2024:DHC:2149-DB

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 13.02.2024*
Judgment pronounced on: 19.03.2024

\+ **MAT.APP.(F.C.) 357/2023 & CM APP. 63060/2023**

..... Appellant

Through: Mr K.P. Mavi, Ms Chitra Gera and Mr Dinesh Pratap Singh, Advocates.

versus

..... Respondents

Through: Mr Vivek Kohli, Senior Advocate with Ms Bhavya Bhatia, Mrs Nimita Kaul, Mrs Shivambika Sinha and Mr Gurveer Lally, Advocates for R-1.
Mr Kirtiman Singh, CGSC with Mr Waize Ali Noor, Ms Shreya V. Mehra, Ms Vidhi Jain and Mr Kartika Baijal, Advocates for UOI.
Ms Mehak Nakra, ASC (Civil) with Ms Disha Choudhary and Mr Abhishek Khari, Advocates for R-5.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]

AMIT BANSAL, J.:

1. The present appeal has been filed seeking setting aside of the judgment dated 23rd November, 2023 passed by the learned Judge, Family Court, Patiala House Courts, New Delhi (hereinafter referred to as "Family Court"), whereby the guardianship petition filed on behalf of the appellant/father (hereinafter referred to as "appellant") seeking custody of

the appellant's son was dismissed.

2. Brief facts giving rise to the present appeal are as under:

2.1. The appellant was married to the respondent no.1 in Vinnytsia City, Ukraine on 18th November, 2000. From the said wedlock, two children were born; a female child on 24th November, 2002 and a male child on 12th February, 2019. Both the children were born in Ukraine and are thus, citizens of Ukraine by birth.

2.2. Subsequently, marital disputes arose between the parties and the respondent no.1 approached the Vinnytsia District Court seeking dissolution of the marriage. The marriage was dissolved *vide* Decision dated 6th May, 2021, passed by the Vinnnytsia District Court, Ukraine.

2.3. The appellant approached the Executive Committee, Vinnytsia City Council, seeking visitation rights in respect of their minor son, which was allowed *vide* a Decision dated 15th July, 2021. In terms of the said Decision, the appellant was granted supervised visitation for a period of two months, followed by unsupervised visitation.

2.4. On 24th February, 2022, war broke out between Ukraine and Russia. The appellant on 23rd March, 2022 took the minor son from Ukraine and reached India on 28th March, 2022. The minor child was around three years old at that point of time.

2.5. This prompted the respondent no.1 to come to India and approach this Court on 27th October, 2022 by filing a *habeas corpus* petition, being W.P.(Crl.) No.2537/2022, praying that the appellant produce the minor child. *Vide* order dated 28th July, 2023 a coordinate bench of this Court transferred the interim custody of the minor child from the appellant to the respondent no.1, subject to the respondent no.1 surrendering her passport

and the passport of the minor child with the Station House Officer (SHO), Police Station Vasant Kunj. It was also directed that the minor child shall not be removed from the jurisdiction of this Court.

2.6. The aforesaid writ petition was disposed of on 20th October, 2023, observing that the relief sought for in the said petition, i.e., *habeas corpus* had already been granted. The Court observed that the issue of interim custody or visitation rights in respect of the minor child has to be dealt with by the concerned Family Court and granted liberty to the appellant to approach the appropriate forum. Further, the Court also directed the respondent no.1 to not leave the country for the next three weeks, i.e. till 10th November, 2023.

2.7. In view of the aforesaid liberty, the appellant filed a guardianship petition being G.P. No. 58/2023 under Sections 7 and 25 of the Guardians and Wards Act, 1890 before the Family Court, seeking grant of permanent custody of the minor child.

2.8. In the said petition, the appellant also sought a relief that the respondent no.1 and the minor child be restrained from leaving the country. *Vide* order dated 7th November, 2023, the Family Court directed the respondent no.1 to file her reply in the said petition and posted the matter for 17th November, 2023. However, the Family Court did not grant *ad interim* relief restraining the respondent no.1 from leaving the country along with her minor child.

2.9. The appellant challenged the aforesaid order by filing an appeal, being MAT.APP.(F.C.) No.337/2023 before this Court. The said appeal was disposed of by a Co-ordinate Bench *vide* order dated 10th November, 2023, by taking on record the submission of the counsel appearing on behalf of the

respondent no.1 that the respondent no.1 shall not seek release of her passport as well as the passport of the minor child till the next date of hearing before the Family Court, i.e., 17th November, 2023.

2.10. The respondent no.1, on 17th November, 2023, filed her written statement to the guardianship petition pending before the Family Court, in which, *inter alia*, she raised the issue of lack of territorial jurisdiction.

2.11. The Family Court *vide* the impugned judgment dated 23rd November, 2023 dismissed the guardianship petition by observing that the Family Court did not have the territorial jurisdiction.

3. Hence, the present appeal has been filed impugning the aforesaid judgment dated 23rd November, 2023 passed by the Family Court.

4. Notice was issued in the present appeal on 6th December, 2023.

5. After the impugned judgment dated 23rd November, 2023, passed by the Family Court, the respondent no.1 moved an application in the disposed of *habeas corpus* petition [W.P.(Crl.)2537/2022], seeking release of the passports belonging to herself and her minor child.

6. The Court directed release of the passport of the respondent no.1 and granted liberty to the respondent no.1 to return to Ukraine *vide* order dated 21st December, 2023. However, it was directed that the minor child shall not leave the country without the prior permission of the Court where the appeal against the judgment dated 23rd November, 2023 passed by the Family Court was pending, i.e., this Court.

7. Pursuant to the aforesaid direction, the passport of the respondent no.1 was returned to her on 22nd December, 2023 by the SHO, Police Station Vasant Kunj.

8. On 22nd December, 2023, the predecessor bench directed the

concerned authorities to extend the Indian visa of the respondent no.1, noting that it was expiring on 2nd January, 2024.

9. When the appeal came up for hearing before this Bench on 3rd January, 2024, the respondents no.2 to 4 were directed to file an affidavit with regard to the situation obtaining in Vinnytsia, Ukraine, in view of the ongoing war between Russia and Ukraine. The Indian visa of the respondent no.1 was also directed to be extended for a period of six weeks.

10. Pursuant to the aforesaid direction, the Ministry of External Affairs, Union of India, filed an Affidavit dated 25th January, 2024 with regard to the situation in Vinnytsia, Ukraine.

11. On 29th January, 2024, the appellant was directed to deposit a sum of Rs.1,50,000/- towards litigation expenses with the Registry of this Court. However, the aforesaid sum has not been deposited by the appellant, who claimed that he was not in a position to make the aforesaid deposit.

12. Mr. K.P. Mavi, learned counsel appearing on behalf of the appellant submits that the learned Family Court has commited an error in dismissing the guardianship petition of the appellant on the ground of lack of territorial jurisdiction without taking into account the best interest of the minor child. It is submitted that even if the minor child has been removed from another country, the courts in India should give paramount importance to the welfare of the child and the order of a foreign court would only be one of the factors to be considered. In this regard, reliance has been placed on the judgment of the Supreme Court in ***Jasmeet Kaur* v. *Navjot Singh***, (2018) 4 SCC 295.

13. It is contended that on account of the war, which broke out between Russia and Ukraine in March, 2022, the situation in Ukraine has been grave and it would not be in the best interest of the minor child to be taken back to

Ukraine and made to live there. Reliance has been placed on various alerts, advisories and news reports to show the devastating effect of the war in Ukraine.

14. *Per contra*, Mr. Vivek Kohli, learned Senior counsel appearing on behalf of the respondent no.1 submits that the Family Court has correctly observed that it did not have territorial jurisdiction in terms of Section 9 of the Guardians and Wards Act, 1890 to entertain the petition filed on behalf of the appellant. Reliance in this regard has been placed on the judgments of the Supreme Court in ***Ruchi Majoo* v. *Sanjeev Majoo***, (2011) 6 SCC 479 and ***Lahari Sakhamuri* v. *Sobhan Kodali***, (2019) 7 SCC 311.

15. He further submits that the appellant, who was a permant resident of Ukraine and the respondent no.1, a citizen of Ukraine got married under the Civil laws of Ukraine. Both the children are citizens of Ukarine by birth. Further, the marriage between the parties was dissolved under the laws of Ukraine. Therefore, Ukraine has the most intimate contact with the parties and laws of Ukraine would govern the relationship between the parties, including all questions relating to custody and guardianship of the minor child.

16. It is further submitted that the appellant himself had submitted to the jurisdiction of the competent courts in Ukraine when he approached the Vinnytsia City Council, seeking visitation rights to the minor child. The appellant, in violation of the visitation rights granted to him by the Vinnytsia City Council, unlawfully removed the minor child from Ukraine and brought him to India, who at the relevant time was only three years of age. Therefore, the appellant cannot be allowed to take advantage of his own wrong-doing. In this regard, reliance has been placed on ***Elizabeth Dinshaw***

v. ***Arvand M. Dinshaw***, (1987) 1 SCC 42.

17. It has been stated that despite the on-going war situation in Ukraine, all institutions including hospitals, schools, transportation and other public utilities are fully functional in Vinnytsia, Ukraine. Reliance in this regard has been placed on communications issued by various authorities in Ukraine, including the Vinnytsia Municipal Council and the Department for Civil Protection.

18. We have heard the learned counsels for the parties and perused the material on record.

19. The fulcrum of the challenge of the appellant rests on the issue whether the Family Court had the jurisdiction to entertain the guardianship petition.

20. At the outset, reference may be made to Section 9 of the Guardians and Wards Act, 1890, which is set out below:

> "*9. Court having jurisdiction to entertain application.—(1) If the application is with respect to the guardianship of the person of the minor,* ***it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides****.*
> …"

21. The expression '*where the minor ordinarily resides*' has been interpreted by the Supreme Court in ***Ruchi Majoo*** (supra), wherein it was held that the question of territorial jurisdiction is a mixed question of fact and law. The Supreme Court also noted the difference in the nature of proceedings in a *habeas corpus* petition and proceedings arising under the Guardians and Wards Act, 1890, insofar as the issue of jurisdiction is concerned. The proceedings in a *habeas corpus* writ petition are summary in nature based on the affidavit of the parties. On the other hand, in

proceedings under the Guardians and Wards Act, 1890, the Court has to make an enquiry in terms of the statute, summary or detailed as to whether the minor ordinarily resides within the jurisdiction of the concerned Family Court. If the Court comes to the conclusion that it does not have the jurisdiction, it cannot pass an order with regard to custody of the minor child. The relevant extracts are reproduced hereunder:

> "*24. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the "ordinary residence" of the minor. The expression used is "where the minor ordinarily resides". **Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy**.*
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> …
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> *58. Proceedings in the nature of habeas corpus are summary in nature, where the legality of the detention of the alleged detenu is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views the rival claims, if any, to such custody.*
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> …
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> ***60. In cases arising out of proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There is thus a significant difference between the jurisdictional facts relevant to the exercise of powers by a writ court on the one hand and a court under the Guardians and Wards Act on the other**.*
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> ***61.** Having said that we must make it clear that no matter a court is exercising powers under the Guardians and Wards Act it can choose to hold a summary enquiry into the matter and pass appropriate*

> *orders* ***provided it is otherwise competent to entertain a petition for custody of the minor under Section 9(1) of the Act****. This is clear from the decision of this Court in Dhanwanti Joshi v. Madhav Unde [(1998) 1 SCC 112] , which arose out of proceedings under the Guardians and Wards Act. The following passage is in this regard apposite: (SCC pp. 125-26, para 30)…*
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> ***62.*** *It does not require much persuasion for us to hold that the issue whether the court should hold a summary or a detailed enquiry would arise only if the court finds that it has the jurisdiction to entertain the matter.* ***If the answer to the question touching jurisdiction is in the negative the logical result has to be an order of dismissal of the proceedings or return of the application for presentation before the court competent to entertain the same. A court that has no jurisdiction to entertain a petition for custody cannot pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a court in that country.*** *The party aggrieved by such removal, may seek any other remedy legally open to it. But no redress to such a party will be permissible before the court which finds that it has no jurisdiction to entertain the proceedings.*"
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> [Emphasis is ours]

22. In the present case, admittedly, the appellant and the respondent no.1 were married in Ukraine and subsequently divorced, in accordance with the laws of Ukraine. Both the children, including the minor child, whose custody is the subject matter of the present appeal, were born in Ukraine and are citizens thereof.

23. The appellant himself had filed an application before the Vinnytsia City Council, seeking visitation rights to the minor child. Accordingly, the appellant had submitted to the jurisdiction of the competent courts in Ukraine. The Vinnytsia City Council *vide* its Decision dated 15th July, 2021, granted the appellant supervised visitation to the minor child for a period of two months, followed by unsupervised visitation.

24. In ***Lahari Sakhamuri*** (supra), the Supreme Court was seized of a

similar case, wherein the contesting parties were permanent residents of the United States of America (US) and had been residing there since a long period of time. Both the children were born in the US and were US citizens. In the said case, divorce and custody proceedings were initiated in the US and interim orders were passed therein. Despite the interim orders, the wife brought the children to India and filed a petition before the Family Court in Hyderabad for custody. The argument of '*best interest of child*' was raised on behalf of the wife to invoke jurisdiction of the Family Court. The husband filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908, seeking dismissal of the guardianship petition for want of territorial jurisdiction, which was rejected. The High Court allowed the appeal filed by the husband observing that the minor children were not ordinary residents of Hyderabad in terms of Section 9(1) of the Guardians and Wards Act, 1890.

25. In these circumstances, the Supreme Court, taking into account the '*doctrine of comity of courts*', held that the exclusive jurisdiction with regard to the custody of the children would be of the competent courts in the US as the minor children were US citizens and custody proceedings had already been initiated there. The relevant observations are set out below:

> "*48. It is true that this Court has to keep in mind the best interest of the child as the paramount consideration.* ***The observations of the US court clearly show that principle of welfare of the children has been taken into consideration by the US court in passing of the order as it reiterates that both the parties are necessary for proper upbringing of the children and the ultimate decision of custody and guardianship of the two minor children will be taken by the US which has the exclusive jurisdiction to take the decision as the children happen to be US citizens*** *and further order has been passed on the respondent's emergency petition with special release in custody on 9-3-2018 permitting the respondent (Sobhan Kodali) to apply for*

> *US passports on behalf of the minor children without the appellant (Lahari Sakhamuri) being mother's consent.* ***The appellant (Lahari Sakhamuri) cannot disregard the proceedings instituted at her instance before the US court and she must participate in those proceedings by engaging solicitors of her choice to espouse her cause.***"
>
> [Emphasis is ours]

26. In our considered view, insofar as the issue of territorial jurisdiction is concerned, the present case is broadly covered by the judgment of the Supreme Court in ***Lahari Sakhamuri*** (supra).

27. In ***Lahari Sakhamuri*** (supra), the wife had relied upon the order of the Supreme Court in ***Jasmeet Kaur*** (supra), which has been relied upon by the appellant in the present case. However, ***Jasmeet Kaur*** (supra) was distinguished on the ground that since the minor child therein was born in India and the doctrine of '*best interest of child*' could have been adopted. In this regard, relevant observations in ***Lahari Sakhamuri*** (supra) are set out below:

> "***32.*** *The judgment relied upon by the learned counsel for the appellant of Jasmeet Kaur case [Jasmeet Kaur v. Navtej Singh, (2018) 4 SCC 295 : (2018) 3 SCC (Civ) 71] may not be of any assistance for the reason that it was* ***a case where one of the child was born in India which was one of the reason prevailed upon this Court to hold that principle of comity of courts or principle of forum convenience cannot determine the threshold bar of jurisdiction and when paramount consideration is the best interest of the child, it can be the subject-matter of final determination in proceedings and not under Order 7 Rule 11 CPC****. In our considered view, the application for custody of minor children filed at the instance of the appellant was rightly rejected by the High Court under the impugned judgment, in consequence thereof, no legal proceedings in reference to custody of the minor children remain pending in India.*"
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> [Emphasis is ours]

28. There is another aspect which weighed with the Family Court in holding that it does not have the territorial jurisdiction. The appellant, in

violation of the Decision passed by the competent authority in Ukraine had removed the minor child from Ukraine and brought him to India. Therefore, the Family Court has correctly observed that the presence of the minor child in India was a result of an illegal act of the appellant. Merely because the minor child has been living in Vasant Kunj, South-West District, Delhi with his mother (the respondent no.1), pursuant to custody being handed over to her in the *habeas corpus* petition *vide* order dated 28th July, 2023, it would not make the minor child an ordinary resident in terms of Section 9 of the Guardians and Wards Act, 1890. The appellant cannot be permitted to take advantage of his own wrong. In ***Elizabeth Dinshaw*** (supra), the Supreme Court has observed that a parent who illegally removes the child out of a country should not gain any advantage of his/her wrongdoing.

29. Even on merits, we do not think that it would be in the best interest of the minor child, who is currently five years old, to be separated from his mother (respondent no.1) and his elder sister, who are living in Vinnytsia, Ukraine. The Family Court while passing the impugned judgment had interacted with the minor child on 17th November, 2023, who had expressed his desire to go back to Ukraine with the respondent no.1 and stated that he did not wish to speak to the appellant and his family members.

30. Furthermore, it appears that the appellant does not have the financial wherewithal for the upkeep of the minor child. In this regard, it may be mentioned that this Court *vide* Order dated 29th January, 2024, had directed the appellant to deposit Rs.1,50,000/- towards litigation expenses. However, the appellant has expressed his inability to deposit the said amount on account of financial distress.

31. Therefore, in our considered view, both emotionally and financially, it

would not be in the best interest of the minor child to remain in India, separated from his mother and sister.

32. Our view appears to be in line with Article 9(1)[i] and Article 10(2)[ii] of the Convention on the Rights of the Child [in short, "CRC"].

32.1. *Inter alia,* as per Article 9(1), where parents are living separately, a decision has to be made [in this case, by the courts] as to the child's place of residence.

32.2. In consonance with Clause (2) of Article 10, the States parties are required to respect the right of the child and his/her parents to leave any country, including their own, and to enter their own country.

33. Consistent with the aforementioned articles, we are of the opinion that the usual place of residence of the child is Vinnytsia, Ukraine. The child, as noted hereinabove, seeks to remain in the company of the respondent/mother. The respondent/mother and the child, who are citizens of Ukraine, wish to return to their country. The appellant has been given rights of visitation by the concerned Ukrainian authorities.

34. Therefore, in our view, it is in the best interest of the child, notwithstanding the hostilities in other parts of the country, to remain in the company of the respondent/mother and his siblings as it provides the child, in the given circumstances, a safe environment.

35. With regard to the situation prevailing in Vinnytsia, Ukraine, in the Affidavit filed on behalf of the Ministry of External Affairs, Union of India, though it is stated that the situation in Ukraine remains uncertain and volatile in the wake of the war between Russia and Ukraine, insofar as Vinnytsia is concerned, the Affidavit refers to a news report dated 1st September, 2023, wherein it is stated that there was one Air Strike in

Vinnytsia sometime back, i.e., on 1st September, 2023. Further, as per the advisories issued by the Indian Embassy in Kyiv in October, 2022, "Indian Nationals" have been asked to leave Ukraine. However, these advisories would not be applicable to the respondent no.1 and the minor child as both of them are citizens of Ukraine.

36. Accordingly, taking a holistic view of the matter, we are not inclined to interfere with the impugned judgment. The present appeal is dismissed. Resultantly, the respondent no.1 shall be free to leave India with the minor child.

37. All pending applications stand disposed of.

AMIT BANSAL
(JUDGE)

RAJIV SHAKDHER
(JUDGE)

MARCH 19, 2024

[i] States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

[ii] A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.