



LEGAL ISSUES RELATING TO CUSTODY OF CHILDREN OF FOREIGN ORDINARY RESIDENTS BROUGHT TO INDIA – A STUDY

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ABSTRACT

Custody of children of foreign ordinary residents who are brought to India has raised innumerable complex problems. The need to deal with such issues judiciously has been stressed in the future interests of such children. A study is undertaken in the light of series of decisions. The welfare of minor children must be the most important consideration, in the applicability of comity of courts. Legal issues relating to the custody of children has been studied. Several suggestions have been made.

KEYWORDS : Persons of Indian origin, Modern theory of conflict of laws, Principles of comity of courts and welfare of children, Domestic court, Decree of foreign court, Bandi's cas

INTRODUCTION

Case of persons of Indian origin settled in foreign countries and employed acquiring the citizenship of that country marrying a person, who at the time of marriage an Indian citizen moving to such a foreign country leading a married life with a secured job in that country begetting children, whose custody becomes a complex and difficult problem to decide when the parties have deep irreconcilable differences, when one of the party comes back to India with the children. One of the party makes a constant effort to get back the children to the foreign country by filing cases for their custody, while the other files in an Indian court seeking divorce. The casualty in such cases are the innocent children whose future would be ruined, if a judicious decision is not taken about their custody.

One such case, which is illustrative of what is mentioned above, is the case of Surya Vadanani.¹ In order to decide the issue of custody of children, a series of decisions had to be referred to by the Supreme Court.

In Sarita Sharma's case,ⁱⁱ the ratio in Surinder Kaur Sandhuⁱⁱⁱ was relied upon to the extent relevant to the issue. This can be stated thus:-

- i) The modern theory of conflict of laws recognises and in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case;
- ii) Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as where the child, whose custody is in issue is brought or for the time-being lodged;
- iii) To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum shopping;
- iv) Ordinarily jurisdiction must follow upon functional lines i.e., that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the off springs of marriage.

In other words, Sarita Sharma's case^{iv}, suggests that the principles of comity of courts and welfare of the child shall be applied to determine the issue of the custody of the child.

In Shilpa Agarwal's case,^v the following principles were laid down:-

- a. The principles of comity of courts and the welfare of the child are the two contrasting principles of law;
- b. In matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child;^{vi}
- c. Domestic courts cannot be guided entirely by the fact that one of the parents violated an order passed by the foreign court;^{vii}
- d. Since the foreign court had the 'most ultimate contact' with the

child and parents,^{viii} the principle of comity of courts required that the foreign court would be the most appropriate court to decide which parent would be best suited to have the custody of the child.

Shilpa Agarwal's case stresses the 'most intimate contact' principle to be applied to determine the custody of the child and also to decide which parent shall have the custody.

In V. Ravi Chandran's case,^{ix} the following principles were laid down:-

- a. The comity of nations does not require a court to blindly follow the order made by a foreign court;
- b. Due weight should be given to the views formed by the court of a foreign country of which the child is a national. The principle of comity of courts demand's not the enforcement of an order of a foreign court but its grave considerations;
- c. The welfare of the child is the first and paramount consideration, whatever order may have passed by the foreign court;
- d. The domestic court is bound to consider what is in the best interests of the child. Although the order of a foreign court will be attended to as one of the circumstances to be taken into account, it is not conclusive one way or other;^x
- e. One of the consideration that a domestic court must keep in mind is that there is no danger to the moral or physical health of the child in repatriating him or her to the jurisdiction of the foreign country;^{xi}
- f. While considering whether a child should be removed to the jurisdiction of the foreign court or not, the domestic court may either conduct a summary enquiry, it would return the custody of the child to the country from which the child was removed, unless such return could be shown to be harmful to the child.
 1. In the event the domestic court conducts an elaborate inquiry, the court could go into the merits as to where the paramount welfare of the child lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstance;^{xii}
 2. An order that the child be returned forthwith to the country from which he or she has been removed in the expectation that any dispute about his or her custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child;^{xiii}
- g. The modern theory of conflict of laws recognises and in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged;^{xv}
- h. That the decree passed by a foreign court cannot override the

consideration of welfare of the child;

It is clear from the decision in Ravi Chandra's case, the most important decisive factor is the 'welfare of the child' and even a foreign decree cannot over-ride this consideration.

In Ruchi Majoo's case,^{xvi} the following principles were laid either by way of earlier principles being reiterated or added:-

- a. The welfare of the child is the paramount consideration.
 1. Simply because the foreign court has taken a particular view on any aspect concerning the welfare of the child is not enough for the courts in India to shut out an independent consideration of the matter.
 2. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement;
- b. One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate enquiry for repatriating the child is the time gap in moving the domestic court for repatriation.
 1. The longer the time gap, the lesser in the inclination of the domestic courts to go in for a summary inquiry;
 2. The order of the foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But it will not over-ride the consideration of welfare of the child;
- c. Even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent, who approached the foreign court would not be warranted if it were not in the welfare of the child;
- d. Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court, where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary enquiry on the question of custody of the child;
 1. If an elaborate enquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed;
- e. A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may conduct an elaborate enquiry into the welfare of the child, whose custody is claimed and a Guardian court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case;
- f. Since the interest and welfare of the child is paramount, a domestic court is entitled and indeed duty-bound to examine the matter independently, taking the foreign Judgment, if any, only as an input for its final adjudication;
 1. It is interesting to note that ratio in Ruchi Majoo's case^{xvii}
 2. emphasises on the welfare of the child and the need to conduct an elaborate or summary enquiry to determine this crucial issue, though the foreign courts Judgment is a relevant factor to be considered on this issue – 'welfare of the child'.
2. In Bandi's case,^{xviii} the Supreme Court laid down as follows:-
 - i) It is the duty of the courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong-doing;
 - ii) In a given case relating to the custody of a child, it may be necessary to have an elaborate enquiry with regard to the welfare of the child or a summary enquiry without investigating into the merits of the dispute relating to the case of the child on the ground that such an order is in the best interests of the child;
 - iii) Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue.

It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed. The principle of comity of courts is essentially a

principle of respect applicable when a foreign court is seized of issue of custody of a child prior to the domestic court. There may be situations where the foreign court though seized of the matter not passed an effective or substantive order or direction. In that event the domestic court were to pass an effective or substantive order or direction prior in time then the foreign court ought to exercise self-restraint and the direction or order of the domestic court (or vice-versa) unless there are very good reasons not to do so;

3. The Supreme Court observed that 'there is complete unanimity that the best interests and welfare of the child are of paramount importance and this is the final goal or the final objective to be achieved.

The principle of comity of courts and the principle of the best interests and welfare of the child are 'contrasting principles' in the sense not opposite of each other but different principles to be applied in the facts of a given case.^{xx}

SUGGESTIONS AND CONCLUSION

In conclusion, the following guidelines are useful in deciding the issues relating to the custody of children:-

- i) 'Most intimate contact' and the 'closest concern' are doctrines very much alive to be applied, inspite of the fact that such application may be in uncomfortable in certain situations;
- ii) A domestic court not having much 'intimate contact' with the child or its parents (as against a foreign court) should not take upon itself the onerous task of determining the best interests and welfare of the child;
- iii) There is no reason as to why the principle of 'comity of courts' should be Jettisoned except for special and compelling reasons. This is more so when the foreign court has not finally adjudicated the issue but merely given an interim order or has not given any order at all;
- iv) If the time-gap is usually longer and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate enquiry;
- v) The 'first strike' principle i.e., the first court which has passed an effective order should tilt the balance with regard to the principle of comity of courts.

The principles laid down in Surya Vadaman's case should serve as guidelines to the courts in India to decide the issues of custody of child in a complicate case involving domestic and foreign jurisdictions.

REFERENCES

1. Surya Vadaman Vs. State of Tamilnadu & others, AIR 2015 SC P.2243.
2. Sarita Sharma Vs. Sushil Sharma, AIR 2002 SC P.1019.
3. Surender Kaur Sandhu Vs. Harbax Singh Sandhu AIR 1984 SC P.1224.
4. Ibid Note 3.
5. Shilpa Agarwal Vs. Arvind Mittal and others 2009, AIR SCW P.7694.
6. This is also an emerging principle in Elizabeth Dinshaw Vs. Arivant M.Dinshaw AIR 1987 SC P.3. This principle in no way rejected the principle of comity of courts.
7. This was the decision in Sharma's case followed in Shilpa Agarwal. See note 2 and Note 5 respectively.
8. In this proposition of law, it was rested on the fact that the child was a foreign national and the parents had permanent residential status as well as both worked in the foreign country.
9. V.Ravi Chandran Vs. Union of India, AIR 2010 SC (Supp) P.257.
10. See Kernot Vs. Kernot (1964) 3 All ER P.339.
11. H (Infants) in Re (1966) 1 All ER P.886.
12. In Re L (Minors) (1974) 1 All ER P.913.
13. Ibid.
14. This is the ratio in Survinder Kaur Sandhu's case (See note 3).
15. This is the ratio in Sarita Sharma's case (See Note 2).
16. Ruchi Majoo Vs. Sanjeev Majoo, AIR 2011 SC P.1952.
17. See Note 16.
18. Arathi Bandi Vs. Bandi Jagadrakshaka Rao (2013) 15 SCC P.790.
19. Note 1 Para 51.
20. Ibid Para 52.
21. See Note 1