***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 14th November, 2017

\+ **W.P.(C) 6759/2016**

MASTER DIVYANSH ARORA MINOR THROUGH
HIS NEXT FRIEND RAJ KUMAR ARORA ..... Petitioner

versus

UNION OF INDIA & ORS. .... Respondents

Advocates who appeared in this case:

For the Petitioner	:	Ms. Sumita Kapil with Ms Pooja Swami
For the Respondents	:	Mr Gaurang Kanth with Mr. Kavindra Gill and Ms Eshita Baruah

CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. By this petition, the petitioner seeks a direction in the nature of mandamus thereby directing the respondents to issue directions to the respective Visa Issuing Authorities that Certificate from Central Adoption Resource Authority (CARA) is not mandatory in view of an order of a Court under Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as *'the HAMA Act'*) from a Competent Court and further for a direction to respondent No.3, i.e., Ministry of External Affairs to issue a passport to the petitioner.

2. The petitioner was born on 15.01.2004. The biological parents of the petitioner are Shri Raj Kumar Arora and Smt Neeru Arora. The

petitioner was adopted by his paternal uncle and aunt, i.e., the elder brother of Shri Raj Kumar Arora and his wife, namely, Shri Dalip Kumar Arora and Smt Vaishali Arora. Formalities and ceremonies for adoption were performed on 26.01.2015. A registered Adoption Deed was executed on 27.01.2015. The adoptive parents, who were married since 11.07.2008, did not have any child despite undergoing various medical procedures. The adoption of the petitioner was ratified by the Court of District & Sessions Judge (West), Tis Hazari Courts, Delhi, in a Guardianship Petition No.01/2015 by judgment dated 28.05.2015.

3. The adoptive parents of the petitioner are German citizens with Overseas Citizen of India (OCI) status and live in Hannover**,** Germany.

4. As per the petitioner, since the adoption was an inter-country adoption, the parents of the petitioner approached CARA, as directed by the German Consulate at Delhi. CARA refused to assist the petitioner's parents but required them to apply through proper channel for adoption on the premise that CARA was the Central Authority regulating inter-country adoptions, which were guided by the provisions of The Hague Convention, 1993 and accordingly, the parents would require a No Objection Certificate from CARA prior to applying for a visa and for such a Certificate they had to make an application for adoption with CARA. The parents of the petitioner allege to have approached CARA various times but there was no

response or assistance from them.

5. It is contended that despite the fact that there is a valid adoption of the petitioner by the adoptive parents and there is a Deed of Adoption dated 27.01.2015 and a judgment of the Competent Court dated 28.05.2015 ratifying the adoption, CARA has required the parents of the petitioner to go through a cumbersome process by making an application for adoption to CARA.

6. It is contended that reliance placed by CARA on the guidelines of 2015, which were notified on 17.07.2015 under the Juvenile Justice Act, 2015, which in itself was effective on 01.01.2016, the said Act is not applicable to adoption of children made under the provisions of HAMA Act.

7. It is further contended that the guidelines of 2015 are not applicable, first of all, because they were notified after the adoption in the present case on 27.01.2015 and would only cover an orphan, abandoned or surrendered child and does not covered inter-country direct adoptions. It is contended that the present case is not only of an inter-country direct adoption but an adoption within the family.

8. The respondents have contended that it is mandatory for the adoptive parents to obtain the agreement/approval of the Central Authority concerned in Germany as well as the NOC (agreement) of CARA under Article 17 of The Hague Convention on Prevention of Children & Cooperation in respect of Inter-Country Adoption, 1993

(hereinafter referred to as Hague Adoption Convention).

9. It is denied that the parents of the petitioner, ever, approached CARA for any NOC. It is contended that the parents of the petitioner need to make an application for grant of an NOC along with, *inter alia*, (i) Home Study Report of the adoptive parents from the Central Authority of Hamburg in Germany with supporting documents, (ii) letter from the Central Authority in Germany containing necessary declaration under Articles 5 & 17 of the Hague Adoption Convention, (iii) undertaking from the Central Authority in Germany for post-adoption follow-up.

10. It is contended that the respondents cannot ensure immigration clearance for the adopted child to the country of residence of adoptive parents since the passport and Visa Issuing Authority are not under the administrative jurisdiction of the respondents.

11. It is contended that the respondents do recognize the adoptions made under the HAMA Act and the Adoption Order issued by the Competent Authority, however, CARA is mandatory to issue NOC for inter-country adoption being the Central Authority of India under the Hague Adoption Convention for which an application is required to be made along with the requisite documents.

12. During pendency of the present petition, the petitioner placed on record a judgment of the Higher Regional Civil Court at Germany dated 20.02.2017 recognizing the adoption of the petitioner and also

recognizing the judgment of the Court of District & Sessions Judge (West), Tis Hazari Courts, dated 28.05.2015

13. Identical issue as arising in this petition also arose in Writ Petition (Civil) No.5718/2015 titled *PKH versus Central Adoption Resource Authority through the Secretary General*. By Judgment dated 18.07.2016, a Coordinate Bench of this Court examined in detail the various International Conventions as well as the judgments of the Supreme Court in *Lakshmi Kant Pandey versus Union of India*, 1984(2) SCC 244 and *Anokha (Smt.) versus State of Rajasthan and Others*, (2004) 1 SCC 382, while analysing the Juvenile Justice Act, 2000, the Juvenile Justice (Care and Protection of Children) Rules, 2007 and Guidelines Governing Adoption of Children, 2015.

14. It may be expedient to extract the analysis and reasoning of the learned Judge in *PKH versus Central Adoption Resource Authority (supra)* as the same would have direct applicability in the present case and applies on all fours. The relevant extract is as follows:-

> ‘‘****** ***** *****
>
> *COURT’S REASONING*
>
> *47. Having heard the learned counsel for parties, this Court is of the view that it is essential to trace the development of the law relating to child rights and adoption nationally as well as globally.*
>
> *GENEVA DECLARATION OF THE RIGHTS OF THE CHILD, 1924*
>
> *48. The first major declaration on child rights was the*

"Geneva Declaration of the Rights of the Child" which was adopted on 26th September, 1924 by the League of Nations. This Declaration recognized that a child who cannot fend for himself/herself must be protected and rehabilitated inasmuch as it stated that "the orphan and the waif must be sheltered and succored". This initial Declaration indicated that it was the society's responsibility to ensure that the interest of a child who does not have a natural family, is safeguarded.

DECLARATION OF THE RIGHTS OF THE CHILD, 1959

49. On 20th November, 1959, the General Assembly of the United Nations, by Resolution 1386(XIV) adopted the „Declaration of the Rights of the Child". By this Declaration, the best interest of the child was sought to be protected. Importantly, in Principle 9, it was declared that a child should be protected from "neglect, cruelty and exploitation".

DECLARATION ON SOCIAL AND LEGAL PRINCIPLES RELATING TO THE PROTECTION AND WELFARE OF CHILDREN, WITH SPECIAL REFERENCE TO FOSTER PLACEMENT AND ADOPTION NATIONALLY AND INTERNATIONALLY, 1986

50. On 03rd December, 1986, the General Assembly of the United Nations in its 95th Plenary Meeting adopted the „Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally". While Articles 13 to 24 dealt with adoption, Articles 17 to 24 dealt specifically with inter-country adoption. Article 13 stated that the objective of adoption was to ensure that a child who did not have a natural family is taken care of in a family setting. Article

17 stipulated that when the option of placing a child either in foster care or adoption in the child's home country was unavailable, then inter-country adoption should be resorted to with the singular objective of ensuring that a child can grow up in a family. Article 18 stated that national governments should endeavour to enact laws for regulating inter-country adoptions. Article 20 stated that a competent authority must be created in States in order to oversee inter-country adoptions. Article 22 stated that inter-country adoptions should only be made once the child is legally free for adoption and that all the necessary protocols have been satisfied in order to facilitate the adoption. Article 23 stated that the inter-country adoption should be considered as legally valid in the two countries which are involved.

CONVENTION ON THE RIGHTS OF THE CHILD, 1989

51. On 20th November, 1989, the General Assembly of the United Nations adopted the „Convention on the Rights of the Child". This Convention comprehensively dealt with the rights and entitlements available to a child. Article 21 of the Convention referred to adoption. It stipulated that in matters of adoption, the best interest of the child is the most important factor. Article 21(a) stipulated that adoption of the child must be undertaken through competent authorities in order to preserve the sanctity of the adoption process. Article 21(b) dealt with inter-country adoption. It provided that inter-country adoption must be allowed when no one is willing to take care of the child and that in the child's home country, an adoptive family could not be found. Articles 21(c), 21(d) and 21(e) stipulated that sufficient safeguards must be in place in order to protect a child who is given in inter-country adoption. India acceded to this Convention on 11th December, 1992.

CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER-COUNTRY ADOPTION, 1993 AT HAGUE

52. The most important international convention on inter-country adoption is the subsisting „Convention on Protection of Children and Co- operation in respect of Inter-Country Adoption", which concluded on 29th May, 1993 at The Hague, Netherlands. Its Article 1 states that the purpose and aim of the Convention is to preserve the best interest of the child and to ensure recognition of inter-country adoption between contracting states.

Articles 4 and 5 provide for the circumstances in which an adoption can be said to be within the scope of the Convention. Article 6(1) provides that in a Contracting State, a Central Authority must be created to perform the duties imposed by the Convention. Articles 14 to 21 relate to the manner in which inter-country adoption can be undertaken and the role of the Central Authority in that regard. Article 23 provides that when the competent authority of a state certifies that the adoption has taken place as per the Convention, the certification should be recognized in the other Contracting States. India signed this Convention on 09th January, 2003 and ratified it on 06th June, 2003.

53. Interestingly, a reading of certain Articles in the Convention shows that the Convention recognizes the operation of different laws on adoption within a country. Article 6(2) provides, inter-alia, that where a State has more than one system of law which relate to adoptions, then the Contracting State can create several Central Authorities for the different systems of law. Article 28 provides that the Convention does not affect a law which stipulates that the adoption must occur in the home country of a child. Also, Article 37 provides that when a State has several systems of law which apply to different

groups, the specific law is to be considered when a reference is made to the State's law.

54. It should be noted that according to the „Conclusions and Recommendations" of the Special Commission of the practical operation of the Hague Convention of 29 May 1993 on protection of Children and Co- operation in Respect of Inter-country Adoption, one of the recommendations made is that direct and independent adoptions are incompatible with the Convention (see Para. 1(g) and Paras. 22, 23, 24). However, it should be noted that it is only a recommendation and not binding as the Convention is.

55. At this stage, it is also necessary to take into account domestic legislative and jurisprudential developments that took place with regard to inter-country direct adoptions.

IN 1984, SUPREME COURT DELIVERED A COMPREHENSIVE AND SEMINAL JUDGMENT IN THE CASE OF LAKSHMI KANT PANDEY (SUPRA)

56. In 1984, the Supreme Court in the case of Lakshmi Kant Pandey (supra) delivered a comprehensive and seminal judgment on the question of inter-country adoptions.

57. Acting on a letter petition filed by an individual complaining of questionable practices adopted by agencies which gave children in inter- country adoptions, the Supreme Court decided to comprehensively review the process by which children were given in inter-country adoptions. The decision begins by noting that there were two legislative attempts at passing an Adoption Bill which did not fructify. The first was „The Adoption of Children Bill, 1972" which had been introduced in the Rajya Sabha but was not passed. The second effort was

made in 1980, when the „Adoption of Children Bill" was introduced in the Lok Sabha, but which remained pending.

58. Prior to the Lakshmi Kant Pandey (supra) judgment, in the absence of any law on adoption, foreign parents who desired to adopt an Indian child would make an application under the Guardians and Wards Act, 1890 to be appointed as the guardian of the child after which the foreign parents would have the right to take the child out of the country. To regulate this process, the High Courts of Bombay, Gujarat and Delhi had even put in place certain procedural rules.

59. The Supreme Court noted that when the child is abandoned or when a parent wants to relinquish a child and give the child up for adoption, then an effort should be made to find prospective adoptive parents within India. If no one was willing to adopt such a child in India, then the child could be given to foreign parents since it would be wiser to give the abandoned, orphaned or surrendered child for inter-country adoption rather than condemning him/her to a life in an orphanage or an institution without any family support.

60. The Supreme Court also held that since the best interest of the child has to be protected scrupulously, safeguards must be put in place to ensure that inter-country adoptions are not resorted to by persons who would mistreat the child. Thus, the Supreme Court held that in order for foreign parents to adopt a child from India, the parents" application for adoption should be sponsored by a child welfare agency in the parent's home country which agency must prepare a Home Study Report of the parents. Further, a Child Study Report should also be prepared. The Supreme Court noted that a Central Adoption Resource Agency must be created to oversee the process of inter-country adoption and ensure

the sanctity of the adoption process is observed. With regard to the surrender of a child, natural parents who want to surrender their child to an agency or institution must receive proper assistance and be made aware of the consequences of their decision.

61. Significantly, the Supreme Court judgment was emphatic on the point that the procedural and substantive safeguards which it laid down were inapplicable to cases where the foreign parents directly adopt the child from the natural parents. The Supreme Court in Lakshmi Kant Pandey (supra) held as under:

> *"11. We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare."*

62. The justification provided for this exception was that when the child is abandoned or destitute or when the child is living in a welfare centre then there is no one to protect his/her interests. By contrast, in the case of direct adoptions, the natural parents still live with the child and they are best suited to judge whether it would be in the best interests of the child to be given up for inter-country adoption. Therefore, the decision is categorical in holding that inter-country direct adoptions are outside the ambit of the decision.

THE ANALYSIS OF THE ACT, 2000, RULES, 2007 AND GUIDELINES,

63. The Act, 2000 was enacted pursuant to India's obligations under the Convention on the Rights of the Child. In 2006, this Act was amended. Inter alia, Section 2(aa) was introduced to define adoption as "the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship." The provision relating to adoption, and sub-sections (2) to (4) of Section 41 were also substituted in 2006. The amended Section 41(2) provides that adoption is a means to rehabilitate a child who is an orphan or abandoned or surrendered. Sections 41(3) to 41(5) provide the procedure that has to be adhered to for the adoption of such a child.

64. The Juvenile Justice (Care and Protection of Children) Rules, 2007, (for short 'Rules, 2007') prescribes the process for adopting a child in Rule 33.

65. Rule 33 (1) provides that the purpose of adoption is to ensure that a child is placed in a permanent substitute family when such a child is not fortunate to receive the care from his/her natural parents. Rule 33 (2) provides that the guidelines issued by the Central Adoption Resource Agency shall govern all adoptions. Rule 33 (3) pertains to the process to be followed for the adoption of an orphan or abandoned child.

66. Rule 33 (4) pertains to the adoption of "surrendered children". A reading of this rule reveals that a child who is directly adopted from the natural parents cannot be considered as a "surrendered child". Rule 33 (4)(a) provides that a "surrendered child" is the

one who has been declared by the Committee i.e. the Child Welfare Committee ('CWC') as "surrendered" in order to also declare the child legally free for adoption. Further, such "surrender" is contemplated only in certain compelling conditions, such as a child born out of a non-consensual relationship [Rule 33(4)(a)(i)]. Rule 33 (4)(b) provides that the CWC must counsel the parents to see whether they would like to keep the child, and if they are unwilling to do so, the child may be kept in foster care (Section 42, Rules 34, 35, 36) or sponsorship (Section 43, Rule 37) may be arranged for him/her. Rule 33 (4)(c) read with Rule 33 (4)(e) provides that a deed of surrender has to be executed by the parents before the CWC. Rule 33 (4)(f) provides that after the time period for reconsidering the surrender of the child elapses [Rule 33 (4)(d)], the surrendered child may be declared legally free for adoption.

67. Section 41 read with Rule 33 suggests that a "surrendered child" denotes a child who has been relinquished by the natural parents and that the parents seek to irreversibly terminate the parental-child relationship. Upon the termination of this relationship which has to be done under the supervision of the CWC, the child is "surrendered" to the care and custody of the CWC who is then responsible for the care of the child.

68. The abovementioned provisions make it amply clear that direct adoption cannot be considered as a process by which the child becomes a "surrendered child" because in the case of direct adoption, the natural parent gives the child in adoption directly to the adoptive parents without surrendering the child to the CWC and/or any third entity or agency. In direct adoptions, unlike the case of surrender, there is no termination of the parental-child relationship in favour of the CWC or any third agency which then decides whether or not to give the child in adoption.

69. Further, a reading of the Guidelines, 2015, issued by the Ministry of Women and Child Development on 17th July, 2015 under the Act, 2000 also makes it clear that a surrendered child is not a child given in direct adoption. These Guidelines were made pursuant to Section 41 (3) of Act, 2000 and replace the Guidelines, 2011. In para 2 of the Note to the Guidelines, it is stipulated that, "These Guidelines shall govern the adoption procedure of orphan, abandoned and surrendered children in the country from the date of notification and shall replace the Guidelines Governing the Adoption of Children, 2011".

70. Certain Rules of the Guidelines, 2015 are also important. Rule 2(2) defines an abandoned child to mean an "unaccompanied and deserted child who is declared abandoned by the Child Welfare Committee after due inquiry". Rule 2(23) defines an orphan to mean a child who does not have parents or legal guardian, or whose parents or legal guardians are unwilling to take care of the child or are incapable of taking care of the child. Rule 2(33) defines a surrendered child to mean a "child, who in the opinion of the Child Welfare Committee, is relinquished on account of physical, emotional and social factors beyond the control of the parent or legal guardian". A reading of Rule 2(33) reveals that the definition of a surrendered child cannot apply to cases of direct adoptions because in inter-country direct adoptions there is no element of relinquishment to the CWC, or a third entity or an agency.

71. A holistic reading of the Act, 2000, the Rules, 2007 and the Guidelines, shows that a surrendered child means a child who is given to the CWC after which it is only the CWC who has a say with regard to the welfare of the child. After the surrender, the parents no longer have any role to play and it is the CWC which decides the best course of action for the child. Consequently, a

reading of Act, 2000 read with the Rules, 2007 shows that neither the Act, 2000 nor the Rules made there-under cover inter- country direct adoptions.

THE SUPREME COURT'S INTERPRETATION OF THE ACT, 2000

72. In Anokha (supra) the Supreme Court specifically examined the applicability of Guidelines on Adoption to inter-country direct adoptions and the role of respondent-CARA. In that case, an Italian couple wished to adopt an Indian child and to that end filed an application under the Guardian and Wards Act, 1890 in the court of the District Judge at Alwar. The District Judge rejected the application, inter alia on the ground that the Central Government had issued Guidelines for the „Adoption of Indian Children" which required an authorised agency in the adoptive parents" home country to sponsor an adoption application and issue a no-objection certificate. The District Judge held that in its absence, the application of the Italian couple had to be rejected. This decision was affirmed in appeal and the High Court ruled that in addition to the adoption application being sponsored by an agency in the foreign country, CARA must also issue a no-objection certificate. It is in this context that the matter was carried forward to the Supreme Court in appeal.

73. The Supreme Court in Anokha (supra) following the decision of Lakshmi Kant Pandey (supra) held that inter-country direct adoptions are not amenable to the rigours of the procedural safeguards since the natural parents are best positioned to judge what is in the best interests of the child. Crucially, the Supreme Court reiterated the distinction which Lakshmi Kant Pandey (supra) drew between a surrendered child and the giving of a child in direct adoption by noting that the said judgment would apply to a child who is surrendered or

relinquished to an institution and "not to cases where the child is living with his/her parent/parents and is agreed to be given in adoption to a particular couple who happen to be foreigners".

74. The Supreme Court held that nothing in the Indian jurisprudence on the subject suggests that the adoption guidelines such as the one before the Court could apply to inter-country direct adoptions. The Supreme Court further held that the need for CARA to furnish an NOC, the application for adoption needing to be sponsored by a recognised agency, and the adoption needing to be undertaken by a recognised Voluntary Coordinating Agency, only arises when "... there is the impersonalized attention of a placement authority...".

75. The Supreme Court reiterated the conclusion that the extant adoption guidelines are inapplicable to cases of inter-country direct adoptions. However, it stated that when the adoptive parents make an application under the Guardian and Wards Act to be appointed as the guardians of the child, the Court must be satisfied that the adoption is voluntary, that the consent of the natural parents to give up the child for adoption has not been obtained through questionable means, and that the adoptive parents must present evidence as to their overall suitability to adopt a child.

76. In conclusion, the Supreme Court held in Anokha case (supra) that since there was sufficient material on record which attested to the suitability of the adoptive parents to take care of the child, the Italian couple were appointed as the child's guardian.

77. From a reading of Anokha (supra), it is clear that the Supreme Court declared that the extant Guidelines on adoption as they existed at that time would be inapplicable to cases of inter-country direct adoptions

and that CARA would have no jurisdiction over such adoptions. However, it held that it otherwise be established that the inter-country direct adoption has taken place in a bona fide manner and that the adoptive parents are suitable for taking care of the child.

DELHI HIGH COURT'S INTERPRETATION OF ACT, 2000

78. The question of whether inter-country direct adoptions are amenable to the jurisdiction of CARA has also been examined by this Court.

79. In Dr. Jaswinder Singh Bains v. CARA, W.P (C) 8755/2011 decided on 13th February, 2012, the Petitioners, had directly adopted a child from a couple and also executed a duly registered adoption deed. The Civil Judge (Sr. Division), Patiala issued a declaratory decree to the effect that the Petitioner was the guardian of the child under Section 7 of the Guardians and Wards Act. Since the Petitioners resided in Canada, they wished to take the child with them, but the Family Services of Greater Vancouver sought a NOC from CARA. Since CARA did not respond to the Petitioner's request for a NOC, the parents filed a writ petition against CARA.

80. Following Lakshmi Kant Pandey (supra) and Anokha (supra), the High Court ruled that when inter-country adoptions are made directly from natural parents, a NOC from CARA was not required, since the procedural rules were inapplicable to cases of direct voluntary adoptions.

81. In Swaranjit Kaur (supra) the Petitioners therein adopted a child, executed an adoption deed and obtained a declaratory judgment from the competent civil court. In the said case, a NOC had been issued by CARA and since the Petitioners wanted to take the child back to Alberta,

Canada, the Alberta Government inquired from CARA India as to the authenticity of the NOC that had been issued. Meanwhile, the Canadian Immigration Department wrote to the Petitioner stating that CARA had informed the Immigration Department that the NOC in question had not been issued by them. The Petitioners filed a writ petition under Article 226 in the Delhi High Court after they failed to obtain a response from CARA on the issue of the NOC.

82. This Court held in the said judgment that this was a case of inter- country direct adoption by a relative and following the decision of Jaswinder Singh Bains (supra) respondent-CARA had no role whatsoever to play with respect to direct adoptions.

83. In view of aforesaid binding judgments of the Apex Court and this Court, the judgment of the Madras High Court in Mr. Tim Cecil and Mrs. Steffi Cecil (supra) offers no assistance to the respondent-CARA.

APPLICABILITY AND ANALYSIS OF ACT, 2015

84. This Court is in agreement with the submission of the learned Amicus Curiae that as the adoption deed in the present case had been executed before the Act, 2015 came into force, it would be governed by the Act, 2000 and not by the Act, 2015.

85. Since arguments were advanced with regard to the scope and interpretation of Act, 2015, this Court clarifies that though there is some ambiguity as to whether the Act, 2015, applies to inter-country direct adoptions, yet it is of the opinion that the scope of Section 60 of the Act, 2015, should be expanded to cover all forms of inter-country direct adoptions. This interpretation would advance the best interest of the child whose family wishes to give him/her in adoption and also ensure that the

sanctity of the adoption process is respected and the best interest of the child is scrupulously safeguarded. This Court may mention that in exercise of its writ jurisdiction, it has the power to expansively interpret a provision of a statute in order to achieve the objects and reasons which the law seeks to achieve and to reach injustice wherever it is found. [See Dwarka Nath Vs. ITO, (1965) SCR 536]

86. The respondent-CARA should ensure that the applications for approval/NOC are processed in a child friendly manner and that too, in a strict time frame. After all, incorporation of safeguards should not lead to harassment and delay.

87. This Court suggests that the respondent-CARA should consider the option of appointing a panel of Psychologists, Lawyers as well as NGOs in all the States so that the Child Study Report and Home Study Reports in the case of domestic adoptions, if applicable, in India are prepared scientifically in a time bound manner. The local police as well as Anti Trafficking Unit of the Ministry of Home Affairs should be asked to give their response to the Adoption application within a strict time frame. If response is not received from statutory/government authority within the time-frame prescribed, it should be presumed that said authority has no objection to the adoption."

15. After analysing the domestic laws and various international conventions and the Judgments of the Supreme Court, Learned judge reached the following conclusion:

"91. The survey of the domestic law and international conventions leads to the following conclusions:

a. As the adoption deed in the present case has been

executed under HAMA, 1956, before the Act, 2015 came into force and the adoption deed has been held to be legal, valid and genuine by the Additional Civil Judge (Senior Division), Zira in a civil suit filed by the adoptive parents against the natural mother, the adoption in the present case is governed by the Act, 2000 and not by Act, 2015.

b. The Act, 2000 read with the Rules, 2007 and the Guidelines, 2015 expressly lays down a procedure for adoption only in relation to a child who is an orphan or abandoned or surrendered, and does not cover inter-country direct adoption.

c. The Act, 2000 read with the Rules, 2007 and the Guidelines, 2015 provides that a child is surrendered when the parents wish to relinquish him/her to the CWC and a formal act takes place by which the child is surrendered by the natural parents to the CWC. Once the surrender is complete, the parents have no role in the future of the child and the CWC alone decides the best course for the child's future before the child is adopted.

d. A child given in direct adoption cannot be termed as a "surrendered child", since there is no relinquishment of the child, by the parents to the CWC.

e. The Supreme Court in Lakshmi Kant Pandey (supra) as well as Anokha (supra) and the High Court of Delhi in Dr. Jaswinder Singh Bains (supra) and Swaranjit Kaur (supra) have categorically and conclusively held that all inter-country direct adoptions are outside the scope of the rules set out for adoptions under the Act, 2000 and the Rules/Guidelines framed there-under.

f. In view of the aforesaid binding precedents, there is no scope for incorporation of the concept of parens patriae in inter-country direct adoption cases under the Act, 2000, specially when the adoption deed has been declared to be legal, valid, genuine and binding by a competent court.

g. Rule 26 of the Guidelines, 2011 is a procedural provision and it does not advance the case of the respondent-CARA.

h. In view of CARA, Canada's approval for adoption and its favourable home study report as well as the decree of declaration passed by Additional Civil Judge (Senior Division), Zira, this Court is of the opinion that the requirements of Articles 5 and 17 of The Hague Convention are satisfied in the present case.

i. Consequently, in cases of inter-country direct adoption like the present case, NOC from respondent- CARA is not required under the Act, 2000 and the Guidelines, 2011.

j. The Regional Passport Officer/MEA cannot insist on issuance of an NOC by respondent-CARA before processing the petitioner's application for issuing a Passport to the adopted child."

16. At this juncture, it may also be expedient to refer to the judgment of the Court of the District & Sessions Judge (West) dated 28.05.2015, with regard to the adoption of the petitioner. The relevant portion reads as follows:-

"Petitioner No.1- Dalip Kumar Arora appeared in the witness box as PW1 and he also deposed on behalf of

his wife in view of the General Power of Attorney Ex.PW-1/1, executed by his wife in his favour attested by Consulate General of India, Hamburg and carrying the seal & stamp of the Consulate as well as the signatures of Vice Council of the Consulate General of India, Hamburg. PW-1 was executed in his presence and his wife signed at point E on each page. He further deposed that the present petition was also signed by her in his presence expressing her keenness to adopt Master Divyansh Arora.

PW-1 deposed that petitioners do not have their own child due to medical problems and Master Divyansh Arora born on 25.01.2004 has been adopted by them vide Adoption Deed dated 27.01.2015 Ex.RW-2/2. He further deposed that the adoption/godi ceremony was performed on 26.01.2015 in presence of their near and dear.

Further, it is deposed that after adoption of the child, his parentage in his birth certificate was changed. His initial birth certificate, showing the respondents as his parents is Ex.RW2/1 and his birth certificate, showing petitioners as his parents is Ex.PW1/2. His Aadhar Card with changed parentage is Ex.PW-1/4.

PW-1 further deposed that he is earning 25,000/- Euro annually and he is having good financial status and that he and his wife will treat Master Divyansh Arora born on 25.01.2004 as their own child and will give him best environment and education and will take care of all his needs.

Respondent No.1 – Shri Raj Kumar Arora and respondent No.2 – Smt Neeru Arora have been examined as RW-1 & RW-2 respectively. They deposed that they are biological parents of Master Divyansh Arora born on 25.01.2004. The copy of the Adhaar Card of respondent No.1 is Ex.RW-1/1. The copy of initial birth

certificate of Master Divyansh Arora born on 25.01.2004 is Ex.RW-2/1.

It was further deposed by the respondents that they were blessed with three children i.e. elder son Vishesh Arora born on 20.03.2002, younger son Master Divyansh Arora born on 25.01.2004 and a daughter Luvya Arora born on 07.10.2009.

They further deposed that the petitioners are Bhaiya and Bhabhi of respondent No.1 who were married in the year 2008 and did not have their own child due to medical problems. Accordingly, Master Divyansh Arora born on 25.01.2004 was adopted by them and formal Adoption Deed dated 27.01.2015 Ex.RW-2/2 was executed and a godi ceremony was performed at their residence on 26.01.2015 as per Hindu rituals and ceremonies and consequent upon adoption by the petitioners, the birth certificate of the child was got issued and the names of the respondents i.e. the natural and biological parents were substituted with the names of the adopted parents, i.e. the petitioners.

They stated that the reason for giving Master Divyansh Arora born on 25.01.2004 in adoption to the petitioners is that from his early childhood, the child is too much attached with them and he has been living with them whenever they stayed in India.

Both the respondents who are natural and biological parents of Master Divyansh Arora stated that the child is being looked after by the petitioners as their own child.

Therefore, as per facts of the case, petitioner No.1 is the real brother of respondent No.1 and since petitioners could not have their own child due to medical reasons, Master Divyansh Arora born on 25.01.2004,

the second child of the respondents, was given in adoption to the petitioners vide Adoption Deed dated 27.01.2015 Ex.RW-2/2.

Master Divyansh Arora has been examined by the Court in-camera in chamber, who in response to Court queries, expressed that he loves his Taya and Tayi, who are now his parents, and they too love him and in response to another Court query that whether he will miss his siblings, he answered that he can talk to them on phone and he expressed his desire to settle with the petitioners in Germany for the sake of his education. Even in the Court, it is observed that the child was standing close to petitioner No.1 in presence of the respondents.

In view of the testimony of the respondents, i.e. the natural and biological parents of Master Divyansh Arora and the testimony of petitioner No.1 and the examination of the child-in-camera in the chamber, the present petition is allowed and the petitioners are permitted to adopt Master Divyansh Arora born on 25.01.2004 , the second child of the respondents.

The requisite certificate be issued in favour of Shri Dalip Kumar Arora and Smt Vaishali Arora, the petitioners herein for adopting Master Divyansh Arora on their furnishing the necessary undertaking that they will take care of Master Divyansh Arora as their own child and that Master Divyansh Arora will succeed to all their properties and estate."

17. Further, it may be seen that the Higher Regional Civil Court at Germany by its order dated 20.02.2017 has also recognized the present adoption and honoured the judgment of the Court of District & Sessions Judge (West), Tis Hazari Courts.

18. As noticed by the learned Single Judge in *PKH versus Central Adoption Resource Authority(supra)*, delay in adoption would mean that the minor has to live with uncertainty and insecurity. The adoption ceremonies were performed on 26.01.2015 and the adoption deed was executed on 27.01.2015 and for over two and a half years, the minor child is living with uncertainty and till date, has not been integrated with his adoptive family in the new country of residence. Though in the case of *PKH versus Central Adoption Resource Authority (supra)*, there was also a home study report from Canada, however in view of the conclusion reached by the learned judge as noticed in para 91 of the said judgment (extracted hereinabove), it would not be required for the present case more so in view of the fact that the Higher Regional Civil Court at Germany by its order dated 20.02.2017 has also recognized the present adoption.

19. In view of the judgment dated 28.05.2015 of the Competent Court in a Guardianship Petition No.01/2015, the petitioner is now lawfully adopted, the said judgment has attained finality and even if the petitioner was to wish, the petitioner cannot re-unite with his biological parents. The Petitioner's birth certificate and his Adhaar card has already been modified and the names of his adoptive parents have already been substituted therein in place of his biological parents. Further, it is not a case of adoption between strangers. The present is a case of adoption between family members. The adoptive parents being the real elder brother of the biological father and the

elder brother's wife. The adoption, being in accordance with the HAMA Act, is complete. Accordingly, all relations between the petitioner and his natural family are severed. If the petitioner is not permitted to unite with his adoptive family, the petitioner would be in a very precarious position, where his relations with the biological parents have severed and the relations with his adoptive family are not permitted to be joined. It would cause grave injustice to a child.

20. In view of the above, the present petition is disposed of with a direction to the respondent – CARA to grant, within a period of two weeks, a No Objection Certificate (NOC) to the adoptive parents of the petitioner for taking the petitioner to Germany. The Ministry of External Affairs/Regional Passport Officer is also directed to issue a passport to the petitioner within a period of two weeks thereafter.

21. The petition is accordingly allowed in the above terms.

22. *Dasti* under signatures of Court Master.

SANJEEV SACHDEVA, J

NOVEMBER 14, 2017
'sd'