

(2009) 10 J&K CK 0005

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 610 of 2009

Anurag Priyadarshi

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 30-10-2009

Acts Referred:

Jammu and Kashmir Hindu Adoptions and Maintenance Act, 1960 — Section 9, 9(5)

Citation : (2010) 2 JKJ 53

Hon'ble Judges : H. Imtiyaz Hussain, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

H. Imtiyaz Hussain, J.—A female baby of about 3 months age was found abandoned enroute the Holy Shrine of Shri Mata Vaishno Devi on

6th May, 2009. In this behalf FIR u/s 317 RPC was registered by Police Station Bhawan (Vaishno Devi) on the same day. The Petitioners

(husband and wife), who hail from New Delhi and do not have any child, whether biological or adopted, have expressed desire to adopt the child

but the difficulty is that the State-Respondent objects to it on the ground that there is no law permitting adoption in these circumstances, applicable

in the State. The Petitioners grievance is that amendment to Section 9(4) of Central Hindu Adoptions and Maintenance Act, 1956 incorporated in

the year 1962, has not been made applicable to the State of Jammu and Kashmir. They state that had this been done, the Petitioner could have

adopted the said child. In the circumstances they seek a writ of certiorari to quash Section 9 of the Jammu & Kashmir Hindu Adoption and

Maintenance Act, 1960 on the ground that the same is ultra-vires to the Constitution of India to the extent that it does not permit adoption of

abandoned child whose parents are not known. The Petitioners further seek a direction that Respondent-1 be directed to give child in adoption to the Petitioner.

2. In the reply submitted to the present petition the Respondents have stated that the provisions of J&K Hindu Adoption and Maintenance Act, 1960 are constitutionally valid and challenge to Section 9 of the Act is misconceived. The Respondents further state that the said provision does not permit adoption of child to a non-State subject as such prayer made cannot be allowed. The Respondents further state that the Petitioners have already availed remedy under the provisions of Jammu & Kashmir Juvenile Justice Act, 1997. Sub Judge Judicial-Magistrate, Katra on 18.5.2009 passed orders regarding-custody of the child, if the Petitioners are aggrieved of the same they should seek a proper remedy in this behalf.

3. Heard. I have considered the matter.

4. FIR No. 317/09 of Police Station Bhawan would show that on 6.5.2009 at about 15.00 hours a female child of three months age was found abandoned at Adhkwari enroute the Holy Shrine. The State has in this behalf approached the Court of Sub Judge JIMC with powers under Juvenile Justice Act, Katra for custody of the child. During the pendency of the proceedings four more applications were filed by different parties namely Harekrishna Mission, Aditi Pratishthan, SOS Gole Gujral, Jammu and one Swati Mitra for interim custody of the child. Learned Sub Judge on consideration of the matter found SOS Children Village, Gole Gujral, Jammu as a fit and proper organization to whom custody of the abandoned juvenile should be given. He, therefore, accepted the application filed by the said Organisation, Jammu and directed that abandoned child be kept on superdnama of the Director SOS Childrens Village, Jammu with the condition that the child be given proper care and protection.

The Court in this behalf directed as under:

The Juvenile/abandoned child has been recovered by the police at Adhkwari and same requires proper care and rehabilitation and motherly treatment at this stage. Different organizations like Harekrishna Mission, Aditi Pratishthan, SOS Gole Gujral, Jammu and one Swati Mitra respectively have approached the court for seeking interim custody of the child Asstt; Director SOS Jammu as per letter No. SOS/JMU/164

dated 18.5.2009 addressed to this Court is taking care of 220 children presently besides that earlier also the SOS Jammu have been given the

interim custody of the abandoned child by court orders. The fact has' been substantiated by Asstt/Director SOS Jammu by placing on record

different court orders pertaining to interim custody of the children. SOS Jammu is a voluntary non government organization with the sole aim and

objective of taking care of orphaned and abandoned children. The name of the school also depicts the word children's village. SOS Jammu is a

recognized institute where orphaned children are properly taking care of. The SOS children's village is engaged for social cause to provide

treatment, care, development and rehabilitation of abandoned and orphaned children. The school SOS village is having an infra structure for the

said purpose. Therefore, SOS children's village Jammu is fit and appropriate organization to whom the interim custody of abandoned juvenile can

be given, so that the abandoned child who has been left by cruel and gender-biased parents at the mercy of gooders mata Vaishno Devi is taken

care of.

Accordingly the application filed by SOS Jammu is accepted and abandoned child recovered is directed to be kept on superdnama of Director

SOS children's village Jammu with the conditions that child be given proper care and protection. That supurdar shall produce the child before the

court as and when asked or till guardian is appointed by competent court or natural parents of the child are found whichever is earlier.

Director/Asstt. Director shall file an under taking to this effect. Addl. S.P Katra who is supervising the care of abandoned child presently in

observation home is direction to handover the child to SOS Gole Gujral Jammu through Director/Asstt. Director concerned. This application is

accordingly disposed of and be consigned to record.

5. Through the medium of the present petition the Petitioners have now sought adoption of the child.

6. Adoption of a Hindu child in the State is governed by Section 9 of the J&K Hindu Adoption and Maintenance Act, 1960 which reads as under:

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 chil in adoption.

2. Subject to the provisions of Sub-section (93), 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.

4. Where both the father and mother are dead or have completely and finally renounced the world or have ceased to be Hindus or have been

declared by a Court of competent jurisdiction to be of unsound mind, the guardian of a child (where a testamentary guardian or a guardian

appointed or declared by a court) may give the child in adoption with the previous permission of the Court.

5. Before granting permission to a guardian under Sub-section (4), the Court shall be satisfied that the adoption will be for the welfare of the child,

consideration being for this purpose given to the wish of the child having regard to the age and understanding of the child and that the applicant for

permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or

reward in consideration of the adoption except such as the Court may sanction.

7. State Hindu Adoption and Maintenance Act, 1960 has been enacted on the lines of the Central Hindu Adoption and Maintenance Act, 1956. In

the year 1962 Section 9(4) of the Central Hindu Adoption and Maintenance Act was amended and word 'abandoned' was inserted which

provides for adoption of a child who has been abandoned by the parents. A corresponding amendment has not so far been made in the State Act.

Thus, as rightly pointed out by the Petitioners there is now a slight difference between the Central Act and the State Act in so far as provisions for

abandoned child is concerned. But this in my view will not make any material difference so far the facts of present case are concerned.

8. u/s 9(4) of the State Act where both the father and mother of a child are not alive or have renounced the word or have ceased to be Hindus or

have turned insane, the guardian may give such a child in adoption. Thus the section contains provisions for adoption of a child whose parents have

become incapacitated to give him/her in adoption. Section 9 deals with persons capable of giving a child in adoption and its sub Section 4 deals

with a situation where adoption by parents is not possible. The object appears to make a provision where adoption by parents is not possible for

one reason or the other. The situations contained in the section are only illustrative in nature and would include also cases where parents of the child are not known.

9. It is now a firmly established rule that a provision of law should be read in its context. The provision is to be construed with reference to the

context to make it effective and operative. A rigid interpretation which leads to absurdity and hardship and creates vacuum should be avoided. In

this behalf reference may be made to certain observations of lord Denning in a famous case of Seaford Court Estates Ltd. v. Ashcr (1949)²

ALLER 155, which have been cited with approval by the Supreme Court in M. Pentiah and Others Vs. Muddala Veeramallappa and Others, ,

State of Bihar and Others Vs. Dr. Asis Kumar Mukherjee and Others, and Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, ,

as under:

When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the

intention of Parliament and then he must supplement the written words so as to give 'force and life' to the intention of the Legislature. A judge

should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have

straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and

should iron out the creases.

10. In Magor & St. Meltons Rural District Council v. New Port Corporation (1950)² ALL ER 1226 Lord Denning reiterated his views and

observed:

How should we construe an Act of Parliament? I have said before and I repeat it now, that we should so construe an Act of Parliament as to

effectuate the intention of makers of it and not to defeat it. If they have by mistake overlooked something, we should do our best to smooth it out.

WE should construe it so as to avoid absurdities and incongruities and to produce

a consistent and just result.

11. The Supreme Court in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, approved the rule of construction given by

Lord Denning while dealing with the definition of 'Industry' in the Industrial Disputes Act, 1947. In *Pratap Singh Vs. State of Jharkhand* and

Another, , a constitution Bench of the Supreme Court held that the statute must be construed in a manner that would make it effective and

operative on the principle of '*ut res magis valeat quam pereat*'. Similar observations were made in *Umesh Chandra Vs. State of Rajasthan*, .

12. Keeping in view the object of the section its provisions can very safely be extended to the cases where parents of the child are not available or

are not known. In such cases the State, being the protector of the life and liberty of its citizens can and has to act as guardian of such a child and

can give the child in adoption under the provisions of the Act. Reliance may in this behalf be placed on *Sankar Kumar Das and another Vs.*

Superintendent, Jawaharlal Nehru Memorial Hospital, Kalyani and others, .

13. I could not find any merit in the pleas raised regarding the constitutional invalidity and illegality of Section 9 of the State Act. Merely because

the State has not incorporated the amendment affected in the year 1962 in the Central Act in the State Act will not render the later constitutionally

invalid. It lies exclusively within the domain of the State legislature to make a provision of law or to make amendment or substitution in it. The

courts cannot issue any direction in this behalf particularly in a case of present nature.

14. I could also not find any force in the submissions of Mr. Qazi that adoption of a State subject by a non-State Subject cannot be permitted as it

is likely to adversely effect the rights of the abandoned child which he/she possess as a subject of the State. Merely because a child is found within

the territory of the State would not ipso facto make him/her a state subject unless he/she fulfils the requirements of State Subject Notification No:

I-L/84 dated 20.4.1927 and till she is granted a certificate issued in this behalf under the provisions of the Grant of Permanent Resident Certificate

(Procedure) Act and the rules. If a child holds such a certificate his/her rights and status will not get effected in any way with adoption or marriage.

Reference in this behalf may be made to Full Bench judgment of this Court

reported as State of J&K v. Dr. Susheela Sawhney 2002 SLJ 325.

15. In the circumstances of the case I, however, find the present writ is not maintainable for the reason that the Jammu and Kashmir Hindu

Adoption and Maintenance Act, 1960 contains provisions regarding adoption and lays down the procedure which is required to be followed in this

behalf.

16. Authority who can direct adoption has also been prescribed and u/s 9(4) of the Act a guardian can give a child in adoption with the previous

permission of the Court and the Court under explanation (ii) to the sub-section means a District Court within the local limits of whose jurisdiction

the child to be adopted ordinarily resides. Sub-section (5) gives the conditions under which the Court may grant permission for such an adoption.

Where a remedy is available under the ordinary law, invoking the writ jurisdiction is not permissible.

17. Under these circumstances I find the present petition will not lie. The Petitioner may approach the proper forum for the appropriate relief.

With these observations the petition is disposed of.