
(1983) 03 P&H CK 0070

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 82 of 1983

Marilynn Anita Dhillon Gilmore

APPELLANT

Vs

Margaret Nijjar and Others

RESPONDENT

Date of Decision : 16-03-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Citation : (1984) 1 ILR (P&H) 1 : (1983) 1 RCR(Criminal) 396

Hon'ble Judges : Madan Mohan Punchhi, J

Bench : Single Bench

Advocate : V.K. Jhanji and C.M. Sharma, for the Appellant; Sarwan Singh, for Respondent Nos. 2 and 3 and R.C. Setia, for the Respondent

Final Decision : Allowed

Judgement

Madan Mohan Punchhi, J.—The jurisdiction of this Court as parens patriae has been invoked in this petition for habeas corpus bringing to its notice that there are two infants named Sabrina Dhillon and Malle Dhillon within its jurisdiction which are requested to be put to the custody of the mother who has petitioned.

2. Facts relevant as emerging from the pleadings of the parties and as stated at the bar, may be taken note of.

3. The wife-Petitioner is a citizen of the. United States of America. The added Respondent No. 3, the husband, by birth is an Indian but became a naturalised citizen of United States of America in May, 1969. They met in the United States and were bound in matrimony on 16th July, 1971 in California, U.S.A. On 16th July, 1972, Sabrina Dhillon, one of the detenu (e)(s), was born to them. On 25th September, 1975, Malle Dhillon, the second detenue was born. For some differences between the parties, with which this Court is not concerned in the instant proceedings, the Respondent-husband on 29th September, 1976 obtained a default judgment of dissolution of marriage from a California Court. Twenty days later on 19th October, 1978 he brought his children to India.

4. On the twenty-seventh day of the default judgment of dissolution of marriage, the wife-Petitioner on 26th October, 1978 applied to the Court for vacation of her default and setting aside the interlocutory (default) judgment of dissolution of marriage. A motion hearing was held on 6th November, 1978 by the superior Court of the State of California in and for the County of Santa Clara. The husband's counsel put in special appearance and challenged the Court's jurisdiction over him for he was of the view that the husband had not been served of the motion hearing in accordance with law. Thereat it was admitted that the husband had gone to India with his two children on 19th October, 1978. The Court took the view that the husband had been served in accordance with law and thus on 8th November, 1978 set aside the default, judgment of dissolution of marriage. Eventually the Appellate Court on 30th December, 1981 (Annexure R. 1) upset the aforesaid order taking the view that the husband did not have the statutory notice of fifteen days.

5. The children came to India as United States citizens and landed at New Delhi on 28th October, 1978 on the authority of Passports Nos. G-2415900 and G-2415901 both dated 26th October, 1976 issued at San Francisco, U.S.A. The Immigration Staff at the Delhi Airport granted a period of thirty days landing permit to the infant visitors. Their stay was further extended up to 27th January, 1979 (these endorsements have been taken from the passports themselves). It appears that the Government of India apprised the Punjab Government that it had extended the stay of the children in this country till 26th January, 1980--vide Order No. 18017/237/79-F-2, dated 4th June, 1979 issued by the Ministry of Home Affairs, Government of India (Annexure R. 3). During that time, Sabrina Dhillon was stated to have been put as a boarder at Sacred Heart Convent School, Dharamsala (Himachal Pradesh) for a short while. Later on 29th December, 1979, both the children were got admitted by the husband-Respondent as residential pupils in Shamrock Convent School, Ludhiana (Punjab). The husband-Respondent appointed a close relation of his, Mr. Apinder Singh Grewal Respondent No. 2, as the local guardian of the children. Earlier to the admission in the school, the paternal grandfather of the children Mr. Dalbir Singh Dhillon of Dhillon Farm, Village Darvesh, Phagwara, District Kapurthala (Punjab)(an ex-Respondent herein) on 14th October, 1979 reported to the local police that his two grand-children named Sabrina and Malle were missing and their whereabouts were not known. Obviously, the police could not locate the children.

6. The California Court of first instance, after having set aside the default interlocutory judgment of dissolution of marriage, engaged its attention to the question of the children. Vide order, Annexure P. 1, it passed an ex parte order in favour of the wife-Petitioner granting her custody of the two minor children. The husband-Respondent was ordered to immediately transfer physically the said children to her. Seemingly, the said order was not obeyed and thus contempt proceedings were initiated against the husband. It was found that he was in contempt of Court for having failed to deliver the children to their mother. Thus,--

vide order, dated 5th November, 1979, the husband-Respondent was ordered to be confined in the County Jail of Santa Clara. As stated at the bar, he was kept there for about a month and was released.

7. The custody order above-referred was replaced by a conditional consent order, dated 8th February, 1980, Annexure R. 2, whereby the stipulations suggested by the parties and their counsel were made rule of the Court. Thereunder the following stipulations were made order of the Court:

1. CUSTODY of SABRINA DHILLON, born July 16, 1972 and of MALLE DHILLON, born September 25, 1975, the minor children of the parties, is awarded this date to Petitioner SUKHDIP S. DHILLON, subject to reasonable rights of visitation in Respondent, which shall include the following:

A. VISITATION of Respondent with the minor children:

1. Alternate weekends, commencing Saturdays at 9.00 a.m. and terminating Sundays at 9.00 p.m.

2. Four weeks of each and every summer school vacation, provided thirty days" written notice of such visitation has first been given to the Petitioner and such visitation shall not, in any event, commence before August 8, 1980;

3. Alternate school holidays, the first of which shall be agreed upon by the parties.

2. In the event that the said minor children, namely, SABRINA and MALLE DHILLON are not in the United States forty-days from date herein, to wit, March 2, 1980, the custody and consequent visitation agreement hereinabove stipulated shall be vacated in their entirety.

3. Respondent MARILYNN ANITA DHILLON agrees not to move for a custodial change of said children, or either of them, for six months from date herein, which said six months shall expire August 8, 1980.

4. The Honourable WILLIAM FERNANDEZ shall retain jurisdiction over any matters now pending before this Court and in particular the matter of contempt, the latter of which shall be heard March 26, 1980 at 9.00 a.m., for purposes of determining whether said children are in California at said time and in the event that said children are in California, the contempt proceedings herein shall go off calendar and there shall be no further contempt chargeable against Petitioner regarding previous events charged and subject of these proceedings. It is further agreed that both parties shall appear March 26, 1980 at 9.00 a.m.

8. It seems that when the matter came up again before the California Court to ascertain whether the children were in California as stipulated, the husband-Respondent was successful in making the Court believe that the children were kidnapped/missing and that they were last seen in India. What happened to the contempt proceedings or the result of the breach of the consent order is not clear from the present record.

9. All this while, the children remained in India. As stated at the bar, the husband-Respondent periodically kept coming to India and met his children. During vacation in the school, they were being taken to their grand-parents at the aforesaid Dhillon Farm. In the meanwhile, the husband-Respondent got married again to an Indian girl and from whom he has a daughter. On the other hand, the wife-Petitioner also married one Mr. Billmore, a widower having six children, back in the United States. Hereafter, I would refer to them respectively as the mother and the father for easy reference.

10. The mother then in February, 1983 moved the California Court,--vide application (copy Annexure P. 7) seeking assistance of the Court to obtain her children. She pleaded as under:

During the past four (4) years I have retained, five different private investigators to assist in locating my children. We have had various leads as to the whereabouts of our children throughout the world. I have consulted with the Santa Clara County District Attorney's Office concerning the matter and they have issued a felony warrant for the Petitioner's arrest. The Petitioner (husband) was arrested and he is awaiting trial on the felony charges concerning the disappearance of our two children.

The preliminary hearing in the felony matter involving our children and the Petitioner (husband) took place before the Hon. Robert Ahern. The matter is set for trial, to the best of my knowledge, on March 1, 1983.

In October, 1982 a private investigator who I had hired gave me leads which made it possible to locate the Petitioner's (husband's) residence and possibly where the children resided. No one had been able to locate the Petitioner's (husband's) residence for certain for over three years. The Petitioner (husband) used addresses of friends and/or relatives but he never actually resides at the various addresses that he gave.

On or about October 20, 1982 I learned that the children were in the State of Texas and I made arrangements to fly to Texas. An investigator from New York verified that the children were not in Texas and as a result I was unable to find my children. During the past four months I have been dealing with the United States Embassy in New Delhi, India, Citizens Emergency Centre in Washington, D.C., Children's Rights Inc., the State Department and numerous other organizations to attempt to locate my children. I have recently been dealing with people in and around the area of New Delhi, India. On or about February 23, 1983 I received word from the United States Embassy in New Delhi that the children had been located. The children were located at the Shamrock Christian School in Ludhiana, State of Punjab, India. The principal of the school is a Mrs. Nizzer.

A person went to the Shamrock Christian School and personally spoke with my two children and verified that they were at the school and verified their names and ages. I have been in communication with Linda Donahue at Citizens

Emergency Centre in Washington, D.C. to verify the fact that the children were in India.

When I received verification that the children were in Ludhiana, India, on or about February 23, 1983, I made arrangements to obtain airline tickets for myself and my present husband to fly to India. In addition, I am in the process of making arrangements for myself, my present husband and our two children to return from India.

I have made arrangements to have officials in the State of Punjab to assist me in obtaining my children from the school where they are enrolled and bringing them back to this country.

I have, during this week, spent approximately \$ 5,000.00 to make arrangements for the trip to India.

During the past four years I have spent thousands of hours trying to locate my children and in excess of \$ 25,000.00 in an attempt to locate my children. I am informed and believe and based on that information and belief allege that the Petitioner (husband) has constantly been concealing our minor children from me in an attempt to make it so that I would never see them again.

The Petitioner (husband) has family members who reside, to the best of my knowledge, within fifty (50) miles of the school where the children are located.

The Petitioner (husband) has been asked repeatedly where the children are and he indicates that he has no knowledge of their whereabouts.

I request that the Court grant to me an order awarding to me sole legal custody of our minor children and sole physical custody of our minor children so that I can obtain the children from the school where they are attending in India and return them to the United States of America.

The Petitioner (husband) currently is residing at 4950 Stevenson Avenue, Fremont, California in Apartment No. 30.

11. I am concerned that if the Petitioner (husband) knows anything about this request for an order he will try to interfere with my activities and have the children removed from the school where they are currently enrolled.

If the Court grants my request I will be returning to the Santa Clara County area with our minor children and will keep myself and our children within the jurisdiction of the Santa Clara County Superior Courts. My lawyer, Walter Pierce Hammon, Esq. will know my whereabouts at all times while I reside in the Santa Clara County area.

I request a specific restraining order that the Petitioner (husband) be ordered to stay 500 yards away from myself and our minor children until further Court hearing in this matter.

I request that the Petitioner (husband) be ordered to in no way communicate

with myself and/or our minor children until this matter can be brought back to Court.

I have been advised by officials in the State Department and the Embassy in India that I must have a specific order awarding to me custody or else I might have difficulty in obtaining an exit visa out of India with the children.

I pray to the Court that the Court will assist me in my struggle to obtain my children which has gone on for over (4) years.

On the afore-referred to petition of the mother, the Californian Court on 25th February, 1983 passed the following order (Annexure P. 5):

THE COURT HEREBY ORDERS:

1. The sole legal custody of the two minor children, to wit:

SABRINA DHILLON, born July 16, 1972 and MALLE DHILLON, born September 25, 1975 shall be awarded to the Respondent immediately.

2. The sole physical custody of the two minor children, to

wit: SABRINA DHILLON, born July 16, 1972 and MALLE DHILLON, born September 25, 1975 shall be awarded to the Respondent immediately.

3. All governmental agencies and law enforcement agencies are to assist the Respondent in effectuating the return of the minor children from the Country of India to the County of Santa Clara, State of California, United States of America.

4. The Superior Court of California, County of Santa Clara, has jurisdiction over the children of the parties and the children are United States citizens having been born in the United States.

LEONARD P. EDWARDS

Dated: FEB 25, 1983

JUDGE, SUPERIOR COURT

12. Fortified by the above-said order, the mother escorted by Mr. Gilmore came to India and moved the present petition for habeas corpus against the Principal of the School (Respondent No. 1), the local Guardian of the children (Respondent No. 2) and their paternal grandfather (Respondent No. 3) on 3rd March, 1983. S.S. Dewan J. the same day issued notice for 4th March, 1983 and entrusted a roving writ to the Warrant Officer directing the Respondents to produce the detenu (e)s in Court on the date fixed. The Warrant Officer on visiting the school premises on 3rd March, 1983 found the detenu (e)s present there. The children were produced on 4th March, 1983 before S.S. Dewan J. who on that day deleted the paternal grandfather from the array of Respondents. Interim custody of the children was granted to the mother with rights of visitation to the paternal grandfather. The matter was adjourned to 8th March, 1983 for consideration.

13. On 8th March, 1983, the matter was put up before me and by that time an affidavit of the father had been brought on record who was stated to have arrived in India to defend this petition. Accordingly, on consent of the parties, I added him as a party and his filed affidavit as his return. It is he who produced before me the two passports of the children and apprised me that their stay in India had only been validated upto 26th January, 1980 and thenceforth their stay had not been regularised. I then called the Union of India, the State of Punjab and the Consulate of American Embassy to assist me in that regard, but I got no assistance of any sort from those quarters.

14. Now according to the Canons of Private International Law the mother and children will have the father's domicile. Concededly, both the parents and the children are United States Citizens and all are here for the moment. That this Court has *parens patriae* jurisdiction is beyond doubt. The jurisdiction is inherent as distinct from statutory and the question of custody of infants in habeas corpus proceedings can undoubtedly be gone into. This Court can decide whether the custody should be entrusted with one or the other contesting parties. Of course, in making that decision, the best interests and welfare of the child are the paramount considerations which weigh with the Court. And in exercise of that discretion, the Court can even permit the child to be taken away from its jurisdiction.

15. As mooted at the bar, three questions have cropped up. The first is whether this Court should respect the order of a foreign Court granting custody of the children to the mother. The second question is whether this Court can and if it can, whether it should grant the prayer in this petition and give the custody of the children to the mother who undoubtedly is all set to take the children back to United States. The third question is whether such a step would be in the interest of the minors; more so when they have nearly spent a little over four years in this country.

16. It may at this stage be noticed that the categorical stand of the father is that he is in no case going to be back to the United States. His further stance is that in all likelihood he would stay in India and would like to keep the children and bring them up in his own religion (which is Sikh), culture and tradition. The mother, on the other hand, apprised the Court by pointing out from Annexure P. 6 that the father has been accused of a felony as he has violated the California Penal Code, Section 278.5 (Violation of Child Custody Order) as also other felonies and that he being on the wrong side of law in that country would obviously avoid getting there.- She suggested that the present attitude of the father was nothing but an impromptu device to frustrate her efforts to get the children for he had all the same left the children with strangers and denied them the love of both parents. In addition thereto, it has been crossly pointed out that if the mother has the custody, she would take the children to the house of a step-father having his own children and in case the custody is given to the father, then in a house with a step mother with a child, with no chances of a settled home for

the present. To draw the mean between such cross suggestions, learned Counsel for the father suggested that let this Court order placement of the children in a third country (for example, United Kingdom) providing to them the best educational facilities, the cost of which would be borne by the father and preserve the right of visitation to the mother for once in three years for a month's duration at the expense of the father.

17. Children need the love and care of both parents. If they cannot get it from both, then at least they must get it from one. The course which would deprive them of both must be avoided and adopted as the last resort. Children are required to be in the custody of someone until they attain their majority. The Court in passing an order in writ jurisdiction in the matter has to deal it in an equitable manner. It has also to give due weight to the claim of the respective parent founded on human nature and generally what is equitable and just. And irrespective of the rights and wrongs of the contending parents, the welfare of the children is the supreme consideration when employing the remedy of habeas corpus. It has rightly been observed by legal commentators that the proceeding of this kind partakes of the incidence of a suit in equity and is considered to be one in rem, the child being the res.

18. It is plain from the orders of the Californian Court that the presence of the children in this Court's jurisdiction is in violation thereof. There can be no doubt that the father brought the children to India within a span of a few days from the passing, of the interlocutory orders of dissolution of marriage. Having put the corpus of children beyond the jurisdiction of the Californian Court, it is futile for him to contend that he anticipated all the while that he would be adjudged entitled and remain entitled to the custody of the children. This was an unilateral movement on his part. His conduct showed scant respect for the Court to which he had approached for relief and which had itself granted him an interlocutory order of dissolution of marriage. It seems to me that he was callously indifferent to the feelings of the mother, for it was sequally logical that right of visitation would in any case have been preserved for her even if the father were to be successful in obtaining and maintaining the custody of the children.

19. Courts all over the world frown on the attitude of parents running away from their legal obligations. The prevailing view in Private International Law is that the Courts all over the world should, other things being equal, set its pace against the conduct of unilateral movement of children and they should be careful not to do anything to encourage this tendency. The predominant view also is that a Judge should 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. Here the father on account of his conduct not only put the children beyond the jurisdiction of the Californian Court, but seemingly made a further attempt to camouflage their presence by dubious means. He, however, conveniently ignored that when the children were removed from the Californian scene, the girl was barely 6 1/2 years and the boy a little over 3 years of age. A mother's protection

for such children was indispensable. In the ostensible extension of his own protection to the children, he deprived the children of their mother's protection. And further more he even deprived the children his own protection by putting them in a boarding school where, but for the present detection, they were likely to remain goodness known till when.

20. During the course of the hearing of the petition, I had jointly-questioned the new wife of the father and the new husband of the mother at one time as also the father and the mother at another. I had also questioned the children together, out of whom the girl was capable of giving intelligent answers. Both the children appeared to me of moderate health even from Indian middle class standards. It emerges that in the house of the new husband of the mother, there lives only-one school going female child, the other five having settled elsewhere and the old mother of the new husband. He is 55 years of age. The mother, who is 35 years of age and her new husband do not expect to bear any children. That is the reason she gave to cling to her children. The aforesaid two were keen to have the children with them. Their desire is otherwise exhibited by their presence in India despite the cost. They were stated though to be from the middle classes. On the other hand, the new wife of the father had subjugated her will with that of the father. Since the father as projected was not expected to be in the United States any more, so the chance of his keeping the children with him in the United States appears remote. Even his willingness to keep the children with him in India seems doubtful for his stay here is not very certain, he having tasted the affluence of a rich country.

21. After an anxious consideration of all the aspects of the case, I have come to the conclusion that I must respect the orders of the foreign Court ignoring the comment to it that the recent order has been passed ex parte and in the absence of the husband and is thus opposed to natural justice bringing it within the ambit of Section 13, exception (d), of the Code of Civil Procedure. That order was temporary in nature like all such orders. It has to be borne in mind that any order that I pass would also be of a temporary nature and may have to be modified according to the circumstances that may arise in future. But, while passing such an order, I must contain therein the necessary safeguards that any direction given by me will be implemented to the full extent. I am also of the considered view that the custody of the children in such circumstances-must be given to the mother for undoubtedly I can give it and in the circumstances of the case I should. And lastly I have come to the conclusion that it is in the interest of the minors, who are undoubtedly United States Citizens, that they be brought up in the culture of the country of their birth, for they are the off springs of a composite culture, Indian as also American. Barriers between nations have started to crumble and the world is becoming small. America, undoubtedly, is a civilised and cultured country with which the Indian people have very friendly relations. The four and a half years' stay of the children in this country, imprisoned in the four walls of a boarding house run on Western lines, could hardly have caused any cultural or traditional Indian impact on the children so

that their present displacement could cause them any traumatic blow or psychological problems. They had parental grand-parents here who suggestedly were imparting them teachings on the Sikh faiths and Indian culture, besides giving them their love. But most of these considerations are balanced against the availability of maternal grand-parents in the United States, who are stated to have remained married happily for over forty years and the mother was their only living child. However, in granting the custody of the children to the mother, I would introduce sufficient safeguards for the enforcement of further orders of this Court. The safeguards are to the following effect:

(1) The mother will execute a bond to this Court to produce the children whenever ordered by this Court to do so.

(2) An undertaking from the United States Consulate at New Delhi that they will render all assistance possible for the implementation of any order passed by this Court from time to time within the framework of the American Law and the said undertaking shall be produced by the mother.

(3) The mother, while in the United States, shall take the children on the first week-end of every month to a Gurdwara (Sikh temple) in the vicinity or on any festive occasion in that month; so as to inculcate in the children reverence to the Sikh faith and obtain a certificate in that regard from the Sikh priest and send a copy thereof to father at the address of the paternal grand-parents.

(4) The mother shall take the children to United States as also their passports and place them for appropriate orders before the Californian Court by the latest on 30th April, 1983. However, she will not take the children outside the jurisdiction of that Court without obtaining the previous orders of that Court except when they are brought to this country, as directed in this order. And to be able to receive directions of the kind afore-indicated, she shall keep informed the Registrar of this Court the address of her residence from time to time and any change of address shall immediately be notified.

(5) Once in three years, she must bring the children to this country for a minimum period of 15, days at her own expense. This period shall commence from 1st May, 1983. At that time, the father will have access to the children on terms and conditions to be directed by this Court when the children have reached this country. However, the children would be brought to India, as afore-indicated on the direction of the Court at the instance of the father approaching this Court for the purpose well in hand. Should the father be not in India to avail of the opportunity, there would be no necessity for the mother to bring the children to India.

(6) The father, if he visits United States of America, will be allowed access to the children on terms and conditions, as ordered by the Court on motion by the father intimating, his desire to go and see the children and requesting for permission for access.

(7) Should the father not obtain any permission from this Court, as afore-referred to and proceed to United States of America, on his own, his rights of visitation be left to be regulated by the Californian Court for which purpose production of the children before the Californian Court has been ordered by 30th April, 1983 and it is expected the Court would regulate visitation rights of the father on the supposition that he is, or is expected to be, in the United States.

(8) When the children are brought to India at the end of three years, the whole question of custody may be reviewed suo motu by this Court or at the instance of father and mother and the present order is subject to review.

22. These disrections have been given by this Court being fully aware that once the children are taken out of India, it will cease to have jurisdiction in the sense that its writ cannot run outside India. But all the same it has faith, the hope and confidence that the directions of this Court will be respected and implemented in letter and spirit by the United States Court just the same way as this Court has honoured their orders, not only in letter but in spirit.

23. The mother is directed to produce the undertaking from the Consulate in accordance with the terms mentioned in the order and the Registrar of this Court shall accept it on being satisfied that such undertaking is reliable. It is only then that the mother would be entitled to remove the children from the jurisdiction of this Court. And to facilitate such removal, it is directed that the Registrar of the Court would arrange for police escort for the mother and the children to be safely placed in the American Embassy at New Delhi for their onward journey to the United States.

24. This petition is allowed on the above-said terms. No costs.

25. Simultaneous with the pronouncement of the aforesaid order and in the presence of the parties and their counsel, an oral request has been made by Mr. Sarwan Singh, learned Counsel for Respondent No. 3, that he be given leave to appeal to Supreme Court of India against this judgment and order. The prayer is declined.

Further prayer has been made that this order be not put into effect till he obtains appropriate orders from the Supreme Court of India. In the nature of things, there are two undertakings to be supplied by the successful Petitioner. They would involve some time before my order can actually be put into action. Taking into consideration the overall picture, I restrain the Petitioner from taking the children away to United States of America before 22nd March, 1983.