

2023:PHHC:164341

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

105

CWP-26747-2021

Date of Decision: 19.12.2023

AMRIK SINGH AND OTHERS

... Petitioners

VERSUS

**UNION TERRITORY OF CHANDIGARH THROUGH ITS
PRINCIPAL SECRETARY AND OTHERS**

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. Gaurav Chopra, Sr. Advocate with
Mr. Reshabh Bajaj, Mr. Anurag Chopra,
Ms. Seerat Saldi, Ms. Gauri C. Kaushal,
Ms. Himani Jamwal and Mr. Vardaan Seth
Advocates for the petitioners.

Mr. Jaivir S. Chandail, Addl. Standing Counsel with
Ms. Jyoti Kumari, Advocate for respondents No.1 to 3.

Mr. Vijay Kumar Jindal, Sr. Advocate-**Amicus Curiae** with
Mr. Pankaj Gautam, Advocate.

None for respondent No.4.

VINOD S. BHARDWAJ, J. (ORAL)

Prayer made in the present petition is for seeking quashing of
Memo No.DC/SR/2021/1458 dated 19.10.2021 (Annexure P-6) whereby
respondent No.3- Sub-Registrar of Documents, Chandigarh directed the
petitioners to approach a competent Court on the representation dated
16.08.2021 submitted by the petitioners and has not registered the Adoption
Deed dated 07.06.2021 (Annexure P-4) presented before him.

Learned counsel for the petitioners contends that the petitioner No.3 was subjected to rape by respondent No.4 in the month of May 2020 when she was 13 years of age. The said respondent No.4 had threatened to kill the petitioner No.3 (minor) if she informed anyone about the rape. Being under fear, she could not tell about the said incident to anyone. There was, however, a constant pain in her abdomen, for which she was taken to PGI by her parents, where it was informed that she was pregnant as an outcome of rape committed upon her. On being questioned, petitioner No.3 informed her parents that she was subjected to rape by respondent No.4 and about the threat. Immediate action was taken and the matter was reported to the police, whereupon FIR No.06 dated 14.01.2021 was registered at Police Station Sector 19, Chandigarh against respondent No.4 for the commission of offence under Section 376(3) and 506 of IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012. The said case has now culminated into a judgment of conviction against respondent No.4 and sentenced to undergo 20 years.

Since the knowledge with regard to the pregnancy was acquired only at the final stage, it was deemed medically unsafe for petitioner No.3 to terminate the consequential pregnancy. A baby girl was born to petitioner No.3 on 02.03.2021 who is named as (Rxxxxx-name concealed). Since the mother is herself a minor and is not in a capacity to take care of the child at such a tender age and even otherwise, the said child would have not only been stigmatic for her future prospects but also a constant reminder of the physical assault and outrage of modesty committed upon her. It would have not only caused huge social incarceration and emotional stress on the petitioner No. 3

but would also require huge financial drain on their limited fiscal resources. The same would not have served good for her well being, her development and for her future growth, prospects, career and life. Hence, with the consent of her parents (petitioners No.1 and 2), the petitioner No.3 decided to give her child in adoption.

The petitioners No.4 and 5 are married since 1997 and have one son named Jagtar Singh aged 11 years at the time of filing of the case. He is suffering from a genetic disorder of 'spinal muscular atrophy' and they also have one daughter namely 'Mehtar' who was born on 19.11.2021 through the process of surrogacy. The genetic disorder of spinal muscular atrophy leads to an impaired central nervous system and limited cognitive ability. Further, on account of the fetal DNA of the petitioner No.4 having certain abnormalities, it makes it highly likely that fetus of petitioner No.5 is also affected with spinal muscular atrophy and that any biological child born to them is likely to suffer from the aforesaid disease. A copy of the said DNA Analysis Report has been attached as (Annexure P-1). The abovesaid petitioners No.4 and 5 had two children earlier i.e. one girl child namely Simrat and one boy namely Gurnoor, who were suffering from genetic disorder of 'spinal muscular atrophy'. The girl child passed away due to severe pneumonia leading to respiratory failure on 21.12.2005 before attaining the age of 7 years and son Gurnoor also passed away due to cardiac arrest on 20.09.2013 before attaining the age of 12 years. Copies of the death certificates have also been attached with the present petition. Despite the child being conceived through surrogacy, she is likely to inherit the DNA disorders and the chances of her survival are bleak.

That the parents of petitioner No.3 (minor rape victim) (being petitioner Nos.1 and 2 herein) are Sewadars in a Gurudwara. The petitioners No.4 and 5, being aware of the abovesaid incident, expressed their willingness to adopt the girl child namely Rxxxx born on 02.03.2021 for their well being as well as for the well being of the minor child, who deserves to live a dignified life with all amenities and facilities, love, care and respect. The parties being well known to each other, the process of adoption was undertaken and petitioners No.1 to 3 decided to give the minor Rxxxx in adoption to petitioners No.4 and 5. Accordingly, an Adoption Deed was executed on 07.06.2021 between the petitioners No.1 and 2 (also for and on behalf of minor petitioner No.3); and petitioners No.4 and 5. The requisite ceremonies were performed and the child has been given in adoption to the petitioners No.4 and 5 and since then, she has been in their continuous care and protection. It was thereafter, that the petitioners No.4 and 5 were also blessed with a girl child namely Mehar, on 19.11.2021 through surrogacy.

Be that as it may, the Adoption Deed dated 07.06.2021 was presented to the office of respondent No.3 i.e. the Sub-Registrar of Documents, Chandigarh on 16.08.2021 for registration thereof as per the Registration Act, 1908, without the consent of the biological father of Rxxxx i.e. accused-respondent No.4, who is undergoing sentence on account of conviction in the aforesaid rape case. Despite the Sub-Registrar of Documents, Chandigarh having been informed about the unfortunate circumstances in which the child was born and the Adoption Deed is being executed by the petitioner No.3 without the consent of respondent No.4, the

respondent No.3 refused to register the said Adoption Deed for want of consent from the biological father. A representation was submitted by the petitioners on 16.08.2021 to the Sub-Registrar, however, the same was declined vide order dated 19.10.2021 without assigning any reasons and by giving a direction to the petitioners that they should approach the competent Court of law for the needful. Having been left with no other remedy, the petitioners have approached this Court.

Vide order dated 02.09.2023, Mr. V.K. Jindal, Advocate was appointed as Amicus Curiae to assist the Court in this case. A report was also sought from the department of Social Welfare, U.T. Chandigarh regarding the socio-economic status of the petitioners alongwith the recommendation as to whether the giving away of child Rxxxx in adoption to the petitioners No.4 and 5 would be in best interest of the child or not vide order dated 22.11.2023.

A status report has been filed on behalf of respondent No.1- through Ms. Palika Arora, Director, Social Welfare, Women and Child Development, Chandigarh Administration, as per which, the socio-economic status of the petitioners No.4 and 5 has been verified and that the said petitioners meet the socio-economic criterion for taking the said child in adoption. It is averred in the abovesaid report by the Department of Social Welfare, Women and Child Development, Chandigarh Administration that the needs of the child can be easily met by the petitioners No.4 and 5 and that both the said petitioners are happy and healthy minded couple, who have been extending all due care to their children.

The parties have been heard at length and the documents have been perused with their able assistance.

Before proceeding further in the matter, it would be essential to refer to various statutory provisions which determine and deal with guardianship and adoptions. The relevant statutory provisions are extracted as under:

“CONSTITUTION OF INDIA

Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

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(3) Nothing in this article shall prevent the State from making any special provision for women and children.

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39. Certain principles of policy to be followed by the State-

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(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

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Article 45 - “The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”

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Article 47 of The Constitution of India is one of the Directive Principles which directs the State to raise the level of nutrition and the standard of living and to improve public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of intoxicating drinks and drugs which are injurious to health.

**THE HINDU MINORITY AND GUARDIANSHIP
ACT, 1956**

- 4. Definitions.—In this Act,—**
- (a) “minor” means a person who has not completed the age of eighteen years;
 - (b) “guardian” means a person having the care of the person of a minor or of his property or of both his person and property, and includes—
 - (i) a natural guardian,
 - (ii) a guardian appointed by the will of the minor’s father or mother,
 - (iii) a guardian appointed or declared by a court, and
 - (iv) a person empowered to act as such by or under any enactment relating to any Court of wards.
 - (c) “natural guardian” means any of the guardians mentioned in section 6.
- 5. Over-riding effect of Act.—**Save as otherwise expressly provided in this Act,—
- (a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act Shall cease to have effect with respect to any matter for which provision is made in this Act.
 - (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so

far as it is inconsistent with any of the provisions contained in this Act.

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) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
- (b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;
- (c) in the case of a married girl—the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—
 - (a) if he has ceased to be a Hindu, or
 - (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.—In this section, the expressions “father” and “mother” do not include a step-father and a step-mother.

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8. Powers of natural guardian.—

- (1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

- (2) The natural guardian shall not, without the previous permission of the court,—
 - (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or
 - (b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.
- (3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.
- (4) No court shall grant permission to the natural guardian to do any of the acts mentioned in subsection (2) except in case of necessity or for an evident advantage to the minor
- (5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular—
 - (a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;
 - (b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and
 - (c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the Acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

- (6) In this section, “Court” means the city civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

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13. Welfare of minor to be paramount consideration.—

- (1) In the appointment or 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.

**THE HINDU ADOPTIONS AND MAINTENANCE
ACT, 1956**

“6. *Requisites of a valid adoption.*— *No adoption shall be valid unless—*

- (i) *the person adopting has the capacity, and also the right, to take in adoption;*
- (ii) *the person giving in adoption has the capacity to do so;*
- (iii) *the person adopted is capable of being taken in adoption; and*
- (iv) *the adoption is made in compliance with the other conditions mentioned in this Chapter.*

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9. Persons capable of giving in adoption.—

- (1) *No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.*
- (2) *Subject to the provisions of sub-section (4), the father or the mother, if alive, shall have equal right to give a son or daughter in adoption: Provided that such right shall not be exercised by either of them save with the consent of the other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.*
- (3) ** * * * **
- (4) *Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.*
- (5) *Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.*

Explanation.—For the purposes of this section—

- (i) the expressions “father” and “mother” do not include an adoptive father and an adoptive mother;*
- (ia) “guardian” means a person having the care of the person of a child or of both his person and property and includes—*
 - (a) a guardian appointed by the will of the child's father or mother, and*
 - (b) a guardian appointed or declared by a court; and*
- (ii) “court” means the city civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.*

10. Persons who may be adopted.—

No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—

- (i) he or she is a Hindu;*
- (ii) he or she has not already been adopted;*
- (iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;*
- (iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.*

11. Other conditions for a valid adoption.—

In every adoption, the following conditions must be complied with:—

- (i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have*

a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

- (ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;*
- (iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;*
- (iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;*
- (v) the same child may not be adopted simultaneously by two or more persons;*
- (vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption: Provided that the performance of datta homam shall not be essential to the validity of an adoption."*

**THE JUVENILE JUSTICE (CARE AND PROTECTION
OF CHILDREN) ACT, 2015.**

2. Definitions

In this Act, unless the context otherwise requires,—

- (1) "abandoned child" means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Committee after due inquiry;
- (2) "adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child;

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- (9) "best interest of child" means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development;

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- (14) "child in need of care and protection" means a child—

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- (v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or
- (vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

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- (viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

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(31) "guardian" in relation to a child, means his natural guardian or any other person having, in the opinion of the Committee or, as the case may be, the Board, the actual charge of the child, and recognised by the Committee or, as the case may be, the Board as a guardian in the course of proceedings;

(42) **"orphan" means a child—**

- (i) who is without biological or adoptive parents or legal guardian; or
- (ii) whose legal guardian is not willing to take, or capable of taking care of the child;

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3. **General Principles to be followed in administration of the Act.**

The Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely:—

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- (iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.
- (v) Principle of family responsibility: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.
- (vi) Principle of safety: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

- (vii) Positive measures: All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

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Section 38 Procedure for declaring a child legally free for adoption.

- 1) In case of orphan and abandoned child, the Committee shall make all efforts for tracing the parents or guardians of the child and on completion of such inquiry, if it is established that the child is either an orphan having no one to take care, or abandoned, the Committee shall declare the child legally free for adoption:

Provided that such declaration shall be made within a period of two months from the date of production of the child, for children who are up to two years of age and within four months for children above two years of age:

Provided further that notwithstanding anything contained in this regard in any other law for the time being in force, no first information report shall be registered against any biological parent in the process of inquiry relating to an abandoned or surrendered child under this Act.

- (2) In case of surrendered child, the institution where the child has been placed by the Committee on an application for surrender, shall bring the case before the Committee immediately on completion of the period specified in section 35, for declaring the child legally free for adoption.

- (3) Notwithstanding anything contained in any other law for the time being in force, a child of a mentally retarded parents or a unwanted child of victim of sexual assault, such child may be declared free for adoption by the Committee, by following the procedure under this Act.
- (4) The decision to declare an orphan, abandoned or surrendered child as legally free for adoption shall be taken by at least three members of the Committee.
- (5) The Committee shall inform the District Magistrate, the State Agency and the Authority regarding the number of children declared as legally free for adoption and number of cases pending for decision in the manner as may be prescribed, every month.

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Section 56 Adoption

- (1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority.
- (2) Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority.
- (3) Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956 (78 of 1956).
- (4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.
- (5) Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring

the care and custody of a child to another person in a foreign country without a valid order from the District Magistrate, shall be punishable as per the provisions of section 80.

Section 57 Eligibility of prospective adoptive parents.

- (1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.*
- (2) In case of a couple, the consent of both the spouses for the adoption shall be required.*
- (3) A single or divorced person can also adopt, subject to fulfillment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.*
- (4) A single male is not eligible to adopt a girl child.*
- (5) Any other criteria that may be specified in the adoption regulations framed by the Authority.*

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Section 63 Effect of Adoption

A child in respect of whom an adoption order is issued by the District Magistrate, shall become the child of the adoptive parents, and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy, with effect from the date on which the adoption order takes effect, and on and from such date all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by the adoption order in the adoptive family:

Provided that any property which has vested in the adopted child immediately before the date on which the adoption order takes effect shall continue to vest in the adopted child

subject to the obligations, if any, attached to the ownership of such property including the obligations, if any, to maintain the relatives in the biological family.

THE ADOPTION RULES 2017

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3. *General principles to be followed in administration of Act.—*

The Central Government, the State Governments, the Board, the Committee, or other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely:—

- (i) Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.*
- (ii) Principle of dignity and worth: All human beings shall be treated with equal dignity and rights.*
- (iii) Principle of participation:*

Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child’s views shall be taken into consideration with due regard to the age and maturity of the child.
- (iv) Principle of best interest:*

All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.
- (v) Principle of family responsibility: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.*

(vi) *Principle of safety:*

All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

(vii) *Positive measures:*

All resources are to be mobilized including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

(viii) *Principle of non-stigmatizing semantics:*

Adversarial or accusatory words are not to be used in the processes pertaining to a child.

(ix) *Principle of non-waiver of rights:*

No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

(x) *Principle of equality and non-discrimination:*

There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.

(xi) *Principle of right to privacy and confidentiality:*

Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

(xii) *Principle of institutionalisation as a measure of last resort:*

A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

(xiii) Principle of repatriation and restoration:

Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socioeconomic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.

(xiv) Principle of fresh start:

All past records of any child under the Juvenile Justice system should be erased except in special circumstances.

(xv) Principle of diversion:

Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.

(xvi) Principles of natural justice:

Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.

(Emphasis Supplied)

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From a perusal of the above, it is evident that The Hindu Minority and Guardianship Act, 1956 defines a 'natural guardian' and Section 6 thereof recognizes that in respect of a Hindu minor i.e. an illegitimate unmarried girl, the mother would be the natural guardian. Section 8 thereof vests power in a natural guardian to do all acts that are necessary, reasonable

and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate. Hence, the petitioner No.3-mother of the minor is the natural guardian of the said child despite she herself being a minor. The petitioners No.1 and 2 are the natural guardians of petitioner No. 3. Section 8 vests power in a guardian to do all such acts which are necessary and reasonable for the care and protection of the minor. The said Act also mandates that the welfare of the minor is to be of paramount consideration.

The Hindu Adoptions and Maintenance Act, 1956 codifies laws relating to adoption and maintenance amongst Hindus. The abovesaid Act intends to simplify the law of adoption. The requisites of a valid adoption have been provided under Section 6 thereof, which provides for the capacity of the person adopting as well as giving a child in adoption and a person to be adopted as well. The person capable of giving a child in adoption has been provided under Section 9 and it stipulates that no person other than the mother or father or the guardian of a child shall have the capacity of giving the child in adoption. The Proviso thereto is that such right shall not be exercised by either of them without the consent of the other unless one of them has renounced the world or seizes to be a Hindu or has been declared by a competent Court to be of unsound mind. Further, a 'guardian' has also been defined under Section 9(1) (a) to mean a person having the care of a person or a child or of both. Section 9 also recognizes the right of the guardian to give a child in Adoption. A conjoint reading would establish that only the mother of an illegitimate child is her guardian and right of a guardian is recognized independently under the Hindu Adoption and Maintenance Act, 1956. A meaningful reading of the said provisions would show that law does recognize

an independent right of the guardian to give a child in adoption and in a case of guardian, the consent of biological father would become inconsequential since an expression 'or' has been used in The Hindu Adoptions and Maintenance Act, 1956. Hence, each person has its own substantive right to do such acts- to the exclusion of other. The only check on the guardians act of giving child in adoption is under Section 9(4) of The Hindu Adoptions and Maintenance Act, 1956. A father can be a guardian in case of an illegitimate child, only after the mother. The law thus did not extend to confer any right at par on father of an illegitimate child as have been conferred on father of a legitimate child. Recognition of father of the illegitimate child, notwithstanding the legislative intent to the contrary, would amount to violating the statutory mandate and subjecting the statutory status of the mother, in such case, below that of the father ignoring Section 6(b) of the Hindu Minority & Guardianship Act, 1956 and giving an over-riding effect to Section 6(a) thereof. Other conditions of valid adoption have been prescribed in Section 11 of the said Act.

Still further, the parliament also notified The Juvenile Justice (Care and Protection of Children) Act, 2015, which was intended to amend the law relating to children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social reintegration and disposal of matters in the best interest of children and for their rehabilitation through processes provided. Section 2(1) of The Juvenile Justice (Care and Protection of Children) Act, 2015 defines that an 'abandoned child' to mean, who has been deserted by his biological/adoptive parents/guardians and has been declared as 'abandoned' by the Committee.

Section 2(9) of The Juvenile Justice (Care and Protection of Children) Act, 2015 defines the 'best interest of a child' which lays the basis for any decision regarding ensuring fulfillment of basic rights and needs, identity and social wellbeing etc. of a child. Sub-Sections (iv), (v) and (vi) of Section 2(14) of The Juvenile Justice (Care and Protection of Children) Act, 2015 define a child in need of care and protection. According to above said sub-sections, a child, whose parents or guardian are found to be unfit or incapacitated to take his/ her care and protect his/her safety and wellbeing, is deemed to be a child in need of care and protection. It also includes a child for whom no one is willing to take care or whose parents have abandoned or surrendered him/her. Sections 2(31) defines a guardian and 2(42) of The Juvenile Justice (Care and Protection of Children) Act, 2015 define an 'orphan' child, which means also a child whose legal guardian is not willing or is incapable of taking his/her care. Similarly, Chapter 2, Section 3 of The Juvenile Justice (Care and Protection of Children) Act, 2015 deals with the principles to be followed in administration of the provisions of the said Act of 2015 and mandates that all decisions should be guided by the primary consideration of being in the best interest of the child and to help the child to develop full potential, ensuring that all primary responsibilities with regard to the care, nurturing and protection of the child as well as to ensure that the child be not subjected to any harm, abuse or maltreatment etc. are taken into consideration. The resources ought to be mobilized for promoting the wellbeing, facilitating development of identity and to reduce vulnerability of children under the need of care and protection. Section 38 of The Juvenile Justice (Care and Protection of Children) Act, 2015 deals with the procedure for declaring a child legally

free for adoption and that if the Child Welfare Committee, constituted under Section 27 of the said Act of 2015, opines that the child is an orphan having no one to take care, then it shall declare the child legally free for adoption. Sub-Section 3 of Section 38 of The Juvenile Justice (Care and Protection of Children) Act, 2015 stipulates that an unwanted child of a victim of sexual assault may be declared free for adoption by the abovesaid Committee. The time period prescribed by the Committee to examine the said issue is two months from the production of the child. Section 56 of the Act of 2015 deals with the issue of adoption and Section 57 of the Act of 2015 determines the eligibility of prospective adoptive parents/guardian.

Rule 45 of The Juvenile Justice (Care and Protection of Children) Model Rules 2016 lays down procedure for obtaining an adoption order from a competent Court and also provides that the procedure laid down in Civil Procedure Code or the Evidence Act shall not be mandatorily followed by the Court. Further, the Government also notified the Adoption Regulations 2017 in exercise of powers conferred by Clause (c) of Section 68, original Clause 3 of Section 2 of The Juvenile Justice (Care and Protection of Children) Act, 2015. The fundamental principles governing adoption as provided under the Regulations of 2017 keep the best interest of the child to be of paramount consideration and give a preference to place a child in adoption with the Indian Citizens. It also deals with the aspect of a child who is eligible for adoption and includes an orphan, abandoned or surrendered child to be eligible for giving in adoption. The eligibility criteria of the adoptive parents have also been prescribed in the Regulation 5. The availability of a child for adoption has been provided in Section 8 of The Juvenile Justice (Care and

Protection of Children) Act, 2015 and every child is legally free to be given in adoption once the Committee so declares. Further, the provisions of the Constitution referred to above require the State to ensure that all the needs of children are met and that their basic human rights are fully protected.

Now adverting to the factual aspect of the present case, it remains undisputed that insofar as the capacity of petitioners No.4 and 5 for taking the child in adoption is concerned, they fulfill the requirement prescribed under different statutes and are eligible to take the child in adoption. The dispute becomes peculiar and has come before this Court only on account of the fact that even though the minor petitioner No.3 being mother of an illegitimate girl child is her natural guardian, who is entitled and recognized by law to take all necessary steps which are in the best interest of the minor, however, under The Hindu Adoptions and Maintenance Act, 1956, a mother/natural guardian can give the child in adoption only after obtaining consent of the father. The sub registrar of documents refused to register the adoption deed for the said reason and by relying solely on Section 9(2) of The Hindu Adoptions and Maintenance Act, 1956 and ignoring the scope of Section 6(b) of the Hindu Minority and Guardianship Act, 1956 read with Section 9(1) and 9(4) of The Hindu Adoptions and Maintenance Act, 1956 as well as the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 and the rules framed thereunder.

The question which thus arises for consideration is as to whether the minor petitioner No.3, who is a mother, and is a natural guardian under Section 6(b) of Hindu Minority and Guardianship Act, 1956 would be eligible to give her illegitimate child in adoption or not? It is in the said background

that the issue of The Juvenile Justice (Care and Protection of Children) Act, 2015 also gets attracted, since both the minor mother and her minor child are the juveniles/children in need of care and protection. The petitioner No.3-minor mother, having been sexually abused, would fall in Clause 2 (14) (viii) of The Juvenile Justice (Care and Protection of Children) Act, 2015 and the minor illegitimate child would fall in the interplay of Clause (vi) and (vii) of Section 2(14) read with definition of 'abandoned child' under Section 2(1) of The Juvenile Justice (Care and Protection of Children) Act, 2015 for whom no one is willing to take care and also considering that the 'natural guardian' (minor petitioner No.3) herself is unfit and incapacitated to take care and protect or provide for the safety or well being of the minor illegitimate girl child. While recognizing that Section 6(b) of the Hindu Minority and Guardianship Act, 1956 is not subject to Section 6(a) thereof and Section 9(1) of The Hindu Adoptions and Maintenance Act, 1956 recognizes right of the 'guardian' (which in this case happens to be petitioner No. 3) to give a child in adoption subject to Section 9(4) thereof and the said section is also not subject to Section 9(2) of The Hindu Adoptions and Maintenance Act, 1956- this Court feels that mother-natural guardian of the illegitimate minor girl child cannot be left to the mercy of her oppressor. Law would not intend to turn the minor to her tormentor to protect and save her left over dignity, honour and pride and plead his consent for putting her life on correctional and restitutive path. Such an interpretation as would give an over-riding effect to Section 9(2) of The Hindu Adoptions and Maintenance Act, 1956 ignoring the statutory mandate to cater to circumstances surrounding this case would not only violate the statutory scheme of other provision but would also be hit by

Article 21 of the Constitution of India. The statutory inference that flows from above is that consent of father would not be necessary in present circumstances since Section 9(2) of The Hindu Adoptions and Maintenance Act, 1956 would not be attracted and authorities should take of Section 6(B) of Hindu Minority and Guardianship Act, 1956 read with Section 9(1) and (4) of The Hindu Adoptions and Maintenance Act, 1956. The law should thus recognize the right of a mother of an illegitimate child and accept her status as the sole guardian of such child.

However, since even the mother in the present case happens to be a minor and a child in need of care and protection, this Court finds strength also in the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 38 (3) of The Juvenile Justice (Care and Protection of Children) Act, 2015 is the only provision that considers unwanted child of a victim of sexual assault to be declared as free for adoption by the Committee notwithstanding anything contained in any other law, for the time being in force. Section 38(3) of The Juvenile Justice (Care and Protection of Children) Act, 2015 has further been given an overriding power under the statutory scheme in relation to giving an unwanted child of a victim of sexual assault in adoption.

A perusal of the documents available on record also establishes that the petitioner No.3 was 13 years of age as on the date when she was impregnated due to penetrative sexual assault by respondent No.4 and that her parents are also working as *Sewadars* in a *Gurudwara*. Their financial status and ability to up-bring the illegitimate child born are thus limited and may not sub-serve the best interest of the child. Additionally, the fact the rearing of an illegitimate child due to rape on their daughter is a constant

reminder of the trauma and may not be good for the social and psychological wellbeing of the minor mother (petitioner No.3) as well as the child. The said child may have to suffer the agony of an unwanted child and dealt with contempt and hate, for no fault. It is also evident that the petitioner No.3 or even the petitioners No.1 and 2 as parents of petitioner No.3 are not well equipped under the circumstances to extend best care and future as well as the overall development of the minor illegitimate child –(Rxxxx), who shall have to live her life with the stigma of being an illegitimate child. It is also evident that the child was born on 02.03.2021 and had been given in adoption to petitioners No.4 and 5 on 07.06.2021 when she was only about three months old. Undisputedly, the said child has been residing with the petitioner No.4 and 5 since then and recognizes them to be her only known parents.

It has also come forth that the prosecution of respondent No.4 in the alleged FIR was initiated before the Fast Track Court on 12.03.2021, and after the child had already taken birth on 02.03.2021. The factum of pregnancy of petitioner No.3 was fully known to respondent No.4 and that the said aspect had also been brought forth during the evidence led before the Fast Track Court. The Blood Authentication Form of the baby girl delivered on 02.03.2021 (wrongly mentioned as 03.03.2021 in the judgment of Fast Track Court) is Ex.P4 that was produced during the trial. Hence, the respondent No.4 as well as members of his family were fully aware of the birth of Rxxxx on account of sexual assault committed by respondent No.4. The CFSL report Ex.P22, produced during the trial, also establishes that respondent No.4 – the accused was the biological father of the girl child namely Rxxxx that was born to the victim (petitioner No.3). The defence taken by respondent No.4, in the

proceedings before the Fast Track Court, was to the effect that the relationship between him and the petitioner No.3 (victim) was consensual and not forceful. Hence, he ought not to be penalized for the same. As the aspect of physical assault and consequential impregnation of minor petitioner No.3 aged 13 years stood established, the Fast Track Court recorded that even if the plea of consensual relationship between the victim and accused is admitted for the sake of arguments, yet, being a minor of 13 years, she was not competent to extend any valid consent for developing sexual relations with respondent No.4. During the arguments advanced and/or at the time of hearing on the quantum of sentence, the respondent No.4-father of minor Rxxxx showed no inclination or willingness to support or accept the minor child or to extend care and protection to her. However, it was pleaded that he himself is not in a capacity to sustain himself and that a leniency may be shown to him. Despite a lapse of more than two years, respondent No.4 or his family members showed no inclination or attempt for looking after the minor child or even staking any claim over her, on the basis whereof, it may be assumed that the respondent No.4 has any interest in the upbringing, safety, care and protection of the said child.

During the course of hearing, this Court has asked for a report, vide order dated 22.11.2023 from the Department of Social Welfare, U.T. Chandigarh for examining the best interest of the child and the capacity of petitioners No.4 and 5 to take the child in adoption. The District Child Protection Unit, Mohali thereafter submitted a report after receiving the same from the District Child Protection Officer. The relevant extract of the said report is as under:

“In reference to the above cited subject, it is submitted that a visit was conducted on 11-12-2023 at residence of Gurcharan Singh Virdi and Ms. Kiran Virdi regarding submission of report with respect to the social/financial status of the Petitioners and suggestions as to whether the requirements for giving a child in adoption would be met on socio economic evaluation of Petitioners.

- Petitioner no. 4 and 5 own and live in a 9 maris house in Phase-10 Mohali. It is a double story house and used by Petitioners for their own family only i.e. both floors are utilized by the family.*
- Petitioner no. 4 Mr. Gurcharan Singh Virdi is an advocate at Chamber no. 25, District Courts Complex, Sector-43, Chandigarh*
- Petitioner no. 5, Ms. Kiran Virdi W/o Petitioner no. 4 is a house wife.*
- Petitioner no. 4 own property named National Saw Mill at plot # 12, Timber Market, Sector-26, Chandigarh. (ownership certificate is attached)*
- Petitioner no. 4 jointly owns a 14 marla house with his brother in Panchkula, Haryana*
- As per the latest ITR furnished by the Petitioner no. 4, his annual income is Rs.18,82,090/-.*
- Petitioner number 4 and 5 own 2 cars.*
- Both: Petitioners no. 4 and 5 are of Sikh religious beliefs.*
- They have 2 full time (residential) maids for household chores and as care taker of children*
- They have one more daughter named Mehar. She is 2 year old and was born through surrogacy.*
- Both girl children go to a school Cute Cubs in sector 33-A Chandigarh.*

- *The residence/home of Petitioner no. 4 and 5 lavishly decorated and maintained.*
- *The immunization card of Rxxxx was also seen. Her consultation and immunization is done in Chaitanya Hospital Sector-44, Chandigarh.*
- *Both Petitioner no. 4 and 5 come across as happy and healthy minded couple.*
- *Deeming the above, it can be stated that Petitioner no. 4 and 5 belong to upper financial strata society, economically/ financially they are very sound to provide a fulfilling life to their children. All the needs of child/children can be met easily Petitioner no 4 and 5.*
- *It is for your information and further necessary action please.”*

District Child Protection Unit, Mohali as well as District Child Protection officer also did not raise any apprehension with respect to the best interest of the child being compromised on account of the adoption of the said child being given to petitioners No. 4 and 5. On the contrary, it is rather acknowledged that the child is being taken care of by the petitioners No.4 and 5 (adoptive parents) and that they have been taking good care of all their children including the minor Rxxxx. The report having been received from the Director, Social Welfare, Women and Child Development, U.T.Chandigarh and the report having been furnished by the District Child Protection Officer, S.A.S. Nagar (Mohali), it is deemed expedient and in the fitness of things, taking into consideration the peculiar facts and circumstances of the case, that the detailed procedure and report from the Child Welfare Committee be exempted. This Court has no apprehension at this juncture and is satisfied

about the report furnished by the District Child Protection Officer, S.A.S. Nagar (Mohali) and forwarded by the Department. The child in question i.e. Rxxxx can be deemed as an 'orphan' child under Section 2(42) of The Juvenile Justice (Care and Protection of Children) Act, 2015 read with Clause 2(1) thereof since her legal guardian is not willing and is not capable of taking care of the child. The petitioner No.3 i.e. the mother is recognized as a legal guardian by operation of law as per The Hindu Minority and Guardianship Act, 1956. The provisions of The Hindu Minority and Guardianship Act, 1956 also recognize the right of a guardian to take such effective steps as required necessary to give a child in adoption as per Section 9 (5) (ia). It is undisputed that petitioners No.1 to 3 would also fall within the definition of guardian having the care of the child. The Hindu Adoptions and Maintenance Act, 1956 is although a statute governing adoption, however, the Juvenile Justice (Care and Protection of Children) Act, 2015 deals with the affairs and concerns of Juvenile/Children in conflict with law or in need of care and protection. Section 38(3) deals specifically with children born out of sexual assault. The above section starts with a non-obstante clause giving it an over-riding effect on any other statute. Hence the provision would fall under a special statute and no precedence is to be given to The Hindu Adoptions and Maintenance Act, 1956, which would be a general law, in such a case.

The chronology of facts also show that the petitioner No.3 had initially sought termination of pregnancy under The Medical Termination of Pregnancy Act, 1971, however, as the foetus was more 33 months old, the Medical Board did not recommend termination of pregnancy. Even thereafter, the petitioner No.3, her parents i.e. petitioners No.1 and 2 as well as

respondent No.4 have shown no inclination to retain, rear and bring up the minor child –Rxxxx. It establishes that the child Rxxxx is an unwanted child from a victim of sexual assault attracting Section 38(3) of The Juvenile Justice (Care and Protection of Children) Act, 2015. Having held so, the only question which is left is as to whether the child in question has been declared free for adoption by the Committee i.e. the Child Welfare Committee as constituted under Section 27 of The Juvenile Justice (Care and Protection of Children) Act, 2015 or not. The procedure for declaration of a child to be free for adoption is stipulated under Section 38 of The Juvenile Justice (Care and Protection of Children) Act, 2015 and it requires that if it is established that the child is either an orphan or abandoned having no one to care, the said child shall be declared by the Committee to be legally free for adoption. The definition of 'Orphan' and 'abandoned' as per the provisions of The Juvenile Justice (Care and Protection of Children) Act, 2015 are definitely attracted to the case of Rxxxx as neither of the parents i.e. the petitioner No.3 or the respondent No.4 are willing to take up the responsibility, care and protection of the child and as such, the said child falls within the definition of an 'orphan' under Section 2(42) of The Juvenile Justice (Care and Protection of Children) Act, 2015 and has the shades of an 'abandoned child' under Section 2(1) of the said Act of 2015. The petitioners No. 1-3 have shown no inclination to retain or bring up the child. The requirement to seek a declaration for the child being legally free for adoption would be necessary only to make efforts for tracing the parents/guardian of the child and to come to a conclusion as to whether the child is an orphan or abandoned child or not. Since the said aspect is no more in dispute, relegating the case for seeking a report and/or declaration from the

Committee would only be a formality causing bureaucratic delay in the present case. Moreover, the requirement to submit a report in a case of child less than 2 years of age is within a period of 2 months and in other case 4 months. A much longer period has already elapsed during the time when this case has remained pending before this Court and the authorities were seized of the facts.

In the peculiar circumstances of the case and taking into consideration that the entire factual legal background is undisputed and also considering that neither respondent No.4 nor the petitioner Nos. 1 to 3 are willing to take responsibility of Rxxx or have ever staked any claim for seeking the custody of the said child, this Court is of the view that the requirement of a declaration from the Child Welfare Committee is only a procedural formality and the same is not likely to sub-serve any larger interest. In the totality of the circumstances, this Court holds that the child “Rxxx” is legally free for adoption.

Taking into consideration the parameters prescribed under Chapter VII of The Juvenile Justice (Care and Protection of Children) Act, 2015 and the respective eligibility of the parties and the guidelines alongwith the report received from the Child Welfare Committee as well as the Adoption Regulations, 2017, it is held that there is no legal impediment or prohibition against giving the child Rxxxx in adoption.

While holding so, this Court is fully conscious of the peculiar nature of the present case as also the socio-economic status of the petitioners No.1 to 3 and also the fact that the minor Rxxxx is an unwanted child of sexual assault committed on petitioner No.3, who is now 15 years of age and

is pursuing her studies. The petitioners No.1 to 3 are residing in a room in a Gurudwara and have no means to provide any better facility as compared to what the petitioners No.4 and 5 have to offer. Besides, the rearing of the child by petitioners No.1 to 3 shall be stigmatic and traumatic not only for petitioner No.3 but also for the minor –Rxxxx. The atmosphere of being brought under disdain and meager financial resources for an unwanted child would definitely not be healthy for the future prospects, mental stability and wellbeing of the child and would not sub-serve the overall development of the said child as well. The burden is thus on this Court to examine as to what is best suited for the wellbeing of the minor child in the present case where the biological parents are unfit and incapacitated either on account of their age, social circumstances or on account of continued incarceration in jail and who have expressed no willingness to take care of the child by their express or implied act and/or conduct. Besides, the minor child has been residing with petitioners No.4 and 5 since 07.06.2021 and is more than 2½ years of age and would not be recognizing any other person apart from the petitioners No.4 and 5 as her parents. Any order or direction for separation of minor child from petitioners No.4 and 5 at this stage is likely to be traumatic even for the said minor child. The Court has also noticed that the petitioners No.4 and 5 have volunteered willingly to take the girl child in adoption without any inhibition and also they have produced the relevant medical evidence to suggest that the DNA profiling and disorders make it difficult for them to give birth to any healthy child. Having already lost their two children, the petitioners No.4 and 5 strongly want to take the child in adoption. The respondent No.4 i.e. the biological father has been awarded a sentence of 20 years by the Court and it

seems highly improper that he would have any natural love, affection, affinity or desire to undertake the responsibility of Rxxxx (minor child).

Hence, taking into consideration the statutory provisions referred to above as well as the well being of the child, I am of the opinion that mandating consent from the father (Respondent No.4) would not be attracted in the facts of the present case.

Since the issue of declaration of the child to be legally free for adoption has already been examined and ruled, I am of the opinion that the present petition deserves to be allowed.

The respondent No.3-Sub-Registrar of Documents, Chandigarh is directed to register the Adoption Deed dated 07.06.2021 giving minor Rxxxx, born on 02.03.2021, in adoption to petitioners No.4 and 5, in a time bound manner without raising any further objection(s) with respect to the lack of concurrence from the biological father and/or delay and on presentation of the said documents for registration.

Petition stands allowed accordingly.

19.12.2023.
rajender

(VINOD S. BHARDWAJ)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No