

Reserved On : 05/02/2026
Pronounced On : 18/03/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**R/SPECIAL CRIMINAL APPLICATION (HABEAS CORPUS) NO.
 17368 of 2025**

With
CRIMINAL MISC.APPLICATION (DIRECTION) NO. 1 of 2026
In R/SPECIAL CRIMINAL APPLICATION NO. 17368 of 2025

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TILLANA SHRIPAL SHAH W/O SHRIPAL SHREYASKUMAR SHAH
THRO POA TUSHAR RAMAKANT DESAI

Versus
STATE OF GUJARAT & ANR.

=====

Appearance:

MR HARSH N PAREKH(6951) for the Applicant(s) No. 1
MANAN K PANERI(7959) for the Respondent(s) No. 2
MS. MONALI BHATT, ADDL. PUBLIC PROSECUTOR for the
Respondent(s) No. 1

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CORAM:HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA
and
HONOURABLE MR.JUSTICE D. M. VYAS

CAV JUDGMENT
(PER : HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA)

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I. INTRODUCTION

1. Tillana Shripal Shah (hereinafter referred to as ‘the mother’) has filed this petition against her husband Shrippal Shreyaskumar Shah (hereinafter referred to as ‘the father’) and has sought for issuance of a writ of habeas corpus and for a direction to be issued to the State and to the father to produce Shriyan Shripal Shah (hereinafter referred to as ‘the son’) and to set him at liberty.
2. She has also prayed that the father be directed to hand over the passport of the son to her and for handing over the custody of her minor son to her, since she is

the legal custodian of the son as per the orders of the Ontario court of Justice.

3. The facts, as gathered from the pleadings and from the arguments that were advanced, which are not in serious dispute, are stated in a chronological manner, as follows:

II. CHRONOLOGY OF EVENTS UPTO THE INITIATION OF PROCEEDINGS BEFORE THE CANADIAN COURTS

- a) On 21.09.2018, the father and mother got married at Toronto, which is situated in the province of Ontario in Canada. A record of the solemnization of marriage has been produced. In fact, it is admitted in paragraph 3.1 of the petition that the marriage was solemnized on 21.09.2018 as per the civil law in Canada.
- b) On 11.05.2020, the son was born in Canada, and by virtue of being born in Canada, he is, admittedly, a naturalized citizen of Canada by birth.

- c) In 2021, the son was issued with an Overseas Citizen of India Card (OCI card), as a result of which, he has a lifelong visa to enter India.
- d) In May, 2022, the mother along with the son came and stayed in India till September, 2022 and in September 2022, the father also came down to India and all of them stayed in India till November, 2022 and all of them thereafter returned to Canada.
- e) In March, 2023, the mother came down to India and stayed here for a month i.e., till April, 2023 and thereafter returned to Canada.
- f) It appears thereafter that marital discord set in between the couple and this ultimately resulted in an e-mail being sent by the father to the mother on 23.03.2024 (which is produced as Annexure-A1 with the affidavit-in-rejoinder). It would be useful to extract the entire contents of the email, in support of the reasoning provided for in this judgment later. The said email reads as follows:

“Hi Tillana,

I'm writing this with a calm mind and after thinking it through innumerable times. I think it's about time we part ways for good. I was planning to stay in Canada till Shriyan graduates from pre-school in June, but I think I can't take it anymore, specially after things you told me yesterday. You said things you shouldn't have said, no matter what! You have no filters and then threaten me to call 911 after provoking me. I don't think it's doing any good to either one of us or Shriyan.

I tried a lot to work on this marriage. Gave my everything but got nothing much in return. I don't deny the fact that you haven't tried but its just not meant to be! I stayed late at work or took 10 hr shifts bcoz I was at more peace there than at home with you. For me there was no mental peace or much physical intimacy (even if it was once in a while, it came with a tag line saying "u swallowed is cum and I like it more" which I will never ever forget). No matter how good or bad the situation, you always want what you want, but u don't want to give! Mind you, I stopped supporting you emotionally intentionally when I stopped getting things which I longed for. It has to work both the ways! I can go on and on, but what's the point?

Anyways, I'll be working on winding up my things as I'll be moving back to India as soon as I can. Its turning toxic for me here. Specially with you blaming me that I'm abusing you mentally, physically and financially!! Really?

Mentally: you do whatever u want, treat Shriyan in whatever way u think is right (good or bad) and give me stress all the time and I'm abusing u mentally?

Physically: you hit and push me all the time. There is hardly any proper sex happening between us and I'm abusing you physically?

Financially: considering the fact that we have been married for 5.5 years (66 months) and our monthly expenses are atleast \$5K, I've spend already \$330K. That's almost 2 crore INR. Not even calculating student loan and other things I had to take to do to stay here with you! Have u even seen that kind of money in your life.. and u say I'm abusing u financially? Have u not seen how our other friends live in basement and without cars even when they are earning twice than us. I tried to give u every luxury that I could afford from day one, but I'm abusing you financially.. wow!!

Earlier I always wished that Shriyan and you would accompany me to India and I can take care of the rest, but with present circumstances where you threaten me to call 911 and blame me for things which I don't do, I think it would be best that we part ways. I would be happy to take Shriyan with me and take care of him, but I know that you and your extended family (who has never wished or will never wish good for you) will not let that happen. Laws also say that the kid has to be with the mom until a certain age and hence I'm left with no choice. Let me know if you have something else on your mind and would like to take Shriyan with me. I will be more than happy to oblige.

I'm going to start selling my things and wind up everything as soon as I can. If you need or want anything (bed, sofa tv, etc) its yours! You can keep it. Shriyan's daycare expenses will be taken care of until June since you receive a greater amount in child care benefits than what they charge at

daycare. The amount is getting deducted from your account since March 01 st.

As far as rent of the house is concerned, it will be taken care of until May 31st. We have to vacate it on May 31st as per the landlord's notice and I will keep it that way, unless you want to keep paying and extend it. In that case, talk to him directly since I will be officially accepting his notice of vacating it.

If you decide to keep any of the things (sofa, bed, kitchen things, etc) it will be completely your responsibility to vacate it on May 31st since I will be gone before that mostly. Also from now on, all your bank accounts and credit cards will be your responsibility. Start managing them and let me know if you have any questions. Open a zero balance account asap. Nothing else comes to mind as of now. Will text/email you if something comes up.

Last 5-6 years has been one hell of a ride. Unfortunately, we don't like anything about each other anymore. Poor Shriyan might have to suffer because of that. I will try my best so that our separation doesn't affect him much. But again, your and my definition of that would be quite different like everything else.

Good luck to you. Hope you find your peace as I hope I might find mine. Also a small request: please make sure that Shriyan atleast remembers who his dad is/was!

-Shripal”

4. As can be seen from the said e-mail, which came about at an undisputed point of time, the father had stated

in categorical terms that he could not get along with the mother and that the marriage had failed. He has by this e-mail informed the mother that he would be winding up things and moving back to India as soon as he could.

5. In this e-mail, as far as the son is concerned, it is clearly stated that the father had wished that the son and the mother would accompany him to India, but given the present situation, that was not possible and it would be in the interest of both the parties to part ways. He has also stated that the mother and her family would not allow him to take the son, and he has also conceded that the laws would also say that the child has to be with the mother until a certain age and left with no other choice he was agreeing to the mother having custody of the son. In fact, he has stated that the son's day care expenses would be taken care of until June and the mother would receive a greater amount in childcare benefits. This e-mail makes one thing clear and that is the father had decided to part

ways with the mother and had also agreed to allow the mother to have custody of the son.

6. During the course of arguments, it was also admitted that in the month of December, 2024, the father had gone to Canada and stayed there for two weeks. It was stated that he stayed in the same building in which the mother resided, though separately, and thereafter returned to India after two weeks.
7. In the month of April, 2025, it was stated that the father returned to Canada and started residing there.
8. It is apparently clear from the above that from March, 2024 till April, 2025, the custody of the son was with the mother, and this was with the clear consent of the father.

III. CHRONOLOGY OF EVENTS AFTER THE INITIATION OF LEGAL PROCEEDINGS IN THE ONTARIO COURTS:

9. On 06.08.2025, the mother initiated proceedings before the Ontario Court of Justice making claims under the Family Law Act or the Children's Law Reform Act and sought support for herself, for her son, decision-making responsibility for the son, parenting time with the son and for spousal support.

10. The assertions made in support of the application may not be relevant, except for referring to the following statements made by the mother.

“9. In September, 2024 Mr. Shah fled to India just to escape from his responsibilities towards his son.

10. Since then, I am taking care of my son all alone.

11. I seek 100% decision making responsibility and child support since the date of separation.

12. I am agreeable to give parenting time to Mr. Shah every alternate weekend from Friday evening 5.00 pm to Sunday evening 5.00 pm.”

11. A reading of this statement would also indicate that the mother had categorically stated before the Ontario Court that she was taking care of the son all by herself since September, 2024 and was therefore

seeking 100% decision making responsibility and also child support since the date of separation.

12. This would tally with the admitted fact that the father had left Canada in the year 2024 and in the month of March, 2024 preceding his departure, he had categorically stated in the e-mail referred to above that he had conceded for the son to stay with the mother.

13. On 03.09.2025, the father filed his reply to the claim of the mother. In this reply, he agreed to Claim Nos. 11 and 14, i.e., support for the son and parenting time with the son, respectively, which had been sought for by the mother. He, however, denied the claim Nos. 10, 13, 16, 30 and 32 i.e., the claim made by the mother for support claimed by her, decision making responsibility for the son and the spousal support that was sought. Claim Nos. 30, 32 and 50 related to costs pre-judgment interest and arrears of

support since the date of separation, which may not be relevant for the present case.

14. In this statement accompanying his reply, the following would be relevant for the purpose of this case and the same is therefore extracted:

“In September 2024, I departed for India for medical reasons, as my health was deteriorating. For a year beforehand, I had attempted to persuade my wife to relocate to India, where I am a dental surgeon and where we would have family support, but she consistently declined. At the age of 36, my health was failing, and I was required to take several medications daily due to numerous health problems and undue stress. I always offered my wife the option of relocating to India with me and our son, but she consistently declined. Consequently, I made the decision to travel to India in September 2024 for a period of three months to focus on my health and address my medical concerns. I want to emphasize that I did not abandon my family. Indeed, I provided support by assisting her in acquiring a new car, aiding in the move to a condominium, and also providing her with \$11,000 to help with their needs.

I maintained communication and spoke with my wife and son daily from India. Upon my return in December 2024 to spend a month with my family, I was unfortunately denied access to the residence by her and was compelled to secure a guest suite for approximately 25 days to spend time with my son.

I returned to India in mid-January 2025. My health significantly improved there, and I was able to discontinue all medications. My wife and I also participated in couple's therapy while I was in India, and I covered the costs for all sessions, including hers. I have consistently desired for our relationship to thrive and have always shielded our son from any difficulties we faced. I have consistently prioritized our son's well-being above all else.

I must respectfully disagree with the assertion that my wife has been solely responsible for our son's care. I have maintained daily contact with them and provided financial support, even while I was in India, until my return to Canada in April 2025. Upon my return, and due to my wife's decision not to allow me access to the new home, I secured a rental unit in the same building and have resided there since. My son resides with both of us, dividing his time relatively evenly between my care and that of his mother, with the majority of his time spent in my presence.

While I am interested in assuming complete decision-making responsibility for my son, considering that a child typically benefits from the involvement of both parents and prioritizing his well-being, I would prefer to share decision-making responsibilities on a 50-50 basis. I am prepared to fulfill my child support obligations in accordance with the established guidelines and support table. I have, in fact, already remitted \$11,000 prior to my departure for India, and I kindly request that this amount be taken into consideration when determining the child support calculation.”

15. This statement of the father in the reply would also admit of the fact that he was not in Canada from September, 2024 and returned to Canada only in April, 2025 (apart from a brief period in December, 2024).
16. It may be relevant to state here that the son was born in 2020, so as of September, 2024, he was only about 4 years and 4 months, and ever since, the son was under the care of the mother in Canada and that too with the consent of the father.
17. On 05.11.2024, the father addressed an e-mail raising several concerns regarding the son. In this e-mail, he has stated that the behaviour of the mother was affecting the son and he was therefore calling upon the mother to shield him and requested her to refrain from discussing the differences between them with the son.

18. Notwithstanding the fact that the father filed a reply before the Ontario Courts on 03.09.2025, he left Canada on 07.12.2025 to India.

19. On arrival in India on the 08.12.2025, he sent an e-mail on 09.12.2025 (Annexure-A2 to the affidavit-in-rejoinder), in which he has stated as follows:

“Hi Ms. Brooks & Ms. Soares Barday,

Greetings. I trust this email finds you in good health.

I am writing to inform you that Shriyan will be unable to attend school for the next few weeks, commencing today and potentially extending until the beginning of January, due to our sudden travel plans.

We would appreciate your understanding and excused absence for him during this period.

Thank you.

Regards”

20. As could be seen from this e-mail, the father had decided to return to India along with his son and had thereafter thought it fit to inform the school about his

absence. In fact, he has stated that the son would not be able to attend school until the beginning of January, 2026 due to the sudden travel plans.

21. It is not in dispute that the father did bring the son to India on the 07.12.2025 without securing the permission of the mother. It is sought to be argued that the mother and father were in joint custody of the son and there was no order barring the father from traveling with the son to India.

22. The fact, however, remains that the father brought the son to India without the permission of the mother and after he had filed a reply on 03.09.2025 to the claim made by the mother before the Ontario Courts on 06.08.2025.

23. On 10.12.2025, the father proceeded to file a brief to the claim made by the wife. This brief was filed on the 10.12.2025 i.e., after he had returned to India.

24. In this brief, at paragraph-2, the father has admitted that he travelled to India with the son and that the

son was under his care. He has made certain assertions regarding the manner in which the mother was taking care of the child and has sought dismissal of the mother's claim. There is also a schedule attached to this brief in which he states that it would be in the best interest of the son if he was allowed to take care of him.

25. It is also asserted in this brief that both of them being Hindus by religion, it would not be in the best interest of the son to grow up experiencing and observing his mother in an unhealthy relationship and it would be better for the son to be brought up with Hindu cultural values, Indian ethos and traditional Hindu identity.

26. It is asserted that as on 10.12.2025, he was in the company of his paternal grandmother, paternal uncle and aunt and their minor child and all of them were cohabiting together in a joint shared residential unit, and the son therefore had the support of a Hindu

joint family and was living in the company of his extended family.

27. The father had basically taken the decision to return to India along with the son without seeking the permission of the mother and sought to file a brief before the Ontario Courts stating that the best interests of the child was that he should reside with him.

28. An assertion is also made that the father was the natural guardian under the provisions of the Hindu Minority and Guardianship Act and that the custody and care of the son would therefore be lawful. An assertion is also made that there was no restriction on him by means of any order passed by the Court to travel to India along with his son.

29. It is ultimately stated by him that the mother can relocate to India to live as a family with the son and the father and that it would be in the best interest of the son if both the father and mother stayed in India.

30. The wife thereafter moved to the Ontario Court complaining about the removal of the son from Canada and this resulted in orders being passed by the Ontario Court. In this order, it has been recorded that the mother and father had a *“without prejudice parenting arrangement, whereby the father would have parenting time from Sunday to Monday morning but the father had not returned the child on Monday i.e., December 8, 2025 and the wife had later learned that the child was taken by the father to India.”*

31. The order of the court reads as follows.

This case is about Shriyan Shripal Singh born May 11, 2020 (age 5). The Applicant is his mother and the Respondent is his father.

The matter is actively before the court, the application is issued on August 6, 2025. The father has filed an Answer dated September 3, 2025. The parties had their first appearance court date on September 18, 2025 to which they both attended. They have an initial case management court date before this judge scheduled for next week on December 17, 2025. In fact, both parties have filed their briefs for such a court case and appear to be ready for it.

The mother now comes to the court to say that the father has left the country with Shriyan without the knowledge or consent of the mother.

Her evidence describes that the parties had a without prejudice parenting arrangement whereby the father would have parenting time from Sunday to Monday morning weekly. On Monday December 8, 2025, the child was not returned. Upon investigation and after calling 911, the mother learned that the child was taken by the father to India.

There is no question that the child's habitual residence in the Region of Peel, Province of Ontario, Canada. The father's own Answer describes the child's living circumstances as such.

The travel to India with the father was not with the mother's consent. He ought not to have done that and he should immediately return the child to Canada.

The mother's requests on a temporary without prejudice basis shall be granted given the above with the exception of the restraining order – that claim shall be adjourned for further evidence and to be addressed after service on the father.

The mother should immediately seek out and retain legal counsel who has the experience to assist in non-Hague country wrongful removal cases.

Orders:

On a temporary without prejudice basis

The Applicant, Tillana Shripal Shah, is granted sole decision-making responsibility for the child, Shriyan Shripal Singh born May 11, 2020 on all significant decisions about his well-being including with respect

to his health, education, culture, language, religion, spirituality and significant extra-curricular activities pursuant to s.28 of the CLRA

The child, Shriyan Shripal Singh born May 11, 2020, is habitually resident in the Region of Peel, Province of Ontario, Canada.

The respondent Shripal Shreyaskumar Shah shall immediately return the child to this jurisdiction and into the primary care of the applicant.

There shall be a police enforcement provision to give effect to this order

Once the child is back in this region, the respondent shall not further remove the child from the region of Peel.

Court administration to prepare and issue today's order. Unrepresented party approval is waived.

The mother shall ensure that the father is served with the motion materials and this endorsement

Scheduling of this case remains unchanged. The next court date is December 17, 2025 at 11:30 am. In person. Initial case management conference and motion review.

32. As could be seen from the above, the mother claimed that there was a *without prejudice parenting arrangement* whereby the father had parenting time from Sunday to Monday and the father, having taken the son to have his parenting time on Sunday, had

failed to return the child on Monday. During the course of arguments, it was admitted by the learned Counsel for the parties that there had indeed been an informal arrangement where the father was also given parenting time by the mother voluntarily.

33. The Ontario Court which was seized of the matter has passed an order on 12.12.2025 directing that the son should be immediately returned to Canada fundamentally because he was habitually resident in the region of Peel, province of Ontario in Canada. This order was passed by the Ontario Court on 12.12.2025 ex-parte i.e., without notice to the father.

34. On 17.12.2025, the Ontario Court had recorded the events that had unfolded until then and noticed that the father was not present before it nor was the child returned. The Ontario Court accordingly adjourned the matter to 15.01.2026 and stated that the existing orders would continue.

IV. CHRONOLOGY OF EVENTS BEFORE THIS COURT:

35. On 22.12.2025, the mother has thereafter filed this writ petition seeking for issuance of a writ of habeas corpus and was posted before the Court on 05.01.2026 on which day, notice of the petition was ordered on the same day. Appearance, however, was entered by a learned Counsel on behalf of the father on the same day and a request was made for grant of time to file a reply.
36. A complaint was also made that the mother was not even being given online access to her 5-year-old son. In order to remove any confusion, this Court directed the father to file an affidavit stating that there would be no hindrance or impediment to the online access of the mother with her son
37. The maternal grandfather, through whom the petition had been presented, was also given the right to have access to his grandson whenever he desired.

38. On 15.01.2026, the date that had been scheduled by the Ontario Court, the Ontario Court adjourned the matter to 17th March, 2026.

39. On the very same day i.e., on 15.01.2026, the matter was posted before this Court and this Court taking into consideration the age of the son, observed that it would be beneficial for the parties to arrive at a mutually acceptable solution and that the parties should not invite any order from the Court and to facilitate a possible reconciliation, the matter was adjourned to 03.02.2026.

40. However, on 20.01.2026, the father presented an application requesting this Court to refer the parties to the Gujarat High Court Mediation Centre. This Court, taking note of the manner in which the matter was being conducted, and realizing that the mediation proceeding would not be successful given the arguments being advanced, proceeded to call upon the parties to argue the matter on merits.

41. Accordingly, the matter was heard on merits on 03.02.2026 and 05.02.2026 and after the arguments were concluded and while reserving the judgment, this Court directed the mother to place on record the marriage certificate and also directed the father to deposit the passport and the OCI card of the son into Court, which directions have been complied with by both the parties.

V. CONTENTIONS ADVANCED BY THE MOTHER:

42. Shri D. C. Dave, learned Senior Counsel and Shri Harsh Parekh, learned Counsel appearing for the petitioner, advanced the following contentions:

- a) The mother and father have been admittedly married under the Canadian laws and are subject to the jurisdiction of the Canadian Courts. Consequently, if the Canadian Court had held that the father had brought the minor son out of Canada without the permission of the mother and had thereafter gone on to disobey the order of the

Canadian Court which had directed him to return of the son, it was obvious that the custody over the minor son was unlawful, and his custody would therefore have to be returned to the mother.

- b) On facts, the father had, in March, 2024 itself, admitted that the mother would be in custody of the minor son and he had also left Canada in September, 2024 (except for a brief period of two weeks in December, 2024) and had ultimately returned to Canada in April, 2025. Thus, for more than a year, the minor son, who was aged about four years as of 2024, was in the sole custody of the mother, which had in fact been acceded to by the father, making the custody of the mother lawful and in the light of this particular fact, it was unlawful on the part of the father to have removed the son from the custody of the mother and brought him to India.

- c) It was not in dispute that there was an informal arrangement whereby the father would have visitation rights whereby he had the right to have custody of the minor son only on the weekends and this informal arrangement was entered into in the background of proceedings regarding the custody of the son in the Canadian Courts. In this situation, a breach of an informal arrangement by transporting the son out of the country without his mother's consent and thereby disrupting his entire life, would clearly be detrimental to the welfare of the son.
- d) In law, though the father is the natural guardian, so long as the son is of a tender age, such as in the instant case, the best interest of the son would be for the mother to have custody.

43. The citations relied upon by the learned counsel for the petitioner are noted at a later stage in this judgment.

VI. CONTENTIONS ADVANCED BY THE FATHER:

44. On the other hand, Shri Anil Malhotra, learned Senior Counsel appearing for the father, made the following contentions:

- a) Admittedly, there were legal proceedings regarding the custody of the son and spousal support and yet the mother had not sought for and had not obtained any restraint order restraining the father from bringing the son to India and since there was no legal bar for the father to take the son to India, the assertion that the the father had acted in an unlawful manner cannot be accepted.
- b) The parties being Hindus, obviously, the custody of a Hindu child would be governed by the provisions of the Hindu Minority and Guardianship Act and not by Canadian laws.
- c) The minor son, being a Hindu, would be traumatized by the act of his mother staying in an

adulterous relationship, and this would therefore not be in the best interests of the child.

- d) The son was living in a secure environment, in a joint family in India, and the best interests of the son would be for him to continue to stay in India.
- e) The maternal grandfather had been given unbridled access to the minor son, and the wife was also given unrestricted video conferencing access to the son and therefore, no prejudice would be caused to the mother if the son continued to stay in India.
- f) The citations relied upon by the learned Senior counsel appearing for the respondent are noted at a later stage in this judgment.

45. In the light of these contentions, the following questions would arise for consideration in this writ petition.

**VII. QUESTIONS WHICH ARISE FOR
CONSIDERATION IN THIS PETITION:**

- (A) Whether the removal of the son from Canada and his transfer to India without the permission of the mother would result in the father being in unlawful custody of the minor son?
- (B) Whether the best interests of the son would be served by permitting him to stay with his mother or would it better served by permitting his father to have his custody in India?

VIII. Re: QUESTION (A):

46. In this case, it is not in dispute that the mother and father got married in Canada under the Canadian laws. Since the couple were married under the Canadian laws, it is obvious that they would be governed by the laws under which they were married. It was no doubt open for them to get married under the provisions of the Hindu Marriage Act, in which

case, the situation would have been a bit different. The couple, being educated professionals, chose to get married consciously under the Canadian laws, and as a consequence, their rights and obligations under that marriage would have to necessarily be governed by the Canadian laws and not by the Indian laws.

47. Another way of looking at this situation is that the parties, though being Hindus, chose not to get married under the Hindu laws or under their personal law i.e., the Hindu Marriage Act, and they would therefore be estopped from contending that the laws under which they got married i.e., the civil laws of Canada, are inapplicable to them.

48. In the email of 23rd March, 2024, which has already been extracted above, the father categorically stated that the marriage had ended and that he did not wish to stay in Canada and had requested the mother to take care of his son. In fact, he has also categorically stated as follows:

“Earlier I always wished that Shriyan and you would accompany me to India and I can take care of the rest, but with present circumstances where you threaten me to call 911 and blame me for things which I dont do, I think it would be best that we part ways. I would be happy to take Shriyan with me and take care of him, but I know that you and your extended family (who has never wished or will never wish good for you) will not let that happen. Laws also say that the kid has to be with the mom until a certain age and hence I'm left with no choice. Let me know if you have something else on your mind and would like to take Shriyan with me. I will be more than happy to oblige.

49. This portion of the e-mail would clearly establish that the father had consciously stated that the minor son would be with the mother and he had no objections for the same. Importantly, he has also acknowledged the fact that the legal position was that a son has to be with the mother until a certain age and he had no choice in the matter. If the father, who is a dentist by profession, categorically states at an undisputed point of time i.e., when the marital discord had erupted and the son was barely 4 years old, that the mother could

have custody of the child and this was in accordance with law, it would not be open for him to now contend that the best interests of the child would be if his son stayed with him and not with the mother.

50. It must also be relevant to state here that when the wife initiated proceedings before the Ontario Court, the father did not raise any contention before the Canadian Courts that they did not possess jurisdiction. In fact, he entered a plea and also submitted a brief in which he did not raise any objections regarding the jurisdiction of the Canadian Courts. If that is the resultant position, the father, in the light of the orders passed by the Canadian Court after he returned to India to return the child to Canada, was required to comply with the orders passed by the Canadian Courts. If the father chooses to defy an order passed by a competent Court which had the jurisdiction to decide the question of marital disputes and consequently the custody of the child, he cannot invoke the jurisdiction of this Court so as

to facilitate his defiance of the order of the Canadian Court.

51. The following conduct of the father in regard to the custody of his son would also have to be examined.

52. As noticed above, the father filed a reply in the Canadian Court on 03.09.2025. During the pendency of these proceedings, on 07.12.2025, he left Canada and brought his son along with him to India without informing the Court or more importantly without securing the permission of his wife.

53. After the father returned on 08.12.2025, he has sent an e-mail on 09.12.2025 (Extracted above) stating that his son would be absent from school till the end of January, 2026. However, in this petition, he makes an averment that he has returned to India for good and would want his son to continue to stay in India along with him.

54. On 10.12.2025, i.e., two days after he returned to India, he has submitted the brief in which he has stated as follows:

(1) Shriyan is about 5 years and 6 months old. Since the parents were separated and were living in different apartments in the same residential building (in Canada), Shriyan was in primary custody, care and control of his father Shripal Shreyaskumar Shah and was permanently residing with his father in Canada.

(2) Tillana Shripal Shah i.e. the mother, had voluntarily and willingly chosen to live separately and independently. She was/is cohabiting with her male partner Mr. Pradeep Meta in a separate apartment in Canada in the same building. She was/is in full time employment with sufficient independent funds of her own for her maintenance and upkeep.

(3) As a primary care giver in Canada, the father's responsible for permanent shelter, schooling, welfare, care and control on a day to day basis. In the school records, in Canada, the address of minor Shriyan's apartment of the father is shown and recorded as the permanent address of minor Shriyan.

(4) Shriyan is of tender age. For him, to experience his mother in an extra-marital relationship whilst his natural parents are not officially or legally divorced, is an inappropriate influence for his normal mental development in formative years and it's having a very negative impact on his positive growth.

(5) Shriyani's mother openly prefers and chooses the company of her male partner in preference to the welfare of minor Shriyan. She does not provide good moral behavior, support facilities for his upbringing with a good

Parental control, it is confusing to see his biological mother prefer to live with another male partner in preference to his biological father as a family.

(6) That being Hindu by religion, it is not in the best interest and welfare for Shriyan to grow up in experiencing and observing an unhealthy relationship of his mother by cohabiting as a family. Upbringing of Shriyan with Hindu cultural values, traditional Hindu identity and good moral principles are very important for him.

(7) As of today, Shriyan is in the company of his paternal grandmother, paternal uncle and aunt, and their minor child, all cohabiting together in a joint shared residential unit. Shriyan is in a Hindu joint family set up with all support and extended family company. His care, nurture, education, attention, cultural and moral values are well looked after in a family home where a lot of attention is given to Shriyan for his mental stability. Shriyan is extremely happy, secure, safe, well supported & very comfortable.

(8) The father, Shripal, who is a Dental Hygienist in Canada & a practicing Dental Surgeon by profession, in India, has worked for over 10 years in the area and locality where they are presently residing. The permanent domicile of father, mother and Shriyan is now in India, in a comfortable place where people of his religion, culture and identity reside. Hence, Shriyan is given the proper environment for his upbringing. Shriyan has Overseas Citizen of India (OCI) status in India, which gives him a life long visa free entry & permanent resident status, with no restrictions or conditions.

(9) Just in a few days, Shriyan has adjusted very well to this environment as he has visited India in a few days with his father and mother adjusted very well to this family home, he has the company of his younger cousin brother with frequently paternal grandmother, uncle,

aunt & his dad (Shripal) looking after all his personal needs, food requirements, health care. Shriyan has made new friends and enjoys extracurricular activities. The paramount interest and welfare of Shriyan is well secured in India. Hence, the best interest.

(10) Regardless, the mother is free to have online access, regular telephonic contact, and frequent interaction on whatsapp India from Canada whenever she wants. Besides, the mother too is free to visit Shriyan in India, on a mutually agreed plan. The mother too can reside in the same postal code in India, which establishes that Shriyan is at a permanent secure place secure environment domicile. Hence, Shriyan is in a safe, protected and culturally sound environment.

(11) In the facts and circumstances stated above, Shriyan being in the safe custody of his biological father, as his natural guardian under the provisions of Hindu Minority and Guardianship Act, 1956 (HMGA), the custody, care and control of Shriyan is by no means allegedly illegal or unlawful. Under Hindu law, a minor child in the custody of his biological father is legally recognized as conferring the status of a legal guardian under the HMGA. This legitimate status cannot be displaced, disputed or challenged by the mother.

(12) The father presently in India has not violated any law of Canada nor has he infringed any Court Order of the Canadian Court. No travel restriction, restraint or prohibition was imposed upon the father disallowing him to take Shriyan to India. Shriyan has previously travelled to India with his parents which was never objected to or opposed by either parents.

(13) Most respectfully, the father with all humility submits that it is in the best interest and welfare of Shriyan to be in the care, control, guardianship and custody of his father in India. All decisions in the upbringing of Shriyan in India will be taken in

consultation with the mother. She is free to have online access, communication on phone from Canada, besides being at liberty to visit and have physical contact with Shriyan in India, at a time agreed upon. The mother, if she so wishes, can relocate to India to live as a family with Shriyan and her husband (Shriyan's father) as the parties are not divorced. It will be in the best interest and welfare of Shriyan to cohabit with his father and mother in India, where extended families of his parents permanently reside and where Shriyan's father is a respected practicing Dental Surgeon.”

55. As could be seen from the above, though in the e-mail of March, 2024, he has categorically stated to his wife that she could take care of the minor son in any manner that she thought fit, but only made a request that he be taken care of in an appropriate manner, he has nevertheless chosen to contend in this brief filed after he returned to India that he was in primary custody.

56. It is to be noticed here that right from September, 2024 till the father returned in April, 2025, the son was in the sole custody of the mother and was being brought up by her alone. The brief visit for about two

weeks by the husband in December, 2024 would not in any way result in a situation where the custody of the mother over the son translated into a shared custody. If, at an undisputed point of time, the mother was in sole custody of the minor son with the consent of the father, it is not open for the father to contend before this Court that he was entitled to have custody of the child exclusively and at a place of his choice.

57. It is not disputed by the father during the initial brief that he had filed on 03.09.2025 that the mother was in sole custody of the child from September, 2024 till April, 2025. Even the father, in fact, before the Canadian Courts, has not pleaded at any point of time, that he should be given exclusive custody of the son. The fact that the mother was given exclusively custody in September, 2024 and the son continued to be in her exclusive custody, at least until April, 2025, only goes to show that the custody of the son was lawfully with the mother.

58. In a marital dispute before a Court of law, in which the custody of the five year old is a subject matter, if the father had voluntarily conceded exclusive custody to the mother and had thereafter returned to India without the consent of the mother, it would be improper for the father to contend that he was having joint custody of the son.

59. It is also to be stated here that if the son of four years is brought up by the mother all by herself for more than a year, the father having chosen to return to India, it will have to be held that the responsibility of the child was handed over to the mother and the father cannot claim that he was having joint custody. The mere fact that the mother agreed for an informal arrangement whereby the father would have custody over the child over the weekends would not translate that kind of an arrangement into a joint custody of the child.

60. If the father chose to stay in an apartment in the very same building so that he could spend time with his son, that would also not translate into a joint custody. At best, this arrangement would lead to an inference that the mother did not have any objection for the father to have access to his son every day. Permitting or facilitating visitation by the mother to the father, in the best interests of the child, does not mean that custody becomes a shared custody.

61. It is therefore clear from the above set of facts, that the custody of the child was lawfully with the mother, and since it is not in dispute that the child was removed from Canada without the permission of the mother and brought to India, the father's custody would have to be declared as unlawful.

62. Lastly, as also noticed above, the Canadian Court, whose jurisdiction the father has acceded to, has passed an order directing the return of the child to Canada and in the background, it would not be

appropriate for this Court to hold that the custody of the father is a lawful custody. In fact, the orders of the Canadian Court, only reinforces the above conclusion that the father is in unlawful custody of the son. We, therefore, hold that the custody of the minor child by the father is unlawful and should be restored to the mother forthwith.

63. Question [A] is accordingly answered.

IX. Re: QUESTION [B]:

64. Notwithstanding the above conclusion of ours regarding unlawful custody of the father over the son, we would also have to examine whether the restoration of the custody of the son to the mother is in the best interests of the son.

65. Learned Senior Counsel contended that, in law, our Courts have consistently held that the only consideration, when it came to the question of custody of the child, would be the welfare of the child.

He submitted that there was a long line of decisions rendered by the Supreme Court, wherein, notwithstanding the subsistence of legal proceedings in foreign Courts, the Indian Courts would only be guided by the best interests of the child and not by the legality of custody with reference to orders passed by the Foreign Court.

X. POSITION OF LAW REGARDING CUSTODY MATTERS OF MINOR CHILDREN WHO ARE RESIDENTS OF A FOREIGN COUNTRY

66. The Apex Court has over a period of time rendered a series of decisions in relating to the custody of a child wherein the parties were Indians or Indians who had obtained a foreign citizenship and who were litigating in foreign courts (wherein they were residing) in relation to their marital dispute, including the issue relating to the custody of the child, the transfer of child to India, etc., was the subject matter of the litigation. In fact, learned counsel for the parties, as

indicated above, have relied upon a series of decisions.

67. For the sake of convenience, all the decisions in this regard, which have been cited by both the learned counsel, are as follows:

- A) In the case of **Nithya Anand Raghavan v. State of NCT of Delhi (2017)**, a 7 year old female child had been brought to India from the UK by the mother and Father sought custody of minor daughter by filing a writ petition of habeas corpus contending that she should be returned to the UK as per UK court order, wherein, the Hon'ble Supreme Court has held as under:

“26. The consistent view of this court is that if the child has been brought within India, the Courts in India may conduct (a) summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the Court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open

to the Court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign Court. In an elaborate inquiry, the Court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign Court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the Court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native state.”

- B) In the case of **Mrs. Kanika Goel v. State of Delhi (2018)**, 3 year old female child was brought to India by the mother in contravention of an order passed by a Court in the USA and Father sought custody of child by filing a writ petition of habeas corpus, wherein, the Hon'ble Supreme Court has held as under:

“23. The issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful. This has been the consistent view of this court as restated in the recent three Judge Bench decision in Nithya Anand Raghavan (supra), and the two Judge Bench decision in Prateek Gupta (supra). It is unnecessary to multiply other decisions on the same aspect.”

- C) In the case of **Prateek Gupta v. Shilpi Gupta (2017)**, 5 year old male child had been brought to India by the father in violation of the custody orders passed by the US Courts and Mother sought custody of child by filing a writ petition of habeas

corpus, wherein, the Hon'ble Supreme Court has held as under:

“32. The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of "intimate contact and closest concern" notwithstanding. Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer res integra that the overriding determinant would be the welfare and interest of the child. In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgedly subservient thereto. Though in the process of adjudication of the issue of repatriation, a court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the applicant/parent is prompt and alert in his/her initiative and the existing circumstances ex facie justify such course, again in the overwhelming exigency of the welfare of the child, such a course could be approvable in law, if an effortless discernment of the relevant factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological,

social, cultural existence, thus exposing it to visible, continuing and irreparable detrimental and nihilistic attenuations. On the other hand, if the applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold.”

D) In the case of **Rohan Rajesh Kothari v. State of Gujarat (2024)**, a female child aged 4 was brought by the mother from USA to India, and later also gave birth to second female child in India. The Father sought custody of minor daughters by filing a writ petition of habeas corpus, wherein, The Hon'ble Supreme Court has held as under:

“1. Having heard learned Senior Counsel/counsel for the parties and after careful perusal of the material placed on record, we are satisfied that the petitioner has not approached the US Courts or Indian Courts with clean hands. In any case, his effort to secure temporary custody of the children through a Writ of Habeas Corpus, especially when both the children are girls and are living with their mother, can neither be entertained nor appreciated.”

E) In the case of **Sameer Hamsa Ramla v. State of Karnataka (2022)**, 3 year 9 month old female child was brought from the USA to India by the mother after an alleged assault in the USA and the husband later obtained a US court order for return of the female child. Father sought custody of child by filing a writ petition of habeas corpus, wherein, the Hon'ble High Court has held as under:

“15. In view of aforesaid enunciation of law by a three judge bench of the Supreme Court, following broad propositions relevant for the case in hand may be culled out:

(i) The remedy of writ of habeas corpus cannot be used for mere enforcement of directions given by a foreign court against a person within its jurisdiction and to convert that jurisdiction into an executing court.

(ii) In a habeas corpus petition, at the outset, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person. It can be presumed that custody of a minor with his/her mother is lawful.

(iii) In such a case, only in exceptional situation the custody of the minor can be ordered to be taken away from her mother for being given to any other person including the father of the child.

(iv) The other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.

(v) The order of foreign court must yield to welfare of the child.

(vi) Ordinarily the custody of a girl child who is around 7 years of age must ideally be with her mother unless there are circumstances to indicate that it will be harmful to a girl child to remain in the custody of the mother.

(vii) In deserving cases, the courts in India are not denuded from declining the relief to return the child to the native state merely because of a pre-existing order of foreign court of competent jurisdiction, which has to be considered on case to case basis be it summary enquiry or elaborate enquiry.”

F) In the case of **V. Ravi Chandran v. Union of India (2009)**, 7 year old male child was brought from the USA to India by the mother in contravention of an order passed by a Court in the USA and the Father sought custody of male child by filing a writ petition of habeas corpus, wherein, the Hon'ble Supreme Court has held as under:

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

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

*30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in *McKee v. McKee* that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in *L (Minors), In re* and the said view has been approved by this Court in *Dhanwanti Joshi*. Similar view taken by the Court of Appeal in *H. (Infants), In re* has been approved by this Court in *Elizabeth Dinshaw*.”*

- G) In the case of **Shilpa Aggarwal v. Aviral Mittal (2009)**, a 3 and half year old female child was brought from the UK to India by the mother in contravention of an order passed by a Court in the USA and the Father sought custody of female child

by filing a writ petition of habeas corpus, wherein, the Hon'ble Supreme Court has held as under:

“31. Although Mr Shishodia relied heavily on the decision in Surinder Kaur case, it cannot be ignored that the said case has duly considered the principle that the interest of the minor is paramount in any decision relating to custody. It is but natural that in a matrimonial tussle both the parents would want the custody of the minor child. In this tussle, we have to decide who would be more suited to have custody of the child. In our view, the High Court appears to have taken the correct approach in a matter like this.”

H) In the case of **Arathi Bandi v. Bandi Jagadrakshaka Rao (2013)**, a 3 year old male child was brought from the USA to India by the mother in contravention of an order passed by a Court in the USA and the Father sought custody of male child by filing a writ petition of habeas corpus, wherein, the Hon'ble Supreme Court has held as under:

“40. The courts have taken cognizance of growing practice of children being removed from one country to another just to put pressure/influence the legal proceedings that are usually pending in these cases, in relation to the irretrievable breakdown of marriage. In H. (Infants), In re¹, Willmer, L.J., as long back as 1961, observed as follows: (WLR p. 389B)

“... The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and, as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing.””

- I) In the case of **Surya Vadanam v. State of Tamil Nadu (2015)**, 10 year old and 6 year old female children was brought from the UK to India by the mother in contravention of an order passed by a Court in the USA and the father sought custody of 2 female child by filing a writ petition of habeas corpus, wherein, the Hon'ble Supreme Court has held 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. 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.”

- J) In the case of **Lahari Sakhamuri v. Sobhan Kodali (2019)**, a 6 Year old male child and 4 year old female child was brought from the USA to India by the mother in contravention of an order passed by a Court in the USA and the father sought custody of children by filing a writ petition of habeas corpus, wherein, the Hon'ble Supreme Court has held as under:

“41. The essence of the judgment in Nithya Anand Raghavan case is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc. cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

43. The expression “best interest of child” which is always kept to be of paramount consideration is indeed wide in its connotation and it cannot remain the love and care of the primary care giver i.e. the mother in case of the infant or the child who is only a few years old. The definition of “best interest of the child” is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean “the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development”.

K) In the case of **Yasita Sahu v. State of Rajasthan (2020)**, 3 year old female child was brought from the USA to India by the mother in contravention of an order passed by a court in the USA and father sought custody of child by filing a writ petition of habeas corpus, wherein, the Hon'ble Supreme Court has held as under:

“10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw, Nithya Anand Raghavan v. State (NCT of Delhi) and Lahari Sakhamuri v. Sobhan Kodali among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the

appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.

19. We are of the considered view that the doctrine of comity of courts is a very healthy doctrine. If courts in different jurisdictions do not respect the orders passed by each other it will lead to contradictory orders being passed in different jurisdictions. No hard-and-fast guidelines can be laid down in this regard and each case has to be decided on its own facts. We may, however, again reiterate that the welfare of the child will always remain the paramount consideration.

20. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

21. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very wary of what is said by each of the spouses.

22. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other.

Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.”

- L) In the case of **Nilanjan Bhattacharya v. State of Karnataka (2020)**, 3 and half year old child was brought from the USA to India by the mother in contravention of an order passed by a Court in the USA and father sought custody of child by filing a writ petition of habeas corpus, wherein, the Hon'ble Supreme Court has held as under:

“11. Where a child has been removed from their native country to India, this Court has held that it would be in the best interests of the child to return to their native country if

the child has not developed roots in India and no harm would be caused to the child on such return. In V. Ravi Chandran (2) v. Union of India, this Court observed: (SCC pp. 196-97, paras 32 & 35-37)

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

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

“36. It is true that the child Adithya has been in India for almost two years since he was removed by the mother—Respondent 6—contrary to the custody orders of the US court passed by the consent of the parties. It is also true that one of the factors to be kept in mind in exercise of the summary jurisdiction in the interests of the child is that application for custody/return of the child is made promptly and quickly after the child has been removed. This is so because any delay may result in the child developing roots in the country to which he has been removed. From the counter-affidavit that has been filed by Respondent 6, it is apparent that in the last two years Adithya did not have education at one place. He has moved from one school to another. He was admitted in a school at Dehradun by Respondent 6 but then removed within a few months. In the month of June 2009 the child has been admitted in some school in Chennai.

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

12. The respondent arrived in India with the child in March 2019. The appellant filed for custody and for return of the minor child before the Superior Court of New Jersey,

Hudson County, Chancery Division-Family Part on 16-4-2019, which awarded him temporary custody on 21-5-2019. On 10-7-2019, the appellant filed a petition under Article 32 of the Constitution seeking a writ of habeas corpus before this Court. This Court granted the appellant liberty to move the appropriate forum. Thereafter, the appellant filed a habeas corpus petition before the High Court of Karnataka on 13-8-2019. The above sequence of events makes it evident that the appellant has acted promptly to secure the custody of the child. In such an event, this Court is only required to conduct a summary inquiry to ascertain whether there is any harm if the child returns to the US, where he was born and has been brought up. The Court is required to engage in an elaborate inquiry on the merits of the case only if a considerable time has passed since the child has been removed and if the child has developed roots in India. In either event, the primary consideration of this Court is to ascertain the welfare of the child.”

M) In the case of **Rohith Thammana Gowda v. State of Karnataka (2022)**, 9 year old female child was brought from the USA to India by mother in contravention of an order passed by a Court in the USA and father sought custody of child by filing a writ petition of habeas corpus, wherein, the Hon'ble Supreme Court has held as under:

“11. At the outset we may state that in a matter involving the question of custody of a child it has to be borne in mind that the question “what is the wish/desire of the child” is different and distinct from the question “what would be in the best interest of the child”. Certainly, the wish/desire of the child can be ascertained through interaction but then,

the question as to “what would be in the best interest of the child” is a matter to be decided by the court taking into account all the relevant circumstances.

12. When couples are at loggerheads and wanted to part their ways, as Parthian shot they may level extreme allegations against each other so as to depict the other unworthy to have the custody of the child. In the circumstances, we are of the view that for considering the claim for custody of a minor child, unless very serious, proven conduct which should make one of them unworthy to claim for custody of the child concerned, the question can and shall be decided solely looking into the question as to, “what would be the best interest of the child concerned”. In other words, welfare of the child should be the paramount consideration. In that view of the matter we think it absolutely unnecessary to discuss and deal with all the contentions and allegations in their respective pleadings and affidavits.”

- N) The Gujarat High Court in case of **Sejalben Arpit Shah v. State of Gujarat (2019)**, a 1 year 2 month old female child was in unlawful custody of respondent no.3 according to petitioner. Mother sought custody of child by filing a writ petition of habeas corpus, wherein, the Hon'ble High Court has held as under:

“38. It is well settled that in an application seeking a writ of habeas corpus for custody of minor child, the principal consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in

the care and custody of someone else. It is equally well settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties. [See : Dr. (Mrs.) Veena Kapoor v. Shri Varinder Kumar Kapoor, (1981) 3 SCC 92 and Syed Saleemuddin v. Dr. Rukhsana, (2001) 5 SCC 247]. It is, therefore, to be examined what is in the best interest of the child Priyanshi and whether her welfare would be better looked after if she is given in the custody of the appellant, who is her father.

40. Thus, the Court should avoid a technical and legalistic view; it should adopt a pragmatic and realistic view in such a case. Moreover, the Court acts less as a Court of law, and more as a Court of equity. For it deals less with legal issues, and more with a human problem of the parents and the children. According to the Apex Court, "To repeat, issues relating to custody of minors and tender aged children have to be handled with love, affection, sentiments and by applying human touch to the problem." Ref. to Nil Ratan Kundu, (2008) 9 SCC 413 : AIR 2009 SC (Supp) 732 (supra)."

68. In all the aforementioned decisions, the Apex Court has laid down the proposition, time and again, that when it comes to the question of custody of a minor in the background of a marital dispute and especially in cases where the couple were residing outside India and the minors were in India either voluntarily or against the wishes of either of the spouses, the overriding concern of the Courts would always be to

look at the best interest of the child and pass appropriate orders.

69. The Apex Court, in fact, in the case of **Somprabha Rana and ors vs State of State of MP reported in 2024 (9) SCC 382**, after considering all the decisions rendered by the Apex Court earlier (including the decisions cited above) has summarized the proposition of law as follows:

“6. After having perused various decisions of this Court, the broad propositions of settled law on the point can be summarised as follows:

a. Writ of Habeas corpus is a prerogative writ. It is an extraordinary remedy. It is a discretionary remedy;

b. The High Court always has the discretion not to exercise the writ jurisdiction depending upon the facts of the case. It all depends on the facts of individual cases;

c. Even if the High Court, in a petition of Habeas Corpus, finds that custody of the child by the respondents was illegal, in a given case, the High Court can decline to exercise jurisdiction under Article 226 of the Constitution of India if the High Court is of the view that at the stage at which the Habeas Corpus was sought, it will not be in the

welfare and interests of the minor to disturb his/her custody; and

d. As far as the decision regarding custody of the minor children is concerned, the only paramount consideration is the welfare of the minor. The parties' rights cannot be allowed to override the child's welfare. This principle also applies to a petition seeking Habeas Corpus concerning a minor.”

XI. APPLICATION OF THE PROPOSITION OF LAW

TO THE FACTS OF THIS CASE:

70. In light of the elucidation of the legal position, it would be important for us to examine whether the best interests of the son would be served by restoring his custody to the mother and directing the son's return to Canada or by permitting the son to stay in India along with his father.

71. The son, as of now, is about 5 years old and is a Canadian citizen. The father of the child, due to his marital differences with his wife, chose to return to India in September, 2024 and at that point in time, he had voluntarily given up sole custody of the son to the

mother. The mother, as a consequence, has admittedly raised the child all by herself from September, 2024 till April, 2025.

72. It is obvious that a child who was born in Canada and was aged just 4 years, when the father returned to India, would be used to an atmosphere where he was being taken care of only by his mother. Displacing such a child to a country like India and forcing the child to stay away from the mother would, in our view, be traumatic to the child. The secure atmosphere that the child enjoyed would be transformed into a new and alien atmosphere where he would be forced to adopt to come to terms with people who are fundamentally strangers to him. We are conscious of the fact that the children of a tender age can get adjusted to new atmospheres, especially when his grandparents are involved in the child's upbringing, but that cannot be a substitute to the care and warmth that a child would secure from his natural mother.

73. Indian laws, in fact, recognize this aspect and state that until the age of 5 years, it would be appropriate for the mother to be in the custody of the child even though the father is a natural guardian.

74. Arguments were, however, sought to be advanced that the mother was in an adulterous relationship and this would be against the interest of the child. A reading of the e-mail of September, 2024 would indicate that even at that point of time the complaint of the father was that his wife was living an adulterous life and yet he chose to give up custody of the child in favour of his wife. In fact, he acknowledged in the e-mail that the custody of the child under the relevant laws would always be referred to the mother. In this situation, the argument that is now sought to be advanced that the son would be traumatized by his mother's alleged adulterous relationship cannot be accepted.

75. It is also to be noticed that, admittedly, the son had been enrolled into a school in Canada and was pursuing his studies there. Judicial notice can be taken of the fact that if a child is brought up in a particular educational system, moving the child to another educational system would be disruptive and would affect the child's educational upbringing.

76. It cannot also be in dispute that the standard of living in Canada, to which the child was accustomed, would obviously be better than the standard of living that the father can provide in India. Since the child has been born in Canada and has been virtually brought up there his entire life, it would not be in the interest of the child, if this normalcy is disrupted and he is made to face an alien culture and a completely new atmosphere.

77. A young child, would primarily, need a secure and serene atmosphere to have a wholesome life, which, unfortunately, would be absent if he is in the midst of

a marital discord his parents are engaged in. Given the fact that the son was living with his mother since September 2024 and was being looked after exclusively by her till the father returned in April 2025 and was only having an informal parenting arrangement in the backdrop of legal proceedings, in our view, that life which the son had would have to be restored and thereby give him the limited serenity that he enjoyed.

78. We, are therefore, of the view that the best interests of the child would also be for him to return to Canada and be with his mother.

79. Question [B] is accordingly answered.

XII. CONCLUSION:

80. As a result of our answers to question (A) and (B), which are in favour of the mother, we hold as follows:

- a) The father is in unlawful custody of the minor son Shriyan and he is therefore directed to hand over custody of the child to either the mother or the grandfather (through whom this petition is filed forthwith).
- b) The mother/the grandfather would be at liberty to collect the passport and the OCI card of the minor son from the Registry of this Court and to transport him to Canada.
- c) It would be open for the father to approach the Canadian Court before whom the proceedings are pending for resolution of his disputes including his right to secure visitation/custody of the child.

81. The present writ petition is accordingly allowed. As a sequel, Criminal Misc. Application for direction is dismissed.

(N.S.SANJAY GOWDA,J)

(D. M. VYAS, J)

Further order:

1. That the respondent seeks a stay of this order to enable him to approach the Hon'ble Supreme Court, since the custody of the minor child is ordered to be handed over forthwith.

2. We deem it proper that the order shall remain in abeyance for a period of two weeks.

3. Learned Counsel for the respondent undertakes that the earlier order regarding grant of access to the mother and the grandfather of the child shall continue till then.

(N.S.SANJAY GOWDA,J)

(D. M. VYAS, J)

Mehul Desai