



W.P.(MD)No.8416 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.06.2024

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THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)No.8416 of 2024

and

W.M.P(MD)No.7713 of 2024

Ashok Kumar

... Petitioner

Vs.

1.The Inspector General of Registration,
No.100, Santhome High Road,
Mullima Nagar, Mandavelipakkam,
Raja Annamalaipuram,
Chennai – 600 028.

2.The District Registrar,
Tenkasi District.

3.The Sub Registrar,
Pavoorchathram.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records in connection with the impugned Refusal Check Slip dated 13.01.2022 bearing refusal Number RFL/Pavvochatram/4/2022 issued by the third respondent and the impugned order dated 14.02.2022 in Na.ka.En.384/Aa1/2022 passed by the second respondent and quash the same and consequently direct the third respondent to register the adoption deed dated 12.01.2022.



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For Petitioner : Mr.T.Muhilan

For Respondents : Mr.R.Ragavendran
Government Advocate

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ORDER

"A" is a three year old male child. He was born on 28.11.2021 to "K" out of an illicit relationship. "K" was a minor when she conceived. "K" now wants to give the child in adoption. The petitioner and his wife have come forward to take "A" in adoption. Deed of adoption was executed and presented for registration. The registering authority refused registration on the ground that "K" had attained majority and remains unmarried at the time of giving adoption. Challenging the impugned refusal check slip, this writ petition has been filed.

2.The learned counsel appearing for the petitioner reiterated the contentions set out in the affidavit filed in support of this writ petition. He drew my attention to the relevant statutory provisions. Placing reliance on the decision reported in (2016) 10 SCC 767, the learned counsel argued that the impugned order has to be set aside and relief granted.



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3.The learned Government Advocate on the other hand submitted that since the consent of the biological father is absent, the registering authority rightly refused registration. He admitted that the impugned refusal check slip does not reflect this reason. He called upon this Court to dismiss the writ petition.

4.I carefully considered the rival contentions and went through the materials on record. Section 2(1) of the Hindu Adoptions and Maintenance Act, 1956 deals with the application of the Act. Explanation (b) to the said provision reads that the Act will apply to any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged. In this case, "K" is a Hindu and she has brought up "A" as a Hindu. The petitioner is also a Hindu. His wife has given consent for taking the child in adoption. Therefore, the applicability of the personal laws of Hindus is beyond dispute.

5.Section 6 of the Hindu Adoptions and Maintenance Act, 1956 sets out the requisites of a valid adoption. One of the conditions is that the person giving in adoption has the capacity to do so. Section 9(1) and (2) of the Act read as follows :



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“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 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.]”

The first question that arises for consideration is whether the adoption is invalid since consent has not been obtained from the biological father of “A”. The answer is found in Section 6 (b) of the Hindu Minority and Guardianship Act, 1956. It states that in the case of a Hindu minor illegitimate boy or an illegitimate unmarried girl, the mother is the natural guardian and after her, the father. The traditional view was that the mother is the lawful guardian of her illegitimate children. The High Court of Lahore held that where the father is known, he has preferential right (*Prem Kaur v. Banarsi Das* (AIR 1934 Lah 1003)). But the High Court of Madras in more than one decision (*Rajlakshmi v. Ramachandran*, AIR 1967 Mad 113), (*Dorai Raj v. SR Laskhmi*, AIR 1947 Mad 172) had taken a contra view. In any event, Section 6 of the Hindu Minority and Guardianship Act, 1956 had clarified the legal position. On the Act coming



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into force, the mother of the illegitimate minor child alone is the guardian of his person and property. Therefore, "K" is competent to give her biological child "A" in adoption. The proviso to Section 9(2) of the Act will kick in only if the father is around to claim paternity over the child. In this case, the father has not even been identified. "K" has not done so probably because that will expose him to prosecution under POCSO Act, 2012. One should therefore proceed on the premise that the biological father of the child is not available. There is a well known legal maxim "Lex Non Cogit Ad Impossibilia" (Law does not compel a person to do that which he or she cannot possibly perform). "K" cannot possibly obtain consent from the natural father of the child. Therefore, the proviso to sub-section (2) of Section 9 of Hindu Adoptions and Maintenance Act, 1956 cannot apply.

6.The expression "after" occurring in Section 6(a) of the Hindu Minority and Guardianship Act, 1956 was considered by the Hon'ble Supreme Court of India in Githa Hariharan v. RBI (1999) 2 SCC 228. It was held therein that the word "after" need not necessarily mean "after the lifetime". It would mean "in the absence of", the word "absence" referring to the father's absence from the care of the minor's property or person for any reason whatsoever. If the father is wholly indifferent to the matters of the minor and the mother is exclusively in charge, the father can be considered to be absent



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and the mother can be recognized as natural guardian and she can act validly on behalf of the minor. The very same approach can be adopted in the present case also. "A" was born on account of the illicit intimacy between "K" and "X". "X" though alive is absent for all practical purposes in the life of "A" and it is the biological mother who is in charge of his person. In these circumstances, "K" cannot be called upon to obtain the consent of "X". I hold that the proviso to sub-section (2) of Section 9 of the Hindu Adoptions and Maintenance Act, 1956 will not apply when the mother/father of the child to be given in adoption is absent in the sense laid down Githa Hariharan's case.

7.The reason given in the impugned refusal check slip betrays the patriarchal mind set of the registering authority. The underlying assumption is that an unmarried woman above the age of 18 years cannot give her biological child in adoption. The marital status of the woman cannot be the determining factor. Section 9 of the Hindu Adoptions and Maintenance Act, 1956 uses the expressions "father" and "mother". It does not use the words "husband" and "wife". Even the proviso to sub-section (2) of Section 9 does not envisage obtaining the consent of one's spouse, if alive. It is possible that a child may be born through live-in relationship or on account of illicit intimacy. The mother may like to give the child in adoption in order to ensure proper future for the child. The father may have abandoned his child. He



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may not be around to assume responsibility. The reason set out in the impugned order is patently unsustainable.

8.I must compliment the petitioner and his wife for taking the child in adoption. The petitioner is a journalist. His wife is a government servant. Because of their act, the child's future is assured.

9.The impugned order is set aside. The parties are permitted to re-present the document. It shall be registered by the registering authority on such re-presentation subject to fulfilment of the other usual formalities. The writ petition is allowed. No costs. Connected miscellaneous petition is closed.

13.06.2024

skm

Issue order copy by 14.06.2024

To

- 1.The Inspector General of Registration,
No.100, Santhome High Road,
Mullima Nagar, Mandavelipakkam,
Raja Annamalaipuram, Chennai – 600 028.
- 2.The District Registrar, Tenkasi District.
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G.R.SWAMINATHAN, J.

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