IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA

&

HON'BLE SHRI JUSTICE BINOD KUMAR DWIVEDI

WRIT PETITION No. 23561 of 2025

ANKUR JOSHI

Versus

STATE OF MADHYA PRADESH AND OTHERS

Appearance:

Shri Shadan Farasat – Senior Advocate appearing through V.C. assisted By Shri Harshit Anand, Shri Priyal Jain & Shri Piyush Parashar – Advocates for the petitioner.

Shri Sunil Ramchandani with Shri Praveen Yogi – Advocates for the respondent No.3.

Shri Rahul Sethi – Additional Advocate General for the respondent / State.

Reserved on	*:*	*17.04.2026*
Pronounced on	*:*	*20.04.2026.*

ORDER

Per*: *Justice Vijay Kumar Shukla

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

> *a. To Issue a writ, direction or order in the nature of Habeas Corpus directing the Respondents to produce the minor children, Arjun Joshi (born on 18.11.2016) and Shaunak Joshi (born on 09.12.2022), before this Hon'ble Court;*
> *b. To Issue the appropriate writ, direction or order to direct the Respondents that the custody of the said minor children be handed over to the Petitioner, their lawful parent and conservator under the Final Custody Order dated 14.04.2025 passed by the 480th Judicial District Court, Williamson County, Texas, United States of America, so that they can return to their country of citizenship and habitual residence, the United States of America;*

c. To Pass such other or further orders as this Hon'ble Court may deem just and proper in the interest of justice and in the welfare of the minor children.

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

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

Jeewanti Pandey Vs. Kishan Chandra Pandey, (1981) 4 SCC 517.
Smt. Surindar Kaur Sandhu Vs. Harbax Singh Sandhu & another, (1984) 3 SCC 698.
Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw & another, (1987) 1 SCC 42.
Mr. Paul Mohinder Gahun Vs. Mrs. Selina Gahun, 2006(130) DLT 524.
Aviral Mittal Vs. The State & another, 2009(112) DRJ 635.
Shilpa Aggarwal Vs. Aviral Mittal & another, (2010) SCC 591.
Dr.V.Ravi Chandran Vs. Union of India, (2010) 1 SCC 174.
Sondur Gopal Vs. Sondur Rajini, (2013) 7 SCC 426.
Arathi Bandi Vs. Bandi Jagadrakshaka Rao & Ors, (2013) 15 SCC 790.
Surya Vadanan Vs. State of Tamil Nadu & Ors., (2015) 5 SCC 450.
Nithya Anand Raghavan Vs. State of Net of Delhi, (2017) 8 SCC 454.
Tippa Srihari Vs. State of AP, 2018 SCC Online Hyd 123.
Ganamukkala Sirisha Vs. Tippa Srihari,

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

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

05. We had considered all the judgments on the point of

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

> ***"10.*** *It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , Nithya Anand Raghavan v. State (NCT of Delhi) [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] and Lahari Sakhamuri v. Sobhan Kodali [Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.*
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> ***11.*** *We need not refer to all decisions in this regard but it would be apposite to refer to the following observations from the judgment in Nithya Anand Raghavan [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] : (SCC pp. 479-80, paras 46-47).*
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> > *"46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that*

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

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

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

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

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

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

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

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

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

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

08. A similar issue came for consideration again before a Judge Bench in the case of ***Nilanjan Bhattacharya*** *(supra),* and relevant paras 9 to 11 are quoted as under:-

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

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

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

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

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

"49. … Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which the child is removed are factors which

deserve notice in deciding the issue of custody and repatriation of the child, it is no longer res integra that the ever-overriding determinant would be the welfare and interest of the child. ...

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

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

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

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

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

month of June 2009 the child has been admitted in some school in Chennai."

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

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

> ***"89.*** *The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for the custody of a minor was examined by this Court in Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari [Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42 : (2019) 3 SCC (Civ) 433] , and it was held that the petition would be maintainable where the detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where the ordinary remedy provided by the law is either unavailable or ineffective.*
>
> ***99.*** *Thus, it is well established that in issuing the writ of habeas corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of habeas corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a habeas corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a habeas corpus proceeding brought by one parent against the other for the custody of their child, the Court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as parents patriae, has in promoting the best interests of the child."*

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

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

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

> *"**20.** In the light of the enunciation of law as discussed in the earlier paragraphs, it is held that:*
>
> *(1) The writ of Habeas Corpus in the matter of custody of a minor child is maintainable, in the light of the aforesaid judgment of the Apex Court, which has been discussed in the earlier paragraphs.*
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> *(2) A writ of Habeas Corpus cannot be used only for mere enforcement of the direction given by foreign Court and same is one of the facts to be considered and the extra ordinary power of writ of Habeas Corpus can be availed in exceptional cases where the detention of a child by parent or others is found to be illegal and without any authority of law where the original remedy provided by the law is either unavailable or ineffective.*
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> *(3) The Court, while passing the writ of Habeas Corpus, will examine whether the welfare of the child requires that the present custody should be changed and child should be left in the care and custody of somebody else.*

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

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

14.1. The petitioner is the biological father and lawful guardian of the minor children, and respondent No.3 is the mother of the children and wife of the petitioner. The parties resided together in the United States of America since 2017 and in the State of Texas since 2022. It is stated that the elder child has spent the majority of his life in the United States, while the younger child is a citizen of the United States by birth and has resided there since birth.

14.2. In August 2024, respondent no.3 expressed her desire to visit India along with the minor children for a temporary period to meet her family. The petitioner accordingly arranged return tickets with a scheduled return in early December 2024. Respondent No.3 travelled to India along with the minor children on 16.08.2024 and informed the petitioner of their safe arrival on 17.08.2024. Thereafter, according to the petitioner, respondent No.3 failed to maintain regular communication and gradually restricted the petitioner's access to the minor children. It is alleged that respondent No. 3 subsequently refused to return to the United States along with the minor children, contrary to the prior understanding between the parties, and retained the children in India.

14.3. The petitioner asserts that he made repeated efforts to communicate with respondent No.3 and to secure access to the children, but such efforts were not fruitful. The petitioner visited India on 28.10.2024 in an attempt to resolve the dispute and to secure access to the children. However, disputes between the parties continued. It is further stated that the petitioner continued to provide financial support to respondent No.3 and the minor children during their stay in India. The petitioner has also averred that respondent No.3 initiated certain complaints against him in

India and declined to return to the United States with the children.

14.4. In view of the continued retention of the minor children in India, the petitioner initiated proceedings in the District Court, 480th Judicial District, Williamson County, Texas, being Cause No. 25-0237-F480. Despite service of notice, respondent No.3 did not appear before the said Court. By order dated 14.04.2025, the said Court appointed the petitioner as the sole managing conservator of the minor children and granted him the exclusive right to designate their primary residence. The petitioner informed respondent No.3 about the aforesaid order; however, respondent No.3 did not comply with the same. The petitioner contends that the minor children are habitual residents of the United States of America and their continued retention in India is contrary to the understanding between the parties as well as the order of the Foreign Court.

14.5. It is further stated that the petitioner has no efficacious alternative remedy and has, therefore, approached this Court seeking issuance of a writ of *habeas corpus* for production and custody of the minor children. The petitioner asserts that the continued custody of the minor children with respondent No.3 is unlawful and not in their welfare and prays for appropriate directions for their return and custody.

15. Learned senior counsel for the petitioner argued that after the marriage of petitioner and respondent No.3, they resided together in the United States of America since 2017 and in the State of Texas since 2022. It is stated that the elder child, Arjun Joshi, has spent the majority of his life in the United States, while the younger child, Shaunak Joshi, is a citizen of the United States by birth and has resided there since birth.

16. The petitioner facilitated the enrolment of his older son in a local school as he did not want his son to go without education in these crucial years thus became the place of 'habitual and ordinary residence' of the minor children.

17. Subsequently, matrimonial disputes arose between the parties, and respondent No.3 retained the children in India. Petitioner approached the Competent Court in Texas, USA, which passed 'custody / access orders' in favour of the petitioner, directing return of both the child to Texas, USA. Alleging violation of those orders, the present writ petition has been filed.

18. Learned senior counsel for the petitioner further argued that for the following reasons, it would be in the 'welfare of the children' and in their 'best interest' that the order of return of the children to Texas, USA be passed by giving him the custody:

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

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

19. *Per contra*, learned counsel for respondent no.3 submits that:

- The welfare of both the children is paramount.
- Mere existence of a foreign decree is not conclusive and the same cannot be sought to be executed.
- Both the children have settled in India and are presently studying here.
- Summary return would be detrimental to the children's well-being.

20. The following issues arise for consideration:

i. Whether this Court is bound to summarily enforce the foreign court decree?

ii. Whether retention of both the children in India is illegal?

iii. What is in the **paramount welfare of the minor child**, particularly with regard to schooling and overall development?

21. Before adverting to law relating to the custody of a child, it would be apt to consider the role of a mother in Indian mythology and society:

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

(a) Luv-Kush living with Mata Sita

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

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

Emotional security
Moral upbringing
Maternal guardianship

(Source)
Valmiki Ramayan, Uttara Kanda, Sargas 65-67
(Birth and upbringing of Luv-Kush under Mata Sita)

Valmiki Ramayan, Ayodhya Kanda, Sarga 20
"जननी जन्मभूमिश्च स्वर्गादपि गरीयसी"
Mother and motherland are greater than heaven.

2. Mahabharat: Mother's Custody Beyond Social Legitimacy

(A) Kunti and Karna

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

(Source)
Mahabharat, Adi Parva, Chapter 104
Karna Parva, Chapter 5

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

These principles resonate with modern law, such as:
Section 6(a), Hindu Minority and Guardianship Act, 1956
Article 3, UN Convention on the Rights of the Child (UNCRC)

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

> ***(B).*** *In Ancient Hindu Society, the concept of child custody as understood in modern legal terms did not exist. The family structure was deeply patriarchal, governed by dharmashastra texts including the Manusmriti, Yajnavalkya Smriti, and Narada Smriti.*
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> *Spiritual and Moral Role: While mothers were venerated in Hindu philosophy with concepts like "matru devo bhava" (mother is divine), this spiritual reverence did not translate into legal rights. The mother's role was confined to nurturing and early childhood care, but without any legal recognition.*
>
> *The evolution of Hindu mothers' custody rights in India represents one of the most significant transformations in Indian family law. The journey can be characterized in four phases:*
>
> ***Phase 1 (Ancient Period)****: Complete legal invisibility - mothers had moral status but zero legal rights over children.*
>
> ***Phase 2 (Colonial Era)****: Minimal recognition - mothers acknowledged as guardians only in father's absence, with strict conditions.*
>
> ***Phase 3 (Early Independence)****: Statutory discrimination - Hindu Minority and Guardianship Act explicitly placed mothers secondary to fathers, though courts began developing welfare principle.*
>
> ***Phase 4 (Post-1999 to Present)****: Progressive judicial activism - courts have interpreted laws expansively to recognize mothers' equal rights, with strong preference for maternal custody of young children.*
>
> *This aligns remarkably with modern legal principles such as:*
>
> *1. Best Interest of the Child*
>
> *2. Natural Guardian Doctrine*
>
> *3. Tender Years Principle*
>
> ***(C).*** *The mother is portrayed as the first home, first teacher, and first protector, making the child's right to stay with the mother a civilizational norm, not merely a modern legal construct.*

22. Now, we reiterate the law relating to execution of an order of a Foreign Court in respect of custody of the children and consideration, the law relating to foreign custody orders is no longer *res integra*. The Supreme Court has consistently held that Comity of Courts is important but not absolute, and welfare of the child is the paramount consideration. The same is reiterated as under:

23. In ***V. Ravi Chandran*** *(supra)*, the Supreme Court held that where a child is removed from the foreign country in violation of custody

orders, Indian courts may direct summary return, unless such return is shown to be harmful to the child.

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

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

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

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

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

28. In compliance to our order, the children were produced before us and we interacted with them in the chamber. Both the child, though of tender age, have expressed comfort and emotional attachment towards the respondent mother. They have been residing in India for last eight

months and at present they are studying in a good school. The children appears well settled in the present environment.

29. We have taken note of the facts that the petitioner is living alone in the USA. The mother of the petitioner has already died and the father of the petitioner is residing in India. There is no allegation by the petitioner that the children are not being taken care properly. We have also taken into consideration the age of the children, the need of maternal care at their formatting stage, the emotional and educational stability of the children and the overall circumstances placed on record, we are of the considered view that the custody of the children cannot be directed to be handed over to the petitioner solely on the basis of a foreign decree, which would not subserve the welfare of the minor as it has been found that it is not in the interest of both the child to return to the foreign country and the custody to the petitioner.

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

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

(VIJAY KUMAR SHUKLA)
JUDGE

(BINOD KUMAR DWIVEDI)
JUDGE

Divyansh