
(2015) 02 RAJ CK 0101
In the Rajasthan High Court
Case No : Civil Misc. Appeal No. 144/15

Darshana Gupta

APPELLANT

Vs

None and Others

RESPONDENT

Date of Decision : 09-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1
Constitution of India, 1950 — Article 15, 21, 39, 45, 47
Hindu Adoptions and Maintenance Act, 1956 — Section 11, 11(i), 11(ii), 9(4 & 5), 9(4)
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 2, 41, 52

Citation : AIR 2015 Raj 105 : (2015) 1 CDR 377 : (2015) 1 RLW 782 : (2015) 2 WLN 364

Hon'ble Judges : Pratap Krishna Lohra, J.

Bench : Single Bench

Advocate : Sachin Acharya, for the Appellant

Final Decision : Allowed

Judgement

Pratap Krishna Lohra, J.—This legal battle is unique wherein appellant is not pitted against any opponent much less formidable opponent. Appellant, Ms. Darshana Gupta, has laid this appeal under Section 52 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, "Act of 2000") read with Order 43 rule 1 of the Code of Civil Procedure, 1908 (for short, "CPC") to assail the impugned order dated 18th December 2014, passed by learned District Judge, Udaipur (for short, "learned Court below).

2. By the order impugned, endeavour made by the appellant in unison with proforma respondent Rajkiya Balika Garh/Visheshak Dattak Garhn Agency, Bal Adhikarita Vibhag, under Section 9(4 and 5) of the Hindu Adoptions and Maintenance Act, 1956 (for short, "Act of 1956") read with Section 41 of the Act of 2000, to adopt a minor girl, Priti, proved abortive inasmuch as the learned Court below declined her prayer by citing embargo envisaged in clause (ii) of Section 11 of the Act of 1956, under the caption "Other conditions for a valid

adoption".

3. Succinctly stated, the facts of the case are that the appellant is presently working as Joint Director, Pension Department having her posting at Udaipur. She made endeavour to adopt minor girl Priti, and for that purpose she invoked provisions of Section 9(4) and (5) of the Act of 1956 read with Section 41 of the Act of 2000 by submitting a joint application before the learned Court below. This effort was made by the appellant seeking declaration for adoption of the minor child. Along with her application, appellant also annexed an affidavit claiming, inter-alia, that she moved an application for adopting minor girl Priti before the co-applicant, which is now a proforma respondent. In her application, material particulars about registration of the minor girl were also incorporated. Facts were also pleaded in the application that the Board of the proforma respondent found her entitled for adoption of minor girl Priti w.e.f. 6th of June 2014 and since then Priti is in custody and guardianship of the appellant. The requisite documents, pertaining to decision of the Board dated 06.06.2014 as well as custody and guardianship of the minor child, were also submitted before the learned Court below. With all humility at her command, the appellant made endeavour to seek declaration and permission from the learned Court below for adopting the minor girl. For substantiating her intention to adopt minor girl Priti, appellant also appeared in the witness box and proved all the documents. In all, during her examination, six documents were exhibited. After conclusion of the evidence, the learned Court below thrashed out the matter and rejected the application by the impugned order.

4. Learned counsel for the appellant Dr. Sachin Acharya submits that the Act of 2000 is enacted with laudable objects for the rehabilitation and providing social integration to orphaned, abandoned or surrendered children and therefore it is intended to regulate the interface all the laws with children in conflict with law. Dr. Acharya, therefore, submits that in case of adoption of Orphaned, abandoned or surrendered children, the power envisaged under Section 11(i) and (ii) of the Act of 1956 cannot be cited as an embargo for the Hindu having biological child of alike gender from adopting the child of same gender. Dr. Acharya has strenuously urged that in such cases, need of the hour is to have a pragmatic rather than purely idealistic and pedantic approach for furthering the aims and objects of the Act of 2000. Dr. Acharya further submits that the Act of 2000 does not envisage a restrictive condition foreclosing the rights of the parents, who have a child, to adopt another child of the same gender. On the strength of these submissions, learned counsel has vociferously urged that the learned Court below has not made any endeavour to harmoniously construe the provisions contained under the Act of 2000 with the Act of 1956, and as such the impugned order cannot be sustained. Lastly, Dr. Acharya has urged that in the impugned order the learned Court below has not at all cared to discuss the provisions of the Act of 2000 and therefore the order is vitiated. In support of his contentions, learned counsel has placed reliance on following legal precedents:

? In Re: Adoption of Payal @ Sharinee Vinay Pathak and his wife Sonika Sahay @ Pathak,

? Rajan Mittal and another Vs. Nari Niketan Trust (Regd.) Nakodar Road, Jalandhar,

? The Secretary, Subhadra Mahatab Seva Sadan of Kolathia and Another Vs. State of Orissa,

5. In Re: Adoption of Payal @ Sharinee Vinay Pathak and Anr. (supra), the Bombay High Court examined the provisions of the Act of 1956 as well as the Act of 2000 threadbare, more particularly, focusing on the embargo envisaged under clause (ii) of Section 11 of the Act of 1956. The Court held:

"The Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice Act, 2000 must be harmoniously construed. The Hindu Adoptions and Maintenance Act, 1956 deals with conditions requisite for adoption by Hindus. The Juvenile Justice Act of 2000 is a special enactment dealing with children in conflict with law and children in need of care and protection. While enacting the Juvenile Justice Act 2000 the legislature has taken care to ensure that its provisions are secular in character and that the benefit of adoption is not restricted to any religious or social group. The focus of the legislation is on the condition of the child taken in adoption. If the child is orphaned, abandoned or surrendered, that condition is what triggers the beneficial provisions for adoption. The legislation seeks to ensure social integration of such children and adoption is one method to achieve that object. The religious identity of the child or of the parents who adopt is not a precondition to the applicability of the law. The law is secular and deals with conditions of social destitution which cut across religious identities. The legislature in its wisdom clarified in sub-section (6) of Section 41 that the Court may allow a child to be given in adoption to parents to adopt a child of the same sex irrespective of the number of living biological sons or daughters. This provision is intended to facilitate the rehabilitation of orphaned, abandoned or surrendered children. The condition must apply to all persons irrespective of religious affiliation who seek to adopt children of that description. The object of rehabilitation and providing for social reintegration to orphaned, abandoned or surrendered children is a matter of high legislative policy. It is in effectuation of that policy that the legislature has stipulated that adoption of such a child must proceed irrespective of the marital status of a person taking in adoption and irrespective of the number of living biological children of the parents seeking adoption. Consequently, where the child which is sought to be adopted falls within the description of an orphaned, abandoned or surrendered child within the meaning of sub-section (2) of Section 41 or a child in need of care and protection under Clause (d) of Section 2, the provisions of the Juvenile Justice (Care and Protection of Children) Act 2000 must prevail. In such a case the embargo that is imposed on adopting a child of the same sex by a Hindu under Clauses (i) and (ii) of Section 11 of the Hindu Adoptions and Maintenance Act, 1956 must give way to the salutary provisions made by the Juvenile Justice Act. Where, however,

the child is not of a description falling under the purview of Chapter IV of the Juvenile Justice Act, 2000, a Hindu desirous of adopting a child continues to be under the embargo imposed by Clauses (i) and (ii) of Section 11 of the Act of 1956. If the two pieces of legislation, both of which are enacted by Parliament are harmoniously construed, there is no conflict of interpretation. Resolution of Conflicting provisions the alternate hypothesis.

Alternatively, even if there were to be a conflict between the provisions of the Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice Act of 2000, it is the latter Act which would prevail. This is on the well settled principle that when there are two special Acts dealing with the same subject matter, the legislation which has been enacted subsequently should prevail. The Supreme Court applied this principle in the context of a conflict between the Companies Act 1956 and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in its decision in Allahabad Bank Vs. Canara Bank and Another, . Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them. Bennion on Statutory Interpretation (5th ed., 2008) ? 80: Implied amendment.

Here, the 1956 Act prohibits a Hindu from adopting a child when he or she already has a child of the same gender, and the 2000 Act creates a general right to adopt abandoned, surrendered, or orphaned children. While there is a presumption against implied amendment or repeal under Indian law, the Supreme Court has recognized that "this presumption may be rebutted where the inconsistency cannot be reconciled." Municipal Council Palai Vs. T.J. Joseph and Others, . If the 2000 Act is held to be inconsistent with the 1956 Act, when passing the later Act Parliament impliedly amended the Hindu Adoptions and Maintenance Act, 1956, to permit adoption of children in the specified subclass, irrespective of whether a person has children of the same sex."

6. In Rajan Mittal and Anr. (supra), High Court of Punjab and Haryana, while relying on the decision of Bombay High Court in Payal @ Sharinee Vinay Pathak and Anr. (supra), reiterated the same principle that the Act of 1956 and the Act of 2000 must be harmoniously construed and held:

"It was finally held in the said judgment that a Hindu couple governed by the 1956 Act can adopt a child of the same gender under the provisions of the Act. Similar is the ratio of the another judgment of Bombay High Court in Indian Association for Promotion of Adoption and Child Welfare and Christopher Drury and Shenz Drury, wherein it was held that a couple already adopted one girl child is entitled to adopt another girl child under the Act reported in 1 FAP 1/2012 decided on January 13, 2012. Before disposal of this petition, an attempt was made to ensure that adoption of minor is bonafide and for the welfare of the child. The petitioner had undertaken to fulfill any condition imposed by the Court

to ensure the future welfare of the child. Prima facie the adoption in the present case is, in consonance with the provisions and objectives of The Juvenile Justice (Care and Protection of Children) Act, 2000 and The Juvenile Justice (Care and Protection of Children) Rules, 2007. I follow the opinion of Bombay High Court in the matter of Payal's case (supra) and hold that the petitioners are entitled to adopt the second child. The impugned order dated August 31, 2010 is hereby set aside." 7. In Secretary, Subhadra, Mahatab Seva Sadan (supra), Orissa High Court has also reiterated the same principle in case of two minor girl children who were being reared as siblings by permitting their adoption in the same family. The Court held:

"Law is well settled that it is the substance and not the form which is to be looked in to by a Court of law while deciding any lis and appropriate relief to which a party may be entitled to should not be withheld on the technical ground that the nomenclature of an application has been made wrongly. The documents which were produced before the learned District Judge clearly envisage that the petitioners intended to obtain an order of allowing adoption under the J.J. Act and not under the Act, 1956. It was, therefore, incumbent upon the learned District Judge to deal with both the applications to be under the J.J. Act. Further, in view of the documents produced and in view of the provisions of the J.J. Act, as discussed above, there was no scope on the part of the learned District Judge to call for a report from the Orissa State Council for Child Welfare, who in an evasive manner only stated in their report in one line that the petitioner No. 2 is not eligible to adopt two girl children under Section 11 of the Hindu Adoption and Maintenance Act, 1956 and relying upon which the learned District Judge mechanically held that Section 11 is a bar for the petitioner No. 2 to adopt both the girl children without considering the ratio of the decision in the case of Lakshmi Kant Pandey (supra) in its proper perspective and the CARA Guidelines. In such cases, it is always incumbent upon the learned District Judge to carefully scrutinize as to whether giving an approval/sanction for adoption is in the best interest of the child in question, who needs care and protection as per the provisions of the J.J. Act for which the petitioners produced all required documents before him. The learned District Judge, therefore keeping the spirit of the provisions of the J.J. Act in Section 41 thereof and the law as laid down by the apex Court should have allowed the applications for rehabilitation and reintegration of both the girl children in the family of the petitioner No. 2.

In view of the materials available on record, this Court has, therefore, no hesitation to hold that both Kuni and Gudly were under the custody and care of the petitioner No. 1 and being reared as siblings, are now under the petitioner No. 2 pursuant to her executing the Foster Care agreement. Both the said children are in need of care and protection and as already held are required to be rehabilitated and socially reintegrated as early as possible within the period prescribed by placing them in the family by giving them in adoption to the petitioner No. 2 so that such children will feel themselves to be an integral part of the society and will not be looked down upon."

8. Mr. S.S. Ladrecha, learned Addl. Advocate General, who was called upon by the Court to render assistance in the matter keeping in view the larger public interest, submits that the Courts are meant for imparting justice and not to thwart the same. While emphasizing the rigor of Article 21, 39, 45, 47 and 51A of the Constitution, Mr. Ladrecha also concurs with the submission of the learned counsel for the appellant that the Act of 2000 and the Act of 1956 are to be harmoniously construed and greater care for minor children in destitute is desirable to facilitate effective implementation of the Act of 2000. Mr. Ladrecha has also referred to the provisions of the Rajasthan Children Act 1970 to support the cause of the appellant with a submission to examine the lis with a pragmatic approach in the best interest of orphaned, abandoned and surrendered children.

9. I have heard learned counsel for the appellant and learned Addl. Advocate General, and perused the impugned order, application submitted by the appellant before the learned Court below, the documents annexed thereto as well as the statement of the appellant, with the assistance of learned counsel for the appellant.

10. Instant case is a glaring example where appellant's pursuit to adopt second child of same gender, i.e. a female child, has foiled without any resistance on account of lackadaisical approach of the learned Court below. A bonafide endeavor of the appellant to adopt a female orphaned child for her rehabilitation and social reintegration has turned out to be a catastrophe due to stringent provision contained under Section 11(ii) of the Act of 1956. Although learned Court below has not cared to examine the issue in the background of welfare legislation, i.e. the Act of 2000, but this Court feels that the matter is to be sorted out while explicating the conflict between the two legislations, viz., the Act of 1956 and the Act of 2000. The Act of 1956 deals with the subject of adoptions and maintenance among Hindus. It provides a complete procedure for adoption by a Hindu by conferring right to take Hindu female in adoption. As such, it is a general law governing the province of adoption amongst Hindus. On the other hand, the Act of 2000 is a special legislation enacted with laudable objects. The Act is for providing "care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation". The preamble to the Act of 2000 makes reference of several Constitutional provisions having bearing on the welfare of the children which are Article 15, 39, 45, 47 and 51A. Section 41 of the Act of 2000 as amended by Act No. 33 of 2006 reads as under:

41. Adoption- (1) The Primary responsibility for providing care and protection to children shall be that of his family.

(2) Adoption shall be restored to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a Court after satisfying itself regarding the investigations having been carried out as are required for giving such children in adoption.

(4) The State Government shall recognize one or more of its institutions or voluntary organizations in each district as specialized adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified under sub-section (3):

Provided that the children's homes and the institutions run by the State Government or a voluntary organization for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified under sub-section (3). (5) No child shall be offered for adoption-

(a) until two members of the Committee declare the child legally free for placement in the case of abandoned children:

(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and

(c) without his consent in the case of a child who can understand and express his consent.

(6) The Court may allow a child to be given in adoption -

(a) to a person irrespective of marital status or;

(b) to parents to adopt a child of same sex irrespective of the number of living biological sons and daughters; or

(c) to childless couples.

11. A bare reading of sub-section (6) of Section 41 of the Act of 2000 makes it crystal clear that a person is competent to adopt a child irrespective of marital status and also child of same sex irrespective of number of living biological sons or daughters. Therefore, the embargo for adopting a child of same sex, as envisaged under Section 11(ii) of the Act of 1956, has been done away under the Act of 2000 for adoption of orphaned, abandoned or surrendered, or child in destitution, with the solemn object of their rehabilitation and their social reintegration.

12. Perusal of the impugned order clearly and unequivocally reveals that the learned Court below has not addressed the issue involved in the light of provisions contained under the Act of 2000 and has simply nonsuited the

appellant by relying on the legal embargo under Section 11(ii) of the Act of 1956. In my opinion, appellant, who is a responsible officer of the Government, has solicited the approval of the Court, in unison with the proforma respondent, to adopt a female child to act as her parent for providing care and protection to her as part of her family.

13. In the present era of woman empowerment, such an endeavor of the appellant is appreciable and deserves encouragement by the law Courts sans technicalities. Looking to the social status of the appellant and the fact that she is maintaining the child for last more than seven months, there remains no doubt about her intentions and credentials. In the changed social scenario, the Act of 1956 and the Act of 2000 are liable to be construed harmoniously to ensure rehabilitation and social reintegration of orphaned, abandoned and surrendered children.

14. There remains no quarrel that the Act of 1956 deals with the conditions requisite for adoption by Hindus, whereas the Act of 2000 is a special enactment dealing with children in conflict with law and children in need of care and protection.

15. As observed hereinabove, sub-section (6) of Section 41 of the Act of 2000 empowers the Court to allow appellant/parents to adopt a child of same sex irrespective of the number of living biological sons or daughters, the embargo envisaged under clause (ii) of Section 11 of the Act of 1956 is to yield before the Act of 2000 as it is a special legislation and the Act of 1956 is a general law applicable for Hindus. Thus, even if there is a conflict between the two legislations, the Act of 2000 is to prevail on the strength of legal maxim *generalibus specialibus non derogant*, which means special provisions will control general provisions. This legal maxim is ordinarily attracted where there is a conflict between a special and a general statute and an argument of implied repeal is raised. Hon"ble Apex Court in a recent judgment in case of Commercial Tax Officer, Rajasthan Vs. Binani Cements Ltd. and Another, has laid down the criteria for determining whether statute is a special or general one. Relying on some of the earlier decisions, the Court held:

In *Gobind Sugar Mills Ltd. Vs. State of Bihar and Others*, this Court has observed that while determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act. With this basic principle in mind, the provisions must be examined to find out whether it is possible to construe harmoniously the two provisions. If it is not possible then an effort will have to be made to ascertain whether the legislature had intended to accord a special treatment vis-a-vis the general entries and a further endeavour will have to be made to find out whether the specific provision excludes the applicability of the general ones. Once we come to the conclusion that intention of the legislation is to exclude the general provision then the rule "general provision should yield to special provision" is squarely attracted.

Having noticed the aforesaid, it could be concluded that the rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the legislature has enacted comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject specific provision relating to a specific, defined and describable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject.

16. As such, the interpretation of the legal maxim *generalia specialibus non derogant* has persuaded me to believe that the Act of 2000 has impliedly amended the conflicting provisions of the Act of 1956 rather than repealing it. It goes without saying that the general prohibition of the Act of 1956 remains in force; the latter Act i.e. Act of 2000 simply creates an exception in case of abandoned children or children in destitute.

17. Therefore, on examining the matter in its entirety, I am in total agreement with the judgment of Bombay High Court in *Re: Adoption of Payal @ Sharinee Vinay Pathak and Anr. (Supra)* and as such, in my opinion, the impugned order passed by learned Court below cannot be sustained and the same is hereby quashed and set aside. The application submitted by the appellant before the learned Court below is therefore allowed and it is hereby declared that the appellant is the adoptive parent of child Priti (Registration No. 92427) with all the rights, privileges, responsibilities and consequences under the law.

18. The appellant is expected to take utmost care about the welfare of child Priti, and the proforma respondent should also make endeavor to see that child is brought up in a profound and healthy atmosphere congenial for her rehabilitation and social reintegration.

19. The appeal is accordingly allowed, as indicated supra.