

Child custody of NRIs

As more and more youth are moving abroad for employment opportunities, they continue to setup their permanent residence overseas. Eventually, the couples set up their matrimonial home outside India and plan to raise their children overseas. When they become parents and decide to split ways, they get entangled in cross jurisdictional laws mostly relating to Divorce and child custody.

Disputes over child custody becomes a tough battle when children are born outside India or to parents who are Non-Resident Indians (NRI). Once problems arise, the couples approach family court in their jurisdiction for divorce followed by child custody. When one of the parents is granted child custody, the other parent, in most cases, bring the child to their native country and file a petition seeking child custody in his/ her favour. And the other parent seeks return of the child to their matrimonial home based on the order passed in the overseas court.

There can be lots of confusion involved in such situation when the Parent detains the child in India against court orders granted by a foreign court on account of the Child's nationality. The alarming number of such cases has gained the attention of the Apex Court in India. The Court in number of cases has addressed this cross border dispute in detail.

In *V. Ravi Chandran Vs. Union of India*, the Court has addressed the issue of handing over the minor child to the Parent who had the orders of the foreign court where the child is a national. The father is a US citizen and has been granted joint custody of their child along with the mother, by the US Court. Subsequently, the mother has taken the child to India and the father has obtained order from the US court granting him sole custody of the minor child. With that order, the father files Habeas Corpus petition in India claiming that the mother cannot go against the US court order and has sought custody of the minor.

The Court observed that the important criteria in deciding any question relating to the custody of the child is what best serves in the best interest of the child. The court also held that order of the foreign court shall also be an important consideration in deciding the welfare of the child and the issues of custody shall depend upon circumstances of each case. The Apex court also observed that when the foreign court has ordered the custody of child to the father, the mother cannot take the child away from him or outside the country without his knowledge/approval.

In the case of *Ruchi Majoo Vs Sanjeev Majoo* (2011) 6 SCC 479, where a petition filed by the mother under Guardian and Wards Act, seeking guardianship of the child at the time when the legal proceedings has been initiated in foreign court. The apex court has held that Indian courts have jurisdiction to deal with custodial disputes of

minor children even if a foreign court has passed an order in favour of either of the parents.

The court has also held in *Prateek Gupta v. Shilpi Gupta*, (2018) 2 SCC 309, that the welfare of the child is of paramount significance and that the applicability of doctrines/principles of comity of courts, would depend upon various facts and circumstances.

The Hague Convention

According to the Hague Convention, it is considered wrongful to remove or retain the child breaching the custody rights attributed to the person by the law of the country in which the child is a habitual resident. Being a multilateral treaty, the Hague Convention provides a procedure to promptly return such kids to where they belong in order to protect them from the harmful effects of retention or removal across borders by their parents. If two countries are signatories of the convention and when a child is removed from one country to the other against the orders of the native country, the country in which the child is retained would simply order to return the child back to his/her habitual residence. Once the child is returned it becomes a custody battle between the parents from then on.

As India is not a signatory to the Hague Convention, the law is that the Court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and the pre-existing order of the foreign Court would be considered as one of the factors. In *Nithya Anand Raghavan v. State (NCT of Delhi)*, (2017) 8 SCC 454, the court observed that the court can exercise summary jurisdiction and 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. However, the relief of return of the child to the country from where the child was removed can also be refused, if the court finds that such return would be harmful to the child, irrespective of a pre-existing order of return of the child by a foreign court. The court is obligated to examine the merits as to where the paramount interest and welfare of the child lay.

The court also observed that it is also important that the court must be convinced that the order of the foreign court yields to the welfare of the child and that the pretexting order alone cannot be a decisive factor.

In a recent case *LahariSakhamuri v. SobhanKodali*, (2019) 7 SCC 311, the Apex Court observed that the US Court has taken the principle of welfare of the children in passing of the order. The Apex Court, in the best interest of the children being of paramount importance, directed them to be returned to the US.

In the custody battle the child has to go through a lot of struggle at a young age. No two child custody cases are same and even similar cases might attract different judgements taking into account the complications involved considering the welfare of the child, more so, in cross border disputes of child custody. Despite living separately after divorce it becomes the parents' duty to make sure the child's needs are properly addressed.