HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Single Bench : HON'BLE SHRI JUSTICE S. C. SHARMA

Writ Petition No.7739/2020

Anushree Goyal

Versus

State of Madhya Pradesh and Others

Counsel for the Parties	:	Shri Hitesh Sharma, learned counsel for the petitioner. Shri Pushyamitra Bhargav, learned Additional Advocate General for the respondent / State. Shri R. S. Chhabra, learned counsel for the respondents No.4, 5 and 6.
Whether approved for reporting	:	Yes
Law laid down	:	1) Writ Petition under Article 226 of the Constitution of India for issuance of a writ in the nature of *Habeas Corpus* for grant of custody of a child is maintainable. 2) The High Court in exercise of powers conferred under Article 226 of the Constitution of India, while dealing with a *Habeas* Corpus writ petition, is certainly having jurisdiction to issue a writ in respect of a child, who is holding nationality of other country.
Significant paragraph numbers	:	10, 14, 15, 16 and 17

O R D E R

(Delivered on this 08th day of June, 2020)

The petitioner before this Court has filed present petition under Article 226 of the Constitution of India for issuance of an appropriate writ in the nature of *Habeas Corpus* directing the respondents No.1 to 5

to produce respondent No.6 before this Court who is allegedly in illegal detention of respondents No.4 and 5. It has been stated in the writ petition that a marriage took place between Shri Ankit Agrawal and the petitioner on 13/05/2013 at Indore. It was an arranged marriage and the petitioner went to United States of America (Columbus) along with her husband. A child namely Arjun Agrawal was born on 01/01/2018 in America.

02- The petitioner has further stated that the husband as well as respondents No.4 and 5 (the in-laws) made her life miserable and they committed cruelty. She has also stated that she was assaulted on number of occasions, however, as it was a matrimonial dispute she lived with a hope that time will resolve the dispute and continued with her husband in America.

03- The petitioner has further stated that her husband finally has obtained some *ex-parte* order from some American Court and the petitioner was restrained from living in the house belonging to the husband and in those circumstances, she left with no other option except to come back Indore and to reside with her parents on 29/12/2019. She has also lodged a complaint with Police Station – Mahila Thana, Indore on 16/03/2020, however, she came to know that her husband came down from America and left the minor child, who is 02 years in age with her in-laws.

04- The petitioner has further stated that child is a very young child and the old grand parents are senior citizens, they are not able to look after the infant child and inspite of the repeated requests of the

petitioner, they have not even permitted the petitioner to meet her child. In those circumstances, the petitioner has filed this present petition. The matter was listed before this Court on 04/06/2020 and the following order was passed:-

> **"**Parties through their counsel.
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> Shri Amol Shrivastava, learned government advocate accepts notice on behalf of the respondent Nos.1, 2 and 3.
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> Let notice be issued to the respondent Nos.4 and 5 by e-mail, fax as well as by any other alternative mode.
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> In addition, the petitioner shall also be free to serve the respondent Nos.4 and 5 by e-mail, fax or by any other alternative mode.
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> It has been stated by the petitioner that she is mother of the respondent No.6 – Arjun Agarwal, who is aged about 2 years and being the mother, she is her natural guardian and in those circumstances, present habeas corpus petition has been filed.
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> The Superintendent of Police, Indore is directed to keep the corpus present before this Court on 08.06.2020.
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> It is needless to mention that the Superintendent of Police, Indore shall observe all the required protocol while bringing the corpus to this Court. The matter involves the custody of a minor child aged about 2 years and therefore, the Superintendent of Police, Indore shall take all due precautions in the matter.
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> The matter is being heard through video conferencing, however, as this is a habeas corpus petition involving the minor child aged about 2 years, for this particular matter, the Superintendent of Police, Indore shall be permitted to enter the premises on 08.06.2020, which is prohibited under the complete lock-down.
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> The respondent Nos.4 and 5 are also permitted to enter the premises along with the child.
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> The petitioner shall also be permitted to enter the premises and as an exceptional cases, the hearing of this matter shall take place in Court No.13 and the Registry shall ensure that all the norms relating to social distancing prescribed by Government of India / State of Madhya Pradesh are followed in the matter.
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> Learned counsel for the petitioner has stated before this Court that there is every possibility of sending the minor child back to the America as his father is residing in America and, therefore, by way of interim relief, it is directed that the respondent No.6 shall not be permitted to leave the country and the respondent Nos.4 and 5 are also restrained from sending the child to America (USA).
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> The Registry of this Court shall forward the copy of this

order through fax, e-mail or by any other alternative mode to the Emigration authorities today itself.

List the matter on **08.06.2020**.**"**

In light of the aforesaid order the child has been produced before this Court. The child is present in the Court room and the child has interacted with mother and he is quite comfortable with the mother. In fact he is sitting in the lap of his mother only.

05- A detailed and exhaustive application has been filed by the grand parents for recalling the order on 04/06/2020 and it has been stated by the grand parents that the child was abandoned by the mother seven months back when she came to India. It is not possible for them to comply the order passed by this Court to bring the child to Indore. It has been further stated that the husband has executed a Power of Attorney and Authorization in favour of grand parents to look after the child and on account of strength of Power of Attorney dated 12/03/2020, the grand parents are entitled to keep the child under their guardianship.

06- Reliance has also been placed upon Section 9 of Guardians and Wards Act, 1890 on the issue of jurisdiction. It has been stated that minor is presently residing at Gwalior. He is a citizen of United States of America and therefore, this Court is not having jurisdiction in the matter. It has also been stated that the injunction has been granted against wife by the Franklin County Common Pleas Court, Division of Domestic Relations, Columbus, Ohio (USA) and in light of the injunction order, the grand parents are entitled to be the guardian of the child. It has been stated that on account of injunction granted on 09/03/2020, the question of handing over the child to the mother does

not arise.

07- This Court has carefully gone through the so called injunction order. It is a petition preferred by the husband before the Franklin County Common Pleas Court against the wife. There is no such injunction order granted by any Court situated in United States of America directing custody of child to be with the father. The so called injunction order is also an *ex-parte* order. The injunction order nowhere mentions anything about the child. The husband might have obtained injunction against wife in respect of domestic violence i.e. Domestic Violence Civil Protection Order (CPO *ex-parte*) but it is certainly not an order in respect of the custody of the child and therefore, the so called civil protection order does not help the grand parents in any manner.

08- The respondent has also stated that in light of the judgment delivered in the case of **Tejaswini Gaud vs Shekhar Jagdish Prasad Tewari** passed in **Criminal Appeal No.838 of 2019** on **06th May, 2019**, the petition for *Habeas Corpus* is not at all maintainable. It has also been stated that in light of the order dated 30/04/2020 passed in **Writ Petition (Civil) Diary No.11058/2020 (Tanuj Dhavan Vs. Court In Its Own Motion)**, the mother can experience visitation rights through electronic contact. A prayer has been made to recall the order.

09- Heard learned counsel for the parties at length and perused the record. This Court has also heard the respondent father-in-law as he wanted to make certain submissions. The first issue before this Court is whether a *Habeas Corpus* petition is maintainable or not in respect of custody of a minor child, who is with his grand parents at Gwalior.

10- The apex Court in the case of **Capt. Dushyant Somal Vs. Sushma Somal** and another **reported in (1981) 2 SCC 277** has dealt with the jurisdictional aspect under article 226 of *Habeas Corpus* writ petition in respect of illegal custody of Child. Paragraphs 3, 5 and 7 of the aforesaid judgment reads as under :-

> **"**3. There can be no question that a Writ of Habeas Corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out. Nor is a person to be punished for contempt of Court for disobeying an order of Court except when the disobedience is established beyond reasonable doubt, the standard of proof being similar, even if not the same, as in a criminal proceeding. Where the person alleged to be in contempt is able to place before the Court sufficient material to conclude that it is impossible to obey the order, the Court will not be justified in punishing the alleged contemner. But all this does not mean that a Writ of Habeas Corpus cannot or will not be issued against a parent who with impunity snatches away a child from the lawful custody of the other parent, to whom a Court has given such custody. Nor does it mean that despite the contumacious conduct of such a parent in not producing the child even after a direction to do so has been given to him, he can still plead justification for the disobedience of the order by merely persisting that he has not taken away the child and contending that it is therefore, impossible to obey the order. In the case before us, the evidence of the mother and the grand-mother of the child was not subjected to any cross-examination; the appellant-petitioner did not choose to go into the witness box; he did not choose to examine any witness on his behalf. The evidence of the grand-mother, corroborated by the evidence of the mother, stood unchallenged that the appellant-petitioner snatched away Sandeep when he was waiting for a bus in the company of his grand-mother. The High Court was quite right in coming to the conclusion that he appellant-petitioner had taken away the child unlawfully from the custody of the child's mother. The Writ, of Habeas Corpus was, therefore, rightly issued. In the circumstances, on the finding, impossibility of obeying the order was not an excuse which could be properly put forward.
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> 5. It was submitted that the appellant-petitioner did not give evidence, he did not examine any witness on his behalf and he did not cross-examine his wife and mother-in-law because, he would be disclosing his defence in the criminal case, if he so did. He could not be compelled to disclose his defence in the criminal case in that manner as that would offend against the fundamental right guaranteed by Article 20(3) of the Constitution. It was suggested that the entire question whether

the appellant-petitioner had unlawfully removed the child from the custody of the mother could be exhaustively enquired into in the criminal case where he was facing the charge of kidnapping. It was argued that on that ground alone the writ petition should have been dismissed, the submission is entirely misconceived. In answer to the rule nisi, all that he was required to do was to produce the child in Courts if the child was in his custody. If after producing the child, he wanted to retain the custody of the child, he would have to satisfy the Court that the child was lawfully in his custody. There was no question at all of compelling the appellant-petitioner to be a witness against himself. He was free to examine himself as a witness or not. If he examined himself he could still refuse to answer questions, answers to which might incriminate him in pending prosecutions. He was also free to examine or not other witnesses on his behalf and to cross examine or not, witnesses examined by the opposite party. Protection against testimonial compulsion" did not convert the position of a person accused of an offence into a position of privilege, with, immunity from any other action contemplated by law. A. criminal prosecution was not a fortress against all other actions in law. To accept the position that the pendency of a prosecution was a valid answer to a rule for Habeas Corpus would be to subvert the judicial process and to mock at the Criminal Justice system. All that Article 20(3) guaranteed was that a person accused of an offence Shall not be compelled to be a witness against himself, nothing less and, certain nothing more. Immunity against testimonial compulsion did not extend to refusal to examine and cross-examine witnesses and it was not open to a party proceeding to refuse to examine himself or anyone else as a witness on his side and to cross examine the witnesses for the opposite party on the ground of testimonial compulsion and then to contend that no relief should be given to. the opposite party on the basis of the evidence adduced by the other party. We are unable to see how Article 20(3) comes into the picture at all.

7. It was argued that the wife had alternate remedies under the Guardian and Wards Act and the CrPC and so a Writ should not have been issued. True, alternate remedy ordinarily inhibits a prerogative writ. But it is not an impassable hurdle. Where what is complained of is an impudent disregard of an order of a Court, the fact certainly cries out that a prerogative writ shall issue,. In regard to the sentence, instead of the sentence imposed by the High Court, we substitute a sentence of three months, simple imprisonment and a fine of Rupees Five hundred. The sentence of imprisonment or such part of it as may not have been served will stand remitted on the appellant-petitioner producing the child in the High Court. With this modification in the matter of sentence, the appeal and the Special Leave Petition are dismissed. Criminal Miscellaneous Petition No. 677/81 is dismissed as we are not satisfied that it is a fit case for laying a complaint.”

In light of the aforesaid judgment, this court is of the opinion that

a writ petition for issuance of a writ in nature of *Habeas Corpus* under article 226 of the Constitution of India in the peculiar facts and circumstances of the case is certainly maintainable. Otherwise also, keeping in view the welfare of the child and other factors including interaction with the child, this court is of the opinion that the child has to be in the custody of mother.

11- Undisputed facts also reveal that the husband and wife are having matrimonial dispute between them. The husband has approached the Franklin County Common Pleas Court in the USA and *ex-parte* injunction has been granted in the matter. The *ex-parte* injunction order nowhere restrains the mother from meeting the child or to keep the child with her. No order has been brought to the notice of this Court which directs the custody of the child to be with the father. The father came down to India and after handing over the child to his parents (in-laws of the petitioner) has gone back to America and now a two year old child is with his grand parents and the mother is claiming custody.

12- The child in question is hardly aged about 02 years. He was born on 01/01/2018 as stated in the application by the respondents i.e. IA.No.1416/2020 and the child in question Arjun Agrawal came to India on 18/02/2020 and since then he is with his grand parents. Though an application was filed for recall of order dated 04/06/2020, however, the respondents No.4 and 5 are present with the child.

13- The child immediately after seeing his mother ran towards the mother and they were observed by this Court. The child is certainly

more than happy with the mother. They are playing together inside the Court room, the child later on went out the Court room with the mother and the child in fact has shown more affection towards the mother than the grand parents. He is hardly two years old. The mother is well educated and the parents of the mother are also well educated. There is nothing adverse brought before this Court so far as the parents of the petitioner are concerned, therefore, this Court is left with no other choice except to direct the respondents No.4 and 5 to handover the child to the present petitioner.

14- Nothing equals a mother's love. Mother love for his child cannot be described in words. It is beyond the boundaries provided by law and that is the reason the Hon'ble Supreme Court has held that the welfare of the child is of paramount importance in the matters relating to the custody of children. There can be few exceptions also. The greatest gift by god to mankind are mothers only. The interaction of the child when he saw his mother cannot be described by this Court in words. The child who was having an “iPad”, left the “iPad” on the ground and ran towards the mother, both of them were looking like the happiest people on this planet. This Court in light of the totality of the circumstances, keeping in view the statutory provisions and the law laid down by the Hon'ble Supreme Court is of the considered opinion that the petitioner is entitled for the relief prayed for in the present petition.

15- The respondents No.4 and 5 have stated that the father of the

child has given a Power of Attorney and Authorization in favour of them (grand parents) to look after the child. In India there is a prescribed procedure for appointment of guardians under the Guardians and Wards Act, 1890. The procedure adopted by the husband of the petitioner, empowering the grand parents to keep the child based upon some Power of Attorney is unheard-of . It does not create any right in favour of respondents No.4 and 5.

16- This Court is not dealing with the application preferred under Section 4 of Guardians and Wards Act, 1890. This Court is dealing with the *Habeas Corpus* writ petition. In the case of **Sheoli Hati Vs. Somnath Das** reported in **(2019) 7 SCC 490** the Hon'ble Supreme while deciding the issue relating to custody of a child has held that the welfare of a child is of paramount importance. While dealing with this *Habeas Corpus* petition again this Court is of the opinion that the welfare of a child is of paramount importance and the mother, who has nurtured the child for nine months in the womb, is certainly entitled for custody of the child keeping in view the statutory provisions governing the field.

17- It is true that the child is a US citizen, however, the mother is an Indian citizen and she does have the legal right guaranteed under the Constitution of India to file a writ petition under Article 226 and to pray issuance of a writ in the nature of *Habeas Corpus*. This Court will not throw away the petitioner on the ground of jurisdiction or on the ground of alternative remedy available under the Guardians and Wards Act, 1890 especially keeping in view the judgment delivered by the Hon'ble

Supreme Court in the case of **Capt. Dushyant Somal (Supra)**.

18- In the case of **Veena Agrawal Vs. Shri Prahlad Das Agarwal** reported in **AIR (MP) 1976 0 92**, the Division Bench of this Court in paragraphs No.5 and 6 has held as under:-

> **"**5. Having heard learned counsel of the parties, we are of opinion that this petition must be allowed. At the outset we would like to mention that in the nature of the present case it is not at all necessary for us to go into the details of allegations and counter-allegations of the parties. We are required to decide this, petition on the sole consideration in whose custody the welfare of the minor lies. Under Section 6(a) of the Hindu Minority and Guardianship Act, 1956, it is provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. The clause gives legislative sanction to the principle which is now well established that although the father is the natural guardian of the minor child and entitled as such to his custody, the prime and paramount consideration is the welfare of the minor and the custody of a child of tender years should, therefore, remain with the mother unless there are grave and weighty considerations which require that the mother should not be permitted to have the minor with her. For applying the aforesaid rule we will have to look to the facts emerging from the petition and the return filed before us. The fact that the petitioner belongs to a respectable family is not in dispute and also her father is drawing a handsome salary. The petitioner has besides her father, her mother, four sisters but no brother. Out of these four sisters, first two are already married and the 4th and 5th studying in a college. The petitioner is the third daughter of her parents. The petitioner is staying with her parents. She herself is a highly educated lady. Therefore, it cannot be denied that if the custody of the male child is given to her she will not be able to look after him and the welfare of the child would in any manner be in jeopardy. As regards the contention advanced on behalf of the respondent that even he can look after the child cannot be a ground for depriving the mother of the custody of the child in view of the provisions of Section 6(a) of the Hindu Minority and Guardianship Act, Even the basis stated by the respondent that he would be in a position to look after the child is not convincing. The petitioner is a lecturer and he will have to discharge his official duties by remaining away from his house. He cannot, therefore, feed the child in a manner which is expected of a mother. The contention advanced on his behalf is that he would keep his aged mother with him and also an Ayah who would be able to look after the child properly cannot be equated with the looking after of the child by his own mother. Besides that, looking to the salary a lecturer draws it does not appear feasible that the respondent would be able to keep an Aya. The mother of the respondent is of an old age, as stated before us, and she would not be able to

properly look after the child. We are, therefore, not convinced that the respondent-father is in a position to look after his newly born male child in preference to that of the mother.

6. In Bhagwati Bai v. Yadav Krishna Awadhiya, AIR 1969 Madh Pra 23, a Division Bench of this Court has held as under :

> "The writ of habeas corpus ad subjic-iendum, i.e., you have the body to submit or answer, is commonly known as the writ of habeas corpus. It is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it The detention of a minor by a person who is not entitled to his legal custody is treated, for the purpose of granting the writ, as equivalent to imprisonment of the minor. It is, therefore, not necessary to show that any force or restraint is "being used against the minor by the respondent. In Gohar Begum v. Suggi Begum, (1960) 1 SCR 597 = (AIR 1960 SC 93) where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued.**"**

The Division Bench of this Court in the aforesaid case while dealing with a writ petition under Article 226 of the Constitution of India for issuance of a writ in the nature of *Habeas Corpus* has allowed the writ petition with a direction for giving the custody of the child to the petitioner therein Veena Agrawal.

19- In the case of **Kamla Devi Vs. State** reported in **AIR (HP) 1987 0 34**, the High Court of Himachal Pradesh in paragraph No.25 has held as under:-

> **"**25. The law, which generally lags behind social advances, has haltingly stepped in by enacting Section 6 of the Hindu Minority and Guardianship Act, 1956 and taken a small step in the direction of treating the mother as better suited for custody till the minor attains the age of 5. The relevant portion of Section 6 of the said Act reads as follows : "The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-
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> (a) in the case of a boy or an unmarried girl - the father, and after him, the mother:

> Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother."
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> (Emphasis supplied)
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> The "tender years rule" has thus found statutory recognition and the legislative policy underlying thereto is based not only on the social philosophy but also in realities and points in the direction that the custody of minor children who have not completed the age of 5 years should ordinarily be with the mother irrespective of the fact that the father is the natural guardian of such minors. When moved for a writ of Habeas Corpus and in exercising the general and inherent jurisdiction in a child custody case, the Court is required to bear this legislative prescription in mind while judging the issue as to the welfare of the child.
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> Findings Against The Factual Backdrop :"

In the present case the child is aged about two years and this Court keeping in view Section 6 of Hindu Minority and Guardianship Act, 1956 is of the opinion that the child has to be given in the custody of the mother.

20- The Hon'ble Supreme Court in the case of **Sarita Sharma Vs. Sushil Sharma** reported in **2000 (1) G.L.H. 616** in paragraph No.6 has held as under:-

> **"**6. Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A. despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in

> taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the Welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would depend upon the joint-efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the Court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court, There is a possibility that both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights.**"**

In the aforesaid case, the appellant Sarita has removed the children from USA despite the order of Court of that country and the Hon'ble Supreme Court has held that the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children and therefore, this Court is of the opinion that the writ petition preferred by the petitioner, who is mother, deserves to be allowed and is accordingly allowed.

21- The present petition is under Article 226 of the Constitution of India for issuance of a writ in the nature of *Habeas Corpus* and the order passed by this Court will not come in way of the parties, in case the parties so desire to approach the Civil Court under the Guardians and Wards Act, 1890. The Civil Court shall be free to decide the matter without being influenced by the order passed by this Court keeping in

view the statutory provisions in respect of visitation rights of father / grand parents. The parties shall again be free to approach the Civil Court in accordance with law.

22- The respondent No.6 child in question, who is two years old, is US citizen and his Passport is also on record and therefore, as the child in question is US citizen, the US Embassy be informed about the order passed by this Court today and the Ministry of External Affairs be also informed about the order passed by this Court today. The Ministry of External Affairs, Government of India / Competent Authority shall pass necessary orders from time to time for extension of Visa of the child, if so required, in accordance with law. The petitioner shall make available the whereabouts of the child to the US Embassy as and when required or any other information required by the US Embassy in the matter. With the aforesaid, writ petition stands allowed.

Certified copy as per rules.

(S. C. SHARMA)
J U D G E

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