2021 INSC 632

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

MISCELLANEOUS APPLICATION NO.1167 OF 2021
IN
CIVIL APPEAL NO.3559 OF 2020

SMRITI MADAN KANSAGRA ...APPELLANT

VERSUS

PERRY KANSAGRA ...RESPONDENT

O R D E R

UDAY UMESH LALIT, J.

1. Civil Appeal No.3559 of 2020 arose from Guardianship Petition filed by Perry Kansagra (hereinafter referred to as 'Perry'), father of minor named Aditya Vikram Kansagra (hereinafter referred to as 'Aditya'), under Sections 7, 8, 10, 11 of the Act[1] before the District Court, Saket, New Delhi. Perry is a person of Indian origin and Gujarati by descent. His grandfather migrated to Kenya in 1935 and settled there. The family has business interests in Kenya and United Kingdom. Perry holds dual citizenship of Kenya as well as United Kingdom. Perry got married to Smriti Madan Kansagra (hereinafter referred to as 'Smriti'), an Indian citizen, on 29.07.2007 at New Delhi. Initially, the couple stayed at

[1] The Guardianship and Wards Act, 1890

Nairobi, Kenya but Smriti returned to India in 2009. The couple was blessed with a son – Aditya on 02.12.2009 at New Delhi. Except for a brief period when the couple had gone to Kenya in 2012, Aditya always stayed with Smriti in Delhi till the disposal of aforestated Civil Appeal No.3559 of 2020.

2. On 26.5.2012, Civil Suit (O.S.) No.1604 of 2012 was filed by Smriti against Perry and his parents in the High Court[2] seeking following reliefs:

> "(a) Pass a decree of permanent injunction restraining the defendants, their agents, representatives, servants and/ or attorneys in perpetuity form in any manner removing the child either from the lawful custody of the Plaintiff No.2 or removing the child from Delhi; the jurisdiction of this Hon'ble Court or accessing the child in his School "Toddlers Train" at Sunder Nagar, New Delhi.
>
> (b) Pass an order directing the Airport Authority of India, Immigration Authority of India, 'FRRO' to ensure compliance of prayer 'a' above.
>
> (c) Pass a decree of permanent injunction restraining the Defendants, their agents, representatives, servants and/ or attorneys in perpetuity from meeting Plaintiff No.1 without the consent/ presence of Plaintiff No.2"

3. On 25.05.2012, an *ex-parte ad-interim* order was passed by the High Court restraining Perry from removing Aditya from the custody of his mother. In this suit, I.A. No.12429 of 2012 was filed by Perry seeking access to Aditya. Though Smriti was not averse to Perry's meeting Aditya, it was submitted that the meetings be held only under her supervision. By its order dated 13.07.2012, the High Court permitted Perry to meet

[2] The High Court of Delhi at New Delhi

Aditya under the supervision of Smriti. Similar orders were passed from time to time.

4. On 06.11.2012, Perry filed Guardianship Petition No.53 of 2012 before the District Courts, Saket, New Delhi praying *inter alia*:

> "a. Declare the petitioner who is natural father of the minor child master Aditya Vikram Kansagra as the legal guardian under Section 7 of the Guardianship and Wards Act, 1890;
>
> b. Grant the permanent custody of the minor child master Aditya Vikram Kansagra to the Petitioner;
>
> c. Pending the hearing and final disposal of the Suit, the Petitioner may be allowed to take minor child master Aditya Vikram to visit his parental home in Kenya MS, 166, 167, James Gichuru Road, Lavington Green, Nairobi, Kenya;
>
> d. Pending the hearing the final disposal of the Suit, the Petitioner may be allowed to take minor child master Aditya Vikram for all holidays summers/ Diwali/ Christmas and any other holiday in India and abroad."

5. During the pendency of these proceedings, Aditya was admitted to Delhi Public School, Mathura Road, New Delhi. On 31.08.2015, both the parties submitted before the High Court that they would pursue their remedies in the pending guardianship proceedings before the Family Court and that the suit be disposed of. The suit was accordingly disposed of on 31.08.2015.

6. By various orders the visitation schedule was modified by the Family Court from time-to-time permitting Perry to have access to and enjoy visitation with Aditya. The interim proceedings taken up in the

Guardianship Proceedings were adverted to in detail in the majority decision of this Court dated 28.10.2020 while disposing of Civil Appeal No.3559 of 2020.

7. By its judgment and order dated 12.01.2018, the Family Court allowed the Guardianship Petition and granted custody of Aditya to Perry which was to come into effect after the end of academic session 2017-2018.

8. Smriti being aggrieved, challenged the decision of the Family Court by filing Mat. App. (F.C.) No. 30 of 2018 before the High Court, which appeal was dismissed by the High Court by its judgment and order dated 25.02.2020. The High Court affirmed the decision that the custody of Aditya be granted to Perry. By a separate order passed on the same date, it recorded that Perry was willing to file an undertaking of his mother, holding an Indian passport to ensure compliance of the Order of the Family Court granting visitation rights to Smriti. It also directed Perry to swear an undertaking before the Indian Embassy in Kenya to the effect that he would submit to the jurisdiction of the Indian Courts; which undertaking would then be filed in the proceedings, in token of his acceptance of the Order.

The High Court also passed following additional directions:

> "(i) Perry shall apply for a Kenyan passport for the child, if not already done, and Smriti would co-operate in filing the application;
>
> (ii) Smriti shall be entitled to talk to the child over audio calls/ video calls for at least 10 minutes everyday at a mutually agreed time which is least disruptive to the schooling and other activities of the child;
>
> (iii) Smriti shall be entitled to freely exchange e-mails, letters and other correspondences with the child without any hindrance by Perry or his family;
>
> (iv) In addition to the grant of temporary custody of the child to Smriti during summer and winter vacations on the dates to be mutually agreed upon. Smriti may visit the child at Nairobi, Kenya. However, she shall not be entitled to take the child out of Nairobi, Kenya. Perry shall bear the cost of her return air-ticket for travel from India once a year and accommodation for seven days;
>
> (v) Smriti shall also file an undertaking before the Court once the order has attained finality that the directions of the Family Court and the directions given by this Court shall be complied with. The undertaking shall state that the period of visitation as stipulated would be strictly adhered to, and she would return the child to the respondent at the stipulated time. Further she would not abuse her visitation and contact rights to brainwash the child with negative comments about the respondent, his family or Kenya."

9. In view of the directions of the High Court, following undertaking was sworn by Perry in Kenya and filed in the High Court:-

> "I Mr. Perry Kansagra S/o Shri Mansukh Lal Patel, aged about 45 years, r/o MS 167 James Gichuru Road, Lavington Green, Nairobi, Kenya do hereby solemnly affirm and undertake as under:-
>
> 1. That I am executing the present undertaking in compliance of Order dated 25.02.2020 passed by Hon'ble High Court of Delhi in Mat. App. (F.C.) No.30 of 2018.
>
> 2. That I undertake to honour and comply with the visitations rights that have been granted to Mrs. Smriti Madan Kansagra vide Judgment dated 12.01.2018 passed by Family Court South East, Saket, Delhi in G-53/2012 and the same has been upheld vide Judgment dated 25.02.2020 passed by the Hon'ble High Court of Delhi in MAT APP (F.C.) No.30 of 2018.
>
> 3. That I further undertake to submit to the jurisdiction of the Indian Courts.
>
> Sd/-
> DEPONENT"

10. The aforestated decision of the High Court was challenged by Smriti by filing Civil Appeal No.3559 of 2020 in this Court, which appeal was dismissed on 28.10.2020. While affirming the findings, following observations were made in the majority decision of this Court :–

> "(a) To safeguard the rights and interest of Smriti, we have considered it necessary to direct Perry to obtain a mirror order from the concerned court in Nairobi, which would reflect the directions contained in this Judgement.
>
> (b) Given the large number of cases arising from transnational parental abduction in inter-country marriages, the English courts have issued protective measures which take the form of undertakings, mirror orders, and safe harbour orders, since there is no accepted international mechanism to achieve protective measures. Such orders are passed to safeguard the interest of the child who is in transit from one jurisdiction to another. The courts have found mirror orders to be the most effective way of achieving protective measures.
>
> (c) The primary jurisdiction is exercised by the court where the child has been ordinarily residing for a substantial period of time, and has conducted an elaborate enquiry on the issue of custody. The court may direct the parties to obtain a "mirror order" from the court where the custody of the child is being shifted. Such an order is ancillary or auxiliary in character, and supportive of the order passed by the court which has exercised primary jurisdiction over the custody of the child. In International Family Law, it is necessary that jurisdiction is exercised by only one court at a time. It would avoid a situation where conflicting orders may be passed by courts in two different jurisdictions on the same issue of custody of the minor child. These orders are passed keeping in mind the principle of comity of courts and public policy. The object of a mirror order is to safeguard the interest of the minor child in transit from one jurisdiction to another, and to ensure that both parents are equally bound in each State.
>
> The mirror order is passed to ensure that the courts of the country where the child is being shifted are aware of the arrangements which were made in the country where he had ordinarily been residing. Such an order would also safeguard the interest of the parent who is losing custody, so that the rights of visitation and temporary custody are not impaired."

Hemant Gupta, J., authored a dissenting view with following observations:-

> "102. The issue is to find out the welfare of the Child in *parens patriae* jurisdiction of this Court. The question required to be examined is whether this Court should permit the child to be out of its supervisory jurisdiction so as to be a mute spectator to the possibility of defiance of the order of this Court. I am of the opinion that welfare of the Child would be to stay in India with his mother who has brought up the child for last 11 years. The Child is intelligent but not mature enough to take decisions by himself. Even, the law recognizes that the child of less than 18 years is incapable of representing himself. Therefore, any opinion of the child is not determinative of the final custody of the child but this Court as *parens patriae* is duty bound to assess the entire situation to return a finding whether the welfare of the child will be with the mother with visitation rights to the father or custody with the father with visitation rights to the mother. If the child is moved to Kenya, there is no way that this Court can enforce the orders to get the child back to India, even if it so desires."

11. In the light of its discussion, the directions issued in paragraphs 20 to 22 in the majority decision of this Court were:-

> "(a) We direct Perry Kansagra to obtain mirror order from the concerned court in Nairobi to reflect the directions contained in this judgement, within a period of 2 weeks from the date of this judgment. A copy of the Order passed by the court in Nairobi must be filed before this Court;
>
> (b) After the mirror order is filed before this Court, Perry shall deposit a sum of INR 1 Crore in the Registry of this Court, which shall be kept in an interest-bearing fixed deposit account (on auto-renewal basis), for a period of two years to ensure compliance with the directions contained in this judgment.
>
> If this Court is satisfied that Perry has discharged all his obligations in terms of the aforesaid directions of this Court, the aforesaid amount shall be returned with interest accrued, thereon to the respondent;
>
> (c) Perry will apply and obtain a fresh Kenyan passport for Aditya, Smriti will provide full co-operation, and not cause any obstruction in this behalf;
>
> (d) Within a week of the mirror order being filed before this Court, Smriti shall provide the Birth Certificate and the Transfer Certificate from Delhi Public School, to enable Perry to secure admission of Aditya to a School in Kenya;
>
> (e) Smriti will be at liberty to engage with Aditya on a suitable video-conferencing platform for one hour over the weekends; further, Aditya is a liberty to speak to his mother as and when he desires to do so;

> (f) Smriti would be provided with access and visitation rights for 50% once in a year during the annual vacations of Aditya, either in New Delhi or Kenya, wherever she likes, after due intimation to Perry;
>
> (g) Perry will bear the cost of one trip in a year for a period of one week to Smriti and her mother to visit Aditya in Kenya during his vacations. The costs will cover the air fare and expenses for stay in Kenya;
>
> (h) Smriti will not be entitled to take Aditya out of Nairobi, Kenya without the consent of Perry;
>
> (i) We direct Perry and Smriti to file Undertakings before this Court, stating that they would abide and comply with the directions passed by this Court without demur, within a period of one week from the date of this judgement.
>
> 21. As an interim measure, we direct that till such time that Perry is granted full custody of the child, he will be entitled to unsupervised visitation with overnight access during weekends when he visits India, so that the studies of Aditya are not disturbed. Perry and his parents would be required to deposit their passports before the Registrar of this Court during such period of visitation. After the visitation is over, the passports shall be returned to them forthwith.
>
> 22. This appeal shall be listed before the Court after a period of four weeks to ensure compliance with the aforesaid directions, and on being satisfied that all the afore-stated directions are duly complied with, the custody of Aditya Vikram Kansagra shall be handed over by his mother Smriti Kansagra to the father Perry Kansagra."

12. Direction (C) issued in paragraph 20 of the majority decision was thereafter modified by order dated 03.11.2020 passed in M.A. No.2066 of 2020 moved by Perry. By said order, Perry was permitted to take Aditya to Kenya on the strength of a one-time travel document issued by the High Commission of Kenya in New Delhi and to apply for and obtain a Kenyan Passport after arrival of Aditya in Kenya.

13. On 30.10.2020, Perry filed an undertaking in this Court submitting that he would abide by and comply with all the directions contained in

the majority decision dated 28.10.2020, without any demur, and in letter and spirit. The undertaking which was sworn in Kenya was: -

> "I am Perry Kansagra s/o Shri Mansukh Lal Patel, aged about 45 years, r/o MS 167 James Gichuru Road, Lavington Green, Nairobi, do hereby solemnly affirm and stated on oath as under: -
>
> 1. That I am the respondent in the captioned matter and I am conversant with the facts and circumstances of the present case and competent to swear the present affidavit.
>
> 2. I am executing the present undertaking in compliance of Judgment dated 28.10.2020 passed in the aforesaid matter.
>
> 3. I truly and faithfully undertake to abide and comply with all the directions as mentioned in the Judgment dated 28.10.2020 passed by this Hon'ble Court without demur and in its letter and spirit."

Similarly, Smriti also filed an undertaking on 05.11.2020 undertaking to abide by and comply with the directions of this Court without any demur.

14. On 30.10.2020, Perry moved an Originating Summons in the High Court of Kenya at Nairobi seeking registration of the Judgment dated 28.10.2020 passed by this Court and for obtaining 'Mirror Order'. The title of the application and the opening recitals were:-

"REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION MISCELLANEOUS APPLICATION NO. OF 2020
IN THE MATTER OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT)
ACT, CAP 43 OF THE LAWS OF KENYA
IN THE MATTER OF AN ORDER OF THE SUPREME COURT OF INDIA
ISSUED ON 28th OCTOBER 2020
AN
IN THE MATTER OF AVK (A CHILD)

AND IN THE MATTER OF SECTION 4, 22, 113 OF THE CHILDREN ACT AND
ARTICLE 53 OF THE CONSTITUTION OF KENYA 2010
FOR AN APPLICATION FOR MIRROR ORDERS
BY
PERRY KANSAGRA----------EX PARTE APPLICANT

Originating Summons

[Under Sections 3, 4, 5 & 6 of the Foreign Judgments (Reciprocal Enforcement) Sections 4, 22, 113 of the Children Act and Articles 53 of The Constitution of Kenya 2010, the Inherent Powers of the Court and all Enabling Provisions of the Law].

LET ALL PARTIES CONCERNED attend the Honourable Judge in Chambers for the hearing of this application which is issued on the application of **PERRY KANSAGRA** of Post Office Box Number 76817 – 00620, Nairobi for orders:

1. THAT this application be certified as urgent, deserving priority hearing and directions ex parte in the first instance.
2. THAT the judgment delivered by the **Supreme Court of India in Supreme Court Civil Appeal No.3559 of 2020 – Smriti Madan Kansagra v. Perry Kansagra be registered.**
3. THAT further, or other orders, be granted so as to give effect to the orders of and in compliance with judgment of the Supreme Court of India made on 28th October 2020."

After referring to the directions issued by this Court, the application stated :-

> "7. That the application is brought in the best interest of the child and to facilitate his return to Kenya to be reunited with his father and family.
>
> 8. That the orders sought are necessary to facilitate the taking of such other steps and proceedings as ordered by the Supreme Court in India…."

15. The Order dated 09.11.2020 passed by the High Court of Kenya at Nairobi on the aforestated application was:-

"REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
HCFOS/EO31 OF 2020

IN THE MATTER OF FOREIGN JUDGMENTS
(RECIPROCAL ENFORCEMENT) ACT, CAP, 43
OF THE LAWS OF KENYA
IN THE MATTER OF AN ORDER OF THE SUPREME COURT OF INDIA
ISSUED ON 28th OCTOBER 2020
AND
IN THE MATTER OF ADITYA VIKRAM KANSAGRA (A CHILD)
AND IN THE MATTER OF SECTION 4, 22, 113,
OF THE CHILDREN ACT, AND
ARTICLE 53 OF THE CONSTITUTION OF KENYA, 2010
FOR AN APPLICATION FOR MIRROR ORDERS
BY
PERRY KANSAGRA ----------Exparte APPLICANT
IN COURT ON 9th DAY OF NOVEMBER 2020
BEFORE HON. MR. JUSTICE A.O. MUCHELULE

O R D E R

THIS MATTER coming up for hearing UNDER **CERTIFICATE OF URGENCY** before Hon. Justice A.O. Muchelule; **AND UPON READING** the application;

IT IS HEREBY ORDERED;

1. **THAT** application certified urgent.
2. **THAT** the order of the Supreme Court of India issued on 28.10.2020 is hereby registered as prayed.

GIVEN under my hand and the seal of this Court this 9th day of November, 2020.

ISSUED at Nairobi this 11th day of November 2020

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL

DEPUTY REGISTRAR DATED 11/11/2020
HIGH COURT OF KENYA, NAIROBI ____"

16. Smriti, however, filed Miscellaneous Application No.2140 of 2020 seeking modification of certain directions issued by this Court in paragraph 20 of the majority decision, which application was disposed of by this Court by its Order dated 08.12.2020. Some of the submissions raised by Smriti may be set out here for facility:-

> "d. Perry's undertaking dated 02.03.2020 [pg. 30 of Application] that he shall continue to submit to the jurisdiction of the Indian Courts, duly filed by Perry in the High Court and relied upon by him in Supreme Court, kindly be accepted.
>
> e. Perry's mother's undertaking dated 27.02.2020 [pg. 33 of Application] given before the High Court and duly relied upon in Supreme Court, may kindly be accepted."

16.1 The aforestated submissions were dealt with by this Court in its Order dated 08.12.2020 as under: -

> "(iii) With regard to the issue at placitum 'd', the learned counsel for the respondent has accepted that having given an undertaking to this Court, the respondent has subjected himself to the jurisdiction of this Court. Mr. Shyam Divan, learned Senior Advocate for the appellant however relied upon paragraph 3 of the undertaking dated 02.03.2020 given to the High Court to emphasize the absence of such clear stipulation in the present undertaking regarding submission to the jurisdiction of the Indian Courts. Though, we accept the submission made by the learned counsel for the respondent, it is hereby clarified that paragraph 3 of the undertaking given by respondent dated 02.03.2020 to the High Court shall continue to be operative, in addition to the undertaking given to this Court.
>
> (iv) In the context of the matter mentioned against placitum 'e', it must be stated that this Court did not deem it appropriate to bind the paternal grandmother of Aditya, because of the various other directions issued in the Judgment, including the one requiring the respondent to obtain a Mirror Order. The High Court had not insisted upon furnishing of any Mirror Order and, therefore, the direction to have the affidavit of the grandmother who is an Indian citizen, was issued. However, the direction to obtain a Mirror Order was taken to be sufficient security by this Court, to take care of any apprehension that the respondent may not fulfil the obligations cast upon him by the Judgment."

16.2. With regard to the issue regarding mirror order, the rival submissions as well as the findings of this Court were as under:-

> "8. We now turn to the issue regarding Mirror Order. It is submitted by Mr. Divan, learned Senior Advocate for the appellant that what is contemplated by the directions issued in the Judgment is a binding and valid Mirror Order. In his submission, the Mirror Order must, in all respects, be one which is fully enforceable, and on which complete reliance can be placed by this Court. He has invited our attention to the Foreign Judgments (Reciprocal Enforcement)

Act, CAP, 43 enacted by the Parliament of Kenya ("the Act", for short) to make provisions for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith.

The submissions of Mr. Divan on this issue are:-

A) India and Kenya are not reciprocating countries and, as such, the provisions of the Act will not be applicable.

B) In any case, by virtue of Section 3(3) of the Act, nothing in the Act will apply to proceedings in connection with "the custody or guardianship of children".

C) In terms of Section 6(1) of the Act, the registration of a judgment rendered by a foreign court can be granted, if "the High Court is satisfied as to the proof of matters required by this Act and any rules of court".

D) Since the Act itself will not apply to proceedings in connection with the custody or guardianship of children, the registration of the Judgment under the Act will be without any consequence in law.

E) Any submission about validity of registration can be taken by a judgment debtor in terms of Section 10 of the Act and have the registration set aside.

It is thus submitted that mere registration of the Judgment will not make it enforceable. Reliance is placed on a legal opinion given by Ms. Rubeena Dar a practising lawyer in Kenya. A copy of Mirror Order dated 14.05.2018 issued by Superior Court, J.D. of Stamford, Norwalk pursuant to the directions of the High Court of Delhi in ***Dr. Navtej Singh vs. State of NCT and another***[3] is also relied upon to submit what a Mirror Order must normally contemplate and provide. The relevant portion of said Order dated 14.05.2018 reads:-

> "1. Plaintiff's Motion for Order is granted on the application to Show Cause, docketed at #114.00.
>
> 2. The prior orders for sole physical and legal custody in favour of the Plaintiff shall be recalled.
>
> 3. The prior orders remain in place that Jasmeet Kaur is to return immediately to Connecticut with the minor children.
>
> 4. The minor children shall remain in the custody of Jasmeet Kaur, and the Plaintiff shall have reasonable interim visitation with the minor children as agreed or Court ordered upon the minor children's return with Jasmeet Kaur to Connecticut, until further custody orders are determined by the Connecticut Superior Court after granting adequate opportunity of hearing to both the parties.

[3] (2018) SCC OnLine Del 75-11 – which was affirmed by this Court in (2019) 17 SCALE 672

> 5. That the Affidavit of Undertaking of the Plaintiff, confirming how he has conformed his conduct to the Order of the High Court of Delhi at New Delhi on March 6, 2018, submitted as Exhibit B to the Motion for Order (Tab 2 of Exhibit 2) is hereby approved and so ordered.
>
> 6. That Attorney William Taylor is hereby appointed as escrow agent pursuant to Exhibit C to the Motion for Order (Tab 3 of Exhibit 2)."

9. On the other hand, Mr. Anunaya Mehta, learned Advocate for the respondent has relied upon the provisions of the Judicature Act of Kenya which empower the High Court of Kenya to exercise jurisdiction in accordance with common law principles and doctrine of equity and upon Article 2(5) of the Constitution of Kenya, 2010, which recognizes the general rules of international law as forming part of laws of Kenya. The opinion given by M/s. GMC Advocates is also relied upon, the relevant portion of which reads as under:-

> "Reference may additionally be had to the provisions of Sections 4, 22 and 113 of the **Children's Act 2010** and Article 53 of the **Constitution of Kenya 2010** which provide that the best interest and welfare of the child is paramount which would justify grant of orders in the nature of mirror orders.
>
> A Mirror Order is issued by another Court which contains the same terms as those that are contained in the Order being mirrored. It is the practice in Courts in Kenya that a Mirror Order is granted by registration of entire Judgment of the Foreign Court by the Court in Kenya. This is done so as to avoid any variation in context, form or substance. The registration of the Foreign Judgment by the Court of Kenya is itself the Mirror Order. Nothing further is required.
>
> Reference may be had to Judgment **In Re Matter of I W P (Infant) [2013] eKLR)** where in a matter concerning a judgment passed by foreign court in relation to custody and guardianship of a minor, the High Court of Kenya at Nairobi had granted a mirror order.
>
> Having regard to the law applicable in Kenya, the application for grant of a mirror order in accordance with the directions contained in the judgment dated 28-10-2020 passed by supreme Court of India in case titled as *"Smriti Madan Kansagra vs. Perry Kansagra"* [CA No. 3559/2020] was made on 09-11-2020 before the High Court of Kenya at Nairobi. The application was an ExParte application, as the orders sought were noncontentious in nature, given the fact that the matter was extensively and conclusively dealt with by the Supreme Court of India and only Mirror Order was sought from High Court of Kenya at Nairobi.
>
> The application for grant of a mirror order was allowed by the High Court and the judgment dated 28-10-2020 passed by Supreme Court of

India in case titled as "Smriti Madan Kansagra vs. Perry Kansagra" [CA No.3559/2020] was registered in its entirety by order dated 09-11-2020.

Accordingly, the order dated 09-11-2020 issued by High Court of Kenya at Nairobi in case bearing No. HCFOS/E031 of 2020 whereby the judgment dated 28-10- 2020 passed by Hon'ble Supreme Court of India in case titled as "Smriti Madan Kansagra vs. Perry Kansagra" [CA No. 3559/2020] has been registered is a mirror order in compliance with the said judgment."

10. Having considered the rival submissions, in our view, the Order passed by the High Court of Kenya respectfully deserves and must be shown due deference. Nothing turns on the form and format of the Order, so long as the High Court of Kenya was apprised of all the facts, and the context in which it was approached, for compliance of the directions passed by this Court in the Judgment. Since the registration of the Judgment passed by this Court has been done under the orders of the High Court of Kenya, we accept the submissions made by the respondent. In our view, the registration of the Judgment is sufficient compliance of the direction to obtain a Mirror Order issued from a competent court in Kenya. The fact that the registration was given at the instance of the respondent and the unconditional undertaking given by the respondent to this Court, are sufficient compliance of the directions issued by this Court."

16.3. In the end, following directions were issued by this Court in its Order dated 08.12.2020:-

"A) Except for direction issued earlier in paragraph 20 of this Order, and matters accepted by the learned counsel for the respondent, no orders are called for in respect of any of the directions sought for by the appellant.

B) All the directions issued in paragraph 20 of the Judgment hold good, with the addition of the one issued in paragraph 20 of this Order.

C) A further affidavit shall be filed by the respondent within three days of this Order, that he shall abide by this Order and the additional direction issued in paragraph 20 of this Order.

D) The respondent is not required to obtain any fresh Mirror Order in respect of the aforesaid additional direction, before Aditya is taken to Kenya, and it shall be sufficient if an appropriate application to have this Order registered, in the same manner as the Judgment was registered, is preferred within two weeks of Aditya reaching Kenya, and the copy of such registration is thereafter filed in this Court at the earliest.

E) After filing of the further affidavit as stated above, the respondent shall be at liberty to take Aditya to Kenya as directed earlier in the Judgment."

17. Perry filed an undertaking dated 09.12.2020 in this Court that he would abide by the Order dated 08.12.2020. The undertaking was as under: -

> "I Mr. Perry Kansagra s/o Shri Mansukh Lal Patel, aged about 45 years, r/o 167 James Gichuru Road, Lavington Green, Nairobi, Kenya presently in Delhi, India do hereby solemnly affirm and state on oath as under: -
>
> 1. That I am the respondent in the captioned matter and I am conversant with the facts and circumstances of the present case and competent to swear the present affidavit.
>
> 2. I am executing the present affidavit in compliance of the directions in paragraph 21(C) of the Order dated 08.12.2020 passed in the aforesaid matter.
>
> 3. I state that I shall truly and faithfully abide by the Order dated 08.12.202 and additional direction issued in paragraph 20 of the Order dated 08.12.2020 passed by this Hon'ble Court."

18. In the aforestated circumstances, in terms of the orders issued by this Court, custody of Aditya was handed over to Perry and Aditya was taken by Perry to Kenya in December 2020.

19. On 29.07.2021, Miscellaneous Application No.1167 of 2021 was filed by Smriti in Civil Appeal No.3559 of 2020 with following assertions:-

> "5. This Hon'ble Court had directed that the Appellant also be granted additional access to Aditya, i.e. two trips of one week each to Kenya to meet Aditya. Accordingly, Appellant sought additional access to the child during the Easter break falling in April, 2021 in terms of para 21 of the judgement dated 28.10.2020. The Appellant requested the Respondent to facilitate access and visitation in Kenya for a week in April during Aditya's Easter Holidays. However, the said access could not take place. Copy of the email dated 30.03.2021issued by the Respondent cancelling the visitation during easter is annexed hereto and marked as Annexure P-3 (pg. no. 161 to 162).
>
> 6. Though the custody of Aditya was given to the Respondent father vide the judgment dated 28.10.2020, the Appellant's/mother was granted visitation and access rights to the child. This Hon'ble Court ensured that both parents were

equally involved in the development of Aditya and protected the Appellant's rights such as including her in the school records and having access to Aditya's school and participation, when possible, in school events etc. The Respondent is not complying with the orders passed by this Hon'ble Court. The Appellant-mother's access and visitation is slowly being reduced. The Appellant's weekly access over Skype has been reduced from 1 hour to 20 minutes a week.

7. That Aditya has not met the Appellant in last 7 months. This Hon'ble Court had also directed that Appellant was entitled to 50% of the annual vacation. The Respondent is obstructing the Appellant's access rights to Aditya. Hence, the Appellant is constrained to file the present application seeking compliance of the directions of this Hon'ble Courtin relation to the Appellant's access rights during summer vacation wherein Aditya is to be in the temporary custody of the Appellant for 50% of the summer vacations. Aditya's school summer vacations have started and the Appellant's precious time with Aditya is being lost. The obstruction of the Respondent is made evident by the following facts:

a. In terms of judgment dated 28.10.2020, the Appellant wrote an email to the Respondent on11.07.2021informing the Respondent that she would like Aditya to visit India 01.08.2021 to 27.08.2021, i.e., 50% of his summer vacation falling between 10.07.2021 to 01.09.2021. A copy of the email dated11.07 .2021is annexed hereto and marked as Annexure P-4 (pg. no. 163).

b. b. That the Appellant received no reply to her email dated 11.07.2021 and was constrained to issue an urgent reminder to the Respondent vide email dated 15.07.2021 wherein the Appellant reiterated her request to the Respondent of urgently confirming the dates of Aditya's visit to India, in terms of the judgement dated 28.10.2020 and order dated 08.12.2020. A copy of email dated 15.07.2021 is annexed hereto and marked as Annexure P-5 (pg.no. 164)

c. That the Respondent vide his email dated 16.07.2021 informed the Appellant that the summer vacation visitation would not be possible. The Respondent declined to comply with the directions of this Hon'ble Court in view of the ongoing Covid-19 pandemic and for the one-year mourning period being undertaken by Aditya and the Respondent for the Respondent's father wherein the Respondent and his family including Aditya have purportedly decided not to travel or go to any hotels. A copy of email dated 16.07.2021is annexed hereto and marked as Annexure P-6 (pg. no. 165 to 166)

d. The Appellant reiterated her request of sending Aditya to India vide email dated 21.07.2021. The Appellant assuaged the Respondent's unreal fears and informed him that Covid-19 cases in Delhi have drastically reduced, and the situation has improved in Delhi. The cases are on an all-time low in Delhi as compared to April-May 2021. Appellant, being Aditya's mother is concerned about his safety and

health and only made a request for visitation when the situation regarding Covid-19 cases improved in Delhi. The Appellant also suggested that she was open to working out an arrangement which would be safest and best for Aditya. The copy of the email dated 21.07 .2021 is annexed hereto and marked as Annexure P-7 (pg. no. 167 to 168)

e. The Respondent, instead of working out a solution and arrangement for Aditya to meet the Appellant replied vide email on 24.07.2021 in a bitter, unpleasant and aggressive manner and again denied the Appellant's request. A copy of email dated 24.07.2021is annexed hereto and marked as Annexure P-8 (pg. no. 169 to 171).

… … …

13. Thus, in view of the above, the present application is being moved for necessary directions directing the Respondent to comply with the judgment dated 28.10.2020 and order dated 08.12.2020 and facilitate Aditya's meeting with the Appellant. The said directions are necessary for the welfare and best interests of the child. The vacation visitation shall ensure that Aditya has a real and effective contact with the mother."

20. The application thus prayed:-

"(a) Pass an order directing the Respondent to comply with the judgment dated 28.10.2020 and order dated 08.12.2020 by facilitating Aditya's vacation access to the Appellant: *inter alia* for breach relating to the direction of Aditya being in the temporary custody of the Appellant during 50% of the summer vacations"

21. The emails dated 11.07.2021, 15.07.2021, 16.07.2021, 21.07.2021 and 24.07.2021 are quoted hereunder for facility:-

"**Email dated 11.07.2021**

"Dear Perry,

As per the term dates on the website of Pepponi School, Nairobi, Aditya's summer vacation has commenced from 09.07.2021 and continues till 02.09.2021. I would like to have Aditya visit me from 01.08.2021 to 27.08.2021. (half of the summer vacation as granted to me by the Hon'ble Supreme Court).

Kindly confirm the same by email.

Regards

Smriti"

Email dated 15.07.2021

"Dear Perry,

Please refer to my email dated 11.07.2021, wherein I had urgently requested you to confirm the dates of travel for Aditya to visit me during his summer break '2021 in terms of the Hon'ble Supreme Court order. I had suggested 1st Aug 2021 to 27th Aug 2021.

Furthermore, I am informed that an Air India flight (bubble flight) once a week (apparently on every Friday) is functional from Kenya to Delhi via Ahmedabad. Kindly arrange for him to visit me on 23rd July 2021 or 30th July 2021or 6th August 2021 for half of his summer break i.e. appropriately 27 days. I am flexible on dates, provided the Hon'ble Supreme Court orders are adhered to.

I am anxiously awaiting your response and affirmation.

Regards

Smiriti"

Email dated 16.07.2021

"Dear Smriti,

I would like to inform you that the whole world is currently in the midst of a major pandemic and throughout the World, Covid Variants like Delta, Delta Plus, Lambda and Kappa are rampant and causing unprecedented infections and deaths.

India has gone through a brutal and lethal Second Wave of Covid which has caused unprecedented deaths in India. There are scientific predictions that India is going to have a Third Wave of Covid Pandemic sometime in August 2021 and the third wave is likely to infect children more.

Several Countries World over including the UK, Russia, France, Italy, Holland, Germany and Bangladesh amongst many, many others have been experiencing the third wave of Covid. The signs of the Third wave of Covid are also evident as some states in India have already started seeing a rise in the number of Covid cases. Aditya is aged 12 years and is very well aware of Covid situation and he is very conscious for the safety of himself and his family.

I would also like to inform you that all passenger flights between Kenya and India are suspended due to Covid. You are also aware that due to Covid, Aditya has recently lost his Paternal grandfather. There is a year long mourning in the family and Aditya has chosen not to celebrate any events and also not to travel. Since this Pandemic has caused an irreparable loss to my

Family, for the safety and well being of Aditya it is not in the interest of Aditya to travel. As you know, there is no Vaccine for children yet.

After reading your email dated 11-7-2021 and 15-7-2021 I am disappointed that when the whole world is facing such a pandemic and people are keeping their children home to protect them from the Covid Pandemic, you want Aditya to risk his life to travel five thousand Kilometers and be exposed to Covid Virus.

Your Information with respect to operation of passenger flights by Air India is extremely incorrect. Air India is operating flights only under The Vande Bharat Mission for evacuating nationals.
The Relevant portion of Air India Circular for Travel attached.
The Relevant extract of KCAA Circular Kenya attached.
Other Relevant attachments: -

• https://www.livemint.com/news/india/india-may-witness-third-covid-wave-from-next-month-sbi-report-11625457429589.html

•https://swachhindia.ndtv.com/third-wave-of-covid-19-likely-to-attack-children-vaccinate-the-parents-quickly-dr-devi-shetty-of-narayana-health-59277/

•https://telanganatoday.com/experts-call-for-caution-ahead-of-third-wave

Therefore in view of the Covid circumstances I am constrained to inform you that Summer vacations visitation with Aditya would not be possible.

Regards.

Perry”

Email dated 21.07.2021

“Dear Perry

Pretty surprised to note the aggressive content in your response dated 16th July 2021 to my email. After all, I am only seeking compliance of the Hon'ble Supreme Court order. Why do you want to make this adversarial?

You pressed for an urgent hearing of the appeal in the Supreme Court in the midst of the pandemic. The Hon'ble Supreme Court permitted you the custody of Adu in middle of pandemic on your asking. You travelled to India from Kenya with your revered now dear departed father in order to take the custody of Adu and then took him to Kenya; all during the pandemic. Clearly all your pandemic related pretexts to not comply with the Hon'ble Supreme Court order are just afterthoughts. And yes, Aditya travelled with you to Kenya in December 2020, very much during the pandemic when there were limited flights permitted, just as in the present situation.

The Hon'ble Supreme Court gave the custody of Adu to you as well as visitation rights to me during the pandemic. Access granted to me was not to begin after the pandemic was over.

Being Aditya's mother, I am most careful and concerned about his safety and security. Please be assured that I will never compromise Aditya's safety. It has been seven months since Aditya has met his mother and grandmother, who he is extremely close to. Continued physical separation from his mother and grandmother shall have an adverse impact on Aditya.

No doubt that the second wave in India was brutal, but cases in Delhi have reduced drastically and presently there are on an average only 40 new cases being reported. Positivity of the virus is only 0.1%. Large number of the population in Delhi have also got vaccinated. All over India the cases are constantly coming down. There is no requirement of a lockdown nor indeed is there one in Delhi. Even national institutions are opening physically. The second wave of covid is all but finished in India. Moreover, my mother and I are also fully vaccinated. In fact the situation in Delhi regarding Covid-19 cases may be relatively better than in Nairobi, Kenya. There is no third wave in India. Chances of a possible third wave in India, even if it were to occur, is only expected in late September and October 2021. This is as per the Indian Council for Medical Research; the Apex Medical Body in this regard. There are even chances that the third wave may not occur at all. The child's right to meet his mother cannot be violated on such distant apprehensions. Your approach is casual and dismissive.

Your revered father's demise was really sad. I have extended my heartfelt condolences to you and your family. I reiterate them to you. May his soul rest in peace. I pray that you and your mother find strength to navigate through this difficult time. However, for a child to meet his mother is nothing to do with breach of mourning that your family may be undertaking. For my child to meet me cannot be seen to be a breach of any custom of your family! Moreover, Aditya meeting his mother and grandmother will only being him love and warmth which is in fact necessary for Aditya right now.

Your email completely denying Aditya's access to his mother and grandmother is not only against the best interest of Aditya but is also unreasonable and unfair. Instead of finding a via media or an arrangement where Aditya can meet his mother and grandmother in the safest possible way, your absolute denial is nothing but an attempt to alienate Aditya from me.

Your attempt to alienate Aditya is also revealed from your consistent attempt in reducing Aditya's weekly skype time from l hour to now 15-20 minutes. During these Skype sessions Aditya looks like he is being controlled and appears to be sad and low. You appear to be intending to chip away at the sacrosanct Supreme Court orders. Not acceptable.

Thus, it is of utmost importance that Aditya is able to meet his mother and grandmother. Though Delhi is safe now, I am open to working out an

arrangement which will ensure maximum security and safety for Aditya. You are aware that My mother and I stayed in Shimla at our house from April to June and it was extremely safe. I could take Aditya to Shimla in order to ensure maximum safety. I am also open to working out any other arrangement keeping Aditya's safety in mind. Shimla has negligible covid cases.

Kindly book Aditya's tickets at the earliest so that he can meet his mother and grandmother.

Eagerly waiting to meet Aditya. Looking forward to your cooperation.

Regards

Smriti"

Email dated 24.07.2021

"Dear Smriti,

Your perpetual habit of living in a hallucination and La La land continues.

Your email dated 21-7-2021 raising aspersions on the Hon'ble Supreme Court of India are uncalled for. Let me remind you that you left no stone unturned to make sure that the custody case in India gets delayed in perpetuity and you tried to do the same before the Hon'ble Supreme Court of India. You employed various tactics like filing frivolous applications one after another, so don't forget your own conduct, acts and deeds.

In December 2020, the regular passenger flights were operating intra country albeit with reduced capacity. It is also relevant to mention that the fresh Covid cases in India in December 2020 were very less as compared to current figure of around 45,000 daily Covid cases. However currently passenger flights between India and Kenya are completely suspended and I had provided you with the details of said suspension of flights vide my earlier reply email dated 16-7-2021.

Your concern for safety of Aditya in the email does not match with your insistence of calling Aditya to India in the present circumstances and Covid environment. The second wave of Corona is not yet over in India and as a matter of fact as per The Govt of India, the third wave will hit India between August and October 2021 (Refer to attached link). If the vaccine was the answer to the pandemic, then the whole World would have opened way back and there would not have been severe restrictions and lockdowns. Lockdowns and restrictions that are increasing by the day.

It seems that your memory is either weak or extremely short, as due to Covid I also did not have my visitations with Aditya from April 2020 till December 2020. That is 9 months of physical separation of Aditya from me due to Covid and at that time I never kept writing you emails for visitations because I was sensible enough to understand the Covid circumstances and restrictions.

> With regret I need to tell you that your approach towards Covid is Casual and dismissive, you are behaving as if there is no covid at all. Do not forget the death toll of Covid cases in India stands at staggering 3-5 million people (Refer to attached link).
>
> With respect to your reference to Shimla, it is extremely unsafe as the humungous Tourists visiting Shimla make it unsafe qua Covid. Secondly, Currently Himachal Pradesh is undergoing massive landslides and road blocks due to the ongoing Monsoons.
>
> As you will recollect that earlier also I had requested you to mend your ways with respect to skype meetings with Aditya but you paid no heed to the same. Please note that the duration of the skype is in the realm of Aditya and nothing to do with me. In case he is talking to you for 15-20 minutes, it appears that your conversation is not sufficient enough to keep him engaged during the skype though you are still having Skype with Aditya every weekend.
>
> Aditya is extremely happy in Kenya, barring the week he lost his grandfather who was very dear to him. In case Aditya is sad and low during skype talks with you, it reflects the non interest of Aditya in your pathetic conversation with him.
>
> Relevant attachments:-
> *https://economictimes.indiatimes.com/news/india/true-deaths-due-to-covid-likely-to-be-in-several-millions-not-hundreds-of-thousands-arvind-subramanian/articleshow/84575636.cms
>
> *https://timesofindia.indiatimes.com/india/second-wave-not-yet-over-centre-writes-to-states-says-no-room-for-complacency/articleshow/84404841.cms
>
> *https://www.hindustantimes.com/india-news/covid-3rd-wave-has-it-arrived-what-government-latest-projection-reports-say-101626620955675.html
>
> *https://www.hindustantimes.com/cities/chandigarh-news/growing-tourist-rush-raises-covid-concerns-in-himachal-101625903253886.html
>
> I again reiterate my stand that was conveyed to you vide my reply email dated 16-7-2021.
>
> Regards.
>
> Perry"

22. In his reply dated 05.08.2021 which was supported by an affidavit sworn in Kenya on 05.08.2021, Perry responded as under:-

> "1. At the outset, the Respondent seeks to state that there is not even the remotest intention on his part to disobey or violate the orders passed by this

> Hon'ble Court including the judgment dated 28.10.2020 passed in the captioned matter. However, the ensuing circumstances as a result of the COVID-19 pandemic and its sweep across the World, in the Respondent's submission, are such that compliance of the direction in relation to visitation of the child in India with the Appellant would not be in the best interest of the health of the child and therefore, the Respondent prays for exemption from strict compliance of the said direction for the present. …"
>
> … … …
>
> "2. There is also a logistical issue in Aditya travelling to India. The Air-bubble flight between Kenya and India would not allow Aditya to travel to India from Kenya since Aditya does not fall under any of the permitted categories of persons who are entitled to travel to India. Even otherwise the current Covid-19 environment prevalent in India and in the world is not safe for the child to undertake long distance travel."
>
> … … …
>
> "7. The Respondent, however, is not at all averse to the Appellant meeting the child and is not in any manner intending to deprive the Appellant of her right of visitation under the orders passed by this Hon'ble Court. If the Appellant can find an alternative method of travelling to Kenya even at present, the Respondent would be more than willing to visitation of appellant with child Aditya in Kenya for the current vacations."
>
> … … …

In reply to paragraph 7 of the application, it was asserted:-

> "That para 7 of the application as stated is wrong, false and vehemently denied. It is denied that the Respondent is obstructing the Appellant's access and visitations, as alleged. Rather, it is only as a result of supervening circumstances, as explained in detail in the preliminary submissions, that the Respondent believes that Aditya's travel to New Delhi will not be in his best interest and welfare, especially from the point of view of his health, and it is for this reason that the Respondent prays for exemption from strict compliance of the direction *qua* visitation in Delhi at present. Pertinently, the reasons for a hiccup in the visitation schedule is for reasons completely beyond the control of the Respondent – similar to the circumstances when the Respondent could not travel to India for about 9 months i.e. from April 2020 till December 2020 during the pendency of the main appeal before this Hon'ble Court in view of the Covid-19 pandemic."

23. In her rejoinder to the aforesaid reply, Smriti appended various documents dealing with the apprehension expressed by Perry and submitted: -

> "b) That most restrictions imposed by the State Government and Central Government have been lifted or relaxed and a large part of the population in Delhi has already been vaccinated. There has been no lockdown in Delhi for the last two months and all the important public and private institutions are either already open and functioning or are in the process of doing so. …
>
> … … …
>
> 2. Thus, in view of the above, it is absolutely safe for Aditya to travel to Delhi and meet his mother and grandmother. The apprehension and fear of the Respondent regarding Aditya's visit to India are misplaced and unjustified.
>
> 3. As far as Aditya taking a flight and being exposed to other fellow passengers is concerned, Aditya would travel in first class and shall have minimum exposure just like he did when he travelled from Delhi to Nairobi in December, 2020. Thus, this fear of the Respondent of Aditya travelling in a flight is not only misplaced but also unreasonable and self-serving. Moreover, all international flights are following prescribed covid appropriate protocol during the flights, similar to the protocol followed in the December 2020 flight taken by Respondent for Aditya while travelling to Nairobi.
>
> 4. It is respectfully submitted that the Aditya is close to his mother and grandmother and it would be incorrect to suggest that he does not want to come to India to meet his mother and grandmother. Aditya's close attachment to his mother and grandmother has also been observed and noted by this Hon'ble Court when it interacted with Aditya on 17.02.2020. …"

24. The matter was taken up on 11.08.2021 when the following order was passed by this Court: -

> "In the judgment dated 28.10.2020 in C.A. No.35589/2020 and subsequent order dated 08.12.2020 passed by this Court, several issues were touched upon and one of the issues was concerning vacation access to be enjoyed by the mother of the child.
>
> In terms of the directions issued by this Court, the child-Aditya was required to join the company of the mother during his vacation. However, because of the prevailing situation pursuant to Covid-19 Pandemic, the father was apprehensive and as such Aditya has not yet joined the company of his mother.
>
> In the circumstances, M.A. No.1167 of 2021 has been preferred by the mother seeing appropriate directions to facilitate Aditya's vacation access to the mother.
>
> Mr. A.S. Chandiok, learned Senior Advocate appearing for the mother submits that she has already booked the flights and Aditya can board the flight leaving Nairobi on 13.08.2021 to be with the mother till 01.09.2021.

According to Mr. Chandiok, since the child enjoys the status as "Overseas Citizen of India" card holder, even under the present regime of Air Transport Bubbles, the child can certainly come to India and after the vacation gets over, go back to Nairobi.

Mr. Anunaya Mehta, learned advocate submits that the OCI card holder status enjoyed by Aditya was attached to his earlier passport. It is submitted that as noticed in the Judgment dated 28.10.2020, the original passport having been lost, a new passport has been issued in favour of Aditya and the number of said passport does not appear in the OCI Card of Aditya.

Since in terms of the order passed by this Court, the vacation access is to be enjoyed by the mother and the fact that Aditya was holding a status of OCI card holder, we direct as under:

(a) Let an appropriate application seeking renewal of the status as OCI Card Holder be preferred by Perry Kansagra-father of Aditya today itself in the Office of the Indian Embassy at Nairobi.

(b) Upon such application being preferred, the Indian Embassy at Nairobi is directed to process the application immediately.

(c) If the Embassy Office finds that Aditya is entitled to the renewal of the OCI card holder Status, appropriate endorsement shall be made or fresh card shall be issued so as to enable Aditya board the flight on 13.08.2021.

(d) Perry Kansagra-father of Aditya is at liberty to produce copy of this order before the Indian Embassy at Nairobi for facility.

Thus, there would be no impediment in Aditya's boarding the flight to Delhi on 13.08.2021 and return on 01.09.2021. In this process, the vacation access to his mother shall stand fulfilled.

List the matter on 16.08.2021 for reporting compliance."

25. On 16.08.2021, I.A. No.100550 of 2021 was filed by Smriti submitting: -

"4. That the Respondent did not allow Aditya to board the flight on 13.08.2021 and from enquiries made by the Appellant from the Indian High Commission at Nairobi, the Respondent has not taken any steps to renew Aditya's OCI Card Status. To perpetuate and in furtherance of his mala fides, the Respondent refused to respond to the e-mails issued by the counsel for the Appellant qua compliance of the aforementioned orders of this Hon'ble Court, as also blocked the Appellant on WhatsApp and email, and also sought to withdraw his legal representation in India, a day before the hearing before this Hon'ble Court. The Respondent has not answered the phone calls of the

Appellant. The Appellant has detailed the specific acts and conduct of the Respondent in this respect in her affidavit dated 14.08.2021 filed before this Hon'ble Court, which may be read as an integral part of this application also. It is respectfully submitted that the aforementioned deliberate conduct of the Respondent is not only mala fide but impedes and obstructs the administration of justice and harm the welfare of Aditya, while seeking to dilute the majesty of this Hon'ble Court.

… … …

6. That the fact the Respondent did not get OCI of the child renewed and attach it to the new passport or take nay steps to apply for visa for Aditya to travel to India shows that the Respondent did not have any intentions of complying with the judgment dated 28.10.2020 from the day it was pronounced. The conduct of the Respondent post the passing of the Judgment dated 28.10.2020 and order dated 08.12.2020 and 11.08.2021 has now established that the Respondent had no intention to allow access between the child and the mother.

7. The respondent has violated the undertaking given vide an affidavit of compliance given by him to this Hon'ble Court dated 20.11.2020 wherein he had given his undertaking to this Hon'ble Court, on solemn oath and affirmation, to comply with its directions. The Respondent had also obtained a mirror order dated 11.11.2020 from the High Court of Kenya, Milimani Law Courts, Family Division wherein the final judgment of this Hon'ble Court dated 28.10.2020 was registered (hereinafter referred to as "**the mirror order**"). The Respondent has thus, willfully defied his undertaking given to this Hon'ble Court and also the mirror order obtained from the Kenyan High Court. …

8. The Respondent had also given an affidavit of undertaking in the proceedings before the High Court of Delhi to comply with the orders of the Hon'ble Court. The Respondent's mother had also given an undertaking to the High Court of Delhi to comply with the orders of the Hon'ble Court. It requires mention that this undertaking of the mother was not included in the order of 08.12.2020 as this Hon'ble Court found that the mirror orders and the Respondent's undertaking and Rs.1 crore security were adequate. …

… … …

12. The Appellant has had no physical access to Aditya since 10.12.2020. The weekly Skype call as per the final judgment dated 28.10.2020 which was to take place on the weekend of 14.08.2021 and 15.08.2021 was also not facilitated by the Respondent. The Appellant has now been blocked on all means of communication, WhatsApp, Skype, phone and email since 14.08.2021. The Appellant has also left a voice message for Master Aditya to call her back but has not received any call back."

The prayers made in the application are not extracted here as the same were quoted in the subsequent order dated 17.8.2021 passed by this Court.

26. Since the directions issued by this Court were not complied with, this Court in its Order dated 16.08.2021 stated:-

> "This is in continuation of the order dated 11.08.2021 passed by this Court in Miscellaneous Application No.1167/2021.
>
> Despite clear directions issued by this Court in the order dated 11.08.2021, the father-Perry Kansagra has not followed the same. No application has been preferred seeking renewal or grant of OCI Cardholder status. In fact as disclosed by Smriti Kansagra has not even responded to any of the calls made by her.
>
> Mr. Anunaya Mehta, learned Advocate instructed by Mr. Inderjeet Saroop and Mr. P.K. Manohar who was representing Perry Kansagra all the while now reports that Perry Kansagra does not wish to continue their services as Advocates representing him. He further states that no instructions are being received from Mr. Perry Kansagra and no contact is getting established between the instructing advocates and Mr. Perry Kansagra.
>
> It was on certain clear understanding that this Court allowed the custody of the child to be with Perry Kansagra subject to certain conditions. Those conditions implied that during vacation, the vacation access shall be enjoyed by mother of the child. Non observance of these conditions shows the attitude of Perry Kansagra. Non observance of the conditions as well as making himself inaccessible definitely betrays defiance on part of Perry Kansagra.
>
> Considering these facts, we direct that Mr. Inderjeet Saroop and Mr. P.K. Manohar, learned advocates shall not be discharged and shall continue to represent Perry Kansagra.
>
> Let a copy of this order be immediately transmitted to the Indian Embassy at Nairobi to be served upon Perry Kansagra.
>
> Additionally, the Registry is also directed to send copies of this order as well as order dated 11.08.2021 to the Indian Embassy at Nairobi for its record and facility.
>
> List this mater for further consideration as first item on Board on 17.8.2021."

27. The Order dated 17.08.2021 passed by this Court the next day quoted the reliefs prayed for in I.A.No.100550 of 2021 and proceeded to pass directions as stated therein: -

> "I.A. No.100550/2021 has been filed on behalf of Smriti Madan Kansagra-mother of Aditya praying inter alia*:*
>
> > "a. Pass an order taking suo motu cognizance of the conduct of Respondent-Perry Kansagra and initiate appropriate proceedings against him and pass all consequential orders:
> >
> > b. Issue show cause notice to Respondent-Perry Kansagra as to why he should not be suitably charged, convicted and sentence in accordance with law and for this purpose direct the Indian High Commission at Kenya and London to seek the assistance of the appropriate authorities to secure the personal presence of Kansagra before this Hon'ble Court by taking him into custody or otherwise;
> >
> > c. Revert the custody of Aditya Vikram Kansagra to the Appellant;
> >
> > d. Restrain the Respondent-Perry Kansagra from taking any action, or/and taking any steps, or/and initiating and/or prosecuting any proceedings or any action of any nature before the Courts in Kenya or any other court which will create an impediment in the implementation or execution of order dated 11.08.2021 or any other order or judgement passed by this Hon'ble Court'
> >
> > e. Restrain the Respondent-Perry Kansagra from seeking any modification of the mirror order dated 11.112020 from the High Court of Kenya, Milimani Law Courts, Family Division.
> >
> > f. Compel the Respondent-Perry Kansagra to yield both the Kenyan passport and the UK passport of Aditya Vikram Kansagra to the Officer authorised by the Indian High Commission.
> >
> > g. Pass an order impleading the Union of India through the Ministry of External Affairs in the present proceedings and take the amended memo of parties being Annexure P-10 on record.
> >
> > h. In view of the mirror order dated 11.11.2020, direct the Indian High Commission at Nairobi, Kenya to take the assistance of the Kenyan Authorities to take steps to locate Aditya Vikram Kansagra and bring him back to India on a flight arranged by the Appellant;

i. Direct the Indian High Commission at Nairobi Kenya to issue an emergency travel document for Aditya Vikram Kansagra renewing his OCI on his present/current Kenyan passport.

j. Direct a responsible official of the Indian High Commission at Kenya to travel with Aditya from Nairobi to New Delhi and to hand over Aditya upon reaching New Delhi to the Appellant;

k. Pass an order directing the Union of India to issue a red corner notice against Perry Kansagra.

l. Revive the undertaking of Respondent's mother, Mrs. Sucheta Patel, dated 27.02.2020 given before the High Court of Delhi and bind her to the orders passed by this Hon'ble Court.

m. Pass an order striking of the defence of the Respondent-Perry Kansagra in the pending proceedings arising out of the marriage with the Appellant and dismiss the counter claim filed by the Respondent as mentioned in paragraph No.21(e).

n. Pass ad interim ex parte orders in terms of prayers 'a' to 'm' hereinabove.

o. Pass any other order it may deem fit in the interests of justice."

Heard Mr. A.S. Chandhiok and Ms. Sonia Mathur, learned Senior Advocates for Smriti Kansagra.

Considering the facts and circumstances on record, we issue notice on this application.

Since, learned advocates for Perry Kansagra are present, no separate notice is actually necessary. However, we direct issuance notice to Mr. Perry Kansagra-father of Aditya on this application.

We also direct the Indian Embassy at Nairobi, Kenya to serve a copy of this order upon Mr. Perry Kansagra.

At this stage, we grant ad interim relief in terms of Prayers (d), (e) & (f) made in the aforesaid application. In order to consider and effectuate the relief prayed for in prayer (g) and for the assistance required in the instant matter, we issue notice to the Central Agency, returnable on 19.08l.2021. Additionally, the papers shall be served upon the office of learned Solicitor General of India to take appropriate steps in the matter.

List this matter on 19.08.2021 as first item on Board.

We request Mr. Anunaya Mehta, learned Advocate as an Officer of the Court to assist the Court in ensuring compliance of a Mirror Order produced on record at the instance of Perry Kansagra."

28. On 18.08.2021, another Interim Application was filed by Smriti stating:-

> "11. The custody of Aditya was given by the Appellant to Perry on 10.12.2020 on the strength of the "mirror order" dated 9.11.2020, which he all along knew was not in compliance of this Hon'ble Court's order in it's true spirit. The Respondent in a well-planned conspiracy consciously did not comply with the judgment dated 28.10.2020.
>
> 12. Pithily put, the motion of the Respondent to comply with the pre-condition of obtainment of mirror orders before taking the custody of Aditya to Kenya has not been met by the Respondent, as the Kenyan Court, has by a speaking order, dismissed the same. The Respondent only came to know of this order dated 21.05.2021 passed by the Kenyan High Court on 17.08.2021.
>
> 13. It appears that the Respondent has perpetrated a fraud on this Hon'ble Court and that he has suppressed his failure to meet the pre-condition of obtaining a mirror order from the Kenyan Court in terms of the judgment dated 28.10.2020 passed by this Hon'ble Court. In that view of the matter, the very custody of Aditya with the Respondent is illegal and the continued illegal custody falls foul of the penal laws of India."

It was, therefore, prayed:-

> "a. Declare that the custody of Aditya Vikram Kansagra with Perry Kansagra is illegal and recall the order dated 28.10.2020 read with 08.12.2020;
>
> b. Direct the Registrar of the Hon'ble Supreme Court of India to register an FIR against the Respondent, his mother and other unknown persons under Sections 191, 193, 209, 420, 361, 363, 365 and 368 read with Sections 34 and 120B of the IPC and any other applicable provision;
>
> c. Direct the CBI to investigate the said FIR and also empower the CBI to take steps to bring Aditya Vikram Kansagra back to the lawful custody of Smriti Kansagra."

29. A copy of the Order dated 21.05.2021 was appended to the aforestated application. Said Order dated 21.05.2021 was to the following effect:-

"**REPUBLIC OF KENYA**

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO.E031 OF 2020

IN THE MATTER OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT)

ACT, CAP 43 OF THE LAWS OF KENYA

IN THE MATTER OF AN ORDER OF THE SUPREME COURT OF INDIA ISSUED ON 28TH OCTOBER, 2020

AND

IN THE MATTER OF AVK (A CHILD)

AND IN THE MATTER OF SECTION 4, 22, 113 OF THE CHILDREN ACT AND

ARTICLE 53 OF THE CONSTITUTION OF KENYA 2010

FOR AN APPLICATION FOR MIRROR ORDERS

BY

PK…….EX-PARTE APPLICANT

BETWEEN

PK…….EX-PARTE APPLICANT

JUDGMENT

1. PK the Applicant herein, filed an Originating Summons dated 30.10.2020 seeking the following:-

1. Spent

2. THAT the judgment delivered by the Supreme Court of India in Supreme Court Civil appeal No.3559 of 2020 – SMK v. PK be registered.

3. THAT further, or other or orders, be granted so as to give effect to the orders of an in compliance with judgment of the Supreme Court of India made on 28th October 2020.

4. THAT costs be reserved.

2. The Application is anchored on the provisions of the Constitution of Kenya, 2020, the Children Act and the Foreign Judgments (Reciprocal Enforcement) Act and all enabling provisions of law. Given the prayers sought herein, the primary law on the matter is the Foreign Judgments (Reciprocal Enforcement) Act.

3. The facts of this case as can be gleaned from the record is that the Applicant a Kenyan citizen married S an Indian Citizen 29.7.09. Following the marriage, S moved to Kenya and settled in her matrimonial home. In 2009, she returned to India for the birth of their son AVK, who was born on 2.12.09 in New Delhi, India. On 1.7.10, the child came to Kenya with his parents where they lived. On 10.3.12 the child went to India both parents and was due to return to Kenya on 6.6.12. The Applicant went to India on 22.6.12 and spent time with S and the child until 26.4.12 when he returned to Kenya. On 26.5.12, S filed suit in the Delhi High Court, seeking a permanent injunction restraining the Applicant and his parents from removing the child from her lawful custody or from Delhi, or accessing the child in school, which orders were granted. This marked the beginning of litigation between the parties from the High Court all the way to the Supreme Court and culminated in the judgment, the registration of which the Applicant seeks.

4. In the judgment, the Supreme Court of India ordered that the custody of the child be handed over by S to the Applicant subject to several conditions set out in the judgment. Key among the conditions is that the Applicant was to obtain a mirror order from this Court reflecting the directions in the judgment, within 2 weeks. A copy of the mirror order was then to be filed in the Supreme Court of India.

5. The law relating to enforcement of judgments made in the foreign countries is set out in the Foreign Judgment (Reciprocal Enforcement) Act, Chapter 43 of the Laws of Kenya. The objective of the Act is to make provision for the enforcement in Kenya, of judgments given in other countries which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith. The orders that the Applicant seeks to have registered by this Court were issued by the Supreme Court of India. In order for the said order to be enforceable, it must meet 2 criteria. First, the order must be made by a designated court and second, it must be an order or judgment to which the Act applies.

6. Section 2(1) of the Act defines a designated court as follows:-

"designated court" means –

(a) a superior court of a reciprocating country which is a Commonwealth country;

(b) a superior court of any other reciprocating country which is specified in an order made under Section 13;

(c) a subordinate court of a reciprocating country which is specified in an order made under Section 13;

7. Section 2(1) of the Act further defines a "reciprocating country" as that country declared as such, for the purposes of this Act by the Minister under Section 13(1). The superior Court giving the judgment must be of a reciprocating country, as declared by the line Minister by an order, to be a reciprocating country for the purposes of the Act.

8. The Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984 lists in a schedule, the countries declared by the minister to be reciprocating countries. Paragraph 2 of the Order provides:

The countries specified in the schedule are declared to be reciprocating countries for the purposes of the Act and the Act shall apply with respect to judgments given by superior courts of those countries.

SCHEDULE

1. ***Australia,***
2. ***Malwai,***
3. ***Seychelles,***
4. ***Tanzania,***
5. ***Uganda,***
6. ***Zambia,***
7. ***The United Kingdom,***
8. ***Republic of Rwanda.***

9. From the above schedule, it is evident that India has not by an order of the Minister, been declared to be a reciprocating country. In the case of Jayesh Hasmukh Shah v. Navin Haria and another [2016] eKLR the Court of Appeal dismissed an appeal where the appellant sought to enforce and execute in Kenya a judgment from Ethopia which like India, is not a reciprocating country under the provisions of the Act. The Court stated:

There is currently no treaty in place between Kenya and Ethopia pursuant to which either country's judgment may be enforced by either country's court. It is not in dispute that Ethopia's Federal Supreme Court is not a "designated court" within the meaning of Kenya's Foreign Judgment (Reciprocal Enforcement) Act. The respondent cited the case of Intalframe Ltd. v. Mediterranean Shipping Company, (1986) KLR where this Court expressed that the basic principle upon which neighbouring or other states provided for enforcement of foreign judgments is one of reciprocity. It is our considered view that the case of Intalframe Ltd. v. Mediterranean Shipping Company (supra) and the Foreign Judgment (Reciprocal Enforcement) Act (Cap 43, Laws of Kenya) are not relevant to this appeal as they are applicable only where there is reciprocal arrangement on enforcement of foreign judgment.

10. There are currently no reciprocal arrangements in place between Kenya and India pursuant to which either country's judgment may be enforced or registered by either country's courts. As such, the Supreme Court of India is not a "designated court" within the meaning of the Act.

11. It is noted that the order, the registration of which is sought by the Appellant relates to the custody of the child of the Appellant and S. Even if India were a reciprocating country, the Application herein would still run into headwinds in view of the provisions of Section 3(3)(e) of the Act which stipulates:-

(3) This Act does not apply to a judgment or order-

(e) in proceedings in connection with the custody or guardianship of children;

12. This Court has no jurisdiction to enforce or register a foreign judgment in proceedings in connection with the custody or guardianship of a child. This is because the Act does not apply to judgment in in such proceedings. In this regard, I agree with Mysyoka, J. who in Ian Mbugua Mimano v. Charlotte Wamuyu Mutisya & 2 others [2014] eKLR. Stated.

There is no jurisdiction for me to deal with the matter of the enforcement of a foreign decree in proceedings in connection with the custody or guardianship of a child.

There is clearly no merit in the application dated 20th May, 2014 so far as it relates to enforcement of a decree made by a USA court in proceedings in connection with the custody or guardianship of a child. I decline to grant it, and I hereby dismiss it with costs.

13. The Court therefore makes a finding that the judgment from the Supreme Court of India, being from a superior court of a non-reciprocating country, and further being one in proceedings in connection with the custody or guardianship of a child, is not registrable in this Court by dint of Sections 13(1) and 3(3)(e) of the Foreign Judgment (Reciprocal Enforcement) Act.

14. The Applicant has relied on the case of **In Re Matter of I W P (Infant) [2013] eKLR** in support of his case. I have considered the decision and note that the same is distinguished, in that the judgment in respect of which registration was sought therein, was from a Superior Court in the United Kingdom, a reciprocating country within the meaning of Section 2 of the Act. Notably, the learned Judge did not address that restriction in Section 3(3)(e) on applicability of the act to matters relating guardianship and custody of children. In any event, the said judgment being of a Court of concurrent jurisdiction to this Court is not binding on this Court.

15. In the end and for the reasons stated, I do find that the Originating Summons dated 30.10.2020 lacks merit and the same is hereby dismissed.

This being a matter concerning a child, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 21ST DAY OF MAY 2021.

M. THANDE
JUDGE"

30. On 19.08.2021, Mr. Tushar Mehta, learned Solicitor General of India appeared and the matter was directed to be taken up on 24.08.2021. Following order was passed by this Court on 24.08.2021:-

"The circumstances in which Miscellaneous Application No.1167/2021 has been filed in Civil Appeal No.3559/2020, have been referred to in some detail in the earlier orders passed by this Court on 11.08.2021, 16.08.2021 and 17.08.2021.

"Pursuant to the request made by this Court, Mr. Tushar Mehta, learned SG has appeared and advanced certain submissions. Mr. Mukul Rohatgi and Ms. Sonia Mathur, learned Senior Advocates appearing for the applicant have also invited our attention to various facts of the matter.

In the light of the submission advanced by the learned counsel, in our view, it would be proper if the matter is placed before the Bench of three judges as the Judgment dated 28.10.2020 and Order dated 08.12.2020 were passed by the Bench of three judges of this Court.

We therefore, direct the Registry to place the instant matter before the Hon'ble CJI and seek requisite directions to constitute a Bench of three Judges alongwith Hon'ble Mr. Justice Hemant Gupta who was a member of the Bench when the Judgment dated 28.10.2020 and Order dated 08.12.2020 were passed.

List the matter at the end of the Board on 27.08.2021."

31. After hearing learned counsel for Smriti and Mr. Anunaya Mehta who rendered assistance as an Officer of the Court by order dated 27.08.2021, the matter was directed to be posted for orders by the

present Bench on 2nd September, 2021. However, on 01.09.2021, I.A. No.108665 of 2021 was filed by Smriti stating as under:-

> "2. That this Hon'ble Court had vide order dated 17.08.2021 granted the following prayers to the Appellant and against the Respondent –
>
> > "d. Restrain the Respondent-Perry Kansagra from taking any action, or/and taking any steps, or/and initiating and/or prosecuting any proceedings or any action of any nature before the Courts in Kenya or any other Court which will create an impediment in the implementation or execution of order dated 11.08.2021 or any other order or judgment passed by this Hon'ble Court;
> >
> > e. Restrain the Respondent-Perry Kansagra from seeking any modification of the mirror order dated 11.11.2020 from the High Court of Kenya, Milimani Law Courts, Family Division."
>
> 3. That the Appellant received an email dated 31.08.2021 along with a notice of motion and an affidavit in support of the notice of motion, both dated 26th August, 2021 and an order dated 30th August, 2021, passed by the High Court of Kenya. The said documents further establish the contumacious and perjurious conduct of the Respondent and are being placed before this Hon'ble Court as Annexure P-1 (Pg.No.5 to 127)."

32. On the same day, another application *i.e.* I.A. No.109369 of 2021 was filed by Smriti stating :-

> "3. That the Appellant received an email dated 31.08.2021 alongwith a Petition and an affidavit in support of the Petition, both dated 26th August, 2021 and an order dated 30th August 2021, passed by the High Court of Kenya. The said documents further establish the contumacious and perjurious conduct of the Respondent and are being placed before this Hon'ble Court as Annexure P-2."

33. From these applications and the documents appended thereto, it is evident that:

A. On 26.08.2021, Perry filed Petition No.E 301 of 2021 claiming *inter alia* for declaration that the orders passed by this Court were invalid and incapable of compliance and/ or enforcement and for permanent injunction barring Smriti from taking Aditya outside the jurisdiction of the High Court of Kenya. The relevant portions from the Petition are:

> "4. The Petitioner and the 1st Respondent solemnized their marriage on 29th July, 2007 at New Delhi, India and following the marriage, the 1st Respondent moved to Kenya and lived with the Petitioner in Nairobi, Kenya. The Minor was born on 2nd December, 2009 from the wedlock of the Petitioner and the 1st Respondent and the said child has dual Kenyan and British citizenship.
>
> 5. The 1st Respondent left Kenya and travelled to India on 10th March, 2012 along with the Minor under the pretext of going to visit her (the 1st Respondent's) Mother who lives in India and on arriving and settling in India, the 1st Respondent clandestinely filed a suit in the High Court at New Delhi, India seeking a permanent injunction restraining the Petitioner and his Parents from removing the Minor from the custody of the 1st Respondent or from removing the Minor from Delhi or accessing him in school.
>
> 6. The 1st Respondent unauthorizedly and illegally detained the Minor in India for Eight (8) Years and the Petitioner had to go through a tedious and prolonged litigation with the 1st Respondent in Indian Courts which litigation culminated in a judgment delivered on 28th October, 2020 by the Supreme Court of India in SUPREME COURT CIVIL APPEAL NO.3559 OF 2020 (SMRITI MADAN KANSAGRA VS. PERRY KANSAGRA) pursuant to which the Petitioner was, inter-alia, granted permanent custody of the Minor.
> 7. The judgments passed by all the three Indian Courts came to a conclusive finding that the best interest and welfare of the child is best secured by granting the Petitioner the custody of the Minor and the three relevant judgments issued in the proceedings between the Petitioner and the 1st Respondent are as follows:-
>
> a) **GUARDIANSHIP PETITION NO.53 OF 2012 (PERRY KANSAGRA VS SMRITI MADAN KANSAGRA)** filed in the Family Court South Saket District Courts, New Delhi where Petition was allowed and Petitioner herein declared as guardian of the Minor child are granted permanent custody of the minor child with the 1st Respondent being granted visitation rights and temporary custody during school vacations in summer and winters, each year.
>
> b) Thereafter, the said Order of the Family Court South Saket District Courts, New Delhi was challenged by the 1st Respondent before the High Court of Delhi vide Case No. **MAT. APP (F.C.) 30/ 2018**. The

said appeal was dismissed vide judgment dated **25th February, 2020** and the Petitioner herein was granted permanent custody.

c) Thereafter, the said order of the High Court of Delhi was challenged by the 1st Respondent before Supreme Court of India vide CIVIL APPEAL NO.3559 OF 2020 (SMRITI MADAN KANSAGRA VS PERRY KANSAGRA) being an appeal arising out of a Guardianship Petition filed at the Supreme Court of India where custody of the Minor was handed over to Perry Kansagra (the Petitioner), subject to the Petitioner meeting certain directions, among them, obtaining a 'Mirror Order' from the High Court in Nairobi, Kenya.

*** *** ***

12. It is humiliating and degrading to the Minor and a violation of his rights to have his inherent dignity respected and protected by forcefully compelling him to take out an Overseas Citizen of India (OCI) card in the Office of the Indian embassy at Nairobi without first ascertaining his feelings and wishes, and without taking into account the fact that he is a dual citizen of the Republic of Kenya and the United Kingdom.

13. The actions, of the 1st Respondent and the orders issued by the Supreme Court of India on 11th August, 2021 requiring the Minor to take out an OCI card and board a flight to India is a clear violation of the rights enshrined under Article 28 of the Constitution of Kenya which recognizes the inherent dignity of the Minor and the right to respect and protect that dignity.

14. No effort has been made by the 1st Respondent and/ or the Supreme Court of India to ascertain the wishes and feelings of the Minor, his emotional needs and no effort has been made to evaluate whether taking out an OCI card and arranging the traveling of the Minor to India during the pendency of the corona-virus pandemic is harmful to his welfare and best interest.

15. The petitioner alleges that under Article 53 of the Constitution of Kenya, the Minor has the right to be protected from abuse, neglect and inhuman treatment and to a recognition that the Minor's best interests are of paramount importance in every matter concerning the child. The concise allegations and facts the Petitioner relies upon to describe the manner and relevant acts of contravention of the said Fundamental Freedom under Article 53 of the Constitution of Kenya are:-

(a) The ineffectual and unenforceable Orders issued by the Supreme Court of India was given without jurisdiction. The Supreme Court of India could not exercise jurisdiction over the Kenyan Minor in matters that concerned the custody of the Minor who is now a resident and citizen of Kenyan. The orders did not have regard to the welfare, ascertainable feelings, wishes and best interest of the Minor and by compelling the Minor to take out OCI card and travel to India before ascertaining the emotional needs,

feelings and wishes of the Minor, the Court acted in total disregard of what constitutes a child's best interest.

(b) the Orders issued by the Supreme Court of India do not advance the rule of law and the human rights and fundamental freedoms guaranteed in the Bill of Rights. The orders are incapable of implementation and if implemented, would have absurd results because the said orders are not binding based on the following:

(i) India has not been declared a reciprocating country under the provisions of Foreign Judgment (Reciprocal Enforcement) Act, Chapter 43 of the Laws of Kenya and as such, the judgment of the Indian Courts cannot be effectively enforced and/or executed in Kenya.

(ii) Section 3(3) (e) of Foreign Judgment (Reciprocal Enforcement) Act, Chapter 43 of the Laws of Kenya does not recognize a judgment or order in proceedings connected with the custody or guardianship of children passed by foreign courts. In the foregoing circumstances, the Courts in Kenya are not bound by the foreign judgment in such a proceedings related with the custody or guardianship of children.

(iii) There is no valid "Mirror Order" and in the event the child is sent to India, there is every possibility that the child may be detained in India by the Indian Courts and/or the Mother and the Kenyan Courts who are lawfully vested with jurisdiction over Kenyan Nationals and Citizens will lose their jurisdiction over the Minor and it will become impossible for Kenyan Courts to protect the rights of the child in such an eventuality.

(c) No regard has been given to the Minor's physical, emotional and educational needs and the Minor is at risk of suffering harm by being compelled to travel to India during the existence of the Covid-19 pandemic, thus exposing him to health hazards.

(d) Kenyan Courts have exclusive territorial and/or geographical jurisdiction over children who are Kenyan Citizens and that jurisdiction cannot be taken away by any other Court or administrative body.

(e) It is unreasonable and contrary to public interest for any Court, Diplomatic Mission or administrative body to unilaterally compel a Minor to adopt citizenship or status of identity that the Minor has not expressed any ascertainable wish to acquire.

(f) The right of every child to have their best interest protected

and safeguarded is paramount and the orders issued by the Supreme Court of India purport to limit and restrict the enjoyment of the child's rights guaranteed under Article 53 (2) of the Constitution of Kenya.

(g) The acts of the 1st Respondent smacks of mala fide and are calculated to make sure that the Minor is issued with an OCI card and travels to India. The 1st Respondent is not motivated by the best interest of the child and offend the provisions of Article 53 of the Constitution of Kenya.

16. The Petitioner states that this Honourable Court has jurisdiction under Article 165(3) (a), (b) (d) and Article 258 of the Constitution of Kenya and Section 22(1) of the Children Act to hear and determine this Petition and make such orders, issue such writs and give such directions as it may consider appropriate bearing in mind the best interest of the Minor as by law required.

YOUR PETITIONER THEREFORE HUMBLY PRAYS THAT:-

1. A declaration of invalidity of Indian jurisdiction and/or laws and/or judgments denying, violating and/or threatening to infringe the fundamental rights of the Minor through purported and unenforceable judgments and orders relating to the Minor under Articles 23(3) (d) of the Constitution of Kenya.

2. A declaration that the Minor is a dual citizen of Kenya and the United Kingdom and a resident of Kenya and that India has no territorial and/or geographical jurisdiction over personal matters relating to the Minor.

3. A declaration that compelling the Minor to take out Overseas Citizen of India (OCI) card in the Office of the Indian Embassy at Nairobi and/or compelling the said Minor to Board a flight to India during the pendency of the highly infectious Covid-19 pandemic and against the travel restrictions imposed by the Government of the Republic of Kenya is contrary to Section 13(1) of the Children Act and is a violation of the fundamental right of the Minor enshrined under Article 28 and 53 of the Constitution of Kenya.

4. A declaration that there exists no valid "Mirror Orders" to the orders issued by the Supreme Court of India on 11th August, 2021 and in the circumstances, the Orders are inapplicable to the Minor and incapable of compliance and/or enforcement.

5. A declaration that under Section 3 93) (e) of the Foreign Judgment (Reciprocal Enforcement) Act, Chapter 43 of the Laws of Kenya, Kenya lacks jurisdiction to recognize, enforce or register a foreign judgment in proceedings that relate to the custody or guardianship of children who are citizens of the Republic of Kenya.

6. A declaration that all the rights of the Minor are governed exclusively by the Children Act, Chapter 141 of the Laws of Kenya and that to safeguard and promote the rights and welfare of the Minor, the 1st Respondent herein or any other party to these proceedings ought to seek any redress from Kenyan Courts where the Minor is a citizen and currently resident as provided for under Section 118 of the Children Act.

7. An Order that the Director of Children's Services do carry out an in-depth enquiry into the wellbeing, welfare, ascertainable wishes and feelings of the Minor under Section 4 (2), 11, 76 (3) of the Children Act and tender a report to this Honourable Court and provide all necessary assistance to the judicial process to the intent that orders issued by this Honourable Court which require administrative arrangements may achieve fulfilment.

8. An order directing the Petitioner to allow the 1st Respondent and the Minor unimpeded telephone access in circumstances and durations the Court shall deem reasonable and visitation rights to visit and stay with the Minor within the Republic of Kenya in circumstances and for a duration the Court shall deem reasonable provided that the 1st Respondent shall not remove the Minor from the said Republic of Kenya.

9. A permanent injunction barring the 1st Respondent either by herself, her Servants and/or Agents from taking the Minor outside the jurisdiction of this Honourable Court or any other person whosoever from arranging and/or facilitating the removal of the Minor from Kenya without the express willful consent of the Minor and the Petitioner. …."

B. In said Petition No.E 301 of 2021, Notice of Motion was also moved for interim relief pending hearing and determination of the dispute. The relevant portion of the Notice of Motion was:-

"NOTICE OF MOTION

(Under rule 11(1) Part II of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all enabling-provisions of the law.)

TAKE NOTICE that this Honourable Court shall be moved on ……the……day of ……2021, by Counsel for the Petitioner/Applicant for hearing an Application for ORDERS THAT:

1. This application be certified urgent and fit to be heard on priority basis.

2. Pending the *inter-partes* hearing and determination of this application, this Honourable court be pleased to issue a conservatory order of *status quo.*

3. Pending the *inter-partes* hearing and determination of this application, this Honourable Court be pleased to grant an order of temporary injunction restraining and barring the 1st Respondent either by herself, her Servants and/or Agents or any other person whosoever from taking the Minor outside the jurisdiction of this Honourable Court and/or arranging and/or facilitating the removal of the Minor from Kenya without the express consent of the Minor and the Petitioner.

4. Pending the *inter-partes* hearing and determination of this application, this Honourable Court be pleased to issue an order of temporary injunction restraining and barring the 1st Respondent either by herself, her Servants and/or Agents or any other person whosoever from applying for or obtaining an Overseas Citizenship of India (OCI) card in the name and/or on behalf of the Minor in order to facilitate the Minor to board a flight and travel outside the Republic of Kenya.

5. In the exercise of its inherent discretion, and should it finds fit, this Honourable Court be pleased to call and interact with the Minor and ascertain his feelings and wishes regarding the 1st Respondent's intention of removing him from Kenya and taking him to India during the pendency of the Covid-19 global pandemic and if the Court find it necessary, to Commission the relevant office in the Department of Children Services to prepare and file before this Honourable Court a situational report on the ascertainable feelings and wishes of the Minor and a finding as to whether the intended travel to India is in the best interest of the Minor.

6. An order that service of the Petition and the supporting Affidavit together with all pleadings and/or process of the Court in this matter be served upon the 1st Respondent through her last known email address and by Courier Service to her last known address in New Delhi, India being care of C-Block 487, Defence Colony, New Delhi-110024.

7. The cost of an incidentals to this application abide the results of the said Appeal.

WHICH APPLICATION is premised *inter alia* on the following grounds supported by the affidavit of the Petitioner/Applicant and on other grounds to be adduced at the hearing hereof;

a) THAT the Petitioner/Applicant is the biological father and natural guardian of the Minor and currently lives and takes care of the Minor at their Nairobi home following a Court Order issued by the Supreme Court of India in Supreme Court Civil Appeal No. 3559 of 2020 (SMRITI MADAN KANSAGRA VS. PERRY KANSAGRA)

b) THAT the Supreme Court of India in Supreme Court Civil Appeal No.3559 of 2020 (SMRITI MADAN KANSAGRA VS. PERRY KANSAGRA) came to the conclusive finding that the best interest and welfare of the child was best served and secured by granting the Petitioner permanent custody of the Minor with the Respondent being granted visitation rights during school vacations in summer and winters, each year.

c) THAT following the aforesaid Judgment of the Supreme Court of India, the Minor has been living with the Petitioner in Nairobi where he has acclimatized and accustomed to his new home and school environment and made friends and is scheduled to start Class VII at Peponi House School in Nairobi in the Month of September, 2021.

d) THAT on 28th June, 2021 the minor lost his paternal grandfather who succumbed to Covid-19 related complications and is still mourning the said loss as he was very close to his paternal grandfather. The minor fears the covid-19 pandemic and he prefers to stay in Nairobi and not travel during the pendency of the covid-19 pandemic.

e) THAT the 1st Respondent sought and on 11th August 2021, obtained orders from the Supreme Court of India in MISCELLANEOUS APPLICATION NO.1167 OF 2021 IN CIVIL APPEAL NO. 3559 OF 2020 (SMRITI MADAN KANSAGRA VS. PERRY KANSAGRA) where the Court issued orders compelling the Petitioner to apply in the office of the Indian Embassy at Nairobi for the Minor to be issued with Overseas Citizen of India card so as to enable the Minor board a flight and travel to India notwithstanding that the Government of the Republic of Kenya has issued travel restrictions through the Kenya Civil Aviation suspending all passenger flights between Kenya and India with effect from Midnight 7th June, 2021 due to the Covid-19 infections.

f) THAT the Minor has declared his ascertainable feelings and wishes as recorded in a situational report dated 9th August, 2021 and prepared by County Coordinator, Nairobi Country Children Services in the Department of Children Services and from the contents of the said report, the Minor fears the 1st Respondent and is not willing to travel to India; he prefers to stay in Kenya with the Petitioner and fears that the 1st Respondent who is drunkard, abusive and violent will illegally detain the Minor in India like she did previously.

g) THAT the 1st Respondent has moved with speed and booked an Air Ticket for the Minor to take the Minor to India via Paris contrary to the ascertainable feelings and wishes of the Minor and the interest of justice will best be served by granting a conservatory order of status quo and pending the hearing and determination of the annexed Petition.

h) THAT the Petitioner/Applicant's Petition raises substantial and important constitutional points as well as points of law and touch on matters of paramount importance to the best interest of the Minor and which is recognized and guaranteed under Article 53(2) of the Constitution.

i) THAT if a conservatory order and/or a temporary order of injunction is not granted restraining and barring the 1st Respondent either by herself, her Servants and/or Agents or any other person whosoever from removing the Minor from the jurisdiction of this Honourable Court and/or applying for an Overseas Citizenship of India (OCI) card in the name and/or on behalf of the Minor in order to facilitate the Minor to board a flight to India, the best interest of the Minor will be compromised and his rights and freedoms guaranteed under the Constitution will be violated and his health, mental and emotional development of affected.

j) THAT it is in the interest of justice and in the best interest of Aditya Vikram Kansagra that the orders sought herein be granted.

Dated at Nairobi this 26th day of August, 2021."

C. The affidavit of Perry in support of the Notice of Motion stated, *inter alia*:-

"15. THAT I am advised by Mr. Pravin Bowry SC, and which advice I verily believe to be true that due to the principle of diplomatic immunity, I cannot file suit and get orders against Government Officials of the Indian Embassy at Nairobi to restrain them from issuing the Minor with an Overseas Citizen of India card since they are not subject to the jurisdiction of Kenyan Courts in the performance of their official duties.

16. THAT I am further advised by my aforesaid Advocate and which advise I verily believe to be true, that under the provisions of Section 3 (3) € of the Foreign Judgment (Reciprocal Enforcement) Act, Chapter 43 of the Laws of Kenya, Courts in Kenya cannot recognize and/or deal with the orders obtained from foreign courts in proceedings connected with the custody or guardianship of children and the Orders obtained by the 1st Respondent on 11th August, 2021 in the Supreme Court of India cannot be given recognition and/or enforcement by Kenyan Courts and are thus invalid and need to be declared as such.

17. THAT I am therefore reasonably apprehensive that if this matter is not certified urgent and admitted to hearing on a priority basis and a conservatory order of status quo issued, the order obtained by the 1st Respondent on 11th August, 2021 from the Supreme Court of India and which is invalid and incapable of recognition and/or enforcement by Kenyan Courts will be used to impede and violate the fundamental rights and freedoms of the Minor who is a citizen and resident of the Republic of Kenya and used to unlawfully remove the Minor from the jurisdiction of this Honourable Court."

D. The Situational Report dated 9.8.2021 referred to in Paragraph 7(f) of the Notice of Motion was :-

"**MINISTRY OF EAC, LABOUR AND SOCIAL PROTECTION**
DEPARTMENT OF CHILD SERVICES
NAIROBI COUNTY CHILDREN SERVICES

Telephone (020) 2059212
Email

Provincial Headquarter Building
Nyayo House
PO Box 58016-0200
Nairobi
Date:09/08/2021

David Kiptum & Company Advocates
49, Mageta Road, off Muthangari Road, Lavington
P.O. Box 21863-001100
Nairobi

SITUATIONAL REPORT ON ADITYA VIKRAM KANSAGRA (MINOR)

The minor is 11 years old having been born on 2/12/2009. He is in year 7 at Pepont School. He was interviewed on 9/8/2021 following the complaints that were raised by his mother to his father via email and in an application filed before the Indian Supreme Court. The gist of her complaint is that the minor is being alienated from her, is being controlled and is sad and low.

The minor was interviewed and he indicated to me that he did not wish to talk to his mother because there was nothing for him to talk about. It was his claim that each time he talked to her she pressured him to leave Kenya and join her in India, something he does not want. He also said that India reminded him of very bad memories where his mother was mistreating him. That she used to shout at him whenever she was drunk something that affected him emotionally. It was also his claim that his mother did not allow him to play with his friends.

The minor said he preferred talking to his maternal grandmother whom he said was very kind to him while in India. He felt that his father was pressuring him to talk to his mother against his wish. He was very candid that he did not wish to go to India and that he preferred to stay in Kenya with his father.

Considering the ascertainable wish of the minor and the orders given by the India Court it is my considered opinion that you should move to the Children Court seeking orders that will give effect to his wishes. To force him to talk to his mother and to travel to India to see her against his wish is likely to visit untold psychological effect on him. Given the fact that the child is within the jurisdiction of Kenya, the children court is clothed with the jurisdiction to issue orders of this nature

Sd/-
ISADIA HOYD
COUNTY COORDINATOR
NAIROBI COUNTY CHILDREN SERVICES"

34. The documents and the developments referred to hereinabove show: -

(i) Perry had given an unequivocal undertaking to the High Court that he would submit to the jurisdiction of the Indian Courts. He had also given a solemn undertaking to this Court that he would comply with the Order dated 28.10.2020 in addition to the Judgment dated 28.10.2020.

(ii) In response to a specific submission raised in Miscellaneous Application No.2140 of 2020 (quoted in paragraph 16 hereinabove), it was submitted by Perry that he had subjected himself to the jurisdiction of this Court. While dealing with the rival submissions in the Order dated 8.12.2020, this Court made it clear that the undertaking given by Perry to the High Court would continue to be operative, in addition to the undertaking given to this Court.

(iii) The Judgment dated 28.10.2020 had called upon Perry to obtain a 'Mirror Order' from the concerned Court in Nairobi to reflect the directions contained in the Judgment dated 28.10.2020. Thereafter, the Order dated 9.11.2020 passed by the High Court of Kenya at Nairobi

along with the relevant application moved by Perry seeking registration of the Judgment dated 28.10.2020, was filed in this Court.

(iv) There was a dispute whether the registration granted vide order dated 9.11.2020 by the High Court of Kenya at Nairobi amounted to fulfilling the requirement of a "Mirror Order". The submissions on the point were dealt with in paragraphs 8 and 9 of the Order dated 8.12.2020. The learned counsel appearing for Perry had relied upon the opinion given by M/s. GMC Advocates which in turn had relied upon the decision of the High Court of Kenya at Nairobi in *Re: Matter of I W P (Infant) [2013] eKLR* to submit that the registration itself was a "Mirror Order" in compliance of the requirements of the Judgment dated 28.10.2020.

Relying on the submissions so advanced on behalf of Perry and in deference to the Order dated 9.11.2020 passed by the High Court of Kenya at Nairobi, in paragraph 10 of the Order dated 8.12.2020, this Court observed that the registration of the Judgment of this Court by the High Court of Kenya at Nairobi was sufficient compliance of the directions to obtain a "Mirror Order" issued from a Competent Court in Kenya.

(v) The Judgment dated 28.10.2020 and the Order dated 8.12.2020 passed by this Court were thus premised on the submission that the Order dated 9.11.2020 passed by the High Court of Kenya at Nairobi

while registering the Judgment dated 28.10.2020 passed by this Court was in fact the "Mirror Order".

(vi) It now transpires that by a subsequent Order dated 21.5.2021, the High Court of Kenya at Nairobi in Paragraph 13 of its order observed that the judgment of this Court was not registrable and dismissed the Originating Summons dated 30.10.2020 filed by Perry.

(vii) At no stage Perry brought this development to the notice of this Court that the Originating Summons moved by him seeking registration of the Judgment dated 28.10.2020 passed by this Court was dismissed by the High Court of Kenya at Nairobi on 21.5.2021. Having submitted to the jurisdiction of the Indian Courts it was the bounden duty of Perry to keep this Court appraised of all the developments particularly when the "Mirror Order" was the fulcrum on the basis of which this Court handed over to him the custody of Aditya.

(viii) This infraction gets more pronounced in the light of the stand taken in his Affidavit dated 5.8.2021 filed in this Court and referred to in Paragraph 22 hereinabove. In that affidavit Perry unequivocally stated that he had not even the remotest intention to disobey the Order passed by this Court including the Judgment dated 28.10.2020. Yet, something as basic and fundamental like the Order dated 21.05.2021 was not

brought to the notice of this Court. Logically, Perry should have brought back Aditya to this country so that status quo ante could be restored and appropriate orders could thereafter be passed by this Court.

(ix) Miscellaneous Application No.1167 of 2021 filed by Smriti had annexed e-mails exchanged between her and Perry and prayed that Perry be directed to comply with directions regarding vacation access. In response, apart from stating that he had no intentions to disobey the orders passed by this Court, Perry voiced concern about sending Aditya to India. Being well aware of the conditions in this Country, a solution was devised by this Court in its Order dated 11.08.2021 and certain directions to facilitate the entry of Aditya into and his exit from India in a safe manner were issued. Pertinently on 11.08.2021, the attention of this Court was not invited to the fact that the Situational Report dated 09.08.2021 as referred to hereinabove was made or that the matter was being looked into by the concerned authorities in Kenya.

(X) Despite clear directions issued in the Order dated 11.08.2021 Perry had not taken any steps to comply with the Order. As a matter of fact, by the time the matter was taken up for further hearing on 16.08.2021, Perry sought to withdraw the authorization in favour of the learned counsel who were all the while representing him before this Court.

(XI) As disclosed in I.A. 100550 of 2021 week-end Skype meetings between Smriti and Aditya were not facilitated from the week-end of 14.08.2021 and 15.08.2021. Perry also blocked all means of communications with Smriti. Though in law the learned advocates who had entered appearance on behalf of Perry would continue to represent him, notice was additionally directed to be served on Perry through Indian embassy of Nairobi.

(XII) In the light of the defiant attitude exhibited by Perry and his refusal to abide by the Orders passed by this court, ad-interim relief in terms of prayers (d) (e) and (f) made by Smriti in her I.A. No.100550 of 2021 was granted by this Court vide its order dated 17.08.2021.

(XIII) Finally, Petition No.E301 of 2021 and – Notice of Motion were moved on behalf of Perry, filed in the High Court of Kenya at Nairobi on 26.08.2021. The stand taken by Perry in said Petition and Notice of Motion is that it would be humiliating to compel Aditya to take OCI Card; that wishes of Aditya were not ascertained by this Court; that there was no valid Mirror Order and that the orders passed by this Court were without jurisdiction. He has prayed for declaration that there existed no valid "Mirror Order" and in the circumstances the orders passed by this Court are incapable of compliance and/or enforcement.

35. These developments not only show the defiant and contumacious posture now adopted by Perry but *prima facie* support the submissions of Smriti made in Interim Applications referred to in paragraphs 25, 27, and 28 herein above. There appears to be concrete material and reason to believe that it was a well-planned conspiracy on part of Perry to persuade this Court to pass orders in his favour and allow him the custody of Aditya and then turn around and defy the Orders of this Court.

36. It is fundamental that a party approaching the Court must come with clean hands, more so in child custody matters. Any fraudulent conduct based on which the custody of a minor is obtained under the orders of the Court, would negate and nullify the element of trust reposed by the Court in the concerned person. Wherever the custody of a minor is a matter of dispute between the parents or the concerned parties, the primary custody of the minor, in *parens patriae* jurisdiction, is with the Court which may then hand over the custody to the person who in the eyes of the Court, would be the most suitable person. Any action initiated to obtain such custody from the Court with fraudulent conduct and design would be a fraud on the process of the Court.

37. We may now refer to some of the cases where orders or decrees from the Court were obtained by a party after practicing fraud upon the Court.

(a) In ***S.P. Chengalvaraya Naidu v. Jagannath***[4] the observations by this Court were to the following effect: -

> "**5.** The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.
>
> **6.** The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

(b) In ***Indian Bank v. Satyam Fibres (India) (P) Ltd.***[5] the principles were stated thus: -

---

[4] (1994) 1 SCC 1
[5] (1996) 5 SCC 550

"21. In *Smith* v. *East Elloe Rural Distt. Council*[6] the House of Lords held that the effect of fraud would normally be to vitiate any act or order. In another case, *Lazarus Estates Ltd.* v. *Beasley*[7], Denning, L.J. said:

> 'No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.'

22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business.

23. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practised upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order. (See: *Benoy Krishna Mukerjee* v. *Mohanlal Goenka*[8] ; *Gajanand Sha* v. *Dayanand Thakur*[9] ; *Krishnakumar* v. *Jawand Singh*[10] ; *Devendra Nath Sarkar* v. *Ram Rachpal Singh*[11]; *Saiyed Mohd. Raza* v. *Ram Saroop*[12]; *Bankey Behari Lal* v. *Abdul Rahman*[13]; *Lekshmi Amma Chacki Amma* v. *Mammen Mammen*[14], The court has also the inherent power to set aside a sale brought about by fraud practised upon the court (*Ishwar Mahton* v. *Sitaram Kumar*[15] or to set aside the order recording compromise obtained by fraud. (*Bindeshwari Pd. Chaudhary* v. *Debendra Pd. Singh*[16]; *Tara Bai* v. *V.S. Krishnaswamy Rao*[17]"

---

[6] [1956 AC 736 : (1956) 1 All ER 855 : (1956) 2 WLR 888]
[7] [(1956) 1 QB 702 : (1956) 1 All ER 341 : (1956) 2 WLR 502] (QB at p. 712)
[8] [AIR 1950 Cal 287]
[9] [AIR 1943 Pat 127 : ILR 21 Pat 838]
[10] [AIR 1947 Nag 236 : ILR 1947 Nag 190]
[11] [ILR (1926) 1 Luck 341 : AIR 1926 Oudh 315]
[12] [ILR (1929) 4 Luck 562 : AIR 1929 Oudh 385 (FB)]
[13] [ILR (1932) 7 Luck 350 : AIR 1932 Oudh 63]
[14] [1955 Ker LT 459] .
[15] [AIR 1954 Pat 450]
[16] [AIR 1958 Pat 618 : 1958 BLJR 651]
[17] [AIR 1985 Kant 270 : ILR 1985 Kant 2930]

(C) In ***United India Insurance Co. Ltd. v. Rajendra Singh***[18] this Court observed: -

> **"16.** Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

(D) In ***Ram Chandra Singh v. Savitri Devi***[19] the discussion on the point was as under:-

> **"18.** A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.
> **18.** A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."

(E) In ***Hamza Haji v. State of Kerala***[20] the matter in issue was discussed thus: -

> **"10.** It is true, as observed by De Grey, C.J., in *R.* v. *Duchess of Kingston*[21] that:
> " 'Fraud' is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical and temporal."
>
> **11.** In *Kerr on Fraud and Mistake*, it is stated that:
> "In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest

[18] (2000) 3 SCC 581
[19] (2003) 8 SCC 319
[20] (2006) 7 SCC 416
[21] [2 Smith LC 687]

> court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."

12. It is also clear as indicated in *Kinch* v. *Walcott*[22] that it would be in the power of a party to a decree vitiated by fraud to apply directly to the court which pronounced it to vacate it. According to Kerr:

> "In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is not, at all events after long delay, sufficient … but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury."
> (*See* 7th Edn., pp. 416-17)

13. In *Corpus Juris Secundum*, Vol. 49, para 265, it is acknowledged that:

> "Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgments."

In para 269, it is further stated:

> "Fraud or collusion in obtaining judgment is a sufficient ground for opening or vacating it, even after the term at which it was rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action."

It is also stated:

> "Fraud practised on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair."

14. In *American Jurisprudence*, 2nd Edn., Vol. 46, para 825, it is stated:

> "Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a court of equity with the operation of a judgment. The power of courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on this ground were made in equity before the practice of awarding new trials was introduced into the courts of common law.

---

[22] [1929 AC 482 : 1929 All ER Rep 720 : 141 LT 102 (PC)]

> Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied."

15. The law in India is not different. Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a court to consider and decide the question whether a prior adjudication is vitiated by fraud. In *Paranjpe* v. *Kanade*[23] it was held that: (ILR p. 148)

> "It is always competent to any court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud;"

16. In *Lakshmi Charan Saha* v. *Nur Ali*[24] it was held that: (ILR p. 936)

> "[T]he jurisdiction of the Court in trying a suit [questioning the earlier decision as being vitiated by fraud,] was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree."

17. In *Manindra Nath Mittra* v. *Hari Mondal*[25] the Court explained the elements to be proved before a plea of a prior decision being vitiated by fraud could be upheld. The Court said: (AIR p. 127)

> "With respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words, where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence:"

---

[23] [ILR (1882) 6 Bom 148]
[24] [ILR (1911) 38 Cal 936 : 15 CWN 1010]
[25] [(1919) 24 CWN 133 : AIR 1920 Cal 126]

18. The position was reiterated by the same High Court in *Esmile Uddin Biswas* v. *Shajoran Nessa Bewa*[26] . It was held that: (AIR p. 650)

> "[I]t must be shown that the fraud was practised in relation to the proceedings in Court and the decree must be shown to have been procured by practising fraud of some sort, upon the Court:"

19. In *Nemchand Tantia* v. *Kishinchand Chellaram (India) Ltd.*[27] it was held that: (CWN p. 740)

> "A decree can be reopened by a new action when the court passing it had been misled by fraud, but it cannot be reopened when the court is simply mistaken; when the decree was passed by relying on perjured evidence, it cannot be said that the court was misled."

20. It is not necessary to multiply authorities on this question since the matter has come up for consideration before this Court on earlier occasions. In *S.P. Chengalvaraya Naidu* v. *Jagannath*[28] this Court stated that: (SCC p. 2, para 1)

> "It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eye of the law. Such a judgment/decree—by the first court or by the highest court—has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to the court with a true case and prove it by true evidence. Their Lordships stated: (SCC p. 5, para 5)

> "The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

21. In *Ram Preeti Yadav* v. *U.P. Board of High School and Intermediate Education*[29] this Court after quoting the relevant passage from *Lazarus Estates*

---

[26] [132 IC 897 : AIR 1931 Cal 649 (2)]
[27] [(1959) 63 CWN 740 : AIR 1959 Cal 776]
[28] [(1994) 1 SCC 1 : 1993 Supp (3) SCR 422]
[29] [(2003) 8 SCC 311 : 2003 Supp (3) SCR 352]

Ltd. v. *Beasley*[30] and after referring to *S.P. Chengalvaraya Naidu* v. *Jagannath*[31] reiterated that fraud avoids all judicial acts. In *State of A.P.* v. *T. Suryachandra Ra*[32]*o* this Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted (at SCC p. 155, para 16) the observations of Lord Denning in *Lazarus Estates Ltd.* v. *Beasley*[33] that: (All ER p. 345 C)

> "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

22. According to *Story's Equity Jurisprudence*, 14th Edn., Vol. 1, para 263:

> "Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

23. In *Patch* v. *Ward* [34] Sir John Rolt, L.J. held that:

> "Fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and obtaining that decree by that contrivance."

24. This Court in *Bhaurao Dagdu Paralkar* v. *State of Maharashtra*[35] held that: (SCC p. 607)

> "Suppression of a material document would also amount to a fraud on the court. Although, negligence is not fraud but it can be evidence on fraud."

25. Thus, it appears to be clear that if the earlier order from the Forest Tribunal has been obtained by the appellant on perjured evidence, that by itself would not enable the Court in exercise of its power of certiorari or of review or under Article 215 of the Constitution of India, to set at naught the earlier order. But if the court finds that the appellant had founded his case before the Forest Tribunal on a false plea or on a claim which he knew to be false and suppressed documents or transactions which had relevance in deciding his claim, the same would amount to fraud. In this

---

30 [(1956) 1 All ER 341 : (1956) 2 WLR 502 : (1956) 1 QB 702 (CA)]
31 [(1994) 1 SCC 1 : 1993 Supp (3) SCR 422]
32 [(2005) 6 SCC 149]
33 [(1956) 1 All ER 341 : (1956) 2 WLR 502 : (1956) 1 QB 702 (CA)]
34 [(1867) 3 Ch App 203 : 18 LT 134]
35 [(2005) 7 SCC 605]

case, the appellant had purchased an extent of about 55 acres in the year 1968 under Document No. 2685 of 1968 dated 2-6-1968. He had, even according to his evidence before the Forest Tribunal, gifted 5 acres of land to his brother under a deed dated 30-1-1969. In addition, according to the State, he had sold, out of the extent of 55.25 acres, an extent of 49.93 acres by various sale deeds during the years 1971 and 1972. Though, the details of the sale deeds like the numbers of the registered documents, the dates of sale, the names of the transferees, the extents involved and the considerations received were set out by the State in its application for review before the High Court, except for a general denial, the appellant could not and did not specifically deny the transactions. Same is the case in this Court, where in the counter-affidavit, the details of these transactions have been set out by the State and in the rejoinder filed by the appellant, there is no specific denial of these transactions or of the extents involved in those transactions. Therefore, it stands established without an iota of doubt as found by the High Court, that the appellant suppressed the fact that he had parted with almost the entire property purchased by him under the registered document through which he claimed title to the petition schedule property before the Forest Tribunal. In other words, when he claimed that he had title to 20 acres of land and the same had not vested in the State and in the alternative, he bona fide intended to cultivate the land and was cultivating that land, as a matter of fact, he did not have either title or possession over that land. The Tribunal had found that the land was a private forest and hence has vested under the Act. The Tribunal had granted relief to the appellant only based on Section 3(3) of the Act, which provided that so much extent of private forest held by an owner under a valid registered document of title executed before the appointed day and intended for cultivation by him and that does not exceed the extent of the ceiling area applicable to him under Section 82 of the Kerala Land Reforms Act, could be exempted. Therefore, unless the appellant had title to the application schedule land and proved that he intended to cultivate that land himself, he would not have been entitled to an order under Section 3(3) of the Act. It is obvious that when he made the claim, the appellant neither had title nor possession over the land. There could not have been any intention on his part to cultivate the land with which he had already parted and of which he had no right to possession. Therefore, the appellant played a fraud on the Court by holding out that he was the title-holder of the application schedule property and he intended to cultivate the same, while procuring the order for exclusion of the application schedule lands. It was not a case of mere perjured evidence. It was suppression of the most vital fact and the founding of a claim on a non-existent fact. It was done knowingly and deliberately, with the intention to deceive. Therefore, the finding of the High Court in the judgment under appeal that the appellant had procured the earlier order from the Forest Tribunal by playing a fraud on it, stands clearly established. It was not a case of the appellant merely putting forward a false claim or obtaining a judgment based on perjured evidence. This was a case where on a fundamental fact of entitlement to relief, he had deliberately misled the Court by suppressing vital information and putting forward a false claim, false to his knowledge, and a claim which he knew had no basis either in fact or on law. It is therefore clear that the order of the Forest Tribunal was procured by the appellant by playing a fraud and the said order is vitiated by fraud. The fact that the High Court on the earlier occasion declined to interfere either on the ground of delay in approaching it or on the ground that a second review was not maintainable, cannot deter a Court moved in that behalf from declaring the earlier order as vitiated by fraud.

> **26.** The High Court, as a court of record, has exercised its jurisdiction to set at naught the order of the Forest Tribunal thus procured by the appellant by finding that the same is vitiated by fraud. There cannot be any doubt that the Court in exercise of its jurisdiction under Article 215 of the Constitution of India has the power to undo a decision that has been obtained by playing a fraud on the Court. The appellant has invoked our jurisdiction under Article 136 of the Constitution of India. When we find in agreement with the High Court that the order secured by him is vitiated by fraud, it is obvious that this Court should decline to come to his aid by refusing the exercise of its discretionary jurisdiction under Article 136 of the Constitution of India. We do not think that it is necessary to refer to any authority in support of this position except to notice the decision in *Ashok Nagar Welfare Assn.* v. *R.K. Sharma* [(2002) 1 SCC 749 : 2001 Supp (5) SCR 662] ."

(F) In ***K.D. Sharma v. SAIL***[36] the matter in issue was dealt with as under:-

> **"26.** It is well settled that "fraud avoids all judicial acts, ecclesiastical or temporal" proclaimed Chief Justice Edward Coke of England about three centuries before. Reference was made by the counsel to a leading decision of this Court in *S.P. Chengalvaraya Naidu* v. *Jagannath*[37] wherein quoting the above observations, this Court held that a judgment/decree obtained by fraud has to be treated as a nullity by every court.
>
> **27.** Reference was also made to a recent decision of this Court in *A.V. Papayya Sastry* v. *Govt. of A.P.*[38] Considering English and Indian cases, one of us (C.K. Thakker, J.) stated: (SCC p. 231, para 22)
>
> > "*22*. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings."
>
> The Court defined "fraud" as an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam.

---

[36] (2008) 12 SCC 481
[37] [(1994) 1 SCC 1]
[38] [(2007) 4 SCC 221]

….. ….. …..

39. If the primary object as highlighted in *Kensington Income Tax Commrs*[39]. is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

(G) In ***Meghmala v. G. Narasimha Reddy***[40] this Court observed: -

"28. It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of the law. "Fraud avoids all judicial acts, ecclesiastical or temporal." (Vide *S.P. Chengalvaraya Naidu* v. *Jagannath*[41]. In *Lazarus Estates Ltd.* v. *Beasley*[42] the Court observed without equivocation that: (QB p. 712) "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

29. In *A.P. State Financial Corpn.* v. *GAR Re-Rolling Mills*[43] and *State of Maharashtra* v. *Prabhu*[44] this Court observed that a writ court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law."

30. In *Shrisht Dhawan* v. *Shaw Bros*[45]. it has been held as under: (SCC p. 553, para 20)

> "*20*. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."

---

[39] [(1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA)]
[40] (2010) 8 SCC 383
[41] [(1994) 1 SCC 1 : AIR 1994 SC 853]
[42] [(1956) 1 QB 702 : (1956) 2 WLR 502 : (1956) 1 All ER 341 (CA)]
[43] [(1994) 2 SCC 647 : AIR 1994 SC 2151]
[44] [(1994) 2 SCC 481 : 1994 SCC (L&S) 676 : (1994) 27 ATC 116]
[45] [(1992) 1 SCC 534 : AIR 1992 SC 1555]

31. In *United India Insurance Co. Ltd.* v. *Rajendra Singh*[46] this Court observed that "Fraud and justice never dwell together" (*fraus et jus nunquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries.

32. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See *Vizianagaram Social Welfare Residential School Society* v. *M. Tripura Sundari Devi*[47], *Union of India* v. *M. Bhaskaran*[48], *Kendriya Vidyalaya Sangathan* v. *Girdharilal Yadav*[49], *State of Maharashtra* v. *Ravi Prakash Babulalsing Parmar*[50], *Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Co.*[51] and *Mohd. Ibrahim* v. *State of Bihar*[52].

33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. [Vide *Vimla (Dr.)* v. *Delhi Admn.*[53], *Indian Bank* v. *Satyam Fibres (India) (P) Ltd.*[54], *State of A.P.* v. *T. Suryachandra Rao*[55], *K.D. Sharma* v. *SAIL*[56] and *Central Bank of India* v. *Madhulika Guruprasad Dahir*[57].

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (*i*) knowingly, or (*ii*) without belief in its truth, or (*iii*) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide *S.P. Chengalvaraya Naidu*[58], *Gowrishankar* v. *Joshi Amba Shankar Family Trust*[59], *Ram Chandra Singh* v. *Savitri Devi*[60], *Roshan Deen* v. *Preeti Lal*[61], *Ram*

---

46 [(2000) 3 SCC 581 : 2000 SCC (Cri) 726 : AIR 2000 SC 1165]
47 [(1990) 3 SCC 655 : 1990 SCC (L&S) 520 : (1990) 14 ATC 766]
48 [1995 Supp (4) SCC 100 : 1996 SCC (L&S) 162 : (1996) 32 ATC 94]
49 [(2004) 6 SCC 325 : 2005 SCC (L&S) 785]
50 [(2007) 1 SCC 80 : (2007) 1 SCC (L&S) 5]
51 [(2007) 8 SCC 110 : AIR 2007 SC 2798]
52 [(2009) 8 SCC 751 : (2009) 3 SCC (Cri) 929]
53 [AIR 1963 SC 1572 : (1963) 2 Cri LJ 434]
54 [(1996) 5 SCC 550]
55 [(2005) 6 SCC 149 : AIR 2005 SC 3110]
56 [(2008) 12 SCC 481]
57 [(2008) 13 SCC 170 : (2009) 1 SCC (L&S) 272]
58 [(1994) 1 SCC 1 : AIR 1994 SC 853]
59 [(1996) 3 SCC 310 : AIR 1996 SC 2202]
60 [(2003) 8 SCC 319]
61 [(2002) 1 SCC 100 : 2002 SCC (L&S) 97 : AIR 2002 SC 33]

Preeti Yadav v. *U.P. Board of High School & Intermediate Education*[62] and *Ashok Leyland Ltd.* v. *State of T.N.*[63]

35. In *Kinch* v. *Walcott*[64] it has been held that:

> "… mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury".
>
> Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury."

36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est."

(H) In ***Badami v. Bhali***[65] a discussion was as under: -

"29. Presently, we shall refer as to how this Court has dealt with concept of fraud. In *S.B. Noronah* v. *Prem Kumari Khanna*[66] while dealing with the concept of estoppel and fraud a two-Judge Bench has stated that: (SCC p. 58, para 20)

> "*20*. It is an old maxim that estoppels are odious, although considerable inroad into this maxim has been made by modern law. Even so, 'a judgment obtained by fraud or collusion, even, it seems, a judgment of the House of Lords, may be treated as a nullity'. (See *Halsbury's Laws of England*, Vol. 16, 4th Edn., para 1553.) The point is that the sanction granted under Section 21, if it has been procured by fraud or collusion, cannot withstand invalidity because, otherwise, high public policy will be given as hostage to successful collusion."

30. In *S.P. Chengalvaraya Naidu* v. *Jagannath*[67] this Court commenced the verdict with the following words: (SCC p. 2, para 1)

> "*1*. 'Fraud avoids all judicial acts, ecclesiastical or temporal' observed Chief Justice Edward Coke of England about three

---

62 [(2003) 8 SCC 311 : AIR 2003 SC 4268]
63 [(2004) 3 SCC 1 : AIR 2004 SC 2836])
64 [1929 AC 482 : 1929 All ER Rep 720 (PC)]
65 (2012) 11 SCC 574
66 [(1980) 1 SCC 52 : AIR 1980 SC 193]
67 [(1994) 1 SCC 1]

> centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eye of the law. Such a judgment/decree—by the first court or by the highest court—has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."
> In the said case it was clearly stated that the courts of law are meant for imparting justice between the parties and one who comes to the court, must come with clean hands."
>
> ….. ….. …..

32. In *Shrisht Dhawan* v. *Shaw Bros.*[68] it has been opined that the fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It has been defined as an act of trickery or deceit. The aforesaid principle has been reiterated in *Roshan Deen* v. *Preeti Lal*[69], *Ram Preeti Yadav* v. *U.P. Board of High School and Intermediate Education*[70] and *Ram Chandra Singh* v. *Savitri Devi*[71].

33. In *State of A.P.* v. *T. Suryachandra Rao*[72] after referring to the earlier decision this Court observed as follows: (SCC p. 155, para 16)

> "*16*. In *Lazarus Estates Ltd.* v. *Beasley*[73] Lord Denning observed at QB p. 712:
> '… No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.'
> In the same judgment Lord Parker, L.J. observed that fraud 'vitiates all transactions known to the law of however high a degree of solemnity' (*Lazarus case*[74], QB p. 722)."

34. Yet in another decision *Hamza Haji* v. *State of Kerala*[75] it has been held that no court will allow itself to be used as an instrument of fraud and no court, by way of rule of evidence and procedure, can allow its eyes to be closed to the fact it is being used as an instrument of fraud. The basic principle is that a party who secures the judgment by taking recourse to fraud should not be enabled to enjoy the fruits thereof.

….. ….. …..

---

68 [(1992) 1 SCC 534 : AIR 1992 SC 1555]
69 [(2002) 1 SCC 100 : 2002 SCC (L&S) 97 : AIR 2002 SC 33]
70 [(2003) 8 SCC 311]
71 [(2003) 8 SCC 319]
72 [(2005) 6 SCC 149]
73 [(1956) 1 QB 702 : (1956) 2 WLR 502 : (1956) 1 All ER 341]
74 [(1956) 1 QB 702 : (1956) 2 WLR 502 : (1956) 1 All ER 341]
75 [(2006) 7 SCC 416 : AIR 2006 SC 3028]

> **38.** All these reasonings are absolutely non-plausible and common sense does not even remotely give consent to them. It is fraudulent all the way. The whole thing was buttressed on the edifice of fraud and it needs no special emphasis to state that what is pyramided on fraud is bound to decay. In this regard we may profitably quote a statement by a great thinker:
>
> > "Fraud generally lights a candle for justice to get a look at it; and rogue's pen indicts the warrant for his own arrest." "

38. We heard the learned Solicitor General, the learned Senior Counsel for Smriti and Mr. Anunaya Mehta (who had earlier represented Perry) as an Officer of the Court.

(A) The learned Solicitor General submitted that as the order of custody was obtained by Perry by practising fraud upon the Court, not only the Judgment dated 28.10.2010 and the Order dated 08.12.2020 be recalled but the Guardianship Proceeding initiated by Perry be also dismissed. It is submitted that the conduct exhibited by Perry would call for initiation of proceeding in contempt and an appropriate notice be issued to him. It was further submitted that the custody of Aditya so obtained by Perry and continues to be illegal and invalid. In his submission, now that Aditya is in Kenya, certain proceedings might have to be initiated by Smriti in Kenya apart from defending the proceeding initiated by Perry in Kenya. He submitted that the Indian High Commission in Kenya would provide all logistical support to Smriti in such action(s) to be initiated or defended by her.

(B) Mr. Amarjit Singh Chandhiok and Ms. Sonia Mathur, learned Senior Advocates appearing for Smriti supported the submissions of the learned Solicitor General that the Judgment dated 28.10.2010 and Order dated 08.12.2020 passed by this Court be recalled and proceeding in Contempt jurisdiction be initiated. They further submitted that since the custody of Aditya was obtained in a fraudulent manner, Central Bureau of Investigation be directed to register a crime against Perry for having committed criminal offences punishable under Sections 361, 362 and 363 of the IPC[76]. It was also submitted that the learned Solicitor General be asked to make appropriate request to the Attorney General for Kenya so that the process would be expedited and Aditya would be brought back as early as possible.

(C) Mr. Anunaya Mehta, learned Advocate fairly accepted that the conduct of Perry was indefensible and supported the course of action suggested by the learned Solicitor General.

39. Though, at every juncture solemn undertakings were given by Perry to the High Court and this Court, such undertakings were not only flagrantly violated but a stand is now taken challenging the very jurisdiction of the Indian Courts, despite having submitted himself to the

[76] The Indian Penal Code, 1860

jurisdiction of the Indian Courts. Such conduct, *prime facie,* can certainly be said to be contumacious calling for an action in contempt jurisdiction. Moreover, the non-disclosure of material facts by Perry at the relevant junctures also shows that he approached the Indian Courts with unclean hands.

40. It was only on the basis of the solemn undertakings given by Perry and the order dated 09.11.2020 passed by the High Court of Kenya at Nairobi which was projected to be a "Mirror Order" in compliance of the directions issued by this Court, that the custody of Aditya was directed to be handed over to Perry. Since the false and fraudulent representations made by Perry were the foundation, on the basis of which this Court was persuaded to handover custody of Aditya to him, it shall be the duty of this Court to nullify, in every way, the effect and impact of the orders which were obtained by playing fraud upon the Court. All the decisions referred to hereinabove point in that direction. This Court would therefore be well within its power and justified to recall all the orders and continue to assume jurisdiction to ensure that the situation as it prevailed prior to the passing of the orders by the Trial Court, the High Court and this Court, gets restored, whereafter appropriate decision can be taken in *parens patriae* jurisdiction.

41. It is true that Aditya is now in Kenya. But he was taken to Kenya only on the basis of fraudulently obtained orders from this Court. In our considered view, the Indian Courts which were the Courts of first contact and had complete jurisdiction over Aditya, must continue to exercise such power and jurisdiction to correct the wrongs which occurred as a result of fraudulent conduct on part of Perry. It may be stated here that at every juncture, welfare of Aditya was and will always continue to be the primary consideration for the Indian Courts. He was interviewed by very competent and qualified Counsellors whose reports and assessments have been part of the record. Aditya was also interviewed by the Trial Court, the High Court and this Court. At no stage any mistreatment by Smriti was even remotely suggested or adverted to by Aditya. After Aditya is brought back to this country, this Court will certainly have appropriate interactions with Aditya to understand his wishes while considering his welfare.

42. In the premises, we pass following directions: -

(A) The Judgment dated 28.10.2020 and the Order dated 08.12.2020 passed by this Court are recalled.

(B) The Guardianship Petition No.53 of 2012 filed by Perry in the District Court, Saket, New Delhi seeking permanent custody of Aditya

and the resultant proceedings arising therefrom including MAT APP (F.C.) No.30 of 2018 filed in the High Court, are dismissed.

(C) The Orders granting custody having been recalled, the custody of Aditya with Perry is declared to be illegal and ab initio void.

(D) Issue notice to Perry as to why proceedings in contempt jurisdiction be not initiated against him for having violated the solemn undertakings given to this Court, returnable on 16th November, 2021. The Registry is directed to register *Suo Motu* Contempt Case and proceed accordingly.

(E) The notice shall additionally be served through e-mail directed at the e-mail id used by Perry in communicating with Smriti. The details in that behalf shall be furnished to the Registry by Smriti within two days.

(F) The Central Bureau of Investigation, New Delhi through its Director is directed to initiate appropriate proceedings by registering criminal proceedings against Perry and to secure and entrust the custody of Aditya to Smriti.

(G) The Secretary, Ministry of External Affairs, Government of India, New Delhi and the Indian Embassy in Kenya are directed to ensure that all possible assistance and logistical support is extended to Smriti in securing the custody of Aditya.

(H) From and out of the amount of Rs.1 crore deposited by Perry in this Court, at this stage, an amount of Rs.25 lakhs be handed over to Smriti towards legal expense incurred or required to be incurred hereafter. Rest of the money shall continue to be kept in deposit with the Registry till further orders.

43. With these directions, Miscellaneous Application No.1167 of 2021 and connected Interim Applications are disposed of.

.....J.
(UDAY UMESH LALIT)

.....J.
(HEMANT GUPTA)

.....J.
(AJAY RASTOGI)

NEW DELHI,
OCTOBER 07, 2021