IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CUSTODY OF THE CHILD

CM (M) No.428 /2005

Date of decision: 01.06.2006

MR. PAUL MOHINDER GAHUN ...PETITIONER

Through: Mr. Sanjay Jain, Advocate.

VERSUS

MRS. SELINA GAHUN

...RESPONDENT

Through: Ms. Malvika Rajkotia, Advocate.

SANJAY KISHAN KAUL, J. (Oral)

CM (M) No.428/2005

1 .Admit.

2. At the request of the learned counsel for the parties, the petition is taken up for final disposal.

3. The tussle for the custody of the minor child brought by the respondent to India from Canada has given rise to the present petition.

4. The petitioner is the father of Anika, a girl child born on 5.11.1998 in Canada out of the wedlock between the parties. The petitioner, the respondent and the minor girl are all Canadian citizens.

5. Prior to the dispute, the petitioner and the respondent were married for 12 years since 1991 and were residing in Canada. During this period of time both the petitioner and the respondent were gainfully employed.

6. The respondent along with Anika came to India on 2.12.2003 for a planned visit and were to stay in India till 2.2.2004. Both of them came to India on return tickets of the said dates. The return was postponed and ultimately in the latter part of February 2004, the respondent informed that she had no intention to return back to Canada. The petitioner immediately contacted the respondent through E-mail expressing concerns about Anika's future and the need of the respondent to return back to Canada. However, the respondent wanted a divorce and the custody of Anika. The petitioner filed proceedings in Canada. The competent court in Canada on 8.4.2004 passed an interim order in favour of the petitioner for custody of the child.

7. The respondent had, in the mean time, filed a petition on 25.3.2004 before the designated court under the Guardians & Wards Act, 1890 (hereinafter referred to as the said Act). The petitioner moved the Delhi High Court by way of a Habeas Corpus petition bearing No.842/2004, which was disposed off by the Division Bench on 3.11.2004, declining to pass an order as the custody of the mother was not illegal and it was for the Guardianship Court to consider the matter expeditiously. The Division Bench also observed that the Guardianship Court will remain uninfluenced by the observations made by the Division Bench.

8. The petitioner filed an application raising preliminary objections to the jurisdiction of the Court and the said application was dismissed vide order dated 14.2.2005 by the Guardian Judge. The petitioner aggrieved by the same has filed the present petition.

9. In order to appreciate the legal plea it is necessary to reproduce Section 9 of the said Act, which reads as under:

"9. Court having jurisdiction to entertain application. - (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of the minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

10. The controversy which thus arise in the present case is whether the minor Anika can be said to be "ordinarily residing" within the jurisdiction of the courts at Delhi.

11. Learned counsel for the petitioner submitted that for almost five years from the birth, Anika was residing in Canada. It is only in December 2003 that the respondent brought the child to India and in March 2004 filed the petition before the Guardianship Court. It was, thus, submitted that the child could not be one, who "ordinarily resides" within the territorial jurisdiction of the courts at Delhi. Learned counsel submitted that the respondent indulged in subterfuge to bring the child to India, so as to take away the child from the jurisdiction of the Canadian Courts, which would have jurisdiction in the matter.

12. Learned counsel for the petitioner has also referred to certain E-mails of the respondent. The E-mail dated 27.1.2004 has been address by the respondent to her friend in Canada about the engagement of a lawyer to defend her case and informing about the fact that she had not disclosed to anyone about her decision of returning back to India permanently. Another E-mail referred to by the learned counsel for the petitioner of the respondent is dated 20.2.2004. The E-mail states that the respondent would have loved to stay in Canada but for the fact that her parents were living in Delhi, she decided to come back to India. She also loved the school Anika went to and there was a nice circle of friends. The respondent has made some imputations that the petitioner did not give her enough love, support and respect. The E-mail states by reference to the petitioner "he loves her and there is no doubt about it". The E-mail, however, goes on to record that the love was not enough to teach and nurture the child and a lot of other actions were required.

13. Learned counsel for the petitioner also points out by reference to an E-mail of the respondent produced in Court which refers to the fact that the petitioner could keep in touch with Anika when she goes back to the boarding school but it can only be once or twice a week. The last E-mail has been referred to by the learned counsel for the petitioner to state that the child was not staying with the respondent but is staying in a boarding school at an age of less than eight (8) years.

14 Learned counsel for the petitioner emphasised that the impugned order was erroneous in law since the Guardian Judge fell into an error in coming to the conclusion that she had jurisdiction to entertain the petition as the respondent and the child had come to India with the permission of the petitioner. The removal of the child from the custody of the petitioner was thus held not to be unauthorised or illegal and thus it was not a case of stealthily removing the child. The Guardian Judge also referred to the Hague Convention of 1980 to come to the conclusion that the interest of the child is paramount and unless the child is wrongfully removed to the jurisdiction of any other country resulting in physical or psychological harm it is not necessary that the child should be restored to the jurisdiction of the original country.

15. The term "ordinarily resides" as used in Section 9 of the said Act has been held to be capable of several interpretations and since Anika was under the continuous care and custody of the respondent since the birth initially in Canada and then in India, the Courts in India would have jurisdiction.

16. I have considered the submissions advanced by learned counsel for the parties and the judgements cited by them at the Bar. No doubt the interest of the child is a paramount factor but the question would remain as to which court has jurisdiction in the matter. I am unable to agree with the submissions advanced by learned counsel for the respondent and the conclusion arrived at in terms of the impugned order and thus proceeded to consider the legal position and reasons for the same hereinafter.

17. The first premise on which the Guardian Judge has acted that the child was not stealthily removed from the custody of the petitioner is itself erroneous. It was never disclosed to the petitioner that the respondent was permanently coming

back to India with the child. The material placed on record leaves no manner of doubt that the respondent came back to India with the child with return tickets on a short visit. Once the respondent came to India she disclosed her intentions which may have been in her mind even earlier. Thus, it is certainly an attempt by the respondent to remove the child from the jurisdiction of the Canadian Courts.

18. It must be kept in mind that the facts of each case are extremely important. The present one is not a case where a marriage has taken place in India and a lady goes to a foreign country without knowing what she is going to face. Prior to the incident, the parties had been married for 12 years. Both the parties were gainfully employed. The child was born seven years after the marriage and lived in Canada for five years. The initial upbringing of the child has been in Canada at the formative years till the child was almost of five (5) years. The child has been in India after that. The important factor is that the child is not even staying with the respondent but in a boarding school. It is not as if the child is staying in the personal care of the mother, which seems to be a factor which has weighed with the Guardian Court.

19. The legal position is expounded in a number of judgements. Learned counsel for the petitioner referred to the judgement in Konuparthi Venkateswarlu & Ors. Vs. Ramavarapu Viroja Nanda & Ors. AIR 1989 Orissa 151. It has been held that the expression "where the minor ordinarily resides" used in sub-Section 1 of Section 9 of the said Act has to be construed in a manner where the residence by compulsion at a place however long cannot be treated as the place of ordinary residence. Similarly the word "ordinary residence" are not identical and cannot have the same meaning as "residence at the time of the application". The purpose for using the expression "where the minor ordinarily resides" is probably to avoid the mischief that a minor may be stealthily removed to a distant place and even if he is forcibly kept there, the application for the minor's custody could be filed within the jurisdiction of the District Court from where he had been removed or in other words, the place where the minor would have continued to remain but for his removal. In my considered view, the said judgement succinctly sets out the object of the wording of the said provision by the legislature. It is such cases of mischief, which are sought to be avoided and this is exactly what has happened in the present case.

20. Learned counsel for the petitioner referred to the judgement of the Supreme Court in Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Anr. AIR 1984 SC 1224. The case related to the custody of a minor son where the spouses had made their home in England. The English Courts granted custody in favour of the mother and the father removed the child to India. It was held that the jurisdiction of English Courts were not ousted and for the welfare of the child handed over the custody of the child to the mother. It was observed in para 10 as under:

"10. We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. 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 as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, 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 offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the Courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See International Shoe Company Vs. State of Washington, (1945) 90 L Ed 95, which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case). It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

21. If applied to the facts of the present case one would find similarity. All the parties involved in the present case including the minor are citizens of Canada. The child had been initially for five years staying in Canada before she was stealthily removed to India on the pretext of only a visit. The Supreme Court thus held that the assumption of jurisdiction by another State would result in encouraging forum shopping. The matrimonial home in the present case is also in Canada up to 2003.

22. Learned counsel for the petitioner has emphasised on the observations made by the Supreme Court in Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw & Anr. (1987) SCC 42. The facts of the case were that the custody of a minor after divorce in USA was granted to the mother with visitation rights to the father of the child. The father secretly brought the child to India against the express orders of the American Court. It was held that the mother was entitled to the child's custody with liberty to take the child to the USA and the father may instead of tendering an unconditional apology before the Supreme Court of India tender an apology before the American Court for restoration of visitation rights. The Supreme Court referred to the judgement in Re H. (infants) (1966) 1 All ER 886 where Courts made the following observations:

"9. In Re H. (infants) [(1966) 1 All ER 886], the Court of Appeal in England had occasion to consider a somewhat similar question. That case concerned the abduction to England of two minor boys who were American citizens. The father was a natural-born American citizen and the mother, though of Scottish origin, had been resident for 20 years in the United States of America. they were divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the

two boys to the mother with liberal access to the father. By an amendment made in that order in December 1964, a provision was incorporated that the boys should reside at all times in the State of New York and should at all times be under the control and jurisdiction of the State of New York. In March 1965, the mother removed the boys to England, without having obtained the approval of the New York court, and without having consulted the father; she purchased a house in England with the intention of remaining there permanently and of cutting by the Supreme Court of New York State to return the boys there. On a motion on notice given by the father in the Chancery Division of the Court in England, the trial Judge Cross, J. directed that since the children were American children and the American court was the proper court to decide the issue of custody, and as it was the duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing, the court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America. In the appeal filed against the said judgement in the Court of Appeal, Willmer L.J. while dismissing the appeal extracted with approval the following passage from the judgement of Cross, J. [(1965) 3 All ER at p. 912.]:

The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing.

The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."

23. After referring to the aforesaid observations, the Supreme Court observed as under:
"10. With respect we are in complete agreement with the aforesaid enunciation of the principles of law to be applied by the courts in situations such as this."

24. The legal position which thus emerges is that the Court frowned upon any unauthorised removal of the child from one country to another. This has become a frequent occurrence and the courts must endeavour to ensure that the wrong doer does not gain advantage by his wrong doing. This is, of course, subject to the condition that there should not be any serious harm to the child. In the present case, unlike some of the cases referred to, it is the mother who decided to take the child outside the custody of the Court where the child "ordinarily resides". That itself would not make a difference. The love and affection of the petitioner for the child is not even doubted by the respondent as is apparent by the E-mails. It is the own personal conflict of the respondent with the petitioner. It is not the function of this Court in the present proceedings to decide about giving the custody of the child to the father or to the mother. That is the factor to be considered by the court of competent jurisdiction. The only factor to be examined is as to which court is authorised and

best suited to determine the controversy. In my considered view, it is the Courts in Canada which would have jurisdiction in the matter.

25. Learned counsel for the respondent referred to the judgement in Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw & Anr. case (Supra) and drew the attention of this Court to para 8 to contend that the predominant criterion is what would best serve the interest and welfare of the minor. The factor taken note by the Supreme Court was that excepting for the last few months that had elapsed since the child was brought to India by the process of illegal abduction by the father, he had spent the rest of his life in the USA and was doing well in school. The child was found to be too tender in age to form any independent opinion. In the present case, learned counsel for the respondent contends that the child is already well settled for the last two years in India.

26. I am afraid this cannot be a submission to be accepted where the child has been stealthily removed to India. The child was happy during the first five years of residence in Canada. No doubt a child is extremely adaptable at this age and it is not as if the child cannot adjust in India to the Indian circumstances. That is, however, not the only factor. Apart from any other reason one cannot lose sight of the fact that the child is in a boarding school and not being personally looked after by the respondent. This is not to cast a doubt on the intention of the respondent but to bring forth that a child adjusts to any situation and the fact to be considered by this Court is as to which Court would be appropriate to determine the interest of the child.

27. Learned counsel for the respondent also referred to the judgement in Harmeeta Singh Vs. Rajat Taneja 102 (2003) DLT 822. That was a case relating to the question of conflict of law and as to which court should decide the dispute pertaining the divorce. The parties were married in India and it was thus held that the Courts in India would undoubtedly have jurisdiction. It was held in the said case that the wife was not in a position to represent herself before the American Court inter alia because of economic constraints. This judgement would have no application to the present case. The present case is not one, as noticed above, where the respondent is under any handicap. The respondent resided for 12 years in Canada, was working there and being gainfully employed till she decided one fine day, due to some disputes with the petitioner or at least on account of absence of her parents in Canada, to come to Delhi.

28. Learned counsel also referred to the judgement of the Supreme Court in Sarita Sharma Vs. Sushil Sharma (2000) 3 SCC 14. The proceedings for divorce were pending and the American Courts put the child in the care of the husband. The wife exercising her visitation rights picked up the children from the residence and brought them into India. It was held that the appellant conduct is a relevant factor but cannot override various aspects relating to the welfare of the children. It was observed that the child being five years of age and a female child should ordinarily reside with the mother.

29. As noticed above the present case is one of the issue of jurisdiction and it

is open to the respondent to approach the competent courts in Canada, which is what she initially intended to do as disclosed in her E-mail to claim her rights for the custody of the child so that the welfare of the child certainly is not adversely affected by such a process.

30. In Dhanwanti Joshi Vs. Madhav Unde (1998) 1 SCC 112, the child had been in the mother's custody for more than 12 years and it was held that the courts in India have to take an independent decision on the merits of the case. Learned counsel also sought to rely upon the judgement of the Supreme Court in Y. Narasimha Rao & Ors. Vs. Y. Venkata Lakshmi & Anr. (1991) 3 SCC 451 to contend that the wife's domicile would not follow that of the husband. However, in the present case even the respondent was working and gainfully employed in Canada for 12 years prior to her sudden departure to India. The Supreme Court did observe that protection is given to women, who are the most vulnerable section of our society. As explained earlier all these aspects have to be considered in conspectus of the facts and there are cases where the women is placed in such a disadvantaged situation that other facts would override. The facts given above do not permit this Court to come to such a conclusion.

31. The last judgement referred to by the learned counsel for the respondent is in the case of Smt. Satya Vs. Shri Teja Singh (1975) 1 SCC 120. The said judgement also deals with the issue of domicile being a jurisdictional fact and it was held that the respondent was not a bonafide resident of Nevada, much less being domiciled in Nevada.

32. The parties in the present case were equally well placed and both employed. It is the normal wear and tear of marriage which has taken a large toll in the present case. The respondent stealthily removed the child to India without disclosing her intention that her short trip would actually be a one way ticket. The child spent five formative years in Canada and the last 2Â½ years in Delhi due to the petition filed by the respondent within about a month of her decision to stay back in Delhi. The child at the age of about 8 years is in a boarding school. In my considered view, the child cannot be said to be one who “ordinarily resides” in Delhi when the petition was filed nor are the interests of the child adversely affected if the Guardian Court determine the issue of custody where the child resided for five years before her removal to Delhi.

33 .In view of the aforesaid reasons, I am of the considered view that the impugned order cannot be sustained and the Guardian Court at Delhi would have no jurisdiction to try and decide the petition. The petition filed by the respondent before the Guardian Court is accordingly dismissed. The impugned order is set aside and the present petition is allowed leaving the parties to bear their own costs.

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34. No further directions are called for in the interim application and the application stands disposed of.

June 01, 2006

Sd/-
SANJAY KISHAN KAUL, J.