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C.M. No. 14931-CII of 2015

Seema Kapoor v. Deepak Kapoor

2016 SCC OnLine P&H 1225

In the High Court of Punjab and Haryana

(BEFORE RAJIVE BHALLA, J.)

Seema Kapoor and another

v.

Deepak Kapoor & Ors.

Mr. Anil Malhotra, Advocate, Amicus Curiae.

Mr. Prateek Gupta, Advocate, for the Union of India.

Mr. P.S. Bajwa, Addl. A.G., Punjab.

Mr. S.S. Sandhu, Spl. Prosecutor, CBI.

C.M. No. 14931-CII of 2015 in CR-6449 of 2006

Decided on February 24, 2016

RAJIVE BHALLA, J.:— A minor child, removed from the de jure custody of this Court, by misusing an interim order, dated 23.12.2006 and the failure of all attempts to restore custody of the minor to this Court, compels me to forward a reference to the Law Commission of India and the Ministry of Women and Child Development, pointing out the ease with which a child can be removed from India for want of any law on "Child removal". Despite the laudable efforts by the Amicus Curiae and the Central Bureau of Investigation, the minor is untraceable.

2. Seema Kapoor and another, filed a revision challenging an order directing them to hand over custody of the minor to the respondents. An interim order, dated 23.12.2006, was passed in favour of the petitioners, allowing them to retain custody of the minor but when Seema Kapoor was directed to produce the minor it transpired that she had fled the country and illegally taken the child to the UK. Mr. Anil Malhotra, Advocate, was appointed as Amicus Curiae to assist the Court, in 2008, and the police was directed to investigate the matter. Thereafter, the investigation was transferred to the Central Bureau of Investigation by this Court. From the replies, filed by the police and the Central Bureau of Investigation, it became apparent that the minor had been spirited away to the United Kingdom on fake passports. The stay order was eventually vacated. An FIR No. 86, dated 12.08.2008 was registered under Sections 363, 193, 209 & 120-B of the Indian Penal Code, at Police Station Dasuya for illegal removal of the minor child and FIR No. 119, dated 30.11.2008 was registered under Sections 420, 467, 468, 120-B and Section 12 of the Passports Act, 1967, also at Police Station Dasuya against Rajesh Kapoor and others for obtaining passports on forged documents. Both FIR's were entrusted to the CBI for investigation by this Court.

3. Further directions were issued on 06.11.2008 and the passports of Seema Kapoor and the minor child were impounded. A Special Leave Petition No. 725 of 2009, filed against order dated 14.07.2008 and 06.11.2008, was dismissed on 01.05.2009 by the Supreme Court, but the minor child was not produced. Eventually after various orders were passed by the High Court at London, the minor child was recovered. The witness statement recorded by British Police Constable, Varinder SOOCH 673XB, at

Southall Police Station, UK dated 03.12.2008 records that Seema Kapoor, the minor child and Rajesh Kapoor were apprehended on 03.12.2008, when they were trying to escape. Seema Kapoor and Rajesh Kapoor were held in custody by the British Police till 05.12.2008. The minor child was, however, placed in foster care.

4. By an affidavit dated 11.12.2008, filed before the Family Court of Justice, Family Division, London, Rajesh Kapoor asked the High Court at London not to return the minor to India. A report dated 17.03.2009, reads as follows:-

"76. Rajesh has indicated he will continue to support his sister in caring for Aishley. He supports Seema's account of the past and shares her thoughts on the care of Aishley. However, I am concerned that he has prioritised this over his own wife and son who remain in India, and I am not clear as to his motivation. Nor am I clear about his relationship with the father (his brother) to whom he seemed willing to gift his own child in return for Aishley."

5. Mr. Anil Malhotra, Advocate, Amicus Curiae, had placed on record a report dated 21.03.2009, furnished to the Family Court of Justice, Family Division, London requesting that the minor and Seema Kapoor be returned to India.

6. A detailed judgment dated 21.04.2009, passed by the High Court of Justice, Family Division, London, between Deepak Kapoor and Jyoti Kapoor and the defendants i.e. Seema Kapoor, Rajesh Kapoor and Aishley Kapoor, concludes as under:-

"23. In conclusion, on the facts before me, I cannot order a return of Aishley to Seema's custody. This would not be in Aishley's best interests. I shall order the summary return of Aishley to India. My order will include arrangements for the return of Aishley to India and a preamble of requests by me to the Punjab and Haryana High Court.

24. This order is to be attached to this judgment and emailed to the Amicus Curiae with a view to him moving the Punjab and Haryana High Court and placing the order on the record before Aishley is taken out of this jurisdiction. The papers in this case will be sent to the Indian Court."

7. An appeal against the above judgment of 21.04.2009 was lodged with the Court of Appeal at London, which was decided on 23.04.2009.

8. However, on 24.04.2009, at around 9.30am, Aishley Kapoor left the school from a play ground in the company of an unidentified Asian male. Thereafter, efforts by the British police and various agencies to trace her have met with abject failure.

9. The investigation of the FIRs, which were entrusted to the Central Bureau of Investigation, Chandigarh, has confirmed that Rajesh Kapoor has fraudulently obtained a second passport without disclosing the fact that he already held passport No. A-0544912 on 08.04.1996. The Central Bureau of Investigation has verified that fraudulent passports were prepared with respect to Aishley Kapoor from the Passport Office, Jalandhar, on the basis of a fake parentage and birth certificate and that she was spirited away to London, on 22.12.2007.

10. The learned Amicus Curiae and the Central Bureau of Investigation despite their stellar efforts have been thwarted at every step on the way primarily for the reason that India is not a signatory to the Hague Convention on The Civil Aspects of International Child Abduction, 1980. This apart, India does not recognise inter-country child removal as a wrong or an offence, nor is it defined under any specific or particular law. The removal or retention of a child in breach of custody rights is a wrong under the Hague Convention but for want the Union of India acceding to the Hague Convention and or enacting a domestic law, children will continue to be spirited away from and to India, with courts and authorities standing by in despair.

11. The reference is, therefore, forwarded to the Law Commission of India, 14th Floor, Hindustan Times House, Kasturba Gandhi Marg, New Delhi-110001 and the

Ministry of Women and Child Development, Shastri Bhawan, A Wing, Dr. Rajendra Prasad Road, New Delhi-110001, to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law and for signing the Hague Convention on child abduction.

12. A report prepared by Mr. Anil Malhotra, Advocate, Amicus Curiae, appointed by this Court, setting out the law needs to be lauded and forwarded with this reference. I place on record and acknowledge the tireless efforts put in by Mr. Anil Malhotra, Advocate.

13. A copy of this order be handed over to Mr. Anil Malhotra, Advocate, Amicus Curiae and counsel for the Union of India, for communication.

14. Adjourned to 30.03.2016.

ANNEXURE-A

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

IN C.R. No. 6449 OF 2006

Seema Kapoor and AnotherPetitioners

v.

Deepak Kapoor and AnotherRespondents

REPORT BY ANIL MALHOTRA, ADVOCATE, AMICUS CURIAE

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DATED: 20 January 2016 (ANIL MALHOTRA) ADVOCATE & AMICUS CURIAE
IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
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RESPECTFULLY SHOWETH:

THE LAW IN RELATION TO THE CUSTODY OF CHILDREN AND CHILD REMOVAL IN INDIA;

a. INTRODUCTION

15. Intercontinental abduction of children by parents is now a contemporary legal issue which baffles and mesmerizes different legal systems of nations whose inter-se conflicting positions prevents the return of children to the country of their habitual residence. Solace can be found inter-se between countries which are signatories to The Hague Convention on Civil Aspects of International Child Abduction, 1980. But what happens to those aggrieved parents whose countries are not a part of this global conglomerate of like-minded nations which honor each other's laws. No global family law governs them. Defiant stands in different courts of such jurisdictions create deadlocks. The sufferers are innocent children who are victimized by legal systems.

16. The world is a far smaller place now than it was a decade ago. Inter country and inter continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Logically, the world in which we and our children live has grown immensely complex. It is filled with opportunities and risks. International mobility, opening up of borders, cross border migration and dismantling of inter cultural taboos, all have positive traits but are fraught with a new set of risks for the children caught up in such cross border situations. Caught in a cross fire of broken relationships, with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross frontier child support. In a population of over 1.2 billion Indians, about 30 million are non-resident Indians living across 180 countries, who, by migrating to different jurisdictions, have generated a new crop of spouse related inter parental child removal and international family disputes.

b. DEFINITION OF CHILD REMOVAL

17. Families with connections to more than one country, face unique problems if their relationships break down. The human reaction in this already difficult time is often to return to one's family and country of origin, with the children of the relationship. If this is done without the approval of the other parent or permission from a Court, a parent taking children from one country to another, may, whether inadvertently or not, be committing child removal or inter parental child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of a person, with whom the child normally lives.

18. A broader definition encompasses the removal of a child from his/her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. The Convention on the Civil Aspects of International Child Abduction, signed at the Hague on October 25, 1980 with over 90 contracting countries today as parties from all regions of the globe, however, defines removal or detention wrongful in the following words:

"Article 3

The removal or the retention of a child is to be considered wrongful where:

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or*

retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

19. Child removal does not find any specific definition in any Indian codified law and since India is not a signatory to The Hague Convention, there is no parallel Indian legislation enacted to give the force of law to The Hague Convention. Hence, in India, all interpretations of the concept of child removal are based on judicial innovation in precedents of case law decided by Indian courts in disputes between litigating parents of Indian and/or foreign origin.

c. GLOBAL SOLUTIONS AND REMEDIES

20. The Hague Convention on Civil Aspects of International Child Abduction came into force on December 1, 1983 and now has about 93 contracting nations to it. The objectives of the Convention are:

- To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. It operates as an effective deterrent, providing real and practical means to restore the status quo prior to the abduction, it also prevents abductors from reaping the benefits of an act opposed to the interests of children, upholds the right of the child to maintain contact with both the parents and introduces harmony where previously chaos prevailed. The Permanent Bureau of The Hague Conference on Private International Law, at The Hague, Netherlands, renders a superb service by monitoring and assisting the development of services to support effective implementation and consistent operation of The Hague Conventions and review their operations. Since there is no centralised system of enforcement or interpretation, the Secretariat of the Hague Conferences guides nations in post convention services. In terms of The Hague Convention on Civil Aspects of international Child Abduction, the Secretariat has published in three parts, guides to good practice, namely Central Authority Practice, Implementing Measures and Preventing Measures which are all approved by contracting States. The Secretariat thus helps to create an international medium of Consenting States who contract with each other to return children who are wrongfully removed.

d. WHY SHOULD INDIA BE INTERESTED IN JOINING THE 1980 CONVENTION.

21. The Hague Convention on the Civil Aspects of International Child Abduction is a remarkable document, which has had significant impact on the Child protection policies in much of the world. In a civilised society where globalisation and free interaction is part of a rapidly changing set up, India is emerging as a major destination in the developing world. Non-resident Indians have achieved laurels in all walks of life. But, back home, the problems at the family law front are largely unresolved. Times have changed, but laws are still the same. Marriage, divorce, custody, maintenance and adoption laws in India need a workup. Child removal is often treated as a custody dispute between parents for agitating and adjudicating rights of spouses while spontaneously extinguishing the rights of the child. Therefore, in an international perspective, four major reasons can be identified to establish and support the necessity of India's need to sign the Convention.

22. *Firstly*, India is no longer impervious to international inter parental child removal. In the absence of the Convention principles, the Indian Courts determine the Child's best interest whereby any child removal is dealt with like any custody dispute. In this process, the litigation is a fight of superior rights of parties and the real issue of

the welfare of the child becomes subservient and subordinate. Clash of parental interests and rights of spouses determine the question of custody. The over powering parent wins to establish his rights and the resultant determination of the best interest of the child is a misnomer and a misconception. Such a settlement is not truly in the best interest of the removed child.

23. *Secondly*, such a determination in India plays into the hands of the abducting parent and usurps the role of the Court which is best placed to determine the long term interests of the child, namely the Court of the country where the child had his or her home before the wrongful removal or retention took place. By contrast, the advantage of The Hague Convention approach is that it quickly restores the position to what it was before the wrongful removal or retention took place and supports the proper role played by the Court in the country of the child's habitual residence. The correct law to be applied to the child would be of the country of the child's habitual residence and so would be the Court of that country. In India, determination of rights, as per Indian law, of a foreign child removed to India by an offending parent may often be bitterly contested and may not be in the best interest of the child and ought to be determined by the law and the Court of the child's origin.

24. *Thirdly*, the fact that India is not a party to The Hague Convention may have a negative influence on a foreign judge, who is deciding whether a child living with his/her parent in a foreign country, should be permitted to spend time in India to enjoy contact with his/her Indian parent and extended family. Without the guarantee afforded by The Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign Judge may be reluctant to give permission for the child to travel to India. As a logical corollary of this principle; membership of The Hague Convention will bring the prospect of achieving the return to India of children who have their homes in India but have been abducted to one of the 93 States that are parties to the Convention.

25. *Fourthly*, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise in Courts of different countries who are equally competent to decide such issues. The recognition and enforcement provisions of the Convention avoid the need for re-litigating custody and contact issues and ensure that decisions are taken by the authorities of the Country where the child was habitually resident before removal.

26. It is thus hoped that India will give a serious consideration to joining the 1980 Hague Convention due to the convincing grounds cited above. However, till date, India has not signed the Hague Convention on Civil Aspects of International Child Abduction, 1980.

e. RELEVANT LEGISLATION AND FORUM FOR CUSTODY PROCEEDINGS

27. As far as the forum for securing the return of the children is concerned, it is important to reiterate that India is not a signatory to The Hague Convention on the Civil Aspects of International Child Abduction 1980. Under Article 226 of the Constitution of India, a parent whose child has been abducted can approach the State High Court to issue a writ of Habeas Corpus against the abducting spouse for the return of the child. Alternatively, a Habeas Corpus Petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Article 32 of the Constitution of India.

28. In so far relating to the relevant legislation, the aggrieved parent (if Hindus by religion) could well seek recourse to the provisions of the Hindu Minority and Guardianship Act, 1956 (hereafter 'HMGA 1956'), which is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The provisions of the HMGA 1956 are supplemental to the earlier Guardians and Wards Act,

1890 (GWA). The HMGA 1956, like the Hindu Marriage Act 1955 (HMA), has an extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir.

29. In so far the law relating to guardianship and custody is concerned, the Guardians and Wards Act, 1890 (GWA) is an Act pertaining to the appointment of guardians and wards, as also for seeking custody of children. It is available to all persons, free of religion or personal laws and can also be invoked by foreigners. The provisions of GWA are independent of personal law and prescribe the procedure, criteria and other details of appointment of guardians as also factors to determine custody issues of children. A guardianship and custody petition under the GWA is also an alternative remedy sought by aggrieved parents in cases of both intra and inter-country parental child removal. This is because there is no other statutory remedy prescribed under the Indian law for seeking sole custody of a child by an aggrieved parent seeking exclusion of the other parent's parental rights. Often, the Supreme Court or the High Court concerned remands the matters to a Guardian Judge or a Family Court or a Trial Court when disputed questions of facts are involved requiring evidence to be led, which is not possible in a writ jurisdiction under Articles 32 or 226 of the Indian Constitution before the Supreme Court or a High Court. Hence, inter-parent, inter-country child custody matters may land up before a Guardian Judge in a Family Court or Trial Court, if the High Court or the Supreme Court in writ jurisdiction is unable to determine the factual aspects requiring evidence to be led by the parties. Therefore, the inter-parental child custody dispute may be remanded to the Guardian Judge in a Family Court or a Trial Court in such a situation, even in cases of inter-country child removal where, despite a foreign court order, summary removal is not directed by the High Court or the Supreme Court.

30. However, precedents of Courts in India indicate that the controlling consideration governing the custody of the children is their welfare and not the rights of the parents litigating before the Indian Court in child custody cases.

f. INDIA AND THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980

31. As of now, India is not a party to The Hague Convention on Civil Aspects of International Child Abduction 1980. Other than the statutory provisions of law quoted above, in which matters of child custody are agitated in different courts in different proceedings, the principles of The Hague Convention cannot be enforced on Indian Courts. Different recent decisions indicate a trend that Indian Courts generally tend to decide the inter-parental child custody disputes on the paramount consideration of the welfare of the child and the best interest of the child. A foreign Court custody order is only one of the considerations in adjudicating any such child custody dispute between parents. Foreign Court orders of child custody are no longer mechanically enforced and normally the Courts go into the merits of the matter to decide the best interest of the child irrespective of any foreign Court custody order. Hence, the position of law in India varies from case to case and there is no uniform precedent which can be quoted or cited as a universal rule.

32. India, not being a signatory to The Hague Convention of 1980 on the Civil Aspects of International Child Abduction, questions regarding the custody of such children are now considered by the Indian Courts on the merits of each case bearing the welfare of the child to be of paramount importance while considering the order made by the foreign Court to be only one of the relevant factors in such decision.

g. THE POSITION OF INDIAN LAW ON CHILD ABDUCTION

33. India is a vast territorial jurisdiction comprising of 29 States and 7 Union Territories spread over 3.28 million sq. kilometers. Every State in India has an individual High Court which governs the internal District Courts in the particular

territory of that State. The High Court is free to frame its procedural rules regarding practices and rules to be followed within its jurisdiction. Depending on the location of a Family Court or Trial Court i.e. Guardian Judge, the practices in deciding child custody disputes may vary. Hence, the time frame of deciding an inter-parental inter-country child removal may vary as per local rules, practices and procedures.

34. Even though India has enacted a Family Courts Act, 1984, at the discretion of every Individual State to constitute a Family Court in its Districts in the State, most States in India do not have Family Courts. Hence, majority of the jurisdictions in States in India do not have Family Courts or Specialist Judges trained to handle only Family Court matters. Therefore, a normal Civil Judge in the Trial Court may, in addition to his other duties and judicial functions, also be a Guardian Judge under the Guardian and Wards Act, 1890, upon being so notified and designated by the High Court. Consequently, when a matter is before an ordinary Civil Judge in the Trial Court in his role as a Guardian Judge, the time frame within which he will be able to decide a child custody dispute is impossible to predict since his pre-occupation with other nature of disputes on his board may vary. Therefore, by no stretch of imagination, any time frame can be predicted. Even when the Judge presiding heads a Family Court, a lot may depend on the pre-occupation of the Court with other matters before the Family Court and the workload of the Family Court which again makes it impossible to predict a time frame.

35. The High Courts and the Supreme Court of India entertain petitions for issuance of a writ of Habeas Corpus for securing the custody of the minor at the behest of the parent who lands on Indian soil alleging violation of a foreign Court custody order or seeks the return of children to the country of their parent jurisdiction. Invoking of this judicial remedy provides the quickest and most effective speedy solution as a redressal for violation of fundamental rights.

36. Different High Courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction has been invoked by an aggrieved parent, seeking to enforce a foreign Court custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past over three decades.

37. That if the matter is taken up in a Habeas Corpus writ petition in the High Court or the Supreme Court, it is the pure discretion of that Court to hold a summary enquiry or a detailed investigation in that particular case. India follows a procedure of detailed bulky written pleadings followed by hearing arguments at length. Depending on the pre-occupation of a Bench with other matters and the workload of the Court, it may be next to impossible to define a time frame for deciding a child custody dispute. Even at the High Court or the Supreme Court, there are no dedicated Family Judges or any Family Division. Therefore, depending on the entire roster of the Court and its pre-occupation with other matters, every individual Bench will take up an inter-parental child custody dispute depending on other important matters before the Court. This again makes the whole situation unpredictable in point of identifying a time frame.

38. That the issue of effectiveness of the procedure is again a very open ended answer. If the petition before the Guardian Judge is favorably decided in a positive decision favoring a foreign aggrieved parent, the matter may not rest there. For enforcing the foreign court order directing return of a child, the aggrieved foreign parent may still have to invoke the writ jurisdiction of the High Court or the Supreme Court seeking a direction for the return of the child. Meanwhile, if the decision of the Guardian Judge is appealed against by the abducting parent, the matter may be further delayed. Ultimately as and when a decision comes by the High Court, the matter may be appealed against in the Supreme Court. This process may take time

and thus the effectiveness of the procedure is open ended till the last appeal is exhausted in the Supreme Court.

h. CONCLUSION OF CASE LAW ANALYSIS

39. An analysis of the Indian case law reveals that until 1997, Indian Courts whenever approached by an aggrieved parent, invariably exercised a power of summary return of a removed child to the country of habitual residence in compliance with a foreign court order to restore parental rights. However, changing the precedent, in 1998, the Indian Supreme Court decided that a custody order of a foreign court shall be only one consideration while determining the matters on merits in which the welfare of the child will be of paramount importance. Thereafter, child removal and custody matters now get decided on merits in India and every individual decision is based on the facts of the case and there is no set pattern of decisions consistently being followed.

40. However, a different trend set by some of the recent decisions above indicates that aggrieved parents who invoke the jurisdiction of the High Court in a writ of Habeas Corpus are not non-suited simply for the reason that the determination of the best interest of the child can be done only by an adjudicatory process in the Family Court or before the Guardian Judge. The Habeas Corpus remedy to enforce the child custody order of a foreign court is proving to be effective and result oriented. These recent decisions also indicate a trend in respecting foreign court orders wherein an aggrieved parent seeks return of the removed child on the strength of such foreign court decisions.

41. Generally, the position varies on the facts and circumstances of each case and no assurance or guarantee can be given that the children will be returned back from India on the strength of a foreign court Order since every matter is determined and decided on its independent merits. This is regardless of the fact that recent Supreme Court decisions have handed down general principles to be observed in inter-parental child removal matters of foreign jurisdictions.

42. Since, inter-country inter-parental child removal is not defined by any statute and is not considered an offence under any existing codified law operating in India, the tendency to go into the merits of the case even on jurisdictional issues, tends to cause delay, prejudice the rights of an aggrieved parent and prevent summary return of a child to its home in a foreign jurisdiction.

43. Since, there is no statute in India defining, recognising or identifying inter-parental child removal, especially in the international context, the Indian Courts over a passage of time have been adjudicating matters on the basis of individual facts and circumstances to decide as to what relief should be granted to the parties. Hence, there is a variation of decisions and there is no consistent view point. The welfare of the child principle being the paramount consideration, there is a tendency among Indian Courts to digress from a consistent approach and accordingly, precedents may be distinguished or differed depending on the factual matrix and circumstances, which may differ from case to case. Thus, the jurisprudence in child abduction law varies.

i. POSITION OF FOREIGN COURT ORDERS IN INDIA

44. The principles governing the validity of foreign court orders are laid down in section 13 of the Indian Code of Civil Procedure, 1908 (CPC). The CPC is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. The principles in Section 13, CPC have been affirmed in relation to the guidelines laid down by the Supreme Court of India on recognition of foreign matrimonial judgments.

45. It is reiterated, as discussed above, that Indian courts would not exercise summary jurisdiction to return the children to the country of habitual residence. The courts consider the question on the merits of the matter, with the welfare of the

children being of paramount importance.

46. Section 14 of the CPC talks presumption as to foreign judgments. It provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

j. NO PROVISION FOR MIRROR ORDERS IN INDIA

47. In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is a concept known to the English law, but not to the Indian legal system. Hence, it is not possible to approach a Court in India for issuing a mirror order on the strength of a foreign Court Order whereby a mechanical return of children can be sought back to the overseas jurisdiction if the foreign court order is violated in India. Accordingly, an independent judicial remedy will have to be invoked in a Court of competent jurisdiction in India for a fresh adjudication and determination on the basis of the principle of the welfare of the child and the best interest rule. The foreign court order granting custody or visitation will form only one consideration before the Indian Court to determine rights of parties. The independent opinion of the children concerned too will be heard in such a process. However, simply seeking return of children on the strength of a foreign court order is not possible. There is no provision in Indian law for mirror orders to be passed.

48. k. A POSSIBLE SOLUTION

49. With the increasing number of non-resident Indians abroad and multiple problems arising, leading to family conflicts, inter parental child removal to India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. Till India does not become a signatory to The Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions. It is equally important that to create a uniform policy of law, some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in The Hague Convention. Divergent views emerging at different times may not be able to cope up to the rising number of such cases, which come up from time to time for interpretation. We in India are thus wanting for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in The Hague Convention. Till such time, India becomes a part of the Hague Convention on Inter-parental Child Removal and enacts an internal legislation to give effect to the Hague Convention by creating a Central Authority or other coordinating body, the inconsistency in judicial decisions will remain. The Indian Courts decide individual matters on the facts and circumstances of every case and are not guided by any statutory or enabling provisions, which interpreted may provide uniformity and consistency. Consequently, issues of custody, removal, inter-parental conflicts and related aspects cannot find any uniform path of judicial interpretation.

I. GENERAL CONCLUSION

50. With the increasing number of non-resident Indians abroad and multiple problems arising leading to family conflicts, inter parental child removal to and from India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. Till India does not become a signatory to the Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions.

It is equally important that to create a uniform policy of law some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in The Hague Convention. Divergent views emerging at different times may not be able to cope up to the rising number of such cases, which come up from time to time for interpretation. We in India are thus wanting for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in The Hague Convention. Let us not delay the path to resolution of these disputes. Removed children cannot be allowed to live on a no man's island.

51. In the light of the above detailed position of law on inter-parental child removal issues in India, the following two conclusions can be said to emerge. They are identified and stipulated as follows:

1. Firstly, India not being a signatory to the Hague Convention on Civil Aspects of International Child Abduction, Courts in India do not take judicial notice of the definition of "Child Removal" which finds mention in the Hague Convention. Inter-Parental Child Removal is not defined as an offence under any Civil or Criminal law in India. Hence, to establish it as a wrong within the meaning of The Hague Convention is extremely difficult. Consequently, deprivation of parental rights on the strength of a foreign court order from a convention country will not find an easy interpretation. Such parental rights will have to be established and proved afresh to step on the threshold of violations resulting thereupon. Again, these may depend on an independent assessment of the Indian Courts on the best interest and the welfare of the child principle on the basis of evidence before the Court.
2. Secondly, the practical difficulties in seeking implementation of a foreign court order if the children are not returned from India, may vary in different jurisdictions in India. To start with, the choice of the petition (Habeas Corpus under the Constitution of India or a Guardianship petition under the Guardian and Wards Act), the time frame for its decision, delays in hearing of the matter, time to be consumed in establishing evidence, and ultimately remedies of further appeals besides executing the Indian Court order, are all time consuming factors. It may be impossible to lay down any straight jacket formula of prescribing a defined time frame for an expeditious decision in seeking the return of the child from India. Further, if the matter is appealed to a Court of superior jurisdiction in India, it may again set off a final conclusion in the matter. Also, seeking implementation of visitation rights may require frequent visits to India since it will be practically impossible to seek temporary return to the foreign jurisdiction from India as long as the matter remains pending final decision before an Indian Court. The legal battles in India may thus be cumbersome, time consuming and requiring procedural formalities.

52. Hence, in the totality of the aforesaid situation, the need for India to have a codified and statutory law on the subject of inter-country, inter-parental child removal is the dire need of the hour. Despite the recommendation of the Law Commission of India in Report no. 218 of March 2009, that India should become a signatory to the Hague Convention to resolve the problem of inter-country child removal, the same has not happened and no domestic law defines or governs this problem till date. The deadlock continues and children suffer in silence in inter-country parental conflicts.
