

INDIA, INTER-COUNTRY PARENTAL CHILD REMOVAL AND THE LAW

By

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(1) INTRODUCTION

The world is a far smaller place now than it was a decade ago. Inter country and inter continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Logically, the world in which we and our children live has grown immensely complex. It is filled with opportunities and risks. International mobility, opening up of borders, cross border migration and dismantling of inter cultural taboos have all the positive traits but are fraught with a new set of risks for children caught up in cross border situations. Caught in cross fire of broken relationships with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross frontier child support. In a population of over a billion Indians, 25 million are non-resident Indians who by migrating to different jurisdictions have generated a new crop of spousal and family disputes.

(1.1) DEFINITION OF CHILD REMOVAL

Families with connections to more than one country face unique problems if their relationship breaks down. The human reaction in this already difficult time is often to return to one's family and country of origin with the children of the relationship. If this is done without the approval of the other parent or permission from a Court, a parent taking children from one country to another may, whether inadvertently or not, be committing child removal or inter parental child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of the person with whom the child normally lives.

A broader definition encompasses the removal of a child from his / her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. The Convention on the Civil Aspects of International Child Abduction signed at the Hague on October 25, 1980 with 75 contracting countries today as parties from all regions of the globe, however defines removal or detention wrongful in the following words.

“Article 3

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

Child removal does not find any specific definition in the Indian statute books and since India is not a signatory to the Hague Convention, there is no parallel Indian legislation enacted to give the force of law to the Hague Convention. Hence, in India all interpretations of the concept of child removal are based on judicial innovation in precedents of case law decided by Indian courts in disputes between litigating parents of Indian and / or foreign origin.

(1.2) GLOBAL SOLUTIONS AND REMEDIES

The Hague Convention on Civil Aspects of International Child Abduction came into force on December 1, 1983 and has now 75 contracting nations to it. The objects of the Convention were:

- a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

It operates as an effective deterrent providing a real and practical means of restoring the status quo prior to the abduction, prevents abductors from reaping the benefits of an act opposed to the interests of children, upholds the right of the child to maintain contact with both parents and introduces harmony where previously chaos prevailed. The Permanent Bureau of the Hague Conference on Private International Law at The Hague, Netherlands, renders a superb service by monitoring and helping the development of services to support effective implementation and consistent operation of the Hague Conventions and review their operations. Since, there is no centralised system of enforcement or interpretation, the Secretariat of the Hague Conferences guides nations in post convention services. In terms of the Hague Convention on Civil Aspects of international Child Abduction, the Secretariat has published in three parts guides to good practice, namely Central Authority Practice, Implementing Measures and Preventing Measures which are all approved by contracting States. The Secretariat thus helps to create an international medium of Consenting States who contract with each other to return children who are wrongfully removed.

(1.3) WHY SHOULD INDIA BE INTERESTED IN JOINING THE 1980 CONVENTION

The Hague Convention on the Civil Aspects of International Child Abduction is a remarkable document, which has had significant impact on Child protection policies in much of the world. In a civilised society where globalisation and free interaction is part of a rapidly changing set up, India is emerging as a major destination in the developing world. Non-resident Indians have achieved laurels in all walks of life. But, back home, the problems on the family law front are largely unresolved. Times have changed but laws are still the same. Marriage, divorce, custody, maintenance and adoption laws in India need a workup. Child removal is often treated as a custody dispute between parents for agitating and adjudicating rights of spouses while spontaneously extinguishing the rights of the child. Therefore, in an international perspective, four major reasons can be identified to establish and support the necessity of India's need to sign the Convention.

Firstly, India is no longer impervious to international inter parental child removal. In the absence of the Convention principles, the Indian Courts determine the Child's best interest whereby any child removal is dealt with like any custody dispute. In this process, the litigation is a fight of superior rights of parties and the real issue of the welfare of the child becomes subservient and subordinate. Clash of parental interests and rights of spouses determine the question of custody. The over powering parent wins to establish his rights and the resultant determination of the best interest of the child is a misnomer and a misconception. Such a settlement is not truly in the best interest of the removed child.

Secondly, such a determination in India plays into the hands of the abducting parent and usurps the role of the Court which is best placed to determine the long term interests of the child, namely the Court of the country where the child had his or her home before the wrongful removal or retention took place. By contrast, the advantage of the Hague Convention approach is that it quickly restores the position to what it was before the wrongful removal or retention took place and supports the proper role played by the Court in the country of the child's habitual residence. The correct law to be applied to the child would be of the country of the child's origin and so would be the Court of that country. In India, determination of rights as per Indian law of a foreign child removed to India by an offending parent may often be clouded and may not be in the best interest of the child and ought to be determined by the law and the Court of the child's origin.

Thirdly, the fact that India is not a party to the Hague Convention may have a negative influence on a foreign judge who is deciding whether a child living with his / her parent in a foreign country should be permitted to spend time in India to enjoy contact with his / her Indian parent and extended family. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign Judge may be reluctant to give permission for the child to travel to India. As a logical corollary of this principle, membership of the Hague Convention will bring the prospect of achieving the return to India of children

who have their homes in India but have been abducted to one of the 75 States that are parties to the Convention.

Fourthly, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise in Courts of different countries who are equally competent to decide such issues. The recognition and enforcement provisions of the Convention avoid the need for re-litigating custody and contact issues and ensure that decisions are taken by the authorities of the Country where the child was habitually resident before removal.

It is thus hoped that India will give a serious consideration to joining the 1980 Hague Convention due to the convincing grounds cited above.

(1.4) THE UK JUDICIAL INITIATIVE

In January 2005, the Rt. Hon'ble Lord Justice Thorpe at the Royal Courts of Justice, London was appointed Head of International Family Law for England and Wales. For the first time such a position has been created within the UK Judicial system. The appointment confirms the increasing importance attached to the development of international instruments and Conventions in a field of family law and to the value of International Judicial Collaboration, particularly in the extension of the Global network of liaison Judges specialising in family law. This may prompt some other jurisdiction in the world, whether or not they are signatories to the Hague Convention on Civil Aspects of International Child Abduction 1980 to make similar appointments. In relation to wrongful removal or retention of children, as between UK and Pakistan, a protocol has been agreed between the President of the Family Division of the High Court of London and the Chief Justice of the Supreme Court of Pakistan for co-operation between the judicial authorities of the two countries and providing agreed procedures for dealing with such cases. India, however has not taken any steps in such regard.

2. GENERAL POSITION OF INDIAN LAW ON THE PROPOSITION OF INTERPARENTAL AND INTERCOUNTRY CHILD REMOVAL.

(2.1) INTRODUCTION

International child abduction law in India stands substantially modified as a result of the Supreme Court judgment in **Dhanwanti Joshi v Madhav Unde (JT 1997(8) SC 720)**, handed down on 4 November 1997. It deals with the provisions and case-law analysis relating to the Hindu Minority and Guardianship Act 1956, read with the Guardian and Wards Act 1890. The two enactments principally govern the law relating to child custody in India.

Under Indian law, the prime consideration is the welfare of the child, though s 6(a) of the Guardian and Wards Act 1890 says that the custody of a minor who has not attained the age of five shall ordinarily be with the mother.

The court held (at pp 733–734, Para 31): ‘So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the Court to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in **McKee v McKee [1951] AC 352**, unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in *Re L* [1974] 1 All ER 913, CA. As recently as 1996–1997, it has been held in *P (A minor) (Child Abduction: Non-Convention Country), Re:* ([1996] 3 FCR 233, CA by Ward, LJ 1996 (Current Law) (Year Book), pp 165–166) that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence—which was not a party to the Hague Convention, 1980, – the Courts’ overriding consideration must be the child’s welfare. There is no need for the Judge to attempt to apply the provisions of Art 13 of the Convention by ordering the child’s return unless a grave risk of harm was established...’

From the above mandate of law, it is clear that courts in India now would not exercise a summary jurisdiction only to return the children to the foreign country of their habitual residence.

It was also held (Para 21) that orders relating to the custody of children are by their very nature not final, but interlocutory in nature, and subject to modification at any future time upon proof of a change of circumstances requiring change of custody; but such change in custody must be proved to be in the paramount interests of the child. This was the position of law laid down by the Supreme Court of India in **Rosy Jacob v Jacob A. Chakramakkal (1973 (1) SCC 840)**, which has since been explicitly reaffirmed in the above-mentioned 1997 ruling.

It was further held that the custody order of a foreign court is only one of the factors which will be taken into consideration by a court of law in India. The court will draw up an independent judgment on the merits of the matter with regard to the welfare of the children. Lastly, superior financial capacity cannot be a sole ground for removing children from their mother’s custody.

(2.2) FURTHER CASE-LAW

The tenor of law laid down in the above-mentioned judgment of **Dhanwanti Joshi (JT 1997(8) SC 720)** has more recently been reaffirmed by the Supreme Court of India in **Sarita Sharma v Sushil Sharma (JT 2000 (2) SC 258)**. The facts of this case are outlined in brief below.

The parents of the children were living in the United States. The children were put in the custody of the father, while the mother was given visiting rights. In exercise of her visiting rights, on 7 May 1997 the mother picked up the children from the father’s residence. She was to return the children next morning. The next morning, the father

discovered that the children had not been brought back to school. Eventually, the mother, without obtaining any US court order, flew to India with the children. The father filed a petition praying for the issue of a writ of habeas corpus at the Delhi High Court on 9 September 1997. To seek the release of any individual in illegal custody, a habeas corpus petition can be filed in any High Court in India under Art 226, or under Art 32 of the Constitution of India if the jurisdiction of the Supreme Court of India is to be invoked directly. The wife's contention was that, by virtue of the orders dated 5 February 1996 and 2 April 1997 passed by the courts in America, both of she and the father were appointed as possessory conservators. Hence, both the children were in her lawful custody.

The Delhi High Court held that, in view of the interim orders passed by the US court, the wife had committed a wrong in not informing that court and not seeking its permission to remove the children from the jurisdiction of that court. The Delhi High Court took note of the fact that a competent court having territorial jurisdiction had passed a decree of divorce and had ordered that only the father should have the custody of the children. Delhi High Court allowed the petition and directed the wife to restore the custody of the two children to the father. It was also declared that it was open to the father to take the children to the United States without any hindrance. The wife appealed to the Supreme Court of India.

The Supreme Court (at p 263, Para 4) noted from the record that there were serious differences between the two warring spouses. The husband was an alcoholic and had been violent towards the wife. The conduct of the wife was also not very satisfactory. The court framed the following issues '... The question is whether the custody became illegal, as she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission. After she came to India a decree of divorce and the order for the custody of the children have been passed. Therefore, it is also required to be considered whether the mother's custody became illegal thereafter.'

The court held (at pp 264 and 265, Para 6):

'6. Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from USA 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 USA 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 USA 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 five 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 the 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 USA 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 USA 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...'

Furthermore, the Supreme Court (at p 264, para 5) reaffirmed para 31 of the judgment in **Dhanwanti Joshi's case (1997 (8) SC 720)** (reproduced above). *Sarita Sharma's* case is the second ruling of its kind handed down by the Supreme Court of India altering the earlier dicta of child abduction law.

Much more recently, the Supreme Court of India dismissed a habeas corpus petition instituted by a mother seeking custody of her two minor children, where earlier contested custody orders had been passed by the family Court awarding custody to the paternal grandmother of the minor children in question. In this particular case, **Saiha Ali v State of Maharashtra (JT 2003 (6) SC 79)**, the wife directly filed the habeas corpus petition in the Supreme Court of India under Art 32 of the Constitution of India. The facts of the case are as follows.

The father of the minor children was serving a jail term in the United States. The mother contended that, under the terms of an order of a competent court of the United States, she being the mother and natural guardian had been granted the custody of her two minor children.

Consequently, the mother petitioned for custody of her minor children along with their passports and travel documents.

The fourth respondent, the paternal grandmother of the children, by virtue of her defence brought to the apex court's notice that the children were in her custody under the terms of an order passed by the competent Family Court in Nagpur. The court also noted the fact that the writ petitioner, i.e. the mother, was a party to the said Family Court proceedings. Subsequently, the mother preferred an appeal before the Nagpur Bench of the Bombay High Court, which was later on withdrawn. Counsel for the respondent grandmother contended that the family court order had assumed finality as to the custody of the children. Hence, the habeas corpus petition was not maintainable. She also contended that the Family Court, while granting the custody of minor children to her, had held the US custody order to be one without jurisdiction and not a decree; due notice of it should have been taken by the Indian courts under section 13 of the Civil Procedure Code 1908.

The court accepted the submissions of the respondent paternal grandmother. The apex court held that the Indian Family Court order was an order passed by a competent court of jurisdiction. The apex court further held that the children were in legal custody, until the order was set aside by the superior courts. The court firmly

concluded that the habeas corpus petition was not maintainable. The court was sympathetic to the mother, who had lead a five-year sustained campaign to reaffirm the visiting rights initially given to her by the Nagpur Family Court. But it also recognised the fact that the petitioner mother had remarried, and had borne another child from the remarriage.

However, the Supreme Court, in order to do complete justice, passed orders in the interest and welfare of the minor children by liberalising the visitation rights of the petitioner mother earlier granted to her by the Court to enable her to take her children out for more time on every weekday and at weekends. The tenor of the law laid down in this ruling is identical to that laid down in the above-mentioned cases of **Dhanwanti Joshi (JT 1997(8) SC 720)** and **Sarita Sharma (JT 2000 (2) SC 258)**. Though there is no mention at all of these two judgments or the earlier position of relevant case-law, in essence, the welfare of the minor children seems to be the paramount consideration in deciding custody rights of children in cases of broken marriages.

Clearly, in the above case, scant regard has been given to the foreign Court custody order obtained by the mother, as it was held to be without jurisdiction. This ruling yet again fortifies the view that the courts in India will independently come to their own judgment in the given circumstances of the case, irrespective of foreign court child custody orders.

Before the above-mentioned 1997, 1999 and 2003 rulings were handed down by the Supreme Court of India, there was case-law to the contrary allowing enforcement of foreign court custody orders on the principle of comity on a case-by-case basis. Such orders were normally enforced by initiating habeas corpus proceedings in the High Court under Art 226 of the Constitution of India where the child was located within the territorial jurisdiction of the High Court or directly in the Supreme Court of India under Art 32 of the Constitution of India.

It is pertinent to mention that Art 137 of the Constitution of India provides for review of judgments or orders made by the Supreme Court of India. Further, Art 141 of the Constitution of India mandates that the law declared by the Supreme Court of India shall be final and binding on all courts within the territory of India.

Hence, the Supreme Court of India from time to time may change the law on any aspect of judicial interpretation, and this will bind all other courts in India. Therefore, the above recent views of the apex court lay down the current position of applicable law in matters of enforcement of foreign court child custody orders when sought to be implemented in India.

(2.3) EARLIER CONTRARY CASE-LAW

There is ample earlier case-law contrary to the law recently laid down in *Dhanwanti Joshi* and *Sarita Sharma*. One such Supreme Court of India ruling, **Surinder Kaur Sandhu v Harbax Singh Sandhu (AIR 1984 SC 1224)**, as noted in *Sarita Sharma* (p 262, para 5), read:

'We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See **International Shoe Company v State o Washington [90 L Ed 95 (1945): 326 US 310]**, which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case). It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy.'

In *Sarita Sharma* the Supreme Court also noted the earlier law laid down in **Elizabeth Dinshaw v Arvand M Dinshaw (AIR 1987 SC 3)**. In this ruling the apex court had exercised summary jurisdiction regarding the return of the minor child. In *Dinshaw* it was also stressed that the interest and the welfare of the minor child is the predominant criteria in child custody matters.

The earlier law laid down in **Sandhu (AIR 1984 SC 1224)** and **Dinshaw (AIR 1987 SC 3)** stands substantially modified with the recent mandate of law in **Dhanwanti Joshi (1997(8) SC 720)**, **Sarita Sharma (JT 2000 (2) SC 258)** and **Sahiba Ali (JT 2003 (6) SC 79)**.

Thus, it can be safely concluded that the exclusive emphasis of the apex court's verdict now is to safeguard the welfare of the children. Mere mechanical implementation of an order of the foreign court is no longer the final response of the court. Hence, irrespective of the dictate of a court of overseas jurisdiction, the Supreme Court of India still rightly insists on a proper evaluation of the best interests of the children of a broken marriage.

(2.4) VISITING RIGHTS CANNOT BE DENIED

The Supreme Court of India, in a recent ruling in **N. Nirmala v Nelson Jeyakumar (JT 1999 (5) SC 223)**, held that depriving a mother of visiting rights was not justified. This appeal was about the custody of a minor daughter. The respondent father was permitted to retain custody as legal guardian. A single judge of the High Court confirmed the custody of the minor daughter with the father but gave visiting rights to the appellant mother.

Against this order passed by the Single Bench of the High Court, the appellant mother, in search of an order of custody, went in further appeal before a Division Bench of the High Court, which by the impugned judgment dismissed the appeal and deprived the appellant mother of her visiting rights, to which there were no cross-objections on the part of the husband respondent. The matter went on further appeal to the Supreme Court on this judgment being questioned by the mother.

The apex court held in the above-mentioned judgment (at pp 223–224, para 3) as follows:

‘... In our opinion, such a further adverse order against the appellant was not justified. The interest of justice will be served if the order of the learned Single Judge continuing the custody of the minor child with the respondent and as confirmed by the Division Bench is maintained subject to the modification that visiting right which was denied to the appellant by the Division Bench be continued... .’

Consequently, the apex court held that depriving of the mother of her visiting rights was not justified. Hence, the spirit of the final judicial view is again in the best interest of the child, who was held entitled to receive the love and care of both parents.

(2.5) ORDERS RELATING TO CUSTODY OF CHILDREN ARE INTERLOCUTORY IN NATURE

Justice Mukul Mudgal of the Delhi High Court in the case of **Leeladhar Kachroo Vs. Umang Bhatt Kachroo reported as 2005 (2) Hindu Law Reporter 449**, reiterated in para 21 at page 457 of the judgment the earlier position of law as follows:

“...In **Jaiprakash Khadria v. Shyam Sunder Agarwalla & Anr. II (2000) CLT 212 (SC) : (2000) 6 SCC 598**, it was held as under:

“Orders relating to custody of children are by their very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interest of the child.”

(2.6) HABEAS CORPUS CAN ALSO BE ISSUED BY A PERSON WHO IS NOT A CITIZEN OF INDIA.

It is well established that a writ of habeas corpus can be issued to secure the custody of a minor child. This can be sought even by a person who is not a citizen of India, as was recently held in **Miss Atya Shamim v Deputy Commissioner/Collector, Delhi (Prescribed Authority under Citizenship Act) (AIR 1999 J&K 140)**. The Jammu

and Kashmir High Court in this ruling reaffirmed **Elizabeth Dinshaw (AIR 1987 SC 3)** where the Supreme Court of India had issued a writ at the instance of a person who was not an Indian citizen.

(3) RELEVANT LEGISLATION AND FORUM FOR CUSTODY PROCEEDINGS

As far as the forum for securing the return of the children is concerned, it is important to mention that India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980. Under Art 226 of the Constitution of India, a parent whose child has been abducted can petition the State High Court to issue a writ of habeas corpus against the abducting spouse for the return of the child. Alternatively, a habeas corpus petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Art 32 of the Constitution of India.

In so far relating to the relevant legislation, the mother could well seek recourse to the provisions of the Hindu Minority and Guardianship Act 1956 (hereafter 'HMGA 1956'), which is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The provisions of the HMGA 1956 are supplemental to the earlier Guardians and Wards Act 1890. The HMGA 1956, like the HMA 1955, has extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir. Under s 4(a) of the HMGA 1956, 'minor' means a person who has not reached the age of 18 years and a 'guardian' in s 4(b) is defined as a person having the care or the person of the minor or of his property or both and includes a natural guardian, a guardian appointed by Will of his natural parents, a guardian appointed or declared by court and a person empowered to act as such under any enactment.

(3.1) INDIA AND THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980

As of now, India is not a party to the Hague Convention on Civil Aspects of international Child Abduction 1980. Other than the statutory provisions of law quoted above in which matters of child custody are agitated in different courts in different proceedings, the principles of The Hague Convention cannot be enforced in Indian Courts. Different recent decisions indicate a trend that Indian Courts generally tend to decide the interparental child custody disputes on the paramount consideration of the welfare of the child and the best interest of the child. A foreign Court custody order is only one of the considerations in adjudicating any such child custody dispute between parents. Foreign Court orders of child custody are no longer mechanically enforced and normally the Courts go into the merits of the matter to decide the best interest of the child irrespective of any foreign Court custody order. Hence, the position of law in India varies from case to case basis and there is no uniform precedent which can be quoted or cited as a universal rule.

India not being a signatory to the Hague Convention of 1980 on the Civil Aspects of International Child Abduction, questions regarding the custody of such children are now considered by the Indian Courts on the merits of each case bearing the welfare

of the child to be of paramount importance while considering the order made by the foreign Court to be only one of the relevant factors in such decision.

(3.2) THE POSITION OF INDIAN LAW ON CHILD ABDUCTION

Under Article 214 of the Constitution of India, there shall be a High Court for each State in India and under Article 124 there shall be a Supreme Court of India. Under Article 141, the law declared by the Supreme Court shall be binding on all Courts within India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions. Part III of the Constitution secures “Fundamental Rights” to citizens, which can be enforced directly in the respective High Courts of the States or directly in the Supreme Court of India by issue of prerogative writs under Articles 226 & 32 respectively of the Constitution of India.

The High Courts and the Supreme Court in India entertain petitions for issuance of a writ of habeas corpus for securing the custody of the minor at the behest of a parent who lands on Indian soil alleging violation of a foreign Court custody order or seeks the return of children to the country of their parent jurisdiction. Invoking of this judicial remedy provides the quickest and most effective speedy solution.

Different High Courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction has been invoked by an aggrieved parent seeking to enforce a foreign Court custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past three decades. A quick summary of Indian law laying down this position is as hereunder:

- i) In **Surinder Kaur Vs. Harbax Singh Sandhu, 1984 Hindu Law Reporter 780 Supreme Court**, it was held that the provisions of the Hindu Minority and Guardianship Act, 1956 cannot supercede the paramount consideration as what is conducive to the welfare of the child while exercising summary jurisdiction in returning the minor children to the foreign country of their origin.
- ii) In **Elizabeth Dinshaw Vs. Arvand M. Dinshaw, All India Reporter 1987 Supreme Court 3**, the Court again exercising summary return of a removed child upheld the right of a foreigner mother to directly invoke the jurisdiction of the Supreme Court to seek the custody of a minor child from his father on the principle that the matter is to be decided not on the considerations of the legal rights of the parties but on the sole and predominant criterion of the best interest of the minor child.
- iii) In **Kuldeep Sidhu Vs. Chanan Singh, All India Reporter 1989 Punjab & Haryana 103**, in a criminal writ petition exercising summary return, it was held that the welfare of the children who were Canadian citizens would override any consented custody arrangement and the children have a right to be brought up in the culture and environment of the country of their birth.

iv) In **Amita Gautam Vs. Ramesh Gautam, 1989 (2) Hindu Law Reporter Punjab & Haryana 385**, following the above decisions, it was held that the orders of the Canadian Court granting interim custody to the mother must be honoured by restoring forthwith the custody of the minor to the mother who had been unauthorisedly removed from Canada to India by the father.

v) In **Sarvajeet Kaur Mehmi Vs. State of Rajasthan, 1987(2) Hindu Law Reporter Rajasthan 607**, the custody the minor child was given to the mother without hearing the father in view of the orders passed by the High Court of Justice (Family Division), UK requesting Courts in India to pass necessary orders and issue directions seeking the return of the minor back to UK from India.

vi) In **Kala Aggarwal Vs. Suraj Prakash Aggarwal, 1993(1) Hindu Law Reporter Delhi 145**, despite the children brought to India from USA in violation of US Court custody orders, the Court upholding the maintainability of the petition only granted access but declined to grant the custody to the mother by concluding that the children's welfare is with the father till they attain majority.

vii) In **Jacqueline Kapoor Vs. Surinder Pal Kapoor, 1994(2) Hindu Law Reporter Punjab & Haryana 97**, following earlier precedents, the Court upheld the mother's petition seeking custody of her minor female child in accordance with the orders of the competent Court in Germany directed that the child be handed over to the mother as the judgment of the German Court was binding on the father who had removed the child to India by the deceitful means.

viii) In **Atya Shamim Vs. Deputy Commissioner / Collector Delhi All India Reporter 1999 Jammu & Kashmir 140**, in a habeas corpus petition by a person who was not a citizen of India was held to be maintainable to secure the custody of a minor.

ix) In **Dhanwanti Joshi Vs. Madhav Unde, 1998 (1) Supreme Court Cases 112**, the Supreme Court observed that the order of the foreign Court will only be one of the facts which must be taken into consideration while dealing with child custody matters and India being a country which is not a signatory to the Hague Convention, the law is that the Court within whose jurisdiction the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance. It is in this case that the Supreme Court changed the earlier view and did not exercise summary jurisdiction in returning removed children to their parent country by observing that the welfare and best interest of the child should be of paramount consideration.

x) The above observations by the Supreme Court of India was followed in its later decision in **Sarita Sharma Vs. Sushil Sharma, Judgements Today 2000 (2) Supreme Court 258**. Thereafter, in **Sahiba Ali v. State of Maharashtra, 2004(1) Hindu Law Reporter 212**, the Supreme Court declined to grant the custody of her children to the mother but at the same time issued directions for grant of visitation rights in the interest and welfare of the minor children.

xi) In **Paul Mohinder Gahum Vs. State of NCT of Delhi, 2005 (1) Hindu Law Reporter 428**, upholding the maintainability of a habeas corpus petition, the High Court held that the orders passed by foreign Courts granting custody take a back seat in preference to what lies in the best interest of the minor rather than what a foreign court has directed.

xii) In **Eugenia Archetti Abdullah Vs. State of Kerala, Hindu Law Reporter 2005 (1) (Kerala) 34** upholding the right of the US citizen i.e. the petitioner mother before the Court in a habeas corpus petition, the custody of the children was handed over to the mother after holding that the High Court can exercise such jurisdiction under Article 226 of the Constitution of India.

xiii) In **Leeladhar Kachroo Vs. Umang Bhat Kachroo, 2005 (2) Hindu Law Reporter, Delhi 449**, upholding the order of a Canadian Court granting custody to the mother of her younger son and allowing him to go back to Canada, the Court upheld the contention and that it has the jurisdiction to order the traveling out of the minor child with one of the parents and the mere possibility of losing jurisdiction would not dissuade the Court from permitting the departure of the child with the determined parent in the interest of the child. Hence, the Court held that it was empowered to entrust the custody of a child to a parent who resides outside its jurisdiction, if it is conducive to the welfare of the child.

xiv) In **Paul Mohinder Gahun Vs. Selina Gahun, 2007(1) Recent Civil Reports (Civil), 129**, it was held that where the wife, husband and the minor girl child were all Canadian citizens and where the wife had stealthily come to India with the minor daughter, the Indian Guardian Court at Delhi had no jurisdiction to try and decide the petition of the mother for a guardianship order as their matrimonial home was in Canada where the child was ordinarily resident.

xv) In a judgment dated March 3, 2006 of the High Court of Bombay at Goa, reported as **Mandy Jane Collins Vs James Michael Collins, 2006(2) Hindu Law Reporter Bombay 446**, between a 62 years old American father and 39 years old British mother resident in Ireland and who were litigating over the custody of their 8 year old minor daughter said to be illegally detained in Goa by the father, the Court declining the issuance of a writ of habeas corpus held that the parties could pursue their remedies in normal civil proceedings in Goa. The Court dismissing the mother's plea for custody concluded that the question of permitting the child to be taken to Ireland without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa is not possible and directed that status quo be observed. This in effect means that the 8 years old minor girl continues to live in Goa without her mother or any other female family member in the father's house. In a challenge to this decision by the mother before the Supreme Court of India, the appeal was dismissed on August 21, 2006, leaving it open to the parties to move the appropriate forum for the custody of the child, which if done, was directed by the Supreme Court to be decided within a period of three months with earlier visitation rights continuing to the mother.

xvi) In another matter reported as **Ranbir Singh Vs Satinder Kaur Mann, 2006 (3), Punjab Law Reporter 571**, The Punjab and Haryana High Court declined to

issue a Writ of Habeas Corpus to the petitioner father residing in Malaysia who was seeking release of his five year old son and three year old daughter from their mother's custody in India . The High Court of Malaya at Kuala Lumpur had held that the petitioner was entitled to the legal guardianship of the said minor children. However, The High Court in India declining to enforce the foreign judgment of the Malaysian High Court held that the matter can be re-agitated before the appropriate forum with regard to the custody of the children on the basis of evidence to be adduced by parties. The Habeas Corpus petition was dismissed with the observation that it would be open to either parties to move for custody of the minor children under appropriate law before an appropriate forum.

The above is the consolidated case law summary on the proposition of inter-parental child removal with regard to cases of removal of children from foreign jurisdiction to India and their decisions in different Courts in India as a non-convention country.

(3.3) POSITION OF FOREIGN COURT ORDERS IN INDIA

The principles governing the validity of foreign court orders are laid down in section 13 of the Indian Code of Civil Procedure (CPC). The CPC is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. The principles in Section 13 CPC have been affirmed in relation to the guidelines laid down by the Supreme Court of India on recognition of foreign matrimonial judgments.

It is reiterated, as discussed above, that Indian courts would not exercise summary jurisdiction to return the children to the country of habitual residence. The courts consider the question on the merits of the matter, with the welfare of the children being of paramount importance.

Section 14 of the CPC talks of presumption as to foreign judgments. It provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

(3.4) THE POSITION OF INDIAN LAW ON SHARED RESIDENCE ORDERS

Although, under the relevant Indian statute law pertaining to child custody matters that is the Hindu Minority Guardianship Act, 1956 supplemented with the provisions of the Guardians and Wards Act, 1890 there exists no concept of shared residence orders.

However, there is one recent judgment of the Kerala High Court i.e. of **Eugenia Archetti Abdullah v. State of Kerala** 2005 (1) HLR (Ker) 34, which has the facts and circumstances of the case handed down a order, which is close/akin to a shared custody order. This was in a case, where divorce and custody proceedings were

pending in the USA and the mother was held entitled to custody of children until a final decision was announced by the courts in the USA.

The facts of the case are as follows: The petitioner wife, the respondent husband and the children were all U.S. citizens in this case. The petitioner wife had approached the Court with a Habeas Corpus petition seeking a direction or commanding respondents numbers 2 to 4 to produce two infants named Roshan and Nishant before the Hon'ble Court and to handover their custody with their passports to the petitioner, their mother. The two infant twins were less than three years old.

The petitioner and the respondent got married while in the United States after which they moved to Bahrain where the petitioner gave birth to the said two children. Because of the shift of employment they went back to the state of Texas in the United States and settled there. According to the petitioner their married life was not happy which led to domestic violence from part of the second respondent. This resulted in a criminal case. Finally, the matter was settled. The respondent lost his employment in Texas and both them with their children, visited India and came to Kozhikode in the state of Kerala where the second respondent (husband) did have his roots. While so, according to the petitioner, there was again ill treatment from part of the second respondent and she was thrown out of the residential house and finally, she had to fly back to the United States without the children. According to her, the custody of the children with the respondent was an act of illegal custody and hence they were illegally detained. The petitioner wife had already moved a petition for custody of the children as well as for the dissolution of the marriage with the second Respondent, in accordance of the family law applicable in the State of Texas in United States.

In light of the facts and circumstances of the case, the Court while granting custody of the children to the petitioner wife laid down rigorous conditions one of which being shared custody/visitation rights for a period of 7 days from the time of the Court order to the time the petitioner wife left India, in this regard it is necessary to advert to para (e) of the guidelines laid down in the judgment mentioned below. Secondly, the judgment is relevant to the facts of the case in hand, because it allowed continued access/visitation rights to the respondent spouse to meet up with his minor children for three hours everyday, although quite limited and laying down contingency measures in the event of violation of the said conditions by the petitioner wife.

Para 24 at page 41 of the judgment above, stipulating the said guidelines reads as follows:

- “(a) The petitioner shall furnish a bank guarantee for 7,500 US dollars before she takes the children to the United States. The bank guarantee shall be in the name of the Registrar of the Court.
- (b) She shall also execute a bond for another amount of 7,500 dollars, undertaking to produce the children before this Court as and when ordered.

- (c) The petitioner shall also obtain an undertaking from the US Embassy or US Consulate in Madras that whenever this Court requires, with a notice of 15 days, she shall be present and shall produce the children at her own expenditure, and that in case of her failure, the Texas/US Administration including the Embassy will see that the directions of this Court in this regard are complied with and the children be produced before this Court.
- (d) She can take the children to Texas only on fulfillment of the aforesaid conditions and on expiry of the period mentioned (1) below.
- (e) The petitioner, shall, from tomorrow onwards, for 7 days, stay in Kozhikode so that the 2nd respondent shall have frequent visit to the Children between 10 a.m. and 1.00 p.m. during the said seven days. Until she leaves India, the children shall be regarded as in the joint custody of both, so that the 2nd respondent shall have visitorial rights on the children.
- (f) The 2nd respondent shall entrust the passport of the children and their birth certificates with the Registrar of this Court within a week from today and the Registrar shall give appropriate receipt to him.
- (g) The petitioner shall send bi-monthly reports about the health of the children from the Senior Pediatrician of at least 20 years of practice, duly attested by a notary or the Indian Embassy/Consulate in United States.
- (h) The petitioner shall not remove herself or the children from her present address shown in this petition i.e.

“ADDRESS DELETED BY AUTHOR FOR CONFIDENTIALITY”

- (i) She shall not, except to take the children to India as per the order, if any, to be passed by this Court, take them beyond the State of Texas.
- (j) In case of any default or violation of any of the conditions in this judgment by the petitioner, or in case of any emergency in respect of the children the second respondent is free to fly to Texas and for that he can obtain sufficient amount from out of the bank guarantee provided by the petitioner.
- (k) Whenever the second respondent goes to Texas, the petitioner shall provided him the visitorial rights always to see the children and shall put them in his company.
- (l) Even if the petitioner complies with all the conditions, we make it clear that she shall not take the children out of India for a period of three weeks from today.

- (m) A copy of the passport of the petitioner and the children, duly attested by the Registrar of this Court with the seal of this Court, shall be regarded as a duly original passport for the purpose of their travel inside India.
- (n) If the petitioner complies with the aforesaid conditions, the petitioner's passport as well as the passports and the birth certificate given to her as mentioned in direction (m) shall be returned to the Registrar.
- (o) If the petitioner happens to leave without complying with the above directions, necessarily, she shall leave the custody of the children to the 2nd respondent.
- (p) The petitioner shall not, except for going to Calicut and Chennai, leave her present address in Ernakulam.
- (q) This arrangement in terms of this judgment will be in force until the Family Court at Texas, where the petitioner has instituted a lis, passes any interim or final order, as the case may be, regarding the custody of the children. We make it clear that any such order passed by the Court at Texas will override the directions contained in this judgment.

Writ petition is disposed of as above.”

In another reported case of the Delhi High Court i.e. **Leeladhar Kachroo Vs. Umang Bhat Kachroo, 2005 (2) Hindu Law Reporter, Delhi 449**, upholding the order of a Canadian Court granting custody to the mother of her younger son and allowing him to go back to Canada, the Court upheld the contention and that it has the jurisdiction to order the traveling out of the minor child with one of the parents and the mere possibility of losing jurisdiction would not dissuade the Court from permitting the departure of the child with the determined parent in the interest of the child. Hence, the Court held that it was empowered to entrust the custody of a child to a parent who resides outside its jurisdiction, if it is conducive to the welfare of the child.

In the above mentioned case, the custody of the older son, who was residing with the father, was not in question and the case was confined to determine the custody of the younger son only. However, it must be noted here that this is a particular reported case looking in the round at the custody of two children between the husband and the wife in two different countries. But, it does not talk of a situation looking at shared custody with respect to the same child.

In view of the fact that there is no statutory concept of a “shared residence order” under Indian legislation, the Indian Courts would view interpreting any such order of a foreign Court in the light of the principle of the best interest of the child keeping in view the welfare of the child as of paramount consideration. Undoubtedly, access rights of the father can be enforced on the basis of a shared residence order and if such rights are violated, they can be enforced in an Indian Court of law. However, this would be viewed as an enforcement of a private contractual arrangement

between the parents. The Court would still go into the welfare of the child to determine the rights of the child. Hence, the position would vary from case to case and there is no uniform principle which can be quoted as a universal rule.

(3.5) VALUE ATTACHED BY THE COURT TO THE WISHES OF THE CHILD

The Court shall certainly consider the wishes of the parents and the minor child, but it is the discretion of the Court. As is evident from the case law analysis, the paramount consideration is the welfare of the minor child.

Justice Mukul Mudgal of the Delhi High Court in the case of **Leeladhar Kachroo v. Umang Bhatt Kachroo reported as 2005 (2) Hindu Law Reporter 449**, analysed some of the decided cases taking into consideration the ascertainment of wishes of the children in child custody matters. In para 14 at page 454 of the said judgment, he reiterated the earlier position of law which is quoted as follows:

“(b) In **Indira Khurana v. Prem Prakash, 60(1995) DLT633**, the learned Single Judge of this Court held as under:-

“10..... It goes without saying that when the grant of custody is concerned, ascertainment of wishes of the children, especially when they are at an age to make an intelligent preference is a relevant and germane consideration. In none of the cited cases, the question of visitation rights only was involved. In the cited cases, the Court was considering the grant of custody and while doing so, had also made provision for visitation rights. It is also significant that in these cases visitation rights were granted to the spouse who did not have the custody. This is because there should be very strong reasons to deny visitation rights to any of the spouse. These could be cases say where the grant of visitation rights could be injurious to the mental and physical health of the children.

11. The Guardian Judge while exercising his judicious discretion in granting visitation rights can ascertain the wishes of the children by meeting them, In fact, it would be desirable to do so. However, omission to do so in case of visitation rights cannot be fatal especially when there is sufficient material on record available otherwise, supporting grant of visitation rights. This is so in the instant case. The memorandum of understanding had been entered into on the 6th day of December, 1993. The petitioner has not pointed out anything attributable to respondent after 6.12.1993, which would render grant of visitation rights respondent injurious to the mental and physical health of the children. The petitioner in terms of memorandum was willing to share the vacation and visitation rights to the respondent. Moreover the expression of wishes of children is very often conditioned by the persuasion of the party in whose exclusive custody the children have been. The Court, therefore, while ascertaining the mind of the children, has to be conscious of the fact that what the children say could be the reflection of the views of the estranged spouse induced by him/her.”

(c) In **Shyam Sunder Trikha v. Sunita, 67 (1997) DLT 619=1997 IV AD (DELHI) 198**, a learned Single judge of this Court held as under:-

".....The Court can only reiterate that the Guardian Judge, while ascertaining mind of the child during a meeting has been conscious and cautious of the fact that what the child is saying could be reflection of the views of the estranged spouse and as induced by him/her."

The above judgments in the cases of *Indira Khurana (supra)* and *Shyam Sunder Trikha (supra)*, in fact refer to the desirability of ascertaining the wishes of the children, I have also not discounted the possibility of the child being influenced by the parent he last stayed with. But even then in view of the overall circumstances of the case and taking into account the factors discussed hereinabove the impugned order has to be sustained except in relation to the enhancement of the amount of personal bond from Rs.2 lakhs to Rs.3 lakhs."

In view of the position of the law quoted above, it is significant to note that the Indian Courts would definitely ascertain the wishes and the feelings of the child before deciding on the issue of the custody of the child.

(3.6) NO PROVISION FOR MIRROR ORDERS IN INDIA

In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is a concept known to the English, but not to the Indian, legal system. Since foreign court custody orders cannot now be mechanically enforced, it is suggested that, in the event of any litigation in the foreign country of habitual residence, a letter of request be obtained from the foreign court in which litigation is pending for incorporating safeguards and conditions to ensure the return of the minor child to the country of normal residence.

This letter of request should be addressed by the foreign court to the Registrar General of the High Court within whose jurisdiction the estranged spouse is residing with the minor child. It should also be specifically mentioned that the passports of both the parent and the child should be deposited with the Registrar General of the State High Court to ensure that the child is not taken away from the jurisdiction of the court where he or she is confined.

(3.7) A POSSIBLE SOLUTION

With the increasing number of non-resident Indians abroad and multiple problems arising leading to family conflicts, inter parental child removal to India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. Till India does not become a signatory to the Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits

to adapt to different foreign Court Orders arising in different jurisdictions. It is equally important that to create a uniform policy of law some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in the Hague Convention. Divergent views emerging at different times may not be able to cope up to the rising number of such cases, which come up from time to time for interpretation. We in India are thus wanting for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in the Hague Convention. Let us not delay the path to resolution of these disputes.

(3.8) LAW IN THE MAKING: AN AFTERMATH

Borders divide jurisdictions but families reunite them. The chain to this link is the global citizen. However, this inter-nation cross-flow has with the passage of time generated a new crop of legal issues in the realm of private international law which comprises of rules a court would apply whenever there is a case involving a foreign element. Such legal dilemmas of the diaspora baffle systems of law but do not defy solutions if nations make sincere efforts for resolving such gripping complications.

As Reuters reports that while the British Parliament is working its way through The Human Fertilization and Embryology Bill to legalise parentage from in-vitro fertilization births and recognize same sex couples as legal parents of children conceived through the use of donated eggs, sperms or embryos, India has still to enact any concrete law arising from the surrogate tourism industry generated here.

A fugitive Non Resident Indian (NRI) parent declared a proclaimed offender in matrimonial proceedings in India cannot even see or talk to his children removed to India. A foreign court refuses to permit NRI children to be taken to India and likewise local courts decline to implement foreign court orders directing return of NRI children. These occurrences find daily mention but find no straight-forward resolution for the NRI in any Indian law. International parental child abduction defined as the removal or retention of a child across international borders by one parent which is either in contravention of court orders or is without the consent of the other parent is sadly an increasing phenomenon which causes acute emotional distress to the abducted child.

Happily, now this acute problem of the swelling 30 million Indian Diaspora has precipitated in the process of the Government acceding to the Hague Convention on Civil Aspects of International Child Abduction. However, before that is done, and India becomes a member of about 80 contracting convention nations, an appropriate Indian legislation will have to be enacted for its implementation. In this way children removed to and from India will be reunited with their aggrieved parent and India will no longer be a sought after destination for parking removed NRI children from foreign jurisdictions. Also, foreign courts will be encouraged to permit NRI children to freely visit India without fear of abduction.

The draft of the Indian Civil Aspects of International Child Abduction Bill 2007 meant to secure the prompt return of children wrongfully retained or removed to India proposes to ensure that the rights of custody and access under laws of contracting

states are respected by providing for prompt removal of wrongfully removed children. The salient and salutary features of this proposed law are as follows.

- The proposed law seeks to create a Central Authority for performance of duties under the Hague Convention for securing the return of removed children by instituting judicial proceedings in the concerned High Court.
- The appropriate authority or a person of a contracting country may apply to the Central Authority for return of a removed child to the country of habitual residence.
- The High Court may order return of a removed child to the country of habitual residence but may refuse to make such an order if there is grave risk of harm or if it would put the child in an intolerable situation. Consent or acquiescence may also lead to refusal for return of a child by the court.
- The High Court may refuse to return a child if the child objects to being returned upon the court being satisfied that the child has attained an age and degree of maturity to take into account his views.
- The High Court before making an order of return may request the Central Authority to obtain from the relevant authorities of the country of habitual residence, a decision or determination as to whether the removal or retention of the child in India is wrongful.
- The High Court upon making an order of return may direct that the person who has removed the child to India pay the expenses and costs incurred in returning the child to the country of habitual residence.

The creditable sacrosanct feature in recognizing and retaining the jurisdiction of the High Court to protect the paramount consideration i.e. the best interest and the welfare of the child, by carving out exceptions for grounds of refusal has upheld the majesty of law vested in the Indian courts. But at the same time, this welcome proposed law will be a big relief to distraught children who have been removed from their parents. The temptation to wrongfully remove will also be deterred. The cruel abduction of NRI children for the purposes of forced marriages will also be checked.

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