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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(CRL) 2375/2019

KIRAN LOHIA ..... Petitioner

Through Mr.Dayan Krishnan, Sr.Advocate with Ms.Malavika Rajkotia and Ms.Rytim Vohra, Advocates.

versus

STATE & ORS. ..... Respondents

Through Mr. Gopal Sankaranarayanan, Senior Advocate as Amicus Curiae with Ms. Gayatri Verma and Mr. Shrutanjaya Bhardwaj, Advocates.
Ms.Maninder Acharya, ASG with Mr.Ripu Daman Bhardwaj, CGSC for UOI/CBI with SP Jagroop Gunsinha (CBI) and Mr.Vivek Phelp, Director, MEA.
Ms.Geeta Luthra, Sr.Advocate with Mr.Rajat Bhalla and Mr.Prateek Yadav, Advocates for R-4.
Mr.Vikas Pahwa, Sr.Advocate with Mr.Varun Bhati, Advocates for R-5.
Mr. N. Hariharan, Sr.Advocate with Mr. Sachin Mittal and Mr. Kanishk Khullar, Advocates for R-6 & R-7
Mr.Joginder Tuli with Ms.Joshini Tuli, Advocates for R-8.

Reserved On: 18th December, 2019

% Date of Decision: 07th January, 2020

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

Crl M.A. 34467/2019

Present application has been filed by the petitioner Ms. Kiran Lohia to restrain her father-in-law, respondent no. 5 from leaving the jurisdiction of this Court and for a direction to respondent no. 5 to deposit his passport with this Court.

Keeping in view the fact that the CBI has already opened a Lookout Circular (In short, 'LOC') against respondent no. 5, the present application is infructuous and it accordingly stands disposed of. In the event of change in circumstances, the petitioner is given liberty to file appropriate proceedings.

Crl. M.A. 34316/2019 & 34924/2019

While Crl. M.A. 34316/2019 has been filed seeking to restrain respondent no.6 (petitioner's mother-in-law) and respondent no.7 (petitioner's sister-in-law) from leaving the jurisdiction of this Court and to further direct respondent nos.4 to 9 to deposit their passports with this Court, Crl.M.A.34924/2019 has been filed to keep the LOC issued against respondent nos. 6 and 7 vide order dated 28th August, 2019 alive even after they have deposited their passports with this Court and to direct respondent no.2 to detain respondent nos.6 and 7 or in the alternative direct respondent nos.6 and 7 to report to Vasant Vihar Police Station daily.

The argument of learned senior counsel for the petitioner was that respondent no. 4 as well as his parents and sister constitute a family which works in unison and supports each other. Learned senior counsel for the

petitioner pointed out that visitation rights in respect of minor child Baby Raina had been obtained by respondent no. 4 from the learned Predecessor Bench vide order dated 1st May, 2018 in W.P.(Crl.) 357/2018 not for himself alone but for his parents also. In support of his submission, learned senior counsel for the petitioner had heavily relied upon the order dated 1st May, 2018. The relevant portion of the said order dated 1st May, 2018 in W.P.(Crl.) 357/2018 is reproduced hereinbelow:-

> *"8. On 13.03.2018, the order dated 08.03.2018 was slightly modified inasmuch, as, the child was to remain with the petitioner on Sundays, and was to be handed over to respondent No. 4 and his parents on Saturdays in modification of clauses (vi) and (vii) of the aforesaid conditions. This arrangement is continuing in operation presently...."*

Per contra, learned senior counsel for respondent nos. 6 and 7 submitted that the said respondents had no involvement in the actions of respondent no. 4 and that the said respondents were not involved in the marital life and affairs of the petitioner and respondent no. 4 and that the averments in the present applications were contrary to petitioner's own pleadings in W.P.(Crl.) 357/2018. Learned senior counsel for respondent nos.6 and 7 contended that the said respondents were not a party to the W.P.(Crl.) 357/2018 or to the parenting plan of the minor child Baby Raina. Learned senior counsel emphasised that respondent no. 7 was an unmarried, independent working lady who had her business establishment abroad.

In rejoinder, learned senior counsel for the petitioner pointed out that the respondent no. 4 in a custody application for Baby Raina filed before the Dubai Court had named respondent no. 6 as a woman who was suitable to be the custodian of Baby Raina. The relevant portion of the custody application

filed by respondent no.4 before the Dubai Court is reproduced hereinbelow:-

> *"Article (144) of the Personal Status Law stipulates:*
> *If the person undertaking the custody is a man:*
> *- He must have a woman who is suitable to be custodian.*
> *- He must be a first degree relative (mahram) to the minor child, if it is a female.*
> *- To have the same religion of the minor child.*
>
> *Whereas the plaintiff has a woman who is suitable to take care of a minor child, her grandmother ((the mother of the plaintiff)), who lives with the plaintiff in the UAE in the same house since a long time, and she is a woman who is fit to custody and to help him in caring of the minor and can take care of the little girl and meet her requirements with the father, we also draw the attention of the esteemed court to the fact that the minor child lives with the plaintiff and stays with him and with her grandmother at the present time....."*

Keeping in view the fact that this Court had directed the CBI to carry out investigation into the allegations made by the petitioner and the CBI's investigation till now shows prima facie involvement of respondent no. 6 (i.e. mother of respondent no. 4-Aman Lohia) in the conspiracy to kidnap Baby Raina, this Court directs the Delhi Police/CBI to keep the LOC alive/operative against respondent no. 6. Further, as this Court is informed that a charge sheet has already been filed in the present case, this Court permits respondent no. 6 to file an application for variation of this order before the trial court in the event there is any change of circumstances. Needless to say, that the said application shall be decided in accordance with law after giving an opportunity of hearing to the prosecutor and the petitioner.

However, in absence of any prima facie evidence found by the CBI till now against respondent no.7 (i.e. sister of respondent no.4-Aman Lohia),

this Court directs the Delhi Police/CBI to withdraw the LOC against respondent no.7 within two weeks provided respondent no.7 files an affidavit within a week giving an undertaking that she will cooperate with any further investigation and will appear before any police official or Court within ten days of receipt of notice by SMS, WhatsApp or E-mail. In the affidavit respondent no.7 would disclose her mobile numbers, email addresses and postal addresses. In the affidavit she would also disclose all her movable and immoveable assets. This Court may mention that it is passing these directions as further investigation is bound to take place as the main accused and other accused like the maid (i.e. respondent no. 9) have not been apprehended till date. The Registry is directed to release the passport of respondent no. 7 after two weeks. For this purpose, list the matter before the Joint Registrar on 23rd January, 2020.

With the aforesaid directions, the present applications stand disposed of.

Crl M.A. 41096/2019

1. Present application has been filed by applicant- respondent no. 4 seeking dismissal of the present writ of Habeas Corpus as well as for vacation of all interim orders passed by this Court.

2. In the present application, it has been averred that in cases of violation of child custody orders, only civil contempt and not criminal contempt lies. It is further averred that a biological parent can never be accused of kidnapping his/her own child and a writ of Habeas Corpus is not maintainable against a biological parent. In support of this submission, applicant-respondent no. 4 relied upon CBI's affidavit filed before the High Court of Bombay in Criminal Writ Petition No. 4086/2016 wherein it had

been stated that the father being the natural guardian of the minor daughter cannot be charged for the offence of kidnapping. It is stated in the present application that the aforesaid statement of the CBI had been accepted by the High Court of Bombay and the said petition had been disposed of accordingly. The order passed by the High Court of Bombay in Criminal Writ Petition No. 4086/2016 is reproduced hereinbelow:-

> *"1. Not on board. Upon production, taken on board.*
> *2. Mr. Venegaonkar appearing for respondent no.2, on instructions of Mr. Krishnan, Deputy Superintendent of Police, C.B.I., Interpol, New Delhi, who is present in Court, makes a statement that the extradition request concerning the petitioner was examined by the Ministry of External Affairs, Government of India. By a letter dated 05/05/2017, the said request was rejected, inter alia, on the ground that the subject being the father and the natural guardian of child Insiya, could not be charged with the offence of kidnapping of Insiya and hence held that the dual criminality is not satisfied in this case. The statement is accepted. Mr. Venegaonkar also makes a statement that the petitioner shall not be arrested and no coercive steps would be taken against him and his minor daughter Insiya in pursuance of the said extradition request of Netherlands. He, accordingly, placed on record the letter dated 05/05/2017. The said letter is taken on record and marked 'X' for identification.*
> *3. In the light of the above, Mr. Ponda, learned Counsel for petitioner, fairly states that the grievance raised in the petition no more survives for consideration.*
> *4. The petition is accordingly disposed off."*

3. It is also averred in this application that this Court did not have the territorial jurisdiction to hear the present case as the petitioner, applicant-respondent no.4 and their minor daughter Baby Raina were all foreign nationals. It is emphasised in the present application that the applicant-respondent no.4 is an Ambassador of International Intergovernmental

Institution for the Use of Micro-Algae Spirulina Against Malnutrition (hereinafter referred to as "IIMSAM"), which is a permanent observer to the United Nations Economic and Social Council under ECOSOC Resolution 2003/212 dated 5th March, 2003, designated by the United Nations Economic and Social Council under Rule 79 of the Council's Rules and Procedures and as per The Vienna Convention on Diplomatic Relations, 1961, a diplomatic agent enjoys immunity from criminal prosecution.

PRELIMINARY OBJECTION ON BEHALF OF THE PETITIONER

4. At the outset, Mr. Dayan Krishnan learned senior counsel for the petitioner- Ms. Kiran Lohia (mother of the minor Baby Raina) stated that the applicant-respondent no. 4 cannot be heard in the present case till he has purged his contempt. According to learned senior counsel for the petitioner, this principle of common law jurisprudence had been well expounded in the English case of ***Hadkinson Vs. Hadkinson, (1952) 2 All ER 567*** wherein Lord Denning has held as under:-

> *"The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice."*

5. Learned senior counsel for the petitioner submitted that the aforesaid principle of law had been adopted by the Supreme Court of India in the case of ***Re : Anil Panjwani, (2003) 7 SCC 375***.

6. Learned senior counsel for the petitioner further stated that the applicant-respondent no. 4 should have first purged his contempt by bringing the minor child baby Raina back to India and restoring her custody to petitioner-Ms. Kiran Lohia.

REPLY TO THE PRELIMINARY OBJECTIONS ON BEHALF OF APPLICANT-RESPONDENT NO.4

7. Ms. Geeta Luthra, learned senior counsel for applicant- respondent no. 4 stated that the petitioner's argument that applicant- respondent no.4 cannot be heard in the present writ petition until he has purged his contempt is highly misconceived as the *suo motu* contempt proceeding initiated by this Court against applicant-respondent no.4 is a separate and independent proceeding from the Habeas Corpus petition and this Court vide judgment dated 25th November, 2019 had disposed of the said criminal contempt. Therefore, according to her, this Court was *functus officio*. She emphasized that only the Habeas Corpus proceeding was pending before this Court.

8. She submitted that Contempt of Courts Act, 1971 (for short "Act, 1971") provides for a statutory right of appeal against the orders of the High Court passed in the exercise of jurisdiction to punish for the contempt of the Court. She stated that prior to the Act, 1971 there was no statutory right of appeal. According to her, since the applicant- respondent no.4 had already filed the statutory appeal before the Supreme Court, the present Habeas Corpus petition should be adjourned *sine die* till the statutory appeal is decided.

9. In the alternative, she submitted that in view of the pendency of the statutory appeal of applicant-respondent no.4 before the Supreme Court arising out of contempt proceedings, this Court should not take into account

its findings in the *suo motu* criminal contempt proceedings and hear the applicant-respondent no. 4 on merits. In support of her submission, she relied upon Section 19(2)(c) of the Act, 1971 which reads as under:-

> *"**19. Appeals.***
>
> *xxxx xxxx xxxx*
>
> *(2) Pending any appeal, the appellate Court may order that—*
>
> *xxxx xxxx xxxx*
>
> *(c) the appeal be heard notwithstanding that the appellant has not purged his contempt."*

10. She also relied upon the following judgments in support of her submission:-

A) ***State of J&K vs. Mohd. Yaqoob & Others, (1992) 4 SCC 167*** wherein the Supreme Court has held as under:-

> *"6. We do not agree. The scope of a contempt proceeding is very different from that of the pending main case yet to be heard and disposed of (in future). Besides, the respondents in a pending case are at a disadvantage if they are called upon to meet the merits of the claim in a contempt proceeding at the risk of being punished. It is, therefore, not right to suggest that it should be assumed that the initial order of stay got confirmed by the subsequent orders passed in the contempt matter.*
>
> *7. We, therefore, hold that the High Court should have first taken up the stay matter without any threat to the respondents in the writ case of being punished for contempt. Only after disposing it of, the other case should have been taken up. It is further significant to note that the respondents before the High Court were raising a serious objection disputing the claim of the writ petitioner. Therefore, an order in the nature of mandatory direction could not have been justified unless the court was in a position to consider the objections and record a finding, prima facie in nature, in favour of the writ petitioner. Besides challenging the claim on merits, the respondent was entitled to raise a plea of non-maintainability of a writ application filed for*

the purpose of executing a decree. It appears that at an earlier stage the decree in question was actually put in execution when the parties are said to have entered into a compromise. According to the case of the State the entire liability under the decree (read with the compromise) has already been discharged. The dispute, therefore, will be covered by Section 47 of the Code of Civil Procedure. It will be a serious question to consider whether in these circumstances the writ petitioner was entitled to maintain his application under Article 226 of the Constitution at all. We do not want to decide any of these controversies between the parties at this stage except holding that the orders passed in the contempt proceeding were not justified, being premature, and must, therefore, be entirely ignored. The High Court should first take up the stay matter in the writ case, and dispose it of by an appropriate order. Only thereafter it shall proceed to consider whether the State and its authorities could be accused of being guilty of having committed contempt of court."

B) ***Modern Food Industries Ltd. & Anr. Vs. Sachidanand Dass & Anr.***

1995 Supp (4) SCC 465 wherein the Supreme Court has held as under:-

"4. Before the High Court, appellants urged that before any contempt proceedings could be initiated, it was necessary and appropriate for the Division Bench to examine the prayer for stay, or else, the appeal itself might become infructuous. This did not commend itself to the High Court which sought to proceed with the contempt first. We are afraid, the course adopted by the High Court does not commend itself as proper. If, without considering the prayer for stay, obedience to the Single Judge's order was insisted upon at the pain of committal for contempt, the appellants may find, as has now happened, the very purpose of appeal and the prayer for interlocutory stay infructuous. It is true that a mere filing of an appeal and an application for stay do not by themselves absolve the appellants from obeying the order under appeal and that any compliance with the learned Single Judge's order would be subject to the final result of the appeal. But then the changes brought about in the interregnum in obedience of the order under appeal might themselves be a cause

and source of prejudice. Wherever the order whose disobedience is complained about is appealed against and stay of its operation is pending before the Court, it will be appropriate to take up for consideration the prayer for stay either earlier or at least simultaneously with the complaint for contempt. To keep the prayer for stay stand-by and to insist upon proceeding with the complaint for contempt might in many conceivable cases, as here, cause serious prejudice. This is the view taken in State of J & K v. Mohd. Yaqoob Khan [(1992) 4 SCC 167]."

SUBMISSIONS OF AMICUS CURIAE

11. Mr. Gopal Sankaranarayanan, learned Amicus Curiae submitted that the rule that a party in contempt cannot be heard until he has purged his contempt comes from the canon law adopted by the Chancery Court and the Ecclesiastical courts in England as explained at length by Denning L.J. in the oft quoted passage from ***Hadkinson*** (supra). He stated that the application of the rule in the Chancery Court comes from the ordinance of Lord Bacon in 1618 wherein it was laid down:

"they that are in contempt are not to be heard neither in that suit, nor in any other, except the court of special grace suspend the contempt."

12. He pointed out that so far as the Ecclesiastical courts were concerned, the rule was not tied to the issue of an attachment or committal and the rule applied was that:

"if a party was in contempt for disobeying an order, and his disobedience impeded the course of justice in the suit, the court might in its discretion refuse to allow him to take active proceedings in the suit until the impediment was removed"

13. Learned Amicus Curiae submitted that in ***Hadkinson*** (supra) itself, two different approaches were taken by the judges in laying down the

principle, which were as follows:-

i. Strict approach: Romer LJ (with whom Somervell LJ agreed) for the majority, held that there was a general rule that a contemnor will not be heard until he has purged his contempt subject to certain exceptions, i.e. situations where a contemnor is:

a) Applying to purge his contempt
b) Appealing against the order which has not been obeyed
c) Submitting that he is not or should not be treated as being in contempt.
d) Defending himself against subsequent applications.
e) Appealing against an order made against him, provided that the order was not made in the exercise of the court's discretion.

ii. Flexible approach: Denning L.J., on the other hand, held:

> *"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed….It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy."*

14. Therefore, according to him, under the strict approach the rule would have no application to subsequent attempts to clear the very contempt complained of.

15. He stated that in modern common law, there is some conflict about whether this principle should be thought of as a "*rule*" or something that is always within the "*discretion*" of the Court to consider in light of the facts and circumstances of a case. According to learned Amicus Curiae, the

Courts in the United Kingdom favour Denning, L.J's approach holding that the rule cannot have universal application as it is a practice that is primarily coercive in nature rather than punitive.

16. Learned Amicus Curiae stated that the approach in Namibia and Zimbabwe is similar as apparent from judgment in ***Christian v. Namfisa, Case No.A 244/2007*** decided by the High Court of Namibia on 13th February, 2009.

17. Learned Amicus Curiae also submitted that Sections 360 and 361 IPC are applicable to the facts of the present case. Section 360 IPC (kidnapping from India) reads as under:

> *"whoever conveys any person beyond the limits of India without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from India."*

18. He stated that to fall within the purview of Section 360 IPC, the removal of the child must be without the consent of "*some person*" who is "*legally authorised to consent on behalf of*" the child. He stated that in the present case, it is this Court that fits into the description of the expression *"that person, or of some person legally authorised to consent on behalf of that person".* He pointed out that the word *"person"* is defined under the IPC and the General Clauses Act, 1897 as under:-

A) Indian Penal Code, 1860

> *"Section 11 – The word "person" includes any Company or Association or body of persons, whether incorporated or not."*

B) General Clauses Act, 1897

> *"Section 3 (42)–"person" includes any company or association or body of individuals, whether incorporated or not."*

19. Pertinently, he submitted that both the definitions of "*persons*" were inclusive and wide enough to include this Court.

20. Learned Amicus Curiae submitted that there is a distinction between Sections 360 and 361 IPC. He submitted that for the purposes of Section 360 IPC, it would make no difference that the accused is also a parent of the child, because Section 360 IPC, unlike Section 361 IPC, creates no exception for a person who in good faith believes himself to be entitled to lawful custody of such a child. Further, according to him, the words "*some person*" occurring in Section 360 IPC must be contrasted with the words "*the lawful guardian*" occurring in Section 361 IPC. He stated that the words "*some person*" are more general and could refer to more than one person at once, thus encapsulating both parents.

21. He also submitted that for Section 361 IPC to be attracted, it must be shown that the child was taken outside the keeping of the "*lawful guardian*" of the child without such guardian's consent. He stated that this Court is the "*lawful guardian*" of the child as its *parens patriae*, thus attracting Section 361 IPC.

22. Also, according to him, the Exception in Section 361 IPC would be inapplicable in the present case for the following two reasons:-

(i) The applicant- respondent no. 4 did not satisfy the requirements of the phrase "*in good faith believes himself to be entitled to lawful custody of such child*". As per Section 52 of the IPC, "*good faith*" implies "*due care and attention*". This in turn implies reasonableness and prudence.

(ii) Even assuming *arguendo* that the good faith requirement is met in this case, there is an exception to the Exception under Section 361 IPC, which is that the accused acted for an immoral or unlawful purpose. The Supreme Court in ***Associate Builders vs. DDA, (2015) 3 SCC 49*** interpreted the meaning of the word "*immoral*" occurring in Section 23 of the Indian Contract Act, 1872 and held that something which "*shocks the court's conscience*" would surely qualify as "*immoral*".

23. Therefore, he submitted that the IPC provisions with regard to kidnapping would apply to the present case.

24. Learned Amicus Curiae suggested issuing the following directions to the CBI:-

"i. Efforts should be made to identify and attach respondent No.4's assets and block his bank accounts in India.

ii. Given that it prima facie appears that respondent No.4 acted in premeditated concert with other members of his family namely respondents No.5 to 7 and respondent No.9, any investigation being conducted should also focus on their conduct in the lead up to the kidnapping and thereafter.

iii. It has been stated by the petitioner that respondent No.5, as the patriarch of the family, controls all the purse strings; respondent No.6 maintains respondent No.5's residence in Dubai and is in charge of the family's staff including long time retainer respondent No.9 who went to Dubai with Baby Raina; that respondent No.7 has played an active role in the custody

battle, and the previous abduction of Baby Raina precipitated the filing of the 2018 Habeas Corpus petition Writ Petition (Crl.) 357 of 2018 before this Court. It would be appropriate in the circumstances that the Indian assets and bank accounts of respondents No.5 to 7 and respondent No.9 be identified by way of affidavits to be furnished by each of them. The same attachment/blocking orders for them can also be considered to prevent them from providing further assistance to the absconding respondent No.4 or fleeing themselves.

iv. The CBI could consider having a second team in Dubai who is focused on locating and securing Baby Raina in co-ordination with the Indian Embassy in the UAE and after consulting the Government and Police of Dubai."

25. Learned Amicus Curiae also suggested issuing the following directions to the Ministry of External Affairs:-

"i. The MEA should immediately direct their Embassy in the UAE to co-ordinate with the CBI and liaise with the UAE Government in Dubai to apprise them of the entire factual matrix of the abduction case, specifically the directions of this Court passed in this regard and actively seek the Dubai Government's assistance in recovery of the minors. A specific officer may be designated for this purpose and he would interact with this Court.

ii. The Indian Embassy in the UAE should also request the Dubai Government to put a travel ban on respondent No.4 and Baby

Raina's Commonwealth of Dominica passports so that they can be prevented from leaving the UAE by any means of transportation. Respondent No.4 has demonstrated that when he feels the laws of a particular country might not find in his favour, he will attempt to flee the jurisdiction of that country. There is no reason not to presume that he might attempt to flee the UAE should he begin to feel that the tide there is also turning against him.

iii. *Kidnapping of a child by a parent or a grandparent from the person who has custody of the child is also punishable under Article 329 of the UAE Penal Code. It is enough that the crime is realized in the UAE though it is planned and perpetrated elsewhere to attract the provisions of the UAE Penal Code. On these grounds, the UAE Government and the Government of Dubai in particular could be persuaded to ensure all efforts are made to prevent respondent No.4 from leaving the UAE with Baby Raina, while also refusing to permit respondents No.5 to 7 from entering the UAE.*

iv. *At the same time, the MEA should have its Embassy to the Commonwealth of Dominica get in touch with the Government of Dominica and apprise them that there is a high likelihood that respondent No.4 has acquired citizenship to Dominica for himself and his infant daughter by fraud. It can be requested that Dominica adopt an approach similar to the one they took when they cancelled the passport of Iranian fugitive Alireza Monfared who was arrested and*

extradited to Iran on allegations of corruption. [See: https://dominicanewsonline.com/news/homepage/news/general/monfareds-dominican-diplomatic-passport-revoked-in-2016-astaphan/]

v. *With the assistance of the Dubai government, efforts should be made to locate and remove Baby Raina from the custody of her abductor, respondent No.4 and move her to the Indian Embassy in the UAE which can then arrange an emergency passport to bring baby Raina back to India to be produced before this Court."*

(emphasis supplied)

LEARNED COUNSEL FOR THE PETITIONER STATED THAT IN SIMILAR CIRCUMSTANCES, THE SUPREME COURT OF PAKISTAN HAD DIRECTED ITS MINISTRY OF FOREIGN AFFAIRS AND FEDERAL INVESTIGATING AGENCY TO BRING BACK THE ABDUCTED MINOR CHILD TO PAKISTAN

26. Ms. Malavika Rajkotia, learned counsel for the petitioner stated that in similar circumstances, the Supreme Court of Pakistan in ***Suo Motu Case No. 19 of 2009 in Criminal Petition No. 686 of 2009, 2010 SCMR 1804*** had directed its Ministry of Foreign Affairs and Federal Investigating Agency (counter-part of CBI) to bring back the abducted minor child to Pakistan. Since, the Pakistan Supreme Court judgment was extensively relied upon, the same is reproduced hereinbelow:-

"By instant order we propose to dispose of listed Suo Motu case of abduction of minor kids of Mst. Tahira Jabeen.

2. Briefly stating the facts of this are that Mst. Tahira Jabeen had two minor kids namely Sameen Arshad and Muhammad Nooran (aged about 4 and 2 years respectively) from her

former husband, Rahmatullah Arshad. On parting ways with each other, Mst. Tahira Jabeen filed proceedings before the Guardian Judge at Lahore seeking permission to retain the custody of the minors. The Court, pending decision of the matter and on account of ad interim arrangement, extended visiting right to their father, Rahmatullah Arshad, who allegedly misused such concession granted to him by the Court on 26th January, 2009 as after receiving the custody temporarily he failed to return them to their mother. Accordingly, at the instance of Guardian Judge, Lahore, a case vide F.l.R. No.312 of 2009 dated 9-4-2009 was registered under section 363, P.P.C. against Rahmatullah Arshad (petitioner), Karamat Ullah (petitioner's father), his driver Kabir Ahmed and Muhammad Younas, the bailiff of the Court. In the meanwhile Rahmatullah Arshad succeeded in taking away the minors out of Pakistan. The police authorities despite registration of case, could not succeed to bring back the custody of the minors. As a result of the investigation of the case Karamat Ullah and Kabir Ahmad were found by the police to be involved in the case; therefore, they approached the Court for their pre-arrest bail, which was not allowed vide order dated 18-6-2009 passed by the Additional Sessions Judge, Lahore. Attempt made by both the accused for getting pre-arrest bail before the Lahore, High Court also failed vide order dated 17-9-2009. Feeling aggrieved by the judgment of High Court, said Karamat Ullah filed Criminal Petition No.686 of 2009 before this Court, which was dismissed vide order dated 20th October, 2009. Operative paras therefrom are reproduced hereinbelow:-

> *"On having gone through the contents of the F.I.R., order of the Additional Sessions Judge as well as the High Court, we are of the considered opinion that in terms of section 498, Cr.Pc. no mala fide has been pointed out in involving the petitioner in the commission of offence. Therefore, under the circumstances both the courts below have rightly declined to grant him pre-arrest bail.*
>
> *It is equally important to note that the learned High Court rejected his application on 17th September, 2009 but the petitioner remained fugitive and now has*

approached this Court after a period of one month without surrendering before the police. Even when we look from this angle, no other conclusion can be drawn except that the petitioner is involved in the case and as such he is adopting the delaying tactics for one or the other reasons. Thus, he is not entitled for grant of pre-arrest bail."

During hearing of the petition it was noticed that the minors named hereinbefore had been taken to Dubai by Rahmatullah Arshad along with his another wife Zohra Rubi, as such following directions were made:--

"As far as the recovery of the minors is concerned, a separate Suo Motu case be registered and notice be issued to DG. FIA for taking all necessary steps. Information in this behalf including F.I.R., orders of Additional Sessions Judge, the High Court and this court be sent by the office to him. Mst. Tahira Jabeen, complainant shall also cooperate with the DG. FIA Adjourned to 30th October, 2009 for progress."

3. Registration of Suo Motu case was ordered in the interest of justice, keeping in view the fact that the Provincial Police Authority had failed to bring the children back and it was not possible for Mst. Tahira Jabeen to succeed in obtaining the custody of children, FIA was involved in the matter for the purpose of effecting their recovery from outside the country.

4. On 30th October, 2009 Mr. Azam Khan, Director (Law), FIA appeared before the Court and submitted progress report, wherein it was stated that efforts would be made to bring back the minor children of the applicant. On the request of applicant, the Court directed the police to provide protection to her family. Thus, the case was adjourned to 17th November, 2009 with the direction to the PPO Punjab to file report.

5. The Additional Advocate-General, Punjab appeared in Court on 17-11-2009 and stated that request had been made to the Secretary Interior for issuance of Red Notice against the accused; hence, the Secretary Interior was directed to expedite the matter to recover the minors by issuing Yellow and Red Notices.

6. On the next date of hearing i.e. 1-12-2009 Mr. Azam Khan, Director (Law), FIA submitted a report stating therein that Rahmatullah Arshad along with minors were living in Oman and request had been sent by D.G. FIA to the Chief of Interpol of Oman for extending cooperation and assistance for repatriation of the minors and the accused. However, directions were made by the Court to the Ministries of Interior and Foreign Affairs to cooperate in expediting the matter.

7. Vide report dated 21-12-2009, submitted by Mr. Azam Khan, Director (Law), FIA, it was stated that there was no extradition treaty with Sultanate of Oman, therefore, extradition documents could not be forwarded without their clearance and demand after arrest of the fugitive. However, Mr. Khalid Mehmood, Counsellor Immigration, FIA Link Office, Muscat was pursuing the matter with Omanian Authorities. Pakistani Ambassador had also requested to Omanian Foreign Office to expedite the matter.

8. On 1-2-2010 Mr. Azam Khan submitted a report stating therein that fake passports obtained by Rahmatullah Arshad had been cancelled and Government was trying its best to trace the accused. He submitted that Ambassador and Mr. Khalid Mehmood, Counsellor Immigration met H.E. Mohammad Bin Yousaf Al-Zarafi, Under Secretary for Foreign Affairs and explained the whole case, especially mentioning the directions of the Supreme Court of Pakistan. He requested for some more time giving assurance to the Court that the accused would be traced and apprehended soon. Meanwhile the properties belonging to Mst. Zohra Rubi, wife of accused were attached as it was informed by the Additional Advocate-General on 11-6-2010.

9. Mr. Sher Bahadur, Legal Advisor, Ministry of Foreign Affairs submitted a report on 9-7-2010 on behalf of Manzoor-ul-Haq, D.G. (Middle East), Ministry of Foreign Affairs. In the report it was stated that Omanian Authorities had been cooperating with the representative of Pakistani Embassy and Royal Oman Police said that they were "ashamed" of not having made any progress so far. However, our Embassy had

made a request to the UAE Foreign Ministry for permission to give an advertisement in the local newspapers for ascertaining the whereabouts of Mr. Rahmatullah Arshad, his wife and two minor children.

10. Thus, on different dates of hearings Mr. Sher Bahadur, Legal Advisor, M/o Foreign Affairs, Mr. Zafarullah Khan, D.G., FIA and other officers belonging to same agency; particularly, Hussain Asghar, Director as well as Muhammad Azam Khan, Director (Law) remained involved. Persistently, they continued their efforts with deep interest, seeking aid of the ministry of Foreign Affairs as well the Consulate in Dubai as per the direction of this Court and ultimately their honest efforts delivered fruits and they succeeded in locating Rehmatullah Arshad along with the above-named two kids, residing in Sharjah. In the meanwhile local police through P.P.O. Punjab accelerated their efforts as per the direction of this Court to find out any clue about the matter and also to proceed the matter in respect of the criminal case which was registered against him, during course whereof, he was declared proclaimed offender, therefore, they were asked to proceed as regards the property, if any, owned by him.

11. At last, with coordinated efforts of the D.G., FIA, Interior Ministry and Ministry of Foreign Affairs, Government of Pakistan, which also involved the Government of UAE over there, the authorities succeeded, in effecting the recovery of both the minors and in this behalf submitted a report. Initially, that report was kept secret, however, since the minor children have been recovered and they have been brought by Hussain Asghar, Director NCB, Interpol from Dubai/Sharjah, the report is being made part of this order as reproduced hereinbelow:-

> *"1. In compliance with the orders of the honourable Supreme Court of Pakistan, DG/FIA constituted two teams, one operating in UAE and Oman and the other at FIA Punjab, Lahore to make all possible efforts for tracing out the missing minors and Rehmatullah Arshad along with his wife Zahra Ruby.*

2. Due to personal efforts of Director General FIA and his team, especially Mr. Hussain Asghar, Director NCB INTERPOL Islamabad. The children, of Mst. Tahira Jabeen namely Sameen Arshad and Muhammad Nooran have been traced out and taken into custody today on 29-7-2010. The children are being moved from Sharjah to Pakistan Consulate, Dubai, UAE by Mr. Hussain Asghar.

DG/FIA has made a request to Consulate-General, Dubai, UAE to immediately arrange Emergency Passports of the children, so that they could be repatriated to Pakistan for producing before the apex Court.

4. FIA gives an assurance to the honourable Supreme Court of Pakistan that the directions given to the Agency by the apex Court, shall be given highest priority for compliance, please."

12. Similarly, P.P.O. Punjab has also submitted a report, according to which following steps were taken for effecting the recovery of the minor children's:-

(i) The Revenue Department was again requested to report regarding property of accused/P.O. Rehmat Ullah Arshad, whereupon the concerned Patwari reported that there was no property in the name of the accused/P.O. however, property is existed in the name of the father of the accused, brother and sisters.

(ii) Moreover, a request was also made to LDA for identification of any property in the name of Rehmat Ullah Arshad absconding accused/P.O. the LDA Authority in response has reported that no property exists in his name but they have identified the property in the name of Mst. Zuhra Rubi (his wife).

(iii) Property i.e. House No. 179, Block D-II, Gulshan Ravi Housing Scheme, Lahore was traced out and found in the name of accused/P.O. Zuhra Rube w/o accused/P.O. Rehmat Ullah Arshad. Proceedings under section 88, Cr. P.C. have been got initiated against accused/P.O. Zuhra Rubi, which are pending in the court of Mr. Naveed Akhtar, Learned Judicial Magistrate, Section-30, Lahore, who has ordered for attachment of the property. The order of the

learned court has been brought into the notice of the Revenue Authorities restraining them from further transfer it to any body without the permission of the court. Attachment process will be complete in due course of time under the law.

(iv) Thorough checking of Nadra record is being made in the light of I.D. Cards of the accused/P.O. Zuhra Rubi in order to ascertain the whereabouts and antecedents of her sisters, brothers, parent and other family members inter se.

(v) Bank Accounts of the accused/P.O. Mst. Zuhra Rubi were searched and the following two Saving Accounts were found in her name:-

(i) Bank Al-Habib Limited, Gulshan-e-Ravi branch, Lahore (Account No. 0039-0071-0000-60-01-9)

This account is being maintained by accused since 19-1-2006 and the credit balance is Rs.8,51,748.25 (Rupees Eight Hundred fiftyone thousand and seven hundred forty eight and paisa twenty five only) as at the close of business on 27-7-2010.

This account is blocked till further orders by the Court.

(ii) Bank Al-Habib Limited Shahra-e-Qaid-e-Azam, Lahore Main Branch

(Account No.0002-0072-065392-75-8),

This account in the state of dormancy with current balance of Rs.2539/04."

13. As pointed out hereinabove, it is evident that Zafarullah Khan, D.G., FIA, Hussain Asghar, Director, NCB, Interpol, Azam Khan, Director (Law) and Mr. Sher Bahadur, Legal Advisor, M/o Foreign Affairs took personal interest in effecting recovery of minor children with cooperation of the Secretary, Ministry of Foreign Affairs as well as the functionaries of the Government of U.A.E. and Oman to bring back the children and further proceed against the accused persons, particularly in the circumstances where property belonging to accused has been traced by the police of the Punjab as per the report of Mr. Tariq Saleem Dogar, P.P,O., Punjab and since Mr. Hussain Asghar, Director, FIA has informed us that a good number of oil tankers belonging to Rehmatullah Arshad in his oil business with his

brother-in-law and the godowns have been sealed and ultimately Zohra Rubi who claims herself to be the wife of Rehmatullah Arshad brought forth the children and handed over to the authorities over there, we express our thanks to all these authorities particularly the FIA authorities including Khalid Mehmood, S.P., FIA posted in U.A.E. as well as the functionaries, of Ministry of Foreign Affairs who have shown respect/honour to the orders/ directions of this Court facilitating deportation/extradition of both the minors, now flown from Dubai in the company of Hussain Asghar, Director, FIA and produced today in the Court. They have been received by Mst. Tahira Jabeen who is also present and according to the law, she is entitled to retain their custody subject to the decision of the Guardian Judge. We are also thankful to Mr. Tariq Saleem Dogar, P.P.O. who had, too, taken personal interest in tracing out the property of wife of Rehmatullah Arshad and while so expressing we observe that he shall also take like steps to ensure that with the cooperation and coordination of D.G FIA bring back the culprits whosoever are involved in the cases so that they may face trial, which will send a loud and clear message that no one is above the law whosoever he may be and shall be dealt with sternly if he violates the law of the State. Children have been handed over to Mst. Tahira Jabeen in the Court and she is allowed to take them back to Lahore. P.P.O. Punjab is directed to provide her protection if need be against any mischief. The case is disposed of accordingly."

27. At the fag end of the hearing, this Court was informed that in the Special Leave Petition being SLP (Crl.) Diary No.45540/2019, the Apex Court had issued notice and had directed that no coercive action shall be taken against the respondents till the next date of hearing. However, it was admitted by the learned counsel for the respondents that no stay of the present proceedings had been granted by the Apex Court. Subsequently, a copy of the chargesheet dated 19th December, 2019 was handed over by the learned counsel for CBI to this Court.

COURT'S REASONING

THE DEFENCE THAT APPLICANT-RESPONDENT NO.4 ENJOYS DIPLOMATIC IMMUNITY IS CONTRARY TO FACTS INASMUCH AS THE LEARNED STANDING COUNSEL FOR UNION OF INDIA/MEA CATEGORICALLY STATED THAT APPLICANT-RESPONDENT NO.4 ENJOYED NO DIPLOMATIC IMMUNITY.

28. The defence that applicant-respondent no.4 enjoys diplomatic immunity is contrary to facts inasmuch as the learned Standing counsel for Union of India/MEA had stated before this Court on 06th December, 2019 that IIMSAM was not in the list of international organisations notified under the Gazette of India under United Nations (Privileges and Immunities) Act, 1947. The learned Standing counsel for Union of India/MEA had further stated on 06th December, 2019 that applicant-respondent no.4 had no diplomatic immunity. In response to a specific direction by this Court, Ministry of External Affairs had filed a short affidavit explicitly stating, *"....the Ministry is of the view that being employed in an organization that is an observer in ECOSOC by itself would not entail Respondent No.1 to diplomatic immunities and privileges.....as per available records, IIMSAM is not on the list of international organizations notified in Gazette of India under The United Nations (Privileges and Immunities) Act, 1947."*

BABY RAINA WAS AND CONTINUES TO BE A WARD OF THIS COURT AS THE PROCEEDINGS FOR HER WARDSHIP HAD BEGUN IN JANUARY, 2018 WITHIN THE JURISDICTION OF THIS COURT AND HER CUSTODY ARRANGEMENT WAS PURSUANT TO ORDERS DATED 08th MARCH, 2018, 13th MARCH, 2018, 01st MAY, 2018 AND 04th MAY, 2018 PASSED BY THE LEARNED PREDECESSOR BENCH OF THIS COURT IN W.P. (CRL.) NO. 357/2018 WHICH HAVE ATTAINED

FINALITY AS SLP (CRL.) NO.4152/2018, HAD BEEN DISPOSED OF BY SUPREME COURT VIDE ORDER DATED 13th JULY, 2018.

29. Further, the child Baby Raina was and continues to be a ward of this Court as the proceedings for her wardship had begun in January, 2018 within the jurisdiction of this Court. In fact, her custody arrangement was pursuant to orders dated 08th March, 2018, 13th March, 2018, 01st May, 2018 and 04th May, 2018 passed by the learned predecessor bench of this Court in Writ Petition being W.P. (Crl.) No. 357/2018. It is pertinent to mention that the aforesaid orders and judgment have attained finality as the Special Leave Petition being SLP (Crl.) No. 4152/2018, had been disposed of by Supreme Court vide order dated 13th July, 2018. The said order dated 13th July, 2018 is reproduced hereinbelow:-

> *"Having heard Mr. Gopal Subramanium, learned senior counsel for the petitioner and Ms. Malavika Rajkotia, learned counsel appearing for the respondent-caveator(s), we grant liberty to the parties to move the Family Court for appropriate interim directions. That apart, we direct the learned Family Judge, Patiala House Courts to dispose of the main application within three months hence.*
>
> *Needless to say, our direction that the matter should be adjudicated by the Family Court will not create any kind of obstacle in arriving at the settlement, for, settlement in such type of cases is a very welcome gesture by the parties. With the aforesaid liberty and direction, the Special Leave Petitions stand disposed of.*
>
> *Pending applications, if any, are deemed to have been disposed of."*

30. Consequently, there is no appeal pending before the Supreme Court against the judgment and orders which have been flouted by the applicant-respondent No. 4.

THE ACTION OF APPLICANT-RESPONDENT NO.4 IN TAKING BABY RAINA OUT OF THIS COUNTRY AND COURT, DESPITE CATEGORICAL DIRECTIONS TO THE CONTRARY, HAS RESULTED IN TWO-FOLD CONSEQUENCES, NAMELY, THE CONTEMNOR IS GUILTY OF CIVIL CONTEMPT FOR HIS WILFUL DISOBEDIENCE OF AN ORDER OF THE COURT; [SECTION 2(b) OF THE ACT, 1971] AND THE CONTEMNOR IS ALSO GUILTY OF CRIMINAL CONTEMPT FOR HAVING INTERFERED OR OBSTRUCTED THE ADMINISTRATION OF JUSTICE AND/OR SCANDALISING/LOWERING THE AUTHORITY OF THE COURT [SECTION 2(c) OF THE ACT, 1971].

31. In the opinion of this Court, the action of applicant-respondent no.4 in taking Baby Raina out of the jurisdiction of this country, despite categorical directions of this Court to the contrary, has resulted in two-fold consequences, namely, the contemnor is guilty of civil contempt for his wilful disobedience of an order of the Court [Section 2(b) of the Act, 1971] and the contemnor is also guilty of criminal contempt for having interfered and/or obstructed the administration of justice and/or scandalising/lowering the authority of the Court [Section 2(c) of the Act, 1971].

32. This Court is also of the opinion that the action of the applicant-respondent no.4 in taking away the child Baby Raina under a foreign passport to another country was done with the sole intent of ensuring that the Indian authorities including this Court are deprived of the option of affording justice to the child Baby Raina and the same amounts to obstruction/interference with the administration of justice and impedes the course of justice.

THE CONTEMPT AND THE WRIT OF HABEAS CORPUS PROCEEDINGS ARE NEITHER DISTINCT NOR SEPARATE AS THEY

STEM FROM THE SINGULAR ACT OF REMOVING THE CHILD FROM THE JURISDICTION OF THIS COURT.

33. The argument of the applicant-respondent no.4 that the contempt proceedings and the Habeas Corpus proceedings are distinct and separate is contrary to facts and untenable in law. A Habeas Corpus by its very nature is between the State and the petitioner who seeks release of a person from unlawful custody of another entity. In such a petition, the only determination is of whether the custody is unlawful or not. Since in the present case the custody of baby Raina is contrary to earlier binding consensual orders passed by the learned Predecessor Bench, this Court is of the view that both the contempt and the writ of habeas corpus proceedings stem from the singular act of illegally removing the child from the jurisdiction of this Country and Court. Consequently, the said act is inextricably linked to the subject matter of the contempt and writ petition.

EVERY COURT OF RECORD, INCLUDING THIS COURT HAS INHERENT POWERS TO PUNISH FOR CONTEMPT. THIS POWER IS RECOGNISED BY THE CONSTITUTION IN ARTICLE 215. CONSEQUENTLY, THIS COURT HAS THE INHERENT POWER TO INITIATE SUO MOTU CRIMINAL CONTEMPT PROCEEDINGS

34. It is also settled law that every Court of record, including this Court has inherent powers to punish for contempt. This power is recognised by the Constitution in Article 215 and exists *de hors* any legislation, as held by the Supreme Court in ***Sukhdev Singh vs. Teja Singh, 1954 SCR 454***. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"4. ……Contempt is a special subject and the jurisdiction is conferred by a special set of laws peculiar to courts of record.*
> *5. This has long been the view in India. In 1867 Peacock, C.J. laid down the rule quite broadly in these words in In re*

Abdool and Mahtab:

"there can be no doubt that every Court of record has the power of summarily punishing for contempt."

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15. In 1927 a Full Bench of the Lahore High Court consisting of five Judges re-examined the position: In the matter of Muslim Outlook, Lahore. They reaffirmed their earlier decision in Crown v. Sayyad Habib and held that this jurisdiction is inherent in every High Court and not merely in the three Chartered High Courts.

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22. .....The Constitution gives every High Court the right and the power to punish a contempt of itself. If we were to order a transfer to another Court in this case we would be depriving the Pepsu High Court of the right which is so vested in it. We have no more power to do that than has a legislature. As for transfer from one Judge to another, there again there is no original jurisdiction which we can exercise. It is not a fundamental right and so Article 32 has no application and there is no other law to which recourse can be had. This petition is therefore incompetent and must be dismissed."

(emphasis supplied)

35. Consequently, in view of the specific powers conferred by Constitution and the Supreme Court judgment, this Court has the inherent power to initiate *suo motu* criminal contempt proceedings. In fact, in similar circumstances, the High Court of Andhra Pradesh in ***Advocate General Vs. Srinivasa Rao Kumbhari, 1998 SCC OnLine AP 392*** had taken *suo motu* cognizance of the contempt committed by the respondent-father when he had taken his minor daughter out of the jurisdiction of this country. The relevant portion of the said judgment is reproduced hereinbelow:-

"1.....The Registrar (Judicial) shall address a letter to the Government of India, Ministry of External Affairs, New Delhi, under Sec. 19(1) of the Extradition Act, 1962 requesting them to

issue a requisition to the Australian High Commissioner in New Delhi or to the Government of Australia for the surrender of Srinivasa Rao Kumbhari with the minor Apama Kumbhari for the purpose of:

(1) handing over the custody of the minor girl Aparna Kumbhari to her maternal grand parents;

(2) prosecution of Srinivas Rao Kumbhari in the Court of the Chief Metropolitan Magistrate at Hyderabad for an offence under Sec. 363, Indian Penal Code; and.

(3) for further action by the High Court of Andhra Pradesh against Srinivas Rao Kumbhari for criminal, contempt, an offence punishable under Sec. 12(1) of the Contempt of Courts Act.

xxxx xxxx xxxx xxxx

5. As far as this contempt case is concerned, the respondent has failed to appear despite service of notice. The respondent acted in blatant violation of the direction given by this Court on the relevant dates mentioned above and also breached his undertaking that he would be present in the Court on 13.3.1995 together with his minor daughter. He abruptly left the country taking the minor daughter with him evidently by obtaining duplicate passports by misrepresentation. The conduct of the respondent is nothing but contumacious that amounts to substantial interference with and obstruction to the administration of justice. He is guilty of criminal contempt within the meaning of Sec. 2(c)(ii) and (iii) of the Contempt of Courts Act and is punishable under Sec. 12 of the Contempt of Courts Act. It does not matter whether he is within or outside the jurisdiction of this court or that he is an Australian citizen. The contempt of Court was committed while the respondent was in this country and by his acts and deeds, he is liable for punishment under Sec. 12 of the Contempt of Courts Act. Accordingly, we find him guilty of criminal contempt and sentence him to undergo simple imprisonment for a period of six months, as we feel that having regard to the facts and circumstances of the case, that maximum punishment is warranted. This sentence shall be executed whenever the respondent comes down to India or brought to India as a result

of extradition proceedings or otherwise.

xxxx xxxx xxxx xxxx

7. The learned Standing Counsel for the Central Government is directed to obtain necessary information from the Ministry of External Affairs as to the steps, if any, taken for extradition of the respondent in connection with the criminal complaint for the offence under Sec. 363, I.P.C. pending in the Court of Chief Metropolitan Magistrate, Hyderabad and to place it before the Registrar (Judicial) within a period of two months. Thereafter, the case shall be posted before the Bench as a taken up writ petition to take stock of the progress as to the extradition of the respondent."

(emphasis supplied)

36. Keeping in view the aforesaid mandate of law, applicant-respondent no.4 was held guilty of *suo motu* criminal contempt of court vide order dated 16th September, 2019. The relevant portion of the said order is reproduced hereinbelow:-

" 22. Having heard the parties at considerable length, this Court is of the prima facie view that the way Mr. Aman Lohia procured a second passport for baby Raina from Commonwealth of Dominica when her supposedly exclusive passport issued by the Government of India had been deposited with the Registry of this Court and the manner in which he had taken baby Raina by flight to Bagdogra and from there by road across the Indian border to Nepal to avoid detection and then flown to Doha (Qatar) and finally to Dubai where personal laws enjoin exclusive custody upon the father, shows a lot of prior planning, both legal as well as logistic in taking the baby Raina out of the jurisdiction of this Court.

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23. As this Court is prima facie of the view that the present matter is a case of child abduction by respondent No.4- husband, Sections 360, 361, 363 as well as 365 IPC are attracted inasmuch as baby Raina had been taken out of this country

contrary to the specific intent of binding Court orders and, in all probability, in pursuance to a conspiracy hatched by respondent no. 4 with some unknown persons, this Court directs the Central Bureau of Investigation to investigate the said fact and file a status report within a week."

(emphasis supplied)

37. Subsequent to the conviction order and prior to the sentencing order being passed, applicant-respondent no.4 changed Baby Raina's and his citizenship, passport and religion in order to avoid complying with consensual orders passed by the learned Predecessor Bench of this Court in the previous Writ Petition being W.P. (Crl.) No. 357/2018. In fact, applicant-respondent No. 4 even went to the extent of 'procuring an alleged diplomatic passport'. Applicant-respondent no.4 compounded the contempt by not personally appearing before this Court along with Baby Raina on 20th November, 2019 despite a specific direction. Consequently, this Court vide order dated 25th November, 2019, sentenced applicant-respondent no.4. The relevant portion of the said order is reproduced hereinbelow :-

"32. Mr. Aman Lohia has not only clandestinely as well as illegally removed Baby Raina from the jurisdiction of this Court, but has also tried to acquire diplomatic immunity subsequent to being held guilty of Criminal Contempt of Court, changed his citizenship as well as religion and passport to change the applicable law and to defeat binding consensual Court orders.

33. Keeping in view the aforesaid as well as the contumacious conduct of Mr. Aman Lohia, he is sentenced under Section 12 of the Contempt of Courts Act to undergo simple imprisonment for a period of six months along with a fine of Rs.2000/-."

(emphasis supplied)

SECTION 19(2) OF THE ACT, 1971 DOES NOT PROVIDE FOR AN AUTOMATIC STAY OF THE ORDER OF CONVICTION. CONSEQUENTLY, THE PRESENT PROCEEDINGS CANNOT BE STAYED MERELY ON ACCOUNT OF AN APPEAL BEING FILED BY THE APPLICANT-RESPONDENT NO.4. CONSEQUENTLY, SECTION 360 IPC IS ATTRACTED

38. Further, the existence of a right to file an appeal in Section 19 of Act, 1971 does not and cannot divest this Court of its powers to redress the contempt. In any event, to accept the submission of applicant-respondent no. 4 would be to render nugatory Section 19(2) of the Act, 1971 and allow a contemnor an automatic stay of the order of conviction, which even Section 19(2) of the Act, 1971 does not provide for, as it states that the appellate court *"may"* (but not shall) order that the appeal be heard notwithstanding that the appellant has not purged his contempt.

39. The applicant-respondent no.4's submission that no court proceedings against the contemnor may be initiated or continued until the contemnor's appeal against the contempt order is disposed of, if accepted, would amount to rewarding the contemnor with an opportunity to stall any judicial proceedings at will. If the Apex Court wants, it can certainly stay the present proceedings and/or the sentencing order. Consequently, the present proceedings cannot be stayed merely on account of an appeal being filed by the applicant- respondent no.4.

40. The two judgments cited by the applicant- respondent no. 4 i.e. ***State of J & K vs. Mohd.Yaqoob Khan*** (supra) and ***Modern Food Industries Ltd. & Anr. Vs. Sachidanand Dass & Anr.*** (supra), do not apply to the present case. In fact, in ***Mohd.Yaqoob Khan*** (supra) and ***Modern Food Industries*** (supra), while one party had filed an appeal against the order, the other party

simultaneously initiated contempt proceedings against the first party for not complying with the said order. This is clear from the following observations in ***Modern Food Industries*** (supra):-

> *".....Wherever the order whose disobedience is complained about is appealed against and stay of its operation is pending before the Court, it will be appropriate to take up for consideration the prayer for stay either earlier or at least simultaneously with the complaint for contempt. To keep the prayer for stay stand-by and to insist upon proceeding with the complaint for contempt might in many conceivable cases, as here, cause serious prejudice. This is the view taken in State of J & K vs. Mohd. Yaqoob Khan (1992) 4 SCC 167."*
>
> (emphasis supplied)

41. It was in view of the aforesaid factual matrix that the Supreme Court observed that the appeal should have been heard and criminal contempt petition be taken up for hearing later. However, in the present case, the order for whose violation the *suo motu* criminal contempt proceedings had been initiated, i.e. the order dated 01st May, 2018 in W.P. (Crl.) 357/2018 had attained finality inasmuch as Special Leave Petition against the said order had been disposed of by the Supreme Court vide order dated 13th July, 2018. Also, in neither of the cases cited by the applicant-respondent no.4 had the order convicting the contemnor been passed, so no question of purging arose in those cases.

THIS COURT STILL EXERCISES PARENS PATRIAE JURISDICTION OVER BABY RAINA AND IT ALONE WAS LEGALLY AUTHORISED TO GIVE CONSENT FOR TAKING THE CHILD BEYOND THE LIMITS OF INDIA. CONSEQUENTLY, SECTION 360 IPC IS ATTRACTED.

42. In ***Shafin Jahan vs. Asokan K.M., (2018) 16 SCC 368***, the Supreme Court held that *parens patriae* refers to *"the power of the State to intervene against an abusive or negligent parent, legal guardian or informal*

caretaker, and to act as the parent of any child or individual who is in need of protection". Further, in ***ABC vs. State (NCT of Delhi), (2015) 10 SCC 1***, the Supreme Court held that *"upon a guardianship petition being laid before the Court, the child concerned ceases to be in the exclusive custody of the parents; thereafter, until the attainment of majority, the child continues in curial curatorship".* Baby Raina's passport is still lying deposited with this Court and neither parent could have taken the child out of this country without the Court's permission.

43. Accordingly, this Court still exercises *parens patriae* jurisdiction over Baby Raina and it alone was legally authorised to give consent for taking the child beyond the limits of India under Section 360 IPC.

44. It is reiterated that unlike any other mere violation of a Court order, the removal of Baby Raina from this country, was an attempt by applicant-respondent no.4 to deprive this Court of its power to administer justice to the child. However, this Court being *parens patriae* will not be denuded of such jurisdiction by the actions of applicant- respondent no. 4.

45. Consequently, as rightly pointed out by the learned Amicus Curiae, Baby Raina was taken out of India without the consent of this Court, which is "*some person*" and is *"legally authorised to consent on behalf of"* the child. Accordingly, Section 360 IPC is attracted.

IN THE ALTERNATIVE, THE PETITIONER-KIRAN LOHIA HAVING BEEN PRIMARILY ENTRUSTED WITH THE CUSTODY OF BABY RAINA VIDE ORDER DATED 01st MAY, 2018 IN WRIT PETITION (Crl.) NO.357 OF 2018, WAS THE ONLY PERSON "LEGALLY AUTHORISED TO CONSENT ON BEHALF OF" THE CHILD. CONSEQUENTLY, SECTION 361 IS ALSO ATTRACTED.

46. The submission of learned Amicus Curiae that this Court had exercised its *parens patriae* jurisdiction vide orders dated 08th March, 2018,

13th March, 2018, 01st May, 2018 and 05th May, 2018 is legal and valid. Consequently, this Court is of the opinion that it is the lawful guardian of the minor child in view of the order dated 01st May, 2018 passed in W.P.(Crl.) 357/2018.

47. In the alternative, the petitioner-Kiran Lohia having been primarily entrusted with the custody of Baby Raina vide order dated 01st May, 2018 in Writ Petition (Crl.) No.357 of 2018, was the only person "*legally authorised to consent on behalf of*" the child. The directions of the learned Predecessor Bench given vide order dated 01st May, 2018 in Writ Petition (Crl.) No.357 of 2018 are reproduced hereinbelow:-

> *"6. In our order dated 08.03.2018, we recapitulated the proceedings which had transpired on 05.03.2018. In respect of the proceedings of 05.03.2018 we recorded: .....*
>
> *7. The terms and conditions, subject to which we had granted interim custody of the child to the petitioner, were as follows:*
>
> *(i) The child shall remain in the custody of the petitioner till the decision of the writ petition. However, the petitioner is directed not to remove the child from Delhi.*
>
> *(ii) The passport of the child is with respondent No.4. He shall continue to retain the same for the time being.*
>
> *(iii) The petitioner may engage a maid to look after the child.*
>
> *(iv) The petitioner has informed the Court that she has taken on rent the premises situated at 37, Paschimi Marg, Vasant Vihar, New Delhi. Though, the petitioner is residing at E-12/1, 3rd Floor, Vasant Vihar, New Delhi; his parents are residing at B-20, Ground Floor, Vasant Marg, Vasant Vihar, New Delhi. During the working of this interim arrangement, neither party shall change his/ her address without prior intimation to the Court. Ajey Lohia shall also continue to live at the same address, and no change shall be made without prior intimation to this court.*
>
> *(v) The child shall be left at the residence of the parents of the respondent No.4 (as desired by respondent No.4) at 02:00 p.m. on*

week days i.e. Monday to Friday, and shall be collected at 07:00 p.m. on the same day by the petitioner.

(vi) On Saturdays, the child shall remain in the custody of the petitioner, with no visitation rights to respondent No.4 or his parents.

(vii) On Sundays, the child shall be left at the residence of parents of the respondent No.4 (as desired by respondent No.4) at 10:00 a.m. in the morning, and collected at 07:00 p.m. in the same evening by the petitioner. We have made this arrangement keeping in view the welfare of the child, since the child, admittedly, was with respondent No.4 and his parents till now, ever since the child was taken to Bangkok and Dubai, and brought back to Delhi, with the petitioner having visitation rights.

(viii) At the time of visitation, the respondent No.4 and his parents shall not remove the child from the residence.

(ix) During the time when the child is with respondent No.4 and his parents, she shall be accompanied by the maid employed by the petitioner.

(x) The visitation rights shall be operated from tomorrow, i.e. 09.03.2018 onwards.

(xi) This arrangement shall continue till the petition is disposed of.

(xii) Both the petitioner and the respondent No.4 shall strictly abide by this condition, and if it is reported that either of the two parties have not complied with this condition, or have resisted its compliance, this Court shall re-consider the arrangement.

(xiii) This arrangement has been worked out without prejudice to the rights & contentions of either of the parties. It is not a reflection of the merits of the case of either party.

8. On 13.03.2018, the order dated 08.03.2018 was slightly modified inasmuch, as, the child was to remain with the petitioner on Sundays, and was to be handed over to respondent No. 4 and his parents on Saturdays in modification of clauses (vi) and (vii) of the aforesaid conditions. This arrangement is continuing in operation presently.....

xxx *xxx* *xxx*

57. Accordingly, we dispose of the present petition by continuing the arrangement devised by us in our order dated 08.03.2018, as modified by our order dated 13.03.2018.....”

(emphasis supplied)

48. Further, as Baby Raina is less than five years old, the petitioner-Kiran Lohia, being the mother, is the custodian by virtue of Section 6(a) of the Hindu Minority and Guardianship Act. The Supreme Court in ***Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318*** has held as under:-

“13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.

14. We must not lose sight of the fact that our reflections must be restricted to aspects that are relevant for the granting of interim custody of an infant. The trial is still pending. The learned Single Judge in the impugned order has rightly taken note of the fact that the Mother was holding a Tenured College Professorship, was a postgraduate from the renowned Howard University, receiving a regular salary. Whether she had a bipolar personality which made her unsuitable for interim custody of her infant son Thalbir had not been sufficiently proved. In the course of present proceedings it has been disclosed that the Father has only passed high school

and is not even a graduate. It has also not been denied or disputed before us that he had undergone drug rehabilitation and that he was the member of Narcotics Anonymous. This is compounded by the fact that he is not in regular employment or has independent income. As on date he is not an income tax assessee although he has claimed to have earned Rs 40,000 to Rs 50,000 per month in the past three years. We must again clarify that the father's suitability to custody is not relevant where the child whose custody is in dispute is below five years since the mother is per se best suited to care for the infant during his tender age. It is for the Father to plead and prove the Mother's unsuitability since Thalbir is below five years of age. In these considerations the father's character and background will also become relevant but only once the court strongly and firmly doubts the mother's suitability; only then and even then would the comparative characteristic of the parents come into play. This approach has not been adopted by the learned Single Judge, whereas it has been properly pursued by the learned Civil Judge."

(emphasis supplied)

49. In fact, the petitioner-Kiran Lohia has obtained sole, absolute and exclusive guardianship and custody of Baby Raina on 21st September, 2019 in ***G.P. No.9 of 2018*** titled as ***Aman Lohia vs. Kiran Lohia***. Pertinently, the jurisdiction of Indian Courts had been invoked by the applicant-respondent no.4 himself. Once having invoked jurisdiction, he cannot now take the plea that Indian Courts have no jurisdiction.

50. This Court is in agreement with the submission of learned Amicus Curiae that applicant-respondent no. 4 cannot avail benefit of Exception to Section 361 IPC as his taking custody of Baby Raina is contrary to express orders of a court and the same can never be conceived, by any reasonable person, to be "lawful custody". Further, as the act of the applicant-respondent no. 4 *"shocks the court's conscience*" it qualifies as *"immoral"*.

Consequently, the act of taking Baby Raina outside India without petitioner-mother's consent also attracts the offence of kidnapping under Section 361 IPC.

THE SUBMISSION THAT A BIOLOGICAL PARENT CAN NEVER KIDNAP HIS/HER OWN CHILD OR THAT A WRIT OF HABEAS CORPUS IS NOT MAINTAINABLE AGAINST A BIOLOGICAL PARENT IS UNTENABLE IN LAW. THE CONCESSION MADE BY THE CBI/ MEA IN THE AFFIDAVIT FILED IN CRIMINAL WRIT PETITION NO. 4086/2016, IS CONTRARY TO LAW AND EARLIER JUDGMENTS. CONSEQUENTLY, IT CANNOT BIND THE STATE. THE DECISION IN CRIMINAL WRIT PETITION NO. 4086/2016 IS SUB-SILENTIO AND HAS NO PRECEDENTARY VALUE

51. It is settled law that a writ of Habeas Corpus is maintainable against a biological parent. The Supreme Court in ***Tejaswini Gaud vs. Shekhar Jagdish Prasad Tewari & Ors. (2019)7 SCC 42***, has held as under:-

> *"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law."*
>
> (emphasis supplied)

52. This Court is also of the view that the submission that a biological parent can never kidnap his/her own child is untenable in law. For instance,

if a mother who is a natural guardian, having found to be pushing the minor to flesh trade is deprived of the minor's custody and guardianship, were to forcibly take custody of the minor in violation of the court order, she can certainly be charged with the offence of kidnapping. The converse example where the father who is deprived of custody and guardianship of his child by an order of the Court, yet forcibly takes the minor out of the country, can certainly be charged with the offence of kidnapping.

53. In fact, in ***In Re P. (G.E.) (An Infant), [1965] 2 W.L.R. 1***, while explaining the role of the State generally and the Court specifically in respect of children within the State's jurisdiction, the U.K. Court of Appeals held that the State protects every child and no kidnapper can escape from punishment on the ground that he is a parent. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"The Crown protects every child who has his home here and will protect him in respect of his home. It will not permit anyone to kidnap the child and spirit it out of the realm. Not even its father or mother can be allowed to do so without the consent of the other. The kidnapper cannot escape the jurisdiction of the Court by such a stratagem."*
>
> (emphasis supplied)

54. The Bombay High Court in ***State vs. Ramji Vithal Chaudhari & Anr., 1957 SCC OnLine Bom 121*** has similarly held that if the Court grants the custody of the minor child to the mother, she is deemed to be 'lawful guardian' and consequently, if the father (even though he is a natural guardian) forcibly removes the child from her custody, it would amount to *"taking the child out of the keeping of the lawful guardian"* and the father can be held guilty under Section 361 IPC. The relevant portion of the said

judgment is reproduced hereinbelow:-

> *"13. ....The words "lawful guardian" as is apparent from the language of S. 361 are of wider connotation than the words "legal guardian." The word "lawful" in that section has been deliberately used in its wider connotation, and that word would mean that wherever the relationship of a guardian and a ward is established by means which are lawful and legitimate that relationship is intended to be included within the meaning of the words 'lawful guardian' as used in this section. In the case of State v. Harbansing, 56 Bom LR 258 : (AIR 1954 Bom 339) (E), it was observed that the words "lawfully entrusted" which are used in the explanation to S. 361 must be liberally construed and that it was not intended that the entrustment should be made in a formal manner nor need there be any direct evidence available about such entrustment.....As regards the contention of Mr. Vaidya that so long as the father was alive the keeping of the girl continued with him notwithstanding the order made by the Court has, in our opinion, no substance. The order expressly states that the custody of the girl Suman was to remain with the mother. The effect of that order is clear and that was that the 1st respondent, notwithstanding his being the father of the girl, was not to have the custody of the minor..... It seems to us, therefore, obvious that the 1st respondent was not only not entitled to keep the girl in his custody but was in fact directed not to disturb the keeping of the girl by Rukhmabai until he made an application under S. 15 of the Bombay Hindu Divorce Act, 1947, to revoke or vary the order passed in that suit. We are, therefore, of the view that in the circumstances existing in this case there could be no doubt that the 1st respondent did take, the girl Suman from out of the keeping of the lawful guardian without the consent of such lawful guardian."*
>
> (emphasis supplied)

55. This Court is of the opinion that the concession made by the CBI/MEA in the affidavit filed before the High Court of Bombay in Criminal Writ Petition No. 4086/2016, on which applicant-respondent no. 4

has placed reliance, was contrary to law and consequently, it cannot be said to be binding on the State. The Supreme Court in ***Director of Elementary Education, Odisha and Others Vs. Pramod Kumar Sahoo, 2019 SCC OnLine SC 1259*** has reiterated that a wrongful concession cannot be binding as there cannot be any estoppel against law.

56. Further, in the opinion of this Court, the Bombay High Court's order in Criminal Writ Petition No. 4086/2016 neither analyzed any provision of IPC nor discussed any law or any precedent. The Supreme Court in ***State of U.P. and Another vs. Synthetics and Chemicals Ltd. and Another (1991) 4 SCC 139*** while reiterating ***Municipal Corporation of Delhi vs. Gurnam Kaur (1989) 1 SCC 101*** has held that when the particular point of law involved in the decision is not perceived by the court, the decision passes of as sub-silentio and has no precedentary value. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey, this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.*
>
> *41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an*

exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn.). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd., the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Shama Rao v. Union Territory of Pondicherry it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

(emphasis supplied)

57. The aforesaid judgment applies to the present case. Consequently, taking the child beyond the shores of this Court, even when done by one of the parents, can in certain circumstances like in the present case, fall within the purview of Sections 360 and/or 361 IPC.

THIS COURT HAS THE TERRITORIAL JURISDICTION TO ENTERTAIN THE PRESENT WRIT PETITION ON THE PRINCIPLE OF OBJECTIVE AS WELL AS SUBJECTIVE TERRITORIAL JURISDICTION AND EFFECT

DOCTRINE AS THE EFFECT OF KIDNAPPING/ABDUCTION IS FELT WITHIN THE JURISDICTION OF THIS COURT.

58. This Court is of the view that it has the territorial jurisdiction to entertain the present writ petition on the principle of objective territorial jurisdiction as the offence of kidnapping/abduction was carried out within the territorial limit of this Court.

59. In any event, this Court would have the territorial jurisdiction as the effect of kidnapping/abduction is felt within the jurisdiction of this Court.

60. Alternatively, even if the effect of kidnapping/abduction was completed in Dubai, this Court would still have the jurisdiction on the ground of subjective territorial jurisdiction inasmuch as the conspiracy to commit the offences had begun in India, that too, after accepting the custody arrangements before this Court.

THIS COURT IS OF THE OPINION THAT IT IS THE 'FLEXIBLE' APPROACH SUGGESTED BY LORD DENNING, WHICH IS TO BE ADOPTED TO DETERMINE WHETHER A PARTY IN CONTEMPT CAN BE HEARD IF HE HAS NOT PURGED HIS CONTEMPT. HOWEVER, IF THE DISOBEDIENCE IS SUCH THAT IT IMPEDES THE COURSE OF JUSTICE AND/OR RENDERS IT IMPOSSIBLE FOR THE COURT TO ENFORCE ITS ORDERS, AND/OR INITIATION OF CONTEMPT PROCEEDINGS HAS HAD NO DETERRENT OR REFORMATORY EFFECT ON THE CONTEMNOR, AND/OR THE CONTEMNOR HAS SHOWN HIS LACK OF WORTH BY ATTACKING THE JUDICIAL SYSTEM, A COURT CAN REFUSE TO HEAR THE CONTEMNOR.

61. This Court is further of the opinion that it is the *'flexible'* approach suggested by Lord Denning, which is to be adopted to determine whether a party in contempt can be heard if he has not purged his contempt. The House of Lords in ***X. Ltd. v. Morgan-Grampian Ltd., (1990) 2 All ER 1,*** has held as under:-

"I cannot help thinking that the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ better accords with contemporary judicial attitudes to the importance of ensuring procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions."

"....in a case where a contemnor not only fails wilfully and contumaciously to comply with an order of the court but makes it clear that he will continue to defy the court's authority if the order should be affirmed on appeal, the court must, in my opinion, have a discretion to decline to entertain his appeal against the order."

(emphasis supplied)

62. The *'flexible'* approach has been adopted by the Courts of United Kingdom in the following subsequent judgments:-

i. ***Mubarak v Mubarak, [2006] EWHC 1260 (Fam)***.

ii. ***Assoun v. Assoun, [2017] EWCA Civ 21.***

iii. ***Gafforj v. Gafforj, [2018] EWCA Civ 2070***.

63. Consequently, according to Lord Denning's approach in the ***Hadkinson*** (supra), disobedience of a Court order is not *per se* a bar to the disobedient party being heard. However, if the disobedience is such that it impedes the course of justice and/or renders it impossible for the Court to enforce its orders, and/or initiation of contempt proceedings has had no deterrent or reformatory effect on the contemnor, and/or the contemnor has shown his lack of worth by attacking the judicial system, a Court can refuse to hear the contemnor. After all, as pointed by Lord Denning in ***Hadkinson*** (supra), the refusal to hear a party is only to be justified by grave considerations of public policy.

64. The Supreme Court in ***Re : Anil Panjwani*** (supra), while deciding an appeal against an order of the High Court which had held the petitioner guilty of contempt of Court, held that it would be justified to withhold from the contemnor access to the Court in the appeal proceedings if the Court thought that the initiation of contempt proceedings had no deterrent/ reformatory effect on the contemnor; and/or the continuance of the disobedience impedes the course of justice and/or renders it impossible for the court to enforce its orders in respect of him.

65. In ***Pravin C. Shah vs. K.A. Mohd. Ali, (2001) 8 SCC 650*** the Apex Court held that if the continuance of the disobedience impedes the course of justice by making it harder for the court to find the truth, or enforce its orders, the Court may refuse to hear that party until the impediment is removed or good reason is shown why it cannot be removed. In ***Pravin C. Shah*** (supra), while dealing with a bar on advocates held guilty of contempt from arguing in Court, the Apex Court held as follows:-

> *"17. ……Courts of law are structured in such a design as to evoke respect and reverence for the majesty of law and justice. The machinery for dispensation of justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in a dignified and orderly manner. The very sight of an advocate, who was found guilty of contempt of court on the previous hour, standing in the court and arguing a case or cross-examining a witness on the same day, unaffected by the contemptuous behaviour he hurled at the court, would erode the dignity of the court and even corrode the majesty of it besides impairing the confidence of the public in the efficacy of the institution of the courts….."*
>
> (emphasis supplied)

66. In ***Prestige Lights Ltd. v. SBI, (2007) 8 SCC 449***, the Supreme Court held that the "*normal rule*" is that the contemnor will not be heard unless he has purged himself of the contempt. In the said case, as a company had violated the conditions imposed by the Court by way of an interim order, it was held that the company had no right to be heard until it purged itself of the contempt. While recognising that the refusal to hear a party to the proceeding on merits is a "*drastic step*" and such a serious penalty should not be imposed on it except in grave and extraordinary situations, the Supreme Court recognised that sometimes such an action is needed in the larger interest of justice, including when a party obtaining interim relief intentionally and deliberately flouts such order by not abiding by the terms and conditions on which a relief is granted in its favour.

67. Consequently, even where the contemnor challenges the contempt order itself, the Appeal Court may decide not to hear the contemnor if either of the above said conditions as mentioned in ***Anil Panjwani*** (supra) are satisfied. This position is contemplated in Section 19(2)(c) of the Contempt of Courts Act, 1971, which provides that pending an appeal against a contempt order, the appellate court *"may"* (but not shall) order that the appeal be heard notwithstanding that the appellant has not purged his contempt.

68. Further, the Supreme Court in ***Prestige Lights*** (supra) made it clear that the applicability of principle that the contemnor must purge before he is heard is not limited to the appeal proceedings against the contempt order. In that case, the Court used this principle to deny discretionary relief under Article 136 to the petitioner because it had not purged the contempt of an interim order passed by the Supreme Court in the same petition.

69. The fundamental premise underlying the principle that a contemnor should not be heard before he purges is that condoning contemptuous behaviour on part of the contemnor would lower the dignity and majesty of the Court.

THE HADKINSON PRINCIPLE APPLIES TO THE PRESENT CASE ON ALL FOURS AS IN THAT CASE AS WELL, THE CHILD HAD BEEN TAKEN OUT OF THE JURISDICTION OF THE COUNTRY WITHOUT THIS COURT'S LEAVE. FURTHER, APPLICANT-RESPONDENT NO.4'S CONTINUING DISOBEDIENCE IMPEDES THE COURSE OF JUSTICE AND HAS RENDERED IT IMPOSSIBLE FOR THIS COURT TO ENFORCE ITS ORDERS IN RESPECT OF HIM AND BABY RAINA.

70. In the opinion of this Court, the ***Hadkinson*** principle applies to the present case on all fours as in that case as well, the child had been taken out of the jurisdiction of the country without this Court's leave. This fact would be apparent from the following passage from Lord Denning's concurring opinion in ***Hadkinson*** (supra):

> *"The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia, it is impossible for this Court to enforce its orders in respect of him. No good reason is shown why he should not be returned to this country so as to be within the jurisdiction of this Court. He should be returned before counsel is heard on the merits of this case, so that, whatever order is made, this Court will be able to enforce it. I am prepared to accept the view that in the first instance the mother acted in ignorance of the order, but nevertheless, once she came to know of it, she ought to have put the matter right by bringing the boy back. Until the boy is returned, we must decline to hear her appeal."*
>
> (emphasis supplied)

71. Consequently, applicant-respondent no. 4's access to this Court and/or participation in the present proceedings is directed to be withheld until he purges the contempt by bringing Baby Raina back to the jurisdiction of this Court as applicant-respondent no.4 is persisting in his contumacious behaviour and conviction under contempt of Courts Act has had no deterrent or reformatory effect on him. In fact, applicant-respondent no.4's every action has been an egregious violation of laws of this country and careless disregard of the rights of not only his wife and child but also his parents and sister presuming they are not complicit. Applicant-respondent no.4 has shown no remorse for his conduct. Further, applicant-respondent no.4's continuing disobedience impedes the course of justice and has rendered it impossible for this Court to enforce its orders in respect of him and Baby Raina. Applicant- respondent no.4 has also shown his lack of worth by attacking the Indian judicial system by alleging general gender bias in favour of ladies.

72. Keeping in view the aforesaid findings, present application is dismissed. Needless to say that the findings/observations in the present case are *prima facie* in nature.

73. This Court also places on record its appreciation for the services rendered by Mr. Gopal Sankaranarayanan, learned Amicus Curiae. He with his usual scholarship lifted the level of debate and painstakingly researched the law.

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74. Since the child Baby Raina continues to be the ward of this Court (as the proceedings for her wardship had begun in January 2018 under the aegis

of this Court) and respondent no. 4 took the child out of this country in violation of clear orders of the learned Predecessor Division Bench that gave the petitioner custody and respondent no. 4 visitation rights, it is the duty of the Court and the State to recover the child from the kidnapper. This Court is also of the opinion that the present case is not a private matter as respondent no. 4 has been convicted for criminal contempt of court. The Division Bench of High Court of Kerala in similar circumstances in ***Jumaila Vs. Abdul Gafoor & Ors., 2012 SCC OnLine Ker 8955*** had directed the State to repatriate to India the absconding accused and two minor children. The relevant portion of the said order is reproduced hereinbelow:-

> *"7. This writ petition was admitted on 2-9-2010. Notice was ordered to respondents 1 to 4 by speed post. On 22-9-2010, respondents 1 and 2 entered appearance. Vakalath was filed on behalf of the second respondent. The counsel sought time for filing vakalath on behalf of the first respondent. The case was thereupon posted for the objections of respondents 1 and 2 to 4-10-2010. On 4-10-2010 the counsel for respondents 1 and 2 submitted that the second respondent had filed a counter statement wherein the contentions of both respondents 1 and 2 were set out. The counsel submitted that though he was continuing to appear for the second respondent, he had not been able to secure a vakalath of the first respondent and to file the same before this Court in time. On his request, further time was granted and the case was posted to 18-10-2010.*
>
> *8. Meanwhile a statement was filed on behalf of respondents 3 and 4 on 22-9-2010 wherein it has been stated that there was marital discord between the first respondent and the petitioner during their stay at Jeddah and that they had approached the Consulate General in October 2007 for intervention and further that it was with the help of the Consulate that they had gone to India to settle their family disputes. It is also stated in the said statement that the first respondent had produced a receipt for payment of Rs. 44,892/- towards maintenance of the petitioner. According to*

respondents 3 and 4, the first respondent had produced the children before the Consulate whenever he was asked to do so. On enquiry, the children had said that they were happy with their father. The Consulate General of India had also arranged telephone call facilities to the petitioner and the petitioner had spoken to her children over the phone in the Consulate on several occasions. The first respondent had given another telephone number over which, according to him the petitioner could contact the children after 2 p.m on any day. With respect to the prayer for producing the minor children what is stated is that since the first respondent who is the sponsor of the children was not willing, the children could not be sent without the permission of the sponsor. Though the Consulate had asked the first respondent to go to India and settle the matrimonial disputes he had informed the Consulate that the children were attending School, which would be disrupted, that he had his family at Jeddah and that his sponsor was not giving him vacation. Any how, he assured that he would try to go to India as early as possible. He also informed the Consulate that he had engaged a counsel to plead on his behalf before this Court.

xxxx xxxx xxxx xxxx

11. A detailed order was passed by us on 8-11-2010, noticing the plight of the petitioner and narrating the proceedings initiated by her one after another to secure the custody of her children. Since she could not get any relief in spite of positive directions issued by the Family Court as well as initiation of criminal proceedings, she had approached this Court with the present petition invoking the extraordinary constitutional jurisdiction of this Court under Art.226 of the Constitution. We also noted the conduct of the counsel for respondents 1 and 2 in submitting before court that he was appearing for respondents 1 and 2 and after we had acted on his submissions, believing that it was the submission of a responsible counsel, he had conveniently back tracked and reported no instructions from his clients, when we issued an order directing production of the children before this Court. Respondents 3 and 4 as well as the fifth respondent were also not able to furnish details of the action taken by them. Therefore, we issued peremptory directions to all the authorities. The order

being a lengthy one, the relevant portion thereof is extracted hereunder:-

> *"6. Notice was ordered to all the respondents. Respondents 1 and 2 appeared before Court. But, later the counsel conveniently reported no instructions when this Court issued certain directions to them to produce the children before Court. The fifth respondent has not furnished to the Court the details of the action taken by the State of Kerala to secure the presence of the first respondent as accused in Crime No: 345/2008 of Nilambur Police Station. We have also not been apprised of the fate or action taken in Crime No: 345/2008 of Nilambur Police Station.*
>
> *7. We have no hesitation to opine that the inability of the petitioner to secure custody of her children in spite of the proceedings initiated by her is a shame on the system and amounts to the negation of the concept of rule of law. If this Court cannot wipe her tears invoking the jurisdiction under Art.226 of the Constitution of India the jurisdiction will be reduced to absolute emptiness. Respondents 3 and 4 are represented by the Central Government Standing Counsel. Fifth respondent is also represented by the learned Govt. Pleader. We have not been apprised of the fate of proceedings initiated in Crime No: 345/2008 of Nilambur Police Station where we are assured that the presence of the first respondent has not been secured so far and he is an absconding accused.*
>
> *8. We do think that peremptory directions must be issued in the matter to respondents 3 to 5 to secure the presence of the first respondent and two minor children of the petitioner before this Court at the earliest. It is a slur on the Constitution and the concept of rule of law that the Courts have not been able to give the petitioner the relief which she richly deserves.*
>
> *9. We want the learned Asst. Solicitor General of India and the learned Director General of Prosecutions to appear before us on behalf of respondents 3, 4 and 5. We want them to explain why the presence of the children has not been assured before this Court in spite of the specific directions issued. We want to know why fifth respondent is not taking necessary interest to procure the presence of the first respondent, an absconding*

accused in Crime No: 345/2008 of Nilambur Police Station. The learned Govt. Pleader on behalf of the fifth respondent submits that the State of Kerala has been attempting through its Police officers to contact the first respondent and request/direct him to produce the children before the Court. But first respondent has not done the same so far. We do not expect the fifth respondent to merely request the first respondent humbly to make the children available. Effective action must be taken by respondent No:5 to ensure that the absconding accused is brought to law and his presence is assured to the Criminal Court, when such presence is required. At any rate, we expect respondents 3, 4 and 5 to take necessary action to ensure that the children are produced before Court on the next date of posting. Call this petition again on 15/11/2010. We want the learned DGP and the learned ASGI to appear before this Court and file necessary statements to explain to the Court the steps taken to secure the presence of the first respondent and the children before Courts.

10. We need not specifically mention that it must certainly be within the legal jurisdiction and competence of respondents 3 and 4 to impound the passport of the first respondent, an absconding accused and the two minor children who have been kept away from the jurisdiction of the Courts in India and get them repatriated to India to facilitate completion of proceedings against them.

11. We need only mention that all necessary steps must be taken by respondents 3 to 5 and the learned DGP and the ASGI must file statements on 15/11/2010 to apprise the Court of the steps taken."

(emphasis supplied)

75. Further, this Court had discussed the Pakistan Supreme Court judgment and suggestions given by the learned Amicus Curiae with the officials of the CBI and MEA on 18th December, 2019. They had suggested that the best course of action would be to form a Joint Committee of

officials of CBI and MEA to examine the Pakistan Supreme Court judgment and suggestions given by learned Amicus Curiae as well as to take steps to bring back the minor child Baby Raina to this country. Since this is the second round of Habeas Corpus petition filed by the petitioner-mother and the respondents despite various opportunities did not bring back the minor child Baby Raina to this country as well as the fact that the identity of Baby Raina is threatened by actions of respondent no. 4 who has changed her passport, citizenship and religion, this Court directs constitution of the following Joint Committee with Mr. Vipul (Consul General of India, Dubai) as the Nodal Officer:-

1. Mr. M.S. Khan, SP/SC-II, CBI
2. Mr. R.K. Sangwan, DSP/IO, CBI
3. Mr. Vivek Jeph (Director OIA-II), MEA
4. Ms. Harsha Garg, MEA

76. The Committee shall take steps in accordance with law to produce the minor Baby Raina before this Court and examine the suggestions put forward by learned Amicus Curiae as well as the course adopted by the Pakistan Supreme Court and submit its report within four weeks.

77. List on 17th February, 2020.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

JANUARY 07, 2020
js/rn/KA