SUPREME COURT OF INDIA

Jitender Arora

Vs.

Sukriti Arora

Crl.A.No.717 of 2013

(A.K.Sikri and R.K.Agrawal,JJ.,)

17.02.2017

JUDGMENT

A.K.Sikri,J.,

1. Marriage between appellant No. 1 (hereinafter referred to as the 'appellant') and respondent No. 1 (hereinafter referred to as the 'respondent') was solemnized sometime in the year 1999, which was got registered with the Registrar of Marriages, Faridabad on 14.12.1999. The parties lived thereafter till March 2000 in Faridabad. However, carrying this notion that great future lies for them out of India, the couple shifted to U.K. on 23.03.2000. Ms. Vaishali Arora was born out of this wedlock on 14.01.2002. Career-wise or financially, whether the couple was better off in U.K., is not known. However, the soil of U.K. certainly did not prove conducive to their matrimonial relationship which, with the passage of time, turned bad to worst and from sweet to savoury to bitter. So much so, legal battles started between them. Eschewing the details in this behalf which are not needed and can be avoided for the sake of brevity, suffice is to mention that respondent has taken decree of divorce from the Court in U.K. Likewise, appellant who had shifted to India along with Vaishali in 2010, filed the petition for divorce and has obtained decree of divorce against the respondent. Both the divorce decrees are ex-parte against each other. Fact remains, which is to be emphasised, that the appellant and respondent have put an end to their matrimonial alliance and the aforesaid move on their part clearly depicts that both of them wanted divorce from each other. That is the reason that the aforesaid ex-parte divorce decrees are not questioned by any of them.

2. As it happens in such cases, an acrimonious and charged up battle between the appellant and the respondent has got concentrated upon the custody of Vaishali Arora. Though the couple had moved to U.K. on 23.03.2000, Vaishali was born on 14.01.2002 in Holy Family Hospital, Delhi. The respondent had come to India when she was pregnant and shortly after her birth, she went back along with the appellant and the new born child. Vaishali came to India in July, 2002 to stay with her paternal grandparents in Faridabad and went back to U.K. in January, 2003. Matrimonial discord started erupting between the parties thereafter. Since both of them were having their permanent jobs, the services of Katie Bradbury, a Child

Minder were obtained by them when Vaishali was merely 13 months old. In July, 2004, both husband and wife and their child were granted permanent resident status of U.K. Thereafter, the parties had been coming to India off and on quite regularly. Vaishali was admitted in a school in Camberley, U.K. In July, 2007, Vaishali came to India and joined Manav Rachna International School where she studied upto March, 2008. Thereafter, she again went back to U.K. where she was admitted in a school. On 07.02.2007, Pushti, second daughter, was born to the parties. Thereafter, the matrimonial relationship between the appellant and the respondent became more bitter and abusive. Respondent alleged the acts of domestic violence perpetrated upon her by the appellant. Surrey Social Services Department investigated into the issues of domestic violence. During this period, the impact of adverse relations between the spouses upon their child Vaishali was also studied from psychological point of view by the officer of the said Department and reports given from time to time.

3.In June, 2007, Vaishali was issued Indian Passport by Indian High Commission in London. On 04.08.2007, the appellant came to India. As pointed out above, Vaishali had already come to India and was admitted in a school in July, 2007. The appellant and Vaishali remained in India till April, 2008. Even the respondent decided to move back to India with her parents. However, on 13.04.2008, the appellant went back to U.K. The respondent remained in India and went back to U.K. in May, 2009. On reaching U.K., she lodged a complaint with the police on 13.05.2009 to trace the whereabouts of Vaishali. Thereafter, she filed a case in the U.K. Court in which, on 04.06.2009, an ex-parte order was passed prohibiting the appellant from removing two minor children from England and Wales. Further, restraint order was passed against the appellant from removing Vaishali from attendance at Alwyn Infants School where she was studying at that time. The appellant filed cross application and it led to further legal tussle between the parties wherein the Court passed orders from time to time. It is in November, 2009 that the respondent filed divorce proceedings against the appellant in a Court in U.K. wherein she has been granted decree of divorce. On 24.11.2009, as aforesaid, the appellant shifted to India along with Vaishali. In their absence, the respondent obtained British Citizenship of Vaishali on 13.07.2010.

4.Since the appellant had come to India with Vaishali, the respondent filed Habeas Corpus Petition bearing Criminal Writ Petition No. 712 of 2010 in the High Court of Punjab & Haryana wherein she impleaded, apart from the appellant, his parents as well as Vaishali, as respondents. Other parties who were made respondents were State of Haryana, Senior Superintendent of Police, Haryana and Station House Officer, Police Station City Faridabad, Haryana. This petition has been allowed by the High Court vide judgment dated 25.05.2010 directing the appellant to handover the custody of Vaishali to her mother i.e. the respondent. It is this judgment which is impugned in the present proceedings.

5. It would be noticed that in May, 2010, when the petition was allowed, Vaishali was almost 8 years of age. Today, she is 15 years old.

6. The Special Leave Petition (which is converted into the instant appeal after the grant of special leave) was filed immediately after the passing of the impugned judgment by the High Court, which came up for hearing on 02.06.2010 before the Vacation Bench of this Court.

While issuing notice in the petition, this Court stayed the operation of the aforesaid judgment of the High Court. That stay order has remained in operation, as a consequence whereof custody of the child continues to be with the father. The respondent, of course, has been granted visitation rights from time to time as and when she came to India and moved an application in this behalf. Such visitation rights have normally been for the entire period of her stay in India on these visits, which range from seven days to even two months. This fact is highlighted to show that the respondent is given access to child for long periods as well, the details whereof are mentioned hereafter.

7. When the case came up before this Court on 31.01.2013 (at that time, Vaishali was 11 years of age), the Bench (comprising of Aftab Alam and Ranjana Prakash Desai, JJ.) decided to meet Vaishali in order to interact with her to ascertain her view point. Thereafter, the matter came up for hearing on 02.04.2013 when the following order was passed:

> "In the proceedings held on January 31, 2013, it was agreed between the parties and was also noted in the order passed on that date that the child Vaishali should stay with respondent No.1 (Sukriti Arora), the mother of the child at her residence in Delhi for one month under monitoring by this Court. In continuation of that order, therefore, we direct that Vaishali should stay with her mother, tentatively for one month from today, subject to any further direction that may be passed by this Court in the meanwhile. The address of respondent No.1 where she will stay with her daughter Vaishali is 6578, Sector-C, Pocket-6&7, Vasant Kunj, Delhi and her contact number (mobile)is:9968661822. Ms. Madhavi Divan, one of the counsel representing the petitioner shall hand over the child to her mother-respondent No.1 outside the court room after we complete the passing of this order. Respondent No.1 shall deposit her passport with the Registrar (J-III) of this Court which shall be returned back to her after Vaishali goes back to her father on completion of the term of her stay with respondent No.1. We are informed that Vaishali's school is reopening from April 4, 2013. On behalf of Respondent No.1, it is stated that she will ensure that the child reaches the school in time and is brought back to her residence after school hours.
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> The child's stay with her mother will, in no way, affect her attendance at the school or her studies. During her stay with the mother, the child will be free to speak to her father on telephone (Mobile No. 9968661822). On behalf of respondent No.1, it was stated that she would not create any obstruction in the way of the child speaking to her father. During the child's stay with her mother, we would like some responsible and competent person to monitor the arrangement. We, accordingly, request Mrs. Sadhana Ramachandran, who works for the Delhi High Court Mediation and Conciliation Centre, to monitor the arrangement on behalf of this Court. Mrs. Ramachandran shall visit the mother and the child at the address noted above on a date and time of her convenience. She would inform respondent No.1 on her mobile phone about the proposed date and time of her visit to the respondent's place. She would see how the relationship between the child and the mother is developing and if need be, she would counsel both the child and the mother.

If the father wants to visit the child while she is staying with her mother, he may do so at a time when Mrs. Sadhana Ramachandran is also present there. For the purpose of the visit he will have to take the necessary permission from Mrs. Ramachandran.
It is submitted on behalf of Respondent No.1 that she would like to take the child to some resort or some hill station for a brief holiday. We would like the mother and the child to stay in Delhi itself but, in case, both the child and the mother together wish to go outside, they may do so subject to the permission in writing taken from Mrs. Ramachandran. Mrs. Ramachandran would submit a report to this Court within ten days from today. Let this matter be listed for further direction along with the report from Mrs. Ramachandran on April 12, 2013." '

8. Mrs. Sadhana Ramachandran, who monitored the arrangement as per the directions contained in the aforesaid order submitted her report. On going through that report, further order dated 15.04.2013 was passed in the matter and we reproduce that order as well in its entirety:

"Seen the report submitted by Mrs. Sadhana Ramachandran.
This Court is thankful to Mrs. Ramachandran for giving her valuable time and attention and for acting as the counselor and the Court's agent in this arrangement.
We note that under the exigencies of the situation, the mother and the child have shifted from the address noted in the previous order and are now living at the following address:
Ms. Sukriti Arora,
C/o. K.D. Prasher
C-2633, Sushant Lok Phase - I,
Gurgaon (Haryana).

The shift has been made with the permission of Mrs. Ramachandran and with the consent of the father of the child. The arrangement made by order dated April 02, 2013 may continue for a period of one month from that date as indicated in that order.
It is, however, made clear that while staying with her mother, the child Vaishali can speak to her father and to Mrs. Ramachandran as and when she wishes. Both the petitioner and the respondent are directed to pay heed to the advice of Mrs. Ramachandran and take part in mediation, as suggested by her, with an open mind.
List on May 01, 2013. Before that date, Mrs. Sadhana Ramachandran is requested to submit a final report."

9. On 01.05.2013, this Court took note of the fact that the respondent was leaving for U.K. In these circumstances, direction was given to her to return the custody of Vaishali to her father i.e. the appellant. The aforesaid background needs to be kept in mind while deciding this custody dispute.

10. We have gone through the entire record, including the orders passed by the Courts in U.K. from time to time in various proceedings. In a recent judgment pronounced on

13.02.2017 delivered by this Court in the case of Vivek Singh v. Romani Singh, of which one of us (A.K. Sikri, J.) was the member of the Bench, dilemma of the Court and the law on the subject was taken note of. We reproduce the following paras of the said judgment in order to make it self-contained in all respects:

> "7. We have given our utmost serious consideration to the respective submissions which a case of this nature deserves to be given. In cases of this nature, where a child feels tormented because of the strained relations between her parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. No doubt, paramount consideration is the welfare of the child. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts.
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> 8. The Hindu Minority and Guardianship Act, 1956 lays down the principles on which custody disputes are to be decided. Section 7 of this Act empowers the Court to make order as to guardianship. Section 17 enumerates the matters which need to be considered by the Court in appointing guardian and among others, enshrines the principle of welfare of the minor child. This is also stated very eloquently in Section 13 which reads as under:
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> "13. Welfare of minor to be paramount consideration. (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.
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> (2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."
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> 9. The Court in the case of *Gaurav Nagpal v. Sumedha Nagpal*[1] stated in detail, the law relating to custody in England and America and pointed out that even in those jurisdictions, welfare of the minor child is the first and paramount consideration and in order to determine child custody, the jurisdiction exercised by the Court rests on its own inherent equality powers where the Court acts as 'Parens statutes give legislative recognition to the aforesaid established principles. The Court explained the expression 'welfare', occurring in Section 13 of the said Act in the following manner:
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> "51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.

52. The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments."

10. We understand that the aforesaid principle is aimed at serving twin objectives. In the first instance, it is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution. While the parents aim to ensure that the child is least affected by the outcome, the inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting thereby having a significantly negative repercussion in the advancement of the child. While these effects don't apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remains the objective of the parents to evade and the court's intent to circumvent. This right of the child is also based on individual dignity."

11. Second justification behind the 'welfare' principle is the public interest that stand served with the optimal growth of the children. It is well recognised that children are the supreme asset of the nation. Rightful place of the child in the sizeable fabric has been recognised in many international covenants, which are adopted in this country as well. Child-centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation. It has been emphasised by this Court also, time and again, following observations in *Bandhua Mukti Morcha v. Union of India & Ors*[2]. :

"4. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better

equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood − socially, economically, physically and mentally − the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development."

12. Same sentiments were earlier expressed in *Rosy Jacob v. Jacob A. Chakramakkal*[3] in the following words:

"15. ...The children are not mere chattels : nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society... "

13. It hardly needs to be emphasised that a proper education encompassing skill development, recreation and cultural activities has a positive impact on the child. The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation. The tools of education, environment, skill and health shape the child thereby moulding the nation with the child equipped to play his part in the different spheres aiding the public and contributing to economic progression. The growth and advancement of the child with the personal interest is accompanied by a significant public interest, which arises because of the crucial role they play in nation building."

11. In the case of Vivek Singh, the girl was 8 years of age. There also, the child had remained with father for most of the period. It was decided to give the custody to the mother. Among others, two weighty reasons which prevailed with this Court were the age of the child, i.e. 8 years, and that during this period, custody had remained with the father because of no fault of the mother. This is clear from the following discussion in the said judgment:

"14. In the instant case, the factors which weigh in favour of the appellant are that child Saesha is living with him from tender age of 21 months. She is happy in his company. In fact, her desire is to continue to live with the appellant. Normally, these considerations would have prevailed upon us to hold that custody of Saesha remain with the appellant. However, that is only one side of the picture. We cannot, at the same time, ignore the other side. A glimpse, nay, a proper glance at the other side is

equally significant. From the events that took place and noted above, following overwhelming factors in favour of respondent emerge.

(a) For first 21 months when the parties were living together, it is the respondent who had nursed the child. The appellant cannot even claim to have an edge over the respondent during this period, when the child was still an infant, who would have naturally remained in the care and protection of the respondent - mother, more than the appellant - father. Finding to this effect has been arrived at by the High Court as well. This position even otherwise cannot be disputed.

(b) The respondent was forcibly deprived by the custody of Saesha from August 04, 2010 when she was forced to leave the matrimonial house. As per the respondent, on that date the appellant in a drunken state gave beatings to her and threw her out of the house. The respondent had called the police. The police personnel called the military police and a complaint was lodged. The respondent had also called her parents who had come to her house from NOIDA. Her parents took hold of the child and the appellant and when they were about to leave, the appellant pulled out the child from the hands of her mother and went inside the house and locked himself. He was drunk at that time. The police suggested not to do anything otherwise appellant would harm the child. It was assured that the child would be returned to her in the morning. In any case, the respondent and the appellant were instructed to come to the police along with the child, next morning. The appellant did not bring the child and threatened that he would not give the child to her. Since then, she had been running from pillar to post to get the child back but respondent had been refusing. The respondent, therefore, cannot be blamed at all, if the custody of the child remained with the appellant, after the separation of the parties.

(c) Within the few days, i.e. on August 26, 2010, the respondent filed the petition seeking custody of the child and for appointment of her guardian. She did not lose any time making her intentions clear that as a natural mother she wanted to have the custody of the child. It was her mis-fortune that the trial court vide its judgment dated December 07, 2011 dismissed her petition. Though, she filed the appeal against the said judgment immediately, but during the pendency of the appeal, the custody remained with the appellant because of the dismissal of the petition by the Family Court. The High Court has, by impugned judgment dated April 02, 2013 granted the custody to the respondent. However, the respondent has not been able to reap the benefit thereof because of the interim orders passed in the instant appeal. It is in these circumstances that child Saesha from the tender age of 21 months has remained with the appellant and today she is 8 years and 3 months. Obviously, because of this reason, as of today, she is very much attached to the father and she thinks that she should remain in the present environment. A child, who has not seen, experienced or lived the comfort of the company of the mother is, naturally, not in a position to comprehend that the grass on the other side may turn out to be greener. Only when she is exposed to that environment of living with her mother, that she would be in a position to properly evaluate as to whether her welfare lies more in the company of

her mother or in the company of her father. As of today, the assessment and perception are one sided. Few years ago, when the High Court passed the impugned judgment, the ground realities were different.

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16. The aforesaid observations, contained in para 31 of the order of the High Court extracted above, apply with greater force today, when Saesha is 8 years' old child. She is at a crucial phase when there is a major shift in thinking ability which may help her to understand cause and effect better and think about the future. She would need regular and frequent contact with each parent as well as shielding from parental hostility. Involvement of both parents in her life and regular school attendance are absolutely essential at this age for her personality development. She would soon be able to establish her individual interests and preferences, shaped by her own individual personality as well as experience... "

12. The circumstances, in the present case, however, are materially different. Vaishali is a mature girl of 15 years of age. At this age, she can fully understand what is in her best interest. She is competent to take a decision for herself. There has been interaction with her by different Benches of this Court from time to time, outcome whereof is reflected in the orders passed after such meetings. She has unequivocally and without any reservations expressed her desire to be with her father. More importantly, she has very categorically said that she does not want to go to U.K.

13. On 31.01.2013, this Court had noted that when her mother came to India, she was not even willing to meet her. However, with the intervention of the Court, a meeting was arranged between Vaishali and her mother. Even after the said meeting, she was not willing to live with the respondent, her mother. Fully realising that it may be due to the reason that all this period, she had lived with her father, the Court deemed it proper to give opportunity to the respondent to win love, confidence and trust of Vaishali. The mother was allowed to stay for one month with Vaishali. This order was continued on 02.04.2013 by extending the period by another month. This time the arrangement that was made was to be monitored by Mrs. Sadhana Ramachandran who was appointed for this purpose. Specific job given to Mrs. Sadhana Ramachandran was to see how the relationship between the child and the mother is developing. In case of need she was to counsel both the child as well as the mother. Thus, an opportunity was given to the respondent by allowing her the access of Vaishali for significant period i.e. till 01.05.2013, whereafter the child was restored back to her father, since the respondent had decided to go back to U.K. It is unfortunate that even during this period, she was not able to influence the thought process of Vaishali who is determined to remain with her father.

14. In fact, during the course of arguments before us, when the respondent was also present, we asked the respondent as to whether she could shift to India, even temporarily for a year or so, as in that eventuality, the Court can consider giving custody of Vaishali to her for that

period. However, she expressed her inability to do so. She wants custody of Vaishali on her own terms. She wants Vaishali to come to U.K. and live with her. Vaishali does not want to go to U.K. at all. This Court cannot take the risk of sending Vaishali to a foreign country, against the wishes of a mature girl like Vaishali, as it may prove to be a turbulent and tormenting experience for her. That would not be in her interest.

15. We also had interaction with Vaishali in the Chambers earlier. On the date of hearing also, Vaishali was present in the Court and in front of her parents, she unequivocally expressed that she was happy with her father and wanted to continue in his company and did not want to go with her mother, much less to U.K. From the interaction, it is clearly discernible that she is a mature girl who is in a position to weigh the pros and cons of two alternatives and to decide as to which course of action is more suited to her. She has developed her personality and formed her opinion after considering all the attendant circumstances. Her intellectual characteristics are adequately developed. She is able to solve problems, think about her future and understands the long term effects of the decision which she has taken. We also find that she has been brought up in a conducive atmosphere. It, thus, becomes apparent that in the instant case, we are dealing with the custody of a child who is 15 years of age and has achieved sufficient level of maturity. Further, in spite of giving ample chances to the respondent by giving temporary custody of Vaishali to her, respondent has not been able to win over the confidence of Vaishali. We, therefore, feel that her welfare lies in the continued company of her father which appears to be in her best interest.

16. The High Court in the impugned judgment had stated that since Vaishali was a minor girl, she needed company of her mother more to understand girly things. The High Court mentioned about the bond between girl child and mother in abstract and from there only the High Court came to the conclusion that it would be better to give the custody to the mother. The High Court did not go into the specific situation and circumstances of this case and did not make any objective assessment about the welfare of Vaishali. Many circumstances which we have narrated above were not taken note of.

17. On the facts of the present case, we are convinced that custody of the child needs to be with father. She is already 15 years of age and within 3 years, she would be major and all this custody battle between her parents would come to an end. She would have complete freedom to decide the course of action she would like to adopt in her life. We, thus, allow this appeal and set aside the judgment of the High Court.

18. No costs.

Judgment Referred.

[1]*(2009) 1 SCC 0042*
[2]*AIR 1997 SC 2218*
[3]*(1973) 1 SCC 0840*