

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No.376 of 2021

Nissan Shalom Children .. Petitioner
Home (SAA)

-versus-

XXX XXX XXX .. Opp. Parties

For Petitioner

Mr. Dwarika Prasad
Mohanty, P.K. Swain, M.
Pal and R. Mohanty

For Opposite Parties :

Mr. Aswini Kumar Mohanty,
Advocate for Opposite Party
Nos.1 and 2
Mr. K.K. Nayak,
Addl. Standing Counsel

CORAM:

JUSTICE A.K. MOHAPATRA

Date of hearing : 25.03.2022 | Date of Judgment:22.04.2022

A.K. Mohapatra, J. :

1. The present revision is directed against the impugned order dated 17.02.2021 passed by the District Judge, Gajapati at Paralakhemundi passed in Adoption Misc. Case No.02 of 2020 under Annexure-1 rejecting the adoption of minor male child, namely, **XXX XXX** , who is presently under the care and custody of the petitioner's institution NISSAN Shalom Children Home (Specialized Adoption Agency (SAA)), located at Biswanath Nagar, Paralakhemundi in the district of Ganjam.

2. Bereft of unnecessary details, the factual backdrop of the present case, is that the petitioner's institution is a registered and

recognized agency working in the field of Child and Social Welfare in the district of Gajapati wherein destitute and relinquished children are rehabilitated. The minor male child, namely, **XXX XXX**, whose adoption is the subject matter of adjudication in the present revision petition, is presently under the care and custody of the petitioner's institution. The male child in question sought to be adopted as an abandoned/orphan child aged about 8 years as he was born on 11.06.2012. Further he was declared legally free for adoption by the district Child Welfare Committee, Gajapati under Section 38 of the Juvenile Justice Act. It is also stated that no guardian has yet been appointed for the said child and therefore, permission of the Court is sought for in her adoption under Section 58(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short 'the JJ Act, 2015').

3. The Opposite Party Nos.1 and 2, namely, Mr. Degano Gianluca and Mrs. Busletta Alessandra, who are issueless couple and are citizens of Italy and at present Opposite Party No.2 working as Clerk At R-1 Radio-Television S.P.A. and Opposite Party No.1 is working as Clerk at ZAZZERON Super market, Via Cesare dell' Acqua-19-3419-TRIESTE. Both are permanent residents at VIA ROVIGNO, N. 19-34145-TRIESTE, Italy expressed their intention to adopt the male child named hereinabove. The Opposite Parties, who have expressed their desire to adopt a child, accordingly approached the agency concerned, after meeting the male child in question. They developed a weakness for the child and decided to adopt the child in question. Accordingly, they have submitted their application after completion of all legal formalities under J.J. Act, 2015. The

Prospective Adoptive Parents (PAP) (Opposite Party Nos.1 & 2) were also found eligible and suitable to adopt the child by Foreign Care Agency, namely, '*ASSOCIAZIONE PER LA FAMIGLIA*' (translated into English '*ASSOCIATION FOR FAMILY AND CHILD'S WELFARE*'). It is further stated in the petition that the Opposite Parties submitted their home study report prepared as per the law. The foreign adoption agency involved in the process has also been approved by the appropriate Central Authority under the Juvenile Justice Act.

4. It is apt to mention here that the Opposite Party Nos.1 and 2 were also found eligible by the Central Adoption Resources Authority (CARA) as per provisions contained under Section 57 of the Juvenile Justice Act and Regulation 5 of the Adoption Regulation. After completion of the legal formalities, CARA has also issued 'No Objection Certificate' in favour of the proposed adoption as per Regulation 58 of the Adoption Regulation. All other necessary undertaking having been submitted by the Opposite Parties for the post-adoption follow ups like the ascertainment of the progress and well being of the child in the adoptive family as has been stipulated under Section 59(11) of the J.J. Act, 2015, the Specialized Agency i.e. the present petitioner submitted a petition before the District Judge, Gajapati at Parlakhemundi under Section 59(7) of the Juvenile Justice Act read with Regulation 12(2) and 17(1) of the Adoption Regulation.

5. The petition which was filed before the District Judge, Gajapati seeking permission for transnational adoption was made under Section 59(7) of the J.J. Act read with the relevant

provision of the adoption regulation. The petitioner as well as Opposite Party No.1 submitted all relevant documents in support of their claim to adopt the child in question. Learned District Judge, Gajapati after taking evidence and after hearing the parties, by order dated 17.02.2021 has rejected the petition filed by the petitioner and thereby refused to grant permission for transnational adoption of minor child in question.

6. It is relevant to mention here that prior to filing of the criminal revision, the petitioner had filed CRP No.06 of 2021 disposed of by order dated 20.09.2021, this Court granted liberty to withdraw the same and to re-file an appropriate petition, which is the present criminal revision petition.

7. Heard Mr. D.P. Mohanty, learned counsel for the petitioner and Mr. K.K. Nayak, learned Additional Standing Counsel for the State and Mr. Aswini Kumar Mohanty, learned counsel appearing for the Opposite Parties. Perused the records from LCR, which was called for by this Court by order dated 25.02.2022.

8. Mr. Mohanty, learned counsel for the petitioner submits that the impugned order dated 17.02.2021 passed in Adoption Misc. Case No.02 of 2020 contains nothing but an emotional outburst on the part of the learned District Judge, Gajapati by taking a cue from the provision under Section 61(1)(a) of the J.J. Act. It is further submitted by Mr. Mohanty, learned counsel for the petitioner that while rejecting the proposed adoption, the learned District Judge, Gajapati was really concerned about the welfare of all the children likely to be given in adoption. He further submits that while considering the aforesaid adoption Misc. Case, learned District Judge, Gajapati has lost sight of the

provisions of the Act as well as regulation which specifically deal with the safety and future of the child likely to be given in adoption. He, therefore, submits that no amount of emotion can take the place of the legal provision. Further learned counsel for the petitioner submits that learned District Judge, Gajapati unnecessarily and mistakenly questioning the legislative competence of the law makers, by losing sight of the relevant provisions of the statute has passed the impugned order.

9. Mr. Mohanty, learned counsel for the petitioner further submits that the learned District Judge, Gajapati has failed to realize that he had to conduct the proceeding in accordance with the provisions contained in the J.J. Act, 2015 and the relevant rules framed there under and he is not bound by the procedure as laid down in the Civil Procedure Code, 1908 and the Indian Evidence Act, 1872. He further submits that the procedure that should have been followed by the District Judge, Gajapati has been laid down in the J.J. Act, 2015 as well as Adoption Regulations. He further draws the attention of this Court to Section 103 of the Juvenile Justice Act to impress upon this Court that the said special statute provides that the appeal or revision against the order passed under the J.J. Act, 2015, the procedure laid down in the Criminal Procedure Code, 1973 has to be followed. He further contends that the learned District Judge, Gajapati has committed gross error of law while coming to the conclusion that as a Civil Court it can draw authority from Section 9 of the Civil Procedure Code to protect Constitutional right / civil right of a child. In such view of the matter, the learned counsel for the petitioner made an attempt to convince this Court

that the entire approach of the learned District Judge, Gajapati in the present matter was erroneous and misleading. It is further contended by learned counsel for the petitioner that learned District Judge, Gajapati has repeatedly hammered in his judgment on the issue of conspicuous absence of a procedure for pre-adoption foster care of a child in a case of Inter – Country adoption under Section 59 of the J.J. Act, 2015. So far the Intra – Country adoptions are concerned, the same are governed by the provision which is extracted herein below:-

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“(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.”

The above quoted provision has been enacted in the statute by the law makers for the purpose of creating a bondage of attachment between the child in question and the proposed adoptive parents (PAP) and further the test of adaptability of the child to the changed circumstances, atmosphere and surroundings in a new family, before a child is given in adoption to the prospective adoptive parents.

10. So far as the question of giving a child in pre-adoption foster care in a case of transnational adoption is concerned, learned counsel for the petitioner draws attention of this court to the provisions contained under Section 59 of the J.J. Act, 2015.

The relevant portion i.e. Section 59(7) needs to be examined by this Court has been quoted herein below.

‘59. Procedure for inter-country adoption of an orphan or abandoned or surrendered child-

xxx xxx xxx xxx

(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.

xxx xxx xxx xxx

From the above quoted provision, it can be seen that in a case of intra-country adoption, in fact, there is no provision for pre-adoption foster care of the child by the (PAP), as is available in the case of Intra-country adoption guided by the aforesaid provision. Learned District Judge, Gajapati had focused almost his entire attention to the fact of non-availability of the pre-adoption foster care in a case of transnational adoption and as such, learned court below has expressed its concern with regard to the safety, well being and future of the child in question.

11. It is further submitted by learned counsel for the petitioner that under Section 59(7) of the J.J. Act, the Specialize Adoption Agency is required to file an application in the court for obtaining adoption order, and it further provides that **“as provided in the adoption regulations framed by the authorities.”**

Further it is brought to the notice of this Court that corresponding to the provisions of Section 59(7) of the J.J. Act. 2015, Adoption Regulation, 2017 Chapter-IV provides the

detailed procedure to be followed in the case of Inter- Country adoption by the non-resident Indian, Overseas Citizens of India and Foreign Prospective Adoptive Parents. Further under Rule-16 of the Adoption Regulation, 2017 under Chapter-IV clearly provides pre-adoption foster care even in case of foreign prospective adoptive parents. Rule 16(2) of the adoption regulation, 2017 which is relevant in the in the present context is extracted herein below:-

“16. No Objection Certificate of Authority and pre-adoption foster care.-

(2) The prospective adoptive parents may take the child in pre-adoption foster care for a temporary period within India after issuance of No Objection Certificate by the Authority while the court order is pending, by furnishing an undertaking to the Specialised Adoption Agency in the format at Schedule VIII.”

12. Referring to Rule 16(2) of the Adoption Regulation, 2017, learned counsel for the petitioner further contends that the said provision for adoption in the case of inter-country or transnational adoption is identical to the provisions contained in Section 55(3) of the J.J. Act, 2015 which is applicable to cases of intra-country adoption of children.

13. On a bare reading of the two provisions, this court found that the provision contained under Section 58(3) of the J.J. Act, 2015 has been made mandatory by use of the word ‘*shall*’ by law makers. Whereas, it is not so in the case of inter-country / transnational adoptions governed under Chapter-IV, Rule 16(2) of the adoption regulation wherein the word ‘*may*’ has been used by the law makers making it directory. Therefore, in a case of inter-country / transnational adoption, the court is required to follow

the procedure of pre-adoption foster care of the child likely to be given in adoption. Therefore, this Court is of the considered view that the conclusion of the learned District Judge, Gajapati to the effect that there is no provision pre-adoption foster care of child in a case of inter-country / transnational adoption is baseless and incorrect. Further, learned District Judge, Gajapati while rejecting the application for adoption has heavily relied upon the fact that there is specific provision in the statute for pre-adoption foster care of the child likely to be given in adoption in the case of inter-country and transnational adoption is completely fallacious and as such, inconsistent in law. Further such a conclusion by the learned District Judge, Gajapati has vitiated the entire order passed by him rejecting the proposed adoption..

14. While considering the social surrounding and atmosphere of the child likely to be given in adoption, who admittedly belong to the Tribal community, learned District Judge, Gajapati in paragraph-8 of the impugned judgment has come to the conclusion that even in a case of legal requirement are applied to the PAPs and SAA, the child in question being an innocent Tribal child should be allowed to stay in a Tribal society and where in he/she was brought up so far. While giving such observation, the learned District Judge, Gajapati has lost sight of the fact that the child in question is an abandoned one and after she was rescued from the Tribal society he has been handed over to the SAA where he has been looked after. Therefore, the aforesaid reasons given by the learned court below makes no sense and as such, this Court is unable to persuade itself to accept such reasons given by the learned court below.

15. In the impugned rejection order, the learned District Judge, Gajapati has referred to the law laid down in several judgments of the Hon'ble Supreme Court of India as well as this Court. The law laid down by the judgments referred to by the learned District Judge, Gajapati, are well accepted and undisputed. The petitioner does not even question the validity and applicability of such judgments to the facts of the present case. While considering the aforesaid judgments, the learned court below has lost sight of an important development in the law relating to adoption, care and protection of children in India. The Juvenile Justice (Care and Protection of the Child) Act, 2015 is a complete Code by itself. Further the Adoption Regulations, 2017 under the J.J. Act, 2015 specifically deals with the cases of adoption. It cannot be interpreted to say that much of apprehension expressed prior to 2015 by the Hon'ble Supreme Court as well as High Courts have been taken note of by the law makers and adequate safe guards have been provided under the amended J.J. Act of the year 2015. It is needless to state here that the amended J.J. Act, 2015 takes care of the safety, protection and well being of children in our country. Therefore, the apprehension expressed by the learned District Judge, Gajapati appears to be unfounded.

So far as the State of Odisha is concerned, the State Government in exercise of power conferred under Section 110(1) of the J.J. Act, 2015 has framed a set of rules, which is known as Juvenile Justice (Care and Protection) Rule, 2018. The said rules were notified by the State Government vide a Gazette notification. Chapter-VII of the rules provides for the procedure

to be adopted in the child adoption issues. The rules so framed provide personal safety measures in case of adoption of orphan obtained or surrendered child. It is relevant to note the provisions (33) of the rules.

“33 Procedure for Enquiry (1) the Committee was enquired into the circumstances under which the child was protest and accordingly declares while to need care and protection.

29. The committee after making enquiry as per provisions of the Act was issued an order in Form-25 declaring abandoned child legally free for adoption and the same was sent for information to the authority.”

Learned District Judge, Gajapati as it appears has completely lost sight of the aforesaid provisions of the Rules. A competent authority on enquiry gives a certificate that the child is legally free for adoption and in such eventuality it is no more open to the authority to comment upon the genuineness and correctness of such a decision.

16. So far as the law relating to inter-country/transnational adoption in India is concerned, this Court had an occasion to scan the provisions of law, rules and regulations for adoption in a case of transnational adoption i.e. in the matter of ***Subhadra Mahatab Seva Sadan, Khurda vrs. XXXX (Criminal Revision No.94 of 2022 decided on 15.03.2022)*** and finally allowed the application for adoption. After analyzing the legal provisions in the above mentioned case, this court has finally come to a conclusion that the under the amended provisions of law for adoption, the responsibility of court has been reduced to some extent with introduction of various safety measures/mechanism in the statute

itself. Further authorities have created to do the background check of the proposed adoption cases.

17. In the above referred case, while considering an identical issue of transnational /intra-country adoption after the child was declared legally free from adoption and the CARA had granted NOC and there was no legal impediment in permitting adoption by the PAP, this Court had allowed the adoption of the child by the PAPs in the said case. This Court in the above noted judgment /order in the case of ***Subhadra Mahatab Seva Sadan, Khurda*** (supra) has specifically held that the order of the learned district judge refusing to grant permission was unsustainable in law as the same was contrary to the law declared in the Hague Convention, 1993 which was signed and ratified by the member Nations and also in view of the provisions contained in JJ. Act, 2015.

18. Further considering the materials available on record, this Court is convinced that the legal requirements having been complied with and since the CARA has already issued No Objection Certificate, the adoption should have been allowed by the learned District Judge, Gajapati to provide poor helpless and abandoned child in question a better future fill with love and care of family and parents.

19. Resultantly, this Court is of the considered view that while considering the issue of adoption, the learned District Judge, Gajapati has completely misdirected himself and being driven by emotions and apprehensions has lost sight of relevant provisions of act as well as rules and as such the impugned judgment passed in adoption Misc. Case No.2 of 2020 dated 17.02.2021 is liable to be set aside and the same is hereby set

aside. Accordingly, the revision petition is allowed and the Opposite Party Nos.1 and 2 PAP are hereby granted permission to adopt the minor male child in question by following the relevant laws and regulations. Further the Opposite Party Nos.1 and 2 are directed to submit monthly report with regard to status and well being of the minor child to the Embassy of India in Italy till such time as would be ordered by the Indian Embassy in Italy. Further it is open to the Officers in the Indian Embassy in Italy to visit the residence of the PAP with prior notice and in the event such a notice is given by the Indian Embassy to the Opposite Party Nos.1 and 2 PAP, they shall make necessary arrangements for the visit of the Indian Embassy Officer in Italy to their residence where the child in question resides with his adoptive family.

20. With the aforesaid directions, the revision petition is allowed. However, there shall be no order as to cost.

(A.K. Mohapatra)
Judge

Jagabandhu Behera, P.A.