



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
10.06.2022	17.06.2022

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO.34069 OF 2014

AND

M.P. NO.1 OF 2014

N.Faritha Begam

.. Petitioner

- Vs -

The Joint Registrar No.2
Office of the Joint Registrar
Kallakurichi.

.. Respondent

Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus calling for the records from the respondent's letter No.Na.Ka. No.31/2014 dated 6.3.2014 relating to refuse to register the adoption deed executed by the petitioner and Ruckmaniammal, W/o Palanisamy, who is residing at No.85, Block No.6, Chinnampalayam Village, Nichampalayam Panchayat, Kuthami (Post), Perunthurai Taluk, Erode District, quash the same, consequently to direct the respondent to register the adoption deed executed between the petitioner and Ruckmaniammal, W/o Palanisamy, who is residing at No.85, Block No.6, Chinnampalayam Village, Nichampalayam Panchayat, Kuthami (Post), Perunthurai Taluk, Erode District.

For Petitioner : Mr. P.Saravanan

For Respondents: Mr.Yogesh Kannadasan, Spl. GP

ORDER

Religion is a mask worn by humans to attain eternal peace by treading the path propounded in the sacred texts. Just as the saying goes "All the roads leads to Rome", likewise, "All the religions leads to eternal salvation". Professing of religion is a matter purely within the domain of an individual and there can be no law which can force any individual to profess only the religion in which he/she was born.



2. The guarantees envisaged under the Constitution confers on the child the right to choose its religion, but which seldom happens, as the religion carried by his/her parents is passed on to the child. However, the mere fact that the religion of the parents is continued on the child would not deter the child to profess any other religion, as it would be against the tenets of the Constitution.

3. There are many children, who are orphaned for one reason or the other, who are taken in the care of the foster homes and homes run by the Government, who are not oblivious of their religion. Those children take on the religion of their adopted home and such adoptions are legalized through the Juvenile Justice (Care & Protection of Children) Act (for short 'JJ Act'). On the concept of adoption, the Hon'ble Supreme Court, in the decision in Shabnam Hashmi - Vs - Union of India (2014 (4) SCC 1), has succinctly culled out the niceties in the enactment of the JJ Act and for better appreciation, the same is quoted hereunder :-

"16. The Fundamental Rights embodied in Part-III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well being of citizens. While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect....."

4. The Hon'ble Supreme Court, in the aforesaid decision, has, in fact, elevated the concept of adoption as bordering fundamental rights, though not pointedly accepted as on date. Therefore, religion cannot be a bar for adoption, as it is a necessity in the current day scenario, which was the reason behind inclusion of the procedure for adoption u/s 56 of the JJ Act, 2015.



5. In the backdrop of the aforesaid legal position, the facts, as has been placed before this Court in the affidavit filed in support of this petition reveals that the petitioner, through her wedlock, had begotten three male and three female children, of which the petitioner had willingly decided to give her third son in adoption to one Ruckmaniammal, due to the poverty-stricken life of the petitioner, and necessary adoption deed was also entered into, which, when presented for registration, was declined to be registered by the respondent on the following grounds, aggrieved by which the present writ petition has been filed :-

- i) The Hindu Adoption & Maintenance Act, 1956, is not applicable for Muslims;
- ii) According to Section 7, a Hindu should adopt Hindu child; and
- iii) Muslim Personal Law does not permit giving adoption and taking adoption.

6. Learned counsel appearing for the petitioner submits that though Muslim Personal Law does not permit adoption, either giving or taking, however, the JJ Act permits adoption and the said special enactment would prevail over the personal law and, therefore, the rejection of the Adoption Deed by the respondent is wholly unsustainable.

7. In support of the aforesaid contention, learned counsel for the petitioner placed reliance on the following decisions :-

- i) Shabnam Hashmi - Vs - Union of India (2014 (4) SCC 1);
- ii) R.R.George Christopher & Anr. (2010 (2) LW 881)

8. Before this Court ventures into the legal issue raised, the legislative intent in the matter of adoption could be seen through the eyes of the Hon'ble Supreme Court in the decision in Shabnam Hashmi case (supra), wherein the Hon'ble Supreme Court has spelt out as under :-

"Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution is the vision scripted by the public spirited individual who has moved this Court under Article 32 of the Constitution. There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the Respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.



WEB COPY

* * * * *

10. It will now be relevant to take note of the stand of the Union of India. Way back on 15th May, 2006 the Union in its counter affidavit had informed the Court that prospective parents, irrespective of their religious background, are free to access the provisions of the Act for adoption of children after following the procedure prescribed. The progress on the ground as laid before the Court by the Union of India through the Ministry of Women and Child Development (Respondent No. 3 herein) may also be noticed at this stage. The Union in its written submission before the Court has highlighted that at the end of the calendar year 2013 Child Welfare Committees (CWC) are presently functioning in a total of 619 districts of the country whereas State Adoption Resource Agencies (SARA) has been set up in 26 States/Union Territories; Adoption Recommendation Committees (ARCs) have been constituted in 18 States/Union Territories whereas the number of recognized adoption organizations in the country are 395. According to the Union the number of reported adoptions in the country from January, 2013 to September, 2013 was 19884 out of which 1712 cases are of inter-country adoption. The third Respondent has also drawn the attention of the Court that notwithstanding the time schedule specified in the guidelines of 2011 as well as in the JJ Rules, 2007 there is undue delay in processing of adoption cases at the level of Child Welfare Committees (CWS), the Adoption Recommendation Committees (ARCs) as well as the concerned courts.

* * * * *

12. The All India Muslim Personal Law Board (hereinafter referred to as 'the Board') which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection and that Section 41 explicitly recognizes foster care, sponsorship and being look after by after-care organizations as other/ alternative modes of taking care of an abandoned/surrendered child. It is contended that Islamic Law does not recognize an adopted child to be at par with a biological



WEB COPY

child. According to the Board, Islamic Law professes what is known as the "Kafala" system under which the child is placed under a 'Kafil' who provides for the well being of the child including financial support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the "adoptive" parents. The Board contends that the "Kafala" system which is recognized by the United Nation's Convention of the Rights of the Child under Article 20(3) is one of the alternate system of child care contemplated by the JJ Act, 2000 and therefore a direction should be issued to all the Child Welfare Committees to keep in mind and follow the principles of Islamic Law before declaring a muslim child available for adoption Under Section 41(5) of the JJ Act, 2000.

13. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date."

9. Through the aforesaid decision, the Hon'ble Supreme Court has laid down that a person is free to adopt or choose not to do so and that the personal beliefs and faiths cannot dictate



WEB COPY

the operation of the provision of an enabling statute. JJ Act being an enabling statute and a special enactment, cannot be put into non-operation on account of the religious faith, beliefs and personal laws of the respective religions. Therefore, it is imperative that the provisions of the JJ Act must be honoured in letter and spirit.

10. Going a step further, even anterior in point of time to the aforesaid decision, a learned single Judge of this Court, in George Christopher's case (supra), has gone in-depth into the matter of adoption, where there is an embargo in the personal law against adoption and in the said context, held as under :-

"1. "We are guilty of many errors and many faults but our worst crime is abandoning the children, neglecting the fountain of life. Many of the things we need can wait. The child cannot. Right now is the time his bones are being formed, his blood is being made, and his senses are being developed. To him we cannot answer. "Tomorrow.

His name is "Today".

- quoted from Gabriela
Mistral

2.... Whether a civilised State committed to the Rule of law, governed by a written constitution and signatory to International Conventions on the Rights of a Child, could deny to a section of its own citizens the right to adopt a child and to give that child, a home, a name and nationality?

This is the question posed by Justice Rebello of the Bombay High Court in Manuel Theodore D'souza and Anr. (2000) 2 DMC 292

3. For the antagonists opposing adoption on the basis of religion, he gave a Sage's advice:

The Rule of law must reach them. Protests, from whatever sections should not stop the pursuit of justice to those in need of it. The right of a child cannot be confused with the personal law of any section of our pluralistic society. Adoption is not to be treated as an act by a State to force a child on unwilling parents. On the contrary it is a voluntary act on the part of eligible persons to provide comfort, love and security to the abandoned and homeless children. No religion can deny family love



WEB COPY

to these children of God. Religions preach peace and brotherhood. How can there be brotherhood if you will not treat a section of your citizens as brothers.

4. Justice Rebello did not stop with that question. He gave a Constitutional basis for the Courts to evolve a solution on the issue of adoption in the following words:

"Many of us examining such issues forget that we have taken a solemn oath to protect and defend the Constitution. That requires examining legislation and fundamental rights in such a manner that the tears of the abandoned and homeless infants are wiped away, of course within the constitutional parameters. In this matter the exercise of powers of parens patriae and Article 226 to give effect to the fundamental rights, what is in issue are the enforceability of directive principles and International Covenants to which India is a signatory.

30... The right of the child is independent, as a human being, and flows from his right to life as contained in Article 21 of the Constitution. Any eligible parent or parents irrespective of religion can apply to adopt a child. Personal laws, as pointed out earlier, have to meet the test of Part III of the Constitution, if they are to be saved. Customs and usage amongst Hindus provided for adoption as a custom, but it was restrictive. On the coming into force of the Constitution it is Article 21 in which the rights of a child are cradled. Custom has given way to Article 21. The case I have made out is that the right of adoption after coming into force of the Constitution is not referable to any customary or personal right. It is now impregnated in Article 21. Its flow now is sustained from the Republican Constitution and not age-old Customs.

33... Apart from this constitutional power this High Court also exercises the powers conferred on it under the amended Letters Patent. By virtue of Clause 17 as already



WEB COPY

stated, it has jurisdiction over infants. This jurisdiction has been traced and identified as the power of *parens patriae*. The power of the King in England in other words, the power of the sovereign stands delegated to the Court exercising the jurisdiction over the person and property of minors. This power of the Court has been protected by Article 225 of the Constitution...."

12. The decisions of the Bombay High Court (2000) and the Kerala High Court (1999) were rendered before the Parliament enacting the Juvenile Justice (Care & Protection of Children) Act, 2000 (Central Act 50/2000) (For short JJ Act). The preamble to the Act reads as follows:

Whereas the Constitution has, in several provisions, including Clause (3) of Article 15, Clauses (e) and (f) of Article 39, Articles 45 and 47, imposed on the State a primary responsibility of ensuring that all the needs, of children are met and that their basic human rights are fully protected;

And whereas, the General Assembly of the United Nations has adopted the Convention on the Rights of the Child on the 20th November, 1989;

And whereas, the Convention on the Rights of the Child has prescribed a set of standards to be adhered to by all State parties in securing the best interests of the child;

And whereas, the Convention on the Rights of the Child emphasises social reintegration of child victims, to the extent possible, without resorting to judicial proceedings;

And whereas, the Government of India has ratified the Convention on the 1st December, 1992;

And whereas, it is expedient to re-enact the existing law relating to juveniles bearing in mind the standards prescribed in the Convention on the Rights of the Child,



WEB COPY

the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), and all other relevant international instruments.

13. The JJ Act for the first time provides 'adoption' as a means to rehabilitate and socially reintegrate a child. It had empowered the State Government and the JJ Board to give a child for adoption. This is the first secular law in India providing for adoption. The provision in Sections 40 and 41 are not restricted to persons belonging to particular religion alone."

(Emphasis Supplied)

11. From the above decision, what flows is that not only JJ Act is a special enactment providing for adoption, but it also provides for adoption without there being any restriction on religion and that persons belonging to any religion are free to enter into adoption, be it give or take.

12. There can be no second thought with regard to the adoption being entered into on the basis of the provisions of the JJ Act and also in view of the decisions aforesaid. In the case on hand, the child being a Muslim and is being given in adoption to a Hindu. The rejection of the adoption deed by the respondent is on the basis that the Muslim personal law does not recognize adoption, either give or take and that the Hindu Adoption and Maintenance Act mandates that a Hindu can only adopt another Hindu.

13. Section 8 of the Hindu Adoptions and Maintenance Act deals with the capacity of a female Hindu to take in adoption and for better clarity, the same is quoted hereunder :-

"8. Capacity of a female Hindu to take in adoption.- Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption:

Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband 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."



regard, the introspective views of the Hon'ble Supreme Court in Shabnam Hashmi's case (supra) with regard to adoption being necessary to be considered as a fundamental right would definitely have much relevance in the present day scenario and for better understanding, the relevant portion is quoted hereunder :-

"16. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. In this regard we would like to observe that the decisions of the Bombay High Court in Manuel Theodore D'souza (supra) and the Kerala High Court in Philips Alfred Malvin (supra) can be best understood to have been rendered in the facts of the respective cases. While the larger question i.e. qua Fundamental Rights was not directly in issue before the Kerala High Court, in Manuel Theodore D'souza (supra) the right to adopt was consistent with the canonical law applicable to the parties who were Christians by faith. We hardly need to reiterate the well settled principles of judicial restraint, the fundamental of which requires the Court not to deal with issues of Constitutional interpretation unless such an exercise is but unavoidable."

19. The Hon'ble Supreme Court, though has refrained to declare adoption to be a fundamental right, however, has left it at the wisdom of the law makers, based on the mindset of the citizenry, to bring in a Uniform Civil Code. The Parliament, only with a view to provide better living conditions and also to give familial ties to children, orphaned or otherwise and keeping in mind the necessity to give care and protection to the children, had brought adoption within the ambit of the JJ Act. When JJ Act provides a mechanism for the purpose of obtaining necessary clearance for adoption of a child, personal law cannot be treated to be an embargo to deny the child a congenial living.



WEB COPY

20. The impugned rejection order is based more on the aspect of religion, centering the personal laws rather than on any other legal premise. This Court is pained to note that religion, a path to attain spiritual enlightenment, is being pressed into service to derail the life of the child, who is yet to see the colour of the day.

21. This Court would like to stress that merely because the conjunction of two entities has brought a child to earth, the child cannot be forced to wear the cloak of its progenitors and the child should have its right to profess any religion it so desires. A child is not covered with any particular religion when it steps on to mother Earth. It is the humans, who give the colour of a particular religion to a child and put the child within a particular path. However, the right of a child to attain bliss in the way it deems fit in the later part of its life is a guarantee from the Creator and neither the personal law, nor any legal enactment, can take away such a right, which is vested on the child even at the time of its birth and the child cannot be robbed of the said rights citing such laws. Further, when a child in the womb is provided with certain unbridled rights, including property rights, robbing the child of a right to profess a particular religion, upon attaining intellectual emancipation would be nothing but deprivation of the child's right and would be against the international covenants to which our country is a signatory to.

22. It is to be pointed out that no mother would leave her child out for adoption, unless it is for the betterment and healthy upcoming of the child and only when she is totally unable to cater to the child. In the case on hand, the deplorable condition of the mother, viz., the petitioner herein, has resulted in giving the child on adoption for the betterment of the child and such being the position, the personal laws cannot stand in the way of the petitioner to give the child on adoption, when the special enactment paves the way for the said adoption. In the case on hand, the pleadings in the affidavit as also the materials in the adoption deed reveal the position of the mother in giving the child out for adoption. In the resultant backdrop, the respondent cannot deny registration of the adoption deed citing personal laws, but can only enforce that necessary documents be filed so as to process the adoption deed for registration as per the JJ Act.

23. As stated above, the JJ Act provides the mechanism for adoption of the child and one of the provisions contained therein pertains to the procedure to be followed in case of adoption. Specific reference can be had to Sections 41 (5) (a) and (b) of the JJ Act, 2000, which provides the necessary safeguards in case of adoption. Therefore, the only requirement



for the respondent is the necessary clearance as per the provisions of the JJ Act to grant the seal of approval for the adoption deed so that the laudable object of safeguarding and uplifting children socially and reintegrating them into the society is achieved.

24. For the reasons aforesaid, the order passed by the respondent does not stand the test of judicial scrutiny and the provisions of the JJ Act would have a march over the Hindu Adoption & Maintenance Act as also the Muslim Personal Law and, therefore, the adoption of the child of the petitioner by the said Ruckminiammal is permissible. The petitioner is directed to submit necessary petition before the Child Welfare Committee, Villupuram District, within whose jurisdiction the respondent is situate, seeking necessary clearance for adoption within a period of two weeks from the date of receipt of a copy of this order and on submission of the said application, the Child Welfare Committee is directed to conduct necessary enquiry and pass appropriate orders with regard to granting permission within a period of six weeks thereafter and forward the same to the respondent who, on receipt of the said order, is directed to register the adoption deed submitted by the petitioner within a period of four weeks thereafter. On registration of the adoption deed, the petitioner is permitted to move before the appropriate forum and obtain appropriate orders for legalizing the adoption in the manner known to law. The writ petition is allowed with the aforesaid observations and directions. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

25. Registry is directed to circulate a copy of this order to all the Principal District Judges within the State and the Principal District Judges are directed to take appropriate steps for early disposal of adoption cases pending on their file, keeping in mind the decision of the Hon'ble Supreme Court in Shabnam Hashmi and George Christopher case (supra), so that the fruits of the benevolent legislation enures to the benefit of the children so sought to be adopted.

26. Registry is also directed to communicate a copy of this order to the Child Welfare Committee, Villupuram District for necessary action.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar



To

WEB COPY

1. The Joint Registrar No.2
Office of the Joint Registrar
Kallakurichi.

COPY TO

2. The Officer incharge /Chair Person,
The Child Welfare Committee,
Villupuram District. (for Necessary action)
3. The Section Officer, (to circulated the order copy
F Section, to all Principal District Judges
High Court, Madras-104. Within the state.)

+1cc to Mr. P.Saravanan, Advocate, S.R.No.37101

W.P. NO.34069 OF 2014

AD(CO)
CT/04/07/2022