

Ritika Sharan Vs Sujoy Ghosh

Court: Supreme Court Of India

Date of Decision: Oct. 28, 2020

Acts Referred: Constitution Of India, 1950 " Article 142

Hindu Marriage Act, 1955 " Section 13(1)(ia), 26

Protection Of Women From Domestic Violence Act 2005 " Section 12

Citation: (2020) 10 JT 236 : (2020) 12 Scale 442

Hon'ble Judges: Dr. Dhananjaya Y Chandrachud, J; Indu Malhotra, J; Indira Banerjee, J

Bench: Full Bench

Advocate: Meenakshi Arora, Shoeb Alam, D.S. Parmar, Abha R. Sharma, Harshad V. Hameed

Final Decision: Disposed Of

Judgement

Dr. Dhananjaya Y Chandrachud, J

1 These appeals arise from a judgment dated 11 July 2019 of a Single Judge of the High Court of Karnataka.

2 The appellant and the respondent got married on 4 February 2009. Their child, Sattik, was born on 9 May 2013. There are

serious differences between the spouses and they have been living apart since 2016. The appellant submits that she has been

compelled to leave the matrimonial home due to domestic violence and abuse. The appellant instituted a petition on 6 October

2016, under Section 13(1)(i-a) of the Hindu Marriage Act 1955 seeking a decree for divorce on the ground of cruelty. The

divorce proceedings are pending before the Family Court, Bengaluru (MC No. 4484 of 2016). The appellant also instituted an

application under Section 12 of the Protection of Women from Domestic Violence Act 2005, which is pending in the Court of

the Metropolitan Magistrate at Bengaluru (Crl. Misc. No. 228 of 2016). The appellant is in the employment of Nike Global

Trading since 2011 and has been posted in Singapore in September 2017.

3 The appellant filed IA No. 3 in July 2017 in the proceedings before the Family Court in MC No. 4484 of 2016, seeking a

direction to the respondent to handover the passport of the child. The appellant claims that she sought the child's passport on

the ground that prior to her relocation in September 2017, she was required to travel for short durations outside India (where she

was then based) and found it convenient to take the child with her. The respondent opposed the grant of relief and filed an interim

application, IA No. 4, [IA No. 4 of 2017 in MA 4484/2016] seeking an injunction against the appellant from taking the child out

of Bengaluru. On the same day, the respondent had also filed IA No. 5 [IA No. 5 of 2017 in MA 4484/2016] and sought interim

custody and visitation rights so as to enable him to meet the child. The appellant opposed IA No. 4 and IA No. 5 filed by the

respondent, alleging that the respondent was abusive, violent and suffers from a psychiatric disorder as a result of which, he

cannot be granted the custody of the child.

4 By an order dated 4 January 2018, the Family Court dismissed IA No. 3 filed by the appellant for the child's passport, and

allowed IA No. 4 of the respondent, restraining the appellant from taking the child out of Bengaluru. The Family Court granted

this relief on the basis that if the child is moved out of Bengaluru, it would lose jurisdiction over the child. The appellant

instituted two writ proceedings – Writ Petition No. 9528 of 2018 (GM-FC) and Writ Petition No. 11520 of 2018 before the

High Court to challenge the order dated 4 January 2018 of the Family Court in IA Nos. 3 and 4.

5 On 1 March 2018, the Family Court passed an order in IA No. 5 filed by the respondent seeking interim custody and visitation

rights and directed the appellant or her parents (who had moved from NOIDA to Bengaluru to help the appellant with the child) to

produce the child before the Mediation Centre on every third Saturday, at 11:00 am to allow for visitation by the respondent till

5:00 pm.

6 On 9 July 2018, a Single Judge of the High Court in the appellant's Writ Petition No. 9528 of 2018 (GM-FC) and Writ

Petition No. 11520 of 2018, in an interim order, noted that the minor child was in the custody of the maternal grand-parents (who

are permanent residents of AWHO Colony, Greater Noida-201310). The High Court noted that while the appellant resides in

Singapore, the respondent was temporarily residing in Ireland. The order of the Family Court dated 1 March 2018, restraining the

appellant from removing the child from Bengaluru was stayed by the High Court, subject to the child being produced on every

Saturday before the Bengaluru Mediation Centre in terms of the order of the Family Court.

7 While these writ petitions were pending, in November 2018, the appellant filed an application (IA No. 11) in the proceedings in

MC No. 4484 of 2016 before the Family Court under Section 26 of the Hindu Marriage Act 1955 to allow the child to travel to

Singapore during his Christmas vacations, commencing on 14 December 2018 and ending on 2 January 2019. The appellant also

filed IA No. 123 to direct the respondent to submit the passport of the child to the Family Court. By an order dated 20 November

2018, the appellant was permitted to take the child to Singapore for the Christmas vacation and the respondent was directed to

submit the passport of the child before the Family Court, to be kept in the safe custody of the Family Court. The respondent

assailed this order before the High Court in Writ Petition No. 53079 and 53687 of 2018 (GM-FC). By the time the proceedings

came up before the High Court on 18 February 2019, the relief which had been granted by the Family Court allowing the appellant

to take the child to Singapore over Christmas was rendered infructuous since the appellant was not able to take the child due to

the pending proceedings. With respect to the direction for the submission of the passport of the child, the High Court noted that

the Family Court had not considered the objections of the respondent to this direction and the appropriate remedy for the

respondent would be to file for a review of the Family Court's order dated 20 November 2018.

8 Eventually, on 11 July 2019, the Single Judge of the High Court dismissed the writ petitions instituted by the appellant, [Writ

Petition No. 9528/2018 and 11520/2018 (GM-FC)] challenging the validity of the order of the Family Court dated 4 January

2018 restraining her from taking the child out of Bengaluru.

9 Assailing the judgment of the High Court, Ms Meenakshi Arora, learned Senior Counsel submits that:

(i) There is a manifest error on the part of the Family Court in presuming that once the minor child accompanies his mother to

Singapore it would lose jurisdiction;

(ii) The issue before the Family Court did not pertain to the permanent custody of the child;

(iii) The child has been in the custody of the appellant since his birth;

(iv) The appellant sought permission to take the child with her to Singapore, where she has now been relocated by her employer.

The appellant does not seek to do so on a permanent basis since the move is only for the period during which she is posted in

Singapore;

(v) The paramount objective must be to ensure the welfare of the child. The child has been in the care of the appellant since his

birth and the parents of the appellant shifted from NOIDA to Bengaluru to help her. The appellant was even ready and willing to

bring the child on every third Saturday, for grant of visitation to the respondent as directed by the Family Court, should this be so

ordered and directed by this Court; and

(vi) The appellant and her son hold Indian passports and the appellant is willing to furnish such an undertaking, as this Court may

direct, to ensure that the child is not placed outside the control and jurisdiction of the Family Court, Bengaluru. Ms Arora has

urged that the appellant was constrained to move out of the jointly owned residential apartment due to the violent and abusive

conduct of the respondent and the reason for her to seek the permission of this Court to take the child to Singapore is to enable

her to look after the child. It has been submitted that the employer of the appellant is providing assistance towards the expenditure

for the education of the child, who would be admitted to the Global Indian International School at Singapore.

10 Opposing the above submissions, Mr Harshad V Hameed, learned counsel appearing on behalf of the respondent submitted

that:

(i) The appellant has made an attempt to shift the goal-posts from time to time. The pleading before the High Court was

that the child has been in the custody of the maternal grand-parents while a contradictory plea was now being taken up before this

Court that he has been in the care and custody of the appellant;

(ii) The only application that was filed by the appellant in the Family court - IA No. 3 of 2017 dated 21 July 2017 was for the return of

the passport of the child; the basis of which was occasional travel overseas;

(iii) The appellant has not instituted a substantive proceeding claiming guardianship of the child. On the other hand, the respondent has filed for guardianship of the child before the Family Court, Bengaluru;

(iv) Pursuant to the order dated 1 March 2018 of the Family Court, the child has been living in Bengaluru with the child's

maternal grand-parents. The appellant has not assailed the validity of this order; and

(v) If the appellant were to take the child to Singapore, it would not be possible to ensure that she will not relocate elsewhere and

take the child with her, effectively placing the child outside the jurisdiction of the Indian courts.

11 During the course of these proceedings, parties had on the suggestion of the Court, agreed to explore the possibility of

resolving their disputes through mediation. Mediation proceedings were conducted by Ms Laila T Ollapally under the auspices of

the Bengaluru Mediation Centre. The mediator held extensive sittings stretching over twenty seven hours. The mediation has not

resulted in a settlement. This Court must, however, acknowledge the efforts which have been made by Ms Laila T Ollapally, and

records its appreciation. Though the parties have not been able to resolve their disputes, we can only hope that with the facilitative

assistance of the Mediator, each of them has appreciated better the perspective of the other. Since the hearings during the

COVID-19 pandemic have been conducted before this Court through video-conferencing, the Court has had the opportunity to

interact with the appellant and the respondent as well as their child, Sattik, who is now about 7 years old.

12 The narration of facts and the record before this Court indicate that after lodging a petition for divorce before the Family

Court, the appellant sought the passport of the child. It was thereafter, that the respondent filed an application for restraining the

appellant from taking the child out of Bengaluru. IA No. 4 of the respondent was allowed, and IA No. 3 for the return of the

passport to the appellant-mother was rejected. Close on the heels of the above order, which was passed on 4 January 2018, the

Family Court by its order dated 1 March 2018 noted that the child was presently residing with the parents of the appellant and

directed the appellant "or her parents" to produce the child before the Mediation Centre for access on every third Saturday at

11:00 am, and the respondent was directed to return the child to the appellant "or her parents" by 5:00 pm.

13 On 21 July 2017, through IA No.3, the appellant had stated on affidavit before the Family Court that the custody of the child,

who was then about 4 years of age, was with her and since she was required to travel out of India occasionally for work, the

passport may be handed over to her. She, in fact, stated that neither had the respondent any intention to seek the custody of the

child nor had he visited the child after the spouses parted ways. The fact that the child is in the care and custody of the appellant

was not denied by the respondent in his reply dated 29 July 2017. In July 2017, when the appellant sought the return of the

passport, she was based in India. The Court has been apprised of the fact that it was in September 2017 that the appellant had

relocated to Singapore. Ms Meenakshi Arora, learned Senior Counsel, stated before the Court that the appellant was given an

option by her employer to relocate to Singapore as a part of a restructuring exercise. Whatever be the reason underlying her

relocation to Singapore, it is evident from the material on record that the purpose of the appellant in doing so was not to place the

child outside the jurisdiction of Indian courts. Ever since the appellant and the respondent started living apart in 2016, the child

has been in the care and custody of the appellant, his mother. The fact that the parents of the appellant have moved to Bengaluru to

help their daughter, does not transfer the custody of the child, either as a matter of law or fact, from the appellant to the maternal

grand-parents. The record indicates that it was after the appellant sought the return of the passport on 21 July 2017, [IA No 3 of

2017] that the respondent moved an application restraining the appellant from removing the child outside Bengaluru [IA No 4 of

2017] and for the grant of custody and visitation rights on 29 July 2017 [IA No 5 of 2017].

14 The primary consideration that must weigh with the Court is the welfare of the child. The respondent has asserted in the course

of the submissions, that the child is in the custody of the parents of the appellant in Bengaluru and should remain with them.

Alternatively, he submitted that he would take charge of the child. While the parents of the appellant may have volunteered at least

temporarily to relocate from NOIDA to Bengaluru to help the appellant in looking after the child, we are clearly of the view that

the respondent cannot be heard to assert that the child must continue to remain in Bengaluru with the maternal grand-parents. For

the respondent to insist that the court should direct the continued presence of the child under the care of the maternal grand-

parents who have come to Bengaluru and stay in a rented accommodation obtained by the appellant, does not appear to be fair.

Nor is there sufficient material before the Court to indicate that the respondent is in a position to look after the child on his own,

by disturbing a position which has held the field since 2016. Before 2016, when the spouses were together, the child lived and

grew up in the care of both the parents. Since 2016, the appellant has taken the responsibility for the welfare of the child.

15 The child, Sattik, was born on 9 May 2013, following which the appellant and the respondent resided together with the child

until they parted ways in 2016. Since then, in any event, the appellant has been looking after the care and welfare of the child. That

she has done so with the assistance of her parents who have moved to Bengaluru, does not detract from her role and responsibility

as a mother. In fact, the order of the Family Court dated 1 March 2018, which has been adverted to earlier, indicates that on the

days when the respondent is to obtain visitation, it is the appellant or her parents who were to produce the child before the

Bengaluru Mediation Centre and it is the appellant or her parents to whom the child would be returned after the conclusion of

visitation. The fact that the child has been in the care of the appellant and her parents is also evident from the order of the High

Court dated 9 July 2018.

16 During the course of the interaction on the video-conferencing platform, Sattik indicated his desire to reside with his mother

in Singapore. While the child is attached to the respondent, he has indicated, in no uncertain terms, his desire to live with his

mother. The appellant is gainfully employed in Singapore and her desire that she should be allowed to take the child with her is

not an artifice. The appellant, as the mother of the child, has been continuously with the child since his birth, despite the demands

of her employment.

17 The child is likely to be admitted to the Global Indian International School in Singapore. Ms Meenakshi Arora, learned Senior

Counsel, has stated that the appellant would abide by the requirements entailed in travelling between India and Singapore during

the pandemic. Learned Senior Counsel stated that on arrival in Singapore, at the present time, the appellant and the child would be

required to spend 14 days together in an isolation facility. The Court has been apprised of the fact that the employers of the

appellant have informed her that they would facilitate the documentation for travel and relocation of the child with the appellant in

Singapore.

18 In matters such as the present, the welfare of the minor child is of paramount concern. The jurisdiction of this Court under

Article 142 of the Constitution is a facilitative constitutional instrument to advance substantive justice. In exercise of these

powers, we are of the view that the arrangement which has been arrived at during the pendency of the proceedings should be

modified so as to best subserve the interests of the child. The technicality of whether or not the appellant has challenged the

Family Court's order dated 1 March 2018 cannot obfuscate the core issue which is the welfare of the child. Allowing this

case to be lost in a maze of technicalities involving a formal challenge to the order, will eventually lead to the child staying in

Bengaluru with the maternal grandparents, while the mother is employed in Singapore. The child will lose a year of education in

Singapore, which is an additional reason for the exercise of the jurisdiction under Article 142. We have informed that Singapore

is Covid free and the child would be able to attend regular school and some on-line classes. Undoubtedly, the respondent, as the

father, is entitled to have adequate rights of access and visitation. A balance has to be drawn so as to ensure that in a situation

where the parents are in a conflict, the child has a sense of security. The interests of the child are best subserved by ensuring that

both the parents have a presence in his upbringing.

19 Ms Meenakshi Arora has submitted that the respondent has made no contribution for the maintenance of the child. On the

other hand, the respondent in the course of his submissions, stated that he is bearing the expenses of servicing the loan which was

undertaken by the parties for obtaining a residential flat in joint names. Be that as it may, we are of the view that the interests of

the child require that the appellant be allowed to take the child with her to Singapore, where the appellant resides. At the same

time, the ultimate directions that the Court issues must also address the apprehension of the respondent that the child should not

be placed outside the control and jurisdiction of the Family Court, Bengaluru. Adequate arrangements for access and visitation to

the respondent should be ensured.

20 For the above reasons, we allow the appeals, in terms of the following directions:

(i) The impugned judgment and order of the High Court dated 11 July 2019 is set aside;

(ii) The appellant is permitted to take the child, Sattik, with her to Singapore where she is employed and resides;

(iii) The appellant is permitted to make suitable arrangements to facilitate the travel to and admission of the child in a school in

Singapore;

(iv) The respondent shall, within a period of 48 hours from the receipt of this judgment, handover the passport of the child to the

appellant;

(v) The appellant shall be exclusively entitled to take necessary steps for renewing the passport of the child or, if required, for

obtaining a fresh passport in his name;

(vi) Should the appellant be required to relocate for employment outside Singapore, to any other country (except India)

necessitating the relocation of Sattik, she shall file a miscellaneous application before this Court seeking prior permission to do

so;

(vii) In order to facilitate the grant of access and visitation rights to the respondent, the following arrangement shall hold the field

in supersession of all previous orders of the Family Court and the High Court:

(a) The respondent would be at liberty to engage with the child on a suitable video-conferencing platform for one hour each on

every Saturday and Sunday and for five to ten minutes on other days;

(b) Should the respondent desire to travel to Singapore during the school vacations of Sattik, he would be entitled to have

visitation rights over half of the vacation between 10 am and 6 pm. He may meet the child on any other day subject to the mutual

convenience of the parties and the child;

(c) The appellant will ensure the presence of the child in Bengaluru during the course of the child's summer vacations in

2021 for a period of at least two weeks with prior intimation to the respondent and during the course of the visit, the respondent

shall be entitled to meet the child and/or take him out between 11:00 am and 7:00 pm;

(d) The appellant shall bring the child to India at least twice a year during which the respondent shall have access to and visitation

with the child on the terms set out in (c) above;

(e) The appellant shall file an undertaking before this Court to abide by the conditions imposed by this order. The undertaking

shall specifically provide that the appellant shall (i) not relocate the child to any other country, unless permitted by this Court; (ii)

ensure the presence of the child during the summer vacations of 2021 unless prevented by the travel restrictions imposed by the

government of either country; and (iii) furnish the contact details of the child in Singapore to the respondent. Clarified that (e)(i)

above shall not prevent the appellant from taking the child out for holidays outside Singapore. A copy of the undertaking shall be

placed on the record of the Family Court.

21 The above arrangement shall continue to govern, subject to the final orders as may be passed in the Guardianship proceedings

which have been, or may be instituted, by either of the parties.

22 The appeals are accordingly disposed of.

23 Pending application(s), if any, shall stand disposed of.