

(1996) 04 MP CK 0024
In the Madhya Pradesh High Court
Case No : Writ Petition No. 499 of 1995

Lily Kutty

APPELLANT

Vs

State of Madhya Pradesh and Another

RESPONDENT

Date of Decision : 12-04-1996

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Juvenile Justice Act, 1986 — Section 16(2)

Citation : (1996) 41 MPLJ 1042 : (1996) MPLJ 1042

Hon'ble Judges : T.S. Doabia, J; S.K. Dubey, J

Bench : Division Bench

Advocate : Madhukar Rao, for the Appellant; Govind Singh, for the Respondent

Judgement

T.S. Doabia, J.

"Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents." Lakshmi Kant Pandey Vs. Union of India (UOI),

A staff nurse of Kamla Raja Hospital, Gwalior thought of giving mother's love and affection to a female child left abandoned by her biological parents. This one month old child was abandoned in a local hospital. The petition describes the child as "filius nullius" and also uses a strong expression - which expression should have been avoided - to describe this innocent child. This child was spotted by the Duty Doctor. The petitioner, though married for seventeen years, is

issueless. She expressed a keen desire to adopt this child. Legal wrangles intervened. The application submitted by her was forwarded to the Additional District Magistrate. He was unable to take any decision. It was under these circumstances she took recourse to Article 226 of the Constitution of India. Petitioner wants to adopt the child. Everybody wanted to help her but the question was how this could be done. The child is orphan and, as such, it is difficult to decipher to which caste, creed and religion she belongs to, who would give her in adoption, which law is to be made applicable with a view to give the adoption a legal status were some of the questions raised. The petitioner is a Protestant Christian. As such, neither the strict Hindu Law nor the Hindu Adoptions and Maintenance Act, 1956 would apply to her. Recourse during the pendency of this petition has been taken to Juvenile Justice Act, 1986 (hereinafter referred to as the "1986 Act"). Custody of the child has been given to the petitioner by the Board. The duration of this custody is three years by the Board constituted u/s 16(2) of the 1986 Act. This is an interim arrangement. What would happen to the child after three years? As she grows, she would face realities. Every time she is made to appear before a judicial or quasi-judicial authority, she would be reminded of her past. This can have a traumical effect on her. It may affect her psychologically and can also have a telling effect on her mental growth. It is in the background of this position something is required to be done. The infant child is more than a year old. Simple custody has been given. She requires parental love also. Her safe custody with the petitioner has to be recognised. As to how this can be done is a matter which is required to be gone into in this petition preferred under Article 226 of the Constitution of India.

Adoption is recognised under the ancient Hindu Law and also under the Statute of Parliament. The ancient Hindu Law deals with adoption of a son. The purpose was twofold : the first was religious, to secure spiritual benefit to the adopter and his ancestors by having a son. He was supposed to offer - sapindas funeral cakes and libations of water to the manes of the adopter and his ancestors. The second was secular, to secure an heir and perpetuate the adopter's name. In V.T.S. Chandarasekhara Mudaliar (Died) and Others Vs. Kulandaivelu Mudaliar and Others, , the Supreme Court of India, agreeing with earlier decisions of the Privy Council, has expressed an opinion that the validity of an adoption is to be determined by spiritual rather than temporal consideration. It was the view of the Supreme Court that devolution of property is only of secondary importance.

Again under the ancient Hindu Law, the requirements of a valid adoption are :

- (i) The person adopting is lawfully capable of taking in adoption;
- (ii) The person giving in adoption is lawfully capable of giving in adoption;
- (iii) The person adopted is lawfully capable of being taken in adoption;
- (iv) The adoption is completed by an actual giving and taking; and
- (v) The ceremony called datta homan (oblation to fire) has been performed.

When a Hindu gives a boy in adoption, his act is, according to the Hindu Shastras, in the nature of a sacred gift voluntarily made. It is on that account that Manu requires the gift to be "confirmed by pouring water". A daughter given in marriage, which is called kanyadan and a son given in adoption, which is called putradan, stand in this respect on the same footing. Both are gifts for religious and secular purposes.

However adoption of an orphan is not permissible under the ancient Hindu Law. See, AIR 1914 Mad. 460, Vaithilingam v. Natesa; and, AIR 1921 Mad. 331, Mareyya v. Ramalakshmi.

When we turn to the Statute Law dealing with adoption, that is, Hindu Adoptions and Maintenance Act of 1956, it recognises the traditional Hindu Law with some variations. The person who can be adopted should fall within the definition of the term "Hindu" and a person other than father, mother or guardian of the child has no power to give the child in adoption.

So far as the present case is concerned, nobody knows about the parentage of the child and naturally it is difficult to ascertain to which religion she belonged to. She is orphan. As indicated above, an orphan cannot be adopted under the Hindu Law. In spite of this strict stand available in the Hindu Law, some exceptions do exist, wherever custom permitted. An adoption of an orphan has been held to be valid. A brief reference to some of the decided cases in this regard be made. In Sukhbir Singh Vs. Mangeisar Rao and Others , it has been observed as under :-

"Under the law there can be no question that an orphan, i.e., one whose parents are not able to give him away in adoption, cannot be validly adopted. That this is the well recognized Mitakshara Law admits of no doubt. We may refer to a case recently decided by the AIR 1925 118 (Privy Council) . At the same time it cannot also be doubted that if a custom is proved under which such adoptions do take place they would have to be held to be valid. A case in point is the case of Ram Kishor v. Jainarayan, AIR 1922 P.C. 2, where the adoption of an orphan was held valid under a custom by their Lordships of the Privy Council. Every case, therefore, must depend on its own circumstances and evidence."

Again, a Division Bench of Bombay High Court in case of Motilal Mansukhram Vs. Maneklal Dayabhai, , held that among Jains residing in the Idar State in the Mahikanta Agency in the Bombay Presidency, it is customary to adopt an orphan. See, also the case of Bhagvandas Tejmal v. Rajmal, (1873) 10 B.H.C.R. 241.

The Privy Council in Ramkishore and Ors. v. Jainarayan and Ors. AIR 1922 EC. 2, concluded that Dhusars of Gurgaon District of the then United Punjab and now part of Haryana, can adopt an orphan as well. On page 5, the following observations were made :--

"Their Lordships are satisfied that the parties to this suit are governed not by the Mitakshara, as recognised, by the School of Benares, but are governed by the customary law of the Dhusars of the District of Gurgaon. They have further come

to the conclusion that it is consistent with that customary law that the adoption of orphans by Dhusars is valid."

An adoption by a Jat family of Ballabgarh District of an orphan child was held to be valid in a case decided by the Privy Council and reported as *Kunwar Basant Singh and Ors. v. Kunwar Brij Raj Saran and Ors.* AIR 1935 EC. 132. Thus even though strict Hindu Law does not permit adoption of an orphan, but wherever custom permitted the adoption of an orphan was duly recognised.

The petitioner in this case is a Protestant Christian. It would accordingly be apt to notice what is said regarding adoption in Halsbury's Laws of England, Vol. 24, Fourth Edition qua protestant United Kingdom. At page 286, in paragraph 624, it is stated that adoption may not be permissible under the Common law but it is possible in equity to adopt by a relative or a stranger. Para 624 is relevant and be noticed :-

"624. Common law and equity. At common law the rights, liabilities and duties of parents are inalienable, and adoption, in the sense of the transfer of parental rights and duties in respect of a child to another person and their assumption by him, is unknown. In equity, however, it is possible for a relative or stranger to put himself in loco parentis towards a child by undertaking the office and duty of a father to make provision for the child, so as to assume a fiduciary position in respect of his relation with the child. What regard will be had in English courts to foreign adoptions is discussed elsewhere."

In England, several statutes have been brought on the Statute Book. The purpose of these enactments is to give legal sanctity to adoption.

Reverting back to the facts of this case. The petitioner is not a Hindu and, therefore, would not be governed by ancient Hindu Scripture and the Hindu Law. She would also not be governed by the Hindu Adoptions and Maintenance Act. So far as the child is concerned, she is an orphan and it is difficult to find out as to what her religion was. In this state of affair, it would be apt to notice what was said by the Supreme Court of India in the case of *Lakshmi Kant Pandey Vs. Union of India* (UOI), . The issue before the Supreme Court was as to how to regulate adoption of children of this country by the parents who were foreign nationals. This problem was described as inter-country adoption. What was said by the Supreme Court in the matter of regulating adoption of this category of children can well be applied to the facts of this case. Some of the criteria, which was indicated by the Supreme Court, may be summarised thus :-

(i) While regulating system of adoption, it is necessary to keep in mind that the primary object of giving the child in adoption is the welfare of the child, and, therefore, great care has to be exercised in permitting the child to be given in adoption to parents, lest the child may be neglected or abandoned by the adoptive parents. (Paragraph 8)

(ii) In the absence of statutory enactment, one can seek guidance from other

statutory provisions, such as Guardians and Wards Act, 1890, or other similar Acts. (Paragraph 9).

(iii) Steps should be taken so that there is elimination of possibility of child being adopted by unsuitable or undesirable parents or the child being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents. (Paragraph 9)

(iv) Steps should be taken to see that the child is placed in a family where he or she will be able to grow into full maturity of its personality with moral and material security and in an atmosphere of love and warmth and it would not be subjected to neglect, maltreatment or exploitation. (Paragraph 9)

(v) Adoption should be sponsored and regulated through a governmental or semi-governmental agency. (Paragraph 12)

(vi) Efforts should be made to have home study report of the family where the child is to go after adoption. (Paragraph 13)

(vii) If the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption. (Paragraph 14)

What is of paramount importance and what is required to be taken note of in this case is the observation made by the Supreme Court in para 21 of the judgment referred to above. With regard to the proper age, the Court observed that if a child is to be given in adoption, it would be desirable that it is given as far as possible before it completes the age of 3 years. The reason for this was indicated as under :-

"The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be somewhat difficult for a grown up child to get acclimatized to new surroundings in a different land and some times a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown up child."

At the same time, the Court was of the view that there is no hard and fast rule and even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty. There is another important aspect which has been dealt with in the aforementioned judgment. This was with regard to keeping the biological parents away from the adopted child. The reason for this was that in case the biological parents come to know as to who are the adoptive parents, they may try to extort money from the adoptive parents. It was accordingly observed as under :-

"It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be

given to the biological parents."

The above decision given in 1984 was the subject matter of further consideration in *Laxmi Kant Pandey Vs. Union of India (UOI)* and *Another*, . The Supreme Court showed its concern for the children described as cradle babies. The Court was of the view that the social organisation should not readily assume that such children are legally free for adoption. Such children must be produced before the Juvenile Court so that further enquiry can be made and their parents and guardians are located. The Supreme Court also impressed upon the courts and the authorities dealing with the subject of adoption to take steps so that the entire procedural steps are completed at the earliest and in any event not later than two months from the date of filing of the application. The High Courts of this country were requested to call for the report from the district courts within their respective jurisdiction to find out as to whether this aspect of the matter is being given due regard. Otherwise, the Court was of the view that in these matters the paramount consideration is the welfare of the child.

Again this matter came up for consideration before the Supreme Court in the case reported as *Laxmi Kant Pandey Vs. Union of India (UOI)*, . The subject was again as to how adoption by foreign parents is to be regulated. Some guidelines were indicated. The Supreme Court has again given some guidelines in the cases reported as *Laxmikant Pandey Vs. Union of India* and others, ; and, *Sumanlal Chhotelal Kamdar, etc. Vs. Miss Asha Trilokbhai Saha etc.*, .

On the basis of the decisions given by the Supreme Court, more particularly in *Lakshmi Kant Pandey Vs. Union of India (UOI)*, and *Laxmi Kant Pandey Vs. Union of India (UOI)* and *Another*, , it can safely be said that some of the provisions, which were found relevant for inter-country adoption, would apply to the present case also. All that is required to be seen is that the parents who are keen to adopt should show a genuine desire in this regard and while passing an order in their favour the paramount consideration is the welfare of the child. It is not necessary to find out as to who the biological parents were and as a matter of fact the Supreme Court was of the view that once the process is on then the biological parents should not have any opportunity of knowing who are the adoptive parents. The Supreme Court has again laid stress that the process of adoption should be completed by the time the child attains the age of 3 years and the Court has also pointed out the necessity to expedite and finalise the proceedings as early as possible and, as a matter of fact, fixed two months as the outer limit.

In this case, the petitioner has shown a keen desire to adopt the abandoned child. On 23rd June, 1995, this Court took note of the certificate that the child placed in the custody of the petitioner is a healthy child. This Court showed concern for the safe custody of the child. On 6th July, 1995 the child was produced by the petitioner and her husband before the Court and this Court was of the opinion that the child is in safe custody and can be allowed to remain with the petitioner till this matter is finally heard and suitable directions are made by

this Court. Notices were also issued to the Secretary, State of Madhya Pradesh, Woman and Child Department, Bhopal, and the Collector of this district. This happened on 25th July, 1995. The concern of this Court towards the health of the child was responded too by the petitioner, who informed this Court that the child who is being looked after is well and is quite healthy. It was on 22nd August, 1995 the petitioner gave assurance to this Court that she would bring up the child with due love and affection. The Additional Advocate General, who appeared on behalf of the State, suggested that the matter be referred to the Juvenile Welfare Board, constituted under the Act of 1986. The Board so constituted has recommended that the child may remain in the custody of the petitioner for a period of 3 years. This order was passed on 4th September, 1995. The petitioner still wants to give a legal status and a family name to the child. She wants to adopt the child in all earnest.

We are of the view that the petitioner by her conduct and by prosecuting this petition has exhibited her keen desire to adopt the child in question. The Board constituted under the Juvenile Act has also given an opinion that the petitioner is a fit person to be given the custody of the child. If this be the position, then it would be just and proper to permit the relationship to be given a legal sanctity. If this is not done, it can have serious consequences for the child. The Board has given custody for a period of 3 years. This period would come to an end on 3rd September, 1998. If the things are allowed to linger on, the child would again be brought before the Juvenile Board. By that time she would be around 4 years of age. She would have to be explained as to why this is being done. This may create some doubt and wrong impression in her own mind. This may not be conducive to her proper up bringing. She may have to be admitted in school also. Something would be required to be said about her parents. In the absence of a proper adoption, it would be very difficult to complete this formality. A child without the family name in a school would again create a situation which may not be conducive to the welfare of the mental development of the child in question and may leave bitter impressions on her young mind.

Another matter on which something is required to be said is with regard to the jurisdiction of this court to give direction of the nature sought for in this writ petition. This aspect be also examined.

An order has been passed u/s 16(2) of the 1986 Act. As indicated above, custody of the minor has been given to the petitioner. This is for three years. The Board exercising power under the 1986 Act has passed a quasi-judicial order dealing with life and liberty of a minor. This order would certainly be amenable to supervisory jurisdiction of this Court under Article 227 of the Constitution of India and would also be open to judicial review under Article 226 of the Constitution. Again, the subject-matter of this litigation is not merely the simple question of petitioner being permitted to adopt the child but it is the very life of the minor which is going to be affected and therefore, the rights of the minor to life and liberty and her other fundamental rights are involved. As she grows, she

would have to join some educational institution and thereafter compete for getting admission to professional and vocational institutions. Somebody shall have to assert for the rights of the minor. These rights for which some one would assert do come within the sweep of fundamental rights conferred under Chapter III of the Constitution of India. As such, writ jurisdiction can be exercised for safeguarding these rights and for seeing that the minor's fundamental rights are well protected. The order passed by the Board under the 1986 Act can also be scrutinised and if need arises it can be modified also. This Court can accordingly interfere under Articles 226 and also 227. These provisions of the Constitution of India are available for giving appropriate direction in this case.

We are accordingly, of the view that the petitioner who has shown keen desire to adopt the child be permitted to adopt her. This is because :-

(i) The child in question is an orphan and she does require motherly affection and parental care. Both these are as the things stand today available and the child should not be deprived of this;

(ii) Whatever is to be done vis-a-vis the child would be done before she completes the age of three years. This would in consonance with what the Supreme Court said in Laxmikant Pandey's case (see para 12 of this judgment).

(iii) The child would be soon joining some educational institution. Sending her to an institution without parents' name would not be apt. As such, the situation warrants that she be provided with a family name.

(iv) This Court has already satisfied itself that the child is being brought up in a proper manner. The various interim orders passed by this Court do exhibit the satisfaction of this Court.

(v) That the Board constituted under 1986 Act found that the petitioner is a fit person for custody for three years.

Thus, by permitting the petitioner to adopt the child, we would not only be furthering the intention shown by the Board in the welfare of the child and also the desire of the petitioner to adopt the child. In fact both the above elements are the need of the day and require to be given legal sanction so that the child is brought up in a proper homely atmosphere.

The petitioner would accordingly file a deed of adoption before the District Judge of this District. With a view to see as to whether the child is brought up properly or not, the District Judge would nominate one or two judicial officers to visit the house of the petitioner from time to time and see that the child is being brought up with due care, love and affection. This direction is being given so that the child should not be brought to Courts and she should not be made aware of the fact that she is an adopted child of the petitioner. In due course, she may or may not come to know about her adoption but by that time she would be able to form her own impressions, judgment and take her own decisions.

Let the deed of adoption be filed before the District Judge of this district within a period of one month and thereafter the child would be deemed to be adopted child of the petitioner.