

Kerala High Court

Andrew Mendez And Ors. vs State Of Kerala on 19 February, 2008

Equivalent citations: 2008 (1) KarLJ 647, 2008 (1) KLT 1000

Author: R Basant

Bench: R Basant

ORDER R. Basant, J.

1. Which is the court referred to in Section 41(6) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the Act) after its amendment by Act 33/06? can it be said that it is the Juvenile Justice Board itself? If not, which is the court which the Legislature had in mind when the Act was amended by Act 33/06? These are the question which come up before this court for consideration in this petition. How an in alert amendment of a statute can reap pernicious consequences in the implementation of the provisions of the statute is clearly revealed from the dilemma which is posed before the court in this case.

2. The petitioners 1 and 2 are a couple, who had got themselves appointed as guardians of a child sponsored by the placement agency, the third petitioner. By order dated 6/6/97 passed by the Family Court, Ernakulam in O.P. No. 97/97 petitioners 1 and 2 were appointed as guardians of the child and the child continue to be under their care and custody. According to them, since there was no law enabling them to adopt the child they had to remain satisfied with their status as legal guardians of the child.

3. Then came the enactment of The Juvenile Justice (Care and Protection of Children) Act, 2000. It contained provisions relating to adoption. Adoption as a legal concept was available only among the members of the Hindu community except where custom permits such adoption for any sections of the polity. But in Chapter 6 of the Act dealing with rehabilitation and social re-integration of children we find the legislature accepting the concept of secular adoption whereby without any reference to the community or the religious persuasions of the parents or the child concerned, a right appears to have been granted to all citizens to adopt and all children to be adopted. The history of the attempt to bring in the concept of secular adoption into our system of laws narrates a sad tale of inaction and action without conviction on the part of the legislature. It is perhaps unfortunate that even now the republic of India does not have a codified law of adoption applicable to all Indians. The attempts of the Indian Parliament in this direction did not bear fruit. The history of the Adoption of Children's Bill 1972 and Adoption of Children's Bill 1980 do not, of courts, bring credit to the secular credentials of the Indian polity. Let us accept the reality. Awareness and acceptance of failure can be stepping stones to eventual success. We have not been able to bring in a secular law of adoption applicable to all Indians so far. It is in this context that a laudable attempt is undertaken by the legislature by the stipulations which have been made in Chapter IV of the Juvenile Justice (Care and Protection of Children) Act, 2000. There was still confusion as the concept of adoption was not defined in the Act. The provisions were criticized to be inadequate as the legal status of the adopted child has not by law been declared to be equal to that of a biological legitimate child. It is in this context that Act 33 of 2006 was introduced under which the concept of adoption was defined by enacting Section 2(aa) of the Act which reads as follows:

"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;

4. The legislature appears to have moved decisively to at least declare under the Act that secular adoption is possible for those cases covered by Chapter IV of the Act. Section 41 before amendment read as follows:

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 such children as are orphaned, abandoned, neglected and abused through institutional and non-institutional methods.

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time by the State Government, the Board shall be empowered to give children in adoption and carry out such investigation as are required for giving children in adoption in accordance with the guidelines issued by the State Government from time to time in this regard.

(4) The children's homes or the State Government run institutions for orphans shall be recognised as an adoption agencies both for scrutiny and placement of such children for adoption in accordance with the guidelines issued 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 Board may allow a child to given in adoption-

(a) to a single parent, and

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

(emphasis supplied)

5. After the amendment by Act 33 of 2006, Section 41 reads as follows:

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, 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 recognise one or more of its institutions or voluntary organisations 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 organisation 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.

(emphasis supplied)

6. Let it be noted that there is no common law of adoption. The Customary Hindu law as modified and codified by the Hindu Adoptions and Maintenance Act recognized the rights of Hindu parents and Hindu children to adopt and be adopted. Except when customary law permits adoption those of other faiths had no legal option of adopting a child and conferring on such child all rights of a biological legitimate child. The Juvenile Justice Act 2000 made it possible for Indian children to be adopted and Indian parents to adopt. Initially it was stipulated that the Juvenile Justice Board may allow the child to be adopted. Later by Act 33/06, the Act was amended to clarify what adoption meant. It was further declared that the 'court' and not the Board has powers under Section 46 of the Act to allow adoption. What the Parliament did not or could not do overtly by introducing the Adoption Bills in 1972 and 1980 was sought to be achieved covertly by making stipulations in Chapter IV of the Juvenile Justice Act.

7. It will be apposite in this context to refer to the attempt made by the judicial functionaries to declare that under Article 21 of the constitutions, the child as well as the parents have a right to adopt/be adopted. The decision of the Bombay High Court (Justice Rebello) in *Manual Theodore D'Souza [II (2000) PMC 2921]* recognises the constitutional right of the parents to adopt and the children to be adopted under law and their rights to claim the legal status of natural/biological parents and children. In that luminous decision, His lordship Justice Rebello of the Bombay High Court, adverted to all the aspects and declared such right to adopt and be adopted flows from the fundamental right to life under Article 21 of the constitution.

8. Petitioners 1 and 2, in these circumstances, encouraged evidently by the decision of Justice Rebello referred above and the subsequent amendment by Act 33/06 filed application before the Juvenile Justice Board, Ernakulam for permission to adopt the child whose guardians they were. Objections were raised that Juvenile Justice Board is not the court under the amended Section 41(6) and the Board cannot have jurisdictional competence to entertain such a request now - after the 2006 amendment.

9. The Juvenile Justice Board considered the question in detail and came to the conclusion that the Board cannot, at any rate, be reckoned as the "court" contemplated under Section 41(6). A direction was hence issued that the petition filed under Section 41(6) be returned to the petitioners for presentation before the proper court having jurisdiction in the matter - whichever that court be. Since the legislature has consciously amended the expression 'Board' and had substituted it with the word 'Court' I find it impossible to accept that the Juvenile Justice Board must itself be reckoned as the court. That would make the amendment meaningless. I do endorse the conclusion of the Juvenile Justice Board that whichever be the Court under Section 41(6) it cannot be the Board itself.

10. The petitioners, the laity and those learned in the law are all groping in the dark as to which that court is which is referred to in Section 41(6) after amendment of the Act. Detailed arguments have been advanced before me by learned Counsel Sri. C.S. Dias who has taken pains to take the court through all the dimensions of the problem. This is a piece of central legislation and notice was issued to the A.S.G.I. I must say that not much of assistance has been forthcoming from the A.S.G.I. I correctly understand and interpret the concept of the court in Section 41(6) after amendment.

11. The Juvenile Justice (Care and Protection of Children) Act, 2000 does not define a court. However, Section 2(y) of the Act declares that all words and expressions used; but not defined in this Act and defined in the Code of Criminal Procedure shall have the meanings respectively assigned to them in that code. Under the Code of Criminal Procedure, there is no definition of the expression court through the Code speaks of constitution of criminal courts in Chapter 2 of the Code. Section 2(y) of the Cr.P.C. further states that words and expressions used in the Code and not defined; but defined in the Indian Penal Code shall have the meanings respectively assigned to them in that Code; but unfortunately the I.P.C. does not also define the expression "court". Assistance was sought from the General Clauses Act. The same does not also define the expression "court". The Code of Civil Procedure also does not define the expression "court" though the said code also refers to constitution of courts.

12. Section 3 of the Indian Evidence Act defines courts to include all Judges and Magistrate and all persons except arbitrators legally authorised to take evidence. The said definition is also of no crucial help to this court in understanding the concept of the court for the purpose of Section 41(6). In order to decode the intention of the legislature and to decipher the purpose for which the expression 'Board' which was there earlier in Section 41(6) was amended to bring in the expression "court", the learned Counsel Sri. C. Dias took me through the object and reasons of the Amendment Act and also the entire discussions in Parliament on the subject of amendment in 2006. Significantly the objects and reasons of the Amendment Act or the Parliamentary discussions do not help this court in any manner to understand the purpose or motivation of the amendment and the reasons that prompted the legislature to substitute the word Board by the word court in Section 41(6). Thus the fairly exhaustive effort made to fine meaning for the expression court in Section 46(1) and the attempt to identify that court has unfortunately not yielded any success. I may straight away refer to the decision by the Bombay High Court (Justice Rebeloe) Manuel Theodore D'Souza (supra) where it was held that the right to adopt and be adopted being a fundamental right must be capable of enforcement through the civil courts as the dispute will fall within the sweep of Section 9 C.P.C. It was held in the said decision that it will be the District Court or the High Court which shall have jurisdiction to deal with such questions relating to adoption as it is such courts that normally deal with disputes regarding custody, guardianship etc. of children. A detailed discussion on this aspect is available in the said decision and it is finally held that such applications can be filed before the District Courts exercising powers under the Guardian & Warts Act and such applications for adoption of the child by a guardian must be reckoned as a miscellaneous application in the petition in guardianship. I have thus come across the first indication as to what can be reckoned as the court for the purpose of Section 41(6) from the said decision i Manuel Theodore D'Souza & Anr. In the absence of any statutory provision the learned Judge in Manuel Theodore D'Souza has reasoned that the enforceable civil right to adopt and be adopted can be considered, decided and enforced by the District Court or the High Court having jurisdiction under its letters patent pending legislation by the legislature on this specific aspect.

13. In the absence of any other indications, this court grouping in the dark in its attempt to ascertain the court which must take over the functions of the Board under the amended Section 41(6) thus comes across the decision in Manuel Theodore DiSouza as a possible guideline in such ascertainment.

14. During the pendency of this petition, I take note with great relief the model rules have been framed by the Central Government armed with the authority which it derived consequent to the amendments brought in by Act 33 of 2006 with effect from 22-8-2006. The amended Section 68(1) with its proviso reads as follows:

68(1): The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

[Provided that the Central Government may, frame model rules in respect of all or any of the matters with respect to which the State Government may make rules under this Section, and where any such model rules have been framed in respect of any such matter, they shall apply to the State until the rules in respect of that matter is made by the State Government and while making any such rules, so far as is practicable, they conform to such model rules]

15. It is in exercise of powers of the Central Government that the model rules relation to Adoptions have been formulated now under Rule 33 in Chapter 5. The relevant sub-rule is Sub-rule 5 of Rule 33 which reads as follows:

For the purpose 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.

16. Even before the amendment of Section 68 was brought in with effect from 22-8-2006, we find that the Government of Kerala had promulgated rules under the Juvenile Justice Act applicable in Kerala. Those rules had come into force in 2003, that is with effect from 13-8-2003. The said rules were promulgated at a time when Section 41(6) referred to the Board and not the court. The rules made in Kerala covering that aspect appear in Rule 37. It may be unnecessary to advert to the said rules in any greater detail as those rules relate to the pre-amendment text of the statute and cannot be of any crucial assistance in the attempt to decode and ascertain which the court is under the amended Section 41(6). It has therefore got to be accepted that no rule has been framed in Kerala after the amendment of Section 41(6) and in respect of matters covered by Section 41(6). It is the Central Rules which must prevail until rules otherwise are formulated by the Kerala Government.

17. It follows from the above discussions that it is possible for this court now to understand the expression court appearing in Section 41(6) with the aid of Rule 33(5) of the Central Rules promulgated under Section 68. Lest there be any confusion on this aspect, I would like to clarify that the Kerala rules will continue to remain in force except where by necessary implication those rules must be held to have been replaced. The Kerala Rules shall continue to remain in force in future in respect of all such matters for which provision has made in the Kerala Rules and which remain unaffected by the subsequent amendment of the Central Statute. Such rules shall continue to hold the field notwithstanding the promulgation of the Central Rules.

18. The problem does not seem to end there also. The next question is as to which is the court before which an application can be filed by the petitioners and others similarly placed for relief under

Section 41(6). Which court can be said to be the civil court which has jurisdiction in matters of adoption and guardianship under Rule 33(5). Of course, Rule 33(5) declares that such court will include the court of the District Judge, Family Courts and City Civil Courts. In Kerala, we have Family Courts for all districts concerned by now. Is it the District Court which is the court under Rule 33(5) for the purpose of Section 41(6)? This is the next question that will have to be resolved.

19. Questions regarding guardianship are decided by the Family Courts in exercise of their powers/jurisdiction under Section 7(1)(g) of the Family Courts Act. Can the claim for adoption be brought under any of Sub Clauses (a) to (g) of the extraction to Section 7(1) the Family Courts Act so that this court can declare that the Family Court must be the court for the purpose of Section 41(6)? I have rendered my very anxious consideration on this question. I have no doubt that since Family Courts are dealing with disputes regarding claims for guardianship under Section 7(1)(g), it would have been better if the Family Court is declared to be the court for the purpose of Section 41(6) also. But convenience by itself may not be sufficient as one has to reason legally and come to the conclusion that the Family Court has got the jurisdiction under Section 7 to deal with such a claim for adoption.

20. It will now be apposite to extract Section 7 of the Family Courts Act. It reads as follows:

7. Jurisdiction- (1) Subject to the other provisions of this Act, a Family Court shall-

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purpose of exercising such jurisdiction under such law, to be a district court or, as the case maybe, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation:- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage.

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship.

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance.

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise.

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

(emphasis supplied)

21. The question came up before the Division Bench of this court in a decision in *Vinod Krishnan v. Missionaries of Charity* 1997 (2) KLT 863. That decision is authority for the proposition that the Family Court cannot be held to be clothed by the stipulations in Section 7(1) to deal with a claim for adoption. The question that arose for consideration in that case was whether the Family Court has jurisdiction under Section 9(4) of the Hindu Adoption and Maintenance Act to entertain an application by a guardian for permission to give a child in adoption to himself. The learned Judges of the Division Bench in the said decision answered the question against the jurisdiction of the Family Court and held that it is only the District Court, which shall have the jurisdiction to entertain such an application for permission under Section 9(4) of the said Act. The stipulation is Clause (g) was held to be insufficient to confer jurisdiction on the Family Court in the matter of adoption. I am bound by the decision of the Division Bench and cannot definitely be tempted by the argument that explanation (g) in Section 7(1) is sufficient to clothe the Family Court with the requisite jurisdiction to consider an application for adoption by reckoning the same as incidental to guardianship and custody.

22. It was discussed at the Bar whether it can be held that the Family Court has jurisdiction under Section 7(2)(b) of the Family Court Act to entertain a claim for appointment as guardian. After exhausting the stipulations in Section 7(1) and 7(2)(a), a residuary provision is enacted in Section 7(2)(b) to declare that the Family Court shall also have and exercise "be such other jurisdiction as may be conferred on it by any other enactment". Has Section 41(6) of the Juvenile Justice Act read with Rule 33(5) of the Central Rules conferred on the Family Court the jurisdiction to entertain a claim for appointment as guardian? This is the next question to be considered. That leads me to the question as to what is an enactment. Section 41(6) does not certainly say that the Family Court shall be the court for the purpose of Section 41(6). If at all it can only be held that Rule 33(5) confers by implication jurisdiction on the Family Court. But can the rules promulgated under Section 68 of the Juvenile Justice Act be equated to an "enactment". That is the next question to be considered. The Family Courts Act does not give any guideline as to what is the "enactment" contemplated under

Section 7(2)(b). Ordinarily and normally a statute enacted by the legislature is referred to as an enactment. So much appears to be evident from the general principles of law. The General Clauses Act 1897 in Section 3(19) defines the expression in the following words.

"enactment" shall include a Regulation (as hereinafter defined) and any Regulation of the Bengal, Madras or Bombay Code and shall also include any provision contained in any Act or in any such Regulation as aforesaid.

23. The expression regulation in Section 3(19) is further defined in Section 3(50) in the following words:

"Regulation" shall mean a Regulation made by the President [under Article 240 of the Constitution and shall include a Regulation made by the President under Article 243 thereof and] a Regulation made by the Central Government under the Government of India Act, 1870, or the Government of India Act, 1915, or the Government of India Act, 1935.

24. It is significant that Section 3(19) and Section 3(15) read together must lead the court to the conclusion that a statutory rule like Rule 33(5) of the Central Rules may not fall within the sweep of the expression enactment. Doubts, if any, on this aspect is laid to rest when we consider the meaning of the expression rule in Rule 3(51) of the General Clauses Act which reads as follows:

"rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment.

25. Rule 33(5) appears in the Central Rules promulgated under Section 68 of the Juvenile Justice Act and in any view of the matter, the said rule cannot claim a status superior to 'rule' defined in Section 3(51) of the General Clauses Act. It cannot claim a status equal to regulation under Rule 3(50) or an enactment under Rule 3(19). It is therefore clear that Section 7(2)(b) of the Family Court Act cannot be pressed into service to sail to the conclusion that a Family Court has jurisdiction to entertain an application under Section 41(6). The Family Court cannot hence be held to be the court under Section 41(6) which can entertain applications for adoption by a guardian.

26. The conclusion appears to be inescapable in these circumstances that it is only the District Court which can be reckoned as the court for the purpose of Section 41(6) read with Rule 33(5) of the Central Rules. Similar appears to be the conclusion in the decision of the Bombay High Court in Manuel Theodore D'Souza.

27. I find it absolutely safe in these circumstances to come to a definite conclusion that it is only the District Court which can have jurisdiction to entertain an application under Section 41(6) of the Juvenile Justice Act read with Rule 33(5) of the Central Rules. It is declared so. All petitions pending before the Juvenile Justice Boards in the State or filed before them hereafter shall forthwith be returned for presentation before the District Court within a stipulated period of time and if so presented it shall be reckoned that they have been duly presented before the District Courts. The District Courts shall proceed to exercise jurisdiction under Section 41(6) and appropriate orders

shall be passed under Section 41(6) by the District Courts of the State. I may hasten to observe that the District Courts concerned must scrupulously comply that the direction in Lakshmikant Pandey v. Union of India that such applications must be disposed of within a period of two months from the date of presentation. The courts have to sympathetically consider the plight of the guardians yearning for an order for adoption and the need of children being given in adoption with expedition.

This Crl. M.C. is in these circumstances allowed. The petitioners shall be at liberty to present M.P. No. 105/07 returned by the Juvenile Board, Ernakulam to the petitioners before the District Court, Ernakulam within one month from today whereupon the District Court shall proceed to pass appropriate orders under Section 41(6) as indicated above.

28. A copy of this order shall forthwith be issued by the Registry to all the Juvenile Justice Boards are not functional, to the Principal Magistrate as also the District Courts with original jurisdiction to receive petitions. Their attention shall be drawn specifically to the observations and directions in paragraph 28 of this judgment.