

Supreme Court of India Judgements on Cross Border Child Custody Disputes

Due to global business and employment opportunities, there is a growing phenomenon of Indian citizens settling abroad or marrying foreign nationals of Indian origin. This phenomenon is accompanied by setting up matrimonial home in foreign land and also Indian citizens acquiring permanent residence status in foreign countries or acquiring citizenship of foreign countries on account of marriages to foreign nationals. This practice brings nations closer but at the same time also brings to the forefront important questions of conflict of jurisdiction between countries where these individuals have set up matrimonial home and countries of whose they were citizen before leaving their native country.

This question becomes even more complex at the time when disputes pertaining to custody of children of these individuals are brought to the courts of the country wherein either of the parent seek custody of the child on the basis of their rights as citizen or other parent seek return of the child to the foreign country where the parents have set up a matrimonial home on the basis of foreign orders passed in foreign countries on account minor nationality.

The Indian Courts in the recent years have witnessed large number of such kind of disputes and have faced the complex question as to whether to exercise or not to exercise its jurisdiction. The Supreme Court of India in *V. Ravi Chandran (Dr) (2) v. Union of India* (2010) 1 SCC 174, *Shilpa Aggarwal V. Aviral Mittal* arising from S.L.P (CrI.) 5995 of 2009 and *Ruchi Majoo V. Sanjeev Majoo* (2011) 6 SCC 479 have conclusively tried to address the said issue and have set strong precedent for the future disputes to follow.

Important Judgements of Supreme Court of India on Child Custody

The present article aims to briefly describe the ruling held by the Apex Court.

1) THE PETITION BY MOTHER UNDER 'GURDIAN AND WARDS ACT, 1890' SEEKING GURDIONSHIP OF THE CHILD AT THE TIME WHEN LEGAL PROCEEDINGS HAS BEEN INITIATED IN FOREIGN COURT.

Ruchi Majoo vs. Sanjeev Majoo

The Apex court was hearing the appeal petition of the mother - appellant who was challenging the quashing of interim order by the Delhi high Court that had granted interim custody of child to the appellant-mother. The respondent-father had alleged that appellant had abducted the minor child and come to India in spite of the orders of US court where they had set up matrimonial home. The appellant had sought guardianship of the minor child under the section 9(1) of the Guardian and wards act, 1890 in the district court of Delhi and the court had decreed in her favour.

The apex court as mentioned above was hearing the challenge to the order of Delhi high court that set aside District court order.

The apex court relying upon legal principles laid down by supreme Court of India held that the jurisdiction of the Indian court are not barred in all those cases that involve removal by parent of

minor children to India in contravention of the orders of the courts of the country where the minor's parents have set up matrimonial home. The court said that the welfare of child is the paramount consideration for deciding such matters and thereby held in the favour of the appellant-mother.

The court held that jurisdiction of the Delhi trial court in view of the petition under the Guardian and Wards Act depended upon the question whether the minor was 'ordinary' residing within the territorial jurisdiction of the court. The court said that ordinary residence here referred to the fact whether the quality of residence is 'ordinary' and general and not merely for some limited or special purpose. The court held that the intension of the parties shall also go on determine whether the residence is ordinary. The court also observed in this respect that there was a significant difference between Habeas Corpus petition and petitions under guardian and wards act through which custody of minor children are sought in cross-border matrimonial disputes. The court observed that high court in habeas corpus petition exercises its jurisdiction only when the minor or detained individual is within the jurisdiction of High court and in case of petitions under guardian and wards act, the district court exercises its jurisdiction only in case the minor is ordinary residing within district court jurisdictions clearly demarcating the jurisdictions factors that are considered for the exercise of jurisdiction by the courts in respective cases.

The court also held that the principle of comity of courts by virtue of which the foreign judgments are enforced in the country are not applicable to the present case and that the applicability of the said principle shall depend only upon the facts and circumstances of each case. Comity of court is the principle followed across the countries wherein not out of obligation but out of respect, the courts of the country enforce foreign judgments in view of common belief that laws across the countries run on same set of universal principles.

The court further said that in matters involving custody of the child, the welfare of child is primarily important and thereby the Indian courts are entitled and duty bound to examine the matter independently and take the foreign judgment in case they exists as a factor for deciding the dispute and should not oust their jurisdiction simply because the foreign court have passed judgments on the same subject matter.

The court held that courts of the country to which child is removed should first consider the question whether court could conduct elaborate enquiry or deal with the matter summarily and order return of the child by the parent to the country from which the child was removed. The court also observed that only in case the court has jurisdiction to entertain the matter than only the court can hold summary or detailed enquiry and in case it does not have jurisdiction to entertain the matter, **than it cannot order repatriation of the minor child to the country from** where the minor was removed and the party aggrieved should try and explore different legal remedy for doing the same. The court also said and noted the fact that there was no final court order in the present case that the appellant-mother had violated and legal proceeding had just been initiated in the foreign court after the respondent had left the appellant and child for the appellant to explore career options in India.

The court also observed that the role of the father was very important in the development and growth of minor child and therefore granted visitation rights to the respondent-father. The apex court thereby set aside the judgment of High court and granted interim custody of the minor child to the appellant-mother till the final disposal of the case with visitation rights to the father-respondent.

2) THE REMOVAL OF THE CHILD BY A PARENT IN CONTRAVENTION TO THE ORDERS OF THE COURT OF THE COUNTRY WHERE THE PARTIES HAVE SET UP THEIR MATRIMONIAL HOME.

The question before the Apex court in **V. RAVI CHANDRAN V. UNION OF INDIA** was whether the court should order the handing over the custody of the minor child to the petitioner –father in view of interest of the minor child and the orders of the court of country of which the child is a national.

The Petitioner father was a US citizen and had been granted divorce by US family court. The petitioner and the respondent-mother were ordered by the US court to have joint legal and physical custody of the child. The parties were also ordered that minor child shall stay in Allen Texas and both shall keep each other informed about each other whereabouts with providing all details to each other.

The respondent took the minor child to India and told the petitioner that she shall stay only in India. The petitioner in response to these sought orders from US court which therein ordered that petitioner shall be the sole temporary guardian of the minor and the respondent guardianship shall be suspended and also ordered that the issue of custody of the minor child shall be heard in the jurisdiction of US courts especially in Albany County Family Court.

The petitioner filed writ petition in apex court seeking production of the minor child and handing over the custody to him and hence the matter came before the apex court. The apex court relying upon the Legal principles laid down by various courts on the issue of custody of child in cross border disputes observed that under the Modern theory of conflict of Laws, the jurisdiction of those states are preferred who have the most intimate contact with the issues arising in the case. The court further said that ordinarily, jurisdiction must follow upon functional lines with the law of that state to govern the situation that has closest concern with the well-being of the spouse and welfare of the off-spring. The court also said that jurisdiction of the courts cannot be attracted with the operation or creation of fortuitous facts like circumstance as to where is the child etc.

The apex court also said that it is duty of courts of all the country to see that the parent who has committed wrong by removing the child from his native country does not gain any advantage from his/her wrong doing. The court further observed that the court of the country to which the minor child had been removed must first consider the question whether the court can conduct an elaborate enquiry or can conduct summary enquiry upon the issue of custody and further said that this question shall primarily be determined in accordance to the welfare of the child.

The court said that in case the court decides to exercise summary jurisdiction, than, the court shall return the custody of child to the country from which the child is removed (his native country)

leaving all aspects of the child welfare to be decided by that country unless such return is shown harmful for the welfare of the child. The court also said that this jurisdiction is generally invoked in case the application for return or custody of child is moved promptly with does not allow the minor to develop roots in the other land other than his native land or in case it is shown that the minor child is being far removed from social system from his native land or his education is being interrupted all indicating the return of child is in best interest of the child. The court also said that in case the court decides on to conduct elaborate enquiry than, it is required to decide independently on merits whether it is interest of child to return and shall consider factors like time that has lapsed after removal etc. and even factor of unauthorised removal of the child shall not come in the way to decide the said matter independently.

The court also observed that sole and predominant criteria in deciding any question pertaining to the custody of child what shall best serve the best interest of the child.

The apex court relying upon these above mentioned legal principles held in favour of petitioner and ordered it be ward of the US court with respondent open to modify the custody order. The court in case decides to conduct an elaborate enquiry as to issue of custody than the court is bound and under legal obligation to consider the welfare and happiness of the child as a paramount consideration for deciding the issue and should go into all relevant aspects of the welfare of the child that includes stability, security etc. The court also held that order of the foreign court shall also be an important consideration in deciding the same and the persuasive effect of the said order in determining the issues of custody shall depend upon circumstances of each case.

The court also reaffirmed the legal principles laid down by the courts in respect of exercise of summary jurisdiction and held that in case the court decides to deal with the matter summarily and orders returns of the child to the native country from where he was removed keeping in view the jurisdiction of the court of the native country which has closest concern and intimate contact with issues arising there under, than, the court may leave all aspects relating to the welfare of child to be investigated by the court of native country of the child in view of the best interest of the child.

The court thereby held that the minor was a US citizen who was born and brought up in US and had spent his initial years over there making it his natural habitat and thereby in his interest and welfare the child should be returned to US. The court also noted the fact that respondent was on a run with minor that had not provided a stable environment to him and held it was harmful to the interest of the child. The court also noted the fact the petition had been filed promptly with the minor not developing roots in India and therefore in view of principle of comity of courts and facts held that in view of the best interest of the child, the child should be returned to US. The Court also held that it was open for the respondent to seek modification of the custody order in US court by presenting petition over there.

3) REMOVAL OF THE CHILD BY THE PARENT IN CONTRAVENTION TO THE INTERIM ORDERS OF THE FOREIGN COURT THAT ORDERED RETURN OF THE CHILD TO FOREIGN COURT JURISDICTION FOR FINAL DETERMINATION OF THE ISSUE OF CHILD CUSTODY.

Shilpa Aggrawal vs. Aviral Mittal arising out from S.L.P (Crl.) 5995 of 2009

The Apex court was hearing appeal petition of the appellant mother against the order of Delhi High Court which on the basis of comity of courts had ordered return of the minor child to the respondent for safe return to England as a measure of interim custody in accordance to order passed by British High court where the issue of custody was to be decided by the British courts in the near future. The British family division High court had passed ex-parte order (without the other party present) declaring the minor as award of the court till the time she attains majority or till the time the court passes appropriate order. The court had also directed return of child to UK or British jurisdiction for the court to decide the issue of custody of the child in view of the fact that both parents were permanent residents of UK and minor child had British passport (on account of birth in UK).

The apex court in the present case dismissed the appeal petition of the appellant and observed that High court had not erred in the ordering the return of child and had in fact taken into consideration both facts that is comity of courts and welfare of the child which were of paramount importance.

The apex court observed that the UK court did not wanted to separate the minor from the appellant-mother and had only directed the return of the child to UK jurisdiction so that the courts of UK could proceed with the determination of the question as to who shall be granted with the custody of the minor child. The apex court also noted the fact and observed the fact that the minor was considered ward of the court is an important fact in considering whether the UK court's order shall be interfered or not. The Apex court also noted the fact that the appellant and respondent were permanent residents of the UK and the minor held British passport by virtue of being born in UK and therefore the courts of UK were closely and intimately linked to decide upon interest and welfare of child of the child.

The Apex court therefore held that High court did not commit an error on relying upon the principle of comity of courts since the question as to what is in interest of the minor and custody of the child was yet to be determined by UK Courts and the order passed by UK court was only interim in nature and only in view to return the child to the jurisdiction of the court.

Conclusion: The Supreme Court of India through these above mentioned judgments have tried to clear the doubt over the issue of conflict of jurisdiction and importance of foreign judgments on the decisions that are to be rendered by the Indian courts in respect to the custody of children or removal of minor child from foreign countries to India by parents in contravention to foreign court orders.

The Supreme Court through these judgments have held that the jurisdiction of Indian courts is not barred in such issues and the courts are entitled and duty bound to examine the matter

independently taking welfare of child as important consideration to determine the same. The Apex court also said that judgments passed by foreign courts should also be considered as a factor in finally adjudicating the matter and the applicability of principle of comity of courts or enforcing foreign judgments shall or the Indian courts deciding the issue of custody of minor child in such cross-border parent disputes shall purely depend upon the facts and circumstance of each case. The welfare of the child shall be the paramount consideration in deciding the return of child or deciding the issue of custody by Indian courts.

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