

Before S. S. Sodhi, J.

KULDEEP SIDHU,—Petitioner.

versus

CHANAN SINGH and another,—Respondents.

Criminal Writ Petition No. 60 of 1988.

January 21, 1988.

Constitution of India, 1950—Articles 226 and 227—Writ of habeas Corpus—Father, Mother and Children are Canadian Nationals—Strained relations between father and mother—Father restrained from leaving Canada—Children left with grandfather in India—Mother obtaining a decree from Supreme Court of Ontario for custody of Children—Writ filed by mother for obtaining custody of children—Welfare of children is main consideration—Custody handed over to the mother—Order of Canadian Court must be honoured.

Held, that both the children as also their parents are Canadian citizens. This being so, the stay of the children in India cannot but be of a temporary nature. They have eventually to go back to Canada and it is right too that they be taken there and brought up in the culture and environment of the country of their birth.

(Para 15).

Held, that it must be recognized that the children need the love and care of their parents and if they cannot get it from them both, they must get it from at least, one of them. In other words, a course which deprives them of both parents must be avoided unless it is rendered absolutely imperative by the over all consideration of their well being and welfare.

(Para 16).

Held, that it is in the fitness of things too that the children should go back to the country whose citizens they are and the dispute regarding their custody be finally settled by the Courts there. In the meanwhile the petitioner has in her favour an order of the competent court in Canada granting her custody of the children. This order must be honoured and respected.

(Para 17).

Petition under Articles 226 and 227 of the Constitution of India praying that this Hon'ble Court may be pleased to issue :

- (i) *a writ in the nature of habeas corpus ;*
- (ii) *Warrant Officer be appointed to search the premises of the respondent with the aid of local police and minor children namely; Navneet Singh Sidhu and Preeti Sidhu be got produced before this Hon'ble Court and the custody of the children may kindly be given to the petitioner*

being the matter of children who is under law entitled to their custody.

Vijay Kumar Jhanji, Advocate with O. P. Sharma, Advocate, for the Petitioner.

M. P. S. Gill, Advocate with G. S. Nihal Singh Wala. Advocate, for the Respondent.

JUDGMENT

S. S. Sodhi, J.

(1) The matter here concerns the mother's claim for custody of her nine years' son Navreet Sidhu (also known as Ricky Sidhu) and six years' old daughter Preeti Sidhu, founded upon the order of the Supreme Court of Ontario (Canada), granting her interim custody of the children. Both these children were born in Canada and they and their parents are Canadian citizens.

(2) The petitioner Mrs. Kuldeep Sidhu and her husband Gurbachan Singh were married in India in 1975 and have, thereafter, been living in Canada. Navreet Sidhu, their son was born in 1978 and their daughter Preeti Sidhu in 1981.

(3) Sometime in 1984, the petitioner's husband Gurbachan Singh brought his son Navreet Sidhu to India and left him at his father's house in Jagraon (Punjab). About a year and half later, he brought his daughter to India too and left her here. Both the children were admitted in a nearby school and have been studying there since then. Towards the end of 1986, their father Gurbachan Singh came and took them back to Canada.

(4) It appears that in the meanwhile relations between the petitioners and her husband became strained and they started living apart. The petitioner then approached the court and on November 21, 1986, obtained an order, annexure P/1 from the Supreme Court of Ontario granting her interim custody of the children. This order also restrained the father from removing the children from the Province of Ontario. According to the petitioner, on getting to know of this order, her husband Gurbachan Singh, on that very day, came away from Canada with the children and brought them to his father's house in Jagraon and that is where they have been ever since. To controvert this, the respondent has now placed on

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record an affidavit of the father Gurbachan Singh to the effect that this order of the court of November 21, 1986 was obtained by the petitioner, a day after he had left Canada with the children to return to India.

(5) Be that as it may, the fact remains that there is an order of the competent court granting custody of the children to the mother and restraining the father from taking them out of the jurisdiction of that Court. The children being in India and then not with their mother, is clearly contrary to the terms of that order.

(6) According to the petitioner, when she learnt that the children had been wrongfully taken away by her husband, she reported the matter to the police and on her own too tried to locate them.

(7) In October 1987 the petitioner's husband eventually returned to Canada and on arrival, he was arrested by the police and charged with kidnapping of the children. He was, however, subsequently released on bail, but his passport was impounded and he was also restrained from going out of the jurisdiction of the said Court. The order passed in this behalf being of October 29, 1987, annexure P/2.

(8) It was thereafter that the petitioner came to India in November, 1987. On reaching here, she contacted the respondent her father-in-law, Chanan Singh and asked for the custody of the children, but he refused to hand them over to her on the plea that he had no such instructions from his son—the father of the children.

(9) Faced with this situation, the petitioner, moved the District Judge, Ludhiana by filing an application under section 44-A of the Code of Civil Procedure on December 7, 1987 seeking execution thereby of the order passed by the Supreme Court of Ontario on November 21, 1986. This matter is still pending before that Court.

(10) The respondent, on his part, on the very next day, that is, December 8, 1987, filed a suit for injunction in the court of the Additional Senior Subordinate Judge, Jagraon on behalf of the two minor children seeking to restrain thereby the petitioner from forcibly removing the children from his custody. On December 10, 1987, the court issued a temporary injunction against the petitioner. The relevant extract of the order being as under:—

“The defendants are restrained from forcibly removing or cause the plaintiffs any harm through their agents till

further orders. However, the defendant will be entitled to get custody of the minor plaintiffs by invoking the provisions of law."

Visualising being bogged down in prolonged litigation in the subordinate Courts, the petitioner filed the present writ petition on January 11, 1988 under Articles 226 and 227 of the Constitution of India for the issuance of a writ of *habeas corpus* requiring the production of the two minor children in Court followed by their custody being handed over to her.

(11) The respondent here is the grandfather of the children. As per return filed by him, both the children had been sent to him with the consent of both the parents as they wanted the children to be educated in India in accordance with their religion and custom as prevailing in their home town. It was said that the children were being given proper education in a public school and were being well looked after. A plea was also raised that it would not be in the interest of children that their custody be given to the mother as it was alleged that she was living in adultery in Canada with one Victor.

(12) When this matter came up for hearing on January 14, 1988, present in Court were the petitioner and the respondent grandfather as also the two minor children. The respondent was accompanied by his elder son Gurcharan Singh and his wife Jaswant Kaur. This Jaswant Kaur is also the elder sister of the petitioner Mrs. Kuldeep Sidhu. The case was adjourned to the next day to enable the parties to see if they could arrive at a mutually acceptable solution to the situation, as had arisen in this case. No such settlement however, came about and the matter had thus to be taken up for hearing on merits. This was done on the next day i.e. July 15, 1988, when after hearing counsel for the parties and also with their consent talking to the parties and the children separately in chambers, as also in the presence of counsel an interim order was passed granting custody of the children to the mother for a week with the direction that during this period, the mother would keep the children in Chandigarh.

(13) At the very commencement of the hearing today I again spoke to both the children in the chambers and they seemed to have had a happy stay with their mother though they did express a preference for both their parents to come to India to take them back to Canada.

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(14) The situation that now exists here is that the father of the children is in Canada and is restrained from leaving that country and cannot, therefore, come to the children here. The mother of the children who is armed with an order of the competent Court granting her custody of the children is being opposed from getting custody of the children in pursuance of that order by their grandfather. The grandfather Chanan Singh the respondent here, whom I had occasion to see in Court, is far too old to be able to look after any one. The main actors in this drama on the side of the respondent appear to be Gurcharan Singh and his wife Jaswant Kaur, who were adamant in their stand that the children had been left with them in trust by their father and they would, therefore, not like them to be taken away by any one except under his direction. It will be recalled that somewhat similar plea had been put forth by the respondent in his return. This is clearly an untenable stand and cannot be permitted to prevail over what the Court considers to be the welfare of the minors.

(15) Here, both the children as also their parents are Canadian citizens. This being so, the stay of the children in India cannot but be of a temporary nature. They have eventually to go back to Canada and it is right too that they be taken there and brought up in the culture and environment of the country of their birth.

(16) Further, it must be recognized that the children need the love and care of their parents and if they cannot get it from them both, they must get it from at least, one of them. In other words, a course which deprives them of both parents must be avoided unless it is rendered absolutely imperative by the over all consideration of their well being and welfare. No such conclusion is warranted in this case. As matters stand at the moment, the children deserve to be with the mother rather than the father as the mother has been shown to be a graduate and also having done a course in Accountancy. She is said to be employed at a salary of 500 Dollars a week and is thus in a financially sound position to maintain her children. Her husband, on the other hand, is unemployed and is being maintained merely on unemployment benefit.

(17) It is in the fitness of things too that the children should go back to the country whose citizens they are and the dispute regarding their custody be finally settled by the Courts there. In the meanwhile the petitioner has in her favour an order of the competent Court in Canada granting her custody of the children. This

order must be honoured and respected, as observed by M. M. Punchhi, J. in *Marilynn Anita Dhillon Gilmore v. Margaret Nijjar and others* (1), as under:—

“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....”

A similar view was expressed by the Supreme Court in *Smt. Surinder Kaur Sandhu vs. Harbax Singh Sandhu and another* (2), where it was observed, “the modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping....”

(18) In dealing with somewhat similar situation as has arisen in the present case, namely of an order having been passed by the competent Court in the United States granting custody of the minor to the mother and the father in disobedience of it bringing the child to India, the Supreme Court in *Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw and another* (3), expressly approved the judgment of the Court of Appeal in England in *Re H. (Infants)* (4), Wilmer, L.J. there observed:—

“The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as

(1) I.L.R. 1984(1) Pb. & Hry. 1

(2) A.I.R. 1984 S.C. 1224.

(3) A.I.R. 1987 S.C. 3.

(4) (1966)1 All.E.R. 886.

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it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by this wrongdoing.

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The Courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally and a judge should as I see it, 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.”

(19) Such thus being the settled position in law, the order passed by the Supreme Court of Ontario on November 21, 1986 granting interim custody to the petitioner Mrs. Kuldeep Sidhu deserves due regard and there are no circumstances brought out in this case to justify it not being complied with. All that was suggested in this behalf was that the petitioner was living in adultery with one Victor in Canada. This allegation, on the face of it, is too vague to be given any credence. There is no material on record to in any manner substantiate it.

(20) Next, in seeking to oppose custody being granted to the mother, counsel for the respondent sought to rely upon the judgment of this Court in *Babu Ram v. Keshwa Chand Joshi* (5), where a 14-years old child was allowed to continue in the custody of the maternal uncle in preference to its father and *Harpal Kaur and Santokh Singh v. Mohinder Kaur* (6), where custody of a 16-years old girl, was granted to her mother's sister. Neither of these cases bears any resemblance to the case here and therefore call for no further comment.

(21) On an over-all consideration of the situation and circumstances of the children and their parents as also of the respondent here as they emerge from the material on record, there can be no escape from the conclusion that the welfare of the minors lies in

(5) 1979 H.L.R. 352.

(6) 1983 H.L.R. 28.

them being given in custody to their mother—the petitioner Mrs. Kuldeep Sidhu. It is accordingly so directed.

(22) The passport of the mother and children which had been taken in custody by this Court, is ordered to be handed back to the mother as also her air-ticket and those of her children. It may be mentioned here that according to the counsel for the respondent, the passports, on the basis of which, the children were brought to this country, by their father, have probably been taken away by him and they are consequently not available here. As regards their stay in India, counsel for the respondent has handed over the Registration of Foreigners' Rule Form-A, Part-2, Duplicate Registration Report with regard to both the children. These documents have also been handed over to the mother in order to facilitate her taking the children back to Canada. At the same time, a direction is issued to the Foreigners Regional Registration Officer, New Delhi to revalidate the visa granted to the children Navreet Sidhu and Preeti Sidhu or to grant a fresh visa, as may be appropriate in order to enable the petitioner to take them out of India in pursuance of the orders of this Court.

(23) A direction is also issued to the Registrar of this Court to arrange for police escort for the mother and the children from Chandigarh to the Canadian High Commission in New Delhi.

(24) As regards the High Commission of Canada, a request is made that all possible assistance be given to the petitioner Mrs. Kuldeep Sidhu to leave this country with her children and to get to Canada.

(25) Finally, a direction is hereby issued to the petitioner to report her arrival, with the children, in Canada, to the Supreme Court of Ontario within a fortnight of reaching there and to submit herself and the children to the jurisdiction of that Court.

(26) This petition is hereby accepted with costs. Counsel fee Rs. 1,000.

S.C.K.