

124

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-46863-2023
Date of decision: 03.10.2023

GURBAJ SINGH

...Petitioner

VERSUS

STATE OF HARYANA AND OTHERS

...Respondents

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present:- Mr. Aditya Sanghi, Advocate,
Ms. Shaveta Sanghi, Advocate and
Mr. Lokesh Sharma, Advocate
for the petitioner.

JASGURPREET SINGH PURI, J. (Oral)

1. The present petition has been filed under Section 482 Cr.P.C. seeking quashing of the order dated 28.07.2023 (Annexure P-1) as well as the order dated 03.08.2023 (Annexure P-2) passed by learned Sub-Divisional Magistrate, Ratia, District Fatehabad, whereby without giving any opportunity of hearing to the petitioner, who is the biological father of the minor child, namely, Amna, the learned Sub-Divisional Magistrate, Ratia, District Fatehabad handed over the custody of the said child to respondent No.2, who is claiming himself to be the adoptive father of the minor child as per provisions of Section 97 Cr.P.C with a further prayer that the custody of the minor child be handed over to the petitioner, who is his biological father.

2. Learned counsel appearing on behalf of the petitioner submitted that the petitioner is the biological father of a minor child, who is of the age of 4 ½ years and he was staying with respondent No.2, namely, Malkit Singh and on the basis of an application given by respondent No.2 to the learned Sub-Divisional Magistrate, Ratia, District Fatehabad vide Annexure P-3, the learned Sub-Divisional Magistrate, Ratia, District Fatehabad has exercised the power under Section 97 Cr.P.C. for recovering the child, namely, Amna from the custody of the petitioner and got recovered the child and handed over the child to respondent No.2. He further submitted that the learned Sub-Divisional Magistrate, Ratia, District Fatehabad did not have any power under Section 97 Cr.P.C. for the purpose of recovering the child and therefore it amounts to wrongful exercise of power since the petitioner was not a stranger and he was the biological father of the minor child. He also submitted that as per the application (Annexure P-3), the child was with respondent No.2 on the basis of registered Adoption Deed but the petitioner is in the process of challenging the said Adoption Deed before the appropriate Court and therefore the impugned order dated 03.08.2023 (Annexure P-2) is liable to be set aside and custody of the minor child be handed over to the petitioner being the biological father of the aforesaid child. He has referred to a judgment of the Hon'ble Supreme Court in Anjali Anil Rangari versus Anil Kripasagar Rangari and others, 1997 (10) SCC 342 and a judgment of Bombay High Court in Vishal Jivan Jogure versus Smt. Megha Vishal Jogure and another, 2005 (14) RCR (Criminal) 39 to contend that the learned Sub-Divisional Magistrate, Ratia, District Fatehabad did not have the jurisdiction.

3. I have heard the learned counsel for the petitioner.

4. Respondent No.2 filed an application before the learned Sub-Divisional Magistrate, Ratia, District Fatehabad under Section 97 Cr.P.C. vide Annexure P-3, in which he stated that the marriage of his niece, namely, Kauri Rani was solemnized with the present petitioner, namely, Gurbaj Singh in the year 2018 and out of the said wedlock, one child, namely, Amna was born on 20.02.2019 and just after one day of giving birth to the child, his niece died. After the death of aforesaid Kauri Rani, the petitioner, namely, Gurbaj Singh after some time expressed his inability in upbringing the child and therefore respondent No.2, who was in need of support in his old age, since his own son had died, expressed his willingness to all the relatives to adopt a son. Thereafter, the petitioner, namely, Gurbaj Singh gave his consent and agreed to give the aforesaid child in adoption to respondent No.2. Thereafter, the entire legal process was completed and a registered Adoption Deed No.33 dated 25.11.2021 at Sub-Tehsil Kulan was executed and a copy of the same was also enclosed along with the aforesaid application.

5. It was further stated in the application filed by respondent No.2 that about one month back, the petitioner took the minor child with him so that he shall drop back the child within one or two days but when many days had passed and the petitioner did not drop the child back then in order to get the child back, respondent No.2 asked the petitioner about the same but he flatly refused to hand over the child to respondent No.2. Even though the child was stubborn to come along with respondent No.2 and wanted to go back with him but the petitioner although took the child for about one or two days but retained him illegally for about one month and rather respondent No.2 was pushed out of the house and was also threatened that in near future if he comes to his home

then he will have to face dire consequences. It is further stated in the application that the petitioner has kept the child against the wishes of the child and respondent No.2 wants the child to come back to him as the child was an adopted child in accordance with law.

6. On the basis of the aforesaid complaint made by respondent No.2, the learned Sub-Divisional Magistrate, Ratia, District Fatehabad issued search warrants under Section 97 Cr.P.C. Thereafter, the minor child was recovered from the petitioner and the learned Sub-Divisional Magistrate, Ratia, District Fatehabad passed the impugned order Annexure P-2 dated 03.08.2023. A perusal of the aforesaid order would show that it has been so observed by the learned Sub-Divisional Magistrate, Ratia, District Fatehabad that the minor child was recovered and produced in the Court on 03.08.2023. It was also stated by the learned Sub-Divisional Magistrate, Ratia, District Fatehabad that the petitioner, namely, Gurbaj Singh did not appear in the Court. Respondent No.2 rather told the Court that the entire history with regard to the adoption of the child and he being the adoptive father by way of a registered Adoption Deed took place on 25.11.2021 and since then the child was with him.

7. In the aforesaid order, the learned Sub-Divisional Magistrate, Ratia, District Fatehabad also recorded and observed that on being asked from the child, namely, Amna, he told that he wanted to stay with his father i.e. Malkit Singh (respondent No.2) who is the adoptive father. Thereafter, the learned Sub-Divisional Magistrate, Ratia, District Fatehabad closed the case since the child was already recovered.

8. The argument raised by the learned counsel for the petitioner was that the learned Sub-Divisional Magistrate, Ratia, District Fatehabad had no

power under Section 97 of the Cr.P.C. for getting recovered the child and the petitioner was entitled for the custody of the child being the biological father and therefore necessary directions are required to be issued by this Court for the custody of the child. This Court is unable to agree with the submission made by the learned counsel for the petitioner.

9. The provisions pertaining to the adoption of a child are contained under the Hindu Adoptions and Maintenance Act, 1956. Sections 12, 15 and 16 of the aforesaid Act of 1956 are reproduced as under:-

12. Effects of adoption.—*An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:*

Provided that—

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

15. Valid adoption not to be cancelled.—*No adoption which has been validly made can be cancelled by the adoptive*

father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

16. Presumption as to registered documents relating to adoption.—*Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.*

10. Section 12 of the Hindu Adoptions and Maintenance Act, 1956 deals with the effects of adoption and according to Section 12, there is clear cut legislative mandate in the case of an adoption that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption. Furthermore, from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. In other words, the relationship of the petitioner even if he is the biological father is deemed to have been severed by way of a legislative command and operation of law. As per the aforesaid application, the adoption of minor child was done by way of a registered Adoption Deed. Learned counsel for the petitioner has not disputed with regard to the same but has only stated that the petitioner is still in the process of challenging the aforesaid Adoption Deed in future. Therefore, by way of deeming fiction as contained hereinabove, the petitioner had no ties with

the child qua whom the registered Adoption Deed was executed by the petitioner himself way back in the year 2021.

11. As per Section 15 of the Hindu Adoptions and Maintenance Act, 1956, no adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth. Admittedly, the petitioner has not cancelled the aforesaid Adoption Deed nor he could have cancelled the same under Section 15 of the Hindu Adoptions and Maintenance Act, 1956.

12. Under Section 16 of the Hindu Adoptions and Maintenance Act, 1956, there is a statutory presumption with regard to the registered documents related to adoption. It provides that whenever any document required under any law for the time being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved. Along with the application (Annexure P-3), respondent No.2 had attached copy of the aforesaid registered Adoption Deed. Therefore, there was a statutory presumption in favour of the validity of the aforesaid Adoption Deed.

13. The prayer of the petitioner is two-fold. Firstly, for quashing the impugned orders Annexure P-1 and Annexure P-2 and secondly for seeking custody of the minor child. It is a settled law that procedure is handmaid of justice and considering the facts and circumstances of each and every case, the Court has to even ignore the technicalities for the purpose of dispensing justice and for attainment of substantial justice. The Courts especially the

Constitutional Courts and the State are *parens patriae* in such like cases. It is a duty of Court to consider and look into the welfare of the child because welfare of the child is always of paramount consideration. The Hon'ble Supreme Court in *Nil Ratan Kundu and another versus Abhijit Kundu, 2008 (9) SCC 413* dealt with this issue in detail. The relevant portion of the aforesaid judgment is reproduced as under:-

Para 52

“In our judgment, the law relating to custody of a child is fairly well settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.”

14. Therefore, this Court while exercising its powers under Section 482 Cr.P.C. would also invoke the doctrine of substantial justice. It is a case where the petitioner after the death of his wife, after some time had given the small child in adoption to respondent No.2 by way of Adoption Deed dated 25.11.2021. The said Adoption Deed has not been challenged by the petitioner and it has been so stated by learned counsel for the petitioner that the petitioner is contemplating to challenge the same. Therefore, a statutory presumption arises in favour of respondent No.2 and as per Section 12 of the Hindu Adoptions and Maintenance Act, 1956, all the ties of the child were severed. It is a case where the learned Sub-Divisional Magistrate, Ratia, District Fatehabad had to issue search warrants and police had to go to the house of the petitioner and thereafter to restore the minor child to respondent No.2. A lot of trauma must have been caused to a small child of tender years of the age of 4 ½ years. The child has become a victim of the action of the petitioner wherein he rather gave a statement to the learned Sub-Divisional Magistrate, Ratia, District Fatehabad that he wants to live with respondent No.-2, who is his adoptive father. The mental state of mind of a small child appears to have been ruptured by the petitioner.

15. A perusal of Section 97 Cr.P.C. would show that it deals with the situation where a Magistrate has reasons to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case

seems proper. When the child was produced before the learned Sub-Divisional Magistrate, Ratia, District Fatehabad, he stated that he wants to live with the adoptive father, who is respondent No.2. Even if assumingly the child was taken by the petitioner for two days which is the case of the petitioner himself but he retained the minor child for a period of one month which is also the case of the petitioner himself then as per the statement of the child before the learned Sub-Divisional Magistrate, Ratia, District Fatehabad, his custody with the petitioner was illegal beyond two days. Therefore, the learned Sub-Divisional Magistrate, Ratia, District Fatehabad rightly exercised his jurisdiction to protect the child.

16. The reference made by learned counsel for the petitioner to a judgment of Hon'ble Supreme Court in *Anjali Anil Rangari's case (supra)* and a judgment of Bombay High Court in *Vishal Jivan Jogure's case (supra)* are not applicable to the present case and are totally distinguishable. In both the cases, the dispute was between the husband and wife and both the husband and wife being parents were entitled for custody of the child and therefore Section 97 Cr.P.C. could not have been invoked whereas in the present case, the relationship of the minor child with the petitioner was severed statutorily by the operation of law and therefore the aforesaid judgments are totally distinguishable from the present case.

17. Even if assumingly, for the sake of arguments, the learned Sub-Divisional Magistrate, Ratia, District Fatehabad has exceeded its jurisdiction in exercising its powers under Section 97 Cr.P.C. and even if assumingly the impugned order Annexure P-2 is set aside by this Court on the technical grounds only, still the second prayer of the petitioner for seeking custody of the

child is totally unsustainable in view of the aforesaid facts and circumstances. Now the minor child is with the adoptive father i.e. respondent No.2 and the petitioner being the biological father who has given the child in adoption to respondent No.2 by way of registered Adoption Deed as aforesaid has got his relations and ties severed by virtue of Section 12 of the Hindu Adoptions and Maintenance Act, 1956 and therefore by no stretch of imagination by way of filing of the present petition under Section 482 Cr.P.C., the child can be given back to the petitioner. Therefore, even if assumingly the impugned order is set aside by this Court on technical issues, the subject matter remains academic in nature because the custody of the minor child cannot be given to the petitioner by way of filing of the present petition.

18. Consequently, finding no merit in the present petition, the same is hereby dismissed.

03.10.2023
Chetan Thakur

(JASGURPREET SINGH PURI)
JUDGE

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No