

AD-23
Ct No.09
16.01.2024
TN

WPA No. 28682 of 2023

Taniya Guha Roy and another
Vs.
The Union of India and others

Ms. Reshmi Ghosh,
Ms. Barnali Gantait

.... for the petitioners

Mr. Jyoti Prakash Chatterjee,
Ms. Nilanjana Pal Banerjee

.... for the State

Ms. Juin Dutta Chakraborty,
Mr. Bidan Modak

.... for the respondent no.5

- 1.** The present writ petition has been filed by the biological mother of a child of around six years and her present husband. A divorce decree was passed between the biological mother, that is, the petitioner no.1 and the private respondent, her ex-husband. The said divorce was passed on mutual consent. On query of court, learned counsel for the petitioners hands over a copy of the application under Section 28 of the Special Marriage Act, 1954 on the premise of which the divorce decree was passed on mutual consent.
- 2.** Clause 10 of the said application states that both the spouses had decided that the minor son shall remain under the care and custody of the

petitioner no.1 therein, that is, the present writ petitioner no.1 and the petitioner no.2, that is, the private respondent (ex-husband of the petitioner no.1) shall not claim the custody of the child in future.

- 3.** It is argued by learned counsel for the petitioners that there is no bar within the contemplation of the Hindu Adoptions and Maintenance Act, 1956 for either of the present petitioners to take the minor child in adoption.
- 4.** A larger issue is sought to be addressed by the petitioners by arguing that if the petitioner no.1, who is in custody of the child as per agreement with her ex-spouse, being a single parent is not permitted to give the child in adoption, the rights of a single parent and the welfare of the child, which is the paramount consideration in such cases, will be hampered.
- 5.** Learned counsel also places cursory reliance on the Adoption Regulations, which flow from the Juvenile Justice (Care and Protection of Children Act in such regard.
- 6.** Heard learned counsel for the parties.
- 7.** Although custody of the child has been given to the petitioner no.1 at the time of divorce between the petitioner no.1 and the private respondent,

that is, the ex-husband of the petitioner no.1, the right of custody is a much lesser right than that of adoption.

- 8.** There are three rungs to the rights vis-à-vis a child. The lowest rung is custody. The second stratum in the ladder of rights is the right of guardianship. The third and foremost right is the right of parentage, which is conferred by way of a valid adoption. After an adoption, the adopted child, for all practical purposes, becomes the child of the adoptive parents and the relation with the biological parents is severed for all practical legal purposes.
- 9.** Thus, the right of adoption is on a much higher platform than that of custody.
- 10.** Hence, at the outset, it is required to be noted that the conferment of custody of the child on the petitioner no.1 by the mutual consent divorce decree does not tantamount to relinquishment of the parentage of the private respondent, who is the child's biological father.
- 11.** In the present circumstances, the only applicable statute is the Hindu Adoptions and Maintenance Act, 1956 (for short "the 1956 Act"). The proviso to Section 9 (2) thereof stipulates that the right of a parent to give a child in adoption shall not be

exercised by either of the parents 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. The language of the proviso, it is evident, is couched in a negative language and, thus, has mandatory effect.

- 12.** The specific exceptions carved out in the proviso are not satisfied in the present case vis-à-vis the private respondent.
- 13.** Hence, the proviso to Section 9(2) of the 1956 Act debars the petitioner no.1, that is, the biological mother of the child-in-question, to unilaterally give the child in adoption without the consent of the other parent, that is, the father of the child (the private respondent). Hence, the grievance of the petitioners that the petitioner's application for giving her child in adoption to the petitioner no.1 herself and her present husband (the petitioner no.2) is not being processed has no premise to stand on.
- 14.** At best, the petitioners can seek formal guardianship legally by way of filing a proper application in that regard under the relevant provisions of statute from a competent court. If

so applied for, the same shall be decided by the court independently without taking into consideration any of the observations made herein on merits.

- 15.** However, the petitioner no.1, unfortunately, does not have the right to unilaterally give her son in adoption either to herself or to her present spouse without consent of the biological parent of her son, that is, her ex-husband.
- 16.** Accordingly, there is no scope of granting any relief in the present writ petition.
- 17.** WPA No. 28682 of 2023 is, thus, dismissed without any order as to costs, with liberty to the petitioners to apply for guardianship of the child before a competent court.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)