

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 05.04.2011

+ WP (CRL) 1338/2010

DEEPTI MANDLAUS

... Petitioner

versus

STATE (GOVT OF NCT OF DELHI) & ANR ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sanjeev Narula with Mr Ashish Sharma and
Ms Sangeeta Sondhi

For the Respondent No.1/State : Mr Pawan Sharma

For the Respondent No.2. : Mr J.P. Sengh, Sr Advocate with Mr Amiet Andley
and Mr Arun K. Sharma

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE MANMOHAN SINGH

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 the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. This petition on behalf of a mother (Deepti Mandlaus) seeks the issuance of a writ of *habeas corpus* directing the respondents, in particular her husband, Nitin Mandlaus (respondent no.2), to produce her minor child, Armaan Mandlaus before this court and to further direct respondent no.2 to hand over custody of the child to the petitioner.

2. Briefly stated, the petitioner, respondent no.2 and the child, who are all Indian citizens, were residing in Canada since 04.04.2009 where the petitioner and respondent no.2 were working as software professionals. The

respondent no.2 and the child came to India on a visit for the duration 23.06.2010 to 10.08.2010. For this purpose, the petitioner, who stayed back in Canada, had given her consent for travel of the minor son with the father outside Canada i.e., to New Delhi, India. The Respondent no.2 decided not to return to Canada. He got Armaan admitted to a school in NOIDA, India and had the return tickets cancelled.

3. Before we address the legal issues which arise for consideration, we need to set out the factual backdrop in somewhat greater detail. On 20.12.2000, the petitioner and respondent no.2 got married in New Delhi according to Hindu rites and customs. They lived together in New Delhi. In 2002, the respondent no.2 applied for Canadian immigration under the “skilled category – Professional Workers”. While this application for immigration was pending, on 16.04.2004, the minor child Armaan was born. In 2008, the Canadian authorities granted permanent immigration to the respondent no.2 under the said category with the petitioner and their minor child Armaan as his dependants. On 04.04.2009, the respondent no.2 alongwith the petitioner and their minor son left India for Brampton, Ontario, Canada. The petitioner took up a job in Toronto, Canada in June 2009. The respondent no.2 and Armaan travelled to India on 09.10.2009 and returned to Canada on 04.11.2009. The petitioner did not accompany them on that visit and stayed back in Canada. However, the petitioner travelled to India alone from 15.12.2009 to 26.12.2009.

4. Thereafter, certain disputes arose between the petitioner and the respondent no.2, the details of which are not necessary for the purposes of this petition. As mentioned above, the petitioner and the respondent no.2 signed the Parental Travel Consent for Armaan's trip to India between 23.06.2010 and 10.08.2010 with the respondent no.2 as the travelling parent. The return ticket was for 'to and fro' flights on 23.06.2010 and 10.08.2010. Both, the respondent no.2 and Armaan, travelled to New Delhi on 23.06.2010 but did not return to Canada on 10.08.2010, or thereafter. In the meanwhile, on 28.07.2010, Armaan was admitted to Class I in Lotus Valley School, NOIDA, UP, India, where he continues to study. On 09.08.2010, respondent no.2 cancelled the return tickets for his and his son's journey to Canada which was to take place on 10.08.2010.

5. On the same day (09.08.2010), respondent no.2 filed a petition (GP No. 62/2010) under section 7 of the Guardian and Wards Act, 1890 and section 6 of the Hindu Minority and Guardianship Act, 1956 before guardianship court, Patiala House Courts, New Delhi for his appointment as the sole guardian of Armaan. The said petition was listed before the Court on 10.08.2010 when the said Court issued notice to the petitioner herein for 19.11.2010.

6. In Canada, on 10.08.2010, the petitioner filed a petition (Court File No. FS-10-69713-00) before the Superior Court of Justice, Family Court Branch, Ontario, Canada, claiming, *inter alia*, the following reliefs:- Divorce under the Divorce Act; support for child, custody of child and

restraining/non-harassment order under the Family Law Act and/or Children's Law Reform Act; and, exclusive possession of the matrimonial home, freezing of assets and sale of family property. It was also prayed, as a term of the custody order, that the respondent no.2 (Nitin Mandlaus) shall bring back Armaan Mandlaus to the jurisdiction of the Superior Court of Justice, Ontario. On 11.08.2010, the said court passed, *inter alia*, a "without prejudice" ad-interim ex-parte order directing that Deepti Mandlaus shall have sole custody of Armaan and as a term of the custody order, the respondent no.2 (Nitin Mandlaus) shall bring back Armaan to the jurisdiction of the said Court, forthwith. On 14.08.2010, the respondent no.2 received a copy of the petition filed by the petitioner in Canada as well as a copy of the said order dated 11.08.2010.

7. On 06.09.2010, the petitioner filed the present writ petition and the same was listed before this Court on 08.09.2010, when, notice was issued on the petition and it was further directed that the notice issued to respondent no.2 should indicate that he shall produce the child Armaan before court on 16.09.2010, i.e., the next date of hearing. On 08.09.2010, itself, the respondent no.2, perhaps oblivious of the present writ petition, filed a civil suit [CS(OS) 1853/2010] in the Original Side of this Court praying for an order of injunction restraining the petitioner herein from proceeding with her petition before the Superior Court of Justice, Family Court Branch, Ontario, Canada. On 13.09.2010, the said suit was registered. On 15.09.2010, *dasti* (by hand) summons were taken. Since, the petitioner did not appear, she

was proceeded against ex-parte by virtue of an order dated 22.09.2010 and she was also injuncted from prosecuting the petition in Canada. Subsequently, the petitioner herein entered appearance in the said suit and the ex-parte proceeding against her was set aside. She filed the written statement and the suit is pending before the original side of this Court.

8. Coming back to the present petition, on 16.09.2010 this Court, inter alia, passed the following order:-

“Renotify on 20.09.2010. In the meanwhile, without prejudice to the rights and contentions of the parties, the petitioner as well as the respondent No.2 are agreeable that they shall explore the possibility of a settlement. For this purpose, they are directed to appear before the Delhi High Court Mediation and Conciliation Centre today itself at 4.30 p.m. We direct that Ms Sadhna Ramachandran and Ms Maldeev Sidhu shall conduct the mediation proceedings. The object being that the petitioner and the respondent No.2 should, in the first instance, try to get back inasmuch as that would be in the best interest of the minor child [Arman].”

9. Initially, the mediation process showed promise and produced some positive results as would be apparent from this Court’s order dated 21.09.2010. But, on 27.09.2010, the learned counsel for the petitioner stated that there was no possibility of a settlement and that the matter be heard on merits. The petitioner, who had come from Canada, went back on 24.09.2010. Thereafter, the petition was heard on merits and is being disposed of by this judgment.

10. The learned counsel for the petitioner submitted that this Court must recognize the comity of courts principle and direct the respondent no.2 to

honour the order dated 11.08.2010 of the Canadian Court and take the child Armaan to Canada and submit to the jurisdiction of the Superior Court of Justice, Ontario, Canada. He placed reliance on a number of decisions. They are:-

1. *Aviral Mittal v. State & Anr:* 163(2009) DLT 627 (DB);
2. *Mrs Elizabeth Dinshaw v. Arvand M. Dinshaw & Anr:* AIR 1987 SC 3;
3. *Smt Surinder Kaur Sandhu v. Harbax Singh Sandhu & Anr:* (1984) 3 SCC 698;
4. *Shilpa Aggarwal v. Aviral Mittal & Anr:* (2010) 1 SCC 591;
5. *V. Ravi Chandran v. Union of India & Ors:* (2010) 1 SCC 174.

11. It was also submitted that the respondent no.2 cannot be permitted to have sole custody through subterfuge. The learned counsel submitted that the petitioner is only asking that the respondent no.2 should return to Canada with Armaan and face the Divorce and custody proceedings there. It was also contended that the court in Canada had the closest connection with Armaan inasmuch as the respondent no.2 and the petitioner (and Armaan, with them) had migrated to Canada on 04.04.2009 and were living there as permanent residents. It was submitted that the respondent no.2 betrayed the trust of the petitioner when he cancelled the return tickets and did not return to Canada on 10.08.2010 alongwith Armaan, as promised. It was finally submitted that it would also be in the interest of Armaan that he be taken back to Canada and that it cannot be presumed that the petitioner, by herself, would not be able to look after her son – Armaan.

12. Mr J.P. Sengh, senior advocate, appearing on behalf of the respondent no.2 submitted that the most important aspect of this case is that the minor child Armaan is an Indian citizen. In fact, all the three persons, that is, the petitioner, the respondent no.2 and Armaan are Indian citizens and hold Indian Passports. None of them is a citizen of Canada. It was also submitted that the petitioner and the respondent no.2 got married in India in 2000 and Armaan was born in India in 2004. They only left for Canada on 04.04.2009. Armaan was then about 5 years old. When respondent no.2 and Armaan travelled to India on 23.06.2010, they had been in Canada for only 14 months. It was also submitted that both the petitioner and respondent no.2 are IT professionals. While respondent no.2 works from home, the petitioner has taken up a job. Mr Sengh, further drew our attention to the petition filed by the petitioner in Canada wherein she has indicated that support of “Day Care Services” would be taken in caring for the child. It was submitted that in contrast, respondent no.2 would be directly looking after Armaan. All of Armaan’s grand-parents (even the petitioner’s parents) are in India. Other relatives and friends are also in India. And, therefore, it would be in Armaan’s interest and welfare that he is in India. In any event, it was submitted on behalf of respondent no.2 that this petition be dismissed and the matter be left to the Guardianship Court at Patiala House, New Delhi to decide the issue of custody. On the strength of the Supreme Court decision in the case of **Syed Saleemuddin v. Dr Rukhsana and others: AIR 2001 SC 2172**, it was contended that unless the respondent no.2’s custody of Armaan could be said to be unlawful or illegal and not in the welfare of the

child (Armaan), no interference of this Court by way of exercise of its extraordinary writ jurisdiction was called for.

13. The learned counsel for the petitioner had placed great reliance on this Court's decision in *Aviral Mittal (supra)* which was affirmed by the Supreme Court in appeal in *Shilpa Aggarwal (supra)*. Undoubtedly, the principle of comity of courts was recognized and the minor child was directed to be taken back to UK for a decision as regards custody. Although the learned counsel for the petitioner suggested that the facts of that case and the present case are similar, we find that there is a striking difference. In that case the minor child was born in UK and was a citizen of UK. Here, Armaan was born in India and continues to be an Indian citizen. Then, again, in that case there were no proceedings in India, apart from the writ petition, but, in the present case, before the Court in Canada passed the order dated 11.08.2010, the respondent no.2 had already invoked the jurisdiction of the Guardianship Court in New Delhi, on 09.08.2010 and that Court had already taken up the case on 10.08.2010 when it issued notice of the petition to the petitioner herein. As would be apparent from a reading of the decision in *Aviral Mittal (supra)*, particularly paragraphs 15, 16 and 20, the fact that the child in that case was a British citizen weighed heavily with the court. The Supreme Court, in *Shilpa Aggarwal (supra)*, noted in paragraph 27 thereof, that it found itself placed between “*two contrasting principles of law*” and that “*of the two principles, the High Court has placed greater reliance upon the theory of comity of nations and comity of judgments of*

courts of two different countries in deciding the matter". The two contrasting principles were the principle that the welfare of the child was paramount and the comity of courts principle. The Supreme Court, while accepting this court's application of the comity principle in that case took note of the fact that the UK Court was already in seisin of the matter and that the ultimate decision as to custody ought to be left to the English courts "*having regard to the nationality of the child and the fact that both parents had worked for gain in the UK and had also acquired permanent resident status in the UK*". Thus, it is clear that the fact that the minor child was a British national and also the fact that the UK court was already in seisin of the custody matter, weighed heavily with the Supreme Court in upholding the application of the comity of courts principle in the facts of that case. However, the facts here are entirely different. Armaan was born in India and continues to be an Indian citizen. Moreover, when the Canadian Court passed the order on 11.08.2010, the Guardianship Court in New Delhi was already seized of the custody matter filed by the respondent no.2. Thus, no parallel can be drawn from the *Aviral Mittal* (*supra*) and the *Shilpa Aggarwal* (*supra*) decisions. They are clearly distinguishable.

14. In *Elizabeth Dinshaw* (*supra*), the Supreme Court, as noticed in *Aviral Mittal* (*supra*), emphasized that in matters of custody of minor children, the sole and predominant criterion is what would best serve the interest and welfare of the minor. The Supreme Court also observed that courts in all countries are bound to ensure that a parent does not gain

advantage by any wrong-doing like removing children from one country to another. This would be hardly applicable in the present case as it cannot be said that the respondent no.2 has gained any advantage over the petitioner in deciding not to return to Canada with Armaan. The petitioner, like the respondent no.2, is an Indian citizen. Her parents reside in India as do her other relatives and friends. She is not alien to the Indian circumstance. She has lived her entire life in India except the period post 04.04.2009.

15. Similarly, the Supreme Court decision in *Smt Surinder Kaur Sandhu (supra)* is also distinguishable for the reason that the minor child in that case was a British citizen and the father was regarded by the Supreme Court as “a man without a character” who had offered solicitation to the commission of his wife’s murder! The Supreme Court, in any event, invoking the well established principle that the welfare of the minor is paramount, held the custody of the mother in his best interest in the following words:-

“..But, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. As the matters are presented to us today, the boy, from his own point of view, ought to be in the custody of the mother.”

16. Another factor which weighed heavily with the Supreme Court was the fact that the child in that case was a British Citizen and therefore the Courts in England had the most intimate connection with the issue of his custody. This facet is clearly absent in the present case as Armaan is an

Indian citizen. The character of the father, respondent no.2, is also not in question as it was in that case.

17. The decision in *V. Ravi Chandran (supra)* is also a case where the child was born in USA. The child was brought to India at a time when a custody dispute was already pending in a court in USA and the child was brought to India in violation of that court's order. The position here is entirely different.

18. Thus, none of the decisions sought to be relied upon by the petitioner actually come to her aid. The common factors running through those decisions are that the child was a citizen of a foreign state and that a court of that state was already in seisin of the custody case. Both these factors are missing in the present case. Thus, the comity of courts principle would not come to the aid of the petitioner. It must also be remembered that each of these decisions have also emphasized the golden rule in all custody matters that the welfare of the child would be paramount. There has been too much focus on the parents' right to custody, when in fact, the issue must always be addressed from the standpoint of the child. An issue of custody of a minor is actually a facet of the minor's right to life guaranteed under article 21 of the constitution of India. Irrespective of anything, the courts have to look after the interests of the minor and not let themselves to be sucked into the ugly battles of the minor's parents. It is not so much a question as to which parent deserves to gain custody of the child as it is a question of which parent's care is best for the child.

19. In view of the foregoing discussion we are not inclined to allow the reliefs prayed for in this petition as we do not find the custody of respondent no.2 to be unlawful or illegal. Whether it is in the best interest and welfare of the minor will have to be decided by the guardianship court in GP No.62/2010 pending in the Patiala House Courts, New Delhi. It is for this reason that we have not expressed any opinion on which of the parents of Armaan is best suited to look after his welfare. With these observations, the petition is dismissed. In the circumstances, the parties are left to bear their respective costs.

BADAR DURREZ AHMED, J

MANMOHAN SINGH, J

APRIL 05, 2011

HJ