SARITA SHARMA

v.

SUSHIL SHARMA

FEBRUARY 16, 2000

[G.T. NANAVATI AND S.N. PHUKAN, JJ.]

Hindu Marriage Act, 1955—Section 26—Custody of Minor children—Divorce proceedings initiated by husband in USA—During the pendency of the proceedings both husband and wife were living separately from each other in USA—American Court passed an interim order giving custody of children (a boy and a girl) to husband and only visitation rights was allowed to the wife—Exercising her visitation rights, wife took custody of children and flew back to India—Husband filed a writ of Habeas Corpus before High Court for custody of the children—High Court directing wife to restore custody of children to husband and allowed take the children to USA—Held, in view of the facts and circumstance of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children—Therefore, in spite of the order passed by the Court in USA it was not proper for the High Court to have allowed Hebeas Corpus petition solely on the ground of breach of American Court's order—Interest of the children requires a full and thorough inquiry and, therefore, High Court should have directed the husband to initiate appropriate proceedings in which such an inquiry can be held- Hindu Minority and Guardianship Act, 1956, Section 6.

Custody of minor children—Role of mother—Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after—If female child has to stay with the mother, it will be in the interest of another child that they both stay with the mother.

Appellant and Respondent got married in 1988. Respondent (husband) initiated a proceeding for divorce in District Court of USA in 1995 in which interim orders were passed from time to time regarding the care and custody of the children and visitation rights of appellant and respondent. Even when divorce proceedings were pending, the couple lived together between November 1996 and March 1997. They again separated but on this occasion appellant took the children with her. Associate Judge

A of the District Court U.S.A. taking note of this incident, passed an order for putting the children in the care of respondent and appellant was given only visitation rights. Exercising her visitation rights, appellant took the children from the house of respondent and did not leave the children at school the next day. On making inquiries, respondent came to know that appellant had vacated her apartment and gone away somewhere. Respon-
B dent therefore, informed the police and a warrant for arrest of appellant was issued. Respondent later on came to know that without seeking permission from the American Court, appellant had flown away to India with the children. Later on a divorce decree was passed by the court in USA and in view of the conduct of the appellant, an order was passed giving the
C custody of the children solely to the respondent and even visitation rights were denied to the appellant. The records of the divorce proceedings showed that respondent was alcoholic and violent towards appellant and children. Before the appellant came to India she was in lawful custody of the children. The question was whether the custody became illegal as she
D had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court. It was in these circumstances, that the respondent, filed a Habeas Corpus petition before the High Court for the custody of the minor children and the same was allowed by the High Court. [923-E-H; 924-A-C]

E In appeal to this Court, it was contended by the appellant that in a Habeas Corpus petition what a court should consider was whether the person, in respect of whom a writ of Habeas Corpus is sought, was kept in illegal custody or was detained against his wish; that Habeas Corpus petition was not an appropriate proceeding for securing custody of minor
F children staying with the mother, that when she came to India with the children she was the natural guardian of the children and also managing conservator of the children, the decree of divorce and order for custody of children was obtained by respondent by suppressing material facts from the Court and that the said decree and order, even otherwise, should not be taken as binding on the Courts in India as it was inconsistent with the
G law applicable to the parties.

Allowing the appeal, this Court

HELD : 1.1. It will not be proper to be guided by the fact that the
H appellant had removed the children from U.S.A. despite the order of the

Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by an American Court though a relevant factor, cannot override the consideration of welfare of the minor children. In U.S.A. respondent is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. The appellant is not found wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children, 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.

1.2. Still there is some possibility of mother returning to U.S.A. in the interest of the children. Therefore, it is not desirable to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court. There is a possibility that both of them may

thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights. [924-D-E]

Elizabeth Dinshaw v. *Arvand M. Dinshaw,* **[1987] 1 SCC 42, relied on.**

Surinder Kaur Sandhu v. *Harbax Sigh Sandhu,* **[1984] 3 SCC 698;** *Dhanwantri Joshi* v. *Madhav Unde,* **[1998] 1 SCC 112, referred to.**

International Shoe Company v. *State of Washington,* **90 L. Ed. 95 (1945) : 326 US 310;** *Mc Kee* v. *Mc Kee,* **(1951) AC 352 : (1951) 1 All ER 942;** *J.* v. *C.,* **(1970) AC 668 : (1969) 1 All ER 788;** *H (Infants), Re,* **(1966) 1 All ER 886 : (1966) WLR 381, CA; E (Infants), Re, (1967) 1 All ER 88, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 337 of 1998.

From the Judgment and Order dated 18.2.98 of the Delhi High Court in W.P. (Crl.) No. 656 of 1997.

S.K. Dholakia, Arun Jaitley, R.K. Jain, Harish Chandra, Arun Kapil, Ms. Sumita Kapil, Ms. Poonam Prasad, Subramonium Prasad, Manoj Goel, Rajeev Sharma, Sanjeev Singhvani, Ms. Anita Verma, D.S. Mehra, Sanjiv Sharma, Ms. Anil Katiyar, M.K.D. Namboodry, Rajesh Srivastava and M.C. Dhingra, for the appearing parties.

The Judgment of the Court was delivered by

G.T. NANAVATI, J. This appeal is filed against the judgment and order of the High Court of Delhi in Writ Petition (Crl.) No. 656 of 1997. Sushil Sharma had filed the writ petition seeking a writ of Habeas Corpus in respect of two minor children Neil and Monica, aged 7 and 3 years respectively. It was alleged that the children are in illegal custody of Sarita Sharma, whom he had married on 23.12.1988. The High Court allowed the petition and directed Sarita to restore the custody of two children to Sushil Sharma. The passports of the two children were also ordered to be handed over to Sushil Sharma and it also declared that it was open to Sushil Sharma to take the children to U.S.A. without any hindrance. Sarita has, therefore, filed this appeal.

Sushil initiated proceedings for dissolution of his marriage in the District Court of Tarrant Country, Texas, U.S.A. in 1995. In the said proceedings interim orders were passed from time to time with respect to the care and custody of the children and visitation rights of Sushil and Sarita. Even while the divorce proceedings were pending Sushil and Sarita lived together from November, 1996 to March, 1997. They again separated. This time Sarita had taken the children along with her. It was stated in the writ petition that the Associate Judge, taking note of the fact that Sarita had gone away with the children, passed an order for putting the children in the care of Sushil and Sarita was only given visitation rights. On 7.5.1997 Sarita had picked up the children from Sushil's residence in exercise of her visitation rights. She was to leave the children in the school the next day morning. Sushil got the information from the school that the children were not brought back to the school. On making inquiries he came to know that Sarita had vacated her apartment and gone away somewhere. He had, therefore, informed the police and a warrant for her arrest was also issued. It was further stated in the petition that his further inquiries revealed that Sarita had, without obtaining any order from the American Court, flown away to India with the children. It was further stated in the petition that on 12.6.1997 a divorce decree was passed by the Associate Judge and in view of the Conduct of Sarita he has also passed an order declaring that the sole custody of the children shall be of Sushil. She had been denied even the visitation rights. Sushil then filed a writ petition in the Delhi High Court on 9.9.1997. Sarita's contention in the reply to the petition was that by virtue of the orders dated 5.2.1996 and 2.4.1997 she and Sushil were both appointed as Possessory Conservators and, therefore, on 7.5.1997 both the children were in her lawful custody. It was also her contention that she had brought the children to India with full knowledge of Sushil. It was also her contention that Sushil is not a person fit to be given physical custody of the children as he is alcoholic and violent as disclosed by the material on record of the divorce proceeding. The High Court held that in view of the interim orders passed by the American Court Sarita committed a wrong in not informing that court and taking its permission to remove the children from out of the jurisdiction of that court. The High Court took note of the fact that a competent Court having territorial jurisdiction has now passed a decree of divorce and ordered that only the father, i.e. Sushil, shall have the custody of the children. The High Court rejected the contention of Sarita that the decree of divorce and the order for the custody of the

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A children were obtained by Sushil by practicing fraud on the Court and further observed that even if that is so, she should approach the American Court for revocation of that order. Taking this view the High Court allowed the writ petition and gave the directions referred to above.

B The learned counsel appearing for the appellant submitted that in a Habeas Corpus petition what a Court should consider is whether the person, in respect of whom a writ of Habeas Corpus is sought, is kept in illegal custody or is detained against his wish. He further submitted that a Habeas Corpus petition is not an appropriate proceeding for securing custody of minor children staying with the mother. He further submitted C that when she came to India with the children she was the natural lawful guardian of the children and also managing conservator of the children. With respect to the decree of divorce and order for custody of the children, he submitted that the said decree and order were obtained by the respondent by suppressing material facts from the Court and the said decree and D order, even otherwise, should not be taken as binding on the courts in India, as they are not consistent with the law applicable to the parties. He lastly submitted that even if the said decree and order are treated as valid for the present the High Court should not have allowed the writ petition without considering the welfare of the children.

E The record of the divorce proceeding which has come on the record of this case discloses that prior to their separation Sushil and Sarita with their two children and Sushil's mother were staying together in U.S.A. The record further discloses that there were serious differences between the two. Sushil was alcoholic and had used violence against Sarita. Sarita's F conduct was also not very satisfactory. Before she came to India with the children she was in lawful custody of the children. The question is whether the custody became illegal as she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission. After she came to India G a decree of divorce and the order for the custody of the children have been passed. Therefore, it is also required to be considered whether her custody of the children became illegal thereafter.

Mr. R.K. Jain, leaned senior counsel appearing for the respondent H submitted that the facts of this case are similar to the facts of *Surinder Kaur*

Sandhu v. *Harbax Singh Sandhu,* [1984] 3 SCC 698 and following the decision in that case this appeal should be dismissed. In that case this Court after refereeing to the facts observed as under :

> "We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. 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. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that 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. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes 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. See *International Shoe Company* v. State of Washington, (90 L Ed 95 [1945] : 326 US 310), which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case). It is our duty and function to protect the wife against the burden of litigating in an inconvenience forum which she and

A her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

In that case the husband had removed the boy from England and brought him to India and the wife after obtaining an order of English Court, whereby the boy became the Ward of the Court, came to India and filed B a petition in the High Court of Punjab and Haryana seeking a writ of Habeas Corpus. The High Court rejected the wife's petition on the ground, *inter alia*, that her status in England is that of a foreigner, a factory worker and a wife living separately from the husband; that she had no relatives in England; and that, the child would have to live in lonely and dismal C surroundings in England. It was also dismissed on the ground that the husband has gone through a traumatic experience of a conviction on a criminal charge; that he was back home in an atmosphere which welcomed him; that his parents were in affluent circumstances; and that, the child would grow in an atmosphere of self-confidence and self-respect if he was D permitted to live with them. After considering the legal position this Court observed :

> "Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as E to what is conducive to the welfare of the minor."

In *Dhanwanti Joshi* v. *Madhav Unde*,[1980] 1 SCC 112, this Court after referring to the decision of the Privy Council in *Mc Kee* v. *Mc Kee*, (1951) AC 352 : (1951) All ER 942 and that of House of Lords in *J* v. *C*, (1970) F AC 668 : (1969) 1 All ER 788, the two decisions in which contrary view was taken, namely, *H (Infants), Re* (1966) 1 All ER 886 : (1966) 1 WLR 381, CA and *E (Infants), Re* (1967) 1 All ER 881, also the decision of this Court in *Elizabeth Dinshaw* v. *Arvand M. Dinshaw*, [1987] 1 SCC 42 and also the Hague Convention of 1980 observed as under :

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> "As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the Convention any child below 16 years who had been "wrongfully" removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central H authority."

"So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to as taken into consideration as stated in *Mc Kee* v. *Mc Kee* unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explaned in *L., Re.* As recently as 1996-97, it has been held in *P* (A minor) (Child Adbuction : Non-Convention Country), *Re* : by Ward, L.J. (1996 Current Law Year Book, pp. 165-166) that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence - which was not a party to the Hague Convention, 1980, - the courts' overriding consideration must be the child's welfare. There is no need for the Judge of attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also A (A minor) (Abduction : Non-Convention Country) (Re, The times 3.7.97 by Ward, L.J. (CA) (quoted in Current Law, August 1997, p. 13). This answers the contention relation to removal of the child from U.S.A.

"Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A. despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the

A mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children, we are B 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, C therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would depend upon the joint efforts D of the appellant and the respondent to get the arrest warrant cancelled by explaining to the court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court. There is a possibility that both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect E to the custody of the children and visitation rights.

For the reasons stated above, we allow this appeal, set aside the judgment and order of the High Court and dismiss the writ petition filed by the respondent.

F R.K.S. Appeal allowed.