

D.K.C. Vs. K.C. and Others

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SooperKanoon Citation : sooperkanoon.com/1178027

Court : Delhi

Decided On : Jan-12-2016

Judge : Manmohan

Appeal No. : CONT.CAS(C) No. 72 of 2015 & CM APPL. No. 28160 of 2015

Appellant : D.K.C.

Respondent : K.C. and Others

Advocate for Def. : Ms. Malvika Rajokotia

Advocate for Pet/Ap. : Mr. D.N. Goburdhun

Judgement :

1. Present contempt petition has been filed alleging wilful disobedience of the order dated 1st October, 2014 passed by Principal Judge, Family Court in G.S. 11/14. It is the case of the petitioner-mother that respondent no. 1- father in violation of the consensual parenting plan accepted by the Guardianship Court vide aforesaid order, had taken the minor child to Malaysia on 31st December, 2014 even though he had undertaken that he would not take the minor child abroad till such time the divorce decree is passed by way of second motion under Section 13B(2) of the Hindu Marriage Act, 1955.

2. On 2nd February, 2015, learned Predecessor of this Court had issued a notice to respondent no. 1 returnable for 17th July, 2015. On 17th July, 2015, this Court

had passed the following order:-

"Prima facie this is a case of child abduction by the respondent-father, who is stated to be residing in Malaysia. Since the service report is still awaited, the respondent-father is permitted to be served upon deposit of process fee by way of e-mail and courier in addition to registered post. As the respondent-father is an Indian passport holder, the Ministry of External Affairs, Government of India is impleaded as a necessary and proper party because if the facts stated in the petition are correct, then this Court may be inclined to issue orders for cancellation of his passport.

Accordingly, let an amended memo of parties be filed within a period of one week.

Issue notice to the newly impleaded necessary and proper party through standing counsel for Union of India by registered post as well as dasti, returnable for 26th August, 2015."

3. On 26th August, 2015, learned counsel for respondent no.1 entered appearance and at her request she was given an opportunity to file a reply-affidavit within one week. Respondent no. 1 and the minor child were directed to be present in Court on the next date of hearing.

4. On 7th September, 2015, respondent no. 1 and the minor child appeared in Court. They were directed to deposit their passports with the Deputy Registrar (Appellate) of this Court and Ministry of External Affairs was directed to issue directions to FRRO that neither respondent no. 1 nor the minor child shall travel abroad till further orders. Thereafter at the insistence of the counsel, this Court met both the petitioner and respondent no. 1 as well as minor child. But as efforts to resolve the matter did not succeed, the matter was heard on merits.

5. Since the parties have levelled serious personal allegations against each other and insisted that the same be recorded, it is directed that in the order that is to be uploaded, initials of the parties would only be mentioned.

ARGUMENTS OF PETITIONER

6. Mr. D.N. Goburdhun, learned counsel for petitioner stated that on 1st October, 2014, respondent no. 1 had given a solemn undertaking to the Principal Judge, Family Court in Guardianship Case No. 11/2014, which had attained finality. According to him, as per the undertaking the custody of the minor child was to remain solely with the petitioner-mother and respondent no. 1-father could not have taken the minor child of seven years abroad at all.

7. He further stated that respondent no. 1 sought visitation of the minor child from 27th December, 2014 till 1st January, 2015 and he also sought minor's passport as an ID for flight journey to Goa. He contended that on 29th December, 2014, the respondent no. 1 surreptitiously purchased an air-ticket for Malaysia for the minor child without taking any prior consent of the petitioner and it was only by email dated 1st January, 2015, that he informed the petitioner that he had whisked away the child to Malaysia for good. He stated that respondent No. 1 ignored the petitioner's call on the 30th and even when he spoke to her on 31st, he did not inform her about taking the minor child to Malaysia. Mr. Goburdhun stated that petitioner immediately asked the respondent no. 1 to return the child and lodged a police complaint against the respondent no. 1 which has now been converted into an FIR No. 885/2015 under Section 363 IPC, PS Vasant Kunj. He stated that as of today respondent no. 1 is a criminal, and accused in a criminal court.

8. Mr. Goburdhun contended that respondent no.1 was not at all apologetic about his contemptuous behaviour. He stated that on the contrary respondent no. 1 was, in fact, boastful and triumphant about his act of contempt. According to him, the boastful and triumphant attitude of respondent no. 1 could be seen in the reply in which there was no bona-fide or genuine apology. He stated that respondent no. 1 is now justifying his act of contempt by weaving stories like that of Alice in Wonderland'.

9. Learned counsel for petitioner pointed out that respondent no. 1 had divorced his first wife and had a son from her. During the son's childhood/teenage or adult years, the respondent no. 1 had not visited the child at all. According to him, respondent no. 1 was not inclined either to bond with his son or play the role of a responsible father. He stated that consequently respondent no. 1 was not even

allowed overnight custody of the boy.

10. Mr. Goburdhun alleged that respondent no. 1 has weird sexual fantasies. According to him, respondent no. 1 used to press the throat of the petitioner almost choking her to death while having marital relations. He stated that respondent no. 1 was a sexual maniac who suffered from Paraphilia which is to have sexual obsession with an organ of a human.

11. He also stated that respondent no. 1 was an alcoholic and consumed more than moderate amount of liquor on daily basis. He pointed out that in Malaysia respondent no. 1 is registered at various clubs and bars like Sid's at Damansara WIP. According to him, respondent no. 1 exhibited all the physical and mental ailments of an alcoholic. He stated that respondent no. 1 used to get angry, shout, scream and break things when the petitioner or the minor child stopped him from drinking. He stated that respondent no. 1's physical health started to suffer so much from alcohol abuse that he urinated in his car one day.

12. He also stated that in December 2011, the respondent no. 1 and the family had gone to Singapore to open bank account and receive remuneration but there also he was so drunk that he lost the keys of the apartment and the petitioner had to spend the night in a shady motel used for prostitution.

13. Mr. Goburdhun stated that respondent no. 1 used to perform the absurd act of bathing naked with the minor girl child and when petitioner objected to it, it did not make any difference to him. He pointed out that this fact had also been stated in the Guardianship petition and this issue had also been raised before the counsellor who also said that this conduct was truly abhorrent.

14. Mr. Goburdhun stated that respondent no. 1's conduct of kissing his minor daughter on mouth was objected by the petitioner but he paid no heed, stating that this is their family tradition. He further stated that even the counsellor had categorically said that it was not appropriate behaviour ?.

15. Mr. Goburdhun stated that respondent no. 1 had now put false accusation on the petitioner's character.

RESPONDENT NO. 1'S ARGUMENTS

16. On the other hand, Ms. Malvika Rajkotia, learned counsel for respondent no.1-father contended that it was the petitioner-mother who had indulged in child abduction inasmuch as it was the petitioner who had surreptitiously removed the minor child from her home of last seven years, where she was born.

17. She submitted that the custody arrangement arrived at by the parties was non-est as it was arrived at by the parents without consulting the minor child. In support of her submission, she relied upon the judgment of this Court in Soumitra Kumar Nahar Vs. Parul Nahar, 223 (2015) DLT 202 (DB) wherein it has been held that indubitably both father and mother have a crucial role to play in a child's life, but the Court cannot overlook the wishes of a child especially when the child is not gullible and does not get influenced by others and has her own decision making abilities.

18. She contended that respondent no.1's consent for the first motion petition was vitiated as his consent had been obtained by force by intimidating him with vicious pleadings and not allowing him to meet the minor child till he settled all financial aspects of the agreement. She pointed out that in the case of Surestha Devi Vs. Om Prakash (1991) 2 SCC 25, it has been held that consent to a mutual divorce could be withdrawn any time before passing of the divorce decree. Therefore, according to her, respondent no. 1-husband was entitled to withdraw his consent for divorce and to the settlement agreement, to which effect a suit for injunction and cancellation had been filed and was pending.

19. Ms. Rajkotia further submitted that the undertakings are inter-parties and, therefore, violation of the same does not constitute contempt. In support of her submission, she relied upon a judgment of the Supreme Court in Babu Ram Gupta Vs. Sudhir Bhasin and Anr., AIR 1979 SC 1528 wherein it has been held as under:-

6. Miss Seita Vaidialingam who argued this case before us with great ingenuity and persuasiveness submitted that even if the order of the High Court was void, it was not open to the appellant as a litigant to assume the role of a Judge and

unilaterally decide that the order of the High Court being non est he was not bound to obey the same. In other words, It was contended that he having himself filed an appeal before the Division Bench and thereby having invited the Court to pass a consent order which was agreed to by the appellant he could not by virtue of the rule of estoppel by judgment be heard to say that the appeal filed by the appellant himself being incompetent, the judgment was void, hence the appellant could disobey the same with impunity. In support of her submission, the under Counsel cited the cases of State of Uttar Pradesh v. Ratan Shukla MANU/UP/0103/1956 : AIR1956 All258 . Umrao Singh v. Man Singh and Ors. I. L. R. (1971) Del 44. Joseph F. Maggio v. Raymond Zeitz 92 L. Ed 476 and United States of America v. United Mine Workers of America 91 L. Ed. 884. While we do find considerable force in the argument of Miss Seita Vaidyalingam, counsel for the respondent we are of the opinion that the point is not free from difficulty and in the view that we have decided to take on the first point raised by counsel for the appellant, the second point does not fall for determination. We, therefore, refrain from going into this point and leave the matter to be decided in a more proper and suitable case.

7. Coming to the first point, the contention of Mr. Asthana was that there was no undertaking given by the appellant to the court at all. Our attention has not been drawn by counsel for the respondent to any application or affidavit filed by the appellant which contains an undertaking given by the appellant to hand over possession to the receiver appointed by the High Court by virtue of the impugned order. It is manifest that any person appearing before the Court can give an undertaking in two way: (1) that he files an application or an affidavit clearly setting out the undertaking given by him to Court, or (2) by a clear and express oral undertaking given by the contemner and incorporated by the court in its order. If any of these conditions are satisfied then a wilful breach of the undertaking would doubtless amount to an offence under the Act. Although the High Court observed that the consent order extracted above had been passed on the basis of various undertakings given by the contemner, we are unable to find any material on record which contains such undertakings. It seems to us that the High Court has construed the consent order itself and the directions contained therein as an implied undertaking given by the appellant. Here the High Court has undoubtedly committed an error of law. There is a clear cut distinction between a compromise

arrived at between the parties or a consent order passed by the court at the instance of the parties and a clear and categorical undertaking given by any of the parties. In the former, if there is violation of the compromise or the order no question of contempt of court arises, but the party has a right to enforce the order or the compromise by either executing the order or getting an injunction from the court. ?

20. Learned counsel for respondent no.1 stated that it was in Goa that the minor child expressed her deep unhappiness and revealed several facts about petitioner's state of mind that showed that she was psychologically unstable, cussed, obsessive and suffered from deluded righteousness. According to her, petitioner was very strict with her daughter and it was the absence of love and indulgence that had dried up the minor's child's love for her mother. She further stated that it was the petitioner's propensity to punish and not to indulge that had frightened the minor. She stated that the child's spiritedness was seen as insubordinate transgression and the child was meted out with disproportionate punishment that was abusive. According to her, this part of petitioner's character had been countered by respondent no. 1 when they were together but by herself, there was no respite for the child who was dreadfully unhappy.

21. Learned counsel for respondent no.1 emphasised that many parts of the petitioner's conduct after her meeting with a Swamy had begun to scare the child for example, her nightly ritual of Kali worship with her tongue hanging out.

22. Ms. Rajkotia stated that the respondent-father after hearing this was of the opinion that he needed to protect his child. She contended that a parent's responsibility to protect his child was a duty over and above any other duty and that is what respondent no. 1 did. She contended that respondent no. 1's act of taking the minor child back to Kuala Lumpur was not a premeditated act, but an instantaneous decision in the best interest of the child. She pointed out that respondent no. 1 had changed his own ticket to a different airline and booked two tickets from Goa to Kuala Lumpur on 29th December, 2014 at 11.15 p.m. and in doing so, he suffered a loss of Rs. 1.50 lacs. According to her, the act of taking the minor child to Malaysia should not be negatively inferred while deciding this

petition as even if respondent no.1 was in Delhi, the refusal of the child to be with her mother would not make the respondent no.1 liable for contempt.

23. She also contended that respondent no.1's act of taking the minor child to Malaysia was not wilful and consequently, did not constitute contempt. In support her submission, she relied upon a judgment of the Supreme Court in *M/s. Ashok Paper Kamgar Union and Ors. Vs. Dharam Godha and Ors.*, AIR 2004 SC 105 wherein it has been held as under:-

17. Section 2(b) of Contempt of Courts Act defines 'civil contempt' and it means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of undertaking given to a Court. 'Wilful' means an act or omission which is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say with bad purpose either to disobey or to disregard the law. It signifies a deliberate action done with evil intent or with a bad motive or purpose. Therefore, in order to constitute contempt the order of the Court must be of such a nature which is capable of execution by the person charged in normal circumstances. It should not require any extra ordinary effort nor should be dependent, either wholly or in part, upon any act or omission of a third party for its compliance. This has to be judged having regard to the facts and circumstances of each case..... ?

24. In any event, she stated that as the minor child had been brought back to the jurisdiction of this Court, the contempt stood discharged. In support of her submission, she relied upon the *Hadkinson Vs. Hadkinson*, [1952] 2 All ER 567, wherein according to her, it has been held that return of the child was adequate for discharge of contempt.

25. Ms. Rajkotia submitted that the equity is a part of contempt jurisdiction and equity part of contempt jurisdiction is *parens patriae*. She submitted that best interest of the child and *parens patriae* jurisdiction is not limited to family Courts and custody cases, but all pervasive to every Court in any case concerning a child in any manner. She further submitted that justice must be served at every point and in every case particularly, when the person seeking justice is a child who is

not represented in Court. She pointed out that the Supreme Court in the case of ABC Vs. State (NCT of Delhi), AIR 2015 SC 2569 has quoted with approval the Convention on the Rights of the Child in particular its Article 12 which reads as under:-

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

26. Learned counsel for respondent no.1 emphasised that the pleadings in the present case especially with regard to respondent no. 1's conduct were malodorous. According to her, the malodorous pleadings were vitiated by malice and coercion which would be apparent from the fact that petitioner had no objection to respondent No.1's custody of the child and allowed him to take her for a holiday to Goa. She submitted that in view of the nature of the pleadings, the present contempt petition should be dismissed. Ms. Rajkotia contended that the petitioner's only endeavour by making these allegations was to force a settlement of financial terms.

27. Ms. Rajkotia lastly stated that the petitioner's family is dysfunctional inasmuch as the petitioner stays with her mother and sister who are both single and the only engagement outside the immediate family is with Nani and Masi who are also single. She stated that India is not the minor's child home and it is Malaysia where she was born and brought up. She stated that the minor child is a permanent resident of Kuala Lumpur, Malaysia and she must return to her school in Malaysia at the earliest. She also stated that petitioner had not made any sincere attempt to repair her deeply damaged relationship with the minor child.

REJOINDER ON BEHALF OF PETITIONER

28. In rejoinder, Mr. Goburdhun submitted that the contempt jurisdiction is very limited and is confined to compliance of orders. According to him, in contempt proceedings the Court can neither supplement nor substitute the order which has attained finality. In support of his submission, he relied upon the judgments of the Supreme Court in *Prithawi Nath Ram, Vs. State of Jharkhand and Ors.*, (2004) 7 SCC 261 and *Director of Education, Uttaranchal and Ors. Vs. Ved Prakash Joshi and Ors.*, (2005) 6 SCC 98.

29. He further submitted that respondent No.1's suit for injunction and cancellation of settlement agreement was not maintainable in view of Order XXIII Rule 3A of the Code of Civil Procedure, 1908. According to him, there was also no document to be cancelled.

30. According to Mr. Goburdhun, the minor child was at the present moment suffering from Stockholm Syndrome which is a psychological phenomenon in which a hostage expresses empathy and sympathy and has positive feeling towards its captor, sometimes to the point of defending and identifying with the captor. He stated that these feelings are generally considered irrational in the light of danger or risk endured by the victim, who essentially mistakes a lack of abuse from the captor as an act of kindness.

31. Learned counsel for petitioner stated that in the present case as the respondent-father has poisoned the minor's mind against the petitioner-mother, the minor child should be taken out of the father's custody and even if that causes some problem that will get neutralised with passage of time. Consequently, he prays for a direction to return the minor child to petitioner's custody. In support of his prayer, he relied upon the judgments of the Supreme Court in *Gaurav Nagpal Vs. Sumedha Nagpal*, (2009) 1 SCC 42, *Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw and Anr.*, (1987) 1 SCC 42 and *Nil Ratan Kundu and Anr. Vs. Abhijit Kundu*, (2008) 9 SCC 413.

32. Mr. Goburdhun contended that not only the respondent No.1 had violated the order dated 01st October, 2014, but also the order dated 06th November, 2015 passed by this Court which directed the petitioner, respondent No.1 and the minor child to meet daily for a period of one week at each other's residence alternatively.

Thus, according to him, respondent no.1 was a repeat offender under the Contempt of Courts Act, 1971. He also emphasised that the petitioner had not taken any money as alimony, child support or maintenance.

EFFORTS TO AMICABLY RESOLVE THE MATTER DID NOT SUCCEED.

33. At the cost of repetition, this Court may mention that prior to commencing final hearing in the case it had met both the parties at the instance of the counsel for the parties. During the meetings, the Court had impressed upon the parties to amicably resolve the case expeditiously as such a resolution would have been in the best interest of the minor. Not only the Court's plea fell on deaf ears, but the parties also made serious allegations against each other by way of pleadings and insisted that they be recorded.

34. Though this Court has not recorded the allegations and counter allegations with regard to what transpired in pursuance to this Court's direction, yet it may mention that during its interaction with the parties, it was of the view that there were serious differences also with regard to the approach to be adopted to bring up the minor child. While the petitioner-mother wanted the minor child to be brought up in a frugal and disciplined atmosphere, the respondent-father wanted to indulge the child and give her all the luxuries. During its interaction, the minor child conveyed her desire to stay with the father in Malaysia. The minor child was also not happy with the petitioner-mother for having filed the present contempt proceedings inasmuch as she was scared that her father could be sent to prison.

35. This Court also got an impression during its interaction with the parties that one of the spouses wanted to use the minor child as a pawn to ensure that the other spouse comes back to the matrimonial home. The said spouse was willing to exert pressure and, in fact, this Court saw him engage in brinkmanship inasmuch as he did not get the minor child admitted to a school in Delhi even when he knew that resolution of the litigation would take some time. Even, the minor child was aware that the differences between the petitioner and the respondent no. 1 were insurmountable. This Court was sad to note that the minor had prematurely aged and the quintessential quality of any child namely innocence had been a casualty. Given the intransigent attitude of the petitioner and the respondent no. 1, this

Court was left with no other option but to finally hear the matter.

IN SELECTING A GUARDIAN THE PARAMOUNT CONSIDERATION IS THAT OF A WELFARE AND WELL-BEING OF THE CHILD

36. Having heard learned counsel for the parties, this Court is of the opinion that the law relating to child custody is fairly well settled. In selecting a guardian of a minor, the paramount consideration is that of a welfare and well-being of the child and while adjudicating such matters, the Court exercises *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin. Lord Eldon L.C. in described it in the following terms:-

...it belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them. ?

THE VIEWS OF A MINOR ARE RELEVANT BUT NOT DETERMINATIVE OR CONCLUSIVE

37. The wishes of a devoted and responsible parent are not lightly to be set aside, but the Court has to make an independent and objective judgment of its own. Similarly, if the minor is old enough to form an intelligent preference, the court must consider such preference, though the final decision rests with the court as to what is conducive for the welfare of the minor. Consequently, the views of a minor child are relevant but not determinative or conclusive “ as erroneously sought to be contended by the learned counsel for respondent no. 1.

ORDERS RELATING TO CUSTODY OF THE MINOR ARE TEMPORARY IN NATURE. DOCTRINE OF RES JUDICATA IS NOT APPLICABLE

38. It is equally well settled law that the doctrine of *res judicata* is not applicable in matters of child custody. In fact, orders relating to custody of the minor wards are temporary in nature, made in existing circumstances and the Court is entitled to vary such order if such variation is considered in the welfare of the ward.

39. It is always permissible for either of the parents to apply for modification of the court order regarding the custody of a child at any stage if there is any change in circumstances and/or if it is shown that the previous arrangement was not conducive to the child's welfare or that it had produced unsatisfactory results.

CORRECTNESS OF THE ORDER HAS TO BE JUDGED BY A SUPERIOR COURT OR BY A COURT HAVING JURISDICTION TO DO SO.

40. However, in contempt proceedings, it cannot be urged that the order passed by the Family Court is void or non est. In the opinion of this Court, a contempt court should normally not act as an Appellate Court of the Family Court, especially when power of modification, review or variation is available. There is nothing prima facie to show that the paramount consideration in minds of the parents while agreeing to the consensual parenting plan was not the welfare of the minor. After all, no litigant can be permitted to defy or decline adherence to an order of the Court merely because he/she is of the opinion that the order is incorrect. The correctness of the order has to be judged by a superior Court or by a Court having jurisdiction to do so. The Supreme Court in *Union of India and Ors. vs. Subedar Devassy PV* (2006) 1 SCC 613 has held as under:-

6. If any party concerned is aggrieved by the order which in its opinion is wrong or against rules or its implementation is neither practicable nor feasible, it should always either approach the court that passed the order or invoke jurisdiction of the appellate court. Rightness or wrongness of the order cannot be urged in contempt proceedings. Right or wrong, the order has to be obeyed. Flouting an order of the court would render the party liable for contempt. While dealing with an application for contempt the court cannot traverse beyond the order, non-compliance with which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. (emphasis supplied)

41. This issue has also to be appreciated in the context that coordinate benches of this Court exercise original as well as contempt jurisdiction. In Suits for Partition and/or Maintenance, it is quite common for learned Single Judges sitting on the original side of this Court to make arrangements with regard to custody of minor children. Consequently, a learned single judge of the same court cannot become an appellate Court of another coordinate Bench just because the latter court is exercising contempt jurisdiction.

PLEA OF PARENS PATRIAE JURISDICTION IS A RED HERRING INASMUCH AS PEOPLE ARE CONVICTED OF CONTEMPT ONLY WHEN THEIR ACTION IS WILFUL.

42. Respondent's argument with regard to parens patriae jurisdiction in contempt proceedings is, in fact, a red herring inasmuch as people are convicted of contempt only when their action is wilful, that means, deliberate or intentional and not when it is bona fide or due to genuine inability to comply. In fact, the Supreme Court in *Kapildeo Prasad Sah and Others Vs. State of Bihar*, AIR 1999 SC 3215 has held that 'Wilful' would exclude casual, accidental, bona fide or unintentional acts or genuine inability to comply with the terms of the order.

43. The judgment of the Supreme Court in *ABC Vs. State of NCT* (supra) cited by learned counsel for respondent no. 1 is clearly inapplicable to the present case as the issue in the said case was whether in an application for appointment of a guardian of a child, is it imperative for an unwed mother to notify the putative father of the child.

RESPONDENT NO.1'S ACTION OF REMOVING THE MINOR FROM PETITIONER'S CUSTODY WAS WILFUL AND PREMEDITATED. HE COULD HAVE FILED AN APPLICATION FOR VARIATION OF THE CONSENSUAL PLAN. THERE WAS NO APPREHENSION OF A LIFE THREATENING EMERGENCY.

44. In the present case, respondent no.1's action of removing the minor child from petitioner's custody was wilful and premeditated. Admittedly, respondent no. 1 booked the tickets to Kuala Lumpur on 29th December, 2014 and ignored calls of

the petitioner on 30th December, 2014. He replied to petitioner's text only on 31st December, 2014 and did not inform her about his plan to take the minor child to Malaysia.

45. This Court is of the view that respondent no. 1's act of removing the minor child from the jurisdiction of this Court is in direct contravention of the assurance given by him to the Guardianship Court and was certainly not instantaneous or casual or accidental or unintentional decision taken at the heat of the moment due to some sudden or grave provocation. In the opinion of this Court, even if the minor child remained in the custody of petitioner-mother after 31st December, 2014, heavens would not have fallen as there was no apprehension of a life-threatening emergency.

46. Respondent no. 1 is an educated man and understands the significance and importance of orders of a Court and more so when they are consensual. This Court also cannot lose sight of the fact that the petitioner, respondent no. 1 as well as the minor child are Indian citizens. If respondent no. 1 was subsequently convinced that the consensual parenting plan was not conducive to the minor child's welfare, he could have certainly filed an application for variation of the consensual plan and for modification of the order dated 1st October, 2014, but certainly not whisked her away to another country.

SUDDEN AND UNAUTHORISED REMOVAL OF CHILDREN FROM ONE COUNTRY TO ANOTHER IS FAR TOO FREQUENT NOWADAYS, AND IT IS THE DUTY OF COURTS TO DO ALL THEY CAN TO ENSURE THAT THE WRONGDOER DOES NOT GAIN AN ADVANTAGE.

47. This Court is of the opinion that the sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and it is the duty of all Courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. [See: V. Ravi Chandran (Dr.) Vs. Union of India and Ors., (2010) 1 SCC 174, Arathi Bandi Vs. Bandi Jagadrakshaka Rao and Ors., AIR 2014 SC 918 and Surya Vadanam Vs. State of Tamil Nadu and Others, (supra)].

48. In the context of an aggrieved parent not abiding by the Family Court judgment and moving a minor child to a different jurisdiction, the Supreme Court in *Surya Vadanani Vs. State of Tamil Nadu and Others*, (2015) 5 SCC 450 has recently held as under:-

54.No litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because he or she is of the opinion that that order is incorrect "that has to be judged by a superior court or by another court having jurisdiction to do so.....If as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence. Extrapolating this to the courts in our country, it is common knowledge that in cases of matrimonial differences in our country, quite often more than one Family Court has jurisdiction over the subject-matter in issue. In such a situation, can a litigant say that he or she will obey the interim or interlocutory order of a particular Family Court and not that of another? Similarly, can one Family Court hold that an interim or an interlocutory order of another Family Court on the same subject-matter may be ignored in the best interests and welfare of the child? We think not..... (emphasis supplied)

THE ARGUMENT THAT CONSENSUAL CUSTODY ARRANGEMENT IS VOID AND NON-EST, CANNOT BE DECIDED IN A CONTEMPT PROCEEDING.

49. Also, the argument of the respondent no. 1 that it is the petitioner who had indulged in the first instance in child abduction and/or consensual custody arrangement sanctioned by the Guardianship Court is void and nonest, cannot be decided in a contempt proceeding. It is further settled law that disobedience of orders which are subsequently found to be without jurisdiction and/or null or void or non-est still constitutes contempt. The Supreme Court in *Tayabhai M. Bugasawalla and anr. Vs. Hind Rubber Industries Pvt. Ltd. etc.*, AIR 1997 SC 1240 has held as under:-

16. The question is whether the said decision of the High Court means that no person can be punished for flouting or disobeying the interim/interlocutory orders while they were in force, i.e., for violations and disobedience committed

prior to the decision of the High Court on the question of jurisdiction. Holding that by virtue of the said decision of the High Court (on the question of jurisdiction), no one can be punished thereafter for disobedience or violation of the interim orders committed prior to the said decision of the High Court, would indeed be subversive of rule of law and would seriously erode the dignity and the authority of the Courts. We must repeat that this is not even a case where a suit was filed in wrong court knowingly or only with a view to snatch an interim order. As pointed out hereinabove, the suit was filed in the Civil Court bonafide. We are of the opinion that in such a case the defendants cannot escape the consequences of their disobedience and violation of the interim injunction committed by them prior to the High Court's decision on the question of jurisdiction. (emphasis supplied)

50. If violation of Court orders is not viewed seriously, it will have wide spread deleterious effect on the authority of the Courts to implement their orders or compel their adherence.

HADKINSON JUDGMENT NOWHERE STATES THAT ONCE THE CHILD HAS BEEN BROUGHT BACK, THE CONTEMPT STANDS DISCHARGED.

51. This Court is also not in agreement with respondent no. 1's argument that as the minor child has been brought back, the contempt stands discharged. In Hadkinson (supra) it was held that till the child was brought back to the Court that had passed the initial order, the defaulting spouse would not be heard. Judgment in Hadkinson (supra) nowhere states that once the child has been brought back to the jurisdiction of the Court that had passed the initial order, the contempt would stand discharged.

JUDGMENT OF SURESTHA DEVI (SUPRA) HAS NO RELEVANCE AS UNDERTAKING WAS NOT IN A DIVORCE MATTER.

52. The judgment of Surestha Devi (supra) has also no relevance to the present case inasmuch as the undertaking in the present case was not in a divorce matter. In fact, the order dated 1st October, 2014 is not an order disposing of a first motion petition under Section 13B(1) of Hindu Marriage Act. The order in the present case was passed in a guardianship petition. In the said order it had been recorded that

parties had agreed to obtain divorce by mutual consent and that first motion petition would be filed shortly. Consequently, as the order dated 1st October, 2014 did not amount to disposal of the first motion petition, judgment of Surestha Devi (supra) is clearly inapplicable to the present case.

ORDER DATED 1ST OCTOBER, 2014 CONSTITUTES AN UNDERTAKING.

53. Since an argument has been raised by learned counsel for respondent no. 1 that no undertaking was, in fact, given by respondent no. 1 to the Guardianship Court, this Court deems it appropriate to reproduce hereunder the order dated 1st October, 2014 as well as the joint statements made by both the parties :-

A) Order dated 1st October, 2014:-

"G.S.-11/14

01.10.2014

Pr.: Petitioner with Sh. Balendru Shekhar, Adv.

Respondent with Ms. Malvika Rastogi, Senior Adv. with Ms Anchal Kapoor, Adv.

Heard Id. Counsel for both sides. It transpires from their arguments that matter can be amicably settled.

Efforts made for amicable settlement.

Parties have amicably resolved their disputes. Their joint-statement recorded separately. As per their joint statement, put up on 13.10.2014 for hearing of first motion petition in case the same is listed before the date fixed." (emphasis supplied)

B) Joint statement:-

IMAGE ?

54. In the opinion of this Court, definition of civil contempt under Section 2(b) of the Contempt of Courts Act, 1971 includes breach of an undertaking given to a

Court. The Supreme Court after extensively analysing the case law including the case of Babu Ram Gupta (supra) cited by the respondent no.1 has succinctly outlined the concept of undertaking in second Rama Narang (5) vs. Ramesh Narang and Anr., (2009) 16 SCC 126. The relevant portion of the said judgment is reproduced hereinbelow:-

35. Black's Law Dictionary, 5th Edn. defines undertaking in the following words:

A promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other. It does not necessarily imply a consideration. In a somewhat special sense, a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposite party. A promise or security in any form. ?

36. Osborn's Concise Law Dictionary, 10th Edn. Defines undertaking in the following words:

A promise, especially a promise in the course of legal proceedings by a party or his counsel, which may be enforced by attachment or otherwise in the same manner as an injunction. ?

37. In M. v. Home Office, All ER at p. 132g, the expression undertaking has been dealt with in the following manner:

[I]f a party, or solicitors or counsel on his behalf, so act as to convey to the court the firm conviction that an undertaking is being given, that party will be bound and it will be no answer that he did not think that he was giving it or that he was misunderstood. ?

38. Hudson, In re, the English court observed as under: (All ER pp. 112 I-113 A)

An undertaking to the court confers no personal right or remedy on any other party. The only sanctions for breach are imprisonment for contempt, sequestration or a fine. ?

39. Similarly, in *Shoreham-by-Sea Urban District Council v. Dolphin Canadian Proteins Ltd.* the Court observed as under:

Failure to comply with an undertaking to abate a nuisance may be visited with a substantial fine. ?

40. The Division Bench of the Bombay High Court in *Bajranglal Gangadhar Khemka v. Kapurchand Ltd.* had an occasion to deal with similar facts. Chagla, C.J., speaking for the Court, observed as under: (AIR p. 337, para 4)

4. We are not prepared to accept a position which seems to us contrary to the long practice that has been established in this Court, and, apparently, also in England. There is no reason why even in a consent decree a party may not give an undertaking to the court. Although the court may be bound to record a compromise, still, when the court passes a decree, it puts its imprimatur upon those terms and makes the terms a rule of the court; and it would be open to the court, before it did so, to accept an undertaking given by a party to the court.

Therefore, there is nothing contrary to any provision of the law whereby an undertaking cannot be given by a party to the court in the consent decree, which undertaking can be enforced by proper committal proceedings. ?

41. In *Noorali Babul Thanewala v. K.M.M. Shetty*, a tenant committed breach of undertaking given by him to the Supreme Court to deliver vacant possession of certain premises. The Supreme Court held the tenant guilty of contempt. Hon'ble V. Ramaswami, J., delivering the judgment observed: (SCC pp. 265-66, para 11)

11. When a court accepts an undertaking given by one of the parties and passes orders based on such undertaking, the order amounts in substance to an injunction restraining that party from acting in breach thereof. The breach of an undertaking given to the court by or on behalf of a party to a civil proceedings is, therefore, regarded as tantamount to a breach of injunction although the remedies were not always identical. For the purpose of enforcing an undertaking that undertaking is treated as an order so that an undertaking, if broken, would involve the same consequences on the persons breaking that undertaking as would their

disobedience to an order for an injunction. It is settled law that breach of an injunction or breach of an undertaking given to a court by a person in a civil proceeding on the faith of which the court sanctions a particular course of action is misconduct amounting to contempt. ?

42. In *Mohd. Aslam v. Union of India* this Court dealt with the contempt proceedings raising the issues as to the amenability of the State and of its Ministers for failure of obedience to the judicial pronouncements. In this case, the Chief Minister of Uttar Pradesh had made a statement before the National Integration Council that the Government of Uttar Pradesh will hold itself fully responsible for the protection of the Ram Janma Bhumi-Babri Masjid structures. Upon this statement of the Chief Minister, this Court had passed an order. However, in the contempt proceedings it was alleged that the orders passed on the basis of the statements made have been deliberately and wilfully flouted and disobeyed by the State of Uttar Pradesh. While dealing with the expression undertaking ?, this Court observed as under: (SCC p. 453, para 22)

The Chief Minister having given a solemn assurance to the National Integration Council and permitted the terms of that assurance to be incorporated as his own undertaking to this Court and allowed an order to be passed in those terms cannot absolve himself of the responsibility unless he placed before the Court sufficient material which would justify that he had taken all reasonable steps and precautions to prevent the occurrence. ?

43. In *Rita Markandey v. Surjit Singh Arora* this Court came to the conclusion that even if the parties have not filed an undertaking before the court, but if the court is induced to sanction a particular course of action or inaction on the basis of the representation of such a party and the court ultimately finds that the party never intended to act on such representation or such representation was false, even then the party would be guilty of committing contempt of court. The Court observed as under: (SCC p. 20, para 12)

12. Law is well settled that if any party gives an undertaking to the court to vacate the premises from which he is liable to be evicted under the orders of the court and there is a clear and deliberate breach thereof it amounts to civil contempt but

since, in the present case, the respondent did not file any undertaking as envisaged in the order of this Court the question of his being punished for breach thereof does not arise. However, in our considered view even in a case where no such undertaking is given, a party to a litigation may be held liable for such contempt if the court is induced to sanction a particular course of action or inaction on the basis of the representation of such a party and the court ultimately finds that the party never intended to act on such representation or such representation was false. ?

44. In *K.C.G. Verghese v. K.T. Rajendran* this Court dealt with the undertaking in contempt proceedings arising out of eviction proceedings. This Court held that when at the time of giving the undertaking, the tenant did not indicate that he was in possession of a part of the premises and not the other portion nor was such a stand taken in any of the pleadings before the High Court or Rent Controller, the order of eviction passed against the tenant is equally binding upon the occupant of the other portion.

45. This Court again had occasion to deal with a case in *Bank of Baroda v. Sadrudin Hasan Daya*. In that case, the Court clearly observed as under: (SCC p. 361g)

The wilful breach of an undertaking given to a court amounts to civil contempt within the meaning of Section 2(b) of the Contempt of Courts Act. The respondents having committed breach of the undertaking given to the Supreme Court in the consent terms they are clearly liable for having committed contempt of court. ?

46. The respondents placed reliance on *Babu Ram Gupta v. Sudhir Bhasin*. In this case admittedly no application, affidavit or any undertaking were given by the appellant. Therefore, this case is of no assistance to the respondents. In this case, the Court observed that: (SCC p. 53, para 10)

[E]ven the consent order does not incorporate expressly or clearly that any such undertaking had been given either by the appellant or by his lawyer before the court that he would hand over possession of the property to the receiver. In the

absence of any express undertaking given by the appellant or any undertaking incorporated in the order impugned, it will be difficult to hold that the appellant wilfully disobeyed or committed breach of such an undertaking. ?

The Court even in this case observed that: (SCC p. 53, para 10) In fact, the reason why a breach of clear undertaking given to the court amounts to contempt of court is that the contemnor by making a false representation to the court obtains a benefit for himself and if he fails to honour the undertaking, he plays a serious fraud on the court itself and thereby obstructs the course of justice and brings into disrepute the judicial institution. (emphasis in original)

47. The critical analysis of the decided cases of this Court clearly leads to the conclusion that wilful breach of an undertaking given to the court amounts to contempt of court under Section 2(b) of the Act. (emphasis supplied)

55. In the present case keeping in view the aforesaid law, this Court is of the view that the respondent no. 1 had given not only full custody of the minor child to the petitioner-mother, but had also undertaken that he would not take the child for holidays abroad leave alone permanently till such time as the divorce decree was passed. Consequently, this Court is of the opinion that statement of respondent no. 1 under oath in the presence of his counsel constitutes an undertaking and assurance to the Guardianship Court which has been breached.

56. Assuming that respondent no. 1 had not given any specific undertaking/assurance, this Court is of the view that he had certainly induced the Guardianship Court to put its imprimatur to a parenting plan by making a representation and consequently the same constitutes an undertaking. Since in the present case said undertaking has been breached by the respondent-father, he is guilty of contempt.

AN UNDERTAKING HAS ALL THE FORCE OF AN INJUNCTION.

57. In the opinion of this Court, it is important for parties to appreciate that an undertaking has all the force of an injunction. It is equally as important as an injunction, and it has the same penalties for failure to abide by it as an injunction. It

is all too easy for people to promise and all too easy for them to break that promise. Then they, quite rightly, have to face the wrath of the court for having made promises which were not worth the paper which they have signed.

PLEA MINOR IS UNWILLING TO STAY WITH THE PETITIONER WAS REJECTED IN SIMILAR FACTS IN HOSHIAH SHAVAKSHA DOLIKUKA.

58. The further plea of respondent no. 1 that he cannot be held guilty of contempt as the minor child is unwilling to stay with the petitioner was rejected in similar facts by the Supreme Court in Hoshiam Shavaksha Dolikuka Vs. Thrity Hoshie Dolikuka, (1982) 2 SCC 577. The relevant portion of the said judgment is reproduced hereinbelow:-

6. The main defence of the husband in the contempt replication is that he was not in a position to carry out the said orders and to comply with his undertakings, as the daughter Gospi was unwilling to go to her mother's place. It is his defence that in spite of his best endeavours he could not persuade the daughter Gospi to go to her mother's place, and in view of the attitude of Gospi and taking into consideration the question of Gospi's health and welfare, he was prevented from taking Gospi to her mother's place and the violation is, therefore, unintentional and for reasons beyond his control.

10.The defence sought to be put forward on behalf of the appellant that the appellant was unable to comply with the said orders and to carry out the undertakings in view of the attitude of the minor girl does not impress us. If there had been any truth in the case sought to be made by the appellant, it would have been clearly the duty of the appellant, to apply to the Court, drawing the notice of the court to this aspect and to ask for appropriate directions.It, however, appears that the appellant took no such steps in the present case when the appellant felt that he would not be in a position to carry out the orders of the Court and to comply with the undertakings given by him. The fact and circumstances of this case go to suggest that the appellant was not willing to part with the company of his daughter and to allow her to stay with her mother. We are, therefore, of the opinion that the High Court was right in coming to the conclusion that the appellant has committed acts which amount to contempt of court. (emphasis supplied)

59. Supreme Court in Gaurav Nagpal (supra) similarly rejected the arguments of the father that as the minor child was living with him since long, the arrangement should not be disturbed. The relevant portion of the said judgment is reproduced hereinbelow:-

52. The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs..... (emphasis supplied)

THERE IS NO BONA FIDE OR GENUINE APOLOGY.

60. This Court is also in agreement with the contention of learned counsel for the petitioner that in the reply-affidavit filed by respondent no. 1, there is no bona fide or genuine apology.

DUTY OF CONTEMPT COURT TO ENSURE COMPLIANCE OF ORDERS.

61. It is the obligation of this Court to uphold the majesty of law and to ensure that judicial orders are not flouted by a party who believes that it shall be the judge of its own case. This Court is of the view that it is the duty of contempt court to ensure compliance of orders and if the respondent no. 1's conduct is not reprimanded, there shall be no rule of law. The Supreme Court has held so in the following judgments:-

A) Bank of Baroda Vs. Sadruddin Hasan Daya and Another, (2004) 1 SCC 360 wherein it has been held as under:-

16.the court should act with seriousness and severity where justice is jeopardized by a grossly contemptuous act of a party. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society (see Vinay Chandra Mishra, In re)..... (emphasis supplied)

B) Anil Ratan Sarkar and Others Vs. Hirak Ghosh and Others, (2002) 4 SCC 21 wherein it has been held as under:-

22.there cannot be any laxity, as otherwise the law courts would render themselves useless and their order to utter mockery. Feeling of confidence and proper administration of justice cannot but be the hallmark of Indian jurisprudence and contra-action by courts will lose its efficacy. Tolerance of law courts there is, but not without limits and only up to a certain point and not beyond the same. (emphasis supplied)

C) Murray and Co. Vs. Ashok Kr. Newatia and Another, (2000) 2 SCC 367 wherein it has been held as under:-

.....The Contempt of Courts Act of 1971 has been engrafted in the statute-book for the purpose of bringing in a feeling of confidence of the people in general for due and proper administration of justice in the country. It is undoubtedly a powerful weapon in the hands of the courts and as such it must be exercised with due care and caution and in cases of larger interest for due administration of justice. ?

XXXX XXXX XXXX XXXX

9. The right to inflict punishment for contempt of court in terms of the Act of 1971 on to the law courts has been for the purposes of ensuring the rule of law and orderly administration of justice. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law since the image of such a majesty in the minds of the people cannot be led to be distorted. The respect and authority commanded by courts of law are the greatest guarantee to an ordinary citizen and the entire democratic fabric of the society will crumble down if the respect for the judiciary is undermined. It is true that the judiciary will be judged by the people for what the judiciary does, but in the event of any indulgence which can even remotely be termed to affect the majesty of law, the society is bound to lose confidence and faith in the judiciary and the law courts thus, would forfeit the trust and confidence of the people in general. (emphasis supplied)

AS THERE IS A CLEAR BREACH OF THE UNDERTAKING APPROPRIATE DIRECTIONS HAVE TO BE ISSUED TO CLOSE THE BREACH.

62. The facts narrated above would clearly indicate that the respondent No. 1-father is squarely responsible for removal of the child from the jurisdiction of the Indian Court. As there is a clear breach of the undertaking given by the respondent No.1-father, this Court is of the opinion that appropriate directions have to be issued to close the breach. The Supreme Court in Mohammad Idris and Another Vs. Rustam Jehangir Babuji and Others, (1984) 4 SCC 216 has held as under:-

4. On merits, the learned counsel submitted that the undertaking given was not in respect of the property concerned and that in any case the learned Single Judge was not justified in giving certain directions in addition to punishing the petitioners for contempt of court. We find no substance in the submissions made by the learned counsel. There was a clear breach of the undertaking given by the petitioners and we are of the opinion that the Single Judge was quite right in giving appropriate directions to close the breach. The special leave petition is, therefore, dismissed. (emphasis supplied)

63. It is true that taking the child out of the father's custody may cause some problem, but difficulty in implementation of an order passed by the Court, is no answer for its non-implementation. The Supreme Court in Arathi Bandi (supra) has held as under:-

.....All said and done, in such circumstances, the Court is left with making a very unpleasant decision. Either way, certain collateral damage being caused to the child cannot be avoided. The facts narrated above would clearly indicate that the mother is singularly responsible for removal of the child from the jurisdiction of the US courts. (emphasis supplied)

64. Consequently, the respondent-father is directed to return the minor child to the petitioner "mother forthwith. If the respondent-father is of the view that consensual parenting plan is not working in the interest of the minor, he is given liberty to seek variation, modification and/or recall of the order dated 01st October, 2014. The rights and contentions of all the parties are left open.

RESPONDENT NO. 1-FATHER IS GUILTY OF CONTEMPT OF COURT.

65. This Court is also of the opinion that as the respondent No. 1-father has brought back the child at the earliest, the same should be considered as a mitigating factor while awarding punishment. Accordingly, while holding respondent no. 1-father guilty of contempt of Court, he is only sentenced till the rising of the Court. This Court may also mention that imposing any harsher punishment on respondent no. 1 would neither serve any purpose nor would it contribute to the welfare of the minor child. However, the respondent No. 1-father is warned that if he is found indulging in a contemptuous act in future, a stricter view would be taken.

66. The directions issued by this Court to the FRRO on 07th September, 2015 are withdrawn and the Deputy Registrar (Appellate) is directed to release only the passport of respondent no.1 to him against a signed receipt. The passport of the minor child shall be transferred to the Court of Principal Judge, Family Court, Patiala House Courts, New Delhi and it shall abide by further orders to be passed by that Court.

67. With the aforesaid observations and directions, present contempt petition and pending application stand disposed of.

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