

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

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Date of decision: 11th May, 2012

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LPA No.357/2012

**MS. TEESTA CHATTORAJ THROUGH HER MOTHER/NATURAL
GUARDIAN SMT. RAJESHWARI CHATTORAJ Appellant**

Through: Mr. M. Dutta, Advocate

Versus

UNION OF INDIA

..... Respondent

Through: Mr. Ruchir Mishra, Advocate.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This intra court appeal impugns the judgment dated 30th March, 2012 of the learned Single Judge dismissing WP(C) No. 2888/2011 preferred by the appellant. The said writ petition was filed by the appellant impugning the communication dated 4th April, 2011 of the Regional Passport Office, Ministry of External Affairs, Government of India and seeking a mandamus for issuance of the passport, applied for by the appellant.

2. The counsel for the respondent (who had appeared before the learned Single Judge also) appears on advance notice and we have with the consent of the counsels heard the appeal finally at this stage only.

3. The appellant is a minor, born on 15th November, 1995 to Smt. Rajeshwari Chatteraj (through whom the writ petition and this appeal are

filed) then known as Smt. Rajeshwari Ghosh (hereinafter referred to as mother) and Shri Abhijit Ghosh (hereinafter referred to as biological father). The biological father of the appellant, in or about the year 1996 i.e. soon after the birth of the appellant filed a petition in the Courts at Alipore, District 24- Parganas (South) for a decree of restitution of conjugal rights against the mother of the appellant. During the pendency of the said proceedings, in or about November, 1997, an application under Order 23 Rule 3 read with Section 13 B of the Hindu Marriage Act, 1956 was filed by the biological father and mother of the appellant seeking dissolution of their marriage (which had taken place on 1st February, 1993) by a decree of divorce and on the terms and conditions contained in the said application. In the said application, the mother of the appellant waived and/or disclaimed alimony pendente lite and/or permanent alimony and/or any other claim or claims against the biological father of the appellant. It was further recorded in the said application that the mother of the appellant, during her pregnancy of which the appellant was born, stayed at her paternal home from 16th September, 1995 and had continued to stay in her paternal house till the said application for dissolution of marriage by mutual consent was filed and the appellant also since her birth on 15th November, 1995 had resided with her mother only. The mother of the appellant, as per the terms and conditions of the dissolution of marriage, further agreed that she will not claim and/or demand any maintenance or alimony for the minor child i.e. the appellant herein at present or in future from the biological father of the appellant and had agreed to maintain the appellant herself only. It was further a term of

the said settlement between the mother and biological father of the appellant—

“the petitioner admits that he has no right to see the child for all times to come and he will not interfere in any manner regarding rearing up the child by the opposite party and her family members and that he shall have no right to claim and /or demand for custody of the said child from the opposite party”.

In the aforesaid, the biological father of the appellant is described as the petitioner and the mother of the appellant as the opposite party.

4. The Fifth Court of the Additional District Judge Alipore, (South) 24 Parganas, before whom the aforesaid proceedings were pending, vide order dated 27th November, 1997 allowed the petition originally filed for restitution of conjugal rights to be converted into a petition for divorce by mutual consent and after examining both, the mother and the biological father of the appellant on oath and finding, that they had been living apart from each other from 16th September, 1995, and the terms of compromise as contained in the compromise application aforesaid to be lawful, dissolved their marriage by a decree of divorce by mutual consent under Section 13B (supra) in terms of the compromise petition aforesaid which was ordered to form part of the decree.

5. The mother of the appellant (maiden name Rajeshwari Chatterjee) thereafter on 4th March, 1999 married Shri Surojit Chatteraj. On 12th June, 2006 a Deed of Adoption was executed and registered with the Additional District Sub-Registrar Alipore, 24 Parganas (South) whereunder the mother

of the appellant gave the appellant in adoption to the said Shri Surojit Chattoraj (hereinafter referred to as adoptive father). It is recorded in the said Deed of Adoption, that the appellant had throughout been living with her mother; that her biological father had granted total custody of the appellant to the mother and the appellant was being maintained and looked after by the mother only; that since the marriage of the mother with the adoptive father, the appellant had been residing as the daughter of the adoptive father and had been considering him only as her father; however, owing to the problems being experienced, it had been decided to formalize the adoption, in accordance with the ceremonies as well as by execution of the deed. One of the clauses of the said Adoption Deed was as under:

“AND WHEREAS the natural father of the child “TEESTA” gave his consent to the First Party to give the child in Adoption if necessary for proper maintenance, welfare, upkeep, upbringing and for following proper educational permits of the child.”

In the said Adoption Deed, the mother was described as the First Party and the adoptive father took responsibility for the maintenance and education of the appellant and to bring up the appellant as his natural daughter according to his status in life.

6. The appellant on 26th July, 2010 applied for a passport but which was denied vide communication dated 4th April, 2011 (supra) for the following reasons:

“On scrutiny of file, it is seen that biological father’s name as per birth certificate has not mentioned in the passport application form. The adoption Deed as per Adoption Act

is also not valid. As per rules of Ministry of External Affairs Circular No. VI/401/01/05/2008 dated 05.10.2009 serial No. 4(2) “In the event of remarriage after divorce, the name of step-father /step-mother cannot be written in the passport of children from the previous marriage. The relationship of the child to his biological parents subsists, even after divorce by parents. It is also not possible to leave the column of father or mother blank in the passport in such cases. Therefore, such applicants must write the names of their biological parents in the application form. However, if the stepfather or stepmother is appointed by a Court as legal guardian, the name of such step-parent can be written as legal guardian”.

In view of the instruction, you are advised to furnish a fresh Form-1 with name of biological father or a Court Order appointing you as a Legal Guardian. This may be treated as Final Reminder, your compliance may reach this office within 15 days, failing which you have nothing to say and your complaint may be treated as closed.”

7. Impugning the aforesaid communication, the writ petition was filed. The contention of the appellant in the writ petition was that the mother was entitled to give the appellant in adoption because the biological father of the appellant had renounced the appellant.

8. The relevant part of Section 9 of the Hindu Adoptions and Maintenance Act, 1956 at the time of registration on 12th June, 2006 of the Deed of Adoption was as under:-

“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 ¹[sub-section (3) and sub-section (4)], the father, if alive, shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother 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) The mother may give the child in adoption if the father is dead or 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.”

Section 9 was amended w.e.f. 31st August, 2010. The amended sub Section 2 is as under:-

- “(2) Subject to the provision 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.”

Vide the same amendment, Sub Section (3) (supra) stands deleted.

9. The respondent, in the counter affidavit, besides reiterating the reason contained in the communication dated 4th April, 2011, also pleaded that the Adoption Deed (supra) is not valid inasmuch as though the biological father of the appellant was alive and had not renounced the world, the Adoption

Deed did not bear his signatures in token of his consent to the mother giving the appellant in adoption.

10. The learned Single Judge in the judgment impugned before us has held that passport can be denied on grounds other than those specified in Section 6 of the Passport Act, 1967 also and has in this regard differed with the view of the Full Bench of the Punjab and Haryana High Court in ***Pawandeep Singh Vs. Union of India*** 2003 LawSuit (P&H) 1221. It has further been held that the passport authority has jurisdiction to go into the issue of correctness of the Adoption Deed, if the same appears to be in contravention of law. Having held so, the learned Single Judge entered into the aspect of validity of the Adoption Deed (supra) and held (without noticing Section 9 as it stood at the time of registration of adoption deed) that under Section 9 (supra) the mother, though can give the child in adoption but only with the consent of the father unless the father 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. The plea of the counsel for the appellant that renunciation under Section 9 (supra) is the renunciation of the child was negatived and it was held, and according to us rightly so, that the consent of the father to adoption can be done away with only if the father has renounced the world. The learned Single Judge further held that the mother of the appellant could not have taken away or surrendered the appellant's right to claim that Shri Abhijit Ghosh is her natural / biological father and to claim her status as the daughter and heir of Shri Abhijit Ghosh. It was further observed that the identity of the child is derived from the biological parents and the settlement

arrived at between the biological / natural parents of the appellant while obtaining dissolution of their marriage could not be construed as consent of the biological father of the appellant to the mother of the appellant giving the appellant in adoption. The Adoption Deed was also declared as void.

11. The counsel for the appellant in the memorandum of appeal has again emphasized that the biological father of the appellant having renounced the appellant, the conditions of Section 9 of the Adoption Act (supra) were satisfied and the Adoption Deed is valid.

12. In our view, the argument aforesaid of the counsel for the appellant before the learned Single Judge as also in the memorandum of appeal is misconceived.

13. Prior to 31st August, 2010, it was only the natural/biological father who could give the child in adoption, though with the consent of the mother and the entitlement of the mother to give the child in adoption arose only if the father was dead or had completely and finally renounced the world or ceased to be Hindu etc. The biological father in the present case is not dead. It is also not the case that he has renounced the world or has ceased to be a Hindu. The mother thus, could not have on 12th June, 2006 (when the deed of adoption was registered) given the appellant in adoption. Be that as it may, the Sub Registrar, Alipore registered the deed of adoption.

14. Significantly, the biological father of the appellant who alone would have locus to challenge the said adoption has chosen not to do so. Article 57 of the Schedule to the Limitation Act, 1963 provides period of limitation of

three years from knowledge for challenging an adoption. Otherwise, Section 16 of the Adoption Act is as under:-

“16. Presumption as to registered documents relating to adoption

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

The Regional Passport Office before whom the deed of adoption was produced was therefore under the aforesaid provision bound to presume the adoption recorded in the said deed to have been made in compliance with the provisions of the Adoption Act.

15. We, in these proceedings, do not deem it expedient to adjudicate, whether the Regional Passport Office, in the face of a statutory presumption (though rebuttable) of validity of adoption recorded in registered adoption deed and in the absence of any challenge thereto by the biological father who alone would have locus to challenge the same, is entitled to test the validity of the adoption deed in as much as we, for the reasons following, do not find any defect in the deed. Similarly, no argument on Section 6 of the Passport Act or qua the judgment supra of the Full Bench of the Punjab & Haryana High Court has been raised before us and we have not considered the judgment of the learned Single Judge on the said aspect.

16. We are further of the opinion that Section 9 of the Adoption Act as it stood prior to the amendment w.e.f. 31st August, 2010, by conferring the right to give in adoption on the father only and by conferring such right on the mother only in certain eventualities aforesaid, was arbitrary and discriminated between the mother and the father without any reasonable basis and merely on ground of sex. It is perhaps for the said reason only, that the same has been amended w.e.f. 31st August, 2010 so as to give equal rights to the mother and father of the child to give in adoption. Now that the law has been amended, we do not see any justification in applying to this lis which has arisen after the amendment, the law as it stood prior to the amendment, especially when no challenge as aforesaid is being made by the biological father of the appellant.

17. The question however still remains as to whether the biological father of the appellant can be said to have consented to the giving in adoption of the appellant. Admittedly, there is no consent at the time of adoption and the consent is attributed to the terms of the settlement at the time of dissolution of marriage of the natural/biological parents of the appellant. The Adoption Act has not prescribed any form of such consent. In the present case, the Registrar entrusted with the duty of registration of the Adoption Deed was satisfied that the biological father of the appellant had in the compromise application aforesaid in the matrimonial proceedings given consent to the mother giving the appellant in adoption. We tend to agree with the same. As aforesaid, the appellant since her birth has never resided in the house of her biological father who, while dissolving his marriage with the mother of the appellant gave up his right to even see the appellant for all times to come

and/or to interfere in any manner with the rearing up of the appellant and also gave up his rights to the custody of the appellant. Even though the consent to the mother giving away the appellant in adoption is not expressly recorded therein but the language in our opinion is wide enough to include a consent to giving of the appellant in adoption particularly to the person with whom the mother of the appellant is now married. The consent under Section 9 can also be implied and there is no requirement of express consent or consent in writing. Reference in this regard can be made to, ***Om Parkash v. Des Ram*** MANU/PH/0359/1999 where also the adoption deed did not bear the signatures of consenting parent.

18. There is another aspect of the matter. Adoption deed (which can bear signature by way of consent) is not necessary for adoption to be effected. Adoption can also be effected by giving and taking the child in adoption as per the custom. If the adoption is to be effected in such a manner, the consent will necessarily have to be proved by evidence. From the same it also follows that upon adoption being challenged, an opportunity has to be given to the party relying on the adoption to prove the validity thereof and since this is not a proceeding in which the person having locus to challenge the adoption is challenging the adoption, there is no option but to presume the adoption to be valid as is the mandate of Section 16 of the Act.

19. We are rather on a meaningful reading of the compromise in the matrimonial proceedings, of the opinion that the biological father, who alone as per Section 9 as it then stood, had empowered the mother to give the appellant in adoption. We find the Calcutta High Court, in ***Soma Chatterjee***

v. Chapala Chatterjee MANU/WB/0258/1989, to have, relying on *Viziamangam v. Lakshuman* 4 Bombay HCR., O.C. 244, *Shyam Singh v. Santa Bhai* 25 Bom. 554, *Vijama v. Surjya Prakash* MANU/TN/0228/1942 and *Laxman v. Rup Kanwar*, MANU/SC/0225/1961, held that the power to give in adoption under Section 9 can be delegated.

20. It also not as if the mother of the appellant was giving the appellant in adoption to a stranger or that the mother of the appellant was separating herself also from the appellant, in which case perhaps it could have been said that the biological father had consented only to the mother rearing up the child and not to a stranger rearing up the child. If the mother of the appellant in so rearing up the appellant finds it more convenient to give the appellant in adoption to her present husband, the same in our opinion would be within the parameters of her power consented to by the biological father of the appellant.

21. The Supreme Court in *Joginder Pal v Naval Kishore Behal* (2002) 5 SCC 397 though in the context of different statute observed that if the Courts do not meaningfully construe statute, the provisions thereof may suffer from the risk of being branded as unreasonable, arbitrary or as placing uncalled for and unreasonable restrictions. It was further observed that the Courts cannot interpret a statute in an unreasonable way and have to give colour and content to the expression and provide the skin of a living thought to the skeleton of the words which the legislature itself has not chosen to define. It was further laid down that the societal conditions, customs, requirements

and the context where the provision is set in the legislation are the guides leading to interpretation thereof.

22. Though we have not been able to find any case law in the Indian context but we find the House of Lords in ***Re D. (An Infant)*** [1977] 2 W.L.R. 79 to have been faced with a similar position. There, the biological parents were divorced on the ground of the father indulging in homosexuality. By consent custody was granted to the mother with reasonable access to the father. The said access, over a period of time became less frequent and eventually ceased altogether. Upon the mother remarrying, the maintenance which the father was earlier paying stopped. Upon the mother with her new husband applying to adopt the child because they wanted the child to be a full member of their family, the biological father opposed such adoption. The Trial Judge held that the biological father was unreasonably withholding consent, dispensed with it and made an adoption order. The Court of Appeal reversed the Trial Court's decision. The House of Lords allowed the appeal of the biological mother holding that the Trial Court had given due weight to the welfare of a child and had not misdirected itself in law. One of the Judges in his opinion quoted with approval the reasoning given in another judgment as under:-

“On my understanding of the authorities, and as a matter of good sense, it is only where the welfare of the child so overwhelmingly requires adoption, that the father can and should be deprived of his parental status.”

23. We find a similar situation to have arisen before Court in Singapore in ***Re SS*** [1975] 1 Malayan Law Journal 56. Finding the natural father in that

case to be completely unfit to continue in the role of the father, his consent to the biological mother and her new husband taking the child in adoption was dispensed with.

24. In the present case also the biological father of the appellant has totally renounced the appellant and has not performed any of the fatherly duties. We fail to see as to how the mother can be restrained from lawfully including the appellant in her new family. Parental rights cannot be allowed to spring full blown from merely a biological connection. They require relationships more enduring. The biological connection only gives a right to develop a relationship and make contribution to child's development. However if a parent does not grasp that opportunity, does not accept any measure of responsibility, the laws and the courts will hesitate to read any such rights in favour of a parent who has failed to do so. An observation to this effect can be found in a judgment of the Supreme Court of the United States in *Abdiel CABAN v. Kazim MOHAMMED* 441 U.S. 380 where it was observed that "in those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause would preclude the State from withholding from him the privilege of vetoing the adoption of that child."

25. Though the Indian law does not, on renunciation of the child by either parent, vest a exclusive right in the other to give the child in adoption but such renunciation can be taken into consideration while determining whether the power to give in adoption has been delegated or to determine the consent to giving in adoption.

26. Moreover the primary objective in matters relating to adoption is of the welfare of the child. We are satisfied that the adoption aforesaid is for the welfare of the child. Courts cannot be blind to the practicalities and realities of life. It is evident from the documents on record that though the name of the appellant in the birth certificate is shown as “Teesta Ghosh” the name by which the appellant is admitted to the school is “Teesta Chatteraj” and in the school records the name of her parents is recorded as of the mother and adoptive father. A child of tender age becomes a target of unnecessary queries if his/her surname differs from that of her parents. Such difference also acts as a continuous reminder of the factum of adoption and can be a bar to a smooth, natural relationship between the child and her parents. We therefore see nothing unusual in mother of the appellant, upon remarriage having given the appellant in adoption to her husband. The same is found to be a step permeating harmony in the family and to also create rights in favour of the appellant in the family of the husband of the mother of the appellant.

27. Before parting with the subject, to obviate any further controversy we may also advert to the reasoning given in the letter dated 4th April, 2011. The letter dated 4th April, 2011 appears to suggest that the name only of the biological parents can be written in the passport. The same would be contrary to Section 12 of the Adoption Act providing for the adopted child, from the date of adoption being deemed to be the child of adoptive parents. The counsel for the respondent agrees that if the adoption is held to be valid, then the name of the adoptive father i.e. of Shri Surojit Chatteraj would be written as the name of the father of the appellant. The part of the letter dated

4th April, 2011 (supra) to the effect that the names of the biological parents only would be written is contrary to section 12 of the Act as per which on adoption the ties of the child in the family of birth are severed and replaced by those in the adoptive family.

28. We therefore allow this appeal and consequently the writ petition filed by the appellant. In view of what we have held and clarification aforesaid, need is not felt to quash the letter dated 4th April, 2011. The respondent is directed to, within ten weeks hereof and subject to compliance by the appellant/her parents of the remaining formalities if any, issue a passport to the appellant and in which passport the names of her mother and father shall be that of Smt. Rajeshwari Chatteraj and Surojit Chatteraj respectively. We refrain from imposing any costs on the respondent.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MAY 11, 2012

‘M’/pp..