

Mr. David Kenneth Hambly and anr. Vs. Mr. Pinto Kumar

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Court : Delhi

Decided On : Aug-14-2014

Judge : S.Ravindra Bhat

Appellant : Mr. David Kenneth Hambly and anr.

Respondent : Mr. Pinto Kumar

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

01. 08.2014 Pronounced on:

14. 08.2014 + MAT. APPL.(F.C.) 57/2013, C.M. NOS. 17958/2013 & 17959/2013
MR. DAVID KENNETH HAMBLY AND ANR..... Appellants Through : Sh. Robin.
R. David with Sh. P.K. Singh and Sh. Febin Mathew, Advocates. Versus MR.
PINTO KUMAR Respondent Through : Sh. Sh. Sanjeev Narula, Sh. Ajay
Sondhi and Ms. Shagun, Advocates. CORAM: HON'BLE MR. JUSTICE S.
RAVINDRA BHAT HON'BLE MR. JUSTICE NAJMI WAZIRI MR. JUSTICE S.
RAVINDRA BHAT C.M. No.17958/2013 (for condonation of delay) For the reasons
mentioned in the applicaton, C.M. Appl.17958/2013 is allowed. C.M.
No.17959/2013 (for exemption) Allowed, subject to all just exceptions. MAT.
APPL.(F.C.) 57/2013 1. The Appellants question the judgment and order of the
Family Court, Saket in an application (GP No.6 of 2013) under Sections 7, 8, 9
and 10 of the Guardians and Wards Act, 1890 (hereafter "the MAT. APPL.(F.C.)

57/2013 Page 1 Guardianship Act") dated 05.07.2013, for the guardianship of a minor girl child (Sarah Singh).

2. The brief facts are that Sarah Singh was born on 07.08.2002; she became an orphan after the death of her mother (Smt. Sitapati) on 16.08.2010 and her father (Sh. Lalman Singh) on 28.08.2010. She then stayed at a shelter home in Dwarka, New Delhi for roughly six months from September 2010 to February 2011 (since one of her paternal uncles, Jai Kishan worked there). She was later taken into custody by her other paternal uncle, Pinto Kumar (the Respondent herein). This uncle too was unable to take care of the child's needs properly: he was unmarried and was not possessed of the needed time and financial means to take care of the child's emotional and material requirements. The Appellants, who were his employers, David Kenneth Hambly and Anna Christine Hambly, a Canadian married couple living in Delhi for over 9 years and running a bakery business, stated that he shared his concerns about the girl Sarah with them, his employers. The Appellants do not have a child; apparently they began to meet the child and gradually developed a bond. Sarah has been in the care of the Appellants from June 2012.

3. In the background of these facts, the Appellants sought to adopt Sarah; they got an Investigation Report prepared on 03.05.2012 by Ms. Loraine Campos of Delhi Council for Child Welfare, Civil Lines, Delhi for the adoption/foster care placement of the minor child. Subsequently, the Appellants filed a Guardianship Petition under Sections 7/8/9 & 10 of the Guardianship Act, before the Family Court, MAT. APPL.(F.C.) 57/2013 Page 2 Saket, for the guardianship of Sarah Singh. They expressed their desire to adopt the child. This Guardianship Petition was dismissed by Principal Judge, Family Court, Saket on 05.07.2013.

4. The grounds for dismissal of the Appellants' application for adoption spelt out in the impugned order were firstly that no provision of law enabled the respondent to shift the custody and guardianship of the minor child to the Appellants; that secondly, the Appellants stated in their application that they want to adopt the child consequently, it is only a petition for the adoption of the child in such circumstances that would be maintainable and not for the appointment of

guardians. The impugned order surmised that since adoption laws have now become very stringent in India, the Appellants sought to apparently avoid its rigors by filing a guardianship petition, which also appears to be collusive. Lastly, since the child is an orphan, the guidelines prescribed for adoption of Indian Children issues by Ministry of Women and Child Development, Govt. of India have to be followed.

5. After hearing the parties, the Court had by order dated 17.12.2013 sought the assistance of the Central Adoption Resource Agency ("CARA") in making an appropriate order, having regard to its experience, and expertise in regard to adoption, especially with regard to the control mechanism that should be taken recourse to. The parties and CARA were also required to address the Court as to the correct position in law with respect to the guardianship of Sarah since Section 6 of the Hindu Minority and Guardianship Act, 1956 MAT. APPL.(F.C.) 57/2013 Page 3 mentions only the parents as guardian and the other provisions deal with the testamentary guardianship.

6. It is urged that Sarah lost both, her father and her mother, her natural guardians in terms of Section 6(a) of the Hindu Minority and Guardianship Act, 1956 (hereafter referred to as Hindu Guardianship Act). Though she remained under the care of her paternal uncle and the petitioners, such de facto custody and care does not result in legal guardianship of the child, in terms of Section 4(b) of the Hindu Guardianship Act. Relying on the Statement of Object and Reasons of the said enactment, CARA argues that the concept of de facto guardianship is ruled out from its scheme. Consequently, the Appellants applied for appointment as guardians under the Guardianship Act. However, before allowing them to be legal guardians of the child, the Court has to consider whether this is in the welfare of the child. The provisions of law pertaining to the custody of a child contained in either the Guardianship Act, (Section

17) or the Hindu Guardianship Act (Section

13) also hold out the welfare of the child as the dominant consideration.

7. It is argued on behalf of CARA that in this case, guardianship is not in the best interest of the child, since it would not guarantee her permanent rehabilitation. This, according to CARA, would mean that the proposed guardians- i.e. the Appellants, will have no legal responsibility towards her after she attains the age of majority. CARA states that if she is not made capable of standing on her own feet during the proposed guardianship, she will have no support system. MAT. APPL.(F.C.) 57/2013 Page 4 Furthermore, it is submitted guardianship does not confer any rights or privileges on her as that of biological child. On the other hand, she is entitled to have her right to family fulfilled through adoption as an orphan child as per the provisions of Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereafter referred to as "JJ Act") and the Guidelines Governing the Adoption of Children 2011 ("Guidelines").

8. In the written submissions, and during the hearing, it was suggested on behalf of CARA that the Appellants ought to follow the mechanism suggested by it. The relevant part of its submissions, made in this regard, are extracted below: "With regard to the control mechanism that may be taken into consideration, the following are suggested: (i) The present placement of the child in the family of the petitioners may be subjected to the periodic supervision of the concerned Child Welfare Committee (CWC), in order to ensure the well being of the child; (ii) The CWC concerned may be directed to ascertain the facts and circumstances of the case as brought out in the petition as well as the well being and adjustment of the child in the petitioners family and to file a report in this regard before this Honble Court at the earliest. The report may also take into consideration that the custody of the child has not been transferred under any duress (any inducement); (iii) If it is found by the CWC concerned that the child has well-adjusted in the family and the continuance of the child in the family of the petitioners is in her best interest, it may declare the child legally free for adoption to meet the requirement of law [Section 41(5) of the JJ Act].; MAT. APPL.(F.C.) 57/2013 Page 5 (iv) If the petitioners are serious about adopting the child and the child is favourable to such adoption [as ascertained by the CWC concerned under Section 41(5)(c) of JJ Act]., the following procedures as prescribed under para 40 of the said Guidelines (2011) for adoption by a foreign national may be followed..."

9. In the light of the submissions made and the stand of CARA, this Court directed notice to be issued, on 28.03.2014 to the Child Welfare Committee (CWC), Kasturba Niketan Complex, Lajpat Nagar-II. By its order dated 16.05.2014, the Court directed the Chairperson, CWC to examine the matter, make relevant inquiries in accordance with law and report to the Court, having regard to the provisions of the JJ Act.

10. The CWC furnished its report dated 26-06-2014 in compliance with this Court's order. The relevant extracts of that report are reproduced below: "That CWC is the competent authority regarding the declaration of children legally free for adoption, the Committee has to conduct enquiries before declaring a child legally free for adoption. Hence, CWC has referred the present case to Welfare Home for Children, a Specialized Adoption Agency (SAA), for a detailed enquiry in the matter by conducting a home visit at the house of Mr. David Kenneth Hambly and Mrs. Anne Christine Hambly at D-583, 3rd Floor, C.R. Park, New Delhi and also at the house of child's paternal uncle (Chacha) Mr. Pinto Kumar, R/o RZ-2718/28, IV A floor, Tughlakabad Extension, New Delhi. That as per the directions of CWC, a report was submitted by Mrs. Rekha Arora, Dy. Director, Welfare Home for Children, 1B Institutional Area, Sarita Vihar, MAT. APPL.(F.C.) 57/2013 Page 6 New Delhi. As per the report, child Sarah's parents expired in the year 2010 due to some chronic illness and hence there was no one to look after the child. Mr. Pinto, paternal uncle of the child was working the bakery of Mr. David Kenneth Hambly and Mrs. Anne Christine Hambly a Canadian couple. He expressed his inability to keep and look after child Sarah before the couple. Mr. and Mrs. Hambly expressed their desire to look after the child and took the custody of child in April, 2012 from her paternal uncle Mr. Pinto with his consent. The child is staying with Mr. and Mrs. Hambly since April 2012. They got the child admitted in Metro Delhi International School in October, 2012. Mr. and Mrs. Hambly have no child of their own and they have a strong sense of commitment and (sic) able to meet the needs of the child and they have positive attitude towards adoption. That it is further mentioned in the enquiry report submitted by SAA, that child Sarah also appeared happy and satisfied. That child's uncle Mr. Pinto has appeared before the CWC and expressed his incapability to look after the child by keeping with him in a rented accommodation. He has also submitted that child's grandmother stays

under the flyover and begs, therefore, she is not a fit guardian. Further, child's paternal uncles, Mr. Pinto and Mr. Jay Kishen and their mother have submitted in writing that they desire to keep child with Mr. and Mrs. Hambly and will never come to claim her back. They have also submitted that they want to keep the child with Mr. and Mrs. Hambly, so that the child will get love and affection of parents. Mr. Pinto also informed the Committee that child has no maternal grandparents or any other relatives from her maternal side. That on 26.06.2014, child Sarah appeared before CWC along with Mr. and Mrs. Hambly. Child stated before the Committee that she has been staying with the couple for the last 25 months and she is getting care, love MAT. APPL.(F.C.) 57/2013 Page 7 and affection of parents from them. Child further stated that she wants to stay with Mr. and Mrs. Hambly only. Child is studying in Class Vth in Metro Delhi International School. That the Committee observed that the child is very happy and satisfied with Mr. and Mrs. Hambly and she will have a bright future with them as the couple seems to have strong sense of commitments and able to meet child's social and emotional needs that the parents can give to her. That the Committee further observed that child Sarah Singh's parents are not alive and her relatives have submitted in writing before the Committee that they have no claim over the child. Moreover, the child is staying with Mr. David Kenneth Hambly and Mrs. Anne Christine Hambly for more than two years and the child expressed her consent to stay with them, before the CWC. That considering the above facts and circumstances, CWC decided to declare child Sarah Singh legally free to be given in adoption as per Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 and Rule 33(3)(g)(vi) of the Delhi Juvenile Justice (Care and Protection) Rules, 2009 on the basis of details furnished through inquiry conducted by Social Worker/Specialized Adoption Agency, as per its directions. Sd/- Sd/- Sd/- Sd/- 11. (Madhu Garg) (P.C. Chaturvedi) (P.K. Kukreja) (R.K. Member Member Chairperson" Member Rai) Section 41 of the JJ Act enables adoption of children, especially those who are abandoned or neglected. It reads as follows: MAT. APPL.(F.C.) 57/2013 Page 8 CHAPTER IV xxxxxxxx xxxxxxxx 41. Adoption.- (1) The primary responsibility for providing care and protection to children shall be that of his family. (2) Adoption shall be resorted to for the rehabilitation of such children as are orphaned, abandoned, neglected and abused through institutional and non-

institutional methods. (3) In keeping with the provisions of the various guidelines for adoption issued from time to time by the State Government, the Board shall be empowered to give children in adoption and carry out such investigations as are required or giving children in adoption in accordance with the guidelines issued by the State Government from time to time in this regard. (4) The children's homes or the State Government run institutions for orphans shall be recognised as an adoption agencies both for scrutiny and placement of such children for adoption in accordance with the guidelines issued under sub-section (3). (5) No child shall be offered for adoption. until two members of the Committee declare the child legally free for placement in the case of abandoned children b. till the two months period for reconsideration by the parent is over in the case of surrendered children, and c. without his consent in the case of a child who can understand and express his consent. (6) The Board may allow a child to be given in adoption d. to a single parent, and e. to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters.

12. The Juvenile Justice (Care and Protection of Children) Rules, 2007, by Rule 33 prescribes the procedure to be followed for adoption MAT. APPL.(F.C.) 57/2013 Page 9 of children who cannot be cared for by their biological parents. It reads as follows:

33. Adoption.

(1) The primary aim of adoption is to provide a child who cannot be cared for by his biological parents with a permanent substitute family.

(1) For all matters relating to adoption, the guidelines issued by the Central Adoption Resource Agency and notified by the Central Government under sub-section

(3) of section 41 of the Act, shall apply.

(3) In case of orphaned and abandoned children the following procedure shall apply, namely:(a) Specialized Adoption Agencies shall produce all orphaned and abandoned children who are to be declared legally free for adoption before the

Committee within twenty-four hours of receiving such children, excluding the time taken for journey; (b) a child becomes eligible for adoption when the Committee has completed its inquiry and declares the child legally free for adoption; (c) such declaration shall be made in Form XIV; (d) a child must be produced before the Committee at the time of declaring such child legally free for adoption; (e) whenever intimation is received by the police about an abandoned infant, the police shall take charge of the infant and arrange to provide immediate medical assistance and care; (f) subsequently, the child shall be placed in a specialized adoption agency or recognized and certified childrens home or in a pediatric unit of a Government hospital MAT. APPL.(F.C.) 57/2013 Page 10 followed by production of the child before the Committee within twenty-four hours; (g) procedure for declaring a child abandoned and certifying him legally free for adoption: (i) in case of an abandoned child, the recognized agency shall within twenty four hours, report and produce the child before the Committee with the copy of the report filed with the police station in whose jurisdiction the child was found abandoned; (ii) the Committee will institute a process of inquiry, which shall include a thorough inquiry conducted by the Probation Officer or Child Welfare Officer, as the case may be and who shall give report in Form XIII to the Committee containing the findings within one month; (iii) there shall be a declaration by the specialized adoption agency, stating that there has been no claimant for the child even after making notification in at least one leading national newspaper and one regional language newspaper for children below two years of age and for children above two years, an additional television or radio announcement and notification to the missing persons squad or bureau shall be made; (iv) the steps stated in (iii) shall be taken within a period of sixty days from the time when the child is found in case of a child below two years of age and in case of children above two years of age, this period shall be four months; (v) the period of notification shall run concurrently with the inquiry to be conducted and report submitted under clause (ii) of this sub-rule; (vi) the Committee shall declare the child legally free for adoption on completion of the process of inquiry, including MAT. APPL.(F.C.) 57/2013 Page 11 declaration of the specialized adoption agency made under clauses (ii) and (iii) of this sub-rule; (vii) no child above seven years who can understand and express his opinion shall be declared free for adoption without his consent.

(4) In case of surrendered children the following procedure shall apply, namely:(a) a surrendered child is one who had been declared as such after due process of inquiry by the Committee and in order to be declared legally free for adoption, a surrendered child shall be any of the following: (i) born as a consequence of non-consensual relationship; (ii) born of an unwed mother or out of wedlock; (iii) a child in whose case one of the biological parents is dead and the living parent is incapacitated to take care; (iv) a child where the parents or guardians are compelled to relinquish him due to physical, emotional and social factors beyond their control; (b) serious efforts shall be made by the Committee for counselling the parents, explaining the consequences of adoption and exploring the possibilities of parents retaining the child and if, the parents are unwilling to retain, then, such children shall be kept initially in foster care or arranged for their sponsorship; (c) if the surrender is inevitable, a deed of surrender in Form XV shall be executed on a non-judicial stamp paper in the presence of the Committee; MAT. APPL.(F.C.) 57/2013 Page 12 (d) the adoption agencies shall wait for completion of two months reconsideration time given to the biological parent or parents after surrender; (e) in case of a child surrendered by his biological parent or parents, the document of surrender shall be executed by the parent or parents before the Committee; (f) after due inquiry, the Committee shall declare the surrendered child legally free for adoption in Form XIII as the case may be after a sixty days reconsideration period as per Central Adoption Resource Agency guidelines.

(5) For the purposes of section 41 of the Act, court implies a civil court, which has jurisdiction in matters of adoption and guardianship and may include the court of the district judge, family courts and city civil court.

13. CARA has issued separate guidelines for inter-country and in- country adoptions. The underlying theme is that placement agencies involved in adoption and those wanting to adopt children should comply with these guidelines. Registration of applications with respective state governments is a pre-requisite. No Objection Certificate [NOC]. from CARA is essential in case of all inter-country adoption, before placement agency processes the application in competent Judicial Courts. CARA relies on the following provision of the guidelines:

40. Adoption by foreign nationals living in India.- (1) In case of foreign nationals who are citizens of a country that has ratified the Hague Convention and they have been living in India for one year or more, the PAP(s) shall approach CARA along with a certificate of No-objection to MAT. APPL.(F.C.) 57/2013 Page 13 the proposed adoption from the embassy or mission of the country of their nationality.

(2) On receipt of the No Objection Certificate, CARA shall refer the case to a RIPA for carrying out the Home Study and preparation of PAP(s) dossier. (3) The procedures stipulated under these Guidelines for inter-country adoption shall be followed by the RIPA. (4) In cases referred to in sub-paragraph (1), the Embassy or Missions in India or the country of the nationality of the PAPs shall give an undertaking for postadoption follow-up as stipulated in Chapter IV of these guidelines. (5) In case, the PAPs continue to reside in India during the stipulated post-adoption follow-up period, the concerned RIPA would undertake such follow-ups and report to the concerned embassy or mission and CARA. (6) The concerned embassy or mission shall also ensure that the adopted child acquires citizenship of the country of his or her parents immediately after adoption decree and a copy of the citizenship order shall be forwarded to CARA and the concerned RIPA.

14. The acronym PAP means Prospective Adoptive Parent (under rule 2 (z) of the Guidelines); RIPA means Recognized Indian Placement Agency (in terms of rule 2 (aa) of the Guidelines) and SARA stands for State Adoption Resource Agency (rule 2 (zc)). Under Rule 31, an Adoption Recommendation Committee (ARC) has to be set up which will consider the application of the PAP with copies of the dossier forwarded by RIPA including a Home Study Report (HSR) with the other material, and the requisite fee (Rule 31 (4)). The ARC (or SARA, wherever one does not exist in a State) has to process MAT. APPL.(F.C.) 57/2013 Page 14 the request and issue the recommendation certificate within 15 days. Under Rule 61 of the guidelines, a Specialized Adoption Agency can be recognized as a RIPA.

15. In the present case, the report of the CWC dated 26th June, 2014 itself was preceded by a report after inquiry by a Specialized Adoption Agency, i.e. Director, Welfare Home for Children, 1B, Institutional Area, Sarita Vihar, New Delhi. Having

regard to this circumstance, and the further fact that the CWC has made further inquiries into the matter and satisfied itself about the feasibility of the Appellants application for adoption of Sarah, and that a certificate declaring that she is legally free to be given in adoption has been issued under Section 41 of the JJ Act and the Rules, this Court is of the opinion that the further formalities should be fulfilled in accordance with Rule 40 of the CARA guidelines. Since the Specialized Adoption agency has conducted an inquiry leading to the CWCs certificate, the CARA should avoid duplication in regard to further procedures and insist upon fulfilment of only those, which are essential to ensure control mechanisms are placed as well as appropriate prescribed clearances from the High Commission or the foreign mission concerned are obtained, in respect of the prospective adoptive parents.

16. In the light of the above discussion, the impugned judgment and order is set aside. The matter is remitted to the Family Court, Saket, which will now proceed to monitor the further progress of the Appellants request for adoption, and pass appropriate orders after ensuring that CARAs clearance is secured. The parties are directed to MAT. APPL.(F.C.) 57/2013 Page 15 be present before the concerned Family Court on 25.08.2014 for further proceedings. Taking note that a considerable amount of time has already lapsed in this matter, CARA shall endeavour to complete the formalities within 8 weeks from today; the Court shall complete and issue final orders within 4 months from today. The appeal is consequently allowed in these terms. S. RAVINDRA BHAT (JUDGE) NAJMI WAZIRI (JUDGE) AUGUST14 2014 MAT. APPL.(F.C.) 57/2013 Page 16

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