

## CROSS BORDER PARENTAL CHILD ABDUCTIONS: LEGAL REGULATIONS AND PRACTICE OF INDIAN COURT

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### ABSTRACT

The problem of cross-border parental child abduction has been increasing at an alarming rate where the rights of child are being violated by their own parents. The various reasons are present for international child abduction like breakdown of marriage, defying custodial orders, bigamy in the other country and to scapegoat from the laws of country. In the international scenario, *Hague Convention on Civil Aspects of International Child Abduction 1980* multilateral treaty came up to protect the rights of children. The research paper will mainly focus on the cross- border child abduction and its legal implications under Hague Convention. India has not signed The Hague convention on Child Abduction and these types of cases are merely decided based on the interpretation of the judiciary on the doctrine of paramount interest of child. The main theme of this paper revolves around the regulation and judicial trend of Indian Courts in international child abduction cases. Now India is being refereed as safe haven for the parent who abducts the child and scapegoat from the reach of international laws. The draft of *International Child Abduction Bill, 2016* is the positive step towards this direction. The research paper concludes by analysing the lacunas in the Indian legal scenario with regard to international child abduction and provides some recommendations to address the concern of these children.

**Keywords:** *International Abduction, Hague Convention, Interest of Child.*

## INTRODUCTION

The problem of cross-border parental child abduction has been increasing at an alarming rate where the rights of child are being violated by their own parents. Child has been taken to another country by his or her parent without the knowledge or consent of other parent, which makes it an international abduction.<sup>1</sup> The various reasons are present for international child abduction like breakdown of marriage, defying custodial orders, bigamy in the other country and to scapegoat from the laws of country.<sup>2</sup> In most cases it disrupts the child's family life, interrupts his education and divorces him from the normal customs and contacts to which he has been accustomed.<sup>3</sup> Most cases of child abduction commenced due to breakdown of marriage which ultimately lead to the battle of custody of child. In some cases, child is being removed by one parent before the custody proceedings because of the fear of losing the child's custody. In other cases, during the court proceedings or after losing the custody battle for their child cross border child abduction generally happen. There is one more situation where Courts have given visitation or access rights to one of the parent then during exercising of those rights child is being abducted by the parent and taken to different country. Ultimately the rights of child are being violated and interests of child are being totally ignored by the abducting parent. Previously the cases were used to be decided on the best interest of child but the interpretation of this doctrine varies from case to case as well as from country to country. Indeed, this presumably shared interest among nations inspired multilateral action that creates institutional mechanisms to support the interests of children caught between two warring parents present at two different countries.<sup>4</sup> Therefore, in the international scenario, *Hague Convention on Civil Aspects of International Child Abduction, 1980* (hereinafter mentioned as 'Hague Convention, 1980') multilateral treaty came up to protect the rights of children. This Convention was adopted on 24<sup>th</sup> October, 1980 by fourteenth session of Hague conference in private international law.<sup>5</sup> There are 96 countries that have ratified this Convention.<sup>6</sup> India has not signed The Hague Convention on Child Abduction and these

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<sup>1</sup> Jana Glogarova Lenka Kulhankova Radka Sucha International Child Abduction: Legal Regulation and Practice of Czech Courts International Judicial Cooperation in Civil Matters 2008.

<sup>2</sup> John Kiggundu The Problem of Child Abduction in Private International Law 3Afr. J int'l Comp.L399 1991.

<sup>3</sup> Ibid.

<sup>4</sup> Anver M. Emon Urfan Khaliq Private International law, and Cross-Border Child Abduction- A Historico-legal Analysis 2016.

<sup>5</sup> Supra 1.

<sup>6</sup> Available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, last accessed on 15<sup>th</sup> Feb., 2017 at 11.52 a.m.

types of cases are merely decided based on the interpretation of the judiciary on the doctrine of paramount interest of child.

## **OVERVIEW OF HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 1980**

### ***(I) Salient features of Convention***

The preamble and object of the Hague Convention, 1980 and the International Child Abduction Bill, invokes the principle of ‘best interests of the child’.<sup>7</sup> The main objective of this Convention is to prevent unlawful removal of child from their place of habitual residence.<sup>8</sup> The most striking feature of Hague Convention is its ‘jurisdictional’ and ‘procedural’ nature.<sup>9</sup> The heart of the convention is Article 3 and Article 12.<sup>10</sup> Article 3 provides that the removal of child is wrongful if is in breach of custody orders attributed to one parent.<sup>11</sup> Article 12 provides the remedy for the parent from whom the child is taken away if the proceedings are commenced within one year of removal or even if proceedings are commenced after one year and child is not settled in new environment then the return of child can be ordered by Court.<sup>12</sup> Persons who are opposing the return of child order have defences under Article 13 and Article 20. Article 13 provides that the court can refuse to grant return order of child on following grounds:-

- a. Person having the right of custody over child was not actually exercising the rights,
- b. Person having the right of custody over child had consented or acquiescence the time of removal or retention,
- c. That the child will be exposed to the grave physical and mental harm if is sent back to his habitual residence country and
- d. That the child is objecting his return and he has sufficient maturity and appropriate age then Court can take account his views.<sup>13</sup>

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<sup>7</sup> 263 Report of Law Commission of India, October 2016

<sup>8</sup> John O’ Brien Conflict of Laws 524 (2<sup>nd</sup> ed. Cavendish Publishing Ltd. 1999).

<sup>9</sup> LINDA SILBERMAN HAGUE CONVENTION ON INTERANATIONAL CHILD ABDUCTION: A BRIEF OVERVIEW AND CASE LAW ANALYSIS Family Law Quarterly Vol.28 No.1 Special issue on International Family Law 9-34 (Spring 1994)

<sup>10</sup> Ibid.

<sup>11</sup> Article 3 of Hague convention on Civil Aspects of International Child Abduction, 1980.

<sup>12</sup> Article 12 of Hague convention on Civil Aspects of International Child Abduction, 1980.

<sup>13</sup> Article 13 of Hague convention on Civil Aspects of International Child Abduction, 1980.

Finally under Article 20 the return of child can be refused if it is not permitted by fundamental principles relating to human rights and fundamental freedoms of Requested State.<sup>14</sup>

This Convention does not only talk about judicial remedies but also give the administrative mechanism. Article 6 provides for setting up of Central Authority in each contracting state for co-ordinating in return of child.<sup>15</sup>

### **(ii) Controversial Aspects of Convention**

The Hague Convention, 1980 is a well drafted multilateral treaty which covers all the aspects related to cross-border child abduction. There are few controversial aspects which need to be look into for effective functioning of this Convention. Firstly, Hague Convention shall cease to apply *at any time* when the child attains sixteen years of age.<sup>16</sup> This age factor should be reviewed because even when the proceeding is commenced and child attains the age of sixteen years then Convention will cease to apply. Secondly, the time limit of one year to start any judicial or administrative proceeding should be reviewed.<sup>17</sup> The United States of America expressed concern that these restrictive time limits would make the treaty impractical where, in the absence of any identity registration system, location of abducting parents and abducted children is difficult and time consuming.<sup>18</sup> Thirdly, the major drawback of the convention is that only the return of the child is required because the return of the parent should also be required so that he or she may settle any legal costs and face any possible criminal charges arising from the abduction.<sup>19</sup> Fourthly, the term 'habitual residence' needs to be defined. It has caused considerable problems in recent years and different interpretations can be found in various jurisdictions. In some more complex cases, such as relocation of the family before the wrongful removal or retention, it could be questionable whether the habitual residence should be determined from the child's point of view or whether the emphasis should be on the intentions of the parents.<sup>20</sup> Finally, the Convention provides to take into account the wishes of child as well if he or she is of sufficient maturity

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<sup>14</sup> Article 20 of Hague convention on Civil Aspects of International Child Abduction, 1980.

<sup>15</sup> Article 6 of Hague Convention on Civil Aspects of International Child Abduction, 1980.

<sup>16</sup> Article 4 of Hague Convention on Civil Aspects of International Child Abduction, 1980.

<sup>17</sup> Supra 12.

<sup>18</sup> Supra 9.

<sup>19</sup> Caroline MA Nicholson the Hague Convention on the Civil Aspects of International Child Abduction-pill or placebo? p. 228-246 (The Comparative and International Law Journal of Southern Africa Vol.32 No.2, 1999)

<sup>20</sup> Supra 1.

and age. But, this creates problem when Courts of various legal systems deny the defence to return the child because it is very subjective to decide when child is living with the abducting parent for months or even years and left behind parents has not meet him or her for years.

## JUDICIAL TREND OF INDIAN COURTS

India has not yet ratified the Hague Convention, 1980 because of several reasons- Firstly, Indian women who went abroad and now facing domestic violence take their children back to India will not be able to keep their child if India ratify the Convention because under Convention burden of proof lies on the abducting parent to prove that there were incidents of violence. Secondly, when Indian women loose the custody battle of their child their last resort is to come back India which will not be possible under this Convention as then the status of 'abducted child' will be given. Finally, when foreign authorities take no action against the abusive husband and in-laws then in order to protect their children they take their child back to India. Unfortunately, women involved in cross-jurisdictional divorces, 'holiday marriages' or 'limping marriages' have to face additional challenges in the custody battle, which also relate to jurisdiction, access to judicial recourse and resources and it creates biasness against the interests of women.<sup>21</sup> Therefore, the cross-border parental child abduction cases are decided on the basis of interpretation done by Courts on the basis of facts and circumstances of case.

Since India is not a signatory to Hague Convention, 1980, therefore Supreme Court In *Smt. Surinder Kaur Sandhu vs. Harbax Singh*<sup>22</sup> and *Mrs. Elizabeth Dinshaw vs. Arvind M. Dinshaw*<sup>23</sup> exercised summary jurisdiction by returning the child to the Requesting State. This trend of exercising summary jurisdiction severely affected the rights of child because Court by ignoring all the facts adhered to custody orders passed by foreign court. Supreme Court changed this view of exercising summary jurisdiction and give importance to the interests of child. In another case *Dhanwanti Joshi vs. Madhav Unde*,<sup>24</sup> Supreme Court held that custody order by foreign Court will not form the basis of exercising summary jurisdiction and it will be taken as only one of the fact to decide upon the case. The paramount

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<sup>21</sup> Supra 7.

<sup>22</sup> AIR 1984 SC 1224.

<sup>23</sup> AIR 1987 SC 3.

<sup>24</sup> (1998)1 SCC 112.

consideration will be given to the welfare of child.<sup>25</sup> In landmark case of *Sarita Sharma vs. Sushil Sharma*,<sup>26</sup> Supreme Court turned down the custody order by U.S. Court and taking all facts and circumstances of case ordered a proper inquiry where the interest of both the child can be balanced properly. In *Sahiba Ali vs. State of Maharashtra*<sup>27</sup> Supreme Court again reiterated the doctrine of best interest of child and refuse to grant custody to the mother but provided liberal visitation rights on weekdays and on weekend as well. The Supreme Court of India in *Dr. V. Ravi Chandran vs. Union of India*,<sup>28</sup> and *Arathi Bandi vs. Bandi Jagadrakshaka Rao*,<sup>29</sup> directed to return the respective children to the country of their 'habitual residence' on the principle of 'comity of courts' principle for the determination of their best interests and welfare which is the prime consideration.<sup>30</sup> In the landmark case of *Ruchi Majoo vs. Sanjeev Majoo*,<sup>31</sup> the concept of 'ordinary residence' is used to determine the admission of case on the basis of jurisdiction. In the present case since the child had been living in Delhi for more than three years then Delhi is held as his 'Ordinary residence'. In *Surya Vadanam vs. State of Tamil Nadu*,<sup>32</sup> the Supreme Court stated that:

- principle of 'comity of courts and nations' must be respected and the principle of 'best interest and welfare of the child' should apply;
- rule of 'comity of courts' should not be jettisoned except for compelling special reasons to be recorded in writing by a domestic court;
- interlocutory orders of foreign courts of competent jurisdiction regarding child custody must be respected by domestic courts; and
- an elaborate or summary enquiry by local courts when there is a pre-existing order of a competent foreign court must be based on reasons and should not be ordered as routine when a local court is seized of a child custody litigation.<sup>33</sup>

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<sup>25</sup> Anil Malhotra Ranjit Malhotra India, Inter-country Parental Child Removal and the Law Available at <http://www.reunite.org/edit/files/articles/2008%20IFSL%20Contribution.pdf>, last accessed on 15<sup>th</sup> Feb., 2017 at 17.50P.M.

<sup>26</sup> JT 2000 (2) SC 258.

<sup>27</sup> JT 2003 (6) SC 79.

<sup>28</sup> (2010) 1 SCC 174.

<sup>29</sup> AIR 2014 SC 918.

<sup>30</sup> Supra 7.

<sup>31</sup> AIR 2011 SC 1952.

<sup>32</sup> AIR 2015 SC SC 2243.

<sup>33</sup> Supra 7.

## CONCLUSION

Since India has not ratified Hague Convention, India is considered as safe adobe for child abductors who abducts the child and scapegoat from the reach of international laws. A particular case in India takes a long time to be concluded which gives an abductor sufficient time to take advantage of loopholes existing in the system. India should ratify the Convention to avoid disputes with other foreign countries and to keep the interest of child as a paramount consideration. India's accession to Hague Convention, 1980 would resolve many conflicting issues as it revert back the situation to status quo. Hague Convention is based on the principle that the child should be promptly return back to the country of habitual residence where Courts can decide about the issue of custody and access rights. The loopholes in the Convention should be addressed and Courts should act in impartial manner to decide the cases of international parental child abduction. The judicial trend shown by Indian Supreme Court is based on the principle of welfare of the child but it is a high time that India should sign the Hague Convention to protect the rights of children who are suffering due to cross-border parental conflict. Therefore, it is high time India should sign the Convention and make effective mechanism to address concerns of cross-border child abduction cases.