
(2014) 07 SIK CK 0008
In the Sikkim High Court
Case No : WP (Crl.) No. 04 of 2013

Mani Kumar Gurung

APPELLANT

Vs

The State of Sikkim

RESPONDENT

Date of Decision : 22-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173

Citation : (2014) 07 SIK CK 0008

Hon'ble Judges : Sonam Phintso Wangdi, J

Bench : Single Bench

Advocate : S.K. Sarraf, Advocate for the Appellant; Karma Thinlay Namgyal, Additional Public Prosecutor and S.K. Chettri, Assistant Public Prosecutor, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Sonam Phintso Wangdi, J.—This Writ Petition is directed against the impugned order of the District Collector, East District of Sikkim, dated 23-07-2013 in Misc. Case No. 28/DM/E of 2011 by which the Certificates of Identification (in short the "COI") bearing Sl. Nos. 2928/DCE dated 27-04-1989 and 2927/DCE dated 27-04-1989 issued to Mani Kumar Gurung and Mahendra Gurung, Petitioners No. 1 and 2 respectively, were declared invalid and stood cancelled.

2. The primary grounds of challenge against the impugned order are that the principle of natural justice had not been complied with by the District Collector while issuing the impugned order in as much as several representations submitted by the Petitioners had not been considered and opportunity of personal hearing not granted despite their prayers made to that effect. It is next contended that one of the grounds for rejections being the want of registration of the adoption deed by which the Petitioners were adopted by Shri Man Bahadur Gurung, was erroneous in law in as much as the requirement of registration of deeds of adoption prescribed under the law of registration prevailing in the State of Sikkim, i.e., the Sikkim State Registration of Document Rules, 1930, was not

mandatory but merely obligatory. It was then contended that even if the order of rejection of the deed of adoption, on the basis of which the questioned COI were issued, was held to be valid, it amounted to prohibition of the right of a person to adopt a child if he felt the need to do so for want of an issue. That the guideline for issuance of COI prescribed under Notification No. 66/Home/95 dated 22-11-1995 would leave an aggrieved person without any remedy in the event of the Petitioners being held to be ineligible thereunder.

3 (i). Appearing for the Petitioners, the bulwark of the submissions of Mr. S.K. Sarraf, Advocate, was that after the submission of the closure report u/s 173 of the Code of Criminal Procedure, 1973, in Vigilance R.C. No. 8 of 2004 by the prosecution, the matter stood entirely closed leaving no further scope for it being reopened. Order of the Chief Judicial Magistrate, East and North Sikkim, dated 04-09-2006 in Vigilance R.C. No. 8 of 2004, was specifically referred to emphasise this, more particularly the following:-

Heard complainant, perused the final report including the copies of documents filed along with it, final report accepted.

Seized documents be returned to the rightful owner after due verification.

(ii) As per the Learned Counsel, the only option left for the prosecution as a consequence of the above order was to return the questioned COI to the Petitioners. But the Respondent No. 2 instead issued notices calling upon the Petitioners to show cause as to why their services obtained on the strength of the COI, should not be terminated leading the Petitioners to prefer WP (Crl.) No. 2 of 2008 before this Court which eventually was allowed by order dated 06-07-2010.

(iii) It was submitted that by virtue of the aforesaid order of the Chief Judicial Magistrate dated 04-09-2006 and the order dated 06-07-2010 of the Hon''ble High Court in WP (Crl.) No. 2 of 2008, nothing further survived for questioning the validity of the COI and that the proceedings before the District Collector culminating in the impugned order would also amount to double jeopardy and, therefore, liable to be quashed.

4. I have heard Mr. S.K. Sarraf, Learned Counsel for the Petitioner and Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor.

5. Re-emphasising the aforesaid contentions Mr. S.K. Sarraf submits that the right of adoption of an individual cannot be deprived and that the cancellation of the COI of the Petitioners by the impugned order of the District Collector, East Sikkim was illegal and could not be countenanced in the eye of law.

6 (i). Mr. Karma Thinlay Namgyal, on the other hand, submits that the order of the Hon''ble High Court dated 06-07-2010 in WP (Crl.) No. 2 of 2008 did not completely bar the authorities in proceeding further with the subject-matter as regards the issuance of the COI. He has referred to the following portion of the judgment of the Hon''ble High Court dated 06-07-2010 in WP (Crl.) No. 2 of 2008:-

5. In the circumstances, the writ petition is disposed of by declaring that the Vigilance Case No. RC-8/2004 stood closed on 4th September, 2006 and also by quashing the show cause notices referred to above, as well as the order of the Additional District Collector, East at Gangtok, Sikkim dated 7th March, 2008, along with the show cause issued by the employers referred to above. This order will not however prevent the District Collector, East or any other person(s) entitled to interfere with the subject certificates of identification to take such steps as he or they may be advised in relation to the said certificates of identification after giving appropriate prior notice to the petitioners and after giving them appropriate opportunity of hearing. Only thereupon if it is thought fit, the employers may take such further steps as they may be advised.

[underlining mine]

(ii) It is thus submitted that following from the above, the District Collector, East, or any other person(s) were entitled to interfere with the subject certificates of identification with the liberty to take steps as would be permissible under the law subject to the condition that before taking any action, prior notice ought to be issued and, opportunity of hearing be afforded to them. It is his submission that in pursuance of this, the District Collector, East Sikkim, had proceeded against the Petitioners in Misc. Case No. 28/DM/E of 2011. This would be obvious from the very opening words appearing in the order dated 27-06-2011 which reads:-

.....Whereas the Hon''ble High Court of Sikkim in its Order passed in the WP (Crl) No. 02 of 2008 - Mani Kumar Gurung & Another Vs. State of Sikkim & Others, had quashed the order of the Additional District Collector, East, dated 7th March, 2008 canceling the Certificates of Identification bearing No. 2927/DC/E and 2928/DC/E both dated 27th April 1989, of the Respondents. The Hon''ble Court had also quashed the Show Cause Notices issued to the Respondents by the Department of Personnel, Administrative Reforms & Training, Government of Sikkim in pursuance of the Order of the Addl. District Collector, East.

The Hon''ble Court had also stated that its Order will not however prevent the District Collector, East, or any other person(s) entitled to interfere with the subject Certificates of Identification to take such steps as he or they may be advised in relation to the said Certificates of Identification after giving appropriate prior notice to the Petitioners and after giving them appropriate opportunity of hearing.

Now, therefore, the Respondents are hereby directed to show cause why the Certificates of Identification bearing No. 2927/DC/E and 2928/DC/E both dated 27th April 1989 issued to them by this Office should not be cancelled, for having obtained these certificates fraudulently, posing themselves as the sons of Shri. Man Bahadur Gurung, who is actually their maternal grandfather.

They shall file their reply on or before the date fixed for hearing. Issue a copy of this Order to both the Respondents.

Next date fixed on 08.07.2011.

.....

[underlining mine]

7 (i). As would appear from the proceedings that would follow thereafter the Petitioners appear to have been provided with sufficient opportunity to place their case by filing their show causes and making submissions either in person or through their Counsel. In fact, the record of proceedings of the case filed as Annexure P-8 clearly shows that the Petitioners were represented by a Counsel throughout the proceedings. Amongst the orders passed by the District Collector, Respondent No. 2, the order dated 01-06-2012 which has been termed as the preliminary order in the impugned order, Annexure P-1, reflect the entire sequence of events and the details of the submissions placed on behalf of the Petitioners and are found to have been dealt with elaborately. Since the order dated 01-06-2012 is comprehensive and reflective of the entire issues raised before this Court it is felt appropriate to reproduce those for convenience:-

Whereas in pursuance of the Order dated: 6.7.2010 of the Hon'ble High Court of Sikkim in the WP (Crl) No. 02 of 2998, I had initiated a fresh enquiry regarding the Certificates of Identification (COI) issued to the Respondents by the Office of District Collector on 27.4.1989. Accordingly by order dated: 27.6.2011 the Respondents were asked to show cause as to why the COIs issued to them should not be cancelled for having obtained them fraudulently, posing themselves as the sons of Shri Man Bahadur Gurung, who is actually their maternal grandfather.

After availing additional time, the Ld. Counsel appearing on behalf of the Respondents, submitted a reply on 18.8.2011 to the show cause notice issued by me. For various reasons, further hearing on the matter could not be held till 30.11.2011. On 30.11.2011, the Ld. Counsel for the Respondents submitted that the Sub-Registrar, East Sikkim should be asked to trace out the file related to the registration of adoption deed of the Respondents. However, in order to trace out the said file, the Respondents were asked to submit a copy of the Registered Adoption Deed to find out the date of registration in order to enable the Sub-Registrar to retrieve the file. On 5.12.2011, the Ld. Counsel for the Respondents submitted a Photostat copy of the Adoption Deed but it was found that the said Adoption Deed had not been registered till date. On 16.12.2011, the Ld. Counsel for the Respondents clarified that he hadn't asked for the Adoption File but for the file through which the issue of COI to the Respondents was processed. On the same day, the COI Section Officials were directed to trace the said file.

On 25.2.2012 and 15.3.2012, the Ld. Counsel for the Respondents sought adjournments on personal grounds and the same was granted. On 21.4.2012, the Ld. Counsel submitted an additional reply to the show cause notice issued to the Respondents on 27.6.2011. On 25.5.2012, the Ld. Counsel for the Respondents again sought adjournment of the hearing into the matter, on health

grounds and the adjournment was granted. On 1.6.2012, the Ld. Counsel for the Respondents appeared before me and made further written submissions on the matter. Meanwhile, the officials of COI Section submitted that whatever process papers available in the existing case file are the only papers available on this matter.

Heard the Ld. Counsel for the Respondents in detail. The issues which he has raised in his written submissions so far in this matter are as follows:

(i) That the instant matter was enquired by Vigilance Department, Govt. of Sikkim, vide Vigilance Case No. RC 8 of 2004 based on a complaint dated: 17.9.2004, wherein after completion of due and proper investigation, Final Report was submitted before the Ld. CJM, East & North, Sikkim, Gangtok for closure and the same was accepted by the Ld. CJM.

(ii) That no appeal was preferred by the Sikkim Vigilance Police against the said order of the Ld. CJM.

(iii) That the instant Show Cause notice is not accompanied by any Complaint and besides, no appeal has been preferred by the State of Sikkim against the orders passed on 6.7.2000 by the Hon"ble High Court.

(iv) That the instant show cause notice has been issued without any basis of complaint from any corner, when the case was finally closed in 2006 for all practical purposes and is a double jeopardy of the alleged offence.

(v) That though the matter has been taken suo motu, no copy of the compliant was given to the Respondents.

(vi) That after the order passed by the Hon"ble High Court of Sikkim on 6.7.2010, there is no fresh enquiry or any material for initiating the present proceeding over and again on the same alleged subject matter.

(vii) That under which provision of law, suo motu notice has been issued when the case has already been finally closed in 2006.

(viii) That the COI were issued to the Respondents on 27.4.1989 when they were minor students and the COI was obtained by their adoptive father on the basis of adoption deed and that the Respondents had no role to play in obtaining the COI.

(ix) That the Respondents were adopted as per the prevailing customs and norms prevailing in villages in Sikkim and an adoption deed was also made.

(x) That the instant proceedings do not appear to be either Civil or Criminal in nature, and if it is a civil proceeding, the provisions of law involving adducing of evidence, written statements, cross examination, and hearings be followed.

On going through the submissions made by the Ld. Counsel for the Respondents, I find it expedient to reply to the issues raised by him, in the interest of natural justice, and further clarity on the instant enquiry.

(i) The present proceedings before me are neither Civil nor Criminal proceedings. It is an enquiry proceeding. When the Issuing Authority of a Certificate has reasons to believe that the Certificate issued by him/her has been obtained by misrepresentation of facts, the authority has the power to enquire and cancel the certificate, after giving opportunities of being heard, to the parties concerned. In the instant matter, the COI issued to the Respondents on 27.4.1989 by the then District Collector, East Sikkim, have been obtained by the Respondents showing Shri Man Bdr. Gurung, as their father though the natural father of the Respondents is Shri Chandra Bdr. Gurung of Darjeeling. This has been confirmed by the Respondents themselves in the written submissions they have made before me. It is by misrepresentation of facts that the COIs have been obtained by the Respondents. Therefore I, being the Issuing Authority of COI, have the power to initiate a suo motu enquiry into the matter, to find out the facts and take appropriate action in the interest of justice.

(ii) The Vigilance Case referred to by the Respondents in their reply is a Criminal Case filed against the Respondents. Since the Investigating Agency could not collect enough evidence to prove the commission of a criminal offence, they had submitted a Closure Report before the Ld. CJM, E & N, and the same was accepted by the Ld. CJM. Nevertheless, it is a fact that Shri Man Bdr. Gurung is not the natural father of the Respondents and this has been accepted by the Respondents themselves in the submissions made before me. Though there may not be enough evidence to prove the commission of a criminal offence by the Respondents, the fact that Shri Man Bdr. Gurung has been shown as the father of the Respondents in the COI issued to them, is enough of a reason for enquiry and cancellation of the COI.

(iii) The claim of the Respondents that this enquiry would be a double jeopardy upon them is unjustified. Just because the Vigilance Case against them was closed due to lack of evidence, it does not mean that the COI issued to them is in order. Both these proceedings are entirely different and cannot be linked for convenience of the Respondents. The vigilance Department has nowhere certified the authenticity of the COI. If this enquiry would result in double jeopardy to the Respondents, then the Hon''ble High Court in its esteemed opinion wouldn't have remarked that its Order will not however prevent the District Collector, East, or any other person(s) entitled to interfere with the COIs to take such steps as he or they may be advised in relation to the said COIs after giving appropriate prior notice to the parties and after giving them opportunities of being heard. If the Hon''ble High Court had felt that this matter had ended with the closure of the Vigilance Case, then the need to make the above mentioned remarks doesn't arise. Therefore this is to once again reiterate the fact that this enquiry has nothing to do with the vigilance case which was a criminal proceeding against the Respondents.

(iv) The present enquiry is entirely a fresh enquiry without any reference to the enquiry done by the Vigilance Department. If the COI is found to have been

obtained by misrepresentation of facts, it is liable to be cancelled, irrespective of whether it is a criminal offence or not.

(v) I have initiated this enquiry suo motu, on having reasons to believe that the father of the Respondents is not Mr. Man Bdr. Gurung. There is no complaint filed before me on this issue by anyone and therefore the question of supplying the copy of complaint to the Respondents does not arise. The cause of action has been clearly mentioned in the Show Cause Notice issued to the Respondents on 27.6.2011. Therefore the repeated claim of the Respondents to supply a copy of the compliant is ridiculous.

For the sake of brevity, I would like to bring out the core issues in this matter, as detailed below:-

The Respondents had obtained COIs in the year 1989 wherein Mr. Man Bdr. Gurung has been shown as their father. Enquiries reveal that Mr. Man Bdr. Gurung is not the father of the Respondents but is the maternal Grandfather of the Respondents. The biological father of the Respondents is one Mr. Chandra Bdr. Gurung of Darjeeling. This has been accepted by the Respondents themselves in their submissions made before me. However, the claim of the Respondents is that their maternal grandfather had adopted them as his sons as per the prevailing customs and norms and an adoption deed was also made by him. A copy of the Adoption Deed has been submitted by the Respondents before me during the present enquiry. However, it is found that the said Adoption Deed has not been registered as on date.

Therefore the main issue to be decided is what would be the validity of an Adoption Deed that is not registered with the Sub-Registrar concerned and whether the Respondents can obtain COI through their Adoptive Father When the Adoption Deed has not been registered under the Registration of Documents Rules, 1930.

Sikkim is a sensitive border State and there are restrictions imposed upon purchase of immovable property and getting Government employment by those who are not locals of the State. Certificate of Identification is one important document which is used for differentiating the locals from the non-locals. Those who are born to a person not in possession of COI are also not eligible for obtaining COI. In this scenario, chances of a non-local person getting adopted by a local for the sake of obtaining COI are high. In order to prohibit unscrupulous elements in adopting such a tactic to obtain COI for which they are otherwise ineligible, all adoptions in Sikkim are required to be registered under the Registration of Documents Rules, 1930, with the express sanction of the Government.

In the instant matter, since the adoption deed in question has not been registered as prescribed above, in my opinion, the said adoption deed is invalid in the eyes of law and therefore the Respondents were ineligible to obtain the COIs. If the Respondents think otherwise, then they may put forth their

arguments on the next date of hearing. This seems to be the sole issue to be decided in this matter and beyond this, I do not find anything to be argued upon. Since this matter involved a question of law and not question of facts, the need to take evidence, cross examine witnesses, etc. does not arise.

Despite several opportunities given to the Respondents, they have failed to give a strong reason to show cause as to why their COIs should not be cancelled, especially with regard to the validity of the Adoption Deed. Nevertheless, in the interest of justice, the Respondents are hereby given another opportunity to show cause under what provisions of law the adoption deed in question can be treated as a valid document in the eyes of law. Since this enquiry had been adjourned on several occasions before, the Respondents are hereby directed to place their written arguments before me on the question of law described above, on the next date of hearing, without seeking further adjournment.

The next date of hearing on this matter shall be on 15.6.2012.

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(ii) The impugned order dated 23-07-2013 is the final order passed on the basis of the preliminary order dated 01-06-2012. The relevant portion of the impugned order is also reproduced below for convenience:-

.....

Therefore it has established through this enquiry that Mr. Mani Kumar Gurung and Mr. Mahendra Gurung are not the real children of Mr. Man Bahadur Gurung of Lungchok chuchachen, East Sikkim but their actual father is one Mr. Chandra Bahadur Gurung of Darjeeling as already have been accepted even by the Respondents themselves. Further the Respondents didn't disclose during the process of obtaining Certificates of Identification that they are not the real sons and they are claiming on Certificates of Identification on the basis of being "Adopted" by Mr. Man Bahadur Gurung who is actually maternal grandfather of the Respondents. I am also agreed to the opinion made by the then District Collector in the preliminary Order of 01/06/2012 that since the Adoption deed on the basis of which the Respondents are claiming to be "Adopted sons" has not been duly registered under the registration of documents rule, 1930 with the express sanction of the Government it is invalid in the eyes of law and therefore the Respondents were not eligible to obtain the Certificate of Identifications.

The Certification of Identification bearing No. 2928/DCE dated 27/04/1989 issued to Mr. Mani Kumar and Certificate Identification bearing No. 2927/DCE dated 27/04/1989 issued to Mr. Mahendra Gurung are hereby declared invalid and hence cancelled.

.....

As would appear from a bare reading, the order meets all the points canvassed

on behalf of the Petitioners and I find no reason to interfere with those.

(iii) From the records of proceedings reproduced above, no procedural illegality appear to have been committed in the decision making process. In the present proceedings this Court is not sitting in appeal against the finding of the District Collector in the impugned order.

(iv) Mr. Karma Thinlay Namgyal submits that even if it is accepted that the Petitioners were validly adopted by said Man Bahadur Gurung they would not fall within the eligibility criteria prescribed under Notification No. 66/Home/95 dated 22-11-1995 for being issued with the COI.

(v) I have perused the notification of which the relevant portion and the eligibility criterion is reproduced below:-

.....

In supersession of the Memorandum No. 5(92) 229/GEN/EST, dated 25th September, 1976, Notification No. 285/GEN/EST, dated 28th January, 1980, Memorandum No. 5(92) 5/GEN/EST, dated 9th April, 1981 and Circular No. 339/HS/87, dated 17th March, 1987, the State Government is hereby pleased to authorise the District Collectors, Sub-Divisional Officers and Revenue Officers within their respective jurisdiction to issue Certificate of Identification to the persons falling in the different categories as indicated below on the recommendations of the Gram Panchayat and being duly satisfied with such recommendation:-

1.

2. A person whose name is not found registered in the Old Sikkim Subject Register but he/she has established beyond doubt that the name of his/her father/husband/paternal grandfather/brother from the same father has been recorded in the Old Sikkim Subject Register or

.....

[underlining mine]

(vi) When Mr. S.K. Saraff was pointedly asked as to whether the Petitioners would be eligible for the COI in the admitted position that their adoptive father Late Man Bahadur Gurung was in fact their maternal grandfather, he fairly conceded that they would not.

(vii) This is the crux of the entire finding of the District Collector, East Sikkim, in his order dated 01-06-2012 and the impugned order dated 23-07-2013 as would appear from its extract above. The question as to whether registration of the deed of adoption is mandatory or obligatory, in my considered view, would be entirely irrelevant.

8. Whether the Petitioners should be allowed to continue in service or not is a matter which the State-Respondent No. 1 shall consider. The fact, as urged on

behalf of the Petitioners, that they had been in service for almost two decades on the basis of a document issued by the District Collector, East Sikkim, the appropriate authority under the Statute, believing those to be genuine and, therefore, their cases should viewed sympathetically, is for the State-Respondent No. 1 to consider. As far as this Court is concerned, it shall rest short of that.

9. In these circumstances, I am of the view that the Petitioners are not be entitled to the reliefs as sought for in this Writ Petition and is, therefore, liable to be dismissed.

10. In the result, the Writ Petition is dismissed.

11. No order as to costs.