
(2006) 05 P&H CK 0022

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 526 of 2004

Ranbir Singh

APPELLANT

Vs

Satinder Kaur Mann and Others

RESPONDENT

Date of Decision : 30-05-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 114

Citation : (2006) 144 PLR 571 : (2006) 3 RCR(Civil) 628

Hon'ble Judges : Virender Singh, J

Bench : Single Bench

Advocate : S.S. Narula, for the Appellant; D.P.S. Kohlon, for the Respondent

Final Decision : Dismissed

Judgement

Virender Singh, J.—Through the instant writ petition under Article 226 of the Constitution of India, the petitioner is seeking directions in the

nature of habeas corpus, directing release of Haralekh Singh Khosa (aged 5 years) and Mehak Kaur Khosa (aged 3 years), son and daughter of

the petitioner from alleged illegal detention by respondent No. 1.

2. The case set up by the petitioner is that originally he hails from village Tumber Bhan, District Ferozepur and had migrated to Malaysia in the year

1957. Since the petitioner at present is residing in village Tumber Bhan, District Ferozepur, he, therefore, is entitled to invoke the jurisdiction of this

Court. As per the averments in the petition, the petitioner got married to respondent No. 1 at Chandigarh on 1.3.1998 per Sikh rites. After the

marriage, both proceeded to Kuala Lumpur, Malaysia, on 27.3.1998. From their wedlock, son Haralek Singh Khosa was born on 21.6.1999 and

daughter Mehak Khosa on 18.6.2001. Since births both the children were registered with the Registrar of Births, Malaysia and, therefore, they are

Malaysia citizens. In support of this assertion, the petitioner relies on Annexures P-1 and P-2, respectively. It is then asserted that respondent No.

1 was working as a Doctor in Government Hospital in Malaysia. It is further averred that on 4.2.2004, without informing the petitioner or anyone

else, she left the matrimonial home along with her aforesaid two children and came to India. She did not even inform her employer. She had also

brought jewellery articles and other valuable items with her. It is then asserted that the petitioner made certain inquiries and came to know that

respondent No. 1 had taken a Malaysian Airlines Flight to New Delhi after getting visas issued in favour of all the three. According to the

petitioner, even this was against the rules as the petitioner being the father of the children could only apply for issue of visas of the children. The

petitioner, however, tried to contact respondent No. 1 but when he got no response from her, he applied for the custody of the aforesaid minor

children in Malaysian Court being their natural guardian. Vide order dated 1.4.2004 (Annexure P-3) the High Court of Malaya at Kuala Lumpur

held that the petitioner was entitled to the legal guardianship of the aforesaid two minor children. The said order is endorsed by the Ministry of

Foreign Affairs, Malaysia. The petitioner then asserts that his father came to India and moved an application (Annexure P-4) to Senior

Superintendent of Police, Bhatinda (respondent No. 2) seeking his help for implementation of the said order. Another application (Annexure P-5)

was also moved by the petitioner himself when he came to India and despite all efforts, respondent No. 1 had not handed over the custody of the

minor children to him. The other grouse of the petitioner is that respondent No. 1 is not even allowing him to meet his two minor children. Hence,

the instant petition.

3. Pursuant to the notice, respondent No. 1 has filed a detailed reply, controverting all the assertions, stating that Mehak Khosa was born in

California (USA) as per birth certificate (Annexure R-1) and, therefore, she was an American citizen who had got issued a valid passport in her

favour. It is then stated that SHO of the concerned Police Station on asking of the father of the petitioner, had even illegally confined Tier brother

for two days, for which she was constrained to file Cr.W.P. No. 514 of 2004, in which notice of motion was issued to the Senior Superintendent

of Police, Bhatinda, SHO Police station Rampura Phul and Inder Singh, father of the petitioner. She then asserts that ex-parte order (Annexure P-

3) obtained by the petitioner in his favour is based on wrong facts, so much so, even wrong address of the respondent No. 1 was given by the

petitioner for certain ulterior motives, knowing very well that she had left for India along with the children after obtaining valid visas from Indian

High Commission in Malaysia. She then alleges that in fact, she was being harassed by the petitioner along with her other family members right

from the start of the marriage. She was given even beatings and no food was provided to her. She, however, admits the fact of filing the complaint

with the police. Both the children, according to her are staying with their mother, being their natural guardian and cannot be said to be in illegal

custody. Even otherwise, they are being brought up by their mother, who is a doctor by profession and highly qualified. On the basis of the

aforesaid facts, respondent No. 1 prays for the dismissal of the petition.

4. However, no reply has been filed by the official respondents (respondents Nos. 2 and 3).

5. I have heard Mr. S.S. Narula, learned Counsel for the petitioner, Mr. D.P.S. Kahlon, learned Counsel for respondent No. 1 and Mr.

Ramandeep Sandhu, learned Deputy Advocate General. With their assistance, I have gone through the entire records.

6. Mr. Narula contends that the judgment passed by the High Court of Malaysia at Kuala Lumpur for the custody of the children is conclusive u/s

13 of the CPC (for short, the Code) and, therefore, the petitioner is legally entitled to the custody of his son and daughter. Dwelling upon his

argument, Mr. Narula further contends that may be, the aforesaid judgment was passed ex parte, the same would not lose its effect as the

presumption u/s 114 of the Indian Evidence Act is attached to it. Strengthening his argument, Mr. Narula has drawn my attention to the

observations made by the court in the aforesaid judgment and contends that it is conclusive between the parties and has a binding force, therefore,

the same is to be honoured u/s 13 of the Code.

7. In support of his arguments, Mr. Narula relies upon a judgment of the Hon''ble

Apex Court rendered in M/s. International Woolen Mills Vs.

M/s. Standard Wool (U.K.) Ltd., and a judgment of this Court rendered in Mrs. Jacqueline Kapoor v. Surinder Pal Kapoor 1994 (3) Recent

Revenue Reports 171.

8. Repudiating the contentions of Mr. Narula, Mr. Kahlon contends that a foreign judgment shall be conclusive between the parties only when it

overcomes exceptions (a) to (f) mentioned in Section 13 of the Code. According to Mr. Kahlon, the judgment of the High court of Malaysia

obtained by the petitioner, is based on suppression of the true facts from the Court and, therefore, it can not be said to be decided on merits The

petitioner intentionally gave the Malaysian address of respondent No. 1 as Satinder Kaur Mann (Indian Passport No. 00578021), whereas the

petitioner was very well aware of the fact that she had left Malaysia on 4th February, 2004 itself. Mr. Kahlon places on record a photostat copy of

the report made by the petitioner himself on 5.2.2004 to the Police of Malaysia, in which he had stated that on inquiries, he was informed by

checking of MAS flight passenger list that his wife had flown to India (New Delhi) with children and without informing him. This document is being

taken on record with the consent of Mr. Narula, learned Counsel for the petitioner. (Be tagged as its appropriate place). From the aforesaid facts,

Mr. Kahlon develops that it is apparent on record that the petitioner had obtained the said judgment/decreed by concealing material fact otherwise

in all fairness, he should have given the present address of his wife so that, if so desired, she could contest the case. Therefore, the judgment

obtained by the petitioner is opposed to the principles of natural justice also and as such, the same cannot be said to be conclusive one on account

of exception (e) and (d) of Section 13 of the Code.

9. Mr. Kahlon, then submits that even otherwise paramount consideration with regard to the custody of the minor children is their welfare.

Admitted position is that both the children are staying with their mother (respondent No. 1) since April, 2004. They are well set and settled.

Respondent No. 1 is well educated lady being a qualified doctor and is in a position to bring them up to her satisfaction. Mr. Kahlon then submits

that the welfare and interest of the minor children cannot be decided in writ proceedings without detailed evidence being led by the parties and,

therefore, the petitioner should resort to alternate remedy by initiating appropriate proceedings under the law. According to the learned Counsel, the petitioner is not even entitled to interim custody of the children at this stage as for the last more than two years, all the love and affection is being showered upon them by only their mother and, therefore, considering the interest of the children, which is paramount in nature, their custody should remain with the mother only. The petitioner, if by producing cogent evidence at a later stage before an appropriate forum, is able to make out a case for the custody of the children, he may ask for the same but certainly not through the instant petition.

10. In support of his submissions, Mr. Kahlon relies upon two judgments of this Court rendered in *Om Pati Vs. Suraj Bhan and Others*, and

Sukhwinder Singh Parmar v. Satnam Singh Minhas 2001 (1) R C R 437.

11. The core-question which arises for determination in the instant petition is as to whether the foreign judgment Annexure P/3 of High Court of

Malaysia can be said to be conclusive between the parties or not u/s 13 of the Code. The Legislature has carved out certain exceptions in the

section itself before a foreign judgment is to be said to be conclusive. For reference Section 13 in extenso is reproduced as under:

13. When foreign judgment not conclusive.- A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the

same parties or between parties under whom they or any of them claim litigating under the same title except -

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of

India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it sustains a claim founded on a breach of any law in force in India.

12. According to Mr. Narula, there is no presumption in law that ex parte decree cannot be said to be not decided on merits. There cannot be any

dispute about this proposition as in the judgment of Hon^{ble} the Apex Court relied upon by Mr. Narula rendered in *International Woolen Mills's*

case (supra), their Lordships while dealing with Section 114 of the Indian Evidence Act vis-a-vis Section 13(b) of the Code observed as under:

Section 114 would be of no help at all. It must be mentioned that in support of submission that it must be presumed that all formalities were

complied with and the decree passed regularly reliance was also placed on the cases Krishna Kumari and Anr Vs. State of Haryana and Ors, and

Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, . In our view these authorities are of no help in deciding the question

under consideration. Even if we presume that all formalities were complied with and Decree was passed regularly it still would not lead to the

conclusion that it was passed on merits.

13. In the aforesaid case, for the purposes of deciding the controversy, even service of appellant was presumed, yet it was observed that a decree

cannot said to be a decree on merits, and cannot be enforced in India. For reference para 28 and 29 of the aforesaid judgment are reproduced as

under:

28. On the basis of this law let us now see whether the present decree is a decree on merits. It is to be seen that between the parties there is

controversy whether the Appellant/defendant was at all served. As stated above, it is not necessary for us to resolve this controversy. For the

purposes of this order only we will presume that the Appellant had been served. Facts on record disclose that before service was effected an

affidavit had been filed in the English Court by one Kashif Basit, Solicitor for the Respondent, to which affidavit had been annexed copies of the

invoice and other relevant documents. On the basis of this affidavit an order in the following terms came to be passed:

Upon reading the Affidavit of Kashif Basit sworn on 20th January, 1998, it is ordered that the Plaintiff be at liberty to serve the Summons in this

action on the Defendant at 31, Industrial Area, Ludhiana - 141003, Punjab India, or elsewhere in India, and that the time for acknowledging

service shall be 23 days, after service of the Summons on the Defendant." This shows that leave to serve the Appellant was granted after reading

the affidavit. Thus at this stage, the Court had presumably seen the documents annexed thereto. The Court has been careful enough to note that it

had read the affidavit. However, at this stage, only a prima facie opinion was

being formed. Thereafter the said Mr. Kashif Bhasit, Solicitor for the Respondent had filed an affidavit of service stating that service had been effected on one Yash Paul, who is claimed to be an employee of the Appellant. To this Affidavit also all relevant documents were annexed. Thereafter no documents are tendered nor any evidence led. The English Court then pronounces the judgment and decree, which has been set out herein above. It does not even say that the second Affidavit had been read. This judgment and decree does not indicate whether any documents were looked into and/or whether the merits of the case was at all considered. It merely grants to the respondent a decree for the amounts mentioned therein. To be noted that the Appellant had, by his letter dated 8th November, 1997, replied to the Notice of the Respondent dated 18th October, 1997. In this reply it had been mentioned that goods were of inferior quality and not as per contract. Court has not applied its mind or dealt with this aspect. It has not examined points at controversy between the parties it is given ex parte as Appellant did not appear at hearing of Suit. It is not a judgment on merits.

29. On the principles of law enunciated herein above, in our view, it is clear that such a decree cannot be said to be a decree on merits. Such a decree cannot be enforced in India.

14. In my view, Mr. Narula cannot derive any advantage from International Woollen Mills's case (supra).

15. Not that the foreign judgment (Annexure P/3) can be said to be inconclusive between the parties since it does not over-come the first hurdle as envisaged in Section 13(b), but otherwise also it does not pass the test of conclusiveness on account of the main controversy embroiled in the instant case with regard to exceptions (d) and (e) of Section 13 of the Code.

16. The case set up by the petitioner is that the respondent left Malaysia on 4.2.2004 with her two children without informing him and when he got no response from her, ultimately he filed a case for the custody of the children. For reference some part of averments made in para No. 4 of the petition which are supported by an affidavit are reproduced as under:

That the petitioner on making inquiries learnt that respondent No. 1 had taken a Malaysian Airlines Flight to New Delhi. Respondent No. 1

managed to go out of Malaysia along with her children by getting visas issued in

favour of the minor children illegally because as per the Malaysian law, it is only the father who can apply for visas for children. Apprehending deception and desertion, the petitioner tried to contact respondent No. 1 and on getting no response from her, the petitioner applied for the custody of his minor children from the Malaysian Court being natural and biological guardian of the children. Vide order dated 1.4.2004, the High Court of Malaya at Kaula Lampur, Malaysia was pleased to hold that the petitioner was entitled to legal guardianship of the minor children Haralekh Singh Khosa and Mehak Kaur Khosa.

17. The aforesaid averments go to show that the petitioner was aware of the fact that his wife had already left India which fact is otherwise evident from the police report made by him in Malaysia. The petitioner cannot say that he is not aware of the Indian address where his wife is staying as he got married in India only or even otherwise in the instant petition also, he has given the complete address of respondent No. 1 where the service is also effected. But on the other hand the title of the decree shows passport number of respondent No. 1 only. This reflects that the petitioner by not disclosing the Indian address of respondent No. 1 has obtained a decree in his favour from the concerned court of Malaysia.

18. If one reads the operative part of the order passed in judgment Annexure P-3, it appears that the petitioner filed the petition/case for the custody of the children on 18th February, 2004. The order further reflects that the Court had seen the contents of originating summons dated 25.2.2004. The learned Counsel for both the sides are not able to assist this Court as to what are the originating summons. Mr. Narula states that the originating summons can be said to be the summons sent for effecting service. The operative part of the judgment then reveals that the petitioner had also tendered an affidavit on 31.3.2004 and the judgment is pronounced on 1.4.2004. The petitioner has not placed on record, the copy of the summons before this Court. He has also not placed on record of the instant petition, the affidavits tendered by him before the Court at Malaysia and kept all these material documents close to his chest for the reasons best known to him. From this I am not doubting judgment passed by the foreign court but this Court will not hesitate in drawing an adverse inference against the petitioner and the only inference would be that the

petitioner had obtained a judgment of custody of his children by not disclosing the true facts before the concerned Court at Malaysia. In other

words, it can be said that the judgment has been obtained by over reaching the Court. It is a clear case of suppressio veri, Suggestio falsi i.e.

suppression of the truth and suggesting the falsehood. In my view, it can be said to be mixing of acid in milk.

19. From the aforesaid facts, I draw a conclusion that judgment Annexure P/3 obtained by the petitioner is based upon fraud as the same is

procured by trickery. It, therefore, falls within exception (e) of Section 13 of the Code and the petitioner cannot be allowed to avail of any benefit

out of it. My view is fortified by a judgment of Hon"ble the Apex Court rendered in Smt. Satya Vs. Shri Teja Singh, .

20. Once, I have arrived at a conclusion that the judgment obtained by the petitioner is not conclusive on account of exception (e) of Section 13 of

the Code on the basis of the aforesaid detailed discussion, the natural corollary would follow that the same is opposed to natural justice as

enumerated in Section 13(d) of the Code and it does not pass the prescribed test of conclusiveness.

21. No doubt the respondent wife has not asked for setting aside of the aforesaid judgment (Annexure P/3) passed against her, as stated by Mr.

Kahlon, her counsel, but for the purposes of deciding the present controversy, in my view, the said aspect has no bearing upon the merits of the

instant case.

22. To be fair to Mr. Narula, I may say here that the other judgment rendered in Mrs. Jacqueline Kapoor case (supra) on which he is relying is

entirely distinguishable on facts and does not lend any support to the case of the petitioner.

23. I am appreciating the instant case, yet from another angle with regard to the welfare of the children which is of paramount consideration as

observed by Hon"ble the Supreme Court in Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, . In the aforesaid judgment, it was held

as follows:

It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal

right of this or that particular party.

24. That was also a case, where the petitioner (Veena Kappor) had filed a petition for the issuance of a habeas corpus praying for the custody of

the children alleging that the respondent (here husband) was in illegal custody of the child. The High Court dismissed the petition filed by her on the

ground that the custody of the child with the respondent-husband cannot be said to be illegal. In those circumstances, the Hon"ble Supreme Court

held that the welfare of the minor is the paramount consideration in such cases.

25. Admitted position as of today is that the children are staying with their mother (respondent No. 1), since the date she left Malaysia. This turns

out to be more than two years by now. They are ensconced in the lap of their mother. No doubt as per the law, no one is remedy-less and the

matter can be re-agitated before the appropriate forum with regard to custody of the children on the basis of the evidence to be adduced by either

side in which the view taken by this Court in the instant petition shall not at all stand as a bar, but the net result now surfacing from the aforesaid

discussion is that the petitidner cannot seek the enforcement of foreign judgment (Annexure P-3) passed by Court of Malaysia at Kuala Lumpur

for the custody of his two children namely, Haralekh Singh Khosa and Mehak Kaur Khosa, being conclusive between him and his wife

(respondent No. 1) u/s 13 of the Code.

26. Resultantly, the instant petition is dismissed with the observation that it is open to the either of the parties to move for the custody of the minor

children under appropriate law before appropriate forum.

There shall be, however, no orders as to costs.