

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

1. **FAO No.1793 of 2018 (O&M)**
Date of Decision:11.12.2018

Anil Sharma

. Appellant

Vs.

Harjinder Kaur and another

. Respondents

2. **FAO No.2920 of 2018 (O&M)**

Harjinder Kaur

. Appellant

Vs.

Anil Sharma and another

. Respondents

CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN
HON'BLE MR.JUSTICE ANUPINDER SINGH GREWAL

Present: - Mr.Manjeet Singh, Advocate,
for the appellant (in FAO No.1793 of 2018).
for the respondent (in FAO No.2920 of 2018)

Mr.Rahul Sharma, Advocate,
for the respondent (in FAO No.1793 of 2018)
for the appellant (in FAO No.2920 of 2018)

RAKESH KUMAR JAIN, J. (ORAL)

This order shall dispose of two appeals bearing FAO Nos.1793 of 2018 title as “*Anil Sharma Vs. Harjinder Kaur and another*” [for short ‘the 1st appeal’] and FAO No.2920 of 2018 title as “*Harjinder Kaur Vs. Anil Sharma and another*” [for short ‘the 2nd appeal’] as both the appeals have arisen from the common judgment dated 6.3.2018 passed by the Guardian Judge-cum-Civil Judge (Sr. Divn.), Panchkula by which an application filed by the appellant in the 1st appeal under Section 7 of the Guardianship and Wards Act, 1890 [for short ‘the Act’] read with Section 13 of the Hindu Minority and Guardianship Act, 1956 [for short ‘the Act of 1956’] for his

appointment as guardian of the minor girl child, namely, Kashni Neeta Sharma, has been declined. However, for the sake of convenience, the facts are being extracted from the 1st appeal.

In brief, the appellant in the 1st appeal is a Non Resident Indian (British citizen) residing at #7, Lampton Avenue, Hounslow TW3 4EW, United Kingdom from the last 16 years with his wife Neeta Sharma. They are Hindu by religion and are issueless. The respondent Harjinder Kaur is a Sikh by religion and is a resident of Faridkot (Punjab). Although the appellant had set up a case that the respondent, being a friend of his sister Anu Sharma, had agreed to be a surrogate mother for his child by adopting IUI technique but it had ultimately been found, after the DNA test, that the child in question, born to the respondent, was not of the appellant. Rather it has been found as a fact that the respondent is an unwed mother of the female child, namely, Kashni Neeta Sharma. The appellant had filed an application under Section 7 of the Act and Section 13 of the Act of 1956 before the Court at Panchkula, where he was ordinarily residing, for his appointment as a guardian of the minor girl Kashni Neeta Sharma, who was born on 11.1.2017 to the respondent, in view of the settlement/agreement arrived at between the parties on 28.11.2017. It is pertinent to mention here that before the settlement was arrived at between the parties, the appellant had registered one FIR No.144 dated 21.6.2017 under Sections 384, 389 & 420 of the Indian Penal Code, 1860 [for short 'the IPC'] at Police Station Sector 14, Panchkula against the respondent but they had agreed, as per the settlement/agreement dated 28.11.2017, to get rid of the said FIR by seeking its quashment on the basis of a compromise. The application filed by the appellant under Section 7 of the Act and Section 13 of the Act of 1956 dated 2.12.2017 was not contested by the respondent, who had filed an admitting

written statement dated 18.1.2018. The appellant tendered his evidence in examination-in-chief by way of an affidavit as PW1 and was even cross-examined by the respondent only to the effect that they would look after the child as their daughter and would provide her both social and financial security. Neeta Sharma, wife of the appellant, was examined as PW2, who also deposed that they are asking for the custody of the minor child as they ultimately wanted to adopt her and as per law of the United Kingdom the child cannot be adopted until and unless his/her custody is given in India. PW2 was not cross-examined by the respondent. The appellant also tendered in evidence the report of the Andrew Beckwith, an independent social worker of United Kingdom, who had concluded in his report that *“My professional opinion of this couple is that they have a close, stable and loving relationship together. They speak lovingly and affectionately of Kashni. The home is adorned with photographs of Kashni and Mr. & Mrs. Sharma together. The fact that Kashni is not their own biological child has not, in my opinion, affected their love for her. Mr. & Mrs. Sharma are fully supported by their respective families and also regard Kashni as a family member. It is my professional opinion that Mr. & Mrs. Sharma can offer Kashni the love, support and stability that every child needs. They can open a world of opportunity to the child that they ultimately wish to adopt and parent and, most importantly, care for and love”*. He also tendered the statement of truth that *“he had no conflict of interest of any kind”*. Respondent No.1, also put in appearance as RW-1, had stated that she wanted to give her child voluntarily, with her free consent and without monetary interest in the guardianship of the appellant and his wife with a view that the child would be taken into adoption by them.

The learned trial Court, after considering both oral as well as documentary evidence, opined that the respondent had appointed the appellant as a guardian of the minor child by way of Will and in view of Sections 9(4) & (5) of the Act of 1956, the custody cannot be given to the appellant as a guardian during the life time of the biological mother. It is also observed by the trial Court that the appellant has failed to lead evidence to the effect that the biological mother of the child was having any acquaintance with his sister and owing to that relationship the respondent had offered to be a surrogate mother due to love and affection and without financial consideration. It is further observed that the appellant has failed to produce on record the passport record in order to substantiate that the child has been in his direct care and custody since birth. The Court had also referred to the decision of the Supreme Court in the case of ***“Anokha (Smt.) Vs. State of Rajasthan and others”*** 2004(1) SCC 382, cited by the appellant, to distinguish the same on the ground that in the said case, the parties knew each other since long whereas in the present case, the trial Court had found that the parties to the *lis* were having criminal litigation. The trial Court was thus of the view that it would not be just and expedient much less in the welfare of the child to be given under the guardianship of the appellant and his wife.

Aggrieved against the aforesaid judgment of the learned trial Court, the present appeals have been preferred by both the parties.

Learned counsel for the appellant in the 1st appeal, which has been kept as a lead case, has argued that the learned trial Court has unnecessarily swayed with the nomenclature of the declaration dated 01.12.2017 in which Section 9(4) of the Act of 1956 was inadvertently mentioned to treat the same as a Will otherwise there was no intention on the

part of the respondent to appoint the appellant by way of a Will. In this regard, counsel for the respondent has also submitted that the said declaration, prepared under Section 9(4) of the Act of 1956, was an error of commission as there was no intention to appoint the appellant as a guardian of the minor child by way of a Will. It is, however, not disputed by the counsel for the appellant that had a person been appointed by way of a Will in terms of Section 9(4) & (5) of the Act of 1956, the right of the guardianship would arise only after the death of the natural parent/biological mother or father. It is further submitted that insofar as the question of acquaintance of the respondent with the sister of the appellant is concerned, she herself has filed the reply to the petition filed under Section 7 of the Act and Section 13 of the Act of 1956 admitting each and every averment made therein and in this regard, pressed Section 58 of the Evidence Act, 1872 in which it is provided that *“No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings”*. It is further submitted that in case of a illegitimate girl child, the mother is the only natural guardian and in this regard he has referred to Section 6(b) of the Act of 1956, which read as under:-

“6. *Natural Guardians of a Hindu Minor:-*
the natural guardians of a Hindu minor, in
respect of the minor’s person as well as in
respect of the minor’s property (excluding his or
her undivided interest in joint family property),
are:

(a) XXXX

(b) *In case of an illegitimate boy or an illegitimate unmarried girl, the mother, and after her, the father.”*

It is further submitted that one of the bottleneck for appointing the appellant as the guardian was the pending criminal litigation between them as the appellant had admittedly registered one FIR No.144 against the respondent on 21.6.2017. However, he has submitted that the said FIR has now been quashed by this Court vide its order dated 4.12.2018 passed in CRM-M-47001-2017 titled as “Harjinder Kaur and others Vs. State of Haryana and others” on the basis of a compromise arrived at between the parties on 28.11.2017 which came into being at the stage when the respondent had applied for anticipatory bail in this Court. He has further submitted that there is no other case, much less criminal, pending between the parties as of now after the happy ending in that CRM-M-47001-2017. It is also argued that the learned Court below has erred in not appreciating the law laid down by the Supreme Court in the case of **Anokha (Smt.)** in which the facts were almost similar as in that case also the girl child was given in the guardianship of an Italian couple, who was though known to the family of the girl child from the past many years. It is argued that in the said case the Supreme Court has laid down certain guidelines after referring to the provisions of Central Adoption Resource Agency [CARA] but according to him the CARA is not applicable to the facts of the present case in view of Section 56(3) of Chapter VIII of the Juvenile Justice (Care and Protection of Children) Act, 2015 [for short ‘the Act of 2015’] which deals with the ‘Adoption’. Section 56(3) of the Act of 2015 read as under: -

“Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956.”

He has also submitted that since both the parties to the *lis* are either Hindus or Sikhs and are governed by the provisions of the Act and the Act of 1956 and in this regard he has referred to Section 2 of the Act of 1956 in which it is provided that *“the Act to be supplemental to Act 8 of 1890. The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890”*. He has thus submitted that the provisions of Section 7 of the Act and Section 13 of the Act of 1956 were invoked by the appellant for the purpose of seeking custody of the minor child and in that regard in view of Section 56(3) of the Act of 2015, the provisions of CARA would not apply. He has also submitted that neither the provisions of CARA nor the provisions of the Adoption Regulations, 2017, which have been enacted in view of the powers conferred by Clause (c) of Section 68 read with Clause (3) of Section 2 of the Act of 2015, would apply because in the present case, the child is to be given in guardianship by the biological mother. Learned counsel for the appellant has further submitted that the necessity for appointing a guardian of the child has arisen because of the adoption law of United Kingdom. In this regard, he has referred to the provisions of the Adoption and Children Act, 2002 [for short ‘the Act of 2002’] of the United Kingdom and also Paragraphs 316A and 316B of the Immigration Rules. It is submitted that in order to adopt a child in England, the person must be appointed as guardian by the Indian Court in order to take the child to United Kingdom to complete the process of adoption. Although the Act of 2002 is not produced as a

whole but it is submitted that as soon as the child is brought lawfully to the territories of the United Kingdom for the purpose of adoption then the prospective adoptive parents have to comply with certain legal requirements which are summarized as under: -

- “1. Applied for their suitability to adopt a child by a local council or voluntary adoption agency – i.e. IAC*
- 2. Complied with the assessment process.*
- 3. Received confirmation from the agency in writing approving them as suitable to be an adoptive parent.*
- 4. Received notification from the Secretary of State in writing that he is ready to issue a certificate of eligibility.*
- 5. Within 14 days of the couple’s arrival in UK with their child, they must notify their local council informing them about their intention to adopt the child. Once this notification has been received by the local council, the child be a protected child under the law and her placement will be monitored by the council.*
- 6. Child can stay in the UK during which the adoption process can be made through the UK Courts. If adoption order is granted by UK Court than the child will acquire British Citizenship.”*

It is further submitted that paragraph 316A of the Immigration Rules provides the requirement for limited leave to enter the United Kingdom with a view to settlement as a child for adoption. The requirements to be satisfied in the case of a child seeking limited leave to enter the United Kingdom for the purpose of being adopted (which, for the avoidance of doubt, does not include a de facto adoption) in the United Kingdom are as under:

“(i) is seeking limited leave to enter to accompany or join a person or persons who wish to adopt him in the United Kingdom (the “prospective parent(s)”), in one of the following circumstances;

(a) both prospective parents are present and settled in the United Kingdom or is being admitted for settlement on the same occasion that the child is seeking admission, and has had sole responsibility for the child’s upbringing;... and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be maintained and accommodated adequately without recourse to public funds in

accommodation which the prospective parent or parents own or occupy exclusively; and

(v) will have the same rights and obligations as any other child of the marriage or civil partnership; and

(vi) is being adopted due to the inability of the original parent(s) or current carer(s) (or those looking after him immediately prior to him being physically transferred to his prospective parent or parents) to care for him, and there has been a genuine transfer of parental responsibility to the prospective parent or parents; and

(vii) has lost or broken or intends to lose or break his ties with his family of origin' and

(viii) will be adopted in the United Kingdom by his prospective parent or parents in accordance with the law relating to adoption in the United Kingdom, but the proposed is not one of convenience arranged to facilitate his admission to the United Kingdom.

Limited leave to enter the United Kingdom with a view to settlement as a child for adoption.”

Similarly, paragraph 316B of the Immigration Rules provides as under: -

“A person seeking limited leave to enter the United Kingdom with a view to settlement as a child for adoption may be admitted for a period not exceeding 24 months provided he is able, on arrival, to produce to the Immigration Officer a valid passport or other identity document and has entry clearance for entry in this capacity”.

Insofar as the intended parents are concerned, they are also supposed to show that:-

- “(i) They currently live and are settled in the UK legally and that there is no time limit on their stay. Mr. and Mrs. Sharma are both British Citizens (see passport).*
- (ii) They can currently adequately support and house Kashni without needing any support from public funds (see financial statement and report of independent sw)*
- (iii) As Mr. & Mrs. Sharma meet these two conditions, they qualify as prospective adoptive parent who can bring Kashni to the UK.*
- (iv) The child must meet specific requirements in order to qualify to join the couple in the UK: She cannot support herself*

financially, is not leading an independent life and is not married: She is under 18 years and has not made any independent family unit; she has no family ties left with her birth family, she was adopted because the birth parents could not care for her and a genuine transfer of parental responsibility has taken place and any adoption is not for the purpose to make entry to the UK easily.”

Learned counsel for the appellant has thus submitted that there are numerous checks and balances created for the welfare of the child who is removed from the guardianship of the biological parent and is taken to foreign land for the purpose of adoption. He has also submitted that certain guidelines have also been laid down by the Supreme Court in the case of **Anokha (Smt.) (Supra)**, which are reproduced as under: -

“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 authorized 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.

It is also submitted by him that primarily the Court has to see the welfare of the minor. In this regard, reference has been made to Section 13 of the Act of 1956, which read as under: -

“13. Welfare of minor to be paramount consideration.- (1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

Learned counsel for the appellant has also referred to all the decisions mentioned by the Supreme Court in the case of **Anokha (Smt) (Supra)**, which are also mentioned herein for a ready reference:-

- “1. “Laxmi Kant Pandey Vs. Union of India” (2001) 9 SCC 379*
- 2. “Indian Council Social Welfare Vs. State of A.P. and others” (1999) 6 SCC 365*

3. *“Sumanial Chhotalal Kamdar Vs. Asha Trilokbhai Shah” (1995) 3 SCC 700*
4. *“Karnataka State Council for Child Welfare and another Vs. Society of Sisters of Charity St. Gerosa Convent and others” 1995 Supp (4) SCC 529*
5. *“Laxmikant Pandey Vs. Union of India” (1991) 4 SCC 33*
6. *“Laxmi Kant Pandey Vs. Union of India” (1987) 1 SCC 66*
7. *“Laxmi Kant Pandey Vs. Union of India” 1985 Supp SCC 701*
8. *“Lakshmi Kant Pandey Vs. Union of India” (1984) 2 SCC 244”*

Learned counsel for the respondent has also supported the arguments of the counsel for the appellant as the respondent has also filed 2nd appeal being aggrieved against the impugned order dated 6.3.2018 as she has voluntarily taken a decision to give her child to the appellant and his wife in their guardianship looking at her bright future and welfare in their hands as she is an unwed mother.

We have heard learned counsel for the parties and perused the record with their able assistance.

The issues involved in this case are as under: -

- “1. *Whether the respondent had executed a Will while making declaration on 1.12.2017 and, if so, whether in the presence of a Will, the appellant*

could have been appointed as a guardian in terms of Section 9(4) & (5) of the Act of 1956?

2. *Whether the absence of appellant's sister Anu Sharma from the witness box is fatal to the case of the appellant to prove that the family of the appellant or his sister had an acquaintance with the respondent, who has otherwise filed an admitted written statement?*
3. *Whether in the absence of any civil or criminal litigation, now pending between the parties, and keeping in view the better future prospects much less for the welfare of the minor, the Court can appoint the appellant as a guardian?*

Insofar as the 1st question is concerned, in case there is a Will executed by the Hindu mother for appointing a person as a guardian of her minor illegitimate child, in respect of the minor's person or property or in respect of both, the Will would come into effect only after the death of the testator. There is no doubt or exception to this law because the Will would only come into operation after the death of the testator and not in his/her life time. However, from a bare perusal of the document dated 1.12.2017, which is labelled as a declaration under Section 9(4) of the Act of 1956, we are of the considered opinion that there was no intention on the part of the respondent to appoint the appellant as a guardian by way of a Will rather it is the duty of the Court to lift the veil to look into the language used in the document to find out the true purpose of the executant of the document and not to be swayed with the nomenclature or the title given in the document.

In this regard, reference could be had to para 6 of the said affidavit of the declaration dated 1.12.2017, which read as under:-

“6. That the declarant will have no right over the minor child namely Kashni Neeta Sharma presently aged about 10 months and nor shall claim any right over the child in any manner in future and the appointed and declared guardian shall be free to look after the child and take the child with him and take any other decision relating to the child with regard to the welfare and maintenance and education etc.”

It is thus apparent that the intention was to appoint guardian *in praesenti* and not in future. Thus, the first question is answered in the manner hereinabove that from the record we have found that the respondent had not desired to appoint the appellant as a guardian of her minor child in future by way of a Will which would naturally come into effect only after her death. The first objection raised by the learned trial Court in this regard is, therefore, answered.

In regard to the 2nd issue about the doubt of the trial Court in regard to the acquaintance of the family of the appellant with the respondent through his sister Anu Sharma is concerned, though it is a matter of fact that Anu Sharma did not enter the witness box to state about her acquaintance with the respondent but the facts averred in the application filed under Section 7 of the Act read with Section 13 of the Act of 1956 have all been admitted by the respondent in her reply, therefore, Section 58 of the

Evidence Act would come to the rescue of the appellant in which it is provided that the fact which is not disputed need not to be proved.

The 3rd and the last question with regard to the welfare of the minor child is concerned and with the quashing of the FIR by this Court vide order dated 4.12.2018 and in the absence of any other litigation having been brought to our notice, pending between the parties, may be civil or criminal, we are of the considered opinion that the anxiety of the trial Court not to appoint the appellant as the guardian of the minor would be no more in existence. There is no error as such committed by the trial Court in this regard because we are also of the considered opinion that if there is any litigation pending between the parties then it would not be in the welfare of the minor by giving his/her guardianship to a person who is asking for it.

The last but not the least is the issue of welfare of the minor child. We have considered this fact that the respondent is an unwed mother and does not possess sufficient means to give sufficient security, education etc. to the minor child whereas the appellant and his wife are the persons of means, who are of the Indian origin, issueless, living in United Kingdom for the last so many years and having their established business/profession. The English Law, which we have already referred to in the earlier part of this judgment, also provides checks and balances in order to protect the interest of the minor child. Moreover, the decision in the case of *Anokha (Smt) (Supra)* rendered by the Supreme Court, the child, who was given in guardianship by the biological mother after taking into consideration the provisions of CARA as well as by laying down certain guidelines, which we have already referred to in the earlier part of the judgment and would also reiterate the same for the purpose of impressing upon the appellant and his wife to follow. Although in the directions contained in para No.17 of the

decision rendered by the Supreme Court in the case of **Anokha (Smt) (Supra)**, the amount of ₹50,000/- has been ordered to be deposited in the District Court to cover the air fare for the possible repatriation of the child to India till the child is legally adopted. Keeping in view the present scenario we direct the appellant in the 1st appeal to deposit an amount of ₹5 lakh in the District Court, Panchkula with a further direction to submit all the details about the process of adoption taking place at United Kingdom of the said child. The said information has to be sent by the appellant to the District Judge, Panchkula immediately after the adoption and various steps taken with regard to her adoption, up bringing etc. and after every year thereof. All these measures have been taken by this Court in view of the mandatory provisions of Section 13 of the Act of 1956 which also enjoins a duty upon the Court to watch the interest and welfare of the minor.

With these observations, both the appeals are hereby allowed and the impugned judgment is set aside and as a necessary corollary, the appellant and his wife are appointed as guardian of Kashni Neeta Sharma and are permitted to take her to United Kingdom with them for the purpose of her adoption.

A photocopy of this order be placed on the file of connected case.

(RAKESH KUMAR JAIN)
JUDGE

(ANUPINDER SINGH GREWAL)
JUDGE

11.12.2018
Vivek

Whether speaking /reasoned : *Yes/No*

Whether Reportable : *Yes/No*