute to the upbringing of the child in all spheres of life, and the child receives emotional, social and physical support to name a few.

88. In the present case, both the appellant and the respondent are highly educated, professionals and are well-settled in their life. The appellant had at a very early stage of her life, elected to leave India and study in USA and pursue her career. She chose to marry the respondent in USA out of her free will and if we may say, it was a love-cum-arranged

marriage. Both acquired American citizenship and worked jointly as Dentists till 2016. At the cost of repetition, we may say that the elder child was born in USA and the second one was conceived in USA. Both parties had acquainted themselves with the systems and the environment of that country. They had their friends and colleagues in USA and the appellant also had an extended family in USA. The conduct of the parties clearly shows that they had, in fact, abandoned their domicile of origin. Ishnoor is undoubtedly an American citizen by birth and we cannot but accept the contention of Mr. Malhotra that Paramvir is not an Indian citizen though born in India, by virtue of Section 3(1) of the Citizenship Act, which we have quoted above.

89. The two children are, thus, entitled to, as a matter of right, all the privileges, security, both social and financial, in America. At the age in which the two children are, we do not think that it would be difficult for them to get accustomed to the life and environment at America. Ishnoor is now nearly 7 years of age and once she starts going to School in USA, she would make her own circle of friends and with the help of her parents, she would soon acclimatize herself in that country. Insofar as Paramvir is concerned, he is a little over two years, and would be in a position to adapt to the lifestyle and customs in that country, more particularly, with the love and affection of the parents and his sister. Insofar as the welfare aspect is concerned, it can hardly be said that the environment, education and the day-to-day living in USA would be inferior to that in this country or in any manner detrimental to the interests and upbringing of the children. The present is also not a case

where the children are very grown up or have spent many years in India, so as to develop their roots here. Perhaps if that was the case then uprooting them may have been detrimental to their welfare. In fact, Ishnoor had spent about 4 years in USA, before she was brought to India.

90. We also find that while there may be some marital discord between the parties, but the appellant has never alleged that the respondent is an irresponsible or an unfit father. The appellant has not been able to place on record any material to infer that the respondent would have an adverse influence on the minor children. In fact, in our view, the children have a right to be brought up with the love and affection of both the parents and more particularly, when the father is not only willing to look after the children, but is litigating to get their custody. Thus, the best interest of the children, in our view, would be if the children are brought up in USA and by a joint parenting plan of both the parties.

91. The Family Court has rightly observed, in our view, that there cannot be a holistic growth of the children in the sole custody of the appellant. Parental alienation, as rightly held by the Family Court, is not condusive to a good upbringing of the children and can lead to psychological problems in some cases. While we do see the point that the appellant herself feels more comfortable under the umbrage of her parents in India, but the question here is not about her comfort zone but about the welfare of the children. Mr. Malhotra is also right in his submission that just as the appellant wants the love and affection of her

father, with whom she is extremely attached, the two minor children would also need the umbrage of their father and in case the father is willing to look after them and give them the love and affection, we see no reason why the two children should be deprived of his love, affection, care and support. As we had observed above, we are not dealing with the case of a lady who is uneducated or unprofessional. We are dealing with an appellant who is highly educated and chose to live in America to give herself the best in life. We see no reason why we should deprive the children of good education, good environment, good medical care and the joint love of both parents.

92. While we have no doubts in our mind that the mother is a primary care giver, but we cannot also shut our eyes to the fact that even the father can contribute a lot to the upbringing of a child and, in fact, the love, affection, guidance and moral support of a father is extremely important in shaping the life of the children. Thus, the requirement of the respondent in the lives of the children, in our view, is, if not more, equally important for the holistic growth of the children. Paramount consideration being the crucial factor, we hold that the welfare of the children lies with both the parents and in shared parenting.

93. The coordinate Bench of this Court, in the habeas corpus petition, has already held that once the respondent seeks a recall of the order of custody passed in his favour, the appellant would be given a chance to contest the petition for custody in the Court at USA. In fact, to provide a soft landing to the appellant, the Court had also laid down certain conditions in that order. In fact, as a matter of fact, the respondent has

already taken the necessary steps in terms of the judgment of the Division Bench. While we are conscious that an appeal against the said judgment is pending in the Apex Court, we may only say that if the appellant goes to USA, the court of competent jurisdiction, would decide the matter as per law and keeping in mind the welfare of the children. By virtue of the directions by the coordinate Bench, the appellant would not have to face any hostility. We may hasten to add that it may well be that the parties might resolve their differences and come together to jointly bring up the two children.

94. At this stage, we may deal with the contention of Ms. Rajkotia that in view of Section 17 of the GWA, and the judgment of the Apex Court in ***Prateek Gupta*** (supra), that the custody of the children cannot be taken away from the appellant as there is no finding by the Family Court that any harm is being caused to the children in her custody or that the custody is unlawful. We do not find any force in this contention since in the present case the controversy is not about taking away the custody from the appellant but the controversy is about the sole custody of the appellant. For the sake of repetition, we extract issue No. 1 framed by the Family court in this regard as under:

> "1. Whether petitioner is entitled to permanent and sole custody of daughter Ishnoor DOB: 27.08.2012 and son Paramvir Singh (DOB: 12.09.2016) ? OPP

95. Since we are not divesting the appellant from the custody of the children and are of the view that the welfare of the children lies in joint parenting and in the soil of USA, the judgment of ***Prateek Gupta***

(supra) as well as Section 17 of the GWA would actually have no relevance in this case.

96. We thus hold that the paramount welfare of the children would lie in shared parenting in the United States of America for the reasons enumerated by us above. There is thus no infirmity in the judgment of the Family Court that permanent and sole custody of the children cannot be given to the appellant. There is no merit in the appeal and the same is accordingly dismissed.

G.S.SISTANI, J

JYOTI SINGH, J

JULY 1st , 2019
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