

CASE NO.:
Appeal (civil) 6492 of 2005

PETITIONER:
St. Theresa's Tender Loving Care Home & Ors.

RESPONDENT:
State of Andhra Pradesh

DATE OF JUDGMENT: 24/10/2005

BENCH:
ARIJIT PASAYAT & ARUN KUMAR

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P (C) No.9412 of 2003)

ARIJIT PASAYAT, J.

Leave granted.

The basic issue involved in this appeal is whether the appellant no.1 should be permitted to make arrangement for adoption of a child named Sahiti presently about five years by appellant nos. 2 and 3. Appellant no.1 claims to be an organization interested in the welfare of abandoned children and to secure a congenial atmosphere for their upbringing. Challenge in this appeal is to an order dated 23.12.2002 passed by the Andhra Pradesh High Court dismissing the appeal purported to have been filed under Section 19(1) of the Family Courts Act, 1984 (in short the 'Act') and Section 47 of the Guardians and Wards Act, 1890 (in short the 'Guardians Act'). The appeal before the Andhra Pradesh High Court was filed by the appellants questioning correctness of the order dated 8.7.2002 passed by the learned Judge, Family Court, Secunderabad, rejecting the prayer made by the appellants under Sections 7 to 10 of the Guardian Act. Stand of the appellants before the Family Court was that it is a society registered under the Andhra Pradesh (Telangana Area) Public Societies Registration Act, 1350 Fasli (in short 'Societies Act') purportedly for carrying social service activities. One of its main objectives is to provide shelter to abandoned children more particularly by unwed mothers, and as noted above to see them comfortably settled in adopted homes. The appellants 2 and 3 are residents of U.S.A. According to petition they were married on 19.10.1999. They had earlier adopted one son, but wanted to adopt a female child from India and for that purpose wanted to adopt the girl named Sahiti, born on 14.6.2000. The claim that they are well settled in life with decent income, would be eligible for adopting the child and also were sure to provide a happy home to the adopted child. The minor child Sahiti was stated to be daughter of an unmarried mother by name Esther, a native of Hyderabad and earning livelihood as a labourer. Due to social stigma she relinquished the child in favour of the appellant no.1 on 14.6.2000 and executed a Relinquishment Deed. The child suffered from various ailments and her adoption in India did not materialize. On that ground the Voluntary Coordination Agency(in short 'VCA') gave clearance for the minor to be given in adoption abroad. It was stated in the petition that inquiries made by appellant no.1 revealed that none of

her relatives were ready and willing to take care of the minor. Since 14.6.2000 the child has been under the care and custody of appellant no.1. The State of Andhra Pradesh represented by the Director of Women Development and Child Welfare Department resisted the claim. Their stand was that it had come to the notice of the Government that some unscrupulous organizations in Andhra Pradesh were indulging in child trafficking. With a view to curb menaces, the Government had issued G.O.Ms. No.16 of 2001 banning relinquishment of a child. Since the claim of the appellant was based primarily on a Relinquishment Deed purported to have been executed by the mother of the child, inquiry was directed to be conducted by the Crime Branch of CID along with other cases. After inquiry, Crime Branch (CID) reported that the Relinquishment Deed was a fake and fabricated document and the witnesses to the Relinquishment Deed were employees of appellant no.1. Therefore, paper notification dated 4.6.2001 was made calling for claims by biological parents within 30 days in respect of child Sahiti and eight other cases. The Government of India had also addressed to the Central Adoption Resource Agency (in short 'CARA') about the false claim made by appellant no.1 and requested to initiate action against appellant no.1. The Family Court rejected the application holding that the VCA issued no objection certificate on the ground that Indian parents had refused to adopt the child on the ground that she was suffered from skin disease. The Family Court was of the view that the so called reasons did not merit acceptance. The child was also referred to child study report which indicated that the child did not suffer from any ailment. It was noted that letters of rejection by Indian parents were not filed and the efforts of VCA for in county adoption were not established. It was noted that the effort was to be made in the light of decision of this Court in Lakshmi Kant Pandey v. Union of India (1984 (2) SCC 244). It was noted that in term of G.O.Ms. No.16 of 2001 relinquishment of a child by biological parents on grounds of poverty, number of children or unwanted girl child could not be permitted. Accordingly the petition filed was rejected.

The view of the Family Court was affirmed by the High Court. High Court noticed that appellant no.1 based its claim on fabricated document and there was no genuine effort to see that the child was adopted by Indian parents.

In support of the appeal learned counsel for the appellants submitted that all possible efforts have been made to see that the child is adopted by Indian parents. It is not a fact that the child was not suffering from ailments. If the child is kept in the care and custody of the respondent no.1 and is sent to the children's home it would be traumatic for the child who has spent five years with the appellant no.1 quite happily. The State Government has accepted in public interest litigation that the children who have been transferred to Shishu Vihar run by the State Government are in a very pathetic condition. More than 100 children have lost their lives due to negligence on the part of the authority running the home and because of poor medical care, and even many of the children have ran away. It is stated that all possible efforts have been made to find out Indian parents without success. The request of appellants 2 and 3 for adopting the child should have been accepted as they were willing to adopt the child. Because of prolonged litigation, they have shown some reluctance.

Therefore, permission should be given to appellant no.1 to arrange adoption by way of inter-country adoption.

In Lakshmi Kant Pandey case (supra) the guidelines and the norms to be followed in the case of adoption by foreigners were indicated in detail.

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depends on the health and well-being of its children. Children are a "supremely important national asset" and the future well-being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said : "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity into fullness of physical and vital energy and the utmost breath, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. The child is father of the man, said Wordsworth in "My Heart Leaps up". Now, obviously children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they have to play in the nation building process. Without that the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution of India, 1950 (in short the 'Constitution'). Clause (3) of Article 15 enables the State to make special provision, inter-alia, for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter-alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. As was observed by a learned Justice Children are innocent, vulnerable and dependent. Abandoning children and encloding good foundation of life for them is a crime against humanity. Children cannot and should not be treated as chattels or saleable commodities or play things. For full and harmonious development of their personality, children should grow up in an atmosphere of

happiness, love and understanding. In old Testament Proverbs , XXII it is said "Train up a child in the way he should go, and when he is old, he will not depart from it". In "The Crescent Moon" Rabindranath Tagore said "I do not love him because he is good, but because he is my little child". The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented perambulatory introduction:

The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.

The measures are designed to protect children against neglect, cruelty and exploitation and to strengthen family ties "so that full potentialities of growth of children are realised within the normal family neighborhood and community environment". The National Policy also lays down priority in programme formation and it gives fairly high priority to maintenance, education and training of orphan and destitute children. There is also provision in the National Policy for constitution of a National Children's Board. It is the function of the National Children's Board to provide a focus for planning, review and proper coordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels continuous planning, review and coordination of all the essential service.

The essence of the directions given in Lakshmi Kant Pandey case (supra) is as follows:

- (1) Every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter-country adoption' should be acceptable.
- (2) Such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents.
- (3) There is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activating themselves in the field of inter-country adoption with a view to trafficking in children.
- (4) Following are the requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned. In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or

licensed by the government of the country in which the foreigner is resident. No application by foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child. Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it. The record shows that in every foreign country where children from India are taken in adoption, there are social and child welfare agency licensed or recognised by the government and it would not therefore use any difficulty, hardship or inconvenience if it is insisted that every application form a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised by the government of the county in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child

welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of the foreign country and the court should not make an order for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency.

(5) The position in regard to biological parents of the child proposed to be taken in adoption has to be noted. What are the safeguards which are required to be provided insofar as biological parents are concerned? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together or the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the institution or center or home for child care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision.

(6) But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the institution or center or home for child care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the brother of the child and its background, health and development.

But where the child is an orphan, destitute or abandoned child and its parents are not known, the institution or center or home for child care or hospital or social or child

welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced name it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child or within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

(7) Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centers which are active in inter-country adoptions. Such Central Adoption Research Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward agencies in the courts. Every social or child welfare agency taking children under its care can then be required to sent to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency."

In terms of this Court's decision in Lakshmi Kant Pandey case (supra), CARA was formed and it published "Guidelines for adoption". Under these guidelines every State has a VCA to co-ordinate and oversees inter-state adoptions.

It is pointed by Mr. Colin Gonsalves who was requested to assist in the matter though the intervention application filed by him on behalf of Parchuri Jamuna was rejected, that in some States the VCA is a non-governmental organization (in short 'NGO') and in some other States the Department of Women and Child Development. In the State of Andhra Pradesh, the said Department is VCA. Several guidelines have been issued from time to time. The Government of India,

Ministry of Welfare has also issued directions. On the basis of Lakshmi Kant Pandey case (supra) the Government of India has issued certain guidelines vide its Resolution No.13-33/85-CH(AC) dated 4th July, 1989. Subsequently, some clarifactory orders were passed by this Court on 19th September, 1989, 14th August, 1991, 29th October, 1991, 14th November, 1991 and 20th November, 1991. A Task Force was constituted on 12th August, 1992 under chairmanship of retired Chief Justice of this Court. Report was submitted by the Task Force on 28.8.1993. On the basis of the recommendations made certain guidelines were also issued by the Ministry of Welfare Resolution dated 29th May, 1995.

In the background of what has been noticed by the Family Court and the High Court it is crystal clear that the orders passed do not suffer from any infirmity to warrant interference. It has been pointed out by learned counsel for the State and Mr. Gonsalves, that the appellant no. 1 has been prosecuted for offences punishable under various provisions of the Indian Penal Code, 1860 (in short 'IPC'). The accusations relate to cheating, manipulation/fabrication of documents. Some of the functionaries of the appellant no. 1 have already been convicted while permitting any organization to keep a child or give him or her in adoption its credentials are to be minutely scrutinized. It should be ensured that behind the mask of social service or upliftment and evil design of child trafficking is not lurking. It is the duty of the State to ensure a safe roof over an abandoned child. Keeping in view the welfare of the child all possible efforts should be made by the State Governments to explore the possibility of adoption under the supervision of the designated agency. Keeping in view the guidelines indicated by this Court in Lakshmi Kant Pandey case (supra) adoption by foreign parents may in appropriate cases be permitted.

While making the requisite and prescribed exercise it has to be kept in mind that child is a precious gift and merely because he or she for various reasons is abandoned by the parents that cannot be a reason for further neglect by the society. It is urged that some account of vehemence by learned counsel for the appellants that the children homes run by the State Governments are really no place when a child is to be placed. They suffer from neglect, proper care is a myth and a large number of children have lost their lives or are unable to bear the cruelties meted out. If the grievances are true, it is a matter of serious concern. The Central Government and the State Government would do well to look at these problems with the humanitarian approach and concern they deserve.

It would be appropriate for them to keep the following lines from Longfellow's "The Children's Hour" in mind. "Between the dark and the daylight, when the night is beginning to lower, comes a pause in the day's occupations, that is known as the Children's Hours"

With the aforesaid observations the appeal is dismissed with no orders as to costs.

JUDIS