
Custody of Children in India- An Inter-Country Dispute

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Abstract*

The cases concerning parental child abduction often raises the question of comity of courts principle since they are generally cross-jurisdictional. The comity of courts principle requires that courts effectuate judgements of foreign courts as a matter of justice, equity and good conscience. In child custody matters Indian Courts have displayed significant inconsistency in enforcing foreign court orders. The researcher tries to identify the pattern in inconsistent judicial orders pronounced by Indian courts in child custody matters. The factors are taken into consideration by the Indian Courts in accepting or rejecting the foreign court orders and while awarding the custody of the minor will be analyzed in detail.

1. Introduction

In today's time in search for better jobs, lifestyle and education many Indian couples migrate to foreign countries. Judicial separation or dissolution of marriage of the parent is a disastrous situation for a child. The misery of the child gets aggravated when the parents residing in two different countries contend independently before the courts of the two said countries of the custody of the child and obtain conflicting judicial orders. In case, any dispute or conflict arise between the married couple as to the custody of children, the issue of jurisdiction as to which country's courts will have the jurisdiction needs to be decided first. In many cases jurisdiction may vest in two or more countries. The question of jurisdiction is important and is to be dealt with due care and sensitivity.

The cases concerning international custody of children often raises the question of comity of courts principle since they are generally cross jurisdictional. In most of the cases it can be seen that whenever the spouses separate due to some matrimonial dispute, either of the two parent leaves the foreign land and come to India with their child. Cross border inter-parental child removal has become a common occurrence as the migrant and immigrant populations increase manifold. Child removal is violation of parental rights that exists by the virtue of law, agreement, court order or

other privileges. Inter-spousal child removal can be termed as most unfortunate as the children are abducted by their own parents to India or to other foreign.

2. India and Hague Convention, 1980

Hague Convention ensures a rapid procedure for the return of the child wrongly removed to or retained in contracting party to its country of 'habitual residence'.¹ Abduction may occur when a parent removes a child from his or her country of habitual residence in violation of the other parent's custodial rights, even in cases where the parents are married or neither parent holds a custody decree prior to the abduction. All the children who haven't attained the age of sixteen years are covered under this convention.²

Each country that has signed the Convention must have established a Central Authority, which processes such applications.³ The Convention lays down certain roles and functions of the Central Authority.⁴ This Authority must, inter alia, help locate children; encourage amicable solutions and; help process requests for return of children.⁵ A formal request to the Central Authority can be made by the parent who is seeking the return of child of either the country of child's habitual residence or the Central Authority where the child is located.⁶ The Central Authority doesn't have the power to compel the return of the child and they can only negotiate for voluntary return.⁷ However, in case of failure of such negotiation, legal proceedings can be initiated regarding the same.

The preamble and object of The Hague Convention 1980 and the International Child Abduction Bill invoke the principle of 'best interests of the child. The principle of best interests of the child can also be found in the provisions of the convention on the Rights of the Child, 1989. India ratified the convention on 11th December 1992. The Juvenile Justice (Care and Protection of Children) Act, 2000, defines the term 'best interests of the child' in clause (9) of Section 2 as under 'best interest of child' means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs identity, social well-being and physical emotion and intellectual development.

India is not yet a signatory to the Hague Convention of 1980, so it is not bound by the obligations under it. The cases of custody of children in India are decided on merits and paramount importance is given to the welfare of the child.⁸ In spite of being subjected to extraordinary pressure, India hasn't signed the Convention. The argument usually given for not signing the Convention has been

¹ Article 1, Chapter I of Hague Convention the Civil Aspects of International Child Abduction, 1980.

² Article 4, Chapter I of Hague Convention the Civil Aspects of International Child Abduction, 1980.

³ Article 6, Chapter II of Hague Convention the Civil Aspects of International Child Abduction, 1980.

⁴ Article 7, Chapter II of Hague Convention the Civil Aspects of International Child Abduction, 1980.

⁵ *Ibid.*

⁶ Article 8, Chapter III of Hague Convention the Civil Aspects of International Child Abduction, 1980.

⁷ Article 10, Chapter III of Hague Convention the Civil Aspects of International Child Abduction, 1980.

⁸ *Prateek Gupta v. Shilpi Gupta*, (2018) 2 SCC 309.

that it may have the negative effect of subjecting women who are fleeing domestic violence to legal harassment. In majority of the cases, mothers have seen to be the “abducting parent”.⁹ When a woman is trapped in an abusive marriage abroad and have no financial security, returning to their country of origin is the only option open to them. The structure of the convention is such that it considers all actions of removal or retention of a child across borders as being wrongful and requires the prompt return of the child to his/her state of habitual residence. The reasons behind the removal or retention of the child and the effect of his/her return are not taken into account.

The current position of Indian government has its own disadvantages. Indian courts are overburdened and rather insufficient when it comes to speedy disposal of cases and delivery of justice. The Hague Convention provides a particular mechanism for settling of disputes. By not signing the Convention the government is depriving people of a specialised mechanism that would streamline the legal landscape in this regard with that of a major developing country where a large Non-resident Indian population resides.¹⁰

3. Position of Indian Law

India does not recognise child removal as an offence and the government has made it clear that it has no intention of signing the Hague Convention, 1980. When a child is abducted by his or her own parent to India, while custody issues are pending determination in the courts of his or her habitual permanent residence abroad, there is little that local law enforcement agencies can do to remedy the situation. This is because there are no codified family laws or specific child custody laws under which these children can be returned to their homes in a foreign jurisdiction.¹¹

The Protection of Children (Inter-Country Removal and Retention) Bill which was introduced in 2016, as an enabling legislation in India before accession to the Hague Convention, was allowed to lapse.¹² The proposed Bill considers the removal to or the retention of a child in India to be wrongful if it is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, at a place where the child was habitually resident immediately before the removal or retention. It further stipulates that the removal to or the retention in India of a child is to be considered wrongful where at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or would have been

⁹ The Law Commission of India in its 263rd Report also recognised this fact and stated that globally 68% of the abducting parents were mothers, 85% of them being the primary caregivers.

¹⁰ R. Lakshana, *Judicial Patterns in the Enforcement of Foreign Judgements: International Child Custody Issues*, IJLPP (2019).

¹¹ Shalini Nair, *India will not ink Hague treaty on civil aspects of child abduction*, The Indian Express (November 27, 2016), <https://indianexpress.com/article/india/india-news-india/india-will-not-ink-hague-treaty-on-civil-aspects-of-child-abduction-4397236/>

¹² *Govt likely to junk inter-parental child abduction Bill*, The LiveMint, (November 6, 2016), <https://www.livemint.com/Politics/yqWoLTWr0fjY2UWqiiebGK/Govt-likely-to-junk-interparental-child-abduction-Bill.html>

so exercised, but for the removal or retention.¹³ The draft envisaged “prompt return of children wrongfully removed or retained in a contracting state, and to ensure that rights of custody and of access under the law of one contracting state are respected in other contracting states.” It also proposed a central authority to discover the whereabouts of a child, to prevent further harm to any such child and to secure the voluntary return of the child to the signatory nation.

There is the need for clarity in the Indian position on the subject. The Law Commission of India in its 218th report has recommended that India now needs to accede to the Hague Convention on the Civil Aspects of International Child Abduction, and this will, in turn, bring the prospect of achieving the return to India of children who have their homes in India.¹⁴ The Commission was of the view that India should keep pace and change according to the changing needs of the society and thus acceding to the convention is necessary.

3.1.Procedure followed by courts in India

If a child is brought from a foreign country, being its native country to India, the court in India may conduct (a) summary enquiry, or (b) an elaborate enquiry on the question of custody, if called for.¹⁵ Earlier the Supreme Court exercised summary jurisdiction in returning the minor children to the country of their parent.¹⁶ Later on, the position changed and the court did not exercise summary jurisdiction in returning children to its parent and observed that the welfare and best interest of the child or children should be of paramount consideration. Be it summary inquiry or an elaborate inquiry, in either situation, welfare of the child is of paramount consideration. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native State and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native State because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons.¹⁷ In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. even in case of a summary enquiry, it is open to the court to decline the relief of return of the child to the country from where he/she has been removed irrespective of a pre-existing order of return of a child by a foreign court, in case it transpires that its repatriation would be harmful to it. On the other hand, in case of an elaborate enquiry, the court is obligated to examine the merits

¹³ Anil Malhotra, *Rights of Abducted Children*, The Hindu (September 5, 2016), <https://www.thehindu.com/opinion/columns/Rights-for-abducted-children/article14623324.ece>

¹⁴ <https://lawcommissionofindia.nic.in/reports/report218.pdf>

¹⁵ *Nilanjan Bhattacharya v. State of Karnataka*, 2020 SCC Online SC 928.

¹⁶ *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu*, AIR 1984 SC 1224; *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw*, AIR 1987 SC 3.

¹⁷ *Supra* 15

as to where the paramount interest and welfare of the child lay and take note of the pre-existing order of the foreign court for the return of the child as only one of the circumstances.¹⁸

Now, the settled position in India is that the court within whose jurisdiction the minor has been brought must “ordinarily” consider the question on merits. The courts must bear in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court as one of the factors while deciding on the custody of the children.¹⁹ Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return.²⁰ If the courts are satisfied that the child has settled in its new environment or that it would be exposed thereby to physical harm or otherwise, if it is placed in an intolerable or unbearable situation or environment or if the child in a given case, if matured, objects to its return, the courts can decline the relief of repatriation of the child brought within its jurisdiction.²¹

3.2. Comity of courts and doctrines of “intimate contact” and “closest concern”

The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of “intimate contact and closest concern”. These doctrines are components of the modern theory of Conflict of Laws, in as much as, a court which has the closest concern and most intimate contact with the issues arising in the case, may fruitfully exercise its jurisdiction in the case. The other court, which is far distant from the issues, may not take upon itself the onerous task of ascertaining the welfare of the child. This self-restraint by the court, less connected with the issues, would be in the best interests of the minor himself. In cases where both the parents have initiated proceedings in their respective countries, the principle of ‘first strike’ comes into the fray provided the jurisdiction of the Foreign Court is not in doubt. The substantive order which was passed prior in point of time should be given due respect and weight over the subsequent order.²²

Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer *res integra* that the ever-overriding determinant would be the welfare and interest of the child. In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances

¹⁸ *Nithya Anand Raghavan v. State (NCT of Delhi)*, (2017) 8 SCC 454.

¹⁹ *Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112.

²⁰ *Prateek Gupta v. Shilpi Gupta*, (2018) 2 SCC 309.

²¹ *ibid.*

²² *Chandan Mishra v. Union of India*, (2017) 3 DLT (Cri) 520.

of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgeable subservient thereto.

In other words, the principle of comity of courts is not to be accorded a yielding primacy or dominance over the welfare and well-being of the child which unmistakably is of paramount and decisive bearing.²³ The doctrines of “intimate contact” and “closest concern” are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom, etc. with the portent of mutilative bearing on the process of its overall growth and grooming.²⁴

3.3.High Court’s Writ Jurisdiction

The High Court by way of the writ of habeas corpus can order custody of a minor at the behest of a parent applying for the same, with predominant focus placed on the welfare of the child. Habeas Corpus is a procedural writ and the object behind such writ is to secure the release of the person who is illegally deprived of his liberty.²⁵ In child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.²⁶ In a habeas corpus petition concerning a minor child the High Court has to ascertain whether the minor is in the lawful or unlawful custody of the other person.²⁷ Only after considering all the facts and circumstances of the case, the court may direct return of the child or decline to change the custody of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of execution court.²⁸ If a parent seeks to enforce the Foreign courts order, he or she may be asked to resort to the substantive remedy provided in law before the Indian Court for the custody of the child. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in the exercise of extraordinary jurisdiction on a petition for habeas corpus.²⁹

4. Enforcement of Foreign Custody orders

The validity of foreign court decrees and orders is determined by Indian courts keeping in view the provisions of Section 13 of the Code of Civil Procedure, 1908. Section 13 is not mere a rule of procedure but it embodies the principle of res judicata and it provides substantive law. Foreign

²³ *Supra 18*

²⁴ *Supra 20*

²⁵ *Anita Yadav v. Manas Roy*, (2016) 15 SCC 639; *Ummu Sabeena v. State of Kerala*, (2011) 10 SCC 78; *Kamlesh Tiwari v. Union of India*, (2016) 9 SCC 363.

²⁶ *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*, (2019) 7 SCC 42.

²⁷ *Nithya Anand Raghavan v. State (NCT of Delhi)*, (2017) 8 SCC 454.

²⁸ *Nilanjan Bhattacharya v. State of Karnataka*, 2020 SCC OnLine SC 928.

²⁹ *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*, (2019) 7 SCC 42.

Judgments are, therefore, conclusive in Indian Courts regarding any matter directly adjudicated between the same parties. This pays due homage to the principles of comity of courts and the upshot of this is that the courts shed their parochialism and be more internationalist, or at least, tolerant in their outlook.

There are, however, certain exceptions to this general principle, where a foreign judgment is not taken to be conclusive and may not be recognised by the Indian Law. Such exceptions are laid down in the six clauses (a) to (f) of Section 13. In the following six cases, a foreign judgment will not be considered conclusive:

- (1) Foreign judgment not by a competent court;
- (2) Foreign judgment not on merits;
- (3) Foreign judgment against International or Indian Law;
- (4) Foreign judgment opposed to natural justice;
- (5) Foreign judgment obtained by fraud; and
- (6) Foreign judgment founded on a breach of Indian Law.

While enforcing the foreign custody orders the Indian courts in some cases are seen to focus on consideration of welfare of the minor child to the exclusion of all the other factors.³⁰ The welfare of the child continues remain the predominant principle in many cases which are decided recently.³¹ In *Kanika Goel v. State of Delhi (through Station House Officer)*³², the Apex court ruled that it was in the best interest of the minor child to remain with the mother in India though the father had obtained a favourable order from the US court which had the rightful jurisdiction in the matter. On the other hand, in some cases, courts are seen to adopt a blind approach where they blindly enforce the foreign court orders via mirror orders, ignoring the factors what would weigh on child welfare.³³

In recent cases courts are seen to attempt a reconciliation between the conflicting concepts of international comity and well-being of the child. As they are not contrasting principles they can be reconciled. Courts are of the opinion that India is not a signatory to the Hague Convention, and was not bound to execute the foreign child custody orders. foreign court orders is only one of the facts, which must be taken into consideration by Indian Courts while dealing with child custody

³⁰ *Sarita Sharma vs. Sushil Sharma*, (2000) 3 SCC 14.

³¹ *Sumedha Nagpal v. State of Delhi*, (2000) 9 SCC 745; *Kanika Kolhi v State of Delhi*, (2018) 9 SCC 578.

³² *Kanika Goel v. State of Delhi (through Station House Officer)*, (2018) 9 SCC 578.

³³ *Surinder Kaur v. Harbax Singh Sandhu* (1984) 3 SCR 422; *Elizabeth Dinshaw v. Arvind Dinshaw* (1998) 1 SCC 112.

matters.³⁴ In *Shilpa Agarwal v. Aviral Mittal*³⁵, the High Court ordered that the child be returned to the foreign country by invoking Section 6 of the Hindu Minority and Guardianship Act, 1956, whereunder the mother is entitled to retain custody of the minor child under the age of 5 years. The foreign court was also found to be more proximate to the child's place of habitual residence.

In *Arathi Bandi v. Bandi Jagadrakshaka Rao*,³⁶ the Supreme Court once again reiterated the principle that the courts may deny relief to a person who comes to India in defiance of orders of the foreign court. Interestingly, the mother had not even complied with the orders of the High Court which led to the High Court issuing non-bailing warrants against the mother. The Supreme Court declined to intervene and further held that it was the duty of the 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 wrongdoing.

In *Ruchi Majoo v. Sanjeev Majoo*,³⁷ the court observed

“Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Civil Procedure, 1908, as amended by the Amendment Acts of 1999 and 2002. The duty of a court exercising its *parens patriae* jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision.”

It is clear that while deciding matters wherein the question of the custody of a minor child is involved and one spouse is armed with an order of the foreign court, the court must consider numerous factors and may not blindly adhere to the order of the foreign court. The first aspect to be considered is whether the domestic court has the jurisdiction to entertain the matter, which in the case of a petition seeking the writ of habeas corpus arises as soon as it is found that the minor is within its jurisdiction. Thereafter, it is settled law that the interests and welfare of the child are of paramount importance. Then the courts must ascertain as to whether an elaborate enquiry into

³⁴ *Sarita Sharma v Sushil Sharma*, (2000) 3 SCC 14.

³⁵ *Shilpa Agarwal v. Aviral Mittal*, (2010) 1 SCC 591.

³⁶ *Arathi Bandi v. Bandi Jagadrakshaka Rao*, (2013) 15 SCC 790.

³⁷ *Ruchi Majoo v. Sanjeev Majoo*, (2011) 6 SCC 479.

the welfare of the minor is called for or to repatriate the minor and the spouses to contest before the foreign court.