

(1988) 08 GUJ CK 0005
In the Gujarat High Court

Case No : First Appeal No"s. 530 and 531 of 1988 with C.A. No"s. 951 and 952 of 1988

Jayantilal L. Shah and Another etc

APPELLANT

Vs

Asha T. Shah and Another

RESPONDENT

Date of Decision : 23-08-1988

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 6

Citation : AIR 1989 Guj 152 : (1990) 1 DMC 250 : (1989) 1 GLR 257

Hon'ble Judges : D.C. Gheewala, J

Bench : Single Bench

Advocate : J.R. Nanavati and D.M. Shah, for the Appellant; P.M. Raval, for the Respondent

Judgement

1. The present two appeals are directed against the judgment and decree passed by the learned Joint District Judge, Rajkot in Civil Misc. Application No. 14/85 and 87/85. Two Norwegian couples filed these applications through their power of Attorney Holder Miss Asha Trilokbhai Shah who is Superintendent of Kathiawar Nirashrit Balashram, situated at Rajkot for getting themselves appointed as guardian of two minor children, namely, "Varun" and "Dipa". The petitioners of application No. 14/165 were desirous of getting themselves appointed as Guardian of "Varun" and petitioners in the other petition prayed that they should be appointed Guardians of Minor Dipa. Both the children were destitutes. Their biological parents had surrendered their custody to the Balashram with a specific authority that they may be given in adoption to any couple either in India or abroad and of any religion. The authorities of the Balashram were also given absolute power to give in adoption these children to any couple staying abroad even if that meant taking away the children abroad.

2. The applications were duly processed by the agencies ordained. The child study Reports were also produced on the record of the case. The public notice in newspaper was dispensed with. However, special notices were issued to the

Secretary of the Balashram and Gujarat Branch of the Indian Council of Social Welfare. No protest was raised by any of these agencies. However, the present appellants raised objections and the learned Judge after considering the objections came to the conclusion that none of the objections raised by the objectors i.e. present appellants were having any substance. He, therefore, while overruling the said objections allowed the petitions and ordered that the applicants Mr. Anatain Thomasson and Mrs. Unni Thomasson of Norway were appointed as Guardians of the person and property of the male child "Varun" and Mr. & Mrs. Anna Synnova Bjorgen were appointed Guardians of person and property of Minor Dipa. Both the couples were permitted to take the children out of India to Norway where they were residing and directed that within a stipulated period the minors may be adopted by these couples in accordance with the Norwegian laws.

3. It is against this order that present appeals are directed and almost the same objections which were raised before the learned trial Judge have been sought to be raised before me by Mr. J.R. Nanavati, the learned Counsel appearing for the Appellant Objectors.

4. Mr. Nanavati raised the following contentions for my consideration.

(i) In case of adoption where the life of minor is concerned procedural safeguards shall have to be strictly followed.

(ii) The application must be through a recognised agency and it should also be made to a recognised agency.

(iii) Satisfaction of the Indian Council regarding the suitability of the child can be no substitute for the satisfaction of the parents and as the photograph of the child and the study report were not sent to the prospective Norwegian parents beforehand, the procedure can be said to be defective.

(iv) The biological mother was not consulted at all as to whether she was willing to send the child abroad permanently.

(v) The Indian Court is not conversant with the Norwegian law and hence it cannot order that the children shall be adopted under Norwegian law.

(vi) The welfare of the child is to be decided in accordance with Indian law and consistently with the Hindu law.

(vii) The foreign guardian is not contemplated by the Statute.

(viii) Lastly Mr. Nanavati contended that S. 6 of the Hindu Adoptions & Maintenance Act, 1956 lays down the requisites of a valid adoption and if the proposed adoptions by the Norwegian couples cannot be covered under the provisions of S. 6 then there is no other provision under which the said adoptions can be effectively made.

5. Barring the last contention which pertains of S. 6 of the Hindu Adoptions &

Maintenance Act, all the other contentions were raised before the learned trial Judge and they have been convincingly and conclusively dealt with by the learned trial Judge.

6. The main thrust of the argument of Mr. Nanavati was that if a Foreigner wants to adopt an Indian child he cannot be both appointed as guardian and adoptive parent. This virtually amounts to arguing that only the guardian can give the child in adoption. This particular argument has been conclusively answered by the learned Judge in para 30 of his judgment while dilating upon the provisions of S. 9(4) of the Hindu Adoptions & Maintenance Act. is contention of Mr. Nanavati, therefore, hardly need detain us any further.

7. The last contention of Mr. Nanavati can be first dealt with as it pertains to the question of law. S. 6 runs as under:-

"Requisites of a valid adoption : No adoption shall be valid unless -

- (i) the person adopting has the capacity, and also the right, to take in adoptions;
- (ii) the person giving in adoption has the capacity to do;
- (iii) the person adopted is capable of being taken in adoption; and
- (iv) the adoption is made in compliance with the other conditions mentioned in this chapter.

8. Mr. Nanavati argued that not only the person adopting should have capacity but the person giving in adoption also must have the capacity to do so; This Section would come into operation only if Hindu child is to be given in adoption by a Hindu parent to another Hindu. However, in the instant case it is not so. The court only initially appoints two Noregian couples as guardians and ultimately the said couples are directed to adopt the children in accordance with the laws of the said country.

Here Mr. Nanavati urged that as per his contention No. (v) mentioned above the Indian Court is not conversant with the Norwegian law and hence it cannot order that the children shall be adopted under the Noregian law. This is arguing in circle because though the Indian court is not conversant with the Norwegian law the Indian court is going to be regularly kept apprised of the progress and the welfare of the child by a recognised Norway agency through periodical reports and adoption by the Norwegian couple will naturally be supervised by the said agency. This court, therefore, need not be conversant with the Norwegian laws of adoption because a duty recognised Noregian agency is going to be exercising supervisory powers over the Norwegian couples which is appointed as guardians of the minors.

9. The contention of Mr. Nanavati that the religion of the child cannot be changed by the court in permitting an adoption or appointment of a guardian, also would not hold any merit because primary consideration with the court would be the welfare of the child and despite the fact that both the children were in Indian

custody of Balashram for quite some time no Indian couple of Hindu religion had signified any desire to adopt these children. Under these circumstances, the welfare of the child would always rank in priority over the religion of a child for the simple reason that following a particular religion or adopting a particular religion is an act of volition on the part of an individual and a minor being incapable of forming such volition of his own would not be in a position to select a religion. The rationalistic outlook of life also would compel the court to place religion of the child in a secondary position, its welfare being a primary consideration.

There is also no substance in the contention that the Norwegian couples have not been given an opportunity to study the child report. On the contrary from the record it is indicated that they had given the concurrence to their power of attorney holder for adoption of those two children.

10. Next it was argued by Mr. Nanavati that exhaustive guidelines have been laid down by the Supreme Court in a case reported at *Lakshmi Kant Pandey Vs. Union of India (UOI)*, regarding inter-country adoption and these guidelines have not been followed scrupulously. It is true that the Supreme Court laid down exhaustive procedural guidelines in the above case. The Supreme Court in the said case was in fact legislating and while the said observations are binding on every court in India, I feel that all the guidelines laid down for the welfare of the child have been substantially complied with in the present cases and as such no exception can be taken to the procedure followed by the authorities of the Balashram and Indian Counsel of Social Welfare. The contention that the biological parents will never see these children once they are taken abroad requires to be only stated to be rejected inasmuch as these children were abandoned by biological parents totally irretrievably and for all time to come. Hence the question of biological parents ever asking once again for the custody of these children cannot be considered for a moment. It appears to have been contended before the learned trial Judge that the possibilities of these children being subjected to abuse and cruelty cannot be ruled out and hence they should not be sent out of India. Both the couples have been thoroughly screened by recognised agency of Norway and the reports indicate that the couples are really desirous of adopting these children. They are financially sound, temperamental balanced and possess compassionate hearts. The welfare of these children, according to the learned trial Judge and according to this court also is likely to be best secured by sending them abroad to these two Norwegian couples and the apprehension that they are likely to be ill-treated appears to be totally ill founded. Again periodical reports which the court insists upon will take care of that aspect.

11. My attention was also drawn to a decision reported at *In Re: Rasiklal Chhaganlal Metha*, where the Division Bench of this court consisting of B. J. Diwan C.J. and P. D. Desai, J. (as they then were) observed that the courts must exercise greater vigilance while dealing with cases of inter-country adoption. In

the instant case, all the necessary vigilance has been exercised. !Guidelines" laid down by the Supreme Court are substantially complied with. Norwegian couples have been screened by the recognised agency of their country and the periodical reports which are called for will necessarily assure the court that the orders of the court are scrupulously carried out and that the welfare of the children in no way is adversely affected.

12. On behalf of the appellants who seem to be buzy bodies and who have delayed the proposed adoption and thereby deprived these two kids of parental love, care, and warmth, a sense of security, and a reasonably comfortable existence with their adoptive parents for a long time also argued that in the Balashram these children are being properly taken care of and hence it is not necessary that they should be given in adoption to the foreign couples. It appears that according to these appellants a child survives only on a morsel to munch, a roof to recline under and a rag to wrap around. It appears that according to the appellants, the sense of security, loving care of parents in whom the child can repose confidence are all of secondary importance. The child may survive by being provided food and shelter, it may grow in years and in size but that can hardly be said to be summum benum of the existence for the child and it the biological parents have deserted the child or if they are no longer in a position to take care of the child or if the biological parents have died rendering the child an orphan then the society owes a duty to the child that at least assemblence of comfort and care which the biological parents could have provided will be provided to the child, if some people from howsoever distant a corner of this planet, come forth to do so. In such a case a petty contention like the change of religion or culture of the child can hardly stand in the wav f the court in sanctioning inter-country a option founded and imaginary apprehensions also are of little consequence and once The court is assured that there is no possibility of the child being abused which assurance can flow from the independent agencies which are ordained for the purpose then nothing can. and need prevent the court from sanctioning an inter-country adoption.

13. In the instant case this court being satisfied that the Guidelines are scrupulously observed and the children are likely to be better looked after and would be in a position to make their way through life in more congenial circumstances there is no other alternative but to dismiss the appeals as they are without any substance. The appeals are accordingly dismissed with costs throughout and interim relief in both the appeals stands vacated.

14. Appeals dismissed.