

(2019) 02 SC CK 0110

In the Supreme Court Of India

Case No : Civil Appeal Nos. 2017, 2020 Of 2019

Union Of India & Anr. Etc

APPELLANT

Vs

Ankur Gupta & Ors

RESPONDENT

Date of Decision : 25-02-2019

Acts Referred:

Constitution of India, 1950 — Article 226
Juvenile Justice (Care and Protection of Children) Act, 2015 — Section 56(1), 57, 58, 59, 59(1), 59(2)

Citation : AIR 2019 SC 1316 : (2019) 3 Scale 801 : (2019) SCR 31 : (2019) 4 ALD 21 : (2019) 2 ALT 176 : (2019) 3 MLJ 44 : (2019) 2 RCR(Civil) 294 : (2019) 2 Supreme 616 : (2020) 1 MhLJ 809

Hon'ble Judges : Ashok Bhushan, J;K.M. Joseph, J

Bench : Division Bench

Advocate : Aman Lekhi, Priyanka Das, Shraddha Deshmukh, Gurmeet Singh Makker, Jayna Kothari, Anindita Pujari, Nitya Rajshekar, Aarti Krupa Kumar

Final Decision : Allowed

Judgement

Ashok Bhushan, J

1. Leave granted.
2. The contesting respondent Nos. 1 and 2 having appeared through caveat, we have heard counsel for the parties and proceed to decide the matter finally.
3. Union of India and Central Adoption and Resources Agency, Ministry of Women & Child Development is in appeal questioning the Division Bench judgment dated 04.09.2018 in Writ Appeal No. 2259 of 2018 and Writ Appeal No.2675 of 2018. Two other appeals have been filed by two other appellants questioning a common order dated 04.09.2018 passed by the High Court in C.C.C. No. 1690 of 2018 and C.C.C. No. 1691 of 2018.
4. We first take the Civil Appeal filed against the Division Bench judgment in Writ Appeal No.2259 of 2018 and Writ Appeal No.2675 of 2018. The brief facts giving

rise to the appeal as has been noted by the Division Bench of the High Court are to the following effect:-

4.1 That after completing his studies from the Indian Institute of Technology and India Institute of Management, Ahmedabad, in the year 2000, Mr. Ankur Gupta, the respondent No.1 migrated to United State of America (USA for short). In 2004, Ms. Geetika Agarwal, the respondent No.2 went to USA for her Ph.D. During their stay in USA in June, 2006, the respondent Nos. 1 and 2 got married. They stayed in USA for a decade. They returned to India in 2016. While staying in USA, the respondent No.2 became an American Citizen; the respondent No.1 applied for American citizenship. However, till 2016, when the couple returned to India, the respondent No.1 was not given the American Citizenship. Moreover, even after ten years of marriage, the couple was not blessed with any children. Therefore, upon their return to India, they eventually planned to adopt an Indian child.

4.2 The respondent Nos.1 and 2 submitted an Application on 19.07.2016 through Central Adoption Resource Information and Guidance System (CARINGS) to adopt a child as Indian Prospective Adoptive Parents. Just before submitting the application for adoption respondent No.2 had acquired the citizenship of USA on 19.05.2016 which had been declared as such in application submitted on 19.07.2016.

4.3 According to the Guideline, 2015, a Home Study Report has to be prepared by a Specialized Adoption Agency in order to coordinate the efforts of a 'Prospective adoptive parents' to adopt a child. On 01.08.2016, Shishu Mandir Agency, a registered Specialized Adoption Agency, filed its Home Study Report. Thereafter, the respondents were in queue awaiting referral of a child for adoption. On 05.12.2016, during the time they were waiting for referral of a child for adoption, the respondent No.1 was granted the U.S. Citizenship on 05.12.2016.

4.4 According to the respondents, on the basis of the advice received by them, they informed CARA, the appellant No.2 about the change in citizenship status of respondent No.1. Moreover, on 05.11.2017, the couple registered themselves as Overseas Citizens of India (OCI) residing in India. The said registration was made under the Adoption Regulations, 2017 (Regulations, 2017, for short), which was notified on 4th January 2017 in supersession of the Guidelines Governing Adoption of Children, 2015.

4.5 Since the respondents had informed the Specialised Adoption Agency about the change in their citizenship status, the Specialized Agency informed the appellant No.2, through e-mail dated 05.12.2017, about the change of citizenship status of the respondents. The Specialised Adoption Agency referred to the respondents' second registration, namely, CUSA201771205. On behalf of the respondents, the Specialised Adoption Agency requested the appellants that the respondent's seniority for adoption of a child should be continued on the

basis of the first registration.

4.6 By e-mail dated 06.12.2017, the appellant No.2 informed the Specialised Adoption Agency that the request for continuing the seniority of the couple would be considered with the approval of the competent authority. However, the eligibility of the couple for adoption would be in the category of "OCI living in India".

4.7 On 01.01.2018, Baby Shomya (born on 30.09.2017) was referred by the respondent No.3 for adoption by the respondent Nos. 1 & 2. The respondent Nos. 1 & 2 accepted the referral on 02.01.2018. The respondent Nos. 1 & 2 visited Baby Shomya, who was with the respondent No.3 at Patna. Therefore, on 04.01.2018, the respondent Nos.1 & 2 wrote to the CEO of the appellant No.2 requesting for continual of the reference of Baby Shomya for adoption. The respondent Nos.1 & 2, who apprehended that the referral of Baby Shomya for adoption would expire on 18.01.2018, repeatedly corresponded with the appellants as a follow-up for completing the adoption of Baby Shomya. Again, in the month of March 2018, the respondent nos. 1 & 2 visited Baby Shomya. During this visit, they were informed that in a High-Level Committee Meeting on 27.02.2018, their request for permission to continue the first application dated 19.07.2016, as Indians living in India Prospective Adoptive Parents, was declared as invalid, because the respondent No.1 had also been given US citizenship. They were further informed that they will, instead, have to wait for a referral of another child as 'Overseas Citizen of India'.

4.8 Therefore, the respondent Nos. 1 and 2 filed writ petition, namely, W.P. Nos. 12427-428 of 2018, impugning the aforesaid decision, which was communicated to them over an e-mail dated 15.03.2018. The Writ Court allowed the writ petitions by order dated 19.06.2018. The writ Court quashed the aforesaid decision communicated vide the e-mail dated 15.03.2018. Further, the High Court directed the appellants to consider and examine the request of the respondent Nos.1 & 2 on the basis of their first application dated 19.07.2016 expeditiously, but within 15 days from the date of receipt of this order.

4.9 The learned Single Judge vide its judgment and order dated 19.06.2018 allowed the writ petitions by passing following order:-

"ORDER

(1) Writ petitions are hereby allowed.

(2) Communication dated 15.03.2018-Annexure-Z is hereby quashed.

(3) Writ of mandamus is issued to respondents to consider and examine the application submitted by petitioners on the strength and basis of the application dated 19.07.2016 - Annexure-A/Annexure-R-2 expeditiously, at any rate, within 15 days from the date of receipt of this order, by keeping in mind the observations made herein above. "

4.10 Union of India and Central Adoption Resources Agency, Ministry of Women & Child Development filed Writ Appeal No. 2259 of 2018 and Writ Appeal No. 2675 of 2018 against the judgment. Two Contempt Applications being C.C.C. Nos. 1690-1691 of 2018 were also filed by respondent Nos. 1 and 2, which were also considered and decided by Division Bench of High Court vide its judgment dated 04.09.2018. The Division Bench of the High Court vide its judgment dated 04.09.2018 dismissed the writ appeals. The Division Bench affirmed the order of the learned Single Judge. While dismissing the writ appeals, the contempt petitions were also closed. It is useful to extract paragraph Nos. 30 and 31 of the judgment, which is relevant for the present case:-

"30. For the aforesaid reasons, this Court is of the considered opinion that the Writ Court has rightly concluded that the appellants were not justified in denying the benefit of referral of the child, Baby Shomya, for adoption by the respondent Nos.1 and 2, and that no grounds are made out for interference with the exercise of extraordinary jurisdiction by the Writ Court under Article 226 of the Constitution of India in the peculiar facts and circumstances that congeal into exceptional circumstances. Therefore, the Writ appeal is rejected and consequentially, the pending applications are also disposed of. The appellants are directed to implement the directions of the Writ Court within a period of four weeks from the date of receipt of the certified copy of this order.

31. In view of the dismissal of the writ appeal, and the further direction to the appellants to implement the directions of the Writ Court within the further period as stated above, the contempt proceeding is closed."

4.11 The appellants aggrieved by the said judgment have filed these appeals.

5. Shri Aman Lekhi, learned ASG appearing for the appellants submits that High Court, both learned Single Judge and Division Bench erred in not correctly construing the provisions of Sections 57, 58 and 59 of the Juvenile Justice (Care and Protection of Children) Act, 2015 as well as the Adoption Regulations, 2017. It is submitted that the respondent No.1 after submitting first application on 19.07.2016 for in country adoption having acquired US citizenship on 06.12.2016 went outside the zone of in country adoption. It is submitted that the second application was submitted by the respondents on 05.11.2017 for inter country adoption but in that second application, the respondents have given their different identity and mobile numbers. It is submitted that the respondent having gone out of zone of consideration for in country adoption, their application cannot be directed to be considered on the basis of seniority for in country adoption. It is submitted that there are more than 22,000 parents waiting, according to seniority, for in country adoption, respondents cannot stroll march over them. It is submitted that offer to adopt Shomya, which was sent on 01.01.2018 was on the basis of first application of the respondents and after the respondents informed in writing on 04.01.2018 about their second registration dated 05.11.2017, the communication was sent to the respondents that decision regarding their seniority will be taken by the competent authority. The

communication was sent on 15.03.2018 to the respondents that they cannot be given the benefit of their seniority on the basis of their first application and they have to wait for receiving an offer as overseas citizen of India. It is submitted that there were no special circumstances on the basis of which any exception can be made in favour of the respondents as has been directed by the High Court.

6. Learned counsel appearing for the respondents submits that the Act, 2015 and the Regulations, 2017 do not provide for any mechanism when Indian parents, who have already got themselves registered for adoption acquires the foreign citizenship. It is submitted that as per Regulation 41 of the Regulations, 2017, a common seniority list is contemplated, which means that respondents shall retain their seniority position on the basis of first application. Thus, offer to adopt Shomya to the respondents cannot be faulted. It is submitted that respondent Nos.1 and 2 being fully competent for applying for adoption, who are still qualified and economically stable and eager to adopt the child cannot be denied their right merely because the respondent No.1 was conferred the US citizenship on 06.12.2016, i.e., much after submission of their first application as Indian parent.

7. It is submitted that even though respondent Nos.1 and 2 have been conferred US citizenship, both are residing in Bangalore, India and in both the applications, their residence is shown as India, hence in peculiar circumstances, they have rightly been offered child Shomya for adoption. It is submitted that the respondent Nos. 1 and 2 bonafide has not concealed any information and has bonafide submitted their application on 05.11.2017 as Overseas Citizen of India and the fact that immediately when they received offer for adoption of Shomya on 02.01.2018, on 04.01.2018, they sent an e-mail giving details of both the applications. The respondents have been bonafide pursuing their claim for adoption, they having not been blessed with a child even though after happy marital life of more than ten years. It is submitted that the High Court has rightly held that present case can be considered as an exceptional case and without making it a precedent, the adoption in favour of the respondents be allowed to maintain.

8. We have considered the submissions of the learned counsel for the parties and have perused the records.

9. The 2015 Act, Chapter VIII deals with adoption. Section 56 sub-section (1) provides that adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of the Act, the rules made thereunder and the adoption regulations framed by the authority. Section 57 deals with eligibility of prospective adoptive parents, which is as follows:-

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 fulfilment 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

10. Section 58 deals with procedure for adoption by Indian prospective adoptive parents living in India, which is to the following effect:-

58. Procedure for adoption by Indian prospective adoptive parents living in India.--(1) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

(3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(4) On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents.

(5) The progress and well-being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

11. The next provision, which needs to be noticed is Section 59, which provides for procedure for inter-country adoption of an orphan or abandoned or surrendered child, which is as follows:-

59. Procedure for inter-country adoption of an orphan or abandoned or surrendered child.--(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for

adoption, such child shall be free for inter-country adoption:

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

(2) An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

(3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.

(6) The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority

12. The respondent Nos.1 and 2 submitted their application as prospective adoptive parents living in India. Although, on the date of submission of application, respondent No.2 was already a US citizen, the respondent No.1 being Indian citizen, the application was fully maintainable as per the provisions of Regulations and as per the guidelines applicable at the relevant time as Indian prospective adoptive parents. Even Regulation 21(1) of Regulations, 2017 provides that if one of the prospective adoptive parents is foreigner and other is an Indian, such case shall be treated at par with Indians living in India. After the respondent No.1 acquired the US citizenship on 06.12.2016 and OCI card was issued to respondent No.1 on 27.04.2017, second application was submitted on 05.11.2017 by the respondents for inter-country adoption both having become US citizens. In view of the fact that both had become US citizens by 06.12.2016, they were not eligible for adoption as Indian prospective adoptive parents living in India. Mere fact that Act or Regulations does not provide for any mechanism to upload any further information in first registration cannot alter the legal position and consequences of acquiring the foreign citizenship by an Indian. The consequences of obtaining US citizenship of respondent Nos.1 and 2 shall take its effect immediately.

13. The submission of learned counsel for the respondents that Regulation 41 deals with common seniority list also need to be noted. Regulation 41 of the Regulations, 2017 is as follows:-

41. Seniority of the prospective adoptive parents.- (1) The prospective adoptive parents shall be referred children on the basis of a single seniority list, which shall be maintained from the date of registration and other criteria as stipulated under these regulations.

(2) The seniority of resident Indians shall be based on the date of online registration and submission of the documents, except for Home Study Report, in Child Adoption Resource Information and Guidance System.

(3) The seniority of Non Resident Indian or Overseas Citizen of India or foreign prospective adoptive parents shall be based on the date of online registration and submission of the requisite documents alongwith Home Study Report in Child

Adoption Resource Information and Guidance System.

(4) Prospective adoptive parents shall be allowed to change the State preference once within sixty days from the date of registration and in case they change the State preference after sixty days from the date of registration, they shall be placed at the bottom of the seniority list in the changed State.

(5) Seniority of prospective adoptive parents registered as single, but married later shall be counted from the date of registration as single after receipt of fresh Home Study Report.

(6) Prospective adoptive parents registered for normal child, shall be able to adopt a special need child or hard to place child with the same registration.

14. It is also submitted that prior to Regulations, 2017, there were two separate seniority lists, which were maintained under the Guidelines, 2015, which has been now made a single seniority list. Even if there is a single seniority list, now contemplated by Regulation 41, a placement in the seniority list with regard to resident Indian and non-resident Indian or overseas citizen of India are based on different yardsticks as provided in Regulations 41(2) and 41(3). Even if the common seniority list has to be utilised for the purpose of in country adoption and inter-country adoption as per the respective categories, the difference between in country adoption and inter-country adoption cannot be lost sight or given a go bye by the mere fact that a common seniority list is maintained. It is true that Regulation 41 or any other Regulation does not contemplate a situation when a resident Indian after acquiring the foreign citizenship submits a fresh registration, what is the consequence and value of its first registration. Even though regulations are silent and do not provide for any mechanism or any answer to such fact situation, the natural consequences of acquiring foreign citizenship shall follow. We, thus, find force in the submission of the learned ASG that the right of respondent Nos. 1 and 2 for adoption as resident Indian is lost after respondent No.1 having acquired the US citizenship on 06.12.2016. Offer of the child to the respondent Nos. 1 and 2 was based on their first application dated 19.07.2016, in which if the clause of foreign citizenship is ignored, was in accordance with the Act and the Rules. Further, whether the factum of respondent No.1 acquiring US citizenship on 06.12.2016 should be ignored for the purposes of adoption or not is the question, which is required to be addressed and answered in these appeals.

15. Section 58 and 59 provides for two different mechanisms for adoption. As per Section 59(1), if an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parents despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption. Thus, sixty days period has to be elapsed from the date when the child has been declared legally free for adoption. In the present case, child was declared free for adoption on

14.12.2017 by Child Welfare Committee, Patna, Bihar. Before expiry of sixty days, child could not have been offered for adoption to parents, who are eligible for adoption under Section 59. We are, however, not oblivious to the fact that respondent Nos.1 and 2 had been bonafide pursuing their applications for adoption, initially as resident Indians and thereafter even as overseas citizens of India. As per Section 57, both the respondent Nos.1 and 2 are fully eligible and competent to adopt the child. It was under the circumstances as noticed above that the child Shomya was offered to respondent Nos.1 and 2, who rightly communicated their acceptance and communicated with the child and are willing to take child in adoption and to take all care and provide good education to her. We have no doubt in the bonafide or the competence of respondent Nos.1 and 2 in their effort to take the child in adoption, but the statutory procedure and the statutory regime, which is prevalent as on date and is equally applicable to all aspirants, i.e., Indian prospective adoptive parents and prospective adoptive parents for inter-country adoption, cannot be lost sight. However, by virtue of Section 59(2), the respondent Nos.1 and 2 can at best may be given priority in inter-country adoption, they being eligible overseas citizens of India and further due to consequences of events and facts as noticed above.

16. In view of the foregoing discussions, we are of the view that ends of justice be served in disposing the Civil Appeals arising out of SLP (C) Nos. 1476- 1477 of 2019 in following manner:

- (i) The decision dated 27.02.2018 as communicated to the respondent Nos. 1 and 2 by e-mail dated 15.03.2018 is upheld.
- (ii) Judgments of learned Single Judge as well as of Division Bench in so far as it directs to consider and examine the application of respondent Nos. 1 and 2 on the basis of first registration dated 19.07.2016 are set aside.
- (iii) The competent authority shall again notify the child Shomya legally free for adoption, which notification shall be issued within one week from today.
- (iv) That in event, within sixty days from the date the child(Shomya) is declared as legally free for adoption is not taken by or adopted by Indian prospective adoptive parents, the child Shomya shall be given in adoption to the respondent Nos.1 and 2 in inter-country adoption. All consequential steps thereafter shall be completed.

17. Now, coming to Civil Appeals arising out of SLP (C) Nos. 1478-1479, these appeals have been filed against the order dated 04.09.2018 passed in C.C.C. Nos. 1690-1691 of 2018, the contempt proceedings having been closed by the Division Bench by its impugned judgment dated 04.09.2018, nothing more is required to be said in that regard. We, however, observe that filing of the contempt applications in the fact situation of the present case was ill-advised. Both the contempt applications deserve to be rejected. The appeals are allowed and contempt applications stand rejected. Parties shall bear their own costs.