

SUPREME COURT OF INDIA

Shilpa Aggarwal

Vs.

Aviral Mittal

(Altamas Kabir and Cyriac Joseph JJ.)

09.12.2009

JUDGMENT

ALTAMAS KABIR, J.

1. Leave granted.

2. The question which we are called upon to decide in this case is whether a 3= year old girl child, who was born in England of Indian parents and is a British citizen by birth, can be kept in the custody of the mother who is now currently residing in India, despite an order passed on 26th November, 2008, by the High Court of Justice, Family Division, U.K., directing that the child be returned to the jurisdiction of the Courts of England and Wales.

3. This is one of those cases where a minor child below 4 years of age is the victim of the acrimony of the two adults who were responsible for her birth. The appellant was married to the Respondent No.1 herein on 4th November, 2003, and as the Respondent No.1 was already working in the United Kingdom since November, 2000, the parties set up their matrimonial home first in Scotland and then in England. A girl child, who is now 3= years of age, was born of the said marriage. The appellant herein also obtained employment in U.K. and both the Respondent No.1 and the appellant

acquired the status of permanent residents of U.K. in 2004 prior to the birth of the child on 20th February, 2006. Being born in the United Kingdom, the child acquired British citizenship and was the holder of a British passport, although, her parents continued to hold Indian passports.

4. Soon after the birth of the child, some disagreements seem to have developed between the couple but, in any event, the appellant along with the minor child came to India on 12th September, 2008. The Respondent No.1 also came to India on 10th October, 2008, and returned to the United Kingdom on 14th October, 2008. According to the Respondent No.1, the appellant herein was supposed to join him in his family house at New Delhi once he arrived in India, but it is his case that she chose not to do so.

According to the Respondent No.1, the appellant and the minor child were supposed to leave for U.K. on 9th November, 2008, but the appellant got their tickets cancelled on 7th November, 2008, and remained behind in India. The Respondent No.1 thereupon started proceedings before the High Court of Justice, Family Division, U.K., on 25th November, 2008, praying for an order that the minor child be made a ward of the Court and for a direction upon the appellant to return the minor child to the jurisdiction of the said Court. On such ex-parte application, the High Court of Justice, Family Division, U.K., on 26th November, 2009, directed the appellant herein by an ex-parte order to return the minor child, Ms. Elina, to the jurisdiction of the said Court. A further direction was given for the passport and other international travel documents of the minor child to be handed over to the Solicitors of the Respondent No.1 within 72 hours of the return of the child and the same were not to be released to either party without the permission of the High Court.

5. According to the Respondent No.1, since the parties had set up their matrimonial home in Scotland, and, thereafter, in England, they were subject to the jurisdiction of the Courts in U.K. since 2003.

In addition, the parties had worked for gain in U.K. and the minor child was also holding a British passport with the parents having acquired permanent resident status in U.K. It was thus the case of the Respondent No.1 that the status of the minor child in India was that of an "illegal migrant" in view of the directions passed by the English Courts and the child should be returned to that jurisdiction.

6. According to the appellant, the proceedings in the United Kingdom were taken behind her back and it is only on 1st December, 2008, that she received a copy of the proceedings filed before the High Court of Justice, Family Division, U.K. Immediately thereafter, on 4th December, 2008, Writ Petition (Crl.) No.1553 of 2008 was filed by Mr. Shanti Bhushan (father of the Respondent No.1), allegedly on the strength of a Special Power of Attorney executed by the Respondent No.1 in his favour, seeking protection of the minor child before the Delhi High Court and for a direction that custody of the minor child be handed over to him. Notice was issued on the said writ petition and on 16th December, 2008, the appellant was represented before the Delhi High Court through her learned counsel. Incidentally, it may be indicated that 15th December, 2008, was also said to have

been fixed by the High Court in U.K. for hearing of the petition filed by the Respondent No.1 and also for the appearance of the appellant herein.

7. On 7th January, 2009, the Delhi High Court directed both the parties to appear before the Delhi High Court Mediation Centre on 9th January, 2009, to explore the possibility of a settlement and also gave visitation rights to the Respondent No.1 to see his minor daughter. It further appears that on 17th January, 2009, the minor child was admitted to Apeejay School, Pitampura, Delhi, and the appellant was appointed as the Computer Coordinator on 20th January, 2009 in the said school. It appears that the mediation proceedings took place between the parties on 25th February, 2009, but there was no positive outcome and, on the other hand, it is the appellant's case that while surfing through her Orkut Profile on 27th April, 2009, she came to learn that the Respondent No.1 was claiming to be "single" as if his marriage with the appellant was not subsisting.

8. On 7th August, 2009, the Delhi High Court disposed of the writ petition filed by the father of the Respondent No.1 (Writ Petition (Crl.) No.1553 of 2008) by passing the following order :-

"At the first instance, a period of 14 days be granted to Respondent No.2 (Petitioner herein) to take the child of her own to England and join the proceedings before the Courts of England and Wales, failing which the child be handed over to the petitioner to be taken to England as a measure of interim custody and thereafter it is for the courts of England and Wales to determine which parent would be best suited to have the custody of the child."

The present appeal has been filed challenging the said order of the High Court.

1. Appearing for the appellant, Mr. Pallav Shishodia, learned Senior Advocate, submitted that while passing the impugned order, the Delhi High Court appears to have lost sight of the fact that the interest of the minor is of paramount importance in matters relating to custody and particularly in this case where the minor was a girl child and was just about 3= years old.

The learned counsel also submitted that the proceedings taken in the United Kingdom had been taken behind the back of the appellant, without notice to her, despite the fact that both she and child were in India where the child had already been admitted in a school and was being properly cared for and looked after by the appellant.

Mr. Shishodia submitted that in the interest of the minor child, the Delhi High Court ought not to have given such directions which had the effect of the minor child having to be handed over to the custody of her paternal grandparents who had not even maintained any contact with the child.

10. Mr. Shishodia urged that having regard to the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956, whereunder the mother is entitled to retain custody of the minor child under the age of 5 years, the High Court erred in directing the appellant to submit herself and her minor daughter, who were both Hindus, to the jurisdiction of a foreign court in terms of an interim order passed in proceedings taken before the said court for the purpose of deciding the question of custody. He also questioned the jurisdiction of the High Court to issue a writ in the nature of mandamus to a private individual to submit to the jurisdiction of a foreign court in a habeas corpus proceeding.

11. Mr. Shishodia submitted that an almost similar question had been considered and decided by this Court in *Sarita Sharma vs. Sushil Sharma* (2003 (3) SCC 14], wherein it was held that even a decree passed by a foreign court could not override the consideration relating to the welfare of the minor child. It was held that what was of paramount importance was the interest of the minor child, a principle which is universally recognized and accepted. It was submitted that in the aforesaid decision this Court had also observed that all the technicalities involving jurisdiction and Comity of Courts would have to give way to the issue involving the welfare of the minor. Everything else pales into significance in deciding the matter of custody of a minor child and especially a minor child below the age of 5 years.

12. Mr. Shishodia contended that the High Court had erroneously relied upon the judgment of this Court in *Mrs. Surinder Kaur Sandhu vs. Harbax Singh Sandhu & Anr.* [(1984)3 SCC 698] which was based on the principle of Comity of Courts, which had been taken note of in *Sarita Sharma's* case (*supra*).

13. A further submission was made to the effect that the High Court had erred in holding that although the custody of the minor child with the mother was not illegal at the inception, it became so after the directions given by the High Court of Justice, Family Division, U.K., on 26th November, 2008, to return the child to its jurisdiction within 14 days, failing which the appellant herein would be guilty of contempt of court and could also be sent to prison, fined or her assets could be seized. It was contended that the High Court ought not to have ousted its own jurisdiction as well as the jurisdiction of the Indian courts to decide the question of custody of the minor child in accordance with the law of the land where the minor child is currently resident, particularly in the absence of any allegation of kidnapping or of bringing the minor into India in breach of any foreign decree or injunction. Yet another question which was raised was with regard to the psychological damage that could be caused on an impressionable mind which could ultimately destroy the mental orientation and moral fabric of a

minor child.

14. Mr. Shishodia laid special stress on the decision of this Court in Sarita Sharma's case (supra), in which the question of custody of children in almost similar circumstances came up for consideration. In the said case an American Court had put the children born out of the marriage in the care of the respondent-husband, but in exercising visitation rights, the appellant-wife picked up the children from her husband's residence and brought them to India despite the American Court's order. A writ petition for issuance of a writ in the nature of habeas corpus was filed by the husband in the Delhi High Court and having regard to the conduct of the appellant-mother, the High Court directed her to hand over the custody of the children to her husband and permit him to take them to the U.S.A.

The said order being challenged in the Supreme Court, this Court held that although the appellant's conduct of removing the children from the U.S.A. was a relevant fact, it could not override the various aspects relating to the welfare of the children. This Court thereupon held that the High Court had erred in restoring the custody of the children to the husband on the sole ground of breach of the order of the American Court and that the High Court should have directed the respondent-husband to initiate proceedings for holding a full-fledged inquiry as to what would be in the interest of the children having regard to the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956.

15. Mr. Shishodia urged that even in the said case the question of lawful custody of the children cropped up. This Court observed that before she came to India with the children, the appellant-wife was in lawful custody of the children. The question which had to be answered was whether custody became illegal as she had committed breach of the order of the American Courts directing her not to remove the children from the jurisdiction of that court without its permission. In the said case, in a decree of divorce an order of the custody of children had already been passed, and the same was a further consideration for deciding the question as to whether the custody of the children became illegal thereafter. Mr. Shishodia pointed out that, as indicated hereinbefore, Surinder Kaur's case (supra) had been considered in Sarita Sharma's case (supra), where a distinction having been made on the ground of the welfare of the minor child being paramount, this Court held that the interest of the minor child would be best served in allowing the mother to retain custody of the said children, notwithstanding the orders passed by the American Courts. The writ petition filed by the respondent-husband was, accordingly, dismissed by the Appeal Court on the basis of the circumstances relating to the welfare of the minor.

16. To further strengthen his submissions, Mr. Shishodia also referred to the decision of this Court in (i) Rajesh K. Gupta vs. Ram Gopal Agarwala & Ors. [(2005) 5 SCC 359]; and (ii) Dhanwanti Joshi vs. Madhav Unde [(1998) 1 SCC 112]. In Rajesh K. Gupta's case (supra) in relation to a matrimonial and child custody dispute the husband, an Advocate-on-Record practising in the Supreme Court, filed a writ petition for a writ in the nature of habeas corpus for custody of his minor daughter. There also this Court held that in an application for a writ of habeas corpus for custody of a minor child the principal consideration for the court would be to ascertain whether the custody of the child can be

said to be lawful or illegal and whether the welfare of the child required that the child should be left in the care and custody of someone else. It was also noted that in case of disputes between the mother and father regarding the custody of their child, the paramount consideration is the welfare of the child and not the legal right of either of the parties. Mr. Shishodia submitted that notwithstanding the allegations regarding the wife's mental condition, the court thought it fit to allow her to remain in custody of the minor child.

17. In the other decision in Dhanwanti Joshi's case (supra), the claim of the father for custody of the child on the ground of his having superior financial capacity to give his child immediate American education, was negated and it was held that having superior financial capacity cannot be the sole consideration for change of custody from mother to father. This Court held that while the child in his mother's custody was getting good education and doing well in studies, the proposal of an immediate American education, which the father was prepared to finance, could not be a sufficient ground for shifting the child to the father's custody. It was also observed that the child, who was a citizen of U.S.A. by birth, could go to U.S.A. in his own right in future, whenever it was so decided.

18. Mr. Shishodia submitted that the reasoning of the High Court based solely on the doctrine of the Comity of Courts, without giving proper importance to the welfare of the minor, could not be sustained and was required to be set aside.

19. On the other hand, Mr. Debal Banerjee, learned Senior Advocate, appearing for the Respondent No.1, contended that the decision of the High Court to apply the principle of the Comity of Courts was wholly justified, inasmuch as, there was an existence of an order, even if interim in nature, directing the appellant within a period of 14 days to voluntarily take the child to England and to join the proceedings before the Court of England and Wales, failing which the child was to be handed over to the respondent to be taken to England as a measure of interim custody, and, thereafter, it would be for the Courts of England and Wales to determine which of the parents would be best suited to the custody of the child.

20. Mr. Banerjee submitted that although in Sarita Sharma's case (supra) the decision in Surinder Kaur's case was noticed and a passage from the said judgment was also extracted, in the ultimate analysis the Court felt that the minor children should be handed over to the mother as it would be in the best interest of the children to be with the mother since they too expressed the desire to stay with her. Mr. Banerjee submitted that in the said case also the Court had to resort to a chance that the dispute would ultimately be settled and, on such consideration, the writ petition filed by the respondent-husband was dismissed.

21. Reliance was also placed on the oft-repeated decision of this Court in the case of Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw & Anr. [(1987) 1 SCC 42]. The facts of the said case have a good deal of similarity with the facts of the instance case, where also, in view of the father secretly

bringing the child to India against the express orders of the American Court, the mother filed a habeas corpus petition before the Supreme Court for restoration of the child's custody. In the background of the said facts, this Court held that the mother was entitled to the child's custody, with liberty to take the child to the U.S.A. and the father could pursue the matter before the U.S. Court for restoration of the visitation rights which had earlier been granted in his favour.

22. Mr. Banerjee contended that when there was an existing order of a foreign court, the prayer for deciding the matter for the same relief ought not to be granted. The learned counsel submitted that there was no ground whatsoever, for this Court to interfere with the order of the High Court which had been passed in the interest of the minor girl child. From the materials disclosed in this case, we find ourselves placed between two contrasting principles of law which we are required to balance keeping in mind the interests of a minor 3= year old girl child. Of the two principles, the High Court has placed greater reliance upon the theory of Comity of Nations and Comity of Judgments of the Courts of two different countries in deciding the matter. Having held that the High Court of Justice, Family Division, U.K., was already in seisin of the matter and had passed an interim order of restraint and having further regard to the fact that the interests of a 3= year old minor girl child was involved, the Delhi High Court directed that the custody of the child be made over to the father in England and in the alternative to the grand-parents in India who would return the child to the jurisdiction of the U.K. Courts. Even while considering the interests of the minor child, the High Court felt that due respect had to be given to the orders of the U.K. Court as the U.K. Court was closest to the issue involving the custody of the minor child who was a British citizen.

24. There is yet another aspect of the matter on which the High Court has stressed. The High Court has noticed the fact that both the appellant wife and the respondent husband had set up their matrimonial home in Scotland and thereafter in England since 2003. Both the parents had been working for gain in the U.K. and while the minor child was holding a British Passport, the parents had acquired permanent resident status in the U.K.

25. It is not as if the High Court was oblivious of the fact that it was the paramount duty of the Court to look after the interests of the minor child. It has referred to the celebrated decision of this Court in Elizabeth Dinshaw's case (supra), wherein it was emphasized that in matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor. Further, while relying upon the judgment in Sarita Sharma's case (supra), the High Court did consider the decision in Surinder Kaur's case (supra), where the facts were very similar. Yet, the High Court, relying on the decision of this Court in Sarita Sharma's case (supra) came to the conclusion that the Courts in this country cannot be guided entirely by the fact that one of the parents had violated the order passed by a competent foreign Court. Choosing to rely on the doctrine of Comity of Courts, the High Court directed the appellant to return the minor child to the jurisdiction of the U.K. Court as the said Court was closest to the issue involving the custody of the child and would thoroughly examine the claim of the appellant and the Respondent No.1 to be entrusted with the custody of the child.

26. Although, Mr. Shishodia relied heavily on the decision in Surinder Kaur's case, it cannot be ignored that the said case has duly considered the principle that the interest of the minor is paramount in any decision relating to custody. It is but natural that in a matrimonial tussle both the parents would want the custody of the minor child. In this tussle, we have to decide who would be more suited to have custody of the child. In our view, the High Court appears to have taken the correct approach in a matter like this. Although, on first impression, it would appear that the interests of the minor child would best be served if she is allowed to remain with the appellant, we cannot lose sight of the order dated 26th November, 2008, passed by the High Court of Justice, Family Division, U.K., which admittedly is an ex-parte order and, inter alia, reads as follows :-

"IT IS ORDERED THAT :-

1. The minor, Elina Mittal (date of birth 20th February, 2006), shall remain a ward of court during her minority or until further order,

2. The Defendant mother, Shilpa Agarwal, do within 14 days of service of this order upon her cause the said minor to be returned to the jurisdiction of England and Wales,

3. Following the return of the said minor to England and Wales, the Defendant mother shall thereafter be forbidden (whether by herself or by instructing or encouraging any other person) from causing or permitting the minor to be removed from the jurisdiction of England and Wales without the permission of a High Court judge.

4. Within 72 hours of the return of the said minor to England and Wales, the Defendant mother must deliver up to the Plaintiff father's solicitors, Messrs Lyons Davidson of Victoria House, 51 Victoria Street, Bristol BS1 6AD all passports and international travel documents for the child on the basis that those documents will be held by that firm to the order of the court and will not be released to either party without the permission of a High Court Judge;

5. Within 72 hours of the return of the said minor to England and Wales, the Defendant mother must provide the Plaintiff father's solicitors, Messrs Lyons Davidson of Victoria House, 51 Victoria Street, Bristol BS1 6AD with full details in writing of any address at which she intends to reside with the child and a contact telephone number for herself; she must also provide to the father's solicitors in writing full details of any new address to which she intends to move with

the child prior to such move taking place.

6. There be liberty to the Defendant mother to apply to vary or discharge any provision of this order upon giving 24 hours' notice to the Plaintiff father's solicitors, Messrs Lyons Davidson of Victoria House, 51 Victoria Street, Bristol BS1 6AD (of PMM/CLP; telephone number 01179046000); any such application shall be supported by a sworn affidavit.

7. The application shall be adjourned and listed at risk for further directions before a High Court Judge sitting at the Royal Courts of Justice, Strand London at 10.30 am on 15 December 2009 (time estimate = hour).

8. The costs of this application be reserved:

AND NOW THEREFORE this Court respectfully invites all judicial and administrative bodies in the Republic of India to render assistance in ensuring that the minor

Elina Mittal is returned as soon as possible to the jurisdiction of England and Wales."

27. It is evident from the aforesaid order that except for insisting that the minor be returned to its jurisdiction, the English Court did not intend to separate the child from the appellant until a final decision was taken with regard to the custody of the child. The ultimate decision in that regard has to be left to the English Courts having regard to the nationality of the child and the fact that both the parents had worked for gain in the U.K. and had also acquired permanent resident status in the U.K.

The High Court has taken note of the fact that the English Court has not directed that the custody of the child should be handed over to the respondent father but that the child should be returned to the jurisdiction of the Courts in the U.K. which would then proceed to determine as to who would be best suited to have the custody of the child. In our view, the approach of the High Court takes into consideration both the questions relating to the Comity of Courts as well as the interest of the minor child, which, no doubt, is one of the most important considerations in matters relating to custody of a minor child. It has been rightly observed by the High Court following the decision in Surinder Kaur's case (supra) that it was the English Courts which had the most intimate contact with the issue in question to decide the same.

28. The fact that the minor child has been declared a ward of the English Court till she attains majority, is also a matter of considerable importance in considering

whether the impugned order of the High Court should be interfered with or not.

29. We are satisfied from the materials produced before us and the submissions made on behalf of the parties that the High Court did not commit any error in relying on the doctrine of Comity of Courts since the question of what is in the interest of the minor still has to be considered by the U.K. Court and the interim order passed in the proceedings initiated by the Respondent No.1 is only of an interim nature with a view to return the child to the jurisdiction of the said Court.

30. We, therefore, see no reason to interfere with the order of the High Court and the appeal is, accordingly, dismissed. However, in order to implement the directions of the High Court, the Respondent husband shall provide the initial expenses of the appellant and the minor child for travelling to and staying at the U.K. for at least a month to attend and contest the proceedings initiated by the Respondent No.1 before the High Court of Justice, Family Division, U.K.

31. Let this matter be listed for further orders on 15th December, 2009, to enable the respondent-husband to submit a proposal as to how the travel arrangements and the arrangements for the appellant and her minor daughter to stay in the U.K., at least for a month, is to be made. Till then the interim order passed in the appeal shall continue to be operative.

32. There will be no order as to costs.