

(2015) 01 MAD CK 0060

In the Madras High Court

Case No : Writ Petition No. 29105 of 2014 and M.P. No. 1 of 2014

B.S. Deepa

APPELLANT

Vs

The Regional Passport Officer

RESPONDENT

Date of Decision : 23-01-2015

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 12, 5(1), 7, 9, 9(3)

Citation : (2015) 2 CTC 503 : (2015) 1 LW 943 : (2015) 2 MLJ 314 : (2015) WritLR 179

Hon'ble Judges : V. Ramasubramanian, J.

Bench : Single Bench

Advocate : G.K. Muthukumaar, for the Appellant; N. Ramesh, CGSC, Advocates for the Respondent

Judgement

V. Ramasubramanian, J.—The petitioner, who is the mother of a minor girl by name Sruthi, has come up with the above writ petition seeking the issue of a writ of mandamus to direct the respondents to issue a passport for her daughter, mentioning the name of the adoptive father of the minor girl.

2. I have heard Mr.G.K. Muthukumaar, learned Counsel for the petitioner and Mr.N.Ramesh, learned Central Government Standing Counsel appearing for the respondents.

3. The petitioner married one M.Irudayaraj and the marriage was registered in the Office of the Sub-Registrar, Ambattur on 14.09.1998. A baby girl was born in the wedlock on 20.06.2001. The baby was named as "I.Karensruthi".

4. The marriage was short-lived and it was dissolved by a decree of divorce granted by the Second Additional Family Court, Chennai in F.C.O.P. No. 1977 of 2002, by a decree dated 21.07.2003. Since the former husband of the petitioner did not file any appeal or revision against the decree, the decree attained finality. The petitioner is having the custody of the minor child for the past about 13 years, without any claim by her former husband.

5. After the decree of divorce, the petitioner changed the name of her daughter from "I.Karensruthi" to "D.Sruthi". The change of name was also published in the Government Gazette.

6. After about 10 years of the decree of divorce, the petitioner married one R.Lakshmanan according to Hindu Customary rites and practices. The marriage was registered in the Office of the Sub-Registrar, Perambur on 03.12.2013.

7. According to the petitioner, she gave her minor daughter in adoption to her new husband R.Lakshmanan and the same was also evidenced by a deed of adoption registered on 09.04.2014. According to the petitioner, the adoption deed was witnessed by the parents of the petitioner. After the alleged adoption, the petitioner changed her daughter's name from "D.Sruthi" to "L.Sruthi" and the change of name was also published in the Tamil Nadu Government Gazette.

8. The petitioner as well as her husband are employed in the software industry and they are liable to travel abroad frequently. The petitioner wants to take her minor daughter out of India, whenever she is obliged to go out. Therefore, she applied for a passport for her daughter, on 10.07.2014. The passport application was taken on record and assigned a File Number. Though the respondents would normally process an application within 30 days, they did not do in the instant case. Therefore, the petitioner made enquiries and she found out that the application was kept pending on account of the discrepancy between the name of the biological father and the name of the father indicated in the application form. Hence, the petitioner has come up with the above writ petition, seeking the issue of a writ of mandamus to direct the respondents to issue passport to her daughter indicating the name of the adoptive father.

9. But unfortunately for the petitioner, there appears to be a circular bearing No. VI/401/01/05/2008 dated 5.10.2009 issued by the respondents, to the effect that the name of the step father or stepmother of a child cannot be written in the passport of the children. Therefore, it is contended by the learned Central Government Standing Counsel that though there could be a divorce between the husband and the wife, there cannot be a severance of the relationship between the parents and a child. Hence, the learned Central Government Standing Counsel contended that it may not be possible to change the name of the father of the minor child, as the same may conflict with the name indicated in the birth certificate of the child.

10. However, the learned counsel for the petitioner relies upon a decision of the Kerala High Court, a decision of this Court and a decision of the Delhi High Court, in support of his contention that it is possible to effect the change of name of the father of the minor child.

11. In Babu Thomas Vs Regional Passport Officer [W.P.(Civil) No. 29842 of 2012 decided on 19.12.2012], the Kerala High Court was concerned with a case where the Regional Passport Officer refused to issue a passport for the minor child of a lady working in London, for want of an order granting custody of the child to the

mother. In the writ petition filed by the maternal uncle of the minor girl, the biological father was impleaded as a party. He was served with notice, but, he did not appear. Therefore, the Kerala High Court passed an order on the basis of an agreement signed by the biological father stating no objection to the biological mother taking the child out of India. The said decision does not deal with the situation that I am now concerned with.

12. In *R.Gayatri Vs Regional Passport Officer* [W.P. No. 14182 of 2013 decided on 16.5.2013], a learned Judge of this Court was concerned with a case where the Regional Passport Officer refused to register an application of the biological mother on the ground that the birth certificate reflected the name of the biological father, but, the school records reflected the name of the stepfather. Without going into any legal issues, a learned Judge of this Court, sitting in a vacation court, allowed the writ petition at the admission stage. Therefore, the same cannot be taken to be a decision laying down any proposition of law.

13. In *Kaveen Kaur Vs The Regional Passport Officer* [W.P. Civil No. 3582 of 2014 decided on 31.7.2014], the Delhi High Court was concerned with a case where the Ministry of External Affairs turned down the request of the daughter to include the name of her stepfather in her passport. The Ministry of External Affairs relied upon Clause 4.4 of the Passport Manual, which reads as follows:-

4.4 In the case of (b) above, the name of stepfather/stepmother cannot be written in the passport of children from the previous marriage. The relationship of the child to his biological parents subsists, even after divorce by parents. In such cases, the column of father or mother in the passport cannot also be left blank. Therefore, such applicants must apply with the names of their biological parents. However, if the stepfather or stepmother is appointed by a Court as legal guardian, the name of such a step-parent can be written as legal guardian.

14. The respondents also relied upon para 4(III) of Chapter 8 of the Passport Manual, which permitted the parties to have the name of the biological parent replaced by the name of the step-parent, in the event of death of the biological parent.

15. The Delhi High Court rejected the reliance placed upon para 4(III) of Chapter 8, on the ground that it relates only to change of entries in the passport. Thereafter, the Delhi High Court took note of the decision of this Court in *R. Gayatri* and allowed the writ petition, without going into legal issues. Therefore, none of the decisions relied upon by the learned counsel for the petitioner appears to have dealt with the legal issues arising for consideration, in a holistic manner. Hence, it has become necessary to look into the legality of the issue in its originality.

16. Apart from the three decisions relied upon by the learned counsel for the petitioner, there appears to be a few more. Even in those cases, the larger ramifications, appear to have been lost sight of.

17. In *Jigna Mahesh Dedhia Vs Union of India*, a lady, whose marriage with one

Mr. Jayesh was dissolved by a decree of divorce and who got re-married to one Mahesh, came up with a writ petition seeking a direction to the Regional Passport Officer to accept the name of the son as indicated by them. Even in that case, the biological mother claimed to have given the son in adoption to the person whom she re-married. The Union of India opposed the prayer on the ground that the relationship of the child to its biological parents continues even after divorce. But, a Division Bench of the Bombay High Court in its decision reported in CDJ 2014 BHC 1941 held that since the biological father gave up all the rights in favour of the biological mother at the time of divorce and also since there was a deed of adoption executed by the biological father himself in favour of the person, who married the biological mother, the Division Bench held that there was severance of ties between the biological father and the child.

18. But, the said decision may not be of any assistance to the petitioner in this case, since the biological father of the minor child did not join in the execution of the deed of adoption in favour of the petitioner's husband. Wherever there is a valid adoption, which satisfies the requirement of the Hindu Adoption and Maintenance Act, 1956, there would be no difficulty in replacing the name of the biological parents with that of the adoptive parents.

19. Another Division Bench of the Bombay High Court had an occasion to consider the very same issue in Vishwas V.Joshi Vs Union of India [CDJ 2010 BHC 1834]. Even in this case, there was a deed of adoption executed between the biological father on the one hand and the biological mother and the second husband on the other hand. Therefore, the Court found on facts that there was a valid adoption, which had the natural consequence stipulated in Section 12 of the Hindu Adoption and Maintenance Act, 1956. Hence, the said decision is also of no assistance to the petitioner in this case.

20. In Teesta Chatteraj Vs. Union of India, , a minor girl represented by her mother and natural guardian filed a writ petition challenging the rejection of her request by the Passport Officer to include the name of the stepfather in the application for the issue of passport. A learned Judge of the Delhi High Court, after taking note of Section 9 of the Hindu Adoption and Maintenance Act, 1956, indicated in paragraph 28 of his decision, that when both parents of a child are alive, one of them cannot give the child in adoption without the consent of the other. A very clever argument was advanced in that case that the biological father should be deemed to have renounced the child, if not the world and that therefore, his consent was not necessary. But, the said argument was rejected by the learned Judge of the Delhi High Court. Another argument was advanced that the biological mother had obtained the tacit consent of the biological father at the time of divorce. But, the said argument was also rejected by the learned Judge (rightly so in my view) in the following words :

The petitioner's mother could not have secured the right, at the time of her obtaining divorce from Shri Abhijit Ghosh, to claim that the petitioner was not the naturally born child of her natural father, Shri Abhijit Ghosh. The petitioner's

mother also could not have taken away the petitioner's right to claim that Shri Abhijit Ghosh is her natural father. The petitioner's right to claim her status as the daughter and an heir of Shri Abhijit Ghosh also could not have been taken away by her mother by entering into a compromise with her natural father. The rights which inhere in the petitioner on account of her being a natural heir of her natural father continue to survive. The identity of the petitioner is derived by the fact that the petitioner is the naturally born child of her parents i.e. Shri Abhijit Ghosh and Smt. Rajeshwari Ghosh, now known as Smt. Rajeshwari Chatteraj. The settlement arrived at between the petitioner's parents at the time when they obtained the divorce cannot be said to include an implied consent by the petitioner's father to the giving in adoption of the petitioner to any other person. Therefore, the Delhi High Court eventually dismissed the writ petition. This, in my considered view, reflects the correct position of law.

21. Therefore, if one goes strictly by law, the prayer in the writ petition cannot be allowed. But that will leave the future of a minor girl completely in dark. Cases of this nature are going to increase in the coming days and hence when the Government had failed to take note of the societal changes to modify the law suitably, the Court is duty bound to issue appropriate directions, without encroaching into the territory of the legislature.

22. It appears that even in the United States where such questions arise more frequently than they do here, there is no procedure for replacing the name of the biological father with that of the stepfather. If a person under 16 years of age needs a passport in the United States, the application form, which is known as DS11, has to be submitted by his or her parents. But, persons, whose names are listed in the child's birth certificate alone can apply in Form DS11. However, when the federal Government of the United States witnessed an increase in the number of children adopted by same sex partners, the format of DS11 was revised. The original DS11 Form contained columns for filling up the names of the father and the mother of the applicant. But, the new form asks in two identical fields, for the name of "mother/father/parent" purportedly recognizing the diversity in family formations. The result is that the passport of a minor (in the United States) may reflect the names of two males or the names of two females as the parents of the child. It is not even necessary now that those, whose names are mentioned as parents in the passport of a minor in the United States, should have been married.

23. What is called for in the passport application DS11 of the United States today is only the information relating to the child's legal parents. It appears that there is yet another form namely DS3053, which allows the non adoptive parent also to submit an application form along with the adoptive parent.

24. In the United Kingdom also, a few changes have been brought in probably from the year 2011. Interestingly, these changes also came only as a result of lobbying by gay rights groups. The application form for the issue of passport originally contained columns where the names of the father and mother had to

be incorporated. But, the format was assailed as being discriminatory on the ground that it did not contain provisions for same sex parents. Though campaigners for family values opposed the claim made by the other groups on the ground that the move to bring about changes in the application form would denigrate the roles of parents bringing up children in traditional families, the Home Office indicated that the Identity and Passport Service approved the changes. The new format introduced from December 2011 provides for parent 1 and parent 2 in addition to the existing columns.

25. Unfortunately, in their anxiety to provide immediate relief and succor to the separated mothers and their minor children, Courts appear to have forgotten the larger issues arising in these cases. Some of the issues that may pose difficulty of being resolved are as follows:-

(1) The names of the biological parents, as entered in the Hospital Records and in the Birth Register Extracts can never be changed, as they reflect true statements of fact. Therefore, even if a direction is issued to the Regional Passport Officer to change the name of the biological father in a given case, it will still be in conflict with the entry found in the Register of Births. I do not know how this problem could be solved.

(2) Assuming, (God forbids) that there is yet another marriage, as it happens without much ado in Western Societies, is it possible to change the name of the parents every time there is a divorce followed by a fresh marriage.

(3) What would happen in cases where biological father leaves a large estate and dies intestate? Will it be possible for the child to establish its identity and claim the right of inheritance. After changing the name of the biological father in all the records, it may not be possible for the child to inherit the estate of its biological father. In such cases, the child may not even be able to establish its identity.

26. When society evolves and relationships constantly get redefined, legal issues become more and more complex. Therefore, before jumping into a solution, Courts have a duty to think of the problems that the solutions themselves may throw up. Unfortunately, law on this issue has not evolved in India and hence, we have to look up only to International Conventions and the manner in which the Courts in other countries deal with such situations.

27. The General Assembly of the United Nations adopted a Resolution bearing No. 44/25 on 20.11.1989. The said Resolution, which entered into force on 02.09.1990, popularly known as "Convention on the Rights of the Child", indicates several parameters. Under Article 7 of the said Convention, a child should be registered immediately after birth and it shall have the right from birth to a name. It also has a right to know and be cared by his or her parents. Article 7(1) of the Convention reads as follows:-

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the

right to know and be cared for by his or her parents. 28. Under Article 8, the States Parties shall undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Article 8 reads as follows:-

Article 8 UN Convention on the Rights of the Child:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

29. Article 10.2 of the Convention also speaks about the right of the child to maintain direct contacts with both parents. Therefore, internationally, it is a well recognised principle of law that the relationship between parents and children do not get dissolved, except in cases of valid adoption. But, some religions do not recognise or accept adoptions.

30. Fortunately, the petitioner herein claims to be a Hindu and she claims that both of her marriages were according to the Hindu Customary Rites. Therefore, the child is also a Hindu. Hence, the only way, in which, the relationship between the biological father and the child could be severed, without any legal rights and obligations on both sides, is by way of adoption.

31. This is perhaps why the petitioner has set up a claim that there was an adoption. But unfortunately, the petitioner does not appear to have been advised properly, before a deed of adoption was executed and registered. Since the parties happen to be Hindus, the so called adoption pleaded by the petitioner should come within the parameters of the Hindu Adoption and Maintenance Act, 1956. Under Section 5(1) of the said Act, no adoption shall be made by or to a Hindu, except in accordance with Chapter II of the Act. Any adoption made in contravention of this Chapter, is void.

32. Section 7 of the said Act indicates the capacity of a male Hindu to take in adoption. The proviso to Section 7 makes it clear that a male Hindu, who wishes to take a child in adoption, shall not adopt, except with the consent of his wife, unless such wife has completely and finally renounced the world or ceased to be a Hindu or has been declared by a competent Court to be of unsound mind.

33. Section 9 lists out the persons, who are capable of giving a child in adoption. Under Sub-Section (2) of Section 9, the father alone shall have the right to give in adoption, but the right can be exercised only with the consent of the mother. The right of the mother to give in adoption is regulated by Sub-Section (3) of Section 9. It reads as follows:-

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. 34. Unfortunately for the petitioner, the conditions stipulated in Section 9(3) may not be satisfied in the case on hand, to hold the adoption to be valid in the eye of law. The Explanation to Section 9 actually adds to the agony of the petitioner by declaring that the expressions "father" and "mother" do not include adoptive father and adoptive mother.

35. Therefore, the fundamental premise, on which, the Hindu Law of Adoptions proceeds is that the relationship between the biological parents and the children can never get severed, except in accordance with the provisions of this Act. In such circumstances, I do not know how Courts could issue directions to replace the name of the biological father or mother with that of the stepfather or mother. It is only in cases of legally valid adoptions that the names of the biological parents could be replaced by the names of the adoptive parents, as law recognises a severance of ties in such cases.

36. The cases of children surrendered to child care homes or abandoned by their biological parents, do not pose great difficulty. In such cases, the first identity itself is born, only when the Court passes an order approving local or inter-country adoption. Since such adoptions are now well regulated by the earliest decision of the Supreme Court in *Lakshmi Kant Pandey Vs. Union of India* (UOI), and the various guidelines issued by the Government of India, the Courts passing orders in terms of the provisions of the Guardians and Wards Act themselves issue appropriate directions to the Passport Office, to include the names of the adoptive parents in the passport issued to the child. But, as stated earlier, the children in such cases happen to be those abandoned by their biological parents. Therefore, there is no chance of any discrepancy between different types of certificates. But, cases such as the one on hand, pose a lot of difficulties, as I have pointed out earlier. While the Courts are certainly obliged to take care of the immediate interests of these children by giving certain directions to the Passport Office, the Courts cannot overlook the long-term needs and rights of these children. For instance, the right of a child to inherit the estate of its biological father, will get defeated by a direction to effect correction of entries in the statutory records.

37. Therefore, I am of the view that the Ministry of External Affairs is obliged to come up with innovative steps and measures to resolve problems of this nature. The Passport Manual may perhaps have to be amended suitably to incorporate additional columns in the applications for the issue of passports. Apart from the columns where the names of the biological parents are to be indicated, the application form may also contain additional columns where the names of the step-parents could be indicated, wherever applicable. This will reduce or even eliminate the possibility of any discrepancy between the entries in the Birth Register and the School Records or other records.

38. Such a step as suggested above, will also ensure that the rights guaranteed

to children under the United Nations Convention on the Rights of the Child, 1989, to which India is a signatory, are protected. While it is necessary to secure a passport for the minor daughter of the petitioner at the earliest, it is also necessary to ensure that the emergent needs do not destroy the future rights of the child. Therefore, I am of the view that the writ petition could be disposed of with certain directions, both to the Union of India and to the respondents herein, so that persons similarly placed like the petitioner are not compelled to approach the Court every time for the issue of passports.

39. In view of the above, the writ petition is disposed of with the following directions:-

(1) The Ministry of External Affairs, Union of India may incorporate suitable provisions in the Passport Manual and incorporate suitable columns in the applications for the issue of passports, to enable the parties to indicate either the names of the biological parents or the names of the adoptive parents or the names of the step parents or all of them, according as the situation demands. It can be left to the will of the parties either to indicate the names of one or more of the biological parents along with the name/ names of the adoptive or step parent/parents or to indicate the names of all.

(2) In so far as the case on hand is concerned, the respondents shall issue a passport to the daughter of the petitioner, by indicating the name of R.Lakshmanan as the stepfather, in the column reserved for filling up the name of the father. The respondents are directed to issue passport within four weeks, upon the petitioner's application bearing File No. MA3067806994714 dated 10.7.2014. There will be no order as to costs. Consequently, the above MP is closed.