

(2010) 08 AP CK 0046

In the Andhra Pradesh High Court

Case No : Writ Petition No. 2682 of 2010

Alla Venkata Sanath Babji Reddy, Software Engineer in
Walmart, rep. by his General Power of Attorney/father Alla
Venkata Krishna Reddy

APPELLANT

Vs

Government of A.P. and Others

RESPONDENT

Date of Decision : 27-08-2010

Acts Referred:

Constitution of India, 1950 — Article 15(1), 15(4), 16(1), 16(4), 21
Criminal Procedure Code, 1973 (CrPC) — Section 100, 482
Guardians and Wards Act, 1890 — Section 25
Hindu Minority and Guardianship Act, 1956 — Section 6
Penal Code, 1860 (IPC) — Section 363, 498A, 511
Protection of Human Rights Act, 1993 — Section 2

Citation : (2010) 2 ALD(Cri) 751

Hon'ble Judges : V.V.S. Rao, J;K.C. Bhanu, J

Bench : Division Bench

Advocate : C. Praveen Kumar, for the Appellant; A.G. for Respondent Nos. 1 to 3 and O. Kailashnath Reddy, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.

Background

1. A Non Resident Indian initiated these "habeas corpus" proceedings seeking direction to official Respondents to produce fifth Respondent in the custody of fourth Respondent before this Court and further direct fourth Respondent to produce the detenu before Oakland County Court, Michigan, the USA (Oakland Court) as per its order dated 02.12.2009 in Case No. 09 764663 DC. The brief admitted fact of the matter reveals the following relevant background for adjudicating an important issue in private international law touching upon doctrine of comity of Courts. The Petitioner and fourth Respondent are Indians. They married on 10.4.2004 in Nellore Town, State of Andhra Pradesh. Their child,

Aikya (the detenu) was born on 16.11.2007 at Willow Creek Women's Hospital, Johnson, Washington County in Arkansas. Unfortunately matrimonial disharmony afflicted the couple. Petitioner moved Benton County Court, Arkansas, on 12.6.2009 for divorce in Case No. DR 2009-983-6. He also moved for emergency temporary child custody. The said Court declined to exercise jurisdiction as the detenu had not resided there since April 2008 the family had temporarily moved to Michigan. The Petitioner then moved Oakland Court which passed ex parte order granting child custody to Petitioner pending final orders. Fourth Respondent was ordered to return the child to Petitioner. As the same was disregarded, the Court found fourth Respondent to be in contempt of Court and ordered for return of the detenu. Meanwhile on 11.11.2009, fourth Respondent moved application to set aside ex parte order regarding custody, and to dismiss Petitioner's motion for want of jurisdiction. On 02.12.2009, the Court denied the motion.

2. Fourth Respondent and the detenu came to India in March 2009. Petitioner alleges that in spite of Bench warrant for arrest, fourth Respondent did not surrender the minor child before Oakland Court. But she filed a criminal case being Crime No. 185 of 2009 of VI Town P.S., Nellore under Sections 363 read with 511 of Indian Penal Code, 1860 (IPC). Petitioner then filed quash criminal petition before this Court u/s 482 of Code of Criminal Procedure, 1973 (Cr.P.C.). This Court stayed his arrest. Fourth Respondent also filed a case under the Protection of Women from Domestic Violence Act, 2005, being DVC No. 11 of 2009 on the file of the Court of V Additional Judicial Magistrate of First Class, Nellore, which granted temporary custody of detenu to her with direction to Police to ensure its implementation. The Petitioner and his parents were restrained from visiting minor child until further orders. Petitioner filed yet another case being CrI.P. No. 832 of 2010 before this Court for quashing DVC. In the meanwhile fourth Respondent's application to reconsider interim custody order was rejected by the Oakland Court.

3. In her counter affidavit, fourth Respondent does not dispute proceedings before Arkansas and Oakland Courts. She states that she filed appeal against the orders of Oakland Court. She justified her custody on the ground that detenu is female child of 21/2 years old, that the child is attached to fourth Respondent and her parents whereas Petitioner is alone in USA and he would not be in a position to take care of a female child.

4. The Senior Counsel for Petitioner, the Counsel for fourth Respondent and the Advocate General for State made their submissions. Counsel rely on V. Ravi Chandran (Dr.) (2) v. Union of India (2010) 1 SCC 174 and Shilpa Aggarwal Vs. Aviral Mittal and Another, In the light of the rival contentions, the issue for consideration is whether the detenu is in illegal custody of fourth Respondent and whether a Habeas Corpus shall issue for production before Oakland Court.

Rights of the child

5. In a case of this nature, the Court has two options. First, on the principle of

comity of Courts, direct the person having the custody of the minor detenu to produce before foreign Court if child is citizen of foreign State, to be subjected to "family and child custody law" of that Nation. The second option is the exercise of *parens patriae* jurisdiction. The Court, as protector of the child, protects Constitutional right to life and liberty under Article 21 of Constitution. If this option is chosen, consideration would be "paramount interest" or "best interest" of the minor. Choice of option depends on facts. In our considered view, if a child born to Indian parents in a foreign Nation is removed from the jurisdiction of the foreign Courts, after commencement of matrimonial dispute for divorce and child custody, the Court may insist upon the spouses to respect the orders because in such case, the *parens patriae* jurisdiction is deemed to have been exercised by the foreign Court. However, if either of the spouses came to India before commencement of matrimonial proceedings and the adversarial spouse obtains *ad interim* child custody order at later point of time, "paramount or best interest test" must guide Indian Courts in resolving the issue. It can never be an inflexible rule that child custody decree of the foreign Court must be ordered to be obeyed merely because child remain ward of Court which assumed matrimonial jurisdiction, even if it amounts to ignoring law of parents' nation.

6. The second option is part of human rights law. Child is a "person" within the meaning of Article 21. The guaranteed right to its life is to be understood in Indian context, as expansively as it has been understood in other context. A child is more than just a pawn in the fiercely fought matrimonial Court battle. As defined in Section 2(d) read with Section 2(e) of the Protection of Human Rights Act, 1993, "human rights" means, the rights relating to life, liberty, equality and dignity of individual guaranteed by the Constitution or embodied in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition other International, multinational treaties and covenants recognise the right of every person; including a child - the right to life (Article 6 of Convention on the Rights of the Child, 19896 (CRC); Article 3 of Universal Declaration of Human Rights7 (UDHR), the right to family (Article 16 of UDHR), Right to economic well-being (Article 3(2) of CRC8). Further, Article 8 of European Convention for the protection of Human Rights and Fundamental Freedoms, 19509 (Convention Rights) recognized the right of every person to establish family and enjoy family life which includes the right to bring up children and mould the future of the children keeping in view their welfare. Article 27 of CRC recognized the right of every child to good education and good nutrition10, good family (Article 16 (1) of CRC11, good social environment and right of survival and development (Article 6(2) of CRC).

7. The Constitution of India recognizes the children as a special vulnerable group and provides for their protection and well being. Articles 15(1), 15(4), 16(1), 16(4), 23(1)12 and 2413 of Constitution of India either expressly or impliedly ordain the State to protect the children. Directive Principles of State Policy especially Articles 39(e) and (f), 42, 45 and 47 require the State to strive to

promote the wellbeing of children. The rights of the child can neither be ignored nor brushed aside by Indian Courts while considering child custody dispute even in regard to private international law.

Gender equal parenting rights

8. The myth of father's preferential right to custody of the minor child is a cause for mother's agony, shattering the dream of motherhood. In Hindu Customary Law, as natural guardian of the child, father has, "right to the possession of infant, a right which arises out of his obligation in respect of the child; he cannot therefore be deprived of it, even by the desire of the minor himself, except upon sufficient grounds. The father is the natural guardian of his children; but his guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place"¹⁴. Section 25 of Guardians and Wards Act, 1890¹⁵ also recognized such right.

9. In (Kode) Atchayya Vs. Kosaraju Narahari, about eight decades ago, Division Bench of Madras High Court ruled that the father can never be deprived of the custody of the child. After the Constitution of India, a child is no more a chattel; "a child is a person" entitled to all the rights and liberties. Division Bench of this Court in 1981 held that, "the broad view of the right of the father to claim the custody of the minor child without reference to the welfare of the minor, is not acceptable to law" (L. Chandran Vs. Venkatalakshmi and Another, Such a view is not only untenable but clearly wrong. The relevant placitum from the Judgment can be usefully quoted.

The theory that the father has an unlimited and unrestricted right to the custody of the minor child even to the extent of disregarding the welfare of the child would be theoretically inconsistent with this constitutional provision. It is no doubt true that the minor is not in a position to express its preferences. But that incapacity makes no difference to the legal theory with which we are now concerned because that incapacity would not take away the child's inalienable right to life recognized by the Constitution. The recognition of an unlimited right in another person, be it the father, to the custody of the Ward would not only be constitutionally inconsistent with this right of the minor under Article 21 of the Constitution but it would also be inconsistent with the constitutional power and duty of this Court to protect and enforce the fundamental right to life of all persons including that of the minor.

(emphasis supplied)

10. In Ms. Githa Hariharan and Another Vs. Reserve Bank of India and Another, the apex Court was dealing with two cases. In the first one, in divorce proceedings, the husband obtained interim custody of the minor son asserting his "only natural guardian" right, u/s 6(a) of Hindu Minority and Guardianship Act, 1956¹⁹ and Section 19(b) of the Guardians Act²⁰. The wife invoked equality clause to strike down both the provisions. In another case, both the spouses went to RBI to buy relief bonds for their minor son. The Bank refused to issue

bonds; the reason being father's name was absent and mother was mentioned as guardian of the minor. Both the spouses then impeached above mentioned provisions. Justice Umesh C. Banerjee writing the lead opinion relied on constitutional gender equality for reading down to save provision being ultra vires. The Court ruled that, "father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter, the word "after" (in Section 6 of 1956 Act) shall have to be interpreted in terms of the constitutional safeguard and guarantee so as to give a proper and effective meaning to the words used". To sum up, Article 13(3) of ICESCR²¹ obliges the State parties to have respect for the liberty of the parents to choose for their children proper moral, religious and secular education in conformity with their convictions. No preferential right of any spouse is thus recognized nor enforced by International Bill of Rights.

Case Law

11. In *Elizabeth Dinshaw v. Arvand M. Dinshaw* (1987) 1 SCC 42 : AIR 1987 SC 3, Petitioner married Arvand in Negaunee, State of Michigan, in 1972. A male child, Dustan, was born in Rochester. In 1980 differences arose between the couple and the wife took residence with her son in women's shelter in Saginaw. She obtained divorce order from County Court of Saginaw on 23.4.1982. The Court also granted that Elizabeth shall have custody and control of the minor child, with visitation rights to the father. Arvand was also given liberty to travel with minor child outside territorial limits of USA with prior permission of the Michigan Court. In 1986, he left USA with child without intimating the Court. At the instance of Elizabeth, federal warrant of arrest was issued against Arvand. On coming to know through American Consulate General, Bombay (now, Mumbai), that the child Dustan was in India, Elizabeth initiated habeas corpus proceedings before the Supreme Court. While holding that, "a parent doing wrong by removing the children out of their country" should not gain advantage of such wrong doing, the Court considered the question of, "best interests of minor child" and issued a direction that Dustan should go back to his mother at USA. It was further held that, "Whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor."

12. In *Ravi Chandran*, father, an American citizen, moved for production of minor son, Adithya, born in USA. His wife had moved New York State Supreme Court for divorce. On 18.4.2005, consent order for joint custody of the child was passed with a direction to keep the other party informed the whereabouts of the child. They also consented as regards the custody and parenting time. On 08.9.2005, the Court dissolved the marriage incorporating earlier custody order. Two months thereafter order was modified, giving legal and physical custody of the child on weekly basis subject to condition that during August 2007, the child

shall reside in Texas with his father. The other modalities for joint parenting were also incorporated in the order. On 28.6.2007, the mother brought minor son to India without informing the father. In August 2007, the father filed motion for modification of the order before the Family Court of New York. The Court granted temporary sole legal and physical custody of minor son. The mother was directed to immediately turnover custody of minor son and his passport to the father duly suspending her custodial right with minor. The Family Court also issued Warrant for arrest of mother. How to reconcile the orders of the Court situated in a country in which the child is National and interest of the child. Considering the principles and precedents of Indian and foreign Courts, the apex Court held.

While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

(emphasis supplied)

13. *Shilpa Aggarwal* is a case of returning the child to the jurisdiction of a foreign Court to decide what is "best interest" of the minor, in a proceeding before the High Court of Justice, Family Division, United Kingdom, for custody of minor daughter. *Shilpa's* husband obtained an ex parte order to return the minor child to its jurisdiction and to handover the baby to his Solicitors. Indisputably the child was British citizen, but the wife removed the child to India. The husband moved Delhi High Court for custody. Delhi High Court directed *Shilpa* to take the child on her own to England and appear before English Courts, failing which, the child would be handed over to husband to take to England, as a measure of interim custody. In appeal to Supreme Court by special leave, doctrine of comity of Courts was pleaded to oppose the appeal. The Supreme Court noticed that, "English Court did not intend to separate the child from the Appellant until final decision was taken", and dismissed the case observing thus.

It is evident from the aforesaid order that except for insisting that the minor be returned to its jurisdiction, the English Court did not intend to separate the child from the Appellant until a final decision was taken with regard to the custody of the child. The ultimate decision in that regard has to be left to the English courts

having regard to the nationality of the child and the fact that both the parents had worked for gain in the UK and had also acquired permanent resident status in the UK.... The High Court has taken note of the fact that the English Court has not directed that the custody of the child should be handed over to the Respondent father but that the child should be returned to the jurisdiction of the courts in the UK which would then proceed to determine as to who would be best suited to have the custody of the child. In our view, the approach of the High Court takes into consideration both the questions relating to the comity of courts as well as the interest of the minor child, which, no doubt, is one of the most important considerations in matters relating to custody of a minor child. It has been rightly observed by the % High Court following the decision in Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Another, that it was the English courts which had the most intimate contact with the issue in question to decide the same.

14. Conspectus of the three binding precedents is that Indian Courts ought to relegate the parties to seek redressal by submitting to the jurisdiction of a foreign Court, if the child whose custody in question is a citizen of foreign country. A parent, who removed the child from the jurisdiction of foreign Court in contravention of its order, cannot be allowed to take advantage. But there is an exception. A child who is a citizen of a foreign nation subject to the jurisdiction of the foreign Court is also a person "within the meaning of Article 21 of the Constitution of India." Indian Courts can always consider "best interests" of the child whose parents or either of them is an Indian citizen.

Contentious issue

15. The fact remains that from March 2009 till now the detenu is with her grandparents and mother in India. Aged 2V2 years, she is attached to her mother and maternal grandparents. Her memories would have faded because by the time she came to India in March 2009 with her parents, she was a toddler aged one year four months. The Petitioner is alone in USA. He would not be in a position to take good care of female child. The child deprived of mother's affection would suffer mental disturbances. Fourth Respondent went in appeal against the orders of County Court. Pending resolution of divorce and child custody proceedings in American Courts, child's best interests would be served only if she is allowed to stay with the mother in India denying Petitioner's claim for pendente lite custody of detenu.

16. The conduct of Petitioner also militates against his claim. In April 2008, Petitioner and fourth Respondent moved from Arkansas to Detroit in State of Michigan. About a year thereafter, they came to India. Petitioner left India in 2009 but fourth Respondent remained in India with her child. It is not clear from the record when the differences started cropping up. It is only on 12.6.2009, fourth Respondent fired first salvo by instituting criminal case u/s 498A of IPC23. A warrant for arrest of the Petitioner in connection with that case is pending execution. It is by coincidence that on the same day, the Petitioner initiated

divorce proceedings in Arkansas Court, which declined jurisdiction in child custody issue. By that time, the fourth Respondent was very much in USA and she left for India on 12.10.2009. A day thereafter, i.e., on 13.10.2009, Petitioner filed complaint for custody and parenting time in Oakland Court, which passed ex parte order on 16.10.2009 prohibiting parties traveling outside USA. On 28.10.2009, the said Court awarded temporary child custody to Petitioner. Fourth Respondent then unsuccessfully moved motion to set aside the ex parte order and reconsideration.

17. The Petitioner initiated proceedings on 13.10.2009 for child custody and the mother had left USA alone. Indeed the child had come to India along with her parents in March 2009. The peculiar circumstances would show that fourth Respondent cannot be censured for removing the child from the jurisdiction of Oakland Court. The child had come to India very much prior to Petitioner's divorce proceedings and child custody.

18. There is yet another reason to deny habeas corpus in this case. Fourth Respondent has already filed two criminal cases; one, u/s 498A of IPC and the other under the Protection of Women from Domestic Violence Act, 2005. In the latter case, the jurisdictional criminal court granted interim custody to fourth Respondent on 22.12.2009. Therefore, custody of detenu with fourth Respondent cannot be termed as illegal especially when her appeal against the ex parte orders of Oakland Court is statedly pending. Indisputably warrant for arrest of the Petitioner is in force. Whether or not the matrimonial dispute reached a point of no return, the fact remains that detenu has been with fourth Respondent in India from March 2009 and, therefore, it would not be in the best interests of the child to issue habeas corpus. But keeping in view the principle of comity of Courts, this Court directs that if ultimately the fourth Respondent is not successful before the appellate Court in USA she is bound to take detenu to USA, and produce before Oakland Court. In such eventuality, needless to mention, Petitioner alone should bear the expenses towards travel, stay and litigation in USA for the mother and the child, for entire duration of proceedings.

19. The writ petition, subject to observations made hereinabove, is disposed of, denying the relief as prayed for, without any order as to costs.

5 The doctrine of "parens patriae" is the inherent power and authority of the State to provide protection of the person and property of persons non sui juris, such as minors, insane and incompetent persons.

In cases involving custody of minor children, whether it be by divorce or separation, by habeas corpus, petition to chancellor, or other equitable proceeding, the court, as a department of the state, in thus exercising its inherent power and jurisdiction in equity, is spoken of as acting in the capacity of "parens patriae". (Words and Phrases (Permanent Edition) Vol.31, West

Publishing Co.,)

6 Article 6(1): States Parties recognize that every child has the inherent right to life.

(2) States Parties shall ensure to the maximum extent possible the survival and development of the child.

7 Article 3: Everyone has the right to life, liberty and security of person.

8 Article 3 (2): States Parties undertakes to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

9 Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10 Article 27(1): States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

(2) The parent(s) or others responsible for the child to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

(3) States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing,

(4) States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate

arrangements.

11 Article 16 (1): No child shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

12 23. Prohibition of traffic in human beings and forced labour.- (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

13 24. Prohibition of employment of children in factories, etc.- No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

14 Mayne's Hindu Law, 16th edition, page 627.

15 25. Title of guardian to custody of ward:- (1) If a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Code of Criminal Procedure, 1882 (10 of 1882) 16.

(3) The residence of award against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

19 6. Natural guardians of a Hindu minor:- The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or unmarried girl the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

20 19. Guardian not to be appointed by the court in certain cases Nothing in this Chapter shall authorise the court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person-

(b) of a minor whose father is living and is not in the opinion of the court, unfit to be guardian of the person of the minor;

21 Article 13(3): The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or

approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

23 498A. Husband or relative of husband of a woman subjecting her to cruelty.- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.