IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF SEPTEMBER, 2023

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE T.G. SHIVASHANKARE GOWDA

W.P.H.C NO.79 OF 2023

BETWEEN:

SMT. ARCHANA PRADHAN
W/O MR. RAJENDRA KUMAR PRADHAN
D/O MR. MURALIDHARA PRADHAN
AGED ABOUT 39 YEARS
RESIDENT OF WITTERINGSTRASSE 1
45130 ESSEN, GERMANY

PRESENTLY AT BANGALORE
HOLDER OF INDIAN PASSPORT
NUMBER:M3158975
ISSUED ON 27.10.2014 AND
VALID UP TO 26.10.2024
MOBILE NO. +49 15145754107 ....PETITIONER

(BY SMT. S. SUSHEELA, SENIOR ADVOCATE FOR
SHRI. H. SOMANATHA, ADVOCATE)

AND:

1. STATE OF KARNATAKA
REP. BY ITS PRINCIPAL SECRETARY
DEPARTMENT OF HOMES AND
EXTERNAL AFFAIRS
VIDHANA SOUDHA
BANGALORE-560 001

2. THE COMMISSIONER OF POLICE
BENGALURU CITY NO.2
ALI ASKAR ROAD
VASANTH NAGAR
BENGALURU-560 051

3. THE DEPUTY COMMISSIONER OF POLICE
DCP SOUTH, SOUTH END CIRCLE
GUPTA LAYOUT, KANAKAPURA
BASAVANAGUDI
BENGALURU
KARNATAKA

4. THE SUPERINTENDENT OF POLICE
NO.5, MILLERS ROAD
BENGALURU -560 052

5. THE STATION HOUSE OFFICER
WH6Q+ P2C, 21ST MAIN RD
R.K.COLONY, 2ND PHASE
J.P.NAGAR, BENGALURU
KARNATAKA-560 078

6. MR. RAJENDRA KUMAR PRADHAN
S/O MR. PRASANNA PRADHAN
AGED ABOUT 43 YEARS
AT PRESENT TEMPORARILY
RESIDENT OF #304, 3RD FLOOR
IRIS SURYA APARTMENT
J.P.NAGAR, 7TH PHASE
BANGALORE-560 076
(EMAIL: RK.PRADHAN2005@GMAIL.COM
MOBILE:+ 9196502-60680)

7. MR. PRASANNA KUMAR PRADHAN
S/O LATE SRIPATI PRADHAN
AGED ABOUT 67 YEARS
PERMANENT RESIDENT OF
POST OFFICE KURUDOL
P.S.NALCO NAGAR

PRESENTLY RESIDING AT
#304, 3RD FLOOR
IRIS SURYA APARTMENT
NEXT TO ARADHANA SCHOOL

J.P.NAGAR 7TH PHASE
BANGALORE-560 076

8. MASTER ADVIK PRADHAN
(MINOR, AGED ABOUT 9 YEARS)
REP. BY THE FATHER DETENUE
S/O MR. RAJENDRA KUMAR PRADHAN
AGED ABOUT 43 YEARS
S/O MR. PRASANNA PRADHAN

AT PRESENT TEMPORARILY
RESIDENT OF # 304, 3RD FLOOR
IRIS SURYA APARTMENT
J.P.NAGAR, 7TH PHASE
BANGALORE-560 076
EMAIL:RK.PRADHAN2005@GMAIL.COM
MOBILE:+9196502-60680) …RESPONDENTS

(BY SHRI. ANOOP KUMAR, HCGP FOR R1 TO R5;
SHRI. S. KARTHIK KIRAN, ADVOCATE FOR
SHRI. KAPIL DIXIT, ADVOCATE FOR R6 & R7)

THIS WPHC IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA R/W SECTION 482 CODE OF CRIMINAL PROCEDURE, 1973, PRAYING TO ISSUE A WRIT IN THE NATURE OF HABEAS CORPUS DIRECTING RESPONDENTS NO.6 AND 7 TO SECURE THE RELEASE OF ADVIK PRADHAN AND TRANSFER HIS PHYSICAL CUSTODY TO THE PETITIONER TO ENABLE THE PETITIONER TO ACT IN THE BEST AND PARAMOUNT INTEREST OF THE CHILD INCLUDING TO REGULATE HIS SCHOOL/EDUCATION MATTERS AND ISSUE ANY APPROPRIATE WRIT/ORDER/DIRECTION WHEREBY RESPONDENT NO.6 IS DIRECTED TO ENSURE SAFE RETURN OF ADVIK PRADHAN TO GERMANY AND ETC

THIS WPHC, HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 22.09.2023, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, **P.S. DINESH KUMAR, J.**, PRONOUNCED THE FOLLOWING:-

ORDER

This writ petition by the mother of a minor, Master Advik Pradhan, aged 9 years is presented with following prayers:

a) *Issue a writ in the nature of Habeas Corpus directing respondent nos. 6 and 7 to secure the release of Advik Pradhan and transfer his physical custody to the petitioner to enable the petitioner to act in the best and paramount interest of the child including to regulate his school education matters.*

b) *Issue any appropriate Writ Order/ Direction whereby Respondent no. 6 is directed to ensure safe return of Advik Pradhan to Germany.*

c) *Issue any other appropriate Writ. Order or Direction to ensure the compliance of the German Family Court, Essen order dated 28.07.2023 Annexure (G) which is passed in the best interest and welfare of Advik Pradhan.*

d) *Direct respondent No. 1 to 5 to provide all necessary aid, assistance and effective implementation of the directions of this Hon'ble Court in securing the presence of Respondent nos. 6 & 7 before this Hon'ble Court.*

e) *Pass any other order which this Hon'ble Court may deem fit and proper in the facts and circumstances of this case.*

2. Heard Smt. Susheela, learned Senior Advocate for the petitioner and Shri. Karthik Kiran learned Advocate for respondents No.6 and 7.

3. Brief facts of the case are, petitioner-Archana and respondent No.6-Rajendra Kumar Pradhan[1] got married on 08.04.2010 in Orissa. Advik was born on 11.12.2013. Both husband and wife are IT professionals. In June 2016, they moved to Bangkok and both were employed there. In 2022, Archana and Rajendra decided to move to Germany for their better career prospects.

4. On 19.07.2023, on the pretext of taking Advik to a park, Rajendra boarded a flight to Dubai *en route* India. Rajendra did not receive Archana's phone calls. Archana informed the local authorities in Germany, but due to the tedious process there was no timely response.

5. On 24.07.2023, Archana sent an e-mail to the Commissioner of Police, Bengaluru complaining *inter alia* that

[1] 'Rajendra' for short

on 19.07.2023, Rajendra had boarded a flight with Advik and rendered himself for action under IPC as well as Hague Convention on Child Abduction; and requested to register an FIR. She also approached the Karnataka Human Rights Commission and Commission for Protection of Child Rights.

6. Archana got issued a legal notice dated 22.07.2023 calling upon Rajendra to return to Germany forthwith along with Advik and to restore child's custody to her.

7. On 28.07.2023, Archana approached the Family Court in Germany and obtained an *ex-parte* interim order with regard to place of child's residence and the school. Subsequently, on 10.08.2023, she has presented this Writ Petition.

8. Smt. Susheela, for the petitioner, contended that:

- in a case of this nature Courts will have to protect child's interest and welfare. The child was studying in a school in Germany and he has been removed illegally by the husband. The child has

its intimate contact with the environment in Germany;

- before shifting to Germany, Advik was studying in Bangkok. Both husband and wife had taken a conscious decision to move to Germany for their career prospects and better education of Advik as education standards in Germany are far superior when compared with Thailand;
- Advik is aged 9 years and requires the care, love and affection of both parents. Rajendra has stealthily removed Advik from Germany. The jurisdictional Court in Germany has ruled that the right to determine child's place of residence and school was transferred to mother.
- As per the settled law, the Child has to be returned to the country of his 'habitual residence' on the principle of 'Comity of Courts' for the determination of child's best interest;

- petitioner is the natural guardian and therefore, Advik should be handed over to her as per Section 6 of Hindu Minority and Guardianship Act, 1956.
- after the Writ Petition was filed, Rajendra had moved to Bangkok along with the child.

9. With the above submissions and placing reliance on the authorities on the point, Smt. Susheela prayed for allowing this Writ Petition.

10. Opposing the Writ Petition, Shri. Karthik, for respondents No.6 and 7, contended that:

- Advik was born in 2013. In 2016, parents moved to Bangkok and set up their matrimonial home. In January 2022, they moved to Germany for their career prospects;
- Rajendra has strong proof about Archana's infidelity after they moved to Germany. As per his information, in matrimonial cases, Courts in

Germany, sometimes grant child's custody to the State. Hence, keeping in view the child's welfare in mind he had initially brought the child to India. Before going to Germany, Advik was studying in an international school in Thailand for about four years and well acclimatized to that environment. Therefore, Rajendra requested his earlier employee for a placement in Thailand and shifted to Bangkok. Advik has been admitted in the very same school where he was earlier studying and he is happily attending the school;

- Rajendra's old parents reside in Orissa and require his assistance. Bangkok is a nearer destination when compared to Essen in Germany;
- Rajendra is prepared to accept Archana despite her affairs in Germany provided she is prepared to relocate to Bangkok or India;
- as per Section 6 of the Hindu Minority and Guardianship Act, 1956, father is the natural

guardian of a child aged more than five years. Thus the custody of Advik with Rajendra is not illegal and this Writ Petition is not maintainable;

- welfare of the child is of paramount importance. Advik is more happy in Bangkok.

11. We have carefully considered rival contentions and perused the records.

12. This is case involving a child aged nine years shifted from Germany to Thailand. Both parents are Indians hailing from Orissa. The child was born in 2013. Parents moved to Bangkok in 2016. As per the list of dates and events filed before us, Advik was admitted in Kindergarten in Bangkok in August 2017. He studied in Bangkok till December 2021. Thereafter, his parents moved to Germany in January 2022. In Germany, Advik was admitted to Sternschule School in March 2022. According to Archana, Rajendra and Advik flew from Germany on 19.07.2023 for Dubai *en route* India.

13. Smt. Susheela, has placed reliance on following authorities:

i. *Nithya Anand Raghavan Vs. State (NCT of Delhi) and another*[2], wherein it is held that it is settled legal position that the concept of forum convenience has no place in wardship jurisdiction. Further, the efficacy of principle of comity of Courts as applicable to India in respect of child custody matters has been delineated in several decisions. In the said authority, *Dhanwanti Joshi Vs. Madhav Unde*[3] has been referred. In that case, it is held that about 45 Countries are parties to Hague Convention of 1980 on 'Civil Aspects of International Child Abduction' and India is not a signatory. Under the Convention, a child below 16 years who is wrongfully removed or retained in another contracting State, could be returned to the Country from which the child had been removed by application to a Central Authority. Under Article 16 of the Convention, if in the process, the issue

[2] (2017) 8 SCC 454
[3] (1998)1 SCC 112 (paras 28 to 33)

goes before a Court, the Convention prohibits the Court from going into the merits of the welfare of the child.

It is further held in *Nithya Anand Raghavan,* as follows:

"40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceedings instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is

satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation – be it a summary inquiry or an elaborate inquiry – the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quire mature and objects to its return. We are in respectful agreement with the aforementioned exposition."

(emphasis supplied)

(ii) *Rajeswari Chandrashekar Ganesh Vs. The State of Tamil Nadu and others*[4].

In this case, adverting to *Nithya Anand Raghavan,* the Apex Court has held that the object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child was to ascertain whether the custody of child is unlawful and illegal and whether the welfare of the child

[4] 2022 Live Law SC 605

requires that his present custody should be changed and the child be handed over to the care and custody of any other person. We may record that in *Nithya Anand Raghavan*[5]*,* it is held that the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person. After noting that the minor child, in that case was in the custody of biological mother, it was held that the custody of minor was lawful. In the instant case, it is not in dispute that custody of the child is with the biological father. As per Section 6 of Hindu Minority and Guardianship Act, 1956, custody of a male child aged above 5 years with the father, is lawful.

14. In *Rajeswari*, the Apex Court has also considered the following authorities of the Foreign Courts:

> *"87. The question as to how the court would determine what is best in the interest of the child was considered In Re:McGrath (Infants), [1893] 1 Ch. 143 C.A., and it was observed by Lindley L.J., as follows:*
>
> *"…The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to*

[5] Para 47

be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

88. The issue as to the welfare of the child again arose In re "O" (An Infant), [1965] 1 Ch.23 C.A., where Harman L.J., stated as follows:

"It is not, I think, really in dispute that in all cases the paramount consideration is the welfare of the child; but that, or course, does not mean you add up shillings and pence, or situation or prospects, or even religion. What you look at is the whole background of the child's life, and the first consideration you have to take into account when you are looking at his welfare is : who are his parents and are they ready to do their duty?"

15. The Apex Court has also referred to American jurisprudence wherein, it is held as follows:

90. In the context of consideration of an application by a parent seeking custody of a child through the medium of a Habeas Corpus proceeding, it has been stated in American Jurisprudence, 2nd Edn. Vol. 39 as follows :

"…An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of

unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment."

93. In the American Jurisprudence, Vol. 39, Second Edition, Para 148 at pages 280-281, the same principle is enunciated in the following words:

"..... *a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require."*

(emphasis supplied)

(iii) *Vasudha Sethi and Ors. Vs. Kiran V. Bhaskar and Anr.*[6]

In this case, the Apex Court has held as follows:

33. A question was raised whether the High Court was justified in passing an order directing the appellant no.1 to return to USA along with the minor child on or before a particular date. The issue of custody of a minor, whether in a petition seeking habeas corpus or in a custody petition, has to be decided on the touchstone of the principle that the welfare of a minor is of paramount consideration. The Courts, in such proceedings, cannot decide where the parents should reside as it will affect the right to

[6] AIR 2022 SC 476

privacy of the parents. We may note here that a writ Court while dealing with the issue of habeas corpus cannot direct a parent to leave India and to go abroad with the child. If such orders are passed against the wishes of a parent, it will offend her/his right to privacy. A parent has to be given an option to go abroad with the child. It ultimately depends on the parent concerned to decide and opt for giving a company to the minor child for the sake of the welfare of the child. It will all depend on the priorities of the concerned parent. In this case, on a conjoint reading of clauses (i) to (iii) of paragraph 55 of the judgment, it is apparent that such an option has been given to the appellant no.1.

(emphasis supplied)

16. Shri. Karthik, learned Advocate for the respondent-husband has also relied upon *Nithya Anand Raghavan.*

17. We may record that to a pointed query with regard to Hague Convention of 1980, learned Advocates on both sides have filed a Memo stating that India is not a signatory to the said Convention.

18. It is the common case of both parents that in 2016, they had moved from India to Bangkok for their better career prospects. Advik was admitted to the Kindergarten and the Primary School in Bangkok between August, 2017 and

December, 2021. In January, 2022, parents took a conscious decision and moved to Germany.

19. According to Rajendra, he was compelled to leave Germany because of his wife's conduct and apprehension that in matrimonial cases, as per German Laws, sometimes, the State takes over the custody of the minor child.

20. After hearing the learned Advocates on both sides, keeping in view the welfare of the child in mind, we initially heard the parties in the chamber on 13.09.2023. Rajendra mentioned that despite some incidents of infidelity in Germany, he was prepared to take Archana back, if she was prepared to relocate to Bangkok or India. He also submitted that he shall make efforts to get her a job in the same Company in which he is working in Bangkok. Archana was resolute in her view and desired to stay in Germany only. She justified her view contending that both she and Rajendra had taken a conscious decision to move to Germany for better prospects. According to her, pupils in Thailand travelled to

Germany for higher studies. The standard of education in Germany is very high. A child who moves from Germany to Thailand is admitted in a higher class whereas, child who moves from Thailand to Germany is admitted in a lower grade. She submitted that Advik was studying in Grade-3 in Germany and he has been now admitted in Grade-5 in Thailand. She also submitted she may not easily get a job in Bangkok commensurate with her educational qualification.

21. Advik was clear in his mind to stay in Bangkok.

22. After the first chamber hearing, we suggested to the parents and their Advocates to consider an amicable resolution under Section 89 of the CPC. On the next date of hearing, Shri. Karthik relied upon *Archana Vs. Satyapal Singh*[7] wherein, it is held that Court can take help of Psychiatrist to ascertain the psychological impact, which might occur due to change in custody of child. Smt. Susheela opposed for evaluation of the child by a Psychiatrist contending *inter alia* that it is therapeutic in nature and cannot be done overnight.

[7] MANU/UC/1003/2019

Further, it is not the right time for psychological evaluation. In order to respect the stand taken by the mother, we thought it appropriate to interact with the parents and the child again in the chambers. In the second Chamber hearing[8], there was no change in their respective stands taken by the parents.

23. We had a long interaction with Advik in presence of learned Advocates on both side, but without parents. At the outset, he requested us to end these proceedings. He mentioned to us that he is very familiar with the School in Bangkok, all his classmates are his good friends, 12 out of 13 children in his class are Indians. He is taught Foreign Language, Library, Art, Mathematics, English, Science, PSHE (Human Values), Social Studies and Physical Education in his School in Bangkok.

24. Sharing his experience in Germany, at the outset, he stated that he had a scar on his foot because he was constantly bullied and kicked by one of his schoolmates. According to him, his class consisted of 29 pupils and only 3

[8] Dated 22.09.2023

out of them including him, were Indians. He stated that many teachers did not know English. Even the Parents-Teachers meeting required a translator. In substance, we gathered that Advik was more happy and felt 'at home' in his School in Bangkok.

25. In our lengthy interaction with Advik we found that his intelligence is above average. He has a YouTube channel of his own by the name 'cyberdevgames'. He uses his iPad with ease. He also mentioned that he was self-learning Martial Arts. We may also incidentally mention that when we offered him a chocolate, he refused on the ground that he was 'lactose intolerant'. On an overall assessment, we are of the considered opinion that Advik is a brilliant child with an high intelligent quotient and capable of exercising options wisely. He has good comprehension of contemporary affairs in the world and very resolute in his views. He expressed in no uncertain terms that he desired to reside with his father in Bangkok.

26. In the authorities cited before us, it is mainly held that the welfare of the child is of paramount importance. For considering the factum of interest of the child, the Court must take into account all the attending circumstances and totality of situation on case to case basis[9].

27. It is relevant to note that Rajendra was very liberal in his offers and flexible to consider alternative options, if any, whereas, Archana was steadfast in her view and expressed a solitary option to remain in Germany and sought for Advik's custody. Therefore, in our considered view, Archana is more keen on her career prospects at Germany than the welfare of the child.

28. It was argued on behalf of the petitioner that German Court has transferred the right to decide the place of residence and school in Archana's favour. On this aspect, it is relevant to note that it is an *ex parte* order passed by the German Court whilst child was in India. The Court in

[9] *Nithya Anand Raghavan Vs. State (NCT of Delhi) and Ors* (para 51)

Germany did not have the benefit of interacting with the child. In contradistinction, as recorded hereinabove, this Court has conducted two chamber hearings and had a lengthy interaction with the child. In view of the settled position of law in India that the welfare of the child is paramount, for reasons recorded hereinabove and based on the interaction we had with the child, we are of the considered opinion that Advik is happy in his present environment in Bangkok with his father and hence, the contention with regard to the *ex-parte* order passed by the German Court is noted only to be rejected.

29. Archana being the biological mother must be entitled for visitation rights. She may communicate with Rajendra on this aspect and both parents may decide the mutually convenient dates, period and the place of visit. As of now, she may visit Bangkok as and when required after giving advance notice, and both parents and the child may spend time during school vacation either in Thailand or India as may

be decided. Parents shall also at liberty to choose any other destination taking into consideration the desire of the child.

30. In the light of above discussion, we pass the following:

ORDER

I. Writ Petition is ***disposed of*** with following directions:

(i) The custody of minor child, Master Advik shall remain with his father with place of residence as Bangkok and it shall be subject to the orders of Jurisdictional Family Court, if any, in future.

(ii) Rajendra, the sixth respondent shall execute a bond for Rs.10,00,000/- with two sureties for the like sum to the satisfaction of the learned Chief Metropolitan Magistrate, Bangalore to ensure his presence in India along with his minor child, Advik, in case required, pursuant to any order passed by any Court in India.

(iii) Rajendra shall file an affidavit before this Court stating that he shall have no objection for

impoundment of his passport, in case he fails to appear pursuant to any order passed by any Court in India.

(iv) Petitioner shall have visitation rights to meet Master Advik once in three months with advance notice of 15 days. She shall also be entitled to spend time during School vacation period of Master Advik in Thailand, India or any other destination by mutual consent of parties. The duration and place may also be fixed as per mutual convenience of parties.

(v) Petitioner shall also have right to talk with Master Advik on phone/video call twice a week on days to be mutually agreed by the parties as per convenience of the child. Rajendra, the sixth respondent shall facilitate such telephonic/video conversation. Similarly, if Master Advik desires to talk on phone/video conference with his mother, Rajendra, the sixth respondent shall make necessary arrangements after intimating the petitioner in advance.

II. Rajendra, the sixth respondent, shall be at liberty to leave Bangalore along with Master Advik after complying with the directions at I (ii) and (iii) above and file an affidavit reporting compliance.

No costs.

Sd/-
JUDGE

Sd/-
JUDGE

SPS