Delhi High Court
Surjeet Singh vs State & Another on 27 April, 2012
Author: V. K. Jain

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on: 19.04.2012
Judgment pronounced on: 27.04.2012

+ W.P.(Crl.) 494/2010

SURJEET SINGH ..... Petitioner

versus

STATE & ANOTHER ..... Respondents

Advocates who appeared in this case:
For the Petitioner : Mr. Arunav Patnaik & Mr. D.B.Ray
For the Respondent : Mr. Ravinder Singh for R-2

CORAM:
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

This is a petition under Article 226 of the Constitution of India seeking issuance of a writ/order/direction in the nature of habeas corpus to the respondents to produce minor children viz. Jasmine Kaur and Vaani Kaur, daughters of the petitioner before this Court and giving their custody to him.

Respondent No.2 before this Court Mrs. Harpreet Kaur is the wife of the petitioner and their marriage was solemnized in India on 17.11.2003. The petitioner was a permanent resident of New Zealand prior to his marriage. In February, 2004, both of them came to live in New Zealand. Respondent No.2 also acquired permanent residency of New Zealand in the year 2006. The petitioner became a New Zealand citizen in March, 2008. Both the children were born in New Zealand and consequently acquired citizenship of that country.

The petitioner, respondent No.2 as well as both their children came to India on 6.3.2009. The petitioner had planned to return to New Zealand on 10.4.2009, whereas respondent No.2 was to return on 12.6.2009 along with both the children. It is alleged that respondent No.2 refused to return to New Zealand and also retained the custody of the children with her, in India. On 25.2.2010 the petitioner preferred a petition before the High Court of New Zealand under the provisions of Care of Children Act, 2004, for placing his minor children under the guardianship of the Court at New Zealand. Vide order dated 12.3.2010, the High Court of New Zealand directed that both the children be placed under the guardianship of that Court. Respondent No.2 was directed to ensure that the children were returned to the jurisdiction of New Zealand court within two weeks. Since respondent No.2 did not comply with the order passed by the New Zealand court, this petition has

been filed seeking production and custody of the children.

2. The petition has been opposed by respondent No.2. In her counter-affidavit she has alleged that she apprehends danger/threat to her life and lives of her children, if she goes to New Zealand. She also fears harassment by the petitioner, who is alleged to be violent by nature and guilty of treating her with utmost cruelty on numerous occasions. She has also submitted that the children are not in wrongful custody, she being their mother and having lawfully brought them to India along with the petitioner. It has been pointed out that this is not a case where children have been brought to India in disobedience of an order of the foreign court. It is further submitted that the children being girls of tender age and respondent No.2, being their mother, the respondent No.2 is in a better position to take care of them. Referring to the e-mails sent by the petitioner to her and the telephonic conversation between them, respondent No.2 has alleged that in the light of his behavior, the petitioner is not entitled to any relief from this Court.

3. It is an undisputed fact that both the children were brought to India jointly by the petitioner and respondent No.2. It is also not in dispute that when the petitioner left for New Zealand, respondent No.2 as well as children stayed back in India with his consent though they were scheduled to return to New Zealand on 12.6.2009 and their air-tickets for the travel had been booked in advance. The elder daughter viz. Jasmine Kaur was born on 16.9.2004 and the younger child Vaani Kaur was born on 3.1.2008. Both these children were less than 5 years old when they were brought to India on 6.3.2009. Even as on today, Jasmine Kaur is about 7 ½ years old, whereas Vaani Kaur is about 04 years old. Section 6 of Hindu Minority and Guardianship Act, 1956 which applies to the parties, to the extent it is relevant, provides that the custody of a minor child, who has not completed the age of 05 years shall ordinarily be with the mother. Hence, on the date these children were brought to India, respondent No.2 being their mother, was lawfully entitled to their custody. She continues to be entitled to the custody of Vaani Kaur, who is less than 05 years old. Section 13(2) of the Act provides that no person shall be entitled to the guardianship by virtue of provisions of this Act or of any law relating to guardianship in marriage among Hindus, if in the opinion of the Court, his or her guardianship will not be for the welfare of the minor. Though the natural guardians are enumerated in Section 6 the right is not absolute and the Court has to give paramount consideration to the welfare of the minor.

4. In Syed Saleenmuddin v. Dr. Rukhsana and Ors, (2001) 5 SCC 247, the Supreme Court dealing with a habeas corpus seeking custody of minor children, inter alia, observed as under:-

> "11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court."

In Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42, the Supreme Court quoted with approval the following statement of law in America with respect to the custody of a child in a habeas corpus matter:

> "Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.
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> An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.
>
> (emphasis supplied)"

With respect to the principle of comity of Courts, the Supreme Court in a recent decision in Ruchi Majoo v. Sanjeev Majoo (2011) 6 SCC 479, inter alia, observed and held as under:

> "47.....Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision.....

> 58. Proceedings in the nature of Habeas Corpus are summary in nature, where the legality of the detention of the alleged detente 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 extra ordinary 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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> 59. The Court may also direct repatriation of the minor child for the country from where he/she may have been removed by a parent or other person; as was directed by this Court in Ravi Chandran's & Shilpa Aggarwal's cases or refuse to do so as was the position in Sarita Sharma's case. What is important is that so long as the alleged detenue is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenue is within its territorial jurisdiction.
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> 63……. What needs to be examined is whether the High Court was right in relying upon the principle of comity of courts and dismissing the application. Our answer is in the negative. The reasons are not far to seek. The first and foremost of them being that `comity of courts' principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Decisions of this Court in Dhanwanti Joshi, and Sarita Sharma's cases, clearly support that proposition."

5. In an earlier decision, Sarita Sharma vs. Sushil Sharma (2000) 3 SCC 14, the parties were residing in USA along with their two minor children one aged seven years and the other aged three years. Proceedings for dissolution of marriage were initiated by the husband in a US court. In those proceedings, interim orders were passed from time to time with respect to the care and custody of the children and visitation right of the appellants. During the pendency of divorce proceedings, the petitioner-mother of the children took the children with her though in USA itself. The Associate Judge passed an order for putting children back in the care of the father and the mother was given only visitation right. On 7.5.1997, the mother Smt. Sarita picked up the children from the residence of the husband while exercising her visitation right. She was to bring the children back to the school next day morning, but she failed to do so. On the husband informing the police, a warrant of her arrest was issued. Smt. Sarita came to India with her children. On 12.6.1997, a divorce decree was passed by the Associate Judge and the husband was given sole custody of the children. Sarita was denied even the visitation right. The husband Sushil Sharma then filed a writ petition in this Court.

This Court rejected the contention of Sarita Sharma that the decree of divorce and order for custody of the children had been obtained by the husband by practising fraud on the Court and directed Sarita Sharma to restore the custody of the children to the husband. Their passports were also ordered to be handed over to him. Being aggrieved from the order passed by this Court, the wife Sarita approached the Supreme Court by way of a Special Leave Petition. It was contended by her that when she came to India with children, she was their natural guardian.

The question which arose before the Court was whether the custody of the children had become illegal as Sarita committed a breach of the order of the Marriage Court directing her not to remove children from the jurisdiction of the court without its permission. Another question which came up before the Supreme Court was as to whether her custody of the children became illegal after decree of divorce and order passed by American Court giving custody of children to her husband. Allowing the appeal of the mother and setting aside the order passed by this Court, the Supreme Court, inter alia, held as under:

> "6. 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 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 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, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held....."

In Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112, the appellant who was living with the husband in USA for ten months after her marriage to him on 11.6.1982, left the respondent on

20.4.1983 along with their child who at that time was 35 days old. There was litigation between the parties, both civil and criminal, in India as well as in USA for 14 years. The husband continued to live in USA while the wife along with her son was living in India. The husband filed a divorce case in USA and also sought custody of the child. A divorce decree was passed ex parte on 23.9.1983. On 20.2.1984, the appellant came to India along with the child. The respondent husband then obtained an order on 11.4.1984 whereby visitation rights were given to him. This was followed by another order whereby temporary custody was given to him. On 28.4.1986, the US Court passed an ex parte order granting permanent custody of the child to the respondent-husband. The appellant filed a petition in the Civil Court seeking declaration that her marriage with respondent was null and void, he being already married at that time. The respondent came to India and filed a Habeas Corpus petition seeking custody of the child. The writ petition was dismissed by the High Court. The husband, however, was given visitation rights. A petition under Section 13 of the Hindu Minority and Guardianship Act was filed by the appellant/mother, seeking permanent custody of the person and property of her son. The court appointed her the permanent and lawful guardian of the person and property of the child. The order of the trial court was upheld by the High Court. The matter was taken to Supreme Court, by the husband. The Supreme Court, while dismissing the appeal filed by the husband observed that he could have any other remedy open in law against the ex parte decree. The husband/respondent then filed a petition seeking custody of the child. The family court allowed the application filed by him and granted custody of the child to the respondent. The appeal filed by the mother/appellant against the order of the family court was dismissed for non-prosecution. An application filed by her to set aside the dismissal order, was also dismissed holding that she had no case, on merit, for retaining the custody of the child. One of the questions which fell for consideration before the Supreme Court in the appeal filed by the wife was as to whether her bringing the child to India contrary to the order of US Court, would have any bearing on the decision of the courts in India, while deciding about custody and welfare of the child. The Supreme Court held that it was the duty of the courts in the country to which a child is removed, to consider the question of the custody having regard to the welfare of the child. As observed by the Supreme Court in Ruchi Majoo (supra), in doing so, the order passed by the foreign court would yield to the welfare of the child and comity of Courts simply demands consideration of any such order issued by the foreign courts and not necessarily their enforcement.

6. It would, thus, be seen that in the case of Sarita Sharma (supra), the Supreme Court allowed the wife to have custody of the child, giving primacy to the welfare of the child, despite the fact that she had removed the children from the custody of the husband, in violation of the order passed by the Associate Judge, who had put them in custody of her husband and further order of the US Court, declaring that the sole custody of the children shall be with the husband. In Dhanwanti's case (supra), also, Supreme Court allowed the wife to retain custody of the child despite the order of US court, giving permanent custody of the child to the husband. In both these cases welfare of the child was held to be the paramount consideration in such matters. The court was clearly of the view that the principle of comity of Courts and the orders passed by the foreign courts were only one of the relevant factors to be taken by the courts into consideration, the prime consideration in all such cases being as to whether the welfare of the child lies with the husband or the wife. In the case before this court, admittedly, there was no order of New Zealand court giving custody of the children to the petitioner alone or to both, the husband and wife, at the time the children came to India. The

children were not brought to India at the back of their father or without his consent. The entire family came together to India. While leaving India, the petitioner agreed that respondent No.2 would join him later in New Zealand in the month of June along with children. Therefore, neither the children were brought to India in violation of a court's order nor can it be said that respondent No.2 was illegally withholding the children with her when they came to India or when the petitioner left for New Zealand.

7. It is not in dispute that the relations between the petitioner and respondent No.2 are far from cordial. This became evident when respondent No.2 did not return to New Zealand along with the children in June 2009 despite their return tickets having already been booked. In her counter affidavit, respondent No.2 has alleged cruelty and harassment at the hands of the petitioner. Some of the instances of cruelty and harassment alleged in the counter affidavit are as under:

> "13.04.2005 That on the 13th of April, 2005, the respondent called her mother to wish her on her birthday. She inquired about her father and learnt that he was attending the Sat Sang. On haring this, the petitioner got angry and started shouting at the respondent and also slapped her despite the assurance of petitioner's parents.
>
> Jan 2006 That in January, 2006 a friend of respondent was leaving for India and while returning from the New Zealand airport after seeing her off, the petitioner started shouting at the respondent for having talked about her parents at the airport.
>
> Oct 2007 That in October, 2007, respondent was expecting another baby and the petitioner insisted her to call her mother to New Zealnad. The brother of respondent No.2 asked her about the visa procedure and for this too she was slapped by the petitioner. The mother of respondent no.2 visited her in New Zealand on 3.1.2008 and on that date, her second daughter was born. During the stay of the respondent mother, the father of the petitioner abused the mother of respondent and blamed her that it was because of her, the respondent no.2 had a pre-mature baby and they had to spend money on her medical treatment.
>
> 11.03.2009 That on 11.3.2009, the parties came to Delhi and went to the house of the petitioner where they stayed till 8.4.2009 when the petitioner left for New Zealand. During this stay, the respondent and her minor children only once visited the house of her parents.
>
> 10.4.2009 That on 10.4.2009, the respondent came to her parents house for few days in May, 2009 her brother came to India from U.S.A. to find a suitable match for his marriage. The respondent's brother found a match and on 6.6.2009 a Roka ceremony was held. At, 9 a.m., the father of the respondent invited at phone the family of the petitioner but the petitioner had instructed not to attend the function. The ceremony was to be held at 11.30 a.m., followed by a lunch at 2.30 p.m. but with the intent to harass the respondent, the petitioner sent respondent late so that ceremony could be held at 1.30 p.m. and lunch at 5 p.m. the respondent was brought by her father in law

at 6 p.m. 08.06.2009 That on 8.6.2009, the father of the petitioner told the father of the respondent to give a phone call to the petitioner thanking him for allowing the respondent to attend the function. But the petitioner abused him on pone for an hour using filthy language.

09.06.2009 That on 9.6.2009, the uncle of respondent came to her in laws house to bring her to Rajinder Nagar, New Delhi, as the respondent was suspposed to leave for New Zealand on 10.6.2009, and after begging for four hours, the father of the petitioner allowed the respondent to go but after getting in writing four pages with her signatures and dates that is she is going on her own accord and she was not allowed to take her kids, Ms. Jasmine Kaur and Ms. Vaani Kaur as was instructed by the respondent. The purse of the respondent was also checked. She was allowed to go at 4 p.m. without her daughters aged 5 years and 1½ years old. She requested her father in law to give her kids as her younger daughter was on breast feed but he abused her. At 11 p.m. respondent and her uncle went to the house of the in-laws and the father in law started abusing them. He also gave a jolt to the turban of the uncle of the respondent and also slapped him. The shocked uncle came back quietly.

10.06.2009 That on 10.6.2009, the father in law of the respondent who had received instructions from the petitioner started using rough and filthy language and forcibly put off the jewellery of the respondent. At 1 p.m. the father of respondent having undergone so much trauma about these cruelties with the help of police freed respondent and her kids from her father in law and brought her back home wearing apparels only. Since then she is living with her parents and all her belongings are also kept by the in laws."

8. The allegations made in the counter affidavit have been denied by the petitioner in the rejoinder affidavit filed by him. We cannot examine the truthfulness or otherwise of all these allegations in this petition under Article 226 of the Constitution. We would, however, like to take note of certain facts which have a bearing on the issue of welfare of the minor children:

(a) Criminal M.A. No. 83/2010 was filed by respondent No.2 alleging therein that the petitioner made a telephone call to her on 23.5.2010 and made derogatory, abusing, threatening and uncivilized remarks not only against her but against her parents and relatives as well. A cassette of the tape-recorded telephonic conversation was also annexed to the application. The learned counsel representing the petitioner on 04.06.2010, on instructions from the petitioner, categorically denied that the petitioners had made any such telephonic call on 23.5.2010 at 11 a.m. or that he had used derogatory remarks against by respondent No.2 or her parents or relatives. Vide order dated 13.8.2010 we directed the petitioner to file an affidavit indicating as to whether the male voice in the recorded conversation was his voice or not. Another copy of the audio cassette was also handed over to his counsel. We also directed learned counsel for the petitioner to take instructions from him as to whether he was willing to come to India for giving his voice sample so that the same can be compared with male voice in the recorded cassette submitted by the respondent No.2. On 26.11.2010, we were informed that the petitioner was not willing to come to India for this purpose.

The cassette was then sent by us to CFSL, CBI, New Delhi for the purpose of examining as to whether the audio contained therein had been deterred/tampered with or not by insertion or deletion of pieces of conversation which is recorded therein. We received a report from CFSL, opining that the recording in the cassette was continuous and no form of tampering to the recording had been detected. Therefore, it cannot be said that the cassette filed by respondent No.2 has been interpolated in any manner. As regards the male voice in the cassette, it was subsequently conceded by the learned counsel for the petitioner, during the course of arguments before us that the voice was that of the petitioner. Thus, we have an admission of the petitioner that the voice in the cassette is his voice and we also have a report from the CFSL opining that there has been no tampering with the said cassette. It is also evident from the admission made by the learned counsel for the petitioner before us, during the course of arguments, that the petitioner, through his counsel, had made a false statement before us on 04.06.2010 when he stated that he had not made any derogatory remarks against respondent No.2 or her parents or her relatives. Some of the extracts from the English translation of the Hindi conversation recorded in the said cassette read as under:

> "Surjeet:-Where Jasmine is gone.
>
> Harpreet:-She went to Gurudwara.
>
> Surjeet:-You bastard are sitting in the house, Bhen ki lori sent her to Gurudwara, Haramjadi, Kutte ki bacchi I am trying on phone for two hours and not attending, your entire family is sons of bastard, Kanjaro, Bhenchodo live ashamed.
>
> Harpreet:-Really you have no manners.
>
> Surjeet:-Bhen ki lodi, kutti, Bhenchod, Randi you have no manners.
>
> Harpreet:-This is manners, this is manners, this is manners. Surjeet:-You will teach me manners, why you sit for fucking when your father shown manners and what manners shown by your father, your uncle bhen ka loda, son of dog what manners he shown to you.
>
> Harpreet:-good on you, Good on you. You have got these manners. I say one year has completed in one man. Surjeet:-You come to fuck your mother, your attraction has finished and you again coming for fucking sister. You and your father are very bastards and he was not feeling ashamed while disconnecting phone. And on next day when I made phone call he called police then he was not ashamed.
>
> Harpreet:-Your father not ashamed when took out my jewellery and not ashamed while naked her daughter in law. Surjeet:-Kutti ki bacchi, Harm ki aulad, Benchod, your father was not ashamed.
>
> Harpreet:- Your parents are not ashamed when they gives filthy abusing.

Surjeet:-Call your brother, Bhen ke lode in my front, Bhenchod has died.

Harpreet:-You, You are a impossible person. Surjeet:-Tere maa ki chut, Bhenki lodi, callyour father I will talk with him, call that Bhenchod if he is son of only a man. Call your brother and father so that I can talk with them.

xx xx xx xx xx xx xx xx xx Surjeet:-Your uncle Randwa, Behnchod says me that my wife has lost attraction for me and he was putting penis for giving, you were sitting for fucking by your uncle. Harpreet:-Be ashamed, how can a person can tell all these for his wife and what compromise will be made by him, what is your aim.

Surjeet:-Bhenki Lodi, talk with me on phone today, come in front of me I fuck your mother.

Harpreet:-Very good, give more abusing except that what you know and learnt and I was telling for long time what type of you and know this person very well.

xx xx xx xx xx xx xx xx xx Surjeet:-He will fuck his daughter after going in house.

xx xx xx xx xx xx xx xx xx Surjeet:-Your father was bastard since first day and use to say I demand for dowry.

Harpreet:-Whether you have married with me or my father. Tell me from whom you married.

Surjeet:-Haram ki aulad, call your Benchod father.

xx xx xx xx xx xx xx xx xx Surjeet:-I say that you are daughter of bastard and not daughter of your father and you will be daughter of bastard if you not tell that you have to live with me after marriage. You should come her along with children. Come here and why are escaping from situation and responsibility.

xx xx xx xx xx xx xx xx xx Harpreet:-I have allowed my children to talk with you but how can allow a father who talks with children by giving abusing.

Surjeet:-The person will be son of dog who will sent his sister for fucking again and why you not told before the court that you want to live with me and why told lie.

xx xx xx xx xx xx xx xx xx Surjeet:-Kutte ki bacchi, haramjadi, Ullu ki pathi."

(b) The petitioner has been sending messages to respondent No.2 and to say the least, the expressions used in some of these SMSs cannot be said to be parliamentary and do not behove of an educated person like him. One SMS sent by the petitioner to respondent No.2 reads as under:-

> "Is it your status'O' you mean character bastard father, you have given these bad teachings to your daughter that she lost her attraction towards her husband & you will search new husband for your daughter.

9. Having considered the matter and heard the learned counsel for the parties at considerable length, we are of the opinion that for the reasons stated herein below, it could not be in the interest of the minor children, to sent them to New Zealand.

i) Both the children are minor girls, one aged about seven years and the other aged about four years and hence both of them need constant company of their mother. If we direct the respondent No.2 to take the children to New Zealand and live with the petitioner, considering the behavior of the petitioner as is reflected in the tape-recorded conversation, it will not be safe for respondent No.2 to live with the petitioner in New Zealand. The petitioner is likely to cause mental as well as physical cruelty to respondent No.2 if she lives with him. If the petitioner misbehaves with respondent No.2 in the presence of these minor girls, it is bound to have a damaging and ever-lasting negative impact on them and make them constantly worry about their safety and the safety and welfare of their mother. The cruelty with respondent No.2 is likely to cause trauma and distress not only to her, but also to her children.

ii) If we give custody of the children to the petitioner, that would not be in the interest of these girls who need constant care, attention, devotion and love from their mother. Of course, it cannot be disputed that the children need the company of the father as well, but if a choice has to be made between the father and the mother, we are of the firm view that in the facts and circumstances of the case, the welfare of the children lies in being with the mother rather than being with the father.

iii) As far as the younger daughter Vaani's care is concerned, she being less than five years old, respondent No.2 continues to be her natural guardian in terms of Hindu Minority and Guardianship Act, 1956 and it would not be in the interest of the children to separate them from each other. Even the children would not like to part with the company of each other, even if it is at the cost of losing the company of their father.

iv) Both the children are now in India for the last almost three years and are receiving education in Delhi. It will not be in their interest to discontinue their studies abruptly and join some school in New Zealand, since the education received by them in India is not likely to be recognized by the schools in New Zealand.

v) Section 3(3) of Domestic Violence Act, 1995 (New Zealand) reads as under:-

> "3 Meaning of domestic violence:
>
> (1) In this Act, domestic violence , in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.

(2) In this section, violence means--

(a) Physical abuse:

(b) Sexual abuse:

(c) Psychological abuse, including, but not limited to,--

(i) Intimidation:

(ii) Harassment:

(iii) Damage to property:

(iv) Threats of physical abuse, sexual abuse, or psy- chological abuse:

(v) In relation to a child, abuse of the kind set out in subsection (3) of this section.

(3) Without limiting subsection (2)(c), a person psychologically abuses a child if that person--

(a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or

(b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;--

but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse."

Considering the behavior of the petitioner as is reflected in the tape-recorded conversation referred hereinabove, if the petitioner physically or mentally abuses respondent No.2, which we feel he is likely to do considering his past behavior, and such an act on the part of the petitioner is witnessed by the children, this would amount to psychologically abusing the children under the laws of New Zealand and it would not be appropriate for us to pass an order which is likely to result in the children being psychologically abused by the petitioner.

vi) On 19.4.2012, we interacted with the children in our chambers in the presence of the learned counsel for the parties, to ascertain whether they wanted to live in India or to go to New Zealand. Both the children clearly stated that they would like to stay in India with their mother even if it is at the cost of being deprived of the company of their father. Both the children, therefore, have clearly

expressed a disinclination to go to New Zealand to their father.

10. Having given due regard to the order passed by the New Zealand Court directing the respondent No.2 to place both the children in its custody, we are of the view that the relief sought in this petition should not be granted since it will not be in the interest of the children to send them back to New Zealand. The welfare of the minor is the paramount consideration, even in a case involving principle of comity of courts.

11. During the course of arguments, learned counsel for the petitioner placed reliance upon the decisions of the Supreme Court in V. Ravi Chandran v. Union of India and Ors (2010) 1 SCC 174 and Shilpa Aggarwal vs. Aviral Mittal (2010) 1 SCC 591. In V. Ravi Chandran (supra), the Supreme Court was dealing with a Habeas Corpus petition filed directly before it under Article 32 of the Constitution. In that case, respondent No.6 before the Supreme Court had approached New York State Supreme Court, for divorce and dissolution of marriage. A consent order governing issue of custody and guardianship of minor child Adithya was passed by the court on 18.4.2005, granting joint custody of the child to the petitioner and respondent No.6. Both of them consented to the order giving joint custody of the child to them. The marriage between them was dissolved on 8.9.2005. The order pertaining to the custody of the child was incorporated in that order. With the consent of the parties, the order was passed by the family court of State of New York on 18.6.2007, ordering that the parties shall share joint legal and physical custody of the minor child. Some other directions were also given in that order. On 28.6.07, respondent No.6 brought the minor child to India informing the petitioner that she would be residing with her parents in Chennai. On 8.8.2007, the petitioner filed a petition before the family court of the State of New York, for modification and alleging violation of the custody order, by respondent no.6. The Court passed an order giving temporary sole custody of the child to the petitioner and respondent no.6 was directed to immediately return minor child and his passport to the petitioner. The family court of the State of New York also issued Child-abuse Non- bailable warrant against respondent No.6. It was in this backdrop that the Supreme court, directed respondent No.6 to take the child to United States of America as per the consent order dated 18.6.2007 passed by the family court of the State of New York till such time any further order was passed by that Court. Certain directions with respect to travelling expenses of respondent No.6 and the child as well as for making arrangements for residence of respondent No.6 in the USA were also given by the court. In the course of judgment, Supreme Court, inter alia, observed as under:

> "29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention to the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including

> stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case."

The Supreme Court took note of the fact that keeping in view the welfare and happiness of the child and in his best interests, the parties had obtained a series of consent orders concerning his custody/parenting rights, maintenance etc from the competent court of jurisdiction in USA. The court also found that there was nothing on record which may even remotely suggest that it would be harmful to the child to be returned to USA. However, in the present case, the children have not been brought to India in violation of any order passed by a court at New Zealand. The children came to India with their parents and with the consent of both of them. No order with respect to the custody of the children was passed by the Court at New Zealand with the consent of the parties. In the case of V. Ravi Chandran (supra), there was nothing to even remotely suggest that it would be harmful to the child to be returned to USA. On the other hand, there is ample material before this Court which clearly suggests that it would be harmful not only for respondent No.2 but also for the children if they are sent to New Zealand. The facts of this case are, therefore, clearly distinguishable from the facts in V. Ravi Chandran (supra).

In Shilpa Aggarwal (supra), following some disagreement between the parties, the appellant before the Supreme Court came to India on 12.9.2008, but returned on 14.10.2008. The appellant was supposed to join him in his family at New Delhi at his arrival in to India but she chose not to do so. Both of them were supposed to leave for U.K. 9.11.2008, but, the appellant got their tickets cancelled on 7.11.2008 and remained behind in India. The respondent husband thereupon started proceedings before the High Court of Justice, Family Division, U.K. on 25.11.2008, for an order that the minor child be made ward of the court and for a direction to the appellant to return the minor child to the jurisdiction of the said court. On the application of the husband, the High Court of Justice, Family Division, U.K. vide order 26.11.2008 directed the appellant to return the minor child to the jurisdiction of the court. A further direction was given for the passport and travelling documents of the minor child to be handed over to the Solicitor of respondent No.1. This Court directed the appellant before the Supreme Court to take the child to England and join proceedings failing which the child was to be handed over to the husband to be taken of England as a measure of interim custody, and thereafter, it was for the courts of England and Wales to determine which parent would be best suited to have the custody of child. Finding no fault with the order of this Court, the appeal filed by the wife was dismissed by the Supreme Court. It would be pertinent to take note of the fact that in the case of Shilpa Aggarwal (supra), there was nothing before the court to even suggest that the husband was likely to cause physical or mental cruelty to his wife, and therefore, it would be in the interest of the child to send him back to U.K. On the other hand, in the case before this Court, the conduct of the petitioner as reflected in the tape- recorded conversation filed by respondent No.2 in the Court, clearly indicates that it would not be in the interest of the minor daughters of the parties to sent them to New Zealand, with or without respondent No.2 accompanying them. If these girls are sent to New Zealand, there is all likelihood of respondent No.2 being tortured mentally and/or physically by the petitioner and such torture being witnessed by the

children which, in turn, is bound to have an adverse impact on them thereby amounting to their psychological abuse in terms of the laws applicable in New Zealand.

12. For the reasons stated hereinabove, we are of the view that it is not a fit case for exercising our extraordinary jurisdiction under Article 226 of the Constitution by directing respondent No.2 to either return to New Zealand along with children or to give custody of the children to the petitioner. It would, however, be open to the petitioner, if he so desires, to apply to the appropriate court in India seeking custody of the children.

However, in order to ensure that the petitioner is not deprived of his legitimate right to be in the company of his children, whenever he visits India, we direct that he will be entitled to visit after advance intimation, the house where the respondent No.2 is residing at that time with the children and be in the company of the children for two hours during day time, on every Saturday, Sunday and school holiday. While visiting the house of respondent No.2 in India, the petitioner will be alone and will not misbehave with her or any member of her family in any manner and will conduct himself in a dignified and appropriate manner. If the petitioner fails to do so, it would be open to respondent No.2 to refuse entry to the petitioner in her house. If the petitioner while at the house of respondent No.2 in India, conducts himself appropriately, he will be entitled to a peaceful company of his children uninterrupted by respondent No.2 or any member of her family in terms of this order.

The writ petition stands disposed of accordingly. In the facts and circumstances of the case, there shall be no order as to costs.

V.K.JAIN, J BADAR DURREZ AHMED, J APRIL 27, 2012 'raj'