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WHAT IS CHILD CUSTODY?

AUTHORED BY - GAUTAM VINOD

Courts in the contemporary context attach more importance to the wellbeing and welfare of the children in issues of their custody, particularly where the parents are separated or divorced and live in separate countries. It is not the fitness of the parents but the wellbeing and welfare of the children which should be the primary consideration of courts, while deciding custody disputes. In *Rosy Jacob v Jacob*¹ the court was considering guardianship of children of a Syrian Christian couple.

In this case the court held that custodial orders are not final in nature. These orders are interlocutory in nature which is subject to change in future depending upon the “proof of change in circumstances” and that need of change of custody if any, must be in the paramount wellbeing of the child.²

This view was reiterated in *Surinder Kaur Sandhu v Harbax Singh Sandhu*³ when Chandrachud, CJ, ruled 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 offspring of marriage.”⁴

In another verdict the court held that in issues regarding custody of minor primary consideration is the welfare and interest of the minor not the legal rights of parties who are fighting for the custody of the minor child.⁵

In *Dhanwanti Joshi v Madhav Unde*,⁶ the mother removed the child from the USA to India to escape the husband’s cruel treatment towards her. The child then was only 35 days old. The litigation between the spouses thereafter both in the US and India continued for fourteen years. During this period the custody of the child was being shifted from mother to father repeatedly.

¹ *Rosy Jacob v Jacob* AIR 1970 SC 2090.

² *Ibid*

³ *Surinder Kaur Sandhu v Harbax Singh Sandhu* (1984) 3 SCC 698.

⁴ *Ibid*

⁵ *Elizabeth Dinshaw v Arvtma M. Dinshaw* (1987) 1 SCC 42

⁶ *Dhanwati Joshi v Madhav Unde* (1998) 1 SCC 112.

Finally, when the matter reached the Supreme Court, it clearly pointed to the issues involved in child custody and abduction from one country to another. Reference was made to the provisions of The Hague Convention of 1980 on 'Civil Aspects of International Child Abduction', but since India is not a party to the convention, the apex court confined itself to non-Convention State practice. It followed the child's welfare as the sole criterion in cases of child custody.

Dicey has stated in his work on conflict of laws that "undoubtedly the welfare of the child would be the first and paramount consideration today in any contest for custody between a foreign and an English guardian."⁷

CHILD CUSTODY VIV-A-VIS INTER-COUNTRY ADOPTION

Welfare of the child is the cornerstone in inter-country adoptions as well. Conflicts principles have not developed in this subject in India, but the occurrence of inter-country adoptions involving Indian children are increasing. Indian courts administer Guardian and Wards Act, 1890, by which foreigners seeking to adopt Indian children are appointed as guardians. The courts have stressed the welfare of the minor as the dominant factor in such appointments.

In a series of cases, known as *Lakshmikant Pandey v Union of India*⁸ the Supreme Court has laid down principles and norms to be followed in inter-country adoption procedures involving Indian children and foreign adoptive parents while keeping in mind the primary consideration of ensuring welfare of the child. The guidelines do not, however, include or refer to conflicts' principles notwithstanding the invariable presence of the foreign element.⁹

The court ruled "in the case in hand, the child is living with his biological parents; therefore, impugned notice is not necessary to be published. It is only biological parents who may file objections, if any. Therefore, orders impugned are set aside".¹⁰

Commenting on the apex court's task, B.N. Sampath opined that "*The judicial imprimatur enabling the adoption of an Indian child by a foreigner and a foreign law has introduced a*

⁷ Dicey, Morris & Collins, *Conflict of Laws* (15th edn, Sweet & Maxwell, 2018)

⁸ There are four cases in this series: AIR 1984 SC 469; AIR 1986 SC 272; AIR 1987 SC 232 & AIR 1992 SC.

⁹ Ibid

¹⁰ Lakshmikant Pandey (n 14).

novel concept hitherto unknown to Indian law. The application of foreign law by municipal courts for resolving disputes involving foreign elements is based on certain principles of private international law. However, we can hardly invoke the principles of private international law in the present context. It is indeed a case of straight incorporation of the foreign law in the corpus juris of this country. Such universality in judicial outlook is unheard of anywhere in the world.”¹¹

The whole process of inter-country adoptions should be based on *lex domicilii*, as adoption concerns the status of a child in a new family of adoptive parents. It is an elementary principle of private international law that all matters of status are governed by the law of domicile.¹² Such a step would help develop our own law on the one hand and would have enabled such transfer of the child on a sound legal basis on the other. Conceptually, adoption might be understood differently in different countries. Minor children when subjected to inter-country adoptions should not be made victims of variations in the related concepts of adoption and fosterage.

In the last of the *Lakshmikant Pandey* in the judgement series, the supreme court denied a licensed social agency's request that the adopted child's Indian citizenship be maintained until he or she reaches the age of majority and is legally competent to opt. The court rightly opined: “Such a step would run counter to the need of quick assimilation and may often stand as a barrier to the requirements of the early cementing of the adopted child into the adoptive family”.¹³

ROLE OF INDIAN COURTS AS PARENS PATRIAE IN THE CUSTODY OF CHILDREN

Both the Supreme Court and High Courts in India have issued a writ of habeas corpus by enforcing their rights under writ jurisdiction of “Article 32 and 226 of the Constitution of India.” Courts act as “*parens patriae*” in a reasonable manner using their discretion to decide upon conflicting claims of parents keeping in mind welfare of the children. Constant usage of

¹¹ B.N. Sampath, *Lakshmikant Pandey v Union of India: An Instance of Excessive Judicial Legislation* AIR 1985 (Journal) 105.

¹² The provisions of Guardians and Wards Act of 1890 may be considered for carrying out procedural necessities and may thus fulfil the formalities of a secular adoption.

¹³ AIR 1992 SC 118

this doctrine by Indian courts have evolved the law on inter-parental child custody issues. Hence, the evolution of a beneficial law on inter-parental child custody issues has resulted in various progressive precedents rendered by the Supreme Court and High Courts of India.

One of the initial cases where writ of habeas corpus was exercised in a child custody issue between parents was *Gohar Begum v Saggi alias Nazma Begum*.¹⁴ The Supreme Court applied the principles applicable to custody of infants in writ jurisdiction of England to settle issues in this case.¹⁵ In the case of *Nil Ratan Kundu v Abhijit Kundu*¹⁶ Supreme Court of India by following precedents in English and American law held that:

“the basis for issuance of a writ of Habeas Corpus in a child custody case is not an illegal detention, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate”.

Hence for non-resident parents in India with a foreign court custody order writ of habeas corpus is the most efficacious and speedy remedy in the courts of India. Usually in these situations minor “ordinarily resides” abroad and for a guardianship petition before a guardian judge jurisdiction is barred under the Guardian and Wards Act 1890 (GWA).

In the case of *Surya Vadanam v State of Tamil Nadu*¹⁷ Supreme Court put at rest five-decade precedents in India and adopted consistent approach in multijurisdictional child custody disputes with following principles:

- “The principle of comity of courts and nations must be respected. The best welfare/interest of the child should apply in such cases;
- The principle of ‘first strike’, that is, whichever court is seized of the matter first ought to have privilege of jurisdiction in adjudicating the best interest of the child;
- The rule of comity of courts should not be abandoned except for compelling special reasons to be recorded in writing by a domestic court;
- Interlocutory orders of foreign courts of competent jurisdiction regarding child custody

¹⁴ AIR 1960 SC 93

¹⁵ Ibid

¹⁶ AIR 2009 Sup SC 732

¹⁷ 2015 (5) SCC 450

must be respected by domestic courts;

- An elaborate or summary enquiry by local courts must be held when there is a pre-existing order of a competent foreign court. It must be based on reasons and not ordered as routine when a local court is seized of a child custody litigation;
- The nature and effect of a foreign court order, reasons for repatriation, moral, physical, social, cultural or psychological harm to the child, harm to the parent in the foreign country and promptness in moving a concerned foreign court must be measured before ordering the return of a child to a foreign court.”¹⁸

In the recently decided case of “*Nithya Anand Raghavan v State of NCT of Delhi*”¹⁹ the apex court abolished the principle of “comity of courts” and principle of “first strike” in conflict of laws issues of adoption. The position adopted in *Nithya Anand* has been reiterated by the court in the case of “*Prateek Gupta v Shilpi Gupta and Others.*”²⁰

CHILD ABDUCTION AND CUSTODY OF CHILDREN

Dr Justice A.R. Lakshmana, Judge, Supreme Court rightly opines, “*Statistics show that divorce and custody cases are on the rise. The practice of international child abduction has its roots in these inter-parental custody battles.*”²¹ In context of this, it is imperative to comprehend as to constituent elements of international child abduction.

This can be better comprehended through an instance. Suppose a father hailing from Country A and a mother hailing from Country B live inside Country C where the children have citizenship. Copious number of families fall within description in the contemporary world. It is understandable that this combination of cultures, traditions and nationalities has an imperative role in widening the social horizons within the child’s mind, but it also results in creation of unprecedented issues. One of them being Child Removal or child abduction. This concept finds itself defined under “Section 3 of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction”.²²

However, this above-mentioned section does not apply to India. This is primarily due to the

¹⁸ AIR 2017 SC 3137

¹⁹ *Ibid*

²⁰ 2017 SCC OnLine SC 1421

²¹ Charu Singh, ‘Cross-Border marriage disputes: Child Suffers most, Says Jurist’ (THE TRIBUNE, 7 May 2006) <<http://www.tribuneindia.com/2006/20060507/nation.html>> accessed on 10 October 2022.

²² Article 3, Hague Convention of 1980 on the Civil Aspects of International Child Abduction.

fact that Indian Nation has not signed “The Hague Convention of 1980 on the Civil Aspects of International Child Abduction.” To add to it, there exists no parallel legislation at the present which defines “child removal” or deals with other allied issues.

BENEFITS OF SIGNING HAGUE CONVENTION FOR INDIA

In spite of court attempts, India's legal situation regarding Inter-parental custody rights remains deplorable. Currently, India is subject to an international convention or treaty for the enforcement of such rights. The Indian Civil Aspects of International Child Abduction Bill of 2007 inspired optimism. Prior to India's accession to The Hague convention, the organization aimed to establish the necessary implementation processes and systems.²³

Devoid of stable legal position without legislative backing casts India as a safe haven and an ideal country for International Child Abduction. A plethora of offender parents from foreign countries chose India to escape, primarily as it hasn't signed The Hague Convention of 1980. In its 218th Report, the Law Commission has pressed on the need to sign the Convention. It was suggested that India become a member of the Convention. In light of the dualist approach to International Law, the implementation of the treaty through the enactment of local law is unlikely to occur spontaneously. Foreign embassies should be created in India in states with a large population of Non-Resident Indians till this occurs. The aforementioned missions might assist the courts in ensuring the safe return of children to their country of residence in the event that they are removed in violation of foreign court orders. This would “help the foreign parents with limited knowledge as to the Indian legal system to enforce their rights.”²⁴

CONCLUSION

In India the jurisprudence of conflict of laws is still in a developmental stage. Due to the dearth of legislations at both national and international level most of the time it is the judicial pronouncements which serves as the guardian for the parties in times of distress. In India the same situation prevails in cases of intercountry child adoption and inter-parental child abduction. Although the judiciary has adopted innovative approaches in several cases dealing

²³ Anil Malhotra & Ranjit Malhotra, *Child custody and guardianship: issues and challenges in India*, INTERNATIONAL BAR ASSOCIATION (17 December 2018) <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=AE037FE1-EF48-4D26-A830-F3B9C2959E23>> accessed on 3 April 2021.

²⁴ Prashant Sharma & Vinayak Kapur, 'Child Adoption & Maintenance: A legal Perspective', INTERNATIONAL JOURNAL OF RESEARCH AND ANALYSIS 1 (2014).

with the issue of child custody the ephemeral nature of those judgements cannot be disputed. The signing of Hague Convention 1980 was the first internationally recognized effort in the direction of having a universally applicable law for child custody. However, the convention has still not been adopted by domestic laws of several key legal jurisdictions including India. Furthermore, signatory countries can enter into bilateral agreements with the non-signatory countries till the time Hague Convention is adopted by other countries. Also, the Indian courts will have to play a very proactive and important role so that the jurisprudence related to international child custody and inter country adoptions can evolve and that Indian judiciary keeps pace with the international development.

