

(2009) 07 MAD CK 0463

In the Madras High Court

Case No : Application No. 2805 of 2009 in O.P. No. 717 of 2007

In Re: Mr. R.R. George Christopher and Mrs. Kristy Chandra

Date of Decision : 27-07-2009

Acts Referred:

Constitution of India, 1950 — Article 15, 21, 225, 226, 39
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 40, 41
Tamil Nadu Juvenile Justice (Care and Protection of Children) Rules, 2001 — Rule 110, 111

Citation : (2010) 2 LW 881

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : M.B. Dominique and V. Govardhanan, for Air India, for the Appellant;

Final Decision : Allowed

Judgement

K. Chandru, J.—"We are guilty of many errors and many faults but our worst crime is abandoning the children, neglecting the fountain of life. Many of the things we need can wait. The child cannot. Right now is the time his bones are being formed, his blood is being made, and his senses are being developed. To him we cannot answer. "Tomorrow.

His name is "Today".

- quoted from Gabriela Mistral

2.... Whether a civilised State committed to the Rule of law, governed by a written constitution and signatory to International Conventions on the Rights of a Child, could deny to a section of its own citizens the right to adopt a child and to give that child, a home, a name and nationality?

This is the question posed by Justice Rebello of the Bombay High Court in Manuel Theodore D'souza and Anr. (2000) 2 DMC 292

3. For the antagonists opposing adoption on the basis of religion, he gave a Sage's advice:

The Rule of law must reach them. Protests, from whatever sections should not stop the pursuit of justice to those in need of it. The right of a child cannot be confused with the personal law of any section of our pluralistic society. Adoption is not to be treated as an act by a State to force a child on unwilling parents. On the contrary it is a voluntary act on the part of eligible persons to provide comfort, love and security to the abandoned and homeless children. No religion can deny family love to these children of God. Religions preach peace and brotherhood. How can there be brotherhood if you will not treat a section of your citizens as brothers.

(Emphasis added)

4. Justice Rebello did not stop with that question. He gave a Constitutional basis for the Courts to evolve a solution on the issue of adoption in the following words:

Many of us examining such issues forget that we have taken a solemn oath to protect and defend the Constitution. That requires examining legislation and fundamental rights in such a manner that the tears of the abandoned and homeless infants are wiped away, of course within the constitutional parameters. In this matter the exercise of powers of *parens patriae* and Article 226 to give effect to the fundamental rights, what is in issue are the enforceability of directive principles and International Covenants to which India is a signatory.

30... The right of the child is independent, as a human being, and flows from his right to life as contained in Article 21 of the Constitution. Any eligible parent or parents irrespective of religion can apply to adopt a child. Personal laws, as pointed out earlier, have to meet the test of Part III of the Constitution, if they are to be saved. Customs and usage amongst Hindus provided for adoption as a custom, but it was restrictive. On the coming into force of the Constitution it is Article 21 in which the rights of a child are cradled. Custom has given way to Article 21. The case I have made out is that the right of adoption after coming into force of the Constitution is not referable to any customary or personal right. It is now impregnated in Article 21. Its flow now is sustained from the Republican Constitution and not age-old Customs.

33... Apart from this constitutional power this High Court also exercises the powers conferred on it under the amended Letters Patent. By virtue of Clause 17 as already stated, it has jurisdiction over infants. This jurisdiction has been traced and identified as the power of *parens patriae*. The power of the King in England in other words, the power of the sovereign stands delegated to the Court exercising the jurisdiction over the person and property of minors. This power of the Court has been protected by Article 225 of the Constitution....

(Emphasis added)

5. For a devout Christian, the question that always arises is whether the Christianity recognizes adoption of a child. Before dealing with judicial decisions in this regard, it is necessary to reproduce from the Canon Law and the decrees

issued there under:

Canon 110 speaks only of the legal consequences of an adoption made "in accordance with the civil law" and it is as follows:

Canon-110 "Children who have been adopted in accordance with the civil law are considered the children of that person or those persons who have adopted them.

6. Decree XXI of "the Acts and Decrees of the Synod of Diamper 1599" provides that adoption of sons is illegal except in default of children, which by implication suggests that in default of children adoption could be legal. Decree XXII which forbids the Bishop to sanction such adoption as those mentioned in Decree XXI provides also as to how an adoption is perfected.

7. Decrees XXI and XXII are extracted hereunder.

Decree XXI: Adoption of sons Illegal Except in default of children

The Adoption of Sons is not lawful, but in defect of natural children; which not being understood by the Christians of this bishopric through their ignorance of the law, they do commonly adopt the children of their slaves born in their houses of or other people, disinheriting their lawfully begotten children, sometimes upon the account of some differences they have had with them, and sometimes only for the affection they have to strangers, all which is contrary to law and reason, and is a manifest injustice and wrong done to their legitimate children; wherefore the Synod doth declare, that the said adoptions must not be practiced where there are natural children, and being done are void, so that the persons thus adopted are not capable of inheriting anything, except what may be left them by way of legacy, which must not exceed the third of the estate; no, not though the adoption was made before there were any legitimate children to inherit. The Synod doth furthermore declare, That the adoptions which have been made before the celebration of this Synod, where there are children, and the adopted are not in actual possession of the estate, are void, neither shall the adopted have any share thereof, or having had any, shall be obliged to restore it, to which if it be found necessary, the prelate shall compel them by penalties and censures; but as to those who by virtue of such adoptions, have for a long time been in quiet possession of estates, the Synod by this decree does not intend to dispossess them thereof, by reason of the great disturbance and confusion the doing so would make in this diocese, which is what this Synod pretends to hinder, leaving everyone however in such cases, at liberty to take their remedy at law

Decree XXII

Forbids the bishop to sanction such adoption

Whereas the way of adopting by ancient custom in this diocese, it so carry the parties that are to be adopted before the bishop or prelate, with certain testimonials, before whom they declare, that they take such a one for their so,

whereupon the bishop passeth and Olla or certificate, and so the adoption is perfected; the Synod doth command, that from henceforward, the prelate to not accept of an adoption from any that have children of their own; or in case they have none, yet it shall be declared in the Olla. That if they shall afterwards happen to have any, that the said Olla shall be void to all intents and purposes; by which means the great injustices that are now so common in this diocese will be prevented

8. On a reading of the Decrees, it is obvious that custom practiced is recognized as law, with only few exceptions. Therefore if the Petitioner has been able to establish that an adoption as recognized by custom has been there, it could be termed as legal, and which confers automatic right to the adopted child. If further shows that the method of adoption by ancient custom in the diocese is to carry the parties that are to be adopted before the Bishop or Prelate with certain testimonials before whom they declare that they take such a one for their son and that thereupon the Bishop has to pass an Olla or certificate and then adoption is perfected, but however that such adoption thereafter shall not be accepted from any that have children and that in case they have none, yet it shall be declared in the Olla that if they shall afterwards happen to have any, such Olla shall be void for all intents and purposes. Thus an Olla or certificate is contemplated to evidence an adoption....

9. The first question regarding the Indian Christians' right to adopt a child came up for consideration before the Kerala High Court. The Kerala High court in its judgment in Philips Alfred Malvin v. Y.J. Gonsalvis and Ors. reported in, AIR 1999 Ker 187 held as follows:

6... Christian Law also does not recognise adoption. But it is an admitted fact that the Christian Law does not prohibit adoption. The Hindu Adoptions and Maintenance Act provides for adoption of children by Hindu parents. The main purpose of law of adoption is to provide consolation and relief to childless person. An adopted child is transplanted in the adoptive family creating all rights and relationships as if the child was a biological child. On the other hand, all his rights and relationships cease in the natural family. So far as Hindus are concerned, adoption is to preserve the continuation of ones lineage. Apart from the religious motives, secular motives were also important such as man's desire for celebration of his name for the perpetuation of his lineage, for providing security in the old age and for dying in satisfaction that one has left a heir to one's property. It is essentially a transfer of dominion over the child from the natural parents to the adoptive parents and therefore some essential formalities were prescribed to effectuate the transfer on dominion. The position of an adopted child in respect of inheritance and maintenance is the same as that of a natural born child....

8. The Canon Law does not prohibit adoption. The Code of Canon Law, commissioned by the Canon Law Society of America, goes to show that Canon 110 relates to adoption, which reads as follows:

Children who have been adopted according to the norm of civil law are considered as being the children of the person or persons who have adopted them.

Adopted children are usually not at all, or occasionally not wholly, related to the parents adopting them.... Church law adopts the civil law pertinent to the area and states that adopted children are held to be equivalent of natural children of an adopting couple in those instances in which adoption has been duly formalized according to the Civil Law.

Canon 111 provides, that -

A child of parents who belong to the Latin Church is ascribed to it by reception of baptism, or, if one or the other parent does not belong to the Latin Church and both parents agree in choosing that the child be baptized in the Latin Church, the child is ascribed to it by reception of baptism but, if the agreement is lacking, the child is ascribed to the Ritual Church to which the father belongs.

From the above Canon laws, it can be seen that the Church has adopted civil law pertaining to the area. Therefore, adoption made by Correa couple cannot be said to be invalid.

10. Thus, the Hindu Law, Mohammedan Law and Canon Law recognize adoption. Therefore, simply because there is no separate statute providing adoption, it cannot be said that the adoption made by Correa couple is invalid. Since the adopted son gets all the rights of a natural born child, he is entitled to inherit the assets of George Correa couple. The learned Subordinate Judge went wrong in holding that unless adoption is recognized either by personal law, custom or by Canon Law, the first Respondent cannot claim right over the plaint schedule property, as the adoption itself is invalid in the eye of law....

(Emphasis added)

10. This view was approved by a Division Bench of the Kerala High Court vide its judgment in *Maxin George Vs. Indian Oil Corporation*, .

11. Another judge of the Kerala High Court vide his judgment in *Biju Ramesh Vs. Vijayakumar*, , distinguished the earlier decision in *Philips Alfred Malvin's* case (cited supra) on its facts and held that there must be a civil law providing for adoption and that the factum of adoption must be proved before the Court. The relevant passage found in para 16 of the judgment may be usefully extracted below:

16... Adoption has not so far been statutorily recognized in India among the Christian and Muslim communities. The only law on adoption enacted by the Indian Parliament is the Hindu Adoptions and Maintenance Act, 1956, Paragraph 7 of the decision of the Supreme Court in *Lakshmi Kant Pandey Vs. Union of India (UOI)*, indicates that all attempts thus far made to bring out a uniform law of adoption applicable to all communities including Christians, such as the

Adoption of Children Bill, 1972, the Adoption of Children bill, 1980 etc. have not been fruitful. Thus in India there is no statute law of adoption for Christians. Paragraph 32 of (2000) 2 DMC 292 SC observes that in England also adoption was not part of common law or based on equity. If so, it may not be permissible for Courts to evolve a law of adoption for certain communities or religions. Local adoption and inter-country adoption referred to earlier is really the recognition of the rights of the child - whether abandoned, orphaned or destitute for being fostered to a healthy and meaningful habitat as part of the right to life carved out from International Conventions to which India is a signatory, directive principles set out under Article 39(f) of the Constitution of India and *parens patriae* jurisdiction etc. which have been read into Article 21 of the Constitution of India.... I am not called upon to consider the soundness of the decision reported in *Philips Alfred Malvin V. Gonasalves*, (1999) 1 Ker LT 292 (supra) where actually the factum of adoption was admitted. Even if the Christian Law recognizes adoption, there must be evidence of the actual formality of the adoption by proving the physical act of giving and taking of the child....

(Emphasis added)

12. The decisions of the Bombay High Court (2000) and the Kerala High Court (1999) were rendered before the Parliament enacting the Juvenile Justice (Care & Protection of Children) Act, 2000 (Central Act 50/2000) (For short JJ Act). The preamble to the Act reads as follows:

Whereas the Constitution has, in several provisions, including Clause (3) of Article 15, Clauses (e) and (f) of Article 39, Articles 45 and 47, imposed on the State a primary responsibility of ensuring that all the needs, of children are met and that their basic human rights are fully protected;

And whereas, the General Assembly of the United Nations has adopted the Convention on the Rights of the Child on the 20th November, 1989;

And whereas, the Convention on the Rights of the Child has prescribed a set of standards to be adhered to by all State parties in securing the best interests of the child;

And whereas, the Convention on the Rights of the Child emphasises social reintegration of child victims, to the extent possible, without resorting to judicial proceedings;

And whereas, the Government of India has ratified the Convention on the 1th December, 1992;

And whereas, it is expedient to re-enact the existing law relating to juveniles bearing in mind the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), and all other relevant international instruments.

13. The JJ Act for the first time provides "adoption" as a means to rehabilitate and socially reintegrate a child. It had empowered the State Government and the JJ Board to give a child for adoption. This is the first secular law in India providing for adoption. The provision in Sections 40 and 41 are not restricted to persons belonging to particular religion alone.

14. Sections 40 and 41 of the Juvenile Justice (care & Protection of Children) Act, 2000 reads as follows:

40. Process of rehabilitation and social reintegration:

The rehabilitation and social reintegration of a child shall begin during the stay of the child in a children's home or special home and the rehabilitation and social reintegration of children shall be carried out alternatively by (i) adoption, (ii) foster care, (iii) sponsorship, and (iv) sending the child to an after-care organization.

41. Adoption:

(1) The primary responsibility for providing care and protection to children shall be that of his family.

(2) Adoption shall be resorted to for the rehabilitation of such children as are orphaned, abandoned, neglected and abused through institutional and non-institutional methods.

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time by the State Government, the Board shall be empowered to give children in adoption and carry out such investigations as are required for giving children in adoption in accordance with the guidelines issued by the State Government from time to time in this regard.

(4) The children's homes or the State Government run institutions for orphans shall be recognized as adoption agencies both for scrutiny and placement of such children for adoption in accordance with the guidelines issued 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 Board may allow a child to be given in adoption-

(a) to a single parent, and

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

(Emphasis added)

15. Pursuant to the power vested under the JJ Act, the Tamil Nadu Government had framed Rules called as the Tamil Nadu Juvenile Justice (Care & Protection of Children) Rules, 2001. Rules 110 and 111 authorises the JJ Boards to make a final order of giving permanent custody to the adoptive parents. Rule 112 deals with the procedure for adoption by the Child Welfare Committees.

16. It is in this context, the plea of the applicants will have to be considered. The applicants are Christians. They moved this Court with O.P. No. 717 of 2007 for appointing them as Guardians for the minor female child Gwyneth Dhanya (presently 2-1/2 years old). In their application in paragraph 8, they have prayed for the legal custody of the minor for being adopted, fostered, brought up and maintained by them.

17. This Court, after recording evidence, by a final order, dated 28.9.2007, granted permission. In paragraph 4 of the order, this Court directed as follows:

4. There is no objection for the Petitioners being appointed as the guardians of the minor Gwyneth Dhanya and they are appointed as the Guardian of the person of the minor Gwyneth Dhanya. The Petitioners are also permitted to take legal custody of the minor for being adopted, fostered, brought up and maintained by them....

After getting the guardianship, the Petitioners have stated that they have also adopted the child as per the Christian rites and customs, since Canon Law permits such adoption.

18. The first Petitioner, who was an employee of the Air India, approached his employer to get due benefits to the minor child. To their shock, the employer of the first Petitioner informed them that since the child was not legally adopted and the Petitioners are only the guardians, no benefits will accrue to the adopted child. Hence the present application has been filed for a direction that the minor child was entitled to all legal rights including the right of inheritance as if it was a biological child.

19. On notice from this Court, the Air India appeared before this Court through a counsel. The General Manager (Personnel) has also filed a counter affidavit, dated 20.7.2009. Apart from quoting some materials found in the website, in paragraph 4, the following reason has been given for rejecting the request of the Petitioners:

4. I submit that the Directorate of Social Welfare states on the subject of Child Adoption that of Christian law does not recognize complete adoption. As non-Hindus do not have an enabling law to adopt a child legally, those desirous of adopting a child can only take the child in Guardianship under the provisions of

Guardian and Wards Act, 1890. This however, does not provide the child the same status as the child born biologically to the family. Unlike the child adopted under the Hindu Adoption and Maintenance Act 1956, the child cannot become their own, take their name or inherit their property by right. The Act confers only a guardian-ward relationship. The legal guardian-ward relationship exist until the child completes 21 years of age.

20. The stand taken by the Air India is not in consonance with the Constitution and the various judicial pronouncements set out above. It is needless to state that the Canon Law, which is applicable to the Petitioners, provides for adoption if the Civil Law of that Country permit the same.

21. The applicants having approached this Court and got a guardianship order and subsequently, performed necessary rites for adopting the child, the stand of the Respondent is not legally valid. Instead of encouraging people to adopt children with a view to rehabilitate and socially reintegrate, the Air India, which is a Public Sector Undertaking, has come up with a plea that the Petitioners are only guardians and therefore, their adopted child cannot get any benefits otherwise available to the children of Air India staff. It is a spurious argument. Apart from that, their stand is opposed to the law of the land. It further shows their insensitiveness and ignorance regarding the development of Law in this Country.

22. As can be seen from the preamble to the JJ Act, the Act itself was enacted with a view to fulfill the international obligations as well as the constitutional goal envisaged in Part IV of the Constitution. Therefore, this Court thought fit to deal with this issue in-extenso. Aspiring parents, who intend to adopt children, without being inhibited by their personal laws, are entitled to adopt a child in terms of the provisions of the JJ Act.

23. Therefore, in the light of the above, this application is allowed. The Air India represented by its General Manager (Personnel), Chennai-600 027 is hereby directed to recognize the minor Gwyneth Dhanya as the child of the applicants and confer all the service benefits that are available to a child of the staff of Air India forthwith. No costs.