

(1997) 09 BOM CK 0052

In the Bombay High Court

Case No : Writ Petition No. 1980 of 1994

Sandhya alias Supriya Kulkarni and another

APPELLANT

Vs

The Union of India and another

RESPONDENT

Date of Decision : 09-09-1997

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 21

Hindu Adoptions and Maintenance Act, 1956 — Section 11

Citation : AIR 1998 Bom 228 : (1998) 1 ALLMR 699 : (1998) 3 BomCR 9 :
(1998) 1 BOMLR 30 : (1999) 1 DMC 143 : (1998) 1 MhLj 740

Hon'ble Judges : S.S. Parkar, J;Ashok A. Desai, J

Bench : Division Bench

Advocate : Anand Grover, Ms. Furdous Mossa, Anoop Mohta, instructed by
Harish Mehta and Co., Rafique Dada, Addl.S.G, for the Appellant; S.R. Krishnan,
for the Respondent

Judgement

Ashok A. Desai, J.—Since petitioners Nos. 2 and 3 were prevented from taking in adoption second time a female child (petitioner No. 1), in view of section 11(i) and (ii) of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as "the impugned provisions"), they have questioned the validity thereof on the ground of violation of Articles 14 and 21 of the Constitution of India. The impugned provisions read thus:

"In every adoption, the following conditions must be complied with -

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption),

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption"

Thus the impugned provisions injunct a person from having second son or

daughter by adoption.

2. According to Shri Anand Graver, the learned Counsel for the petitioners, the impugned provisions have created several classes not based on an intelligible differentia such as (i) parents with unlimited number of natural children and parents without children, (ii) child adopted and the child to be adopted, (iii) adoptive parents with any number of natural children of same sex, and parents prevented from taking any child of same sex in adoption. This is violative of Article 14. The submission is not well-merited. The classification as carved out has not been created by the impugned provisions. Attempt was also made to seek support from the authority reported in *D.S. Nakara and Others Vs. Union of India (UOI)*, which has laid down that Article 14 prohibits class legislation. Ratio of this authority has no application to the instant case, as the impugned provisions have not attempted to do so.

3. The main challenge put forth is that the Right to Life under Article 21 as explored through various judicial pronouncements, has numerous dimensions. Life with human dignity is one such. The right to have size of a family according to one's own choice, is comprehended within the concept of human dignity. Since the impugned provisions prevent such right, they are violative of the Constitutional guarantee.

4. To deal with the submissions, we propose to trace and summarize the Ancient Law relating to adoption. Unanimous statement at the Bar is that Christianity, Islam or Zoroastrian did not recognize adoption. Ancient Hindu law alone rendered recognition therefor. That too was limited to as male child by an issueless parent. During one's lifetime, there could not be adoption of another male child. Adoption of a female child was not at all recognized. Predominant mythological design was to have a son, even by adoption, to perform last rites so that deceased could avail Moksha i.e. Eternal Bliss and also to continue the generation of adoptive parent. In some part of the country, the dancing girl could adopt a female child. This was more a customary and perhaps with a view to perpetuate the traditional avocation of dancing. This could not, however, be a part of Hindu law. The Orissa High Court in *Krushna Kahali (deceased by L.R.) and Others Vs. Narana Kahali and Others*, held such custom as invalid.

5. The Act of 1956 codified the practices as prevailing under Ancient Hindu in relation to adoption. By way of an amendment, the Act incorporated a significant feature of adoption of a female child which was unknown to the Ancient law. This being the personal law, the adoption was confined by and to Hindu parents and that too of a Hindu child. The Amending Act, 45 of 1962 brought a revolution. The statement

A. To provide adoption and congenial home for an abandoned child.

B. To authorize manage of Fondling or Remand Homes to give abandoned children in adoption, with the permission of the Court.

C. To include a child, legitimate or illegitimate, who has been abandoned by both of his parents or whose parentage is not known, but who, in either case is brought up as Hindu to be a Hindu by religion.

6. In this background, we propose to examine the substance of challenge as to violation of Article 21. No doubt, the right to life has many facets, but every personal desire, even if laudable, could not be included therein. According to Mr. Dada, the learned Solicitor General for the respondents, an unlimited choice in the matter of adoption would be seriously wrong and totally inappropriate. Article 21, even by stretching it to its farthest end, cannot embrace such right of having size of family according to one's own choice. A person could have any number of biological children, by grace of God. That does not certainly render support to a claim to have any number of children by adoption. Such right was candidly not recognized by ancient Hindu law. The submission is well-founded.

7. Their Lordships in *Ahmedabad Women Action Group (AWAG) and Others Vs. Union of India*, quoted *Gajendragadkar, J.*, for having observed:

"Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of the personal law and yet the expression "personal law" is not used in Article 13, because, in my opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution."

Even if the codified personal law is held to be within Article 13 of the Constitution, violation of Part III need to be tested on different pedestal than that of secular right.

8. The Supreme Court in *Smt. Saroj Rani Vs. Sudarshan Kumar Chadha*, has held that the remedy of conjugal rights of spouses is not violative of Article 14 or Article 21 of the Constitution, being not a creature of statute but inherent in the institution of marriage. Similarly, adoption is basically a personal privilege, conferred by Hinduism, as sanctioned by ancient scriptures. Basically it is not bestowed by any statutes.

9. Even under Ancient Hindu law, the parents had a right to adopt only one male child. The Amending Act extended that right to adoption of a female child. As such, the privilege of adoption cannot logically be further extended to more than one female child. The Act with its mythological and secular mission has stood the test of time for around four decades and has conveniently withstood the assaults as attempted from time to time. We, therefore, refrain from examining validity of the impugned provisions on the touchstone of Articles 14 and 21.

10. Mr. Grover, learned Counsel for the petitioners with Mr. Krishnan, learned Counsel for respondent No. 2, Institution canvassed that the choice is to be decided qua the right of the child to be adopted. However, both the learned Counsel conceded that the child has no right to question adoption and he/she cannot have a choice to select his/her adoptive parents. According to them,

Article 39(f) of the Constitution casts an obligation on the State to secure opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity. Moreover, the Amending Act 45 of 1962 also refers to the welfare of children, particularly in destitute. Certain statistics were furnished to indicate that female children are in abundant number and numerous children could not be given in adoption owing to statutory restrictions. The learned Counsel also invited our attention to the Preamble to the Convention of the Rights of the Child, which reads thus:

"..... Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."

Articles 2(1) and 3(1) of the aforesaid Convention emphasize that the States shall respect the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind and in all actions, the best interest of the child, shall be the primary consideration.

11. Persons who are keen to serve the interests of child can have guardianship of a child under the Guardians & Wards Act without there being any restriction on number. The learned Counsel for the petitioners tried to urge that by the said Act the child cannot be integrated into the family and it does not give a social status to the child. We feel if the guardianship attains the welfare of child, social status to him or her would be as a normal course.

12. According to us, the Act of 1962 has incidentally referred to the interests and welfare of the child, but not as an objective. It has endorsed more a religious and mythological sanctity of adoption. Submission is, while achieving the mythological objective, the Act of 1956 can conveniently attain welfare of children who are in destitute. Female children are more in destitute and they need a parentage. Being the need of the present situation, the restriction created by the impugned provisions according to us cannot now be held as unjust and unfair. The modern situation, however, cannot render just 13. Appeal of the learned Counsel for the petitioners is that the conditions under the impugned provisions could be relaxed for abandoned children who are with orphanage or social institution. Such children, if restriction is removed, would get parentage and home in adequate number. Such adoption as provided under the Act has always been under the supervision of the Court. That minimizes the probability, of abuse or misuse. We appreciate the urge and earnest desire in the appeal, but It revolves round the domain of legislative policy and its competence. The Supreme Court in Ahmedabad Women Action Group's case (supra) observed : "At the outset; we would like to state that these writ petitions do not deserve disposal on merits inasmuch as the arguments advanced by the learned Senior Advocate before us wholly involve issues of State policies with which the Court will not ordinarily have any concern. ...

..... It must not be forgotten that in a democracy the Legislature is constituted

by the chosen representatives of the people. They are responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue."

14. We, therefore, refrain ourselves from granting any indulgence in this behalf. The Parliament may, however, re-examine the question of relaxing the ban under the impugned provisions, having regard to the gravity of the problem of adoption of children in destitute and other appertaining circumstances, with a view to provide a solution.

With these observations, the Rule is discharged.