

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.5170 of 2016(O&M)
Date of Decision-21.12.2018

Arjun Yash Mahajan ... Petitioner
Versus

Shivani Mahajan ... Respondent

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Vikas Behal, Sr. Advocate with
Mr. Abhilaksh Grover, Advocate
for the petitioner.

Ms. Neha Sonawane, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this revision petition against the order dated 31.05.2016 passed by Additional Civil Judge (Senior Division), Panchkula, whereby the application under Order 7 Rule 11 CPC filed by the petitioner was dismissed.

[2]. Marriage of the petitioner was solemnized with the respondent on 02.12.2018 in Delhi as per Hindu Rites and Ceremonies. After the marriage, the couple went to London. Minor Child Inayat Mahajan took birth on 02.07.2012. Petitioner and the respondent are British citizens and are having status of Indian overseas citizens. Minor Inayat Mahajan now aged 15 years is also British citizen. The couple could not go ahead with the matrimonial ties and ultimately, got separated vide divorce

dated 04.09.2014 passed by Central Family Court, London. An amicable settlement was done.

[3]. Heads of terms of agreement and settlement were recorded. It was mutually agreed and declared on 11.09.2014 by the parties (couple) as under:-

“1. The father and mother have each taken separate and independent legal advice on the matters referred to in these Heads of Terms.

2. There have been up to now differences between the father and the mother as to residence and contact in respect of the child of the family Inayat Mahajan (date of birth 2nd July 2012) resulting in the mother issuing an application under the Children Act for a prohibited steps order and the father issuing an application under the Children Act 1989 for Residence and Contact.

3. The mother has been served with the father’s application for a residence and contact application which is currently being processed by the Court and a hearing date is awaited.

4. Furthermore the mother in conjunction with the application for a prohibited steps order made a free standing application for an injunction against non-molestation and a restraining order prohibiting the father from entering the Former Matrimonial Home at 15 Cape Yard Kennet Street London E1W2JU.

5. The mother as from the date sets out below consents to the application both as to residence and contact and acknowledges and affirms that the child of the Family Inayat Mahajan shall forthwith reside exclusively with the father.

6. *The mother invites the Court to make an order granting Residence to the father and will sign such consent application or other any documentation required of her by the father or the Court to provide that the father do have residence of the child of the Family Inayat Mahajan.*

7. *The mother further acknowledges and by these Heads of Terms gives full consent to the father that if he chooses to live and or work abroad that she gives full consent to the father taking the child of the Family Inayat Mahajan out of the jurisdiction of England and Wales and she will support any application required of the father to seek permission of the Courts to remove the child of the Family Inayat Mahajan from its jurisdiction.*

8. *The father acknowledges and accepts that the mother shall be entitled to have contact to the child of the Family Inayat Mahajan at times to be mutually agreed between the father and the mother. During school holiday's, the father agrees that the mother can have child of the Family Inayat Mahajan for upto 3 weeks on mutually agreed dates, provided the mother collects Inayat Mahajan and mother returns Inayat Mahajan in the custody of the father.*

9. *The mother hereby further consents that she will make an application forthwith to the Courts to withdraw the prohibited steps order and the injunction both as to non-molestation and the father entering the Former Matrimonial Home. The father accepting that he should not unless invited by the mother return to or enter the Former Matrimonial Home save otherwise than for the purposes of collecting and delivering the child of the Family Inayat Mahajan when the mother has contact."*

[4]. Thereafter, the application filed by the respondent seeking an *ex parte* non-molestation and occupation was dismissed by the East Central Family Court, London i.e. interim order dated 02.07.2014 was discharged. The consent order was signed by the parties on 03.10.2014. A consent order regarding financial agreement between the parties was also converted by the Central Family Court vide order dated 03.11.2014. Thereafter, a similar draft consent order was also signed by the parties on 03.10.2014 in the presence of witnesses and it was agreed that the petitioner is entitled to remove the child from jurisdiction of the Court permanently. In case, petitioner wishes to leave and work out of the jurisdiction of England, then he was to inform the respondent about whereabouts of the child. On 03.10.2014, following order was passed in the aforesaid context:-

“1. The Order of District Judge Davies dated the 2nd June 2014 be discharged.

2. The child of the family Inayat Mahajan date of birth 2nd July 2012 shall reside with the Respondent Father Arjun Yash Mahajan as from the date of this Order and the Applicant shall hand over to the Respondent Inayat Mahajan’s U K passport, Overseas Citizen of India passport and Medical Red Book.

3. Applicant shall have contact to Inayat Mahajan for alternate weekend stay provided the respondent and the child of the family Inayat Mahajan are in the jurisdiction of England and Wales. Respondent further agrees that the applicant shall have contact with child of the family Inayat

Mahajan for upto 3 weeks during the summer school holidays provided that the applicant collects the child Inayat Mahajan and undertakes to return the child Inayat Mahajan to the respondent in the jurisdiction of the residence of the respondent.

4. The respondent shall be entitled to remove the child Inayat Mahajan, date of birth 2nd July 2012, from the jurisdiction of this Court permanently. If the respondent chooses to live and work out of the jurisdiction of England and Wales along with the child of the family Inayat Mahajan, the respondent agrees to inform the applicant the whereabouts of the child, Inayat Mahajan. The respondent further agrees for the applicant to have contact with child of the family Inayat Mahajan via social media (Facetime).

5. There be no order as to costs save for detailed assessment of the applicants publicly funded costs in accordance with the Civil Procedure Rules, 1998 Part 47.17.”

[5]. In the meantime, on 08.10.2014, petitioner sent a letter to the respondent requesting her to sign the letter, giving her family consent so that the petitioner may take the child Inayat Mahajan with him to India. Respondent gave her consent on 09.10.2014 agreeing to the aforesaid proposal. A final draft order laying down the terms of the settlement was delivered to the Court on 10.11.2014.

[6]. Thereafter, in terms of settlement, respondent was given permission to withdraw the child arrangements vide order dated 12.12.2014 and it was agreed between the parties that they

shall make their own arrangements of the child. Respondent consented to the child being taken to India by the petitioner. Consequently, the petitioner left U.K and came to India with the minor and started residing in Panchkula.

[7]. Respondent initiated proceedings against the petitioner before the High Court of Justice, Family Division. Respondent appeared in person, however, petitioner did not appear. The case was dismissed by the High Court on 06.07.2015.

[8]. Thereafter, respondent filed an application under Section 9 of the Guardians and Wards Act, 1890 initially before the Family Court, Saket, New Delhi, but the same was dismissed for lack of jurisdiction. Thereafter, respondent filed petition under Section 7 read with Section 9 of the Guardians and Wards Act, 1890, seeking permanent custody and guardianship of minor child in the Family Court at Panchkula.

[9]. Petitioner contended that the issue of custody has already been concluded on account of order dated 12.12.2014 passed by Family Court at London. Along with the petition, an application under Section 12 read with Section 39 of the Guardians and Wards Act, 1890 was also filed by the respondent for grant of interim order, directing the petitioner to allow the respondent to speak with the minor every day and to have custody of minor every weekend. Interim custody of the minor

was claimed by removing the minor from the custody of the petitioner.

[10]. In the aforesaid petition, the petitioner filed an application under Order 7 Rule 11 CPC for rejection of plaint on the ground of jurisdiction.

[11]. The application filed by the petitioner under Order 7 Rule 11 CPC was dismissed by Additional Civil Judge (Senior Division), Panchkula vide order dated 31.05.2016 and the application under Section 12 of the Guardians and Wards Act, 1890 was adjourned for arguments. That is how, the present revision petition came to be filed.

[12]. Learned Senior Counsel for the petitioner submitted that the respondent cannot be allowed to raise the issue again, once it was culminated in the competent Court at London. The settled things cannot be unsettled with the change of place. The concept of finality of judgment has been explained by the Hon'ble Apex Court in **Indian Council for Enviro-Legal Action Vs. Union of India and others, 2011(3) RCR (Civil) 779**. The maxim '*interest Republicae ut sit finis litium*' is to the effect that the litigation must end after a long hierarchy of remedies at some stage. It is necessary to put a quietus. It is rare that in an adversarial system, despite the judges of the highest Court doing their best, one or more parties may remain unsatisfied with the most correct decision. Opening the door for a further appeal

would result in opening a flood gate which will cause more wrongs in the society at large at the cost of rights. The controversy between the parties must come to an end at some stage. It would be improper to allow the parties to file application after application in the endless process. Finality of judgment is absolutely imperative and great sanctity is attached to the finality of the judgment.

[13]. Allowing the parties to re-open the concluded judgments on the basis of some untested material would be an abuse of process of law and the same would have far reaching adverse consequences on the administration of justice. The principle of finality of litigation is based on high principle of public policy. It is equally important to prevent unscrupulous litigant from taking undue advantage through the process of the Court. It is an onerous duty and obligation of the Court to ensure that an undue enrichment is not drawn by the losing party by exercising the process of the Court. While curbing the aforesaid tendency, the Court would be fully justified in imposing punitive costs, where legal process has been abused. Doctrine of *stare decisis* is very valuable principle of precedent which cannot be departed in ordinary circumstances. The view expressed in **Manganese Ore (India) Ltd. Vs. The Regional Assistant Commissioner of Sales Tax, Jabalpur, (1976) 4 SCC 124** and **Green View Tea & Industries Vs. Collector, Golaghat and another, 2002(2) RCR (Civil) 362** can be relied in the aforesaid context.

[14]. Learned Senior Counsel for the petitioner further submitted that doctrine of *res judicata* is not technical doctrine, but a fundamental principle which sustains rule of law in ensuring finality in litigation. The Court should not be hampered by any technical rule and interpretation at the time of applying principle of *res judicata*. Even the party can be bound down by constructive *res judicata*.

[15]. Learned Senior Counsel by citing **Ramesh Kumar Sharma Vs. The Ambassador, Royal Netherlands Embassy, 2002(1) SCT 761, SNP Shipping Services Pvt. Ltd. and others Vs. World Tanker Carrier Corporation, 2000 AIR (Bombay) 34, Hanifa Kalangattu Vs. Shaista Khan, 2017(2) Ker L.J. 556, HSBC Bank USA Vs. Silverline Technologies Ltd. and another, 2006(3) RCR (Rent) 368, T. Arivandadam Vs. T.V. Satyapal, 1978(1) SCR 742, Surinder Mohan Vs. Pritam Kaur and another, 2009(33) RCR (Civil) 203 and Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman Vs. M/s Ponniamman Educational Trust represented by its Chairperson/Managing Trustee, 2012(3) RCR (Civil) 811** contended that having availed the remedy before the competent Court at London, respondent is not competent to re-agitate the concluded issue and the same is hit by principle of *res judicata*.

[16]. United Kingdom is not a reciprocating country as envisaged under Section 44-A CPC, therefore, the judgment passed by the foreign country is not executable in India. Perusal of petition under Section 7 read with Section 9 of the Guardians and Wards Act, 1890 would show that the petition is nothing but an enforcement of foreign judgment which cannot be done on legal parameters. Learned Senior Counsel relied upon Sections 13 CPC and contended that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:-

(a) Where it has not been pronounced by a court of competent jurisdiction;

(b) Where it has not been given on the merits of the case;

(c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) Where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) Where it has been obtained by fraud;

(f) Where it sustains a claim founded on a breach of any law in force in India.

[17]. Section 44-A CPC deals with the execution of decrees passed by the Courts in reciprocating territories. The District

Court shall refuse the execution of any such decree if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13 CPC. The order passed by the foreign Court has to be executed only before the District Court. The Family Court has been given special jurisdiction in terms of Family Court's Act and the District Court as specified in Section 44-A CPC is the ordinary District Court having civil jurisdiction. In view of above, learned Senior Counsel contended that the Court at Panchkula does not have any jurisdiction to entertain the petition. Learned Senior Counsel further submitted that the foreign judgment as passed in the present case, cannot be treated as foreign judgment as contemplated under Section 13 CPC and the same is not enforceable in India and enforcement of the same by means of petition under Section 7 read with Section 9 of Guardians and Wards Act, 1890 at Panchkula is not maintainable. Since the order was passed on consent by the Family Court in London, therefore, it prevents the Court from going into detailed merits of the case and a party who by its own conduct of giving the consent invites the Court for entering upon an order and judgment is precluded from raising the defence that the judgment is not on merits and therefore, not enforceable under Section 13(b) CPC.

[18]. Learned Senior Counsel further contended that 90% of the petition is relying upon order of UK Court and in remaining

10% of the petition, there is no whisper that the order is not binding or clauses (a) to (f) are attracted. No averments have been made in respect of UK being reciprocating territory so as to attract filing of petition at Panchkula. If no averments in the plaint are made, then only civil suit for declaration could have been filed. No challenge has been made to the foreign decree, nor the decree is a reciprocatory decree. The petition for custody is not maintainable. There is no averments in the petition that the husband is not fit enough to have the custody of minor on lawful parameters.

[19]. On the other hand, learned counsel for the respondent referred to **Nithya Anand Raghavan Vs. State of NCT of Delhi and another, 2017(8) SCC 454, Ruchi Majoo Vs. Sanjeev Majoo, (2011) 6 SCC 479, Surya Vadanam Vs. State of Tamil Nadu and others, (2015) 5 SCC 450, Rajesh K. Gupta Vs. Ram Gopal Agarwala, (2005) 5 SCC 359, Gaurav Nagpal Vs. Sumedha Nagpal, (2009) 1 SCC 41, Jitender Arora Vs. Sukriti Arora, (2017) 3 SCC 726, Sarita Sharma Vs. Sushil Sharma, (2000) 3 SCC 14, Dhanwanti Joshi Vs. Madhav Unde, (1998) 1 SCC 112, Nil Ratan Kundu Vs. Abhijit Kundu, (2015) 8 SCC 318, Bhau Ram Vs. Janak Singh, (2012) 8 SCC 701, Sopan Sukhdeo Sable and others Vs. Assistant Charity Commissioner and others, (2004) 3 SCC 137, Popat and Kotecha Property Vs. State Bank of India Staff, (2005) 7 SCC 510, Kamala and others Vs. V.E.T. Eshwara SA and others,**

(2008) 12 SCC 661, Govind Goverdhandas Daga and another Vs. Field Mining and Ispat Ltd., Nagpur and another, (2009) SCC Online Bom 1134 and Rosy Jacob Vs. Jacob A. Chakramakkal, (1973) 1 SCC 840 and contended that law mandates that in all actions concerning children, the best interests of the child shall be of primary concern and the child shall be provided the opportunity to be heard. The Hague Convention is intended to prevent parents from abducting children across borders and is governed by the principle of comity of Courts. Upholding the principle of comity of Courts while disregarding the welfare of the child would thus go against the public policy and result in great harm being caused to the child. The concept of forum convenience has no place in wardship jurisdiction. The efficacy of the principle of comity of Courts as applicable to India in respect of child custody matters has been succinctly delineated in several precedents. Reference can be made to **Dhanwati Joshi's case (supra)**. The Court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign Court for return of the child as only one of the circumstances. The crucial question to be considered by the Court (in the country to which the child is removed) is to answer the issue according to the child's welfare. This has to be done keeping in view the totality of facts and circumstances of each case independently. The principle of comity of Courts cannot be

given primacy or more weightage for deciding the matter of custody or for return of the child to the native State. The ratio of **Surya Vadan***an's case (supra)* has been diluted in **Nithya Anand Raghavan's case (supra)** to some extent wherein clauses 'a' to 'c' were held to be drifting away from the exposition in **Dhanwanti Joshi's case (supra)** which has been quoted with approval by Larger Bench in **V. Ravi Chandran (2) Vs. Union of India, (2010) 1 SCC 174**. The giving of primacy to the order of the foreign Court on the issue of custody of minor was negated in **Dhanwanti Joshi's case (supra)**. In both the inquiries whether summary or elaborate, the paramount consideration is in the interests and welfare of the child and the pre-existing order of a foreign Court can be reckoned only as one of the factor to be taken into consideration by the Court in India. Indian Courts are strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction.

[20]. The duty of a Court exercising its *parens patriae* jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration, the Court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign Court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the Courts in India to shut out an independent

consideration of the matter. Objectivity is the only consideration in such type of cases. It does not mean that the order passed by a foreign Court is not even a factor to be kept in mind while deciding the welfare of the child. The orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances, requiring change of custody but such change in custody must be proved to be in the paramount interests of the child. The ratio laid down in **Rosy Jacob's case (supra)** can be relied in this context with reference to Section 26 of the Hindu Marriage Act, 1955 which also mandates that custody issue of the minor is a dynamic process and cannot be treated to be static with the passing of the order. The welfare of the child is of paramount consideration. The order relating to custody of minor is always considered to be temporary/interim order. With the passage of time, the Court is entitled to modify the order in the interest of the minor. Even the order based on consent can be varied in the interest of the minor, if the welfare of the minor so demands. The children are not mere chattels, nor are they mere play things for the parents. Absolute right of parents over the destinies and 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.

The Guardian Court in case of dispute between the mother and

the father is expected to strike a just and proper balance between the requirements of welfare of the minor child and the rights of respective parents over the child. In nutshell, welfare of the child has to be appreciated in all possible manner. Any undertaking given in the divorce case between the couples is not binding upon the minor. All orders relating to custody of the minor must be considered to be temporary orders made in the existing circumstances. With the passage of time and with changed conditions and circumstances, the Court is entitled to vary such orders in the interest and welfare of the minor.

[21]. In **Vikram Vir Vohra Vs. Shalini Bhalla, 2010(2) RCR (Civil) 521**, the Hon'ble Apex Court again relied upon the ratio of **Rosy Jacob's case (supra)** and held that Section 26 of the Hindu Marriage Act cannot create any embargo to treat the order of custody passed by the Family Court to be permanent in nature, rather such order will be too hyper technical to be considered seriously in a custody issue of a child. Child cannot be treated to be a chattel nor an article of personal property of equal halves. The Court must remember that it is dealing with a sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his life. Custody orders are always considered to be interlocutory orders and by the nature of such proceedings, custody orders cannot be weighed rigid and final. These orders are capable of being altered and moulded keeping in view the needs of the child. Merely because the father loves

the minor child and is not shown to be otherwise undesirable, cannot necessarily lead to the conclusion that the welfare of the child would be better promoted by granting custody of the minor to him as against mother, who may also be equally affectionate towards the minor. The daily trauma, the child appears to undergo while being tutored against his mother would be far in excess of trauma likely to be faced while entrusted to the husband. In Halsbury's Laws of England, Fourth Edition, Vol. 24, para 511 at page 217, the mother's claim was held to be superior to that of father.

[22]. The custody issue has to be appreciated on the proverbial universally accepted superiority of natural mother's instinctive selfless love and affection of her children particularly infants. Motherly care and affection are indispensable for the healthy growth of the minor. Selfless interest of the mother in the welfare of their children is by and large found to be a part of her nature. This instinct cannot be confined to human race alone. None-else can provide love and affection to the children as mother can, as lap of mother is God's own cradle for children. Intensity of negative feeling of father towards mother would have obvious effect on the psychology of minor, who remained in the custody of his father to the exclusion of his mother. Mother is *per se* best suited to care for infant during tender age. Reference can be made to **Rosy Jacob's case (supra), Mausami Moitra**

Ganguli Vs. Jayant Ganguli, 2008(4) RCR (Civil) 551, Gaurav

Napal's case (supra), Roxann Sharma Vs. Arun Sharma, 2015(2) RCR (Civil) 93 and Kamal Maini Vs. Natasha @ Mona and others, 2017(5) RCR (Civil) 196.

[23]. Learned counsel for both the parties have tried to argue the case on merits which is subject matter of pending consideration before the Court at Panchkula. The aforesaid arguments have been noticed as per intensity of arguments raised by learned counsel for the parties during course of hearing.

[24]. It is a settled principle of law that at the time of consideration of application under Order 7 Rule 11 CPC, only averments made in the plaint are to be seen. The consideration on the basis of Section 13 CPC would give rise to a situation that if the foreign judgment is found to be not in consonance with the welfare of the child, then the Court in India which is not a reciprocating territory can interfere in the custody issue. All these things are dependent upon quality of evidence to be led by parties during trial. Since minor cannot be party to the *lis* between the parents, any order passed on consent of the parents is not binding upon the minor. Sub Clauses (c), (d) and (f) of Section 13 CPC may give rise to certain questions which are required to be answered by the competent Court after receiving evidence from the parties. The foreign judgment can be one of the considerations before the Court while considering the issue on

merits. It cannot be a solitary point for decision of the custody issue before the Court under Section 7 read with Section 9 of the Guardians and Wards Act, 1890. At this stage, forming an opinion on merits of the case may prejudice the case of either of the parties during trial.

[25]. Having considered the questions raked up before this Court, I am of the view that at this stage, no final opinion on the basis of arguments raised by learned counsel for the parties at the bar can be given, lest it may prejudice the case of either of the parties on merits before the trial Court. The scope of Order 7 Rule 11 CPC cannot be applied as triable issues are involved in the present case. Since the custody issue is dynamic in nature which cannot be considered to be static by any stretch of imagination, therefore, dynamic process with the passage of time, needs re-consideration by the Court at appropriate stage. If according to the petitioner, clever drafting has been made by the respondent and that has created the illusion of a cause of action, then the petitioner would be well advised to nip the same in the bud at the first date of hearing by examining the parties under Order 10 CPC. Petitioner would be at liberty to take recourse to the lawful remedy as provided by the ratio as laid down in **Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman's case (supra).**

[26]. At this stage of litigation, there is no ground to interfere in the impugned order dated 31.05.2016 passed by Additional Civil Judge (Senior Division), Panchkula and to reject the plaint under Order 7 Rule 11 CPC. However, this revision petition is disposed of, giving liberty to the petitioner to take recourse to the lawful remedy, if the drafting of the plaint is the result of clever devise and the same has created an illusion of a cause of action.

[27]. Anything recorded hereinabove shall not be construed to be a final opinion on merits of the case. Trial Court shall be obligated to scrutinize the evidence on legal parameters and decide the case strictly in accordance with law.

(RAJ MOHAN SINGH)
JUDGE

21.12.2018
Prince

Whether Reasoned/Speaking	Yes/No
Whether Reportable	Yes/No