

CASE NO.:
Appeal (civil) 9631 of 2003

PETITIONER:
Smt. Anokha

RESPONDENT:
The State of Rajasthan & Ors.

DATE OF JUDGMENT: 08/12/2003

BENCH:
RUMA PAL & P.VENKATARAMA REDDI

JUDGMENT:
J U D G M E N T

[Arising out of SLP (Civil) No.7022 of 2003]

RUMA PAL, J.

Leave granted.

Baby Alka Singh is the daughter of Smt. Anokha and Sumer Singh Yadav. Sumer Singh Yadav was a taxi driver. The Respondents no.2 and 3 are Italian nationals. During their frequent visits to India either singly or jointly for the last 20 years, they used Sumer Singh's taxi to tour the country. About three years ago, Sumer Singh died as a result of an accident which took place after he had dropped the respondents no.2 and 3 at their destination. Sumer Singh and Anokha, the appellant before us, had six children, five of whom were girls. After Sumer Singh's death, the respondents no.2 and 3 who at that point of time had no children of their own wanted to adopt one of the girls viz., Baby Alka. Smt. Anokha agreed.

In January 2001, a petition was filed by the respondents no.2 and 3 under Sections 7, 10 and 17 of the Guardians and Wards Act, 1890 in the Court of District Judge, Alwar in which it was stated inter alia that they were issue-less, that they were responsible citizens, that they have their own business and have a very good income, that they own moveable and immovable properties in Italy, that they would love and look after the well being of Baby Alka and provide her the best education and milieu at Italy. In support of their application, the respondents No.2 and 3 filed the following material before the District Judge:

1. A certificate of the Public Prosecutor of the Court of Venice to the effect that there were no criminal proceedings pending against either of them;

2. Report of the Family Advisory Bureau of the local Health Office consequent upon investigation made giving the family background of the respondents, the present financial status, their vocation, their social status and their personality. The conclusion in the report was that the couple had been married since 1986 and they always wished to have a natural child and another adopted one. They had till the date of the report been unsuccessful in having a child of their own;

3. A certificate of the psychologist and a social worker relating to their residential accommodation, the marital harmony between the respondents no.2 and 3 and their parental competency;

4. A certificate of citizenship issued by the municipal authorities;

5. A decree of the Juvenile Court of Venice on the basis of the material collected declaring that the couple was "well-balanced, mature, cohesive, conscious of the problems concerning adoption" and that they were "suitable to adopt a minor of foreign nationality";

6. Income Tax records certifying solvency;

7. A certificate issued by the Chamber of Commerce, Industry and Agriculture, Venice relating to the business carried on by respondent No. 2.

The District Judge issued notices to the Social Welfare Department of the State of Rajasthan as well as to the appellant and also directed notices to be published in the local newspapers of the proposed appointment of the respondents no.2 and 3 as the guardians of Baby Alka. The notices were duly published. The appellant filed an affidavit before the District Judge in which she stated that she had known the respondents no.2 and 3 for the last 20 years and she had no objection if they were appointed guardians of her baby daughter. A report was also filed on behalf of the Dy. Collector, Social Welfare Department, Alwar on 26.7.2001 recommending that the child could be given in adoption. The report was submitted after investigating into the financial status of the late Sumer Singh's family and ascertaining the wishes of the appellant Anokha. Both the respondents also appeared before the District Judge and reiterated on oath that they would look after the child and were competent to do so physically, financially and emotionally.

The District Judge however was of the view that since the adoption was sought to be effected by a foreign couple, the Guidelines prescribed for 'Adoption of Indian Children' issued by the Ministry of Welfare, Government of India (referred to hereafter as 'the Guidelines') would have to be followed. The Guidelines require that child must be sponsored by a Social or Child Welfare Agency recognized or licensed by the Government of the country in which the foreigner is the resident. It was, therefore, held that unless an authorised agency in Italy submitted an enquiry report and a 'No Objection Certificate' was issued by the Ministry of Welfare, Government of India, no application for appointment of foreigners as guardians could be presented to the Court. The District Judge held that the Guidelines would apply irrespective of whether the child's biological parents were alive or not.

On the rejection of the application, an appeal was preferred by the appellant to the High Court. The High Court was also of the view that the Guidelines applied to this case. It, therefore, directed the respondents no.2 and 3 to make a fresh application for being appointed guardians after the same was sponsored by the Social or Child Welfare Society recognised or licensed by the Government of Italy. In addition, the High Court said that the respondents no.2 and 3 would have to get a No

Objection Certificate from the Central Adoption Resource Agency (CARA). In the event they did not obtain such certificate, their application for guardianship would not be entertained.

The appellant has approached this Court under Article 136 of the Constitution. She has reiterated the stand taken by her before the High Court and the District Judge, namely, that the Guidelines issued by the Ministry of Welfare relating to the adoption of Indian Children did not apply in the case of adoption of children living with their biological parents and that the guidelines only applied to cases where the child was destitute or abandoned or living in Social or Child Welfare Centres. This Court issued notices to the respondents on 28th April, 2003. A counter affidavit was filed by the State opposing the Special Leave Petition.

In our view, the High Court and the District Judge erred in not considering the material produced by respondents no. 2 and 3 in support of their application and in rejecting the application under the Guardians and Wards Act, 1890 solely on the basis of the guidelines. The background in which the guidelines were issued was a number of decisions of this Court, the first of which is *Lakshmi Kant Pandey v. Union of India* [AIR 1984 SC 469 : (1984) 2 SCC 244]. This is borne out from the stated object of the guidelines as set out in paragraph 1.1. thereof which "is to provide a sound basis for adoption within the frame work of the norms and principles laid down by the Supreme Court of India in the series of judgments delivered in *L.K. Pandey V. Union of India and Others* between 1984 and 1991". The original decision of the Court was taken on the basis of a letter written by one Laxmi Kant Pandey complaining of mal-practices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The judgment has considered the problem at great length after affidavits were filed not only by the Indian Council of Social Welfare but also by Foreign Organisations and Indian Organisations which were engaged in offering and placing Indian children for adoption by foreign parents. The decision has referred to three classes of children: (i) children who are orphaned and destitute or whose biological parents cannot be traced; (ii) children whose biological parents are traceable but have relinquished or surrendered them for adoption; and (iii) children living with their biological parents. The third category has been expressly excluded from consideration as far as the decision was concerned "for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents"¹. The reason is obvious. Normally, no parent with whom the child is living would agree to give a child in adoption unless he or she was satisfied that it would be in the best interest of the child. That is the greatest safeguard.

The directions which have been given in the decision are limited to the Ist and IInd categories of children with more stringent requirements being laid down in respect of children in the first category of cases. As far as adoption of children falling within the second category are concerned, the requirements are not so stringent. All that is required is that²:
"they (viz., the biological parents) should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is being

surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter, there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. \005."

The aforesaid observations only pertain to children who have been or are sought to be relinquished or surrendered for adoption in general to a placement agency or other institution where there is no contact between them and the adoptive parents at all and not to cases where the child is living with his/her parent/parents and is agreed to be given in adoption to a particular couple who happen to be foreign.

This decision has been subsequently modified but reaffirmed in several decisions. In all the subsequent cases, the modification, if any, has pertained to adoptions through institutions i.e. the first or second category of children. {See: Lakshmi Kant Pandey v. Union of India & Anr. [1985 (Supp.) SCC 701], Lakshmi Kant Pandey v. Union of India [(1987) 1 SCC 66], Lakshmikant Pandey v. Union of India & Ors. [(1991) 4 SCC 33], Sumanlal Chhotalal Kamdar & Ors. v. Asha Trilokbhai Shah (Miss) & Ors. [(1995) 3 SCC 700], Karnataka State Council For Child Welfare & Anr. v. Society of Sisters of Charity St. Gerosa Convent and others [1995 Supp. (4) SCC 529], Indian Council Social Welfare & Ors. v. State of A.P. & Ors. [(1999) 6 SCC 365], Lakshmi Kant Pandey v. Union of India & Ors. [(2001) 9 SCC 379]}.

The guidelines have formulated various directives as given by this Court in the several decisions and do not relate to regulation of the adoption procedure to be followed in respect of third category of children, namely, children with their biological parents who are sought to be given in adoption to a known couple as is the situation in this case. It is only where there is the impersonalized attention of a placement authority that there is a need to closely monitor the process including obtaining of a no objection certificate from the Central Adoption Resource Agency (CARA), Ministry of Welfare, the sponsorship of the adoption by a recognised national agency and the scrutiny of the inter-country adoption by a recognised Voluntary Coordinating Agency (VCA). Indeed CARA has been set up under the guidelines for the purpose of eliminating the

malpractice indulged in by some unscrupulous placement agencies particularly the trafficking in children.

Under the guidelines, the Home Study Report to be enclosed with an application for adoption must be routed through a foreign and enlisted agency which must be an enlisted agency in India with a copy to CARA. The Home Study Report is required to contain the following particulars:

- (a) Social Status and family background;
- (b) Description of Home;
- (c) Standard of living as it appears in the Home;
- (d) Current relationship between husband and wife;
- (e) Current relationship between the parents and children (if any children);
- (f) Development of already adopted children (if any);
- (g) Current relationship between the couple and the members of each other's family;
- (h) Employment status of the couple;
- (i) Health details such as clinical test, heart condition, past illness etc. (medical certificate etc.);
- (j) Economic status of the couple;
- (k) Accommodation for the child;
- (l) Schooling facilities;
- (m) Amenities in the Home;
- (n) Reasons for wanting to adopt an Indian child;
- (o) Attitude of grand-parents and relatives towards Adoption;
- (p) Anticipated plans for the adoptive child;
- (q) Legal status of the prospective adopting parents.

The report is required to be notarised which must in turn be attested either by an Officer of the Ministry of External Affairs or an Officer of the Justice or Social Welfare Department of the foreign country concerned or by an Officer of the Indian Embassy or High Commission or Consulate in that country.

None of these provisions in the several decisions of this Court impinge upon the rights and choice of an individual to give his or her child in adoption to named persons, who may be of foreign origin. The Court in such cases has to deal with the application under Section 7 of the Guardians and Wards Act, 1890 and dispose of the same after being satisfied that the child is being given in adoption voluntarily after being aware of the implication of adoption viz. that the child would legally belong to the adoptive parents family, uninduced by any extraneous reasons such as the receipt of money etc; that the adoptive parents have produced evidence in support of their suitability and finally that the arrangement would be in the best interest of the child.

In the case before us although the guidelines do not apply, the respondents No.2 and 3 had produced evidence

which fulfilled all the particulars required of a Home Study Report. The appellant has repeatedly affirmed her closeness to the respondents no.2 and 3 and her conviction that they would nourish and care for baby Alka as if she was their own. The respondents no.2 and 3 have produced sufficient evidence to justify their suitability to be adoptive parents. There was a judicially directed scrutiny by a local Governmental Agency in Venice. The enquiry report has resulted in a judgment passed by the Court at Venice, Italy. That judgment can be accepted by this Court under Section 13 of Code of Civil Procedure, particularly when the respondents have filed the investigation report and other material on the basis of which the judgment was delivered.

In the circumstances of the case, the decision of the High Court is set aside and the application of the respondents no.2 and 3 filed under the Guardians and Wards Act, 1890 is allowed. The respondent Nos.2 and 3 are appointed guardians of the child Alka the daughter of Anokha and late Sumer Singh with liberty to take her to Italy for the purpose of adopting her in accordance with Italian law. However, before the child is taken out of the country the following conditions must be complied with:

1) The respondents No.2 and 3 will file an affidavit before the District Court, Alwar with an undertaking to adopt the child within two years and to produce the child, if so required, till proof of adoption is filed with the District Court;

2) The respondents No.2 and 3 shall keep in deposit with the District Court an amount of Rs.50,000/- (Rupees fifty thousand only) to cover the air fare for the possible repatriation of the child to India till the child is legally adopted; the amount shall be kept by the District Court in a short term fixed deposit with any Nationalised bank and the Fixed Deposit Receipt is to be held to the credit of the minor, Alka. Upon proof of her adoption by the respondents No. 2 and 3 the amount deposited shall be forthwith returned to the said respondents or their duly authorised representative together with the interest accrued thereon.

3) The respondents No. 2 and 3 must undertake by affidavit filed before the District Court to submit annual reports to the District Court of the child's welfare and progress in school with photographs and to inform the District Court of any change of address till the child is legally adopted

The Registry of this Court is directed to send two copies of this judgment together with two copies of the affidavit of the appellant dated 1st October 2003 and the annexures thereto to the CARA, Ministry of Welfare, Government of India one set of which is to be retained by CARA and the other forwarded by it to the relevant Indian Diplomatic Mission in Italy for their record in the event any follow up action is necessary. The appeal is allowed and disposed of as above.