

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

Date of Reserve: 14th January, 2010
Date of Order: 8th March, 2010

CM (M) No. 448/2009

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08.03.2010

Sanjeev Majoo

... Petitioner

Through: Mr. Pallav Shishodia, Sr. Advocate with
Mr. Hemant Sharma, Advocate

Versus

Ruchi Majoo

... Respondent

Through: Mr. Rakesh Tiku, Advocate
Ms. Seema Rao, Advocate for EOW

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

By this petition, the petitioner has assailed an order dated 4th April, 2009 passed by the District Judge III (West) whereby an application of the petitioner for dismissing the Guardianship Petition filed by the respondent on the ground of territorial jurisdiction was dismissed.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner and respondent were residents of United States of America. They met there some time in 1996 and got engaged in Michigan, USA in September, 1996. The marriage was solemnized between petitioner and respondent at New Delhi in December, 1996 and the parties after marriage went back to USA and started living together. A child Master Kush was born from this wedlock on 24th March, 2001 in New Jersey USA. The child by virtue of his birth in USA became US Citizens. It seems that both the

parties had already applied for citizenship of USA. It is not disputed that the parties became US citizens in the year 2004. In June, 2008 petitioner and respondent along with child Master Kush visited India and respondent along with the child stayed back in India while petitioner went back to USA. A Guardianship Petition was filed by the respondent on 1st September, 2008 under Section 7,8,10 & 11 of the Guardians and Wards Act before Guardianship Court at Delhi for declaring her as guardian of minor son Kush and allowing her to retain the custody of the minor son. On the other hand, the petitioner also brought a Guardianship action in USA by filing a Child Custody Petition in the Superior Court of California, USA on 25th August, 2008 and an interim order of custody of minor son Kush was granted to the petitioner. Similarly an ex parte interim order of custody was made by the Court in Delhi, India in favour of the respondent on 16th September, 2008. The petitioner after receiving notice of the petition filed by the respondent in Delhi moved an application in October, 2008 challenging the jurisdiction of the Courts at Delhi in entertaining the petition. The respondent also took a plea in the Superior Court of California, USA about the lack of jurisdiction. The plea of respondent was declined by the court at California on 13th January, 2009 and the plea of petitioner about the lack of jurisdiction of District Judge, Delhi was declined by the impugned order.

3. The respondent in her petition before the Guardianship Court at Delhi had made several allegations regarding conduct and behavior of the petitioner which compelled her to come to India and stay in India. I consider that in order to decide the issue of jurisdiction of Courts at Delhi, this Court needs not go into the allegations and counter allegations made by the parties regarding their conduct, attitude and behavior. The conduct and attitude of the parties towards each other would have no bearing on the issue of jurisdiction. The next thing hotly argued before this Court, while arguing the issue of jurisdiction is about the considerations of welfare of the child. It is submitted by

the learned Counsel for the respondent that the welfare of the child must be prime consideration before the Court while deciding this petition. I consider that this argument is misconceived. This Court is not considering an order passed by the lower Court in respect of custody of the child, so as to weigh the pros and cons as to in whose custody the welfare of the child would be the utmost. Neither the Court has to pass an order for interim custody. The Court is considering is 'whether the Courts at Delhi, where Guardianship Petition was moved by the respondent, had jurisdiction to entertain the petition'. The Courts in California or in other States of USA while considering a custody petition of the child do take into account welfare of the child. For that matter courts in any part of the civilized world, while passing orders regarding minor children, keep in mind the overall welfare of the children and issues relating to the children while weighing the rights of the parties to have custody. I, therefore consider that presently the Court is only concerned whether in the light of the undisputed facts regarding residence of the child, residence of the parents of the child and their nationality prior to filing of the petition, the Court in Delhi would have jurisdiction or not.

4. The learned District Judge in his order observed that the paramount consideration for the Court in a Guardianship Petition is the welfare of the child and each case has to be considered with reference to its peculiar facts. Therefore, an inquiry has to be made into the allegations leveled against the respondent regarding his conduct in life and his suitability or otherwise to be a guardian of the minor. It further observed that the Guardianship Petition cannot be thrown away at the threshold on the plea that the Courts in India will have no jurisdiction to try this petition and only Courts in America were competent to deal with the subject. Thus, the District Judge practically did not address the issue whether the Court in India would have jurisdiction or not and decided the application without going into the basic issue of jurisdiction.

5. Section 9 of the Guardians and Wards Act makes it very clear that if the application was in respect of guardianship of the person of the minor, it shall be made to the District Court having jurisdiction over the place where the minor ordinarily resides. The Courts have time and again held that the words “ordinarily resides” does not signify more temporary residence or fortuitous residence.

6. In the present case there is no dispute about the fact that both the parties had been living in USA, the minor was born in USA in 2001 and all along he lived in USA in the State of California with the parents. The minor had visited India along with the mother in December, 2004, as per the allegations made by the respondent in her petition. She stated that she came to India as she was unable to bear the behavior of respondent however, she went back to New York in January, 2005 on an assurance of the petitioner that he would change his ways. Again, the parties lived together in USA. The child was admitted to a school in USA where he was studying before he came to Delhi. There is no dispute that child came to Delhi along with parents for a short visit to India on 27th June, 2008. It is after reaching Delhi that the respondent decided that enough was enough and she was not able to bear the company of the petitioner anymore and she decided to stay back and settle in India for her own safety and the safety of the child. She gave a notice to the petitioner after being in India on 8th July, 2008 informing him that she felt danger to her life and her son’s life and she had no intention to go back to USA. Her contention before the Guardianship Judge was that after this notice, the petitioner repeatedly called her and abused her and threatened that he would come to Delhi and forcefully take away the child which impelled her to file the Guardianship Petition. She also relied upon following e-mail sent to her by the petitioner to press the point that the petitioner had agreed that child shall stay with her in Delhi:

“Dear Ruchi,

As you wish to stay in India with Kush and try career option of dental medicine at Delhi, I give my wholehearted support and request you to put Kush in Indo-American school/equivalent at Delhi this year.

Please let me know the expenses involved for education of Kush which I would like to bear completely.”

7. The contention of the petitioner is that after receipt of legal notice, he sought mediation from the family members but the petitioner was given a threat of being proceeded under Section 498 A IPC so as to obstruct his departure to USA which was scheduled on 20th July, 2008. In order to ensure his smooth departure to USA on 20th July, 2008, he was forced to write above letter dated 19th July, 2008 to the respondent.

8. There seems to be some force in the contention raised by the petitioner regarding this letter. If this letter had not been written under any threat or coercion and had been written by the petitioner willingly, there would have been no occasion for the petitioner to file a Guardianship Petition in USA soon after he reached there since as per letter the petitioner had himself agreed that the child and the mother (respondent) may live in Delhi. She may search for career and the son may keep studying in Indo-American school.

9. However, the issue to be decided by the Court is whether it could be said that the child was “ordinarily residing in Delhi” within the jurisdiction of Delhi Court. It is settled law that an “ordinary resident” does not mean a “temporary resident” for howsoever considerable length of time it may be. The letter which has been relied upon by the respondent and which has been quoted by the Guardianship Judge in the order itself shows that this was a temporary arrangement agreed between the parties. The petitioner had agreed that the respondent may try career option in dental medicine at Delhi and simultaneously put the child in Indo-American school or equivalent in Delhi. This does not show that the child had migrated to India for good and Delhi had become

his "ordinary residence" on 1.9.2008. The child was born and brought up in USA, he was studying in a school in USA, he had lived in an atmosphere in USA which was different from the atmosphere in Delhi. He had all his friends in USA. The "ordinary residence" of the child at the time of filing petition by the respondent was not Delhi but it was USA. Not only the child but both the parents were US citizens, who had been living in US even before their marriage. Thus, Delhi, under no circumstances, could be considered as "ordinary residence" of the child. It may be that the respondent had decided to make Delhi as her and child's future residence but since petitioner and respondent both were natural guardians of the child and both had equal right over the child. Merely because respondent had decided that the child would, in future, be living with her in Delhi would not make Delhi as "ordinary residence" of the child. A unilateral decision taken by one parent, who is citizen of US, to migrate to India (Delhi) along with the child, also a US citizen, would not give jurisdiction to the District Judge within whose jurisdiction to entertain a guardianship petition the child is to live in future. "Ordinary residence" does not mean a residence which will become ordinary residence in future because it is forced on the child by either mother or father. If this is allowed then any of the two parents who had problem with other spouse would come on holiday to India with the child, give a notice that henceforth he/she has decided to live in India and deprive not only the other spouse of the custody and other rights over the child just by removing him/her to India but also the country of original of jurisdiction over the child. That would amount to taking away the rights of the parents by a deliberate act of removal and terminating the jurisdiction of lawful Court by a unilateral act of one of the parents. I consider that such a proposition to invoke jurisdiction would be contrary to the basic principles of Private International Law. Where the parties are citizens of a country and the child born to them is also a citizen of that country, the jurisdiction of that Court cannot be taken away just by removing the child to another country and expressing a

desire that the spouse wants to live in another country. One cannot look at this problem from the angle of a husband or wife. In this case, the mother has removed the child and brought it to India on the ground of atrocities of the husband. There have been many reported cases where father removed the child to India on some similar allegations.

10. It is submitted by the learned Counsel for the respondent that it is not a case where the child has been stealthily removed from the jurisdiction of US Court and brought to India. It was submitted that the child stayed in India with the consent of petitioner and since the child is now for more than 1 ½ years in Delhi, the child should not be sent back to USA since the child had settled in new environment. He relied upon *Dhanwanti Joshi v. Madhav Unde* (1998) 1 SSC 112. As already observed by me, that this Court is not deciding issue as to who should have custody of the child so as to consider what the welfare of the child is. The Court is deciding basic issue whether a petition filed under such circumstances would be entertainable by the Court in Delhi or not. The issue - to whom the custody of the child should be given, whether the child should live in Delhi with the mother or the child custody should be there with the father in USA - are not germane to the issue of jurisdiction. These issues would be decided by the Court who has jurisdiction to decide the issue of the custody of the child, whether it is US Court or Delhi Court.

11. It is also noteworthy that the Court at California, USA where the petitioner filed minor's custody petition had held that it had jurisdiction to entertain the petition, after considering all averments and objections made by the respondent and the fact that both the parties were US citizens, the child was having US citizenship, the child was having Social Security number of US, he was a passport holder of US and the child was habitual resident of US.

12. In *Shilpa Aggarwal v. Aviral Mittal & Anr.* JT 2009 (15) SC 188, the Supreme Court made following observations somewhat in similar circumstances:

23. 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 31/2 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 31/2 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.

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.

13. In Dr. V. Ravi Chandran v. Union of India (UOI) & Ors., the Supreme Court observed as under:

21. Do the facts and circumstances of the present case warrant an elaborate enquiry into the question of custody of minor Adithya and should the parties be relegated to the said procedure before appropriate forum in this country in this regard? In our judgment, this is not required. Admittedly, Adithya is an American citizen, born and brought up in United States of America. He has spent his initial years there. The natural habitat of Adithya is in United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interest, the parties have obtained series of consent orders concerning his custody/parenting rights, maintenance etc. from the competent courts of jurisdiction in America. Initially, on April 18, 2005, a consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court where under the court granted joint custody of the child to the petitioner and respondent No. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a separation agreement entered into between the parties on July 28, 2005, the consent order dated April 18, 2005 regarding custody of minor son Adithya continued. In September 8, 2005 order whereby the marriage between the petitioner and respondent No. 6 was dissolved by the New York State Supreme Court, again the child custody order dated April 18, 2005 was incorporated. Then the petitioner and respondent No. 6 agreed for modification of the custody order and, accordingly, the Family Court of the State of New York on June 18, 2007 ordered that the parties shall share joint legal and physical custody of the minor Adithya and, in this regard, a comprehensive arrangement in respect of the custody of the child has been made. The fact that all orders concerning the custody of the minor child Adithya have been passed by American courts by consent of the parties shows that the objections raised by respondent No. 6 in counter affidavit about deprivation of basic rights of the child by the petitioner in the past; failure of petitioner to give medication to the child; denial of education to the minor child; deprivation of stable environment to the minor child; and child abuse are hollow and without any substance. The objection raised by the respondent No. 6 in the counter affidavit that the American courts which passed the order/decreed had no jurisdiction and being inconsistent to Indian laws cannot be executed in India also prima facie does not seem to have any merit since despite the fact that the respondent No. 6 has been staying

in India for more than two years, she has not pursued any legal proceeding for the sole custody of the minor Adithya or for declaration that the orders passed by the American courts concerning the custody of minor child Adithya are null and void and without jurisdiction. Rather it transpires from the counter affidavit that initially respondent No. 6 initiated the proceedings under Guardianship and Wards Act but later on withdrew the same. The facts and circumstances noticed above leave no manner of doubt that merely because the child has been brought to India by respondent No. 6, the custody issue concerning minor child Adithya does not deserve to be gone into by the courts in India and it would be in accord with principles of comity as well as on facts to return the child back to the United States of America from where he has been removed and enable the parties to establish the case before the courts in the native State of the child, i.e. United States of America for modification of the existing custody orders. There is nothing on record which may even remotely suggest that it would be harmful for the child to be returned to his native country.

22. It is true that child Adithya has been in India for almost two years since he was removed by the mother--respondent No. 6 --contrary to the custody orders of the U.S. court passed by consent of the parties. It is also true that one of the factors to be kept in mind in exercise of summary jurisdiction in the interest of child is that application for custody/return of the child is made promptly and quickly after the child has been removed. This is so because any delay may result in child developing roots in the country to which he has been removed. From the counter affidavit that has been filed by respondent No. 6, it is apparent that in last two years child Adithya did not have education at one place. He has moved from one school to another. He was admitted in school at Dehradun by respondent No. 6 but then removed within few months. In the month of June, 2009, the child has been admitted in some school at Chennai. As a matter of fact, the minor child Adithya and respondent No. 6 could not be traced and their whereabouts could not be found for more than two years since the notice was issued by this Court. The respondent No. 6 and the child has been moving from one State to another. The parents of respondent No. 6 have filed an affidavit before this Court denying any knowledge or awareness of the whereabouts of respondent No. 6 and minor child Adithya ever since they left in September, 2007. In these circumstances, there has been no occasion for the child developing roots in this country. Moreover, the present habeas corpus petition has been filed by the petitioner promptly and without any delay, but since the respondent No. 6 has been moving from one State to another and her whereabouts were not known, the notice could not be served and child could not be produced for more than two years.

23. In a case such as the present one, we are satisfied that return of minor Adithya to United States of America, for the time being, from where he has been removed and brought here would be in the best interest of the child and also such order is justified in view of the assurances given by the petitioner that he would bear all the traveling expenses and make living arrangements for respondent No. 6 in the United States of America till the necessary orders are passed by the competent court; that the petitioner would comply with the custody/parenting rights as per consent order dated

June 18, 2007 till such time as the competent court in United States of America takes a further decision; that the petitioner will request that the warrants against respondent No. 6 be dropped; that the petitioner will not file or pursue any criminal charges for violation by respondent No. 6 of the consent order in the United States of America and that if any application is filed by respondent No. 6 in the competent court in United States of America, the petitioner shall cooperate in expeditious hearing of such application. The petitioner has also stated that he has obtained confirmation from Martha Hunt Elementary School, Murphy, Texas, 75094, that minor son Adithya will be admitted to school forthwith.

14. In light of the decisions of Supreme Court in above two cases and in the light of the facts of the case that the child was hardly in India for two months while he lived in USA for more than seven years and was a US citizen when the petition for Guardianship was filed, I consider that the District Judge exceeded his jurisdiction when he entertained the application made by respondent for custody of child and appointment of guardian. The order passed by the learned District Judge is hereby set aside and it is held that the Court in Delhi would have no jurisdiction to entertain the Guardianship Petition.

March 08, 2010
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SHIV NARAYAN DHINGRA, J.