ORISSA HIGH COURT: CUTTACK.

W.P.(C). NOS. 29388 AND 29389 OF 2011

In the matter of applications under Article 226 of the Constitution of India.

W.PC No. 29388/2011.

The Secretary, Subhadra Mahatab
Seva Sadan of Kolathia and another. ...... Petitioners

-Versus-

State of Orissa ...... Opp. Party.

For Petitioners : M/s. S.S.Das, K.Behera, S.Modi, S.S.Pradhan & K. Pradhan,

For opp. Party: Addl. Government Advocate.

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For opp. Party: Addl. Government Advocate.

Date of Judgment: 11.09.2012

PRESENT:

THE HONOURABLE SHRI JUSTICE M.M. DAS

M. *M. DAS, J.* As both the writ petitions have been filed against two verbatim orders passed in CMA Nos. 222 and 223 of 2009 by the learned District Judge, Khurda at Bhubaneswar on two applications

filed by the same petitioners, i.e., the writ petitioners, both the matters were heard together and are being disposed of by this common judgment.

2. Both the petitioners filed the aforesaid two CMAs purportedly under section 9 (4) of the Hindu Adoption and Maintenance Act, 1956 (for short, 'the Act, 1956') seeking permission of the learned District Judge for the adoption of two minor female children, namely, Kuni and Gudly by petitioner no.2. In both the cases, the petitioners filed the following documents:

(i) Child Study Report

(ii) Home Study Report

(iii) Release order for adoption

(iv) Medical report of petitioner no.2.

(v) Salary certificate of petitioner no.2.

(vi) Foster Care Agreement

(vii) Photograph of the petitioner no.2, i.e., the prospective adoptive mother,

(viii) Photographs of both the minor children.

3. The Child Welfare Committee, Khurda, District – Khurda has passed the release order for adoption of both the children as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, 'the J.J. Act'). The Adoption Co-ordinating Agency, Karnataka prepared Home Study Report of the petitioner no. 2 with her detailed family history.

4. The learned District Judge in course of hearing the matters called for a report from the Orissa State Council for Child Welfare, who reported that the petitioner no. 2 is not eligible to adopt two girl children under section 11 of the Act, 1956. It may be mentioned here that the petitioner no. 1 is the legal guardian-cum-Adoption Placement Agency, which has been recognized by the State and in whose custody, both the above minor children were kept.

5. It is argued before me by Mr. S.S. Das, learned counsel for the petitioners in both the writ petitions that though the petitions were nomenclatured to be under section 9(4) of the Act, 1956, but, in substance, both the petitions were filed under the J.J. Act. He further submitted that all the required necessary documents for appreciation of the learned District Judge to grant permission for adoption of both the minor girl children by the petitioner no. 2 were produced before the learned District Judge, who has not appreciated the same though they satisfied all requirements as per the J.J. Act for grant of permission to the petitioner no. 1 to give both the minor girl children in adoption to the petitioner no.2. With regard to the finding of the learned District Judge that the petitioner no. 2 cannot adopt both the girl children in view of the bar under section 11 of the Act, 1956, he submitted that the learned District Judge has failed to

interpret and apply the decision of the apex Court in the case of ***Lakshmi Kant Pandey v. Union of India,*** AIR 1984 SC 469.

The opp. party – State, however, contended that under sub-section (4) of section 9 of the Act, 1956, permission is to be accorded by the competent authority for adoption of the child and section 9 (5) of the said Act states that if the court would be satisfied that the adoption will be for the welfare of the child, it will grant permission to that effect. He submitted that in the instant case, the petitioners instead of filing application under section 41 (6) of the J.J. Act, filed an application under section 9 (4) of the Act, 1956, which the learned District Judge considered to be one under the Act, 1956 and disposed of the same in accordance with law and, therefore, the impugned orders are not liable to be interfered with.

6. In order to appreciate the rival contentions, it is necessary to refer to the various provisions of the J.J. Act with regard to adoption of a child. Under section 2 (d) (v) of the J.J. Act, "child" in need of care and protection has been defined, as a child, who does not have parent and no one is willing to take care of or whose parents have abandoned (or surrendered) him or who is missing and run away child and whose parents cannot be found after reasonable enquiry.

Admittedly, the two small girl children sought to be adopted by the petitioner no.2 were abandoned children rescued by the petitioner no. 1 – Agency. Section 2 (f) of the J.J. Act defines "committee" to mean a Child Welfare Committee constituted under

section 29. Under Chapter-IV of the said Act, provision is made with regard to rehabilitation and social reintegration of a child in need of care and protection. Section 41 of the J.J. Act under the said Chapter-IV deals with adoption, which reads thus:-

> "41. **Adoption**.-(1) The primary responsibility for providing care and protection to children shall be that of his family.
>
> (2) Adoption shall be restored 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 and daughters; or

(c) to childless couples".

Based on the judgment in the case of Lakshmi Kant Pandey (supra) and section 41 (3) of the J.J. Act, the Central Adoption Resources Agency (in short, 'the CARA'), has framed a set of guidelines. As per the said guidelines, in Clause 23 (2) thereof, the Specialized Adoption Agency (the agency like the petitioner no.1) shall file a petition in the competent court of jurisdiction for obtaining necessary adoption order under the Act, within ten days of acceptance of referral by the prospective adoptive parents and shall pursue the same regularly with the court so that the provision of legal adoption is completed at the earliest. The said clause also envisages that the competent court is required to dispose of the case within a maximum period of two months from the date of filing in accordance with the direction of the Supreme Court in the case of *Lakshmi Kant Pandey* (supra). Rule 33 (5) of the Rules framed under the J.J. Act envisages that for the purpose of section 41 "court implies a civil court" which has jurisdiction in matters of adoption and guardianship and may include

the court of District Judge, Family Courts and City Civil Courts. Keeping the aforesaid provisions in view and on analysis of the material produced by the petitioners, it is amply clear that the petitioner no. 1 has been recognized as a Specialized Adoption Agency under section 41 (4) of the J.J. Act.

Under section 41 (5) (a), no child shall be offered for adoption until two members of the Committee declare the child legally free for placement in case of abandoned children. Rule 25 speaks about the functions and powers of the Committee. Rule 25 (m) envisages that the Committee shall declare a child legally free for adoption. Under Rule 33(3)(b), a child becomes eligible for adoption when the Committee has completed its enquiry and declares the child legally free for adoption.

Therefore, a conjoint reading of section 41 (5) and Rules 25 (m) and Rule 33(3)(b) makes it crystal clear that when an abandoned child lis offered for adoption, the Child Welfare Committee, which is a quasi judicial authority has to declare the child free for adoption, where-after the competent court has to pass necessary orders under section 41 allowing a child to be given in adoption.

7. It is, therefore, seen that it is only the Child Welfare Committee under the J.J. Act, who is authorized to declare a child free for adoption and law does not require any other agency, be it the State Council for Child Welfare or any other body, to have any say in regard to adoption. Section 41 (6) (b) of the J.J. Act, as quoted above,

specifically provides that the court may allow a child to be given in adoption to a person irrespective of marital status. Clause 44 (5) of the CARA Guidelines prescribes that siblings of different ages shall, as far as possible, be placed in adoption in the same family and such children shall also be categorized as special need children. The CARA guidelines were notified in a notification issued by the Ministry of Women and Children Development, Government of India on 24.6.2011 for the purpose mentioned therein. For better appreciation, the said notification is quoted hereunder:-

"MINISTRY OF WOMEN AND CHILD DEVELOPMENT

NOTIFICATION

New Delhi, the 24th day of June, 2011.

Guidelines Governing the Adoption of Children, 2011.

S.O. (E). In pursuance of the powers by sub-section (3) of section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) and in supercession of the Guidelines for In-country Adoption, 2004 and the Guidelines for Adoption from India, 2006, except as respects things done or omitted to be done before such supercession, the Central Government hereby notifies the Guidelines issued by the Central Adoption Resource Authority to provide for the regulation of adoption of orphan, abandoned or surrendered children.

Note:

(1) In order to ensure smooth functioning of the adoption process, Central Adoption Resource Authority, from time to time, issues Adoption Guidelines laying down procedures and processes to be followed by different stakeholders of the a adoption programme. The Adoption Guidelines draw support from:

(a) The Juvenile Justice (Care and Protection of Children) Act, 2000;
(b) Judgment of the Hon'ble Supreme Court in the case of L.K. Pandey vs. Union of India in WP No. 1171 of 1982;

(c) UN Convention on the Rights of the Child, 1989;

(d) The Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption, 1993.

(2) These Guidelines shall govern the adoption procedure of orphan, abandoned and surrendered children in the country from the date of notification and shall replace (i) Guidelines for In-country Adoption, 2004 (ii) Guidelines for Adoption from India, 2006.

(Sudhir Kumar)
Additional Secretary,
Ministry of Women and Child Development."

8. This Court, therefore, considering the provisions of law under the J.J. Act with regard to adoption of a child finds that both the minor girl children, namely, Kuni and Gudly as required under the said Act were declared by the Child Welfare Committee to be fit and free for adoption, who also determined the date of birth of both the girl children being 7.2.2006 in case of Kuni and 13.3.2007 in case of Gudly. It also transpires from the records that the petitioner no. 2 has executed a Foster Care agreement with the petitioner no.1 and has taken both the minor girl children under her foster care. The petitioner no. 1 asserted in the petition that both Kuni and Gudly were being reared as siblings. Hence, as per the guidelines framed pursuant to the judgment of the Supreme Court in the case of *Lakshmi Kant Pandey* (supra), such siblings of different ages shall, as far as practicable, be placed in adoption in the same family, the corollary of which means that Kuni and Gudly should not be separated.

9. The Supreme Court in the case of *Lakshmi Kant Pandey* (supra) set out various principles for care and protection of children who are orphan or abandoned. The Court observed that when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might rise on account of cultural , racial or linguistic differences in case of adoption of the child by foreign parents. With regard to small children, who have been brought up as siblings, the Supreme Court in the said case held as follows:

> "…………..It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalized, the recognized social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its knew home in a new country so that the assimilation of the child to the new environment is facilitated."

Moreover, following the aforesaid judgment of the apex Court, the CARA guidelines has also specifically prescribed that siblings should be placed in adoption in the same family. As already discussed above, there is no dispute that both Kuni and Gudly were being reared as siblings by the petitioner no.1. From the Home Study Report of the

petitioner no.2 prepared by the Adoption Co-ordinating Agency, Karnataka, which was produced before the court below, it is also clear that the petitioner no. 2 is capable and competent under law to adopt the minor children in question. As both the said minor children have been growing up as siblings under the care and protection of petitioner no. 1 – Agency and are now with the petitioner no.2 on her executing a Foster Care agreement, they cannot be separated and given in adoption to two different families contrary to the decision of the Supreme Court in the case of *Lakshmi Kant Pandey* (supra) and the CARA Guidelines.

10. Now, the only question which remains to be answered is whether the learned District Judge erred in deciding both the applications strictly under section 9(4) of the Act, 1956 without due application of judicial mind by not considering the same to be applications made under the J.J. Act.

11. Law is well settled that it is the substance and not the form which is to be looked in to by a court of law while deciding any lis and appropriate relief to which a party may be entitled to should not be withheld on the technical ground that the nomenclature of an application has been made wrongly. The documents which were produced before the learned District Judge clearly envisage that the petitioners intended to obtain an order of allowing adoption under the J.J. Act and not under the Act, 1956. It was, therefore, incumbent upon the learned District

Judge to deal with both the applications to be under the J.J. Act. Further, in view of the documents produced and in view of the provisions of the J.J. Act , as discussed above, there was no s cope on the part of the learned District Judge to call for a report from the Orissa State Council for Child Welfare, who in an evasive manner only stated in their report in one line that the petitioner no. 2 is not eligible to adopt two girl children under section 11 of the Hindu and Adoption and Maintenance Act, 1956 and relying upon which the learned District Judge mechanically held that section 11 is a bar for the petitioner no. 2 to adopt both the girl children without considering the ratio of the decision in the case of *Lakshmi Kant Pandey* (supra) in its proper perspective and the CARA Guidelines. In such cases, it is always incumbent upon the learned District Judge to carefully scrutinize as to whether giving an approval/sanction for adoption is in the best interest of the child in question, who needs care and protection as per the provisions of the J.J. Act for which the petitioners produced all required documents before him. The learned District Judge, therefore, keeping the spirit of the provisions of the J.J. Act in section 41 thereof and the law as laid down by the apex Court should have allowed the applications for rehabilitation and reintegration of both the girl children in the family of the petitioner no.2.

12. In view of the materials available on record, this Court has, therefore, no hesitation to hold that both Kuni and Gudly

were under the custody and care of the petitioner no. 1 and being reared as siblings, are now under the petitioner no.2 pursuant to her executing the Foster Care agreement. Both the said children are in need of care and protection and as already held are required to be rehabilitated and socially reintegrated as early as possible within the period prescribed by placing them in the family by giving them in adoption to the petitioner no. 2 so that such children will feel themselves to be an integral part of the society and will not be looked down upon.

13. In view of the above findings, this Court is of the opinion that the impugned orders are unsustainable and necessary permission should be allowed permitting the petitioner no. 2 to adopt both Kuni and Gudly, who are under her Foster Care.

14. In the result, the impugned orders dated 20.9.2010 under Annexure-6 to both the writ petitions are, therefore, set aside and both the writ petitions stand allowed. Necessary steps be taken by the petitioner no. 2 to take both Kuni and Gudly in adoption in accordance with law.

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M.M. Das, J.

Orissa High Court, Cuttack.
September 11th, 2012/Biswal