

# RETURN OF THE REMOVED CHILD



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Recently, abduction of a toddler daughter by her father to the UAE amidst a custody battle at Delhi, led the CBI to file a charge-sheet before a Special Court invoking provisions of kidnapping from India from lawful guardianship, after the father was convicted and sentenced for criminal contempt by the High Court of Delhi for violating its orders. The burning question of *cross border inter parental child removal* not finding any lawful definition, remains a subject of interpretation of the Supreme Court. India is not a signatory to the Hague Convention on Civil Aspects of International Child Abduction, 1980, signed by 100 countries. Thus, wrongful removal and retention of a child from a foreign country to India defies recognition and acceptance under Indian law, even though it is an offence internationally. A corpus of about 30 million non-resident Indians living globally in 200 countries creates an immense potential for unresolved child custody disputes upon a parent relocating to India in violation of other parent's rights in foreign countries. The hapless child tossed over continents suffers in silence for no fault of his.

The Hindu Minority and Guardianship Act, 1956 (HMGA), declares that the natural guardian of a Hindu minor boy or an unmarried girl shall be the father, and after him, the mother. The custody of a minor under 5 years of age, shall be with the mother. The HMGA does not contain any independent or procedural mechanism for deciding custody rights or declaring Court appointed guardians. The reference to the word "Court" in the HMGA relegates a parent or any other person seeking appointment as a "guardian" to invoke the provisions of a 130

year old antique colonial law i.e. the Guardian and Wards Act, 1890 (GWA) and where the parent is constrained to seek exclusive temporary custody of his biological offspring during the pendency of such hearing. Despite a Law Commission recommendation, no change in law is forthcoming.

In a verdict of July 3, 2017, the Supreme Court in the case of *Nithya Anand Raghavan (Raghavan)* had given new directions in matters relating to custody in inter-country parental child removal cases by departing from the principles of respect of foreign court decisions and first heard priority, which had earlier been laid down in the judgment of *Surya Vadanam*. Whilst now deciding that the authority of the Courts cannot be used and converted for executing the directions of a foreign court, the Supreme Court has ruled that the High Court may examine the return of a child to a foreign jurisdiction, if so is in the interest and welfare of the minor child. In doing so, the domestic Court would not be "fixated" with the foreign court order, which would however be only one factor to be taken into consideration.

On March 15, the Supreme Court in the case of *Lahari Sakhamuri*, adverted to the best interest of children to be of paramount consideration and held that it cannot remain to be the love and care of the mother as primary care giver of a few years old infant. Holding innocent children as the ultimate sufferer of psychological balance in marital disruption, the Supreme Court ordered their return to USA to enjoy their natural environment with love, care and attention of their well-wishers and resume schooling. Recently, ending a three year protracted custody battle, the Supreme

Court in its decision of December 12 in *Navtej Singh*, ordered the mother to return with two minor children to USA within two weeks from the issuance of US passports by the US Embassy, failing which the children would be handed over to the father for return to USA. In doing so, the Supreme Court afforded to the mother protections and safeguards, which had already been made part of the pending US Court proceedings.

By the above returns formula, a new thought process of mirror orders has seen light in India. Internationally, courts are known to follow this principle, wherein orders passed in one country, are reflected, accepted and implemented in another country. Adapting to it, if a conditional order is passed by a Court in India directing return of minor foreign children back to their country of habitual residence upon conditions and protections afforded to a parent by a domestic Court, and such directions are agreed to be implemented by the foreign court in the country where the children are to be returned, then, a free process and passage of return of children to their foreign homes can be initiated. Hence, a court evolved solution can find effective remedy universally. Till the Parliament finds time from its busy schedule of making laws of extreme political importance, the mirror orders concept can work as an expeditious returns remedy whereby tender children can be reunited to grow in families with love of both parents.

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