

Supreme Court of India

M/S Shabnam Hashmi vs Union Of India & Ors on 19 February, 2014

Author: R Gogoi

Bench: P Sathasivam, Ranjan Gogoi, Shiva Kirti Singh

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO. 470 OF 2005

SHABNAM HASHMI

... PETITIONER(S)

VERSUS

UNION OF INDIA & ORS.

... RESPONDENT (S)

J U D G M E N T

RANJAN GOGOI, J.

1. Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution is the vision scripted by the public spirited individual who has moved this Court under Article 32 of the Constitution. There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.

2. The aforesaid alternative prayer made in the writ petition appears to have been substantially fructified by the march that has taken place in this sphere of law, gently nudged by the judicial verdict in Lakshmi Kant Pandey Vs. Union of India^[1] and the supplemental, if not consequential, legislative innovations in the shape of the Juvenile Justice (Care And Protection of Children) Act, 2000 as amended in 2006 (hereinafter for short the JJ Act, 2000) as also The Juvenile Justice (Care and Protection of Children) Rules promulgated in the year 2007 (hereinafter for short the JJ Rules, 2007).

3. The alternative prayer made in the writ petition may be conveniently dealt with at the outset.

The decision of this Court in Lakshmi Kant Pandey (supra) is a high watermark in the development of the law relating to adoption. Dealing with inter-country adoptions, elaborate guidelines had been laid by this Court to protect and further the interest of the child. A regulatory body, i.e., Central Adoption Resource Agency (for short CARA) was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt.

under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under Section 68 of the JJ Act, 2000.

4. A brief outline of the statutory developments in the concerned sphere may now be sketched.

In stark contrast to the provisions of the JJ Act, 2000 in force as on date, the Juvenile Justice Act, 1986 (hereinafter for short the JJ Act, 1986) dealt with only neglected and delinquent juveniles. While the provisions of the 1986 Act dealing with delinquent juveniles are not relevant for the present, all that was contemplated for a neglected juvenile is custody in a juvenile home or an order placing such a juvenile under the care of a parent, guardian or other person who was willing to ensure his good behaviour during the period of observation as fixed by the Juvenile Welfare Board. The JJ Act, 2000 introduced a separate chapter i.e. Chapter IV under the head Rehabilitation and Social Reintegration for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after-care organization. Section 41 contemplates adoption though it makes it clear that the primary responsibility for providing care and protection to a child is his immediate family. Sections 42, 43 and 44 of the JJ Act, 2000 deals with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organisation.

5. The JJ Act, 2000, however did not define adoption and it is only by the amendment of 2006 that the meaning thereof came to be expressed in the following terms:

2(aa)-adoption means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship

6. In fact, Section 41 of the JJ Act, 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the Court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the court of the district judge, family courts and the city civil court. [Rule 33 (5)] Substantial changes were made in the other sub-sections of Section 41 of the JJ Act, 2000. The CARA, as an institution, received statutory recognition and so did the guidelines framed by it and notified by the Central Govt. [Section 41(3)].

7. In exercise of the rule making power vested by Section 68 of the JJ Act, 2000, the JJ Rules, 2007 have been enacted. Chapter V of the said Rules deal with rehabilitation and social reintegration. Under Rule 33(2) guidelines issued by the CARA, as notified by the Central Government under Section 41 (3) of the JJ Act, 2000, were made applicable to all matters relating to adoption. It appears that pursuant to the JJ Rules, 2007 and in exercise of the rule making power vested by the JJ Act, 2000 most of the States have followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the

concerned State.

Rules 33(3) and 33(4) of the JJ Rules, 2007 contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption. The Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption & lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an aftercare organisation. Whatever the Rules do not provide for are supplemented by the CARA guidelines of 2011 which additionally provide measures for post adoption follow up and maintenance of data of adoptions.

8. It will now be relevant to take note of the stand of the Union of India. Way back on 15th May, 2006 the Union in its counter affidavit had informed the Court that prospective parents, irrespective of their religious background, are free to access the provisions of the Act for adoption of children after following the procedure prescribed. The progress on the ground as laid before the Court by the Union of India through the Ministry of Women and Child Development (respondent No. 3 herein) may also be noticed at this stage. The Union in its written submission before the Court has highlighted that at the end of the calendar year 2013 Child Welfare Committees (CWC) are presently functioning in a total of 619 districts of the country whereas State Adoption Resource Agencies (SARA) has been set up in 26 States/Union Territories; Adoption Recommendation Committees (ARCs) have been constituted in 18 States/Union Territories whereas the number of recognized adoption organisations in the country are 395. According to the Union the number of reported adoptions in the country from January, 2013 to September, 2013 was 19884 out of which 1712 cases are of inter-country adoption. The third respondent has also drawn the attention of the Court that notwithstanding the time schedule specified in the guidelines of 2011 as well as in the JJ Rules, 2007 there is undue delay in processing of adoption cases at the level of Child Welfare Committees (CWS), the Adoption Recommendation Committees (ARCs) as well as the concerned courts.

9. In the light of the aforesaid developments, the petitioner in his written submission before the Court, admits that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. JJA 2000 with regard to adoption is an enabling optional gender-just law, it is submitted. In the written arguments filed on behalf of the petitioner it has also been stated that in view of the enactment of the JJ Act, 2000 and the Amending Act of 2006 the prayers made in the writ petition with regard to guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed etc. stands satisfactorily answered and that a direction be made by this Court to all States, Union Territories and authorities under the JJ Act, 2000 to implement the provisions of Section 41 of the Act and to follow the CARA guidelines as notified.

10. The All India Muslim Personal Law Board (hereinafter referred to as the Board) which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection and that Section 41 explicitly recognizes foster care, sponsorship and being look after by after-care organizations as other/ alternative modes of

taking care of an abandoned/surrendered child. It is contended that Islamic Law does not recognize an adopted child to be at par with a biological child. According to the Board, Islamic Law professes what is known as the Kafala system under which the child is placed under a Kafil who provides for the well being of the child including financial support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the adoptive parents. The Board contends that the Kafala system which is recognized by the United Nations Convention of the Rights of the Child under Article 20(3) is one of the alternate system of child care contemplated by the JJ Act, 2000 and therefore a direction should be issued to all the Child Welfare Committees to keep in mind and follow the principles of Islamic Law before declaring a muslim child available for adoption under Section 41(5) of the JJ Act, 2000.

11. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.

12. The writ petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitution. Reliance is placed in this regard on the views of the Bombay and Kerala High Courts in *In re: Manuel Theodore Dsouza*[2] and *Philips Alfred Malvin Vs. Y.J.Gonsalvis & Ors.*[3] respectively. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognize adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

13. Even though no serious or substantial debate has been made on behalf of the petitioner on the issue, abundant literature including the holy scripts have been placed before the Court by the Board in support of its contention, noted above. Though enriched by the lengthy discourse laid before us, we do not think it necessary to go into any of the issues raised. The Fundamental Rights embodied in Part-III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well being of citizens. While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to

comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. In this regard we would like to observe that the decisions of the Bombay High Court in Manuel Theodore Dsouza (supra) and the Kerala High Court in Philips Alfred Malvin (supra) can be best understood to have been rendered in the facts of the respective cases. While the larger question i.e. qua Fundamental Rights was not directly in issue before the Kerala High Court, in Manuel Theodore Dsouza (supra) the right to adopt was consistent with the canonical law applicable to the parties who were Christians by faith. We hardly need to reiterate the well settled principles of judicial restraint, the fundamental of which requires the Court not to deal with issues of Constitutional interpretation unless such an exercise is but unavoidable.

14. Consequently, the writ petition is disposed of in terms of our directions and observations made above.

...CJI.

[P. SATHASIVAM]J.

[RANJAN GOGOI]J.

[SHIVA KIRTI SINGH] NEW DELHI, FEBRUARY 19, 2014.

- [1] (1984) 2 SCC 244
- [2] (2000) 3 BomCR 244
- [3] AIR 1999 Kerala 187
