

(1991) 02 MP CK 0055
In the Madhya Pradesh High Court
Case No : C. R. No. 259 of 1990
Mrs. Joyce Woodfield William

Date of Decision : 07-02-1991

Acts Referred:

Guardians and Wards Act, 1890 — Section 10, 9

Citation : (1991) 02 MP CK 0055

Hon'ble Judges : T.N. Singh, J

Bench : Single Bench

Advocate : N.K. Modi and Raju Sharma and Arun Mishra Amicus cutial, for the Appellant;

Judgement

1. This is a case of "foreign adoption" and the revisionist is aggrieved by order dated 12-11-1990, passed by learned District Judge, Gwalior, acting as a Guardianship Court. By that order, following the guidelines laid in Lakshmi Kant Pandey Vs. Union of India (UOI), the Court below has directed notices to issue to Indian Council of Social Welfare on the application of the revisionist, made under Sections 9 and 10 of Guardian and Wards Act, 1890, for short, the "Act".

2. Before in this matter, the biological parents of the child have appeared and they have filed affidavits. In the Court below also they appeared and their statements were recorded. To make up the deficiency pointed out by Shri Arun Mishra, who has acted in this matter as amicus curiae, those affidavits were filed in this matter.

3. Formoving this Court, the ground stated is that the procedure adopted by learned District Judge is contrary to the guidelines which their Lordships of the Supreme Court have laid down and that the disposal of the guardianship application. which should have been decided within two months, has prolonged unduly. That there will be further delay if proposed procedure is adhered to is another complaint. If the learned District Judge has transferred the matter to Seventh Additional District Judge after holding it for 3 months, the apprehension must be regarded as genuine. /

4. Learned amicus curiae submitted that there is a ticklish issue to be settled in this matter and appropriate guidance for disposal of the application by the Court below is called for because the Laxmikant Pandey cases" guidelines do not cover directly the instant case. In those cases, interposition of a Placement agency and another Scrutinising agency is contemplated and direct contract between the adoptive and biological parents is excluded. Here, the biological parents (both Indian nationals) are known to the adoptive mother who is an American national of Swiss domicile, residing at Zurich. Indeed, as stated in their affidavits, the biological parents of the four month old infant Karan Sanju Rai, have admitted that the revisionist/applicant was introduced to them by the brother of biological mother, who was residing at Zurich at the time of filing of the application. The moot question, indeed, is, if such an application could be entertained. If so, how it is to be dealt with.

5. The first case of Laxmi Kant Pandey Vs. Union of India (UOI) and Another, and the third case, on 3-12-1986, reported in Laxmi Kant Pandey Vs. Union of India (UOI), By referring to the provisions of the two Adoption of Child Bills of 1972 and 1980, and of the Declaration of the Rights of the Child adopted by the general Assembly of United Nations of November, 20, 1959, their Lordships laid down in the first case itself certain guidelines in respect of inter-country adoption. The necessity of a provisional guardian of the child to be adopted in foreign land for it to be taken out from this country and to be looked after till adoption was found obvious because adoption could only be in accordance with the law of the country of the adoptive parents. Their Lordships however observed that after exhausting the possibility of adoption of the child within the country by Indian parents, inter-country adoption should be permitted, hinting at the possibility of trafficking in the child and for other reasons also. To wit, "the possible effect of assimilation and integration of a child in foreign family with different racial and cultural background". However, para 11 of the Report (AIR) in the first case deserves to be quoted verbatim as that has signal relevance to the moot question agitated in the instant case :

"11. We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare."

6. Appearing for the revisionist, Shri Modi has submitted that in this case, at the other end the adoption is duly sponsored by a recognised foreign agency despite the brother of biological mother of the child having introduced her to the adoptive mother. He has also submitted that all formalities contemplated by their Lordships in the first case have been duly completed and the required

documents, such as, the Study Report prepared by the foreign agency of the adoptive parents, photographs, marriage certificate, medical certificate etc. etc. duly vetted by the said agency (Helga Naya), have been filed in the Court below in support of the application. That agency has also filed its own "undertaking" to meet the requirements of the relevant guideline that within two years from the date of arrival of the minor in the home of the adoptive mother, in Switzerland, adoption formalities shall be completed and progress reports shall be sent periodically in respect of the child's welfare. Therefore, counsel submitted, in this matter, the requirement of notice to the Indian Council of Social Welfare or the Indian Council for Child Welfare is not germane and that is to be dispensed with. He submitted further that affidavits of biological parents fulfil the other requirements contemplated by their Lordships that they be made to understand fully all implications of relinquishing their children for final adoption. Accordingly, direction be made to the learned District Judge to pass orders immediately disposing of finally the application filed for provisional guardianship as that was made on 10-8-1990 and that it would be soon well nigh six months.

7. Reading carefully and conjointly the three decisions of the Apex Court in the Laxmikant Pandey's case, I have entertained the view that the guidelines set out in the first case, modified subsequently to some extent in the later two cases, express the concern and anxiety of the Court to pre-empt trafficking in children and the guidelines are, therefore, to be read in that light to serve that purpose. It is, therefore, that no derogation is contemplated from statutory requirement of the Act; the safeguards indicated supplement only the provisions of the Act which do not specifically deal with application of "provisional guardianship" of foreigners. As Section 8 (a) of the Act contemplates application by a prospective guardian, that is not negated though "processing" by a Placement agency is suggested to obviate practical difficulties in dealing with such cases. Although in the first case, their Lordships have recommended for adoption the procedure followed by Bombay and Delhi High Court under which notice to the Indian Council of Social Welfare is contemplated, in the second case, it is stated that the said agency has not to function as a Placement agency, but it can act as Scrutinising agency and that the two agencies must act independently. In the third case, at para 4 of the Report (AIR) the desirability of the biological parents and the adoptive parents, not knowing each other is stressed.

8. However, it is implied that the function of a Placement agency operating in this country is essentially that of liaison, deputising for the foreign Sponsoring agency. What is essential is that the biological parents must be in a position to make up their mind fairly and firmly in relinquishing the child and that they are affected neither by duress nor by temptation. It is equally important that the adoptive parents make an intelligent, honest and bona fide decision to adopt the particular child after being furnished with the requisite particulars of the child and its biological parents. The purpose of adoption should be nothing else than providing the child with parental love and care, as also material and moral security, for the full and harmonious development of his personality. In that

regard, at para 17 of the Report (AIR) in the second case, their Lordships reiterated the requirement contemplated in the first case of sending for the consideration of the adoptive parents (through the Placement Agency and the foreign Sponsoring agency) "a complete dossier of the child consisting of photographs, medical reports, Child study report and other relevant particulars". At para 5 of the Report (AIR) of the same case, furnishing to the Court with the application for guardianship, the medical report and child study report, prepared by the Placement agency is also contemplated evidently to enable the Court to apply independently its mind to the decision of the adoptive parents to reach the conclusion that the decision was bona fide and that the adoption proposed is not fake, but genuine. Indeed, there may be practical difficulty in transferring custody of the child to the adoptive parents without interposition of a Placement agency and necessary travel arrangements including preparation of Passport, Visa etc. is to be made and an "undertaking" is also to be furnished by the foreign agency for repatriation of the child should that eventuality happen.

9. There is universal recognition in our national law (under the Act) and international law "under United Nations Declaration of Children's Rights) of the fact that a Guardianship Court can exercise its jurisdiction only for the "Welfare" of the child as per Section 7 of the Act or "best interest" of the child, as per Principle 7 of the Declaration. In the second case, therefore, at para 7 of the Report (AIR), their Lordship have spelled out the main functions of the Scrutinising agency that it should assist the Court in deciding if it is in the "best interest" of the child to be given in adoption to the prospective adoptive- parents of a foreign country in the particular facts and circumstances of a case even if, as elsewhere observed by them, the decision of the biological parents in so far as it concerns them may be final. They have also vocalised the reasons at para 14 of the Report (AIR) in the second case, for ensuring absence of direct contact between biological parents and adoptive parents that thereby possibility of subjecting the latter to extortion by the former and of the child's suffering emotional stress in the course of its upbringing is excluded. Indeed, one of the functions it is of the Placement agency, as stated by their Lordships, to secure due relinquishment of the child by the biological parent to ensure that it is "free" for adoption.

10. Having fully analysed the scheme of the judicial guidelines of the three Laxmi Kant Pandey's cases, I have reached the conclusion that thereunder no firm and rigid bar is contemplated against entertaining an application by foreigner adoptive parents when it is not "processed" by Placement agency and when the biological and adoptive parents know each other through some other agency. The immutable requirement, however, is that the Court must be satisfied that the proposed adoption does not involve any trafficking in the child sought to be given in adoption and that the adoption, will be in the "best interest" of the child and that the "Welfare" of the child is best subserved by the proposed adoption. In exercising its jurisdiction in passing the order for provisional guardianship, it is advisable, therefore, for the Court to be assisted by

specialised agency, recognised by the Government of India and it is also necessary that the Court addresses itself to the following questions :

(1) If the requisite particulars, as prescribed in the chain of decisions in Laxmi Kant Pawky's cases are duly exchanged between the biological parents and the adoptive parents, albeit preferably (and not invariably) through a specialised agency, recognised by the Government of India, except in a case in which the two sides are known to each other through some other agency of unimpeachable credentials ?

(2) Whether on records of the case, materials appear in the form of copies of the prescribed documents and opinion of the specialised agency concerned to satisfy the Court that the decision of the biological parents was not influenced by either duress or temptation and that of the adoptive parents was honest, intelligent and bona fide and that the proposed adoption would serve the salutary purpose of "Welfare" of the child and it was in its "best interest" ?

(3) That formalities completed and documents exchanged between parties and furnished to Court were suggestive categorically of the child being "free" for adoption and there was clear possibility of a smooth legal adoption in the foreign country in accordance with the law of that country. About arrangements made for travel and transfer of custody of the child and furnishing of "undertaking" in regard to apprehended repatriation of the child satisfactory and reliable information must also be available to the Court.

11. Accordingly, even if there is no interposition of a Placement agency in any case and the biological parents have taken a decision to give their child in adoption to foreign parents, it would be necessary for the Court to notice the specialised agency, such as the Indian Council of Social Welfare or the Indian Council of Child Welfare, to seek assistance of such an agency in examining the questions aforesaid before rendering final decision on the application of the prospective provisional guardians. To avoid delay in disposal of the application it shall be competent, due steps being taken in that regard by the applicant, to send copies of the documents filed, to the concerned agency to enable the agency to transmit expeditiously its opinion to the Court. That may be done in this case and the payment to be made to the agency for service rendered, as contemplated by the Hon'ble Supreme Court, may be remitted by Bank Draft simultaneously. A copy of this order be sent to the concerned agency, along with the notice.

12. If the biological parents have not executed the deed of relinquishment in respect of the child, they shall be asked to do so by the Court before passing the order so that the child is legally "free" for adoption when the order is passed and there is no legal hurdle for it to be entrusted to the custody of the adoptive parents or the authorised agency. It would be advisable also for the Court to ask the biological parents, in a case in which they know the adoptive parents and about child's destination, to give to the Court an undertaking that they would

not misuse the privilege and they would cease to have any contact with the child or the adoptive parents. It is necessary to do so to exclude the possibility of subjecting the adoptive parents to threats of extortion and mainly of disturbance being created to them or to the child during the course of upbringing of the child.

13. In the instant, case, some apparent deficiencies are noted and as such, the Court below is directed to ask the revisionist/applicant to take necessary steps in that regard before soliciting opinion of the Indian Council of Social Welfare or the Indian Council of Child Welfare, Though the biological parents have made statements in the Court below and have filed affidavits in this Court, that mainly meets the requirement of satisfying the Court about their motive and excludes possibility of any trafficking in the child. Even if they have been able to collect all information for their satisfaction about eligibility of the prospective adoptive mother and her circumstances, it is not known if the latter has been similarly apprised about child's and its biological parents' circumstances and particulars. Therefore, clarification in that regard may also be sought from the revisionist/applicant by the Court below before seeking the opinion of the specialised agency chosen for that purpose.

14. The petition accordingly is disposed of in terms of the above defections. The Court below is required to deal with the matter with utmost despatch and, therefore, the learned District Judge shall deal and dispose of the matter himself and shall not make any order of transfer of the application to any other Court. Steps shall be taken to ensure that the application is finally disposed of within two weeks from the date of receipt of opinion from the concerned agency.

15. Before parting with the records, I Would like to dispose of another Implead made in this matter. Care shall be taken by the learned District Judge to conduct proceedings in regard to the application in camera to avoid undue publicity as that may affect the reputation of the child and/or the biological parents. I would also like to place on record the assistance rendered by Shri Arun Mishra as amicus curiae. Let records go down at once.