

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

% Reserved on : 15.07.2009
Date of decision: 07.08.2009

+ W.P.(Crl.) 1553/2008

AVIRAL MITTAL ... PETITIONER

Through: Mr.Prabhjit Jauhar and
Ms. Anupama Kaul, Advocates.

Versus

THE STATE & ANR. ...RESPONDENTS

Through: Mr.Akshay Bipin, Adv. for R-1.

Mr.Sidharth Luthra, Sr.Adv.with
Mr.Neeraj K.Sharma, Advocate
for R-2

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The petitioner was married to respondent No.2 on 04.11.2003. The parties set up their matrimonial home in U.K. as the petitioner was already working there since November, 2000. A child was born out of the said wedlock Ms.Elina who is now three and a half years old. Respondent No.2 also started working in U.K. The petitioner and respondent No.2 acquired the status of permanent residents of U.K. in the year 2004 prior to the

birth of the child on 20.02.2006. The child acquired British passport though the parents continued to hold Indian passports.

2. The pleadings in the present petition show that there were some problems in the marriage.
3. The allegation of the petitioner/husband is that respondent No.2/wife failed to take care of the child and was also not able to attend to her work properly while on the other hand respondent No.2 alleges that it is the petitioner who was least helpful and, in fact, needed psychiatric attention. It is, however, not necessary to go into all the details of allegations and counter allegations as the scope of the present proceedings is limited inasmuch as that the petition has been filed under Article 226 of the Constitution of India for a direction to respondent No.2 to produce the minor child and for grant of custody of the child to the petitioner. The facts leading up to this litigation are being further set out hereinafter.
4. It is the own case of the parties that there was a plan to visit India and respondent No.2 along with the minor child departed from U.K. for India on 12.09.2008. The petitioner arrived at New Delhi, India on 10.10.2008. The petitioner left for U.K. on 14.10.2008. The petitioner claims that respondent No.2 was supposed to join him in his family house at New Delhi once he arrived in India,

but respondent No.2 was not willing to do the same. It is alleged that father of respondent No.2 told the petitioner that he should see a psychiatrist in India and have a medical report prepared about his mental health. The petitioner claimed that he was even willing to undergo that provided it was conducted by a neutral doctor which was not acceptable to respondent No.2 and her father. Respondent No.2 and the child were supposed to leave for U.K. on 09.11.2008, but Respondent No.2 got the tickets cancelled on 07.11.2008 and thus the child and respondent No.2 did not join back the petitioner at their matrimonial home in U.K. The aforesaid resulted in the petitioner initiating proceedings before High Court of Justice, Family Division, U.K. on 25.11.2008 seeking an order that the minor be made a ward of the Hon'ble Court and a direction be passed for respondent No.2 to return the minor child to the jurisdiction of that Court. On 26.11.2008, Hon'ble Mr.Justice Munby of the said High Court directed that respondent No.2 should cause the minor child Ms.Elina to be returned to the jurisdiction of England and Wales within 14 days of the service of the said order and that the child should 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 permission of a Judge of

the said Court. A direction was also passed for the passports and other international travel documents in respect of the minor child to be handed over within 72 hours of the return of the minor to the solicitors of the petitioner and the same would not to be released to either party without permission of a Judge of the said High Court. Respondent No.2, however, did not oblige. The present proceedings were filed soon thereafter in December, 2008.

5. The claim of the petitioner is that the parties had set up their matrimonial home in Scotland and thereafter in England and were subject to jurisdiction of U.K. since the year 2003. The parties worked for gain in U.K. and the minor child was holding a British passport with parents acquiring permanent resident status in U.K. It is thus pleaded that the status of the minor child in India is of an illegal migrant in view of the directions passed by the English courts and the child should be returned to that jurisdiction. This plea is predicated on the Principle of Comity of Courts as in matters relating to matrimony and custody, the law of the place which has the closest connection with the well-being of the spouses and the welfare of the offsprings of marriage must govern the said disputes. It was contended by learned counsel for the petitioner that the factum of respondent No.2 and the child coming to India with the consent of the petitioner

would make no difference since the consent was to visit India and thereafter come back in November, 2008. The conduct of respondent No.2 in cancelling her ticket and refusing to come back to U.K. would amount to improper retention of the child outside the jurisdiction of the Court which was entitled to deal with such custody matters and that too despite the directions passed by a competent court. The petitioner claims to have moved promptly in the matter both before the Court in England and thereafter before this Court.

6. Learned counsel for the petitioner sought to draw strength from the observations of the Supreme Court in Mrs.Elizabeth Dinshaw v. Arvand M.Dinshaw & Anr; AIR 1987 SC 3 where it was emphasized that in matters of custody of the minor children, the sole and predominant criterion is what would best serve the interest and welfare of the minor. It was observed that courts in all countries are bound to ensure that a parent does not gain advantage by any wrongdoings like removing children from one country to another. A reference was made to the judgment in Re H. (infants); (1966) 1 All ER 886 where the mother had removed the children to England without approval of the New York Court and without having consulted the father though they were residing in New York. It was held that the children were

American children and that the American court was the proper court to decide the issue of custody.

7. In Smt.Surinder Kaur Sandhu v. Harbax Singh Sandhu and Anr.; (1984) 3 SCC 698 orders had been passed by the Court in England regarding custody of the minor child. The parents were Indian citizens, but after marriage had settled in England. The child was a British citizen by birth. The father brought the child to India and the mother obtained an order from the English court directing the father to deliver the custody of the child to the mother and on that basis a writ petition was filed in the High Court in India for production and custody of the child. It was held that English courts have the most intimate contact with the issue and jurisdiction and the custody should be given to the mother instead of father, natural guardian in the circumstances of the case. A reference was also made to the judgment in Kuldeep Sidhu v. Chanan Singh & Ors; AIR 1989 Punjab and Haryana 103. The children and parents were Canadian citizens and an order was passed by the Supreme Court of Ontario (Canada) granting interim custody to the mother. The unauthorized removal of the children from Canada to India by the father was held to be improper and the order of the Canadian Court was directed to be honoured.

8. In the end a reference was made to Dhanwanti Joshi v. Madhav Unde; (1998) 1 SCC 112. In the facts of that case, the effect of international norms regarding applicability of judgments of US courts on Indian courts was considered and it was found that the same was subject to paramount consideration of welfare of child. The order of US court granting custody of the child to the respondent was held not binding on Apex Court as the child was well settled with the mother. The Hague Convention of 1980 on “Civil Aspects of International Child Abduction” was examined to which India was not a signatory. It was observed that the court to which the child was removed could conduct summary enquiry and the court would return the child to the country from which the child had been removed unless such return could be shown to be harmful to the child. The overriding concern, however, remains the child’s welfare. If the courts are moved promptly, then those aspects can be considered by the court from whose jurisdiction the child had been removed.
9. Learned senior counsel for the respondent has strongly opposed the prayer made by the petitioner on the ground that the minor child’s health, safety and morals would be seriously hampered if the custody of the minor child is handed over to the petitioner. The custody is of a female child of a tender age and thus it is pleaded that removing

her from the custody of the mother and handing her over to the petitioner would not be in the interest of the minor child specifically in view of the provisions contained in Section 6 of the Hindu Minority and Guardianship Act, 1956. The orders passed by the High Court of Justice are stated to be *ex parte* and on concealment of material facts by the petitioner and thus it cannot be enforced against respondent No.2 or the minor child Ms.Elina. It has been pointed out that the parents continue to be Indian citizens and the child has been issued a British passport only on account of birth. The order is only an interim one relating to interim custody of the child until further orders. It is alleged that respondent No.2 and the child were subjected to the worst forms of cruelty.

10. Learned senior counsel for the respondent No.2 relied upon the observations made in Sarita Sharma v. Sushil Sharma; (2000) 3 SCC 14. In the said matter, the mother had removed the children from USA despite orders of the court of that country. It was observed that a female child should ordinarily be allowed to remain with the mother so that she can be properly looked after and in the given facts of that case proper care was being given to the children in India and thus in spite of the order passed by the Court in USA it was held that it would not be proper to hand over the custody of the children to the respondent and permit him to take the children to USA.

Suppression of material facts from the court would make the order of a foreign court not binding on the Indian Court.

11. A reference has also been made to a Division Bench judgment in Paul Mohinder Gahun v. State of NCT of Delhi and Ors; 113 (2004) DLT 823 (DB) where it was observed that in view of what has been stated in Sarita Sharma v. Sushil Sharma's case (supra) the courts in this country cannot be guided entirely by the fact that one of the parents had violated an order passed by a competent court abroad. The legal position was stated to be consistently in favour of the courts determining the issue regarding custody of the minor child, question of conflict of laws and jurisdictions and orders passed by foreign courts granting custody to one or other parent thus take a backseat. It was observed that a girl child of tender age is bound to shape better in the care of the mother.
12. A reference was also made to Rajesh K.Gupta v. Ram Gopal Agarwala and Ors; (2005) 5 SCC 359 where it has been observed that in such habeas corpus petitions, the principle consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else.

13. We have given considerable thought to the matter as the issue is one of best interest of the child, who is of a tender of three and half years and, at present, is with respondent No.2/mother at Delhi. We have also taken note of the orders passed by the High Court of Justice of England and Wales.
14. In our considered view, the important fact to be taken note of is that both the parents had set up their matrimonial home in U.K. from 2003 onwards – earlier in Scotland and then in England. The allegations against each other in the petition and the counter affidavit are of a serious nature. The petitioner has alleged that the mother was not taking care of the child and she was doing a job which also she could not perform successfully and thus had to leave the job. Respondent No.2/mother on the other hand has made serious allegations about neglect by the petitioner as a husband and even in respect of the physical handling of the child. The allegations reflect that it is a no holds barred fight in respect of the conduct of the parties while they were residing in U.K. for five years. The determination of truth of these allegations would become necessary while considering the aspect of custody of the minor child. All the relevant evidence in this behalf arising from main allegations made by one against the other would be available in U.K.

15. The parties have filed documents and the Respondent No.2/mother even with the synopsis has tried to slip in documents, an aspect which we fail to appreciate. The parties continued to live, cohabit, work for gain and bring up the child together in the U.K. The child is holding a British passport and both the parents have permanent resident status in the U.K. In such a situation, it can hardly be said that any court other than the courts in the U.K. would best serve the ends of justice for determining the allegations and counter allegations between the parties.
16. We are conscious of the fact that in view of the observations made by the Supreme Court and judgments referred to aforesaid, it is the interest of the child which is paramount. The interest of the child is always to have the benefit of company of both the parents. However, where such an ideal situation is not possible, the question would arise as to which of the parents is in a better position to look after the child. It is no doubt true that the child in the present case is a female child and as observed by the Supreme Court in Sarita Sharma v. Sushil Sharma's case (supra) and by a Division Bench of this Court in Paul Mohinder Gahun v. State of NCT of Delhi and Ors's case (supra), normally a child may be better taken care of by the mother, but then this in turn depends on the conduct of the parents. The facts in the

present case, to some extent, are akin to the facts of Smt.Surinder Kaur Sandhu v. Harbax Singh Sandhu and Anr' case (supra) where both the parties were settled in England and the child was born and brought up in England and had British citizenship. In the facts of that case also, a plea was advanced on behalf of the mother that she had no relatives in England and the child would have to live alone and in dismal surroundings in England. However, since the parents set up their matrimonial home in England where both the husband and wife were working, it was held that courts in England would best determine the aspect of custody of the child. We can draw strength from the observations made in the aforesaid judgment that in matters relating to matrimony and custody, the law of that place must govern the parties which has the closest connection with the well-being of the spouses and the welfare of the offsprings of marriage. The present case is not one where the wife is an uneducated lady, who is married and has just gone to a foreign country where she has been unable to settle down. Both the parties are well-educated and were gainfully employed though the mother may have give up her job subsequently. The child is a British citizen by birth. The allegations and counter allegations of the parties against their personal conduct have all happened

in the U.K. and thus it is in those courts that interest of the parties would be best taken care of.

17. It is no doubt true that the visit of the mother and the child to India was with the consent of the petitioner. The custody of the child with the mother is not illegal. However, this visit was on the premise of a return to the U.K. in November, 2008 which did not materialize. Once the High Court of Justice has directed that the child be produced, in our considered view, the retention of the child in India would be unlawful though it may not have been illegal at the inception.
18. We must also take note of the fact that the learned Judge in England has not directed that the custody of the child should be handed over to the petitioner and all that is required is that respondent No.2 should go back with the child to the U.K. and the court in the U.K. would examine as to who is best suited to have the custody of the child and make necessary enquiry in that behalf. Respondent No.2 can hardly have a grievance in this behalf since she has not been asked to go in unfamiliar surroundings but to a place where she has lived and worked for gain. The jurisdiction of a competent court cannot be ousted in this manner by continuing to abstain from those proceedings and the principle of Comity of Courts, in our considered view, requires respondent No.2 and the child to join proceedings in U.K.

19. Learned counsel for the petitioner, on instructions from the petitioner, has fairly stated that to facilitate a proper adjudication no adverse action would be prayed before the courts in England and Wales on the ground that till now respondent No.2 has not joined those proceedings and not brought the child back to jurisdiction of those courts. Not only that, an offer was made that both the respondent No.2 and the child can stay in the house and would be provided the same monetary facilities as were being provided earlier apart from the fact that once they come back, the courts in England and Wales would be competent to deal with even that aspect of maintenance. We may note that this offer had also been put to learned counsel for respondent No.2 but on instructions he informed us that respondent No.2 was not willing to oblige.
20. We may notice the observations in para 9 of the judgment in Mrs.Elizabeth Dinshaw v. Arvand M.Dinshaw & Anr's case (supra) where what has been stated in Re H. (infants)'s case (supra) has been referred to with approval. What holds true between the American and U.K. courts equally applies between U.K. courts and Indian Courts and thus since the child is a British citizen by birth, with the parents having a permanent resident status in U.K., it is the courts in U.K. which would be proper to decide the issue of custody. The principle of

Comity of Courts and interest of minor child would require so.

21. We thus direct that at the first instance, a period of 14 days be granted to respondent No.2 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.
22. The petition is accordingly allowed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

AUGUST 07, 2009
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AJIT BHARIHOKE, J.