

## CHILD WELFARE AND JURISDICTION OF THE INDIAN COURTS

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### **INTRODUCTION**

In this era of globalisation where migration has now become such a common thing 314,541,350 people migrated to other countries from India in the year 2001.<sup>1</sup> Most of these people either get married in India according to their personal laws or then migrate or they come back to India in order to get married according to the ceremonies and customs and provided in their personal laws. In many such cases due to the incompetency of the parties to hold the sanctity of the institution of the marriage opt for divorce outside India even though they get married according to the ceremonies and customs of the personal laws. In such cases the major setback is to the child which is procreated out of the marriage as many a times in order to fund themselves the parent with whom the child is come back to the native place in India.

In such a case –

1. If there is any decree of divorce passed by a foreign Court, binding upon the Indian Court?
2. Is the decree passed by the foreign courts regarding the custody of the child binding upon the Indian Courts?

The modern theory of conflict of Private law recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. The place at which the matrimonial home is which is, where the parties after the marriage reside and where the child is brought up. The fact that the matrimonial home of the spouses is in a State, establishes sufficient contracts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations

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<sup>1</sup> Census of India: Migration ([censusindia.gov.in/Census\\_And\\_You/migrations.aspx](http://censusindia.gov.in/Census_And_You/migrations.aspx))

which were incurred therein by the spouses.<sup>2 3</sup> But, even if a foreign court gives a decree which creates certain obligations, but the parties can always come back to India as in order to solemnize the marriage under Personal Laws, the appropriate forum has to be approached and these obligations which arise out of the decree passed by the foreign court has only a persuasive value upon the Indian Courts. Thus, Indian Courts need to look into the welfare of the child and that shall be the

utmost concern of the courts while looking into such matters.<sup>4</sup> Thus, even though the foreign courts can have the utmost jurisdiction in order to decide the matter as they are in direct contact with the two parties, but such orders or decree would never be binding upon the Indian Courts. None the less such orders would always have persuasive value.<sup>5</sup>

In the light of all such orders passed, Supreme Court has affirmed and has taken a strong stand that in such matters, the first thing to be looked into is the Welfare of the child. In the case of *Sarita Sharma v. Sushil Sharma*<sup>6</sup>, even though the District Court of Texas had granted the divorce and had given the custody of the children to the husband and refused Sarita Sharma to take the children out of the jurisdiction, still she got the children to India. Sushil Sharma, in the Delhi High Court filed a writ of Habeas Corpus regarding the same. Delhi High Court based on the decree passed by the Texas District Court filed a writ. When appealed, Supreme Court's view differed from that of the Delhi High Court. Supreme Court held that the welfare of the child is of the greatest importance and that the High Court should have got appropriate search regarding the same. It was noted that Sushil Sharma was an alcoholic and had used violence against Sarita Sharma. This Court noted the following principles regarding custody of the minor children of the couple:

1. The modern theory of the conflict of laws recognizes or at least prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case.<sup>7</sup>

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<sup>2</sup> *International Shoe Co. v. State of Washington* 12 90 L Ed 95 : 326 US 310 (1945)

<sup>3</sup> *V. Ravi Chandran v. Union of India* (2010) 1 SCC 174

<sup>4</sup> *Sarita Sharma v. Sushil Sharma* (2000) 3 SCC 14

<sup>5</sup> *Surya Vadanam v. State of Tamil Nadu* (2015) 5 SCC 450

<sup>6</sup> *Sarita Sharma v. Sunil Sharma* (2000) 3 SCC 14

<sup>7</sup> *Surinder Kaur Sandhu v. Harbax Singh Sandhu* MANU/SC/0184/1984 : (1984) 3 SCC 698

2. Even though Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.<sup>8</sup>
3. The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.<sup>9</sup>

On the merits of the case, the Supreme Court observed: *“Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the habeas corpus writ petition and directed the Appellant to hand over custody of the children to the Respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the Respondent to initiate appropriate proceedings in which such an inquiry can be held.”*

In the case of *Shilpa Aggarwal v. Aviral Mittal*<sup>10</sup>, there were two British citizens of Indian origin who had a child out of their marriage. There were certain marital differences because of the same the wife came back to India, meanwhile the husband got a decree from the foreign court that minor child shall be in the jurisdiction of the foreign court, though the question of custody was still pending. Relying upon the same decree the husband filed a writ petition in the Delhi High Court in order to hand over the custody of the child to him. High Court dismissed the Writ Petition and granted time to the wife to take the child on her own in order to participate in the proceedings leaving it to the foreign court to determine which parent would be the best suited to have the custody of the child. Against the same, wife preferred an appeal before the Supreme Court which held that “In matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child.”<sup>11</sup> Domestic courts

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<sup>8</sup> *Surinder Kaur Sandhu v. Harbax Singh Sandhu*

<sup>9</sup> *Dhanwanti Joshi v. Madhav Unde* MANU/SC/0810/1998 : (1998) 1 SCC 112 which in turn referred to *McKee v. McKee* 1951 AC 352 : (1951) 1 All ER 942 (PC)

<sup>10</sup> *Shilpa Aggarwal v. Aviral Mittal* (2010) 1 SCC 591

<sup>11</sup> *Elizabeth Dinshaw v. Arvand M. Dinshaw* MANU/SC/0689/1986 : (1987) 1 SCC 42. Even though this Court used the word "sole", it is clear that it did not reject or intend to reject the principle of comity of courts.

cannot be guided entirely by the fact that one of the parents violated an order passed by a foreign court.<sup>12</sup>

In the case of *V. Ravi Chandran v. Union of India*<sup>13</sup> the court had several conclusions. The principles held were-

1. The comity of nations does not require a court to blindly follow an order made by a foreign court.<sup>14</sup>
2. Due weight should be given to the views formed by the courts of a foreign country of which the child is a national. The comity of courts demands not the enforcement of an order of a foreign court but its grave consideration. The weight and persuasive effect of a foreign judgment must depend on the facts and circumstances of each case.<sup>15</sup>
3. The welfare of the child is the first and paramount consideration, whatever orders may have been passed by the foreign court.
4. The domestic court is bound to consider what is in the best interests of the child. Although the order of a foreign court will be attended to as one of the circumstances to be taken into account, it is not conclusive, one way or the other.<sup>16</sup>
5. One of the considerations that a domestic court must keep in mind is that there is no danger to the moral or physical health of the child in repatriating him or her to the jurisdiction of the foreign country.<sup>17</sup>
6. While considering whether a child should be removed to the jurisdiction of the foreign court or not, the domestic court may either conduct a summary inquiry or an elaborate inquiry in this regard. In the event the domestic court conducts a summary inquiry, it would return the custody of the child to the country from which the child was removed unless such return could be shown to be harmful to the child. In the event the domestic court conducts an elaborate inquiry, the court could go into the merits as to where the permanent welfare of the child lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. An

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<sup>12</sup> *Sarita Sharma v. Sushil Sharma*

<sup>13</sup> *V Ravi Chandran v. Union of India*, 2009 (14) SCALE 27

<sup>14</sup> *B's Settlement*, *In Re: B. v. B.* 1940 Ch 54 : (1951) 1 All ER 949 and *McKee v. McKee*.

<sup>15</sup> *McKee v. McKee*.

<sup>16</sup> *Kernot v. Kernot* 1965 Ch 217 : (1964) 3 WLR 1210 : (1964) 3 All ER 339.

<sup>17</sup> *In Re: H. (Infants)*, (1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)

order that the child should be returned forthwith to the country from which he or she has been removed in the expectation that any dispute about his or her custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.<sup>18</sup>

The same was held in the case of *Ruchi Majoo v. Sanjeev Majoo*<sup>19</sup> where the Apex Court held that “*the welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement.*”<sup>20</sup> Further the court held “*An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.*”<sup>21</sup>

On the facts of the case, Supreme Court held that “repatriation of the minor to the United States, on the principle of “comity of courts” does not appear to us to be an acceptable option worthy of being exercised at that stage.” Accordingly, it was held that the “Interest of the minor shall be better served if he continued to be in the custody of his mother (Ruchi Majoo).”<sup>22</sup>

In the case of *Arathi Bandi v. Jagadrakshaka Rao*<sup>23</sup>, Bandi Rao initiated proceedings in the Andhra Pradesh High Court for a writ of *habeas corpus* seeking production and custody of the child to enable him to take the child to USA. The Andhra Pradesh High Court passed quite a few material orders in the case but Arathi Bandi did not abide by some of them resulting in the High Court issuing non-bailable warrants on 25<sup>th</sup> January, 2011 for her arrest. This order and two earlier orders passed by the High Court were then challenged by her in this Court. Supreme

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<sup>18</sup> *In Re: L. (Minors)*, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA).

<sup>19</sup> *Ruchi Majoo v. Sanjeev Majoo*, (2011) 6 SCC 479

<sup>20</sup> *Dhanwanti Joshi v. Madhav Unde* (1998) 1 SCC 112

<sup>21</sup> *Sarita Sharma v. Sunil Sharma*

<sup>22</sup> ¶ 44, *Surya Vadanam v. State of Tamil Nadu*

<sup>23</sup> *Arathi Bandi v. Bandi Jagadrakshaka Rao* (2013) 15 SCC 790

Court observed that Arathi Bandi had come to India in defiance of the orders passed by the foreign court and that she also ignored the orders passed by the High Court. Consequently, this Court was of the view that given her conduct, no relief could be granted to Arathi Bandi. This Court took into consideration various principles laid down from time to time in different decisions rendered by this Court with regard to the custody of a minor child. It was held that:

1. It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong doing.<sup>24</sup>
2. In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child.<sup>25</sup>
3. Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.

From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance. However, it should be clearly understood that this is the final goal or the final objective to be achieved - it is not the beginning of the exercise but the end.

The Appellant i.e. Surya and Respondent i.e. Mayura were married in Chennai on 27<sup>th</sup> January, 2000. While both are of Indian origin, Surya is a resident and citizen of U.K. and at the time of marriage Mayura was a resident and citizen of India. Soon after their marriage Mayura joined her husband Surya in U.K. sometime in March 2000. Later she acquired British citizenship and a British passport sometime in February 2004. As such, both Surya and Mayura are British citizens and were ordinarily resident in U.K. Both were also working for gain in the U.K. On 23<sup>rd</sup> September, 2004, a girl child Sneha Lakshmi Vadanam was born to the couple in U.K. Sneha Lakshmi is a British citizen by birth. On 21<sup>st</sup> September, 2008, another girl child Kamini Lakshmi Vadanam was born to the couple in U.K. and she too is a British citizen by birth. The

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<sup>24</sup> Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw (1987) 1 SCC 42

<sup>25</sup> V. Ravi Chandran v. Union of India

elder girl child is now a little over 10 years of age while the younger girl child is now a little over 6 years of age. It appears that the couple was having some matrimonial problems and on 13<sup>th</sup> August, 2012 Mayura left U.K. and came to India along with her two daughters. Before leaving, she had purchased return tickets for herself and her two daughters for 2<sup>nd</sup> September, 2012. She says that the round-trip tickets were cheaper than one-way tickets and that is why she had purchased them. According to Surya, the reason for the purchase of round-trip tickets was that the children's schools were reopening on 5<sup>th</sup> September, 2012 and she had intended to return to U.K. before the school reopening date. However, the court did not take the same in consideration. On 21<sup>st</sup> August, 2012 Mayura prepared and signed a petition Under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 seeking a divorce from Surya. The petition was filed in the Family Court in Coimbatore on 23<sup>rd</sup> August, 2012. We are told that an application for the custody of the two daughters was also filed by Mayura but no orders seem to have been passed on that application one way or the other. On or about 23<sup>rd</sup> August, 2012 Surya came to know that Mayura was intending to stay on in India along with their two daughters. Therefore, he came to Coimbatore on or about 27<sup>th</sup> August, 2012 with a view to amicably resolve all differences with Mayura. Interestingly while in Coimbatore, Surya lived in the same house as Mayura and their two daughters, that is, with Surya's in-laws. According to Surya, he was unaware that Mayura had already filed a petition to divorce him. Since it appeared that the two daughters of the couple were not likely to return to U.K. in the immediate future and perhaps with a view that their education should not be disrupted, the children were admitted to a school in Coimbatore with Surya's consent. Since Surya and Mayura were unable to amicably (or otherwise) resolve their differences, Surya returned to U.K. on or about 6<sup>th</sup> September, 2012. About a month later, on 16<sup>th</sup> October, 2012 he received a summons dated 6<sup>th</sup> October, 2012 from the Family Court in Coimbatore in the divorce petition filed by Mayura requiring him to enter appearance and present his case on 29<sup>th</sup> October, 2012. We are told that the divorce proceedings are still pending in the Family Court in Coimbatore and no substantial or effective orders have been passed therein. Faced with this situation, Surya also seems to have decided to initiate legal action and on 8<sup>th</sup> November, 2012 he petitioned the High Court of Justice in U.K. (hereinafter referred to as 'the foreign court') for making the children as wards of the court. It seems that along with this petition, he also annexed documents to indicate (i) that he had paid the fees of the children for a private school in U.K. with the intention that the children would continue their studies in U.K. (ii) that the children had left the school without information that

perhaps they would not be returning to continue their studies. On 13<sup>th</sup> November, 2012, the High Court of Justice passed an order making the children wards of the court "during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court" and requiring Mayura to return the children to the jurisdiction of the foreign court. In response to the petition filed by Surya, a written statement was filed by Mayura on 20<sup>th</sup> November, 2012. A rejoinder was filed by Surya on 13<sup>th</sup> December, 2012. Apparently, after taking into consideration the written statement, the foreign court passed another order on 29<sup>th</sup> November, 2012 virtually repeating its earlier order and renewing its request to the administrative authorities of the British Government in India and the judicial and administrative authorities in India for assistance for repatriation of the wards of the court to England and Wales, the country of their habitual residence.

Since Mayura was not complying with the orders passed by the foreign court, Surya filed a writ petition in the Madras High Court in February 2013 for a writ of *habeas corpus* on the ground, *inter alia*, that Mayura had illegal custody of the two daughters that maybe produced in court. The Madras High Court, in its decision, took the view that the welfare of the children (and not the legal right of either of the parties) was of paramount importance. On facts, the High Court was of opinion that since the children were in the custody of Mayura and she was their legal guardian, it could not be said that the custody was illegal in any manner. It was also noted that Surya was permitted to take custody of the children every Friday, Saturday and Sunday during the pendency of the proceedings in the Madras High Court; that the order passed by the foreign court had been duly complied with and that Surya had also returned to the U.K. On these facts and in view of the law, the Madras High Court "closed" the petition filed by Surya seeking a writ of *habeas corpus*. Feeling aggrieved, Surya has preferred the present appeal on or about 9<sup>th</sup> April, 2014. Feeling aggrieved, Surya approached the Supreme Court.

In the case of *Surya Vadanam v. State of Tamil Nadu*<sup>26</sup> it was held that-

(1) Since the children Sneha Lakshmi Vadanam and Kamini Lakshmi Vadanam are presently studying in a school in Coimbatore and their summer vacations commence (we are told) in May, 2015 Mayura Vadanam will take the children to the U.K. during the summer vacations of

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<sup>26</sup> *Surya Vadanam v. State of Tamil Nadu* 2015(3) SCALE151: (2015)5SCC450



the children and comply with the order dated 29<sup>th</sup> November, 2012 and participate (if she so wishes) in the proceedings pending in the High Court of Justice. Surya Vadan an will bear the cost of litigation expenses of Mayura Vadan an.

(2) Surya Vadan an will pay the air fare or purchase the tickets for the travel of Mayura Vadan an and the children to the U.K. and later, if necessary, for their return to India. He shall also make all arrangements for their comfortable stay in their matrimonial home, subject to further orders of the High Court of Justice.

(3) Surya Vadan an will pay maintenance to Mayura Vadan an and the children at a reasonable figure to be decided by the High Court of Justice or any other court having jurisdiction to take a decision in the matter. Until then, and to meet immediate out of pocket expenses, Surya Vadan an will give to Mayura Vadan an prior to her departure from India an amount equivalent to £ 1000 (Pounds one thousand only).

(4) Surya Vadan an shall ensure that all coercive processes that may result in penal consequences against Mayura Vadan an are dropped or are not pursued by him.

(5) In the event Mayura Vadan an does not comply with the directions given by us, Surya Vadan an will be entitled to take the children with him to the U.K. for further proceedings in the High Court of Justice. To enable this, Mayura Vadan an will deliver to Surya Vadan an the passports of the children Sneha Lakshmi Vadan an and Kamini Lakshmi Vadan an.

Since the interest and welfare of the child is paramount, a domestic court is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Child's welfare is the ultimate goal of the Court and no such decision shall be passed which is ultra vires of the same.