

(1981) 08 GUJ CK 0037

In the Gujarat High Court

Case No : Special Civil Application No. 2489 of 1980

In Re: Rasiklal Chhaganlal Metha

Date of Decision : 19-08-1981

Acts Referred:

Guardians and Wards Act, 1890 — Section 17, 19, 25, 7
Hindu Adoptions and Maintenance Act, 1956 — Section 9(4)

Citation : AIR 1982 Guj 193 : (1981) GLR 921

Hon'ble Judges : P.D. Desai, J;B.J. Divan, J

Bench : Division Bench

Advocate : M.D. Pandya, for A.H. Mehta, M.S. Shah, Ambubhai and Divaji, for the State Government, A.P. Ravani, for the Union of India, S.N. Shelat and Girish Patel, Amicus Curiae and D.D. Vyas, for the Indian Council of Social Welfare, for the Appellant;

Judgement

P.D. Desai, J.—This Writ Petition arises out of the order dated September 9, 1980 made by the District Judge at Raikot in Civil Miscellaneous Application No. 153 of 1980. The said application was presented in the District Court on August 27, 1980 by the Honorary Secretary of Kathiawar Nirashrit Balashram, Rajkol, u/s 9(4) of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as "the Act") for permission of the Court to give a minor female child by name "Krutika" in adoption to Mr. and Mrs. Schumann Herbert Jakob residing in West Germany. The application was supported by the affidavit of the applicant and of Mr. Jakob who declared to have adopted Hindu religion. The Court issued a general notice and invited objections. No objections came forth. The Court, on the material placed before it, inter alia, came to the conclusion that the institution of which the applicant was the Secretary, had scrutinized the proposal with regard to adoption quiry and found be beneficial to socially, morally The Court, therefore, u/s 9(4) applicant to give the in adoption to Mr.and Mrs Schumann Herbert Jakob residing in West Germany. The application was supported by the affidavit of the applicant and of Mr.Jakob who declared to have adopted Hindu religion. The court issued a general notice and invited objections. No objections came forth. The court , on the material placed before it, inter alia,

came to the conclusion that the institution of which the applicant was the secretary, had scrutinized the proposal with regard to adoption and made necessary in that the adoption would be for the child, financially, and in every respect. The court, therefore granted permission of the Act to the minor female child Schumann Herbert Jakob. Be it noted that the order did not specifically mention or permit that the minor female child was to be taken to West Germany by the adoptive parents.

2. It appears that even prior to the making of the order referred to deed of adoption was executed on September 4, 1980 by the applicant it was recited that pursuant to the "verbal to order" granting permission to give the minor female child in adoption, the applicant had given the child in adoption to Mr. Schumann Herbert Jakob and Mrs. Annemarie Schumann in the presence of many social workers and witnesses and that Mr. Schumann Herbert Jakob and Mrs. Annemarie Schumann had taken the said child in adoption. The deed also mentioned that the child was to be taken by the adoptive parents to West Germany.

3. It appears that Mr. Schumann Herbert Jakob and Mrs. Annemarie Schumann made an application to the Regional Passport Officer, Ahmedabad, for issue of a passport for the minor female child. The application was, however " returned with an endorsement that unless "the District Court passed an order permitting the child to be taken out of India, no passport could be granted to or in respect of the child. Thereupon, Mr. Schumann Herbert Jakob and Mrs. Annemarie Schumann and the applicant in Civil Miscellaneous Application No. 153 of 1980 instituted Special Civil Application No. 2479 of 1980 praying, inter alia, that the Regional Passport Officer, Ahmedabad be directed to issue a passport to the minor female child forthwith and without further delay. Annexed to the memo of the said Special Civil Application was a copy of the order passed in the said Civil Miscellaneous Application granting permission for adoption u/s 9(4) of the Act.

4. When the aforesaid Writ Petition reached preliminary hearing before one of us (P. D. Desai, J.) it appeared that the order u/s 9(4) of the Act was perfunctorily without holding proper inquiry. Under the circumstances, the Court, in exercise of its suo motu powers under Article 227 of the Constitution, issued a notice to the applicant in Civil Miscellaneous Application No. 153 of 1980 to show cause why the order dated September 9, 1980 made by the District Judge in the said proceeding should not be quashed. The said order was made on September 12, 1980. This is the history behind the present writ petition, which has originated on account of the said order.

5. Subsequently, having regard to the importance of the question involved, the writ petition was referred to the Division Bench. The Court had, meanwhile, issued notice to the Indian Council of Social Welfare as well as to the State Government of India. Mr. S. N. Shelat and Mr. Girish Patel, Advocates were also appointed amicus curiae to assist the Court.

6. When the matter reached hearing on an earlier occasion, Mr. M. D. Pandya made a statement that he had received instructions to seek the permission of this Court for withdrawal of Civil Miscellaneous Application No. 153 of 1980 out of which this writ petition arises. The permission for withdrawal was sought because it was felt that the proper procedure to adopt in the instant case was to make an application to the competent Court under the provisions of the Guardians and Wards Act, 1890. The Court was informed that proceedings under the Guardians and Wards Act had already been instituted in the District Court at Narol and that they were pending hearing and disposal. The Court made an order on that day observing that it was not possible to entertain the request for withdrawal of Civil Miscellaneous Application No. 153 of 1980 because the matter raised questions of far reaching importance which required the making of a speaking order laying down guidelines with regard to the approach of the Court in the matters of adoption. The Court further observed, however, that there was no reason why the District Court at Narol should not proceed with the case under the Guardians and Wards Act till the stage of making of a final order, pending the grant of permission for withdrawal of Civil Miscellaneous Application No. 153 of 1980. Accordingly, the District Court at Narol was directed to consider the request, if any, made by the applicants to proceed with the hearing of the application under the Guardians and Wards Act, pending the disposal of this writ petition.

7. On a subsequent occasion, the Court passed another order stating that it was inclined to grant the request for permission to withdraw Civil Miscellaneous Application No. 153 of 1980. However, since a little more consideration was necessary in order to lay down the guidelines as regards the approach of the Court in matters of adoption, a formal order granting permission for withdrawal of the said Civil Miscellaneous Application would be passed at a later date. In view of the fact, however, that the Court was inclined to grant the request for withdrawal, the District Court at Narol was permitted to make the final ordering the proceedings under the Guardians and Wards Act pending before it.

8. By this order today, permission is granted to the applicant of Civil Miscellaneous Application No. 153 of 1980 to withdraw the said application. The result would be that the proceedings u/s 9(4) of the Act, which were instituted in the District Court at Rajkot, are rendered abortive and the present writ petition hereunder the order passed in the said proceedings was sought to be received in exercise of suo motu powers under Article 227 does not survive. As observed by us on the earlier occasions, however, we propose to broadly indicate the factors which are required to be borne in mind by the Courts in matters of adoption.

9. In the instant case, as the facts set out at the commencement of the judgment would indicate, we are concerned with an intercountry adoption and we would, therefore, confine our attention to such adoptions. The Indian Council of Social Welfare has defined an intercountry adoption as one in which "the adopters and the child do not have the in which adopters and the child is in different countries". The Indian Council of Social Welfare has pointed out that

inter-country (adoption) are not a simple matter. They involve a variety of principles and procedures over migration, citizenship, the socio-economic situation of adoptive parents, matching parents with the child, and the acceptance of the child in a different community and culture. Therefore, the Indian Council of Social Welfare has recommended that in the interests of the child it is necessary to regulate inter-country adoption by legislations and by strict collaboration between qualified and authorized personal and social authorities. The end result of the process will be that adoption would not be mere legalistic arrangement but the creation of an environment in which the child can grow same nationality as well as one the habitual residence of the in health and happiness, integrated in the society. Be it noted at this stage the Indian Council of Social Welfare is that the best answer to the homeless child is adoption within his own country where he can assimilate easily with people, culture and customs. It, therefore, campaigns for more adoptions of Indian children by Indians. However, since there are more children in need of homes than there are parents forthcoming, inter-country adoptions are filling the gap. The Indian Council of Social Welfare has, therefore, also focused attention on inter-country adoptions to ensure that the child's interest is secured in cases of such adoptions.

10. According to the Indian Council of Social Welfare, in case of inter-country adoptions, it becomes essential that legal requirements of both the countries are thoroughly satisfied since adoption laws differ from country to country. Besides, it would be necessary to ascertain whether the adoptive parents are able to provide the child with a satisfactory home. This would mean investigating into the economic status and social conditions of the family, questions of health and psychological preparedness for adoption, the child's acceptance within the community, etc. A qualified social investigation must be provided on the basis of which decision regarding eligibility can be made. With the above end in view the Indian Council of Social Welfare has prepared a list of points to be considered for screening an adoption proposal. The said list is annexed as Appendix-I to this judgment. Every Court concerned with an inter-country adoption would be well advised to satisfy itself that an independent, trustworthy, recognised and reputed social organisation which concerns itself with the child adoption programme has investigated into those points and submitted a report to the satisfaction of the Court. The Indian Council of Social Welfare has also enumerated documents which should be ordinarily submitted to the Court processing adoption cases. The said list of documents is annexed as Appendix-II to this judgment. Every court dealing with an inter-country adoption case should ordinarily insist that those documents accompany the petition. and be really of its adoption, case should ordinarily insist that those documents accompany the petition.

11. At this stage, it would be worthwhile to point out that certain fundamental principles governing an inter country adoption are found incorporated in the report of the European Expert Group on Inter-country adoption organised jointly by the European office of the Technical Assistant Administration, United Nations

and International Social Service. These principles are of great relevance and the Court dealing with intercountry adoption must bear those principles in mind before making an order in an inter-country adoption case. Annexed as Appendix-III to this judgment are those fundamental principles.

12. It is well to remember that ours is a developing country where large sections of the people live under conditions of abject poverty and that many more subsist on a standard of living which is 13. In order that the Courts can sates just above the poverty line. The move factori1v decide an inter-country adoption ment which actively encourages the case against the aforesaid background adoption by foreigners, especially West and in the light of the above-referred erners, of the children born in such guidelines, we consider it necessary to families in the fond belief that the give certain directions. In all such cases, adoption would secure a better life for the Court should issue notice to the In them is, therefore, gaining ground. Besides, there are a large number of orphans and street-urchins for whom the and seek its instance. If the Indian State and Society have not been able to Council of Social Welfare so desires, it provide shelter, food, clothing and education should be made a party to the proceed. There is a good case for their adopting. If the Indian Council of Social Welt ion by genuine foster parents in Europe for does not appear, or if it is unable, or America where it would be legitimate for some reason to render assistance, the to hope that they would be lovingly Court should issue notice to an indepencaered for and ultimately turned into between indent, reputed and publicly/officially rater men. However, this entire movement cognised social welfare agency working is not fool-proof. It is not free from abuse in the field and in the area and request and aberrations. The possible existence of an international racket trading in such children and selling them at profit into slavery or prostitution cannot be all together ruled out. Indeed, the movement was discredited to such an extent in Sri Lanka that cessation of all foreign adoptions was ordered in that country. It is for this reason that the Courts must exercise greater vigilance while dealing With cases of inter-country adoption. We annex to this judgment as Appendix-I article by Dr. Jack Preger, published in "The Statesman" (Delhi Edition) of May 25, 1981 under the caption "Trading in Young Hopes". The article throws considerable light on the Possible existence Of such an international racket and illustrates how in Bangladesh inter national traffic in children was reported to be prevalent. As pointed out in the said article, it is regrettable that these grim aspects of the adoption picture aren't readily acknowledged in our country. Legislative and executive action ensuring that the good case is not exploited for ulterior ends appear to be over due, having regard to the spectacle presented by the neighbouring countries.Social Workers interested in the cause owe it to themselves and to the movement to explode such racket, if any, stealthily working in our country. To ensurere that courts at least,do not, by being hurried into sanctioning such inter country adoptions, un willingly lend authenticity to such mal practices , we have considered it fit to sound a note of caution and to invite attention to the guidelines laid down by reputed and recognized national

inter national organisation.

13. In order that the courts can satisfactorily decide an intercountry adoption case against the above-said background and in the light of the above-referred guidelines, we consider it necessary to give certain directions. In all such cases, the Court should issue notice to the Indian Council of Social Welfare (175, Dadabhai Naoroji Road, Bombay-400 001) and seek its assistance. If the Indian Council of Social Welfare so desires, it should be made a party to the proceeding. If the Indian Council of Social Welfare does not appear, or if it is unable for some reason to render assistance, the Court should issue notice to an independent, reputed and publicly/officially recognized social welfare agency working in the field and in the area and request it to render assistance in the matter. Adequate safeguards, whenever necessary, should be introduced in the Court's order for the enforcement of the further orders of the Court intended to secure the welfare of the child. Reasonable safeguards, which can be introduced with suitable adaptations, are illustrated in Para 27 of the Full Bench order for the enforcement of the further decision in *Marggarate Maria Pulparampil Nee Feldman Vs. Dr. Chacko Pulparampil and Others*, which was a case where custody of the child of the Court intended to be secured for children of tender age born to a German woman out of wedlock with an Indian was given to the mother. Though the context is different, some of the conditions there enumerated are relevant. For the enforcement of such conditions, the adoptive parents ought to be required to submit to the Court's jurisdiction. A provision for a periodical report pertaining to the maintenance and well-being of the child in the hands of the adoptive parents can also be envisaged as a condition of the order,

14. One more aspect may be specifically mentioned, although it is covered by principles 10, 11 and 12 set out in Appendix-III and Point 9 set out in Appendix-1. The Court must ensure in such proceedings that the adoption is legally valid as per the laws of both the countries, that the adoptive parents fulfil the requirement of the law of adoption in their country, that they have the requisite permission to adopt, if required, from the appropriate authorities in their country, that the child will be able to immigrate to the country of the adoptive parents and that he will be able to obtain the nationality of the parents. If these facts are not established, what will result is either an "abortive adoption" having no validity in either country or a "limping adoption", that is to say an adoption recognised in one country but having no validity in another, leaving the adopted child in a helpless and hapless condition. Such an unfortunate situation must, in any event, be avoided.

15. We need hardly mention that we expect that the guidelines and directives hereinabove set out will be scrupulously observed by every Court in the State dealing with a case of inter-country adoption. A copy of the judgment together with the appendices to be circulated amongst the Judges of the City Civil and Sessions Court at Ahmedabad and amongst all the District Judges and Assistant Judges. A copy of the judgment together with the appendices to be forwarded to:

(1) Secretary to the Ministry of Social Welfare, Government of India, (2) Secretary to the Social Welfare and Tribal Development Department, Government of GuWat, (3) Director of Social Defence, Government of Gujarat and (4) Indian Council of Social Welfare.

16. Before parting with the matter we must place on record our deep sense of gratitude to Mr. S. N. Shelat and Mr. Girish Patel for having rendered valuable assistance to us as amicus curiae.

17. Copies of the judgment should also be forwarded to the Registrars of all the High Courts and Courts of Judicial Commissioner, if any, under the signature of the Registrar, with a request that the same should be placed before Honourable the Chief Justice or the Judicial Commissioner, as the case may be.

18. order accordingly.