

(2008) 07 UK CK 0062

In the Uttarakhand High Court

Case No : Writ Petition No. 407 (M/B) Of 2008

Massoud Hadjahmad & Others

APPELLANT

Vs

State Of Uttarakhand & Others

RESPONDENT

Date of Decision : 08-07-2008

Acts Referred:

Juvenile Justice (Care And Protection Of Children) Act, 2000 — Section 41, 41(3)
Juvenile Justice (Care And Protection Of Children) Rules, 2007 — Rule 33, 33(5)
Hindu Adoptions And Maintenance Act, 1956 — Section 9, 9(5), 10, 11
Family Courts Act, 1984 — Section 7
Code Of Civil Procedure, 1908 — Section 9
Constitution Of India, 1950 — Article 226, 227

Citation : (2008) 07 UK CK 0062

Hon'ble Judges : Prafulla C. Pant, J; Dharam Veer, J

Bench : Division Bench

Advocate : Rajendra Dobhal, B.K. Gupta, N.P. Sah

Final Decision : Allowed

Judgement

Prafulla C. Pant, J

(1) By means of this writ petition, moved under Article 226 read with Article 227 of the Constitution of India, the petitioners have sought writ in the nature of certiorari quashing the order dated 29.02.2008, passed by Civil Judge (Senior Division)/ Fast Track Court, Almora, in Suit No. 12 of 2008, whereby said court has directed the plaint be returned to the petitioners for presentation before the competent court.

(2) Heard learned counsel for the parties.

(3) Brief facts of the case are that the petitioner no. 1 Massoud Hadjahmad and petitioner no. 2 Mrs. Maheswari Sharma are husband and wife. They are issue less couple and citizens of Canada. Petitioner No. 2 originally belongs to district pithoragarh in the State of Uttarakhand. They moved a petition under the Juvenile Justice (Care and Protection of Children) Act, 2000, for adoption of

minor child Palak, who is living in Children's home, Almora (Rajkiya Shishu Bal Grah, Karnataka Khola, Almora). On behalf of respondents there is no objection to the adoption sought by the petitioners as the petitioners fulfilled all the required conditions for the adoption of the child. However, the trial court took the view that under Section 41 of the aforesaid Act, it is the Board (Juvenile Justice Board) which is empowered to give the child in adoption, as such the suit is not cognizable by the Civil Judge (Senior Division) / Fast Track Court, hence the order directing the return of the plaint to the petitioners for presentation before the competent court, was passed.

(4) On the face of it, reason mentioned in the impugned order dated 29.02.2008, passed by the trial court is erroneous in law as Section 41 which empowered the Board to give child in adoption has undergone an amendment in the year 2006. Before further discussion, we think it proper to quote the provisions of Section 41 as amended vide Act No. 33 of 2006. Amended Section 41 of Juvenile Justice (Care and Protection of Children) Act, 2000, reads as under:-

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 the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a court after satisfying itself regarding the investigations having been carried out as are required for giving such children in adoption.

(4) The State Government shall recognize one or more of its institutions or voluntary organizations in each district as specialized adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified under sub-section (3): provided that the children's homes and the institutions run by the State Government or a voluntary organization for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified 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 Court may allow a child to be given in adoption-

(a) to a person irrespective of Marital status or;

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

(c) to childless couples."

(5) The above quoted provision makes it clear that now after the amendment which come into force on 22.08.2006, the power to give a child on adoption under the Act is given to a court, which earlier vested with Juvenile Justice Board). Rule 33 of Juvenile Justice (Care and Protection of Children) Rules, 2007, framed under aforesaid Act, provides the procedure of adoption. Sub-rule (5) of Rule 33 of the Rules provides that for the purposes of section 41 of the Act, 'court' implies a civil court, which has jurisdiction in matters of adoption and guardianship and may include the court of the district judge, family courts and city civil court. On behalf of respondents, it is contended before us that Section 41 read with Rule 33 makes it clear that it is only that civil court which has powers of adoption and maintenance, can exercise the power of giving a child in adoption under Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000. In this connection on behalf of respondents our attention is drawn to the provisions of Sections 9, 10 and 11 of the Hindu Adoptions and Maintenance Act, 1956. Clause (ii) of explanation to sub-section (5) of Section 9 of said Act provides that 'court' means the city civil Court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides. Since in the present case both the petitioners are not Hindu as such it cannot be said that the provisions of Hindu Adoptions and Maintenance Act, 1956, is applicable to it. Had both the parties been Hindu, it could be said that this suit would lie before District Judge, but in a suit filed by Muslim for adoption, the said Act cannot be said to be applicable. Apart from this, wherever Family Courts are constituted, Section 7 of Family Courts Act, 1984, confers the jurisdiction on it to decide such matters. Since, in District Almora, so far, there is no Family Court established, as such the jurisdiction of other competent courts is not barred. There is no 'city civil court' designated in the State of Uttarakhand, therefore, in that circumstance court of Civil Judge (Senior Division) being the principal civil court has the power to entertain the suit in question under Section 9 of Code of Civil Procedure, 1908, read with Bengal, Agra, Assam Civil Courts Act, 1887.

(6) In these circumstances, for the reasons as discussed above the writ petition deserves to be allowed. The same is allowed. The impugned order dated 29.02.2008, passed by Civil Judge (Senior Division) / Fast Track Court, Almora, is hereby quashed. The said court is directed to decide the petition treating the same under Section 41 of Juvenile Justice (Care and Protection of Children) Act, 2000, as expeditiously as possible. (Stay Application No. 1100 of 2008, also

stands disposed of).