

CHILD CUSTODY: A CASE STUDY ON SMT. SURINDER KAUR SANDHU V. HARBAX SINGH SANDHU

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ABSTRACT

“Custody of child shall be handed over to such a person who fosters him with care, love and affection.”

-Honourable Justice Vinod Prasad

One of the most stressful aspects of getting divorced or separated is dealing with child custody and visitation. Child custody arrangements will be determined by the court of jurisdiction for the divorce proceedings. If the parents have children while married, they share joint guardianship of the kid and have equal rights. When they divorce, they have an equal entitlement to custody. If the parents cannot agree on custody, the court must assist in determining what is best for the kid. A psychological assessment of one or both parents may be ordered by the court in some instances. This is commonly referred to as a parenthood analysis, which is a formal inquiry into each parent's parenting abilities and which parent is perfectly suited to take care of the child.

Only two of the 83 child custody cases that went to court in a year were awarded to the father, according to an RTI response; 50% overnight vacation is provided to only one parent. The Supreme Court rules that "the welfare and interest of the child, not the rights of the parents, is the first and foremost priority." Despite popular belief that the mother is the child's natural guardian, the court/law will always follow the best interest concept. The Karnataka High Court ruled that it is "the most natural thing for a child to grow up in the company of their mother" and that "even in nature, a youngster gets the best protection and education exclusively through the mother." Chethana Ramatheertha, a divorced mother, married famous cricketer Anil Kumble in this case. The mother was granted custody of the child because she could offer a joyful atmosphere, stability, and well-being for the youngster.² The research

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² <https://www.thebetterindia.com/195917/supreme-court-child-custody-law-mother-father-divorce-case-legal-india/> (visited on 28 march 2022)

goal in this paper is to demonstrate custody and guardianship relating it with the case study of smt. Surinder kaur sandhu v. harbax singh sandhu³.

KEYWORDS: Child, Custody, Welfare, Guardianship, Divorce.

³ <https://advocatetanmoy.com/2018/07/29/smt-surinder-kaur-sandhu-versus-harbax-singh-sandhu-and-another-all-sc-1984-april/> (visited on 28 march 2022)

INTRODUCTION

“I am grieved for my children—and boy’s in particular—that this modern age is emasculating men under the guise of “the best interest of the children”- H. Kirk Rainer.

Parenting is more than just a way for a desperate parent to gloat about their accomplishments; it is an undertaking that defines the child's future well-being and morale. In the event of a divorce or annulment of marriage, the legal guardianship of children under the age of 18 must be determined. The family law courts in India have the authority to decide on this most delicate of provisions.⁴ The court isn't concerned with what each parent wants or needs in terms of spending time with their children when it comes to child custody issues. Instead, it's about what each parent has to offer the child and whether or not spending time with them is beneficial to the youngster's health. In any custody case, the court's purpose is to figure out which parent can offer the child with stability, love, and affection. Judges also want to make sure that parents can provide basic essentials like food, shelter, and clothing for their children. Maintaining a close relationship with both parents is normally in the kid's best interests, but if one or both parents are unfit to care for the child, the court will evaluate what is best for the child before setting a custody plan for the family. When we discuss custody we cannot just read it alone it is must and must to undergo the concept of guardianship. The meaning of these terms are different but they are correlated.

Guardianship is a legal process that protects those who are unable to look after themselves owing to age, infirmity, or impairment. A court appoints a legal guardian to care for a ward who need particular protection. Legal guardians have the legal ability to make decisions on behalf of their wards and to represent their personal and financial interests. Children were seen as property belonging to the father as far back as ancient Roman law, and he had the unilateral ability to sell or enslave them. Even if the father died, mothers had no rights to their children.

Landmark In 1839, British law mandated that courts provide mothers custody of children under the age of seven, as well as visitation rights for older children. The "tender years doctrine's" original purpose was to entrust children to their mothers until they were old enough to be transferred to their father's custody. However, it was the first step toward shared custody rights. The legal and hands-on contact between a parent and his or her child is referred to as "child custody." Custody refers to the right of a parent to raise, care for, and

⁴ <https://www.indiafilings.com/learn/custody-of-children-in-india/> (visited 30 march,2022)

make decisions for their kid. All decisions regarding the child's residence, healthcare, education, and religious upbringing should be made by the child's biological parents in the natural state. When spouses divorce, though, all of these problems may become problematic. When there is a disagreement about a kid's custody and upbringing, the child custody laws and the court become involved.⁵ The welfare of the child is considered the utmost priority of the court before giving custody of a child. It is very difficult for the child to cope up with the situation and for the parents too in some cases to be a single child. Custody can be granted to both parents jointly too or single parent.

FACTS

The appellant and respondent 1 were married according to Sikh traditions in Punjab. They moved to England shortly after marriage and had a son. The relationship between the spouses quickly deteriorated after the birth of the boy. The Berkshire Police Department apprehended the husband after receiving information that he was talking with a hitman to have his wife driven over by a car. For that offence, the spouse was found guilty and sentenced to three years in prison. Ironically, it was the wife who interfered and obtained a probation order for the man who had attempted to murder her. The spouse was released on probation.

While the wife was at work, the husband took the boy out of England and carried him to India. On the same day, the wife secured an order under Section 41 of the Supreme Court Act, 1981, making the boy the Ward of the Court with immediate effect. The husband was ordered to immediately hand over custody of the little boy to the wife or her representative under the terms of the order.

The wife arrived India and filed a petition in the Court of the learned Judicial Magistrate, First Class, Jagraon, under section 97 of the Code of Criminal Procedure. She requested custody of her kid, claiming that he was in the respondents' illegal custody. Section 97 empowers the Magistrate to order a search for those unfairly incarcerated and, if located, to have them brought before the Court in order to assist the passing of whatever order the circumstances of the case may necessitate.

The respondents contested the petition under section 6 of the Hindu Minority and Guardianship Act, 1956, claiming that Respondent 1 was the minor boy's natural

⁵ <https://legaldictionary.net/child-custody/> (visited 30 march, 2022)

guardian. The wife then returned to England to resume her job. She returned to India, this time equipped with the aforementioned English High Court order. She then filed the current writ suit in the Punjab and Haryana High Court, requesting the production and custody of her son. The petition was heard by a learned single judge of the High Court who interrogated with the boy several times and even ordered the spouses to live together for a few days in the home of the Haryana Inspector General of Prisons. The spouses informed him that they had not been able to settle their issues. The learned Judge dismissed the woman's petition on the grounds that she was a foreigner, a factory worker, and a wife living apart from her husband in England; that she had no relatives in England; and that the child would have to live in a lonely and insecure environment minor child.

The father, on the other hand, had gone through the terrible ordeal of a criminal conviction; his parents were in affluent circumstances; and the child would grow up in an atmosphere of self-confidence and self-respect if he was allowed to live with them, according to the judge.

Overall, we are unable to concur that the boy's wellbeing necessitates his living with his father or with his grandparents. The father is a man without a moral compass who aided the murder of his wife. The wife received a probationary order for him, but he took advantage of her generosity by fleeing with the boy shortly after the probationary period ended. Even in that act, he show a complete disregard for the law by acquiring a duplicate passport for the youngster based on a false claim that the original passport had been lost. To his knowledge, his wife was in possession of the original passport.

ARGUMENTS ADVANCED ON BEHALF OF THE PETITIONER

- The husband was apprehended by Barkshire Police, who suspected him of negotiating with a hitman to have his wife driven over by a car. For that offence, the spouse was found guilty and sentenced to three years in prison. Ironically, it was the wife who interfered and obtained a probation order for the man who had attempted to murder her. The husband was given a conditional release.
- While the wife was at work, the husband took the boy out of England and drove him to India on January 31, 1983. On the same day, the wife got an order from the Supreme Court under Section 41 of the Supreme Court Act, 1981, making the kid the Ward of the Court with effect from that date. Mrs. Justice Booth of the High Court of Justice confirmed the order on July 22, 1983. (Family Division). The husband was ordered to immediately hand over custody of the little boy to the wife or her representative under the terms of the order.
- On May 5, 1983, she filed a petition in the Court of the learned Judicial Magistrate, First Class, Jagraon, under Section 97 of the Criminal Procedure Code. She requested custody of her kid, claiming that he was in the respondents' illegal custody. Sec. 97 empowers the Magistrate to order a search for those unfairly incarcerated and, if located, to have them brought before the Court in order to facilitate the passing of whatever order the circumstances of the case may necessitate.
- The wife received a probationary order for him, but he took advantage of her generosity by fleeing with the boy shortly after the probationary period ended. Even in that act, he shown a complete disregard for the law by acquiring a duplicate passport for the youngster based on a false claim that the original passport had been lost. To his knowledge, his wife was in possession of the original passport.
- By taking him to India, not in the regular movement of the matrimonial house, but by an act that was profoundly injurious to the peace of that family, the father cannot deprive the English Court of its authority to decide on his custody.

ARGUMENTS ADVANCED ON BEHALF OF RESPONDENT

- The respondents contested the petition under Section 6 of the Hindu Minority and Guardianship Act, 1956, claiming that respondent 1 was the minor boy's natural guardian.

PRINCIPLES OF LAW ARGUED

- Section 41 of the Supreme Court Act, 1981⁶, which made the boy a Ward of the Court with immediate effect. Mrs. Justice Booth of the High Court of Justice confirmed the order on July 22, 1983. (Family Division). The husband was ordered to immediately hand over custody of the little boy to the wife or her representative under the terms of the order.
- She filed a petition in the Court of the learned Judicial Magistrate, First Class, Jagraon, under Section 97 of the Criminal Procedure Code⁷. She requested custody of her kid, claiming that he was in the respondents' illegal custody. Sec. 97 empowers the Magistrate to order a search for those unfairly incarcerated and, if located, to have them brought before the Court in order to facilitate the passing of whatever order the circumstances of the case may necessitate.
- Respondent 1 was the natural guardian of the minor boy, according to Section 6 of the Hindu Minority and Guardianship Act, 1956⁸.
- *International Shoe Company v. State of Washington*, 90 L Ed 95 (1945), which was not a matrimonial case but is recognised as the forerunner of subsequent developments of jurisdictional difficulties such as the one in the instant case). It is our responsibility and purpose to protect the wife from the burden of having to litigate in an inconvenient forum, which she and her husband had deliberately left in order to make a life in England, where they gave birth to this terrible boy.

OBITUR DICTUM OF THE COURT

- The petition was heard by a learned single judge of the High Court, who made an excellent attempt to bring the couples back together, but he was unsuccessful. He interrogated the boy several times and even encouraged the spouses to stay together for a few days in the home of the Haryana Inspector General of Prisons. The spouses informed him that they had not been able to settle their issues.
- The learned Judge denied the woman's petition on the grounds that she is a foreigner, a factory worker, and a wife living apart from her husband in England; that she has no connections in England; and that the child will have to live in solitary and desolate conditions in England. On the other hand, the learned Judge stated that the father had gone through a

⁶ https://www.legislation.gov.uk/ukpga/1981/54/pdfs/ukpga_19810054_en.pdf (visited on 01 april,2022)

⁷ <https://legislative.gov.in/sites/default/files/A1974-02.pdf> (visited on 01 april,2022)

⁸ https://legislative.gov.in/sites/default/files/A1956-32_0.pdf (visited on 02 april, 2022)

terrible ordeal of being convicted on a criminal charge; that he was back home, in an environment that embraced him; that his family was in affluent circumstances; and that if the child was allowed to live with them, he would grow up in an environment of self-confidence and self-respect.

RATIO DECIDENDI OF THE COURT

- The couple had established their matrimonial home in England, where the wife worked as a clerk and the husband worked as a bus driver. The boy is a British citizen with a British passport, having been born in England. It cannot be disputed that the English Court has jurisdiction to decide on his custody under these circumstances. Modern Conflict of Laws theory recognises and, in any case, prefers the jurisdiction of the state having the greatest direct touch with the issues at hand.
- In problems of marriage and custody, the law of that location must apply, as it is most concerned for the well of the couples and the welfare of the marriage's offspring. In this scenario, the couple had made England their home, and this boy was born to them there. By taking him to India, not in the regular movement of the matrimonial house, but by an act that was profoundly injurious to the peace of that family, the father cannot deny the English Court of its authority to decide on his custody.
- The fact that the spouses' matrimonial home was in England generates sufficient contacts or connections with that country to make it legitimate and just for the courts of that country to acquire jurisdiction over the spouses' obligations committed there.
- For these reasons, we reverse the High Court's decision and order that the child's custody be returned to the appellant-mother. This will be accomplished during the duration of the day.

JURISPRUDENTIAL VALUE OF THE JUDGEMENT

If a youngster is sufficiently knowledgeable and mature, his or her preference in questions of custody is often taken into account.⁹ The choice must also be appropriate- court will not consider the child's wishes if they are based on which parent's home has better toys, for example.¹⁰ Some courts will interview the youngster in court chambers (after obtaining each parent's permission to do so outside their presence) in order to determine the child's choice.¹¹ The welfare of the minor is the most important fact to be seen while the hearing. The court in this case also handed over the custody of the minor to the appellant mother. The court after observing various facts finally concluded that the mother must have the custody.

Section 6 of Hindu Minority And Guardianship Act ,1956¹² gives the father the first right of guardianship then the mother but it does not deny the fact that welfare of minor is of paramount consideration¹³ and any fact is not above this. In case of Surya Vadanam Vs State of Tamil Nadu 2015 (2) SCC (Civil) 183 (SC)¹⁴ the question involved was the welfare of the minor. After hearing the instances of

- (a) Arathi Bandi Vs. Bandi Jagadrakshaka Rao 2013 (3) RCR (Civil) 968¹⁵
- (b) Dhanwanti Joshi Vs Madhav Unde, 1998(1) RCR (Civil) 190¹⁶
- (c) Elizabeth Dinshaw Vs Arvind M.Dinshaw, 1987 (1) SC 42¹⁷
- (d) Mckee Vs Mckee, 1951 AC 352¹⁸
- (e) Ruchi Majoo Vs Sanjeev Majoo, 2011 (3) RCR Civil, 122¹⁹

⁹ VA. CODE ANN. § 20-124.3(8) (courts should consider the "reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference"); COLO. REV. STAT. ANN. § 14-10-124(1.5)(a)(II) (courts should consider the "wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule"); South Africa Children's Act, No. 38 of 2005, § 10 ("Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.")

¹⁰ <http://www.divorcenet.com/resources/a-childs-preference-arizona-custody-proceedings.html> (visited 4 april, 2022)

¹¹ Aaron Thomas, A Child's Preference in Maryland Custody Proceedings, DIVORCENET, <http://www.divorcenet.com/resources/a-childs-preference-maryland-custody-proceedings.html> (visited 4 april 2022); Sleprow, Sleprow & Associates, Inc., Child's Preference and Awarding Custody in Rhode Island, HG.ORG LEGAL RESOURCES, <http://www.hg.org/article.asp?id=18641> (visited 4 april, 2022)

¹² https://legislative.gov.in/sites/default/files/A1956-32_0.pdf (visited 4 april 2022)

¹³ <https://blog.ipleaders.in/guardianship-termination-hindu-law/> (visited 6 april 2022)

¹⁴ https://jhalsa.org/Jhalsa_Booklets_Web/2018/17112018/judgments_book_ranchi.pdf (page no. 93)(visited on 6 april 2022)

¹⁵ <https://india.lawi.asia/arathi-bandi-v-bandi-jagadrakshaka-rao-and-ors/> (visited on 7 april,2022)

¹⁶ <https://main.sci.gov.in/ionew/judis/13699.pdf> (visited on 7 april,2022)

¹⁷ http://ijtr.nic.in/Mrs._Elizabeth_Dinshaw_vs_Arvand_M._Dinshaw_And_Anr_on_11_November,_1986.PDF (visited on 7 april,2022)

¹⁸ <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/3688/index.do> (visited on 7 april,2022)

- (f) Sarita Sharma vs Sushil Sharma, 2000(2) RCR (Civil) 367²⁰
(g) Mrs.Shilpa Aggarwal Vs. Mr.Aviral Mittal & Anr., 2010(1) RCR (Civil) 231²¹
(h) Smt. Surinder Kaur Sandhu Vs Harbax Singh Sandhu, 1984 (3) SCC 698²²
(i) Dr.V.Ravi Chandran Vs. Union of India, 2010 (1) SCC 174.²³The best interests and welfare of the child are of vital concern, as observed and held.

APPLICATION OF LAW IN CONTEMPORARY TIMES

Who actually is a guardian or custodian? Guardian is a person who take care of a minor or his property or both. Guardian is basically appointed for a minor who is not capable or insufficient to take care of himself and below the age of 18 years. Child custody refers to the rights which are given to the parent of the child by any legal authority (the court) and that parent who has custodial rights of the child has a right to look after the child in every aspect like mental, physical, financial, health etc. and hence the other parent can only meet the child on fix times as said by the court. The family court take the decision of custodial rights in the best interest²⁴ of the minor and welfare of the minor.

The Supreme Court has declared that a divorced parent's child can remain with his mom in Singapore while his father visits him, and the mother must travel to India to permit the boy to see his other parent. The mother is given custody of the child. The court made its decision based on the boy's expressed wish to stay with his mother.²⁵

The case was heard through video conference, and the decision was handed down by a bench of Justices DY Chandrachud, Indu Malhotra, and Indira Banerjee, who used Article 142 of the Constitution²⁶ to make their decision.

¹⁹ [http://ijtr.nic.in/Ruchi Majoo vs Sanjeev Majoo on 13 May, 2011.PDF](http://ijtr.nic.in/Ruchi_Majoo_vs_Sanjeev_Majoo_on_13_May,_2011.PDF) (visited on 7 april,2022)

²⁰ [http://ijtr.nic.in/Sarita Sharma vs Sushil Sharma on 16 February, 2000.PDF](http://ijtr.nic.in/Sarita_Sharma_vs_Sushil_Sharma_on_16_February,_2000.PDF) (visited on 7 april,2022)

²¹ <https://www.lawyerservices.in/Shilpa-Aggarwal-Versus-Aviral-Mittal-and-Another-2009-12-09> (visited on 7 april,2022)

²² <https://advocatetanmoy.com/2018/07/29/smt-surinder-kaur-sandhu-versus-harbax-singh-sandhu-and-another-all-sc-1984-april/> (visited on 7 april,2022)

²³ [http://ijtr.nic.in/V.Ravi Chandran vs Union Of India & Ors on 17 November, 2009.PDF](http://ijtr.nic.in/V.Ravi_Chandran_vs_Union_Of_India_&_Ors_on_17_November,_2009.PDF) (visited on 7 april,2022)

²⁴ <https://blog.ipleaders.in/child-custody-respect-indian-laws/> (visited on 8 april,2022)

²⁵ <https://www.indialegallive.com/constitutional-law-news/courts-news/supreme-court-grants-custody-of-child-to-the-mother-allows-the-father-visitation-rights/> (visited on 8 april,2022)

²⁶ <https://legislative.gov.in/sites/default/files/COI.pdf> (visited on 8 april,2022)

CONCLUSION

When it comes to determining child custody however, sexism is the rule.

-Phyllis Schlafly

Both mothers and fathers have a significant role to play in their children's growth and development. When deciding on the child's custody, the child's and mother's basic opinions are mostly overlooked. In the event of a divorce, just because a father earns more than a mother does not entitle him to custody of the child. In recent years, the situation has shifted. The parent with custody of the child is chosen based on the child's best interests. The child suffers due to the personal reasons of the parents and lacks from parental love. Custody cases legal provisions are changing in india, and today they all follow the same approach of putting the child's best interests first. Furthermore, the Law Commission's proposals and new petitions are blossoming for equal custody rights for fathers and mothers. These rights are becoming more prominent in today's world, and courts are increasingly equating mother and father. Custody of a kid is among the most delicate and complicated issues that arise as a result of the parents' divorce. As can be seen, the custody is mostly led by the courts' defined middle ground in this regard. The different religious regulations and the universal legislation created by the State have been a source of heated debate. However, the debate over different legal perspectives should not jeopardise the child's future. While solving complex various pieces of legislation, it is important to remember that the welfare of the child, as well as the assurance of social security, is the primary motivation for child custody. As a result, any legal impediment in this area should be addressed and then rectified.