

the project which is proceeding at a pace to outwit the proposed deadline.

(65) At this juncture when a project of national importance is underway, a whimsical petitioner cannot be permitted to become a 'stumbling block' metaphorically and literally, in the onward journey of the construction of the expressway.

(66) We, therefore, do not propose to interfere in the matter for the aforesaid reasons. Consequently, the writ petition is dismissed.

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**R.N.R.**

***Before Vinod K. Sharma, J.***

**KULWINDER DHALIWAL,—Petitioner**

**versus**

**STATE OF PUNJAB AND OTHERS,—Respondents**

Crl.W.P. No. 9 of 2008

21st July, 2008

***Constitution of India, 1950—Arts. 226/227—Custody of two minor children—Welfare of minor pre-dominant criterion—Foreign Court ordering custody of children to mother—Such order deserves to be respected—Conduct of father showing not in the interest of children if custody remains with him—Petition allowed, respondents directed to hand over custody of children to mother.***

***Held***, that the interest and the welfare of the minor is pre-dominant criterion. It may be noticed that the children are the citizens of Canada and the Hon'ble the Ontario Superior Court of Justice has already adjudicated in favour of the petitioner. However, he has abducted the minor children and keeping them illegally in India.

(Para 16)

***Held***, that the orders of the Courts though of Foreign Court deserve to be respected. There is an order passed by the Ontario Superior Court of Justice giving custody of the minor to the petitioner.

Furthermore, minor children being citizens of Canada would be looked after well by the mother in Canada. The conduct of respondent No. 4 before this Court and in tutoring the children clearly shows that it would not be in the interest of children if the custody remains with the father respondent No. 4.

(Para 21)

R. S. Rai, Sr. Advocate, with Harsh Bunger, Advocate,  
*for the petitioner.*

K.S. Pannu, AAG, Punjab, TPS, Tung, Advocate. *for  
respondent No. 4.*

**VINOD K. SHARMA, J. (ORAL)**

(1) The petitioner has invoked the jurisdiction of this court under Article 226 of the Constitution of India seeking *inter-alia* a writ in the nature of *habeas corpus* or any other writ or direction directing respondents No. 1 to 3 to search, recover and produce the detenué namely Harmanjot Singh, minor aged 7 years, and Loveleen Kaur minor, aged 5 years, who are Canadian Nationals and who are in the illegal custody of respondents No. 4 to 6 i.e. the husband and grand parents.

(2) The petitioner who is resident of British Columbia got married to respondent No. 4 in December 1996 in India. After the marriage, the parties remained in India for approximately 6 months as husband and wife and thereafter the petitioner returned to Canada to pursue the sponsorship application of respondent No. 4. The immigration authorities at Canada did not accept the marriage of the petitioner and respondent No. 4 as genuine as it was considered to be only a religious marriage. The marriage was registered in India in the year 1998. Thereafter, the petitioner travelled to India on two occasions and spent several months in India in order to be with respondent No. 4. The detenué were born in Surrey, British Columbia Canada and after the DNA test was conducted the immigration authorities accepted the marriage to be genuine and respondent No. 4 was permitted to land in Canada in July, 2002. Respondent No. 4 landed in Canada and stayed

with the petitioner at Surrey B.C. Respondent No. 4 after going to Canada authorities started pressurizing the petitioner to move to Toronto and on his insistence the petitioner along with respondent No. 4 moved to Toronto in October, 2003.

(3) It is further the case of the petitioner that respondent No. 4 started pressurizing the petitioner to divorce him on papers and marry his brother in order to enable him to migrate to Canada. The said proposal was refused by the petitioner. It is the case of the petitioner that on her refusal respondent No. 4 started physically abusing the petitioner. In the month of April, 2005, the petitioner summoned the police and respondent No. 4 was charged and later on convicted in Canada. During separation of the petitioner with respondent No. 4 children i.e. Harmanjot Singh and Loveleen Kaur the alleged detenu stayed with the petitioner. It is the case of the petitioner that with the intervention of respectables and in the best interest of the children the petitioner resumed the company of respondent No. 4. It was also agreed that the children would be sent to India temporarily while the petitioner and respondent No. 4 would concentrate with their relationship and marriage.

(4) In the month of November, 2005 the petitioner took children to India and lived with respondents No. 5 and 6 and returned to Canada in December, 2005 after staying here for a while. It is the case of the petitioner that as respondent No. 4 was convicted he could not stay with the petitioner till the terms of probation order were varied. When the consent of the petitioner said terms were varied in May, 2006 and respondent No. 4 moved back into matrimonial home and reconciliation was complete. It is the case of the petitioner that thereafter she showed her desire to have her children returned to Canada as it was proved difficult for herself to be away from her minor children. However, this request was not accepted and only an assurance was given that the children would be called to Canada at the earliest.

(5) It is further the case of the petitioner that respondent No. 4 suggested to the petitioner that they should come to India for attending the marriage of cousin of respondents No. 4 and respondent No. 4 would also join the petitioner in December, 2006. It was also

assured by respondent No. 4 that they would return to Canada with children in 2007 after spending some time in India.

(6) Acting on the advice/suggestion of respondent No. 4, petitioner arrived in India and her husband respondent No. 4 joined her in December, 2006. It is case of the petitioner that thereafter he started pressurising the petitioner again to divorce him and marry his brother for immigration purposes. On her refusal the respondent starting maltreating the petitioner. A request was made by the petitioner to allow her to return to Canada along with her children but her request was declined. Respondent No. 4 and his family members took away the passport of the petitioner. It is further the case of the petitioner that respondent No. 4 claims that he had changed his mind and was not interested to go back to Canada. It is further the case of the petitioner that because of the threat to her she fled from the home of respondents No. 4 to 6 and took refuge at her aunt's residence. However, she was not allowed to take the children with her or contact the children. Passport of the petitioner was returned in June, 2007. However, she was not permitted to take her children back to Canada. The petitioner accordingly returned to Canada in July, 2007. It is the case of petitioner that children are living with respondents No. 4 to 6 with the consent of the petitioner since May/June, 2007. In order to secure the custody of the children the petitioner moved the Ontario Superior Court of Justice. On her petition learned Ontario Superior Court of Justice passed the following order :—

“THE COURT ORDERS THAT :—

- (1) The applicant mother, Kulwinder Dhaliwal (the “applicant mother”) shall have custody of the children, namely Harmanjot Singh born June 13, 2000 and Loveleen Kaur Dhaliwal August 24, 2002.
- (2) The Respondent father, Gurcharan Singh Dhaliwal, the paternal grandparents Harbhajan Singh (Grandfather) and Naseeb Kaur (Grandmother) shall forthwith return the children into the custody/care and control of the applicant mother or her delegated agent or designate.

- (3) All police forces, with jurisdiction in which the said children are situated, including but not limited to the Royal Canadian Mounted Police, the Ontario Provincial Police, the Peel Regional Police and the Toronto Police Services, are hereby authorised and directed, pursuant to 36 of the Children's Law Reform Act of Ontario, (as amended) :
- (a) to locate and apprehend the children, Harmanjot Singh born June 13, 2000 and Loveleen Kaur Dhaliwal August 24, 2002 and deliver them into the custody, care and control of the applicant mother, in accordance with the custodial provisions herein ; and
  - (b) to enter and search any place, at anytime of the day or the night, where he or she has reasonable or probable ground to believe the said children may be, with such assistance and such force as are reasonable in the circumstances.
- (4) All police force including but not limited to the Royal Canadian Mounted Police, the Ontario Provincial Police, the Peel Regional Police and the Toronto Police Services, are hereby authorised and directed to enforce the provisions of this order."

(7) It is also the case of the petitioner that she is the permanent resident of Brampton, Ontario before they were taken to India on temporary basis. Children were studying in school and were scheduled to return to Canada in April, 2007. The petitioner, thus, sought the custody of the children on the plea that it would be for the welfare of the minor that they should go to Canada to stay with the petitioner.

(8) The case came up for hearing on 7th January, 2008 when notice of motion was issued to the respondents. Respondents No. 2 to 6 evaded service and could not be served for the date fixed. Therefore, notices were issued for 4th February, 2008. Respondent No. 4 was

again not served for 4th February, 2008 when the following order was passed :—

“ Adjourned to 25th February, 2008.

The petitioner may take steps to serve respondent No. 4, who remains unserved for today.

Learned counsel for the petitioner submits that respondent No. 4 is trying to take away minors, by evading service. He seeks appointment of Warrant Officer to search for minors at the places to be pointed out by the petitioner.

Ordered accordingly.

In case minors are found in custody of respondent No. 4 or any other adult member, the warrant officer is directed to serve the copy of petition on said adult, who shall produce the detainees in the court on the date fixed for hearing.”

(9) Warrant Officer appointed by this Court submitted his report as under :—

“In order to carry out the order dated 4th February, 2008 passed by this Hon’ble Court. I along with the petitioner and her cousin brother Mandeep Singh @ Billa started our journey to village Singhawala. Tehsil and District Moga on 5th February, 2008 in the morning and reached at Police Station City Moga South, in whose jurisdiction village Singhawala falls, at about 3.00 p.m. I made an entry bearing No. 14, dated 5th February, 2008 in the roznamcha. After taking police help, we proceeded towards village Singhwala. In the way when we reached, near Cambridge International School, the petitioner told that her minor children are studying in this school and first of all a checking be made there. We went inside the school premises and we were told by one Mr. SS. Gill, accountant that there are vacations in the school till 10th February, 2008. On being asked about Harmanjot Singh and Loveleen Kaur, he told that these

children were got admitted by Gurcharan Singh, their father in the school on 29th September, 2005. But all of a sudden, on 29th January, 2008 on an application made by Gurcharan Singh, their names have been strike off and these children were issued school leaving certificate.

Thereafter, we went to village Singhwala at the residence of Gurcharan Singh where his father Harbhajan Singh met us. Balwant Singh, Chowkidar of the village also came at the house. The petitioner along with the police party and Harbhajan Singh took a glance of the house. But Harmanjot Singh and Loveleen Kaur were not found there. Harbhajan Singh told us that about 10-15 days earlier his son Gurcharan Singh, after handing over photostat copies of the school leaving certificate of Harmanjot Singh and Loveleen Kaur, took both the children along with him to some unknown place and he is not acquainted as to where they presently are. During this period, his son has not contacted him. Similar type of statement was made by Chowkidar Balwant Singh, who stated that he has not seen Gurcharan Singh in the village for the last many days. The statements, which are in Punjabi Language were scribed by HC Kulwant Singh and attested by SI Mohan Lal. School leaving certificates of Harmanjot Singh, Loveleen Kaur, statements of Harbhajan Singh and Balwant Singh are annexed herewith as Annexure A-1, A-2, A-3 and A-4 respectively. A Xerox copy of the summons of this Court, containing the direction to Gurcharan Singh to produce the minors in the Court on 25th February, 2008, was served upon Harbhajan Singh and in reply he assured that in case his son Gurcharan Singh visited or contacted to him, he will inform him about the directions issued by the Hon'ble High Court regarding production of minor children.

In the light of statement of Harbhajan Singh, the petitioner told that it is not possible to carry out the search of the minors at any place, since Gurcharan Singh has

concealed him-self and her minor children at some unkonwn place.”

After that, I started my journey towards Chandigarh.  
Report is submitted.

(10) As the petitioner was not submitting to the jurisdiction of the Court by evading service this court on 25th February, 2008 passed the following order :—

“Respondent No. 4 has not been served. As per report submitted by the Warrant Officer, respondent No. 4 has taken away his minor children along with him to unknown place.

Learned counsel appearing on behalf of respondents No. 5 and 6 states that they do not know whereabouts of respondent No. 4 or his minor children. In this view of the matter, non-bailable warrants be issued against respondent No. 4 for his arrest and production before this Court.

The SSP, Moga is directed to take necessary steps to get him arrested and produce him in this Court on 20th March, 2008.”

(11) Respondent No. 4 challenged the order dated 25th February, 2008 before the Hon’ble Supreme Court of India and Special Leave to Appeal No. 1787 of 2008 was disposed of by the Hon’ble Supreme Court by passing the following order :—

“List on 31st March, 2008.

The petitioner undertakes to produce the respondent’s minor children on 20th March, 2008 before the concerned High Court. On such undertaking, warrants against the petitioner shall not be executed till 31st March, 2008.

(12) It was only in pursuance to the orders passed by Hon’ble Supreme Court that respondent No. 4 appeared in this court along with detenues.

(13) When the children appeared in this court it was noticed that respondent No. 4 had tutored the minor children and an attempt had been made by respondent No. 4 to poison the minor children against

their mother. Respondent No. 4 was warned not to treat the minor children in this manner as the same is likely to affect their upbringing. Attempt was also made by this court to have the settlement and get the children admitted in a good boarding school with leberity to the parents to have a visiting right. Though respondent No. 4 agreed to the said arrangement but he failed to honour the same. Respondent No. 4 chose to contest the petition by claiming that the children were in legal custody and therefore, the present petition was not- competent. It is pertinent to mention here that even a false case was got registered by respondent No. 4 through his friend. FIR, thus, registered was also quashed by this court. Allegations have also been leverlled against the petitioner. Respondent No. 4 has also obtained divorce from the court of Additional District Judge, Jalandhar.

(14) It is pertinent to mention here that with the reply respondent No. 4 has tried to create evidence by placing on record affidavit said to have been executed by the petitioner. However, reading of the affidavit shows that the same has been verified. Rather photo copy shown at the time of hearing showed that the said affidavit has not been voluntarily executed and the same has been prepared on a paper which might have been lying with respondent No. 4.

(15) It is also pertinent to notice here that in pursuance to the attempt of conciliation the children were subject to test for admission to Shemrock School, Sector 69, Mohali. Respondent No. 4 did not wait for result of admission test and took away the children to unkonwn place. The children passed the test. However, no fee was deposited, though the petitioner deposited a sum of Rs. 10,000 on account of part payment of fee regarding admission of the children. After seeing the conduct of respondent No. 4 it was noticed that he does not have any respect for the court and the matter was heard on merit.

(16) It is settled law that the interest and the welfare of the minor is pre-dominant criterion. It may be noticed that in the present case the children are the citizens of Canada and the Hon'ble the Ontario Superior Court of Justice has already adjudicated in favour of the petitioner. However he has abducted the minor children and keeping them illegally in India.

(17) Learned counsel for the petitioner contended that the welfare of the children would be in the hands of the mother and mother like love cannot be substituted by any other means. Learned counsel for the petitioner placed reliance on the judgment of Hon'ble Supreme Court in the case of **Mrs. Elizabeth Dinshaw *versus* Arvand M. Dinshaw and another (1)** to seek custody of the children. Hon'ble Supreme Court in the cited judgment has been pleased to lay down as under :—

“8. Whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and pre dominant criterion of what would best serve the interest and welfare of the minor. We have twice interviewed Dustan in our Chambers and talked with him. We found him to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an american citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in school there. In our considered opinion it will be in the best interests and welfare of Dustan that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent Court in that country. We are also satisfied that the petitioner who is the mother is full of genuine love and affection for the child and she can be safely trusted to look after him, educate him and attend in every possible way to his proper up bringing. The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of his origin in the United States of America. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he

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(1) AIR 1987 S.C. 3

has already put the child to some school in Pune. The conduct of the father has not been such as to inspire confidence in us that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present.

- (9) In *Re H. (infants)*, (1966) 1 All ER 886 the Court of Appeal in England had occasion to consider a somewhat similar question. That case concerned the abduction to England of two minor boys who were American citizens. The father was a natural-born American citizen and the mother, thought of Scottish origin, had been resident for 20 years in the United States of America. They were divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the two boys to the mother with liberal access to the father. By an amendment made in that order in December, 1964, a provision was incorporated that the boys should reside at all times in the state of New York and should at all times be under the control and jurisdiction of the state of New York. In March, 1965, the mother removed the boys to England, without having obtained the approval of the New York Court, and without having consulted the father, she purchased a house in England with the intention of remaining there permanently and of cutting off all contacts with the father. She ignored an order made in June, 1965, by the Supreme Court of New York State to return the boys there. On a motion on notice given by the father in the Chancery Division of the Court in England, the trial Judge Cross, J. directed that since the children were American children and the American Court was the proper Court to decide the issue of custody, and as it was the duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing the Court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America. In the appeal filed against the said judgment in

the Court of Appeal. Willmer L.J. while dismissing the appeal extracted with approval the following passage from the judgment of Cross, J :—

“The sudden and unauthorised removal of children from one country to another is far too frequent now a days, and as 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 his wrongdoing.

.....

The Courts in all countries ought, as I see it, to be careful not to do anything to encourage the 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.”

(10) With respect we are in complete agreement with the aforesaid enunciation of the principles of law to be applied by the Courts in situations such as this.”

(18) It may further be noticed here that the way the children have been tutored by respondent No. 4 shows that welfare of children is not safe in the hands of respondent No. 4 but would be safe in the hands of the mother i.e. the petitioner. Reliance was also placed on the judgment of Hon’ble Supreme Court in the case of **Smt. Surinder Kaur Sandhu versus Harbax Singh Sandhu and Another** (2) Hon’ble Supreme Court in the said judgment has been pleased to lay down as under :—

“The modern theory of Conflict of Laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case, Therefore, in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare

of the offsprings of marriage. Ordinarily jurisdiction must follow upon functional lines and 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.

In the present case the facts that the child is a British citizen and that the matrimonial home of the spouses was in England, establish sufficient contacts 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 which were incurred therein by the spouses.”

(19) Learned counsel appearing on behalf of respondents contested the petition primarily on the ground that remedy with the petitioner is to seek relief under the Guardians and Wards Act where the question of welfare and custody of children is to be decided. Learned counsel for the respondents also contended that the custody of the children would not be safe in the hands of mothers as she was earlier married before marriage with the respondent No. 4. Respondent also mentioned that the petitioner has been fined on the allegations of theft in a shopping mall.

(20) On consideration of the matter I agree with the contentions raised by the learned counsel for the petitioner.

(21) The orders of the Court though of Foreign Court deserve to be respected. There is an order passed by the Ontario Supreme Court of Justice giving custody of the minor to the petitioner. Furthermore, minor children being citizens of Canada would be looked after well by the mother in Canada. The conduct of respondent No. 4 before this Court and in tutoring the children clearly shows that it would not be in the interest of children if the custody remains with the father, respondent No. 4.

(22) Consequently, this petition is allowed with costs. Costs are assessed at Rs. 10,000. Respondents No. 4 to 6 are directed to hand over the custody of the children to the petitioner mother with liberty to take them to Canada.

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**R.N.R.**