

Cross border removal of children from lawful custody

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OF 1.2 billion Indians, about 30 million live in 180 countries abroad. This migration harbours cross-border matrimonial relationships whose offspring live in foreign abodes but connect with Indian soil through their parent(s). Their broken multi-jurisdictional matrimonial relationships lead to removal of children to India or foreign jurisdictions in violation of court custody orders or infringement of the parental rights of the aggrieved parent.

Sadly, India does not define or recognise inter-parental child removal as an offence under any statutory law in India, even though this malaise is a frequent phenomenon in daily lives of migrant Indians. As a corollary, remedies in law for effective relief are difficult to secure or achieve.

Happily, by a communication of June 22, 2016, the Ministry of Women and Child Development had uploaded on its website, a proposal to enact a draft of The Civil Aspects of International Child Abduction Bill, 2016, considering that before accession to the Hague Convention, it is imperative to have an enabling legislation in India to give teeth to the provisions of the Convention in India. The draft Bill designates a Central Authority and lays down a procedure for ensuring return of removed children as also seeking return of children wrongfully removed to and from India. The said draft Bill was prepared following a reference made by the Punjab and Haryana High Court to the Law Commission of India as the Ministry of Women and Child Development to examine the issue and thereafter consider whether recommendations should be made for enacting a suitable law on the subject and for signing the Hague Convention.

Justice Rajive Bhalla had made this reference when despite all efforts made by the author as amicus curiae and the CBI, a minor child remained untraceable after she was removed from the de jure custody of the Court and taken abroad by misusing an interim order of 2006. Taking on record a detailed report submitted by the author as amicus curiae, the Court had observed



in its order that for want to the Indian Government acceding to the Hague Convention or enacting a domestic law, children would continue to be spirited away from and to India, with Courts and authorities "standing by in despair".

On 3 February 2017, The Ministry of Women and Child Development in a consultation of all stakeholders for reconsidering India's refusal to accede to the Hague Convention on Civil Aspects of International Child Abduction, has decided that the Chandigarh Judicial Academy along with the NRI Commission of Punjab will furnish a report in four months after examining in detail the legal issues involved by taking all viewpoints into account including those of suffering women facing domestic violence abroad. Reportedly, the academy has recommended constitution of a multimember Committee consisting of Hon'ble Judges and non-judicial members from various Government institutions. Now, the need of the hour is to ponder and not procrastinate. The principal focus should be on resolving modes and means of securing the best interest and the welfare of the child and not diverting pivotal attention to gender sufferance.

In this context, the necessity of developing a jurisprudence of mandatory conciliation and mediation methods inbuilt in Court procedures for adju-

dication of domestic relations should be the center of attention.

The Swiss Federal Act on International Child Abduction and the Japanese Act for implementation of the Convention are extremely beneficial role models to emulate. Closer home, even Pakistan and Sri Lanka who are signatories to the Convention follow simple procedures which are child centric. The proposed Indian legislation can thus look at amicable resolution by mandatory conciliation and mediation procedures with judicial intervention to achieve immediate voluntary return of children.

The Law Commission suggests the terminology of "Protection of Children (Inter country Removal and Retention) Bill, 2016". To ponder over it, the consultative thought process in motion, must extend beyond Government representatives.

Unless view points of family law practitioners, child psychologists, mediators and representative stakeholders of aggrieved parents associations are considered, only one side of the coin will be visible.

Women get myriad protection under statutory provisions of the Indian Penal Code, Protection of Women from Domestic Violence Act, Criminal Procedure Code, Marriage / Dowry Laws and by civil remedies of injunctions. Importing such statutory gender protections in a child welfare law will

tilt the scales. The best interest of the child will become subservient.

Till the above process is completed, the much needed practice directions have emerged in the celebrated decision of the Supreme Court in *Surya Vadanam v. State of Tamil Nadu* (JT 2015 (3) SC 85). This watershed verdict rendered on February 27, 2015 by Justices Madan B. Lokur and U. U. Lalit laid down salutary principles as follows:

The Principle of Comity of Courts and Nations must be respected and the best interest/ welfare of the child should apply in such cases.

The Principle of "first strike", i.e., whichever court is seized of the matter first, ought to have prerogative of jurisdiction in adjudicating the welfare of the child. The Rule of Comity of Courts should not be jettisoned except for compelling special reasons to be recorded in writing by a domestic court.

Interlocutory orders of foreign courts of competent jurisdiction regarding child custody must be respected by domestic courts.

An elaborate or summary enquiry by local courts when there is a pre-existing order of a competent foreign court must be based on reasons and not ordered as routine when a local court is seized of a child custody litigation.

The nature and effect of a foreign court order, reasons for repatriation, moral, physical, social, cultural or psychological harm to the child, harm to the parent in the foreign country and alacrity in moving a concerned foreign court must be considered before ordering return of a child to a foreign court.

The above decision has as of now, set at rest, a five decade string of precedents laid down by courts in India from time to time to evolve a consistent approach in multi-jurisdictional child custody disputes.

India's accession to the Hague Convention would resolve the issue of inter-country parental child removal since it is based on the principle of reverting the situation to status quo ante and on the principle that the removed child ought to be promptly returned to his or her country of habitual residence to enable a Court of that country to examine the merits of the custody dispute and thereupon award care and control in the child's best interest.