

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.HARILAL

&

THE HONOURABLE MR.JUSTICE C.S.DIAS

TUESDAY, THE 07TH DAY OF JANUARY 2020 / 17TH POUSHA, 1941

WP(Cr1.).No.439 OF 2019

PETITIONER/S:

- 1 SIVARAMA K. ,
AGED 39 YEARS
S/O. VENKATTARAMANA BHAT, RESIDING AT HARI NILAYA,
BHAT COMPOUND, KUMBLA, KOYIPADY VILLAGE, KASARAGOD
DISTRICT.
- 2 ARUNA M.S. ,
AGED 33 YEARS
W/O. SIVARAMA, RESIDING AT HARI NILAYA, BHAT
COMPOUND, KUMBLA, KOYIPADY VILLAGE, KASARAGOD
DISTRICT.
- 3 NARASIMHA,
AGED 37 YEARS
S/O. MAYIGA, RESIDING AT HALAGOOR, HOBLI, NITTOORU,
HOSADODDI VILLAGE, MALAVALLI TALUK, MANDYA DISTRICT,
STATE OF KARNATAKA.
- 4 SOWMYA,
AGED 30 YEARS
W/O. NARASIMHA, RESIDING AT HALAGOOR, HOBLI,
NITTOORU, HOSADODDI VILLAGE, MALAVALLI TALUK, MANDYA
DISTRICT, STATE OF KARNATAKA.

BY ADVS.SRI.T.MADHU
SMT.C.R.SARADAMANI

RESPONDENT/S:

- 1 THE STATE OF KERALA,
REPRESENTED BY ITS SECRETARY TO GOVERNMENT, HOME
DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695001.
- 2 THE STATE POLICE CHIEF,
KERALA, OFFICE OF THE STATE POLICE CHIEF,
THIRUVANANTHAPURAM-695001.

- 3 THE DISTRICT POLICE CHIEF,
KASARAGOD, KASARAGOD DISTRICT-671121.
- 4 THE CHILD WELFARE COMMITTEE,
KASARAGOD, REPRESENTED BY ITS SECRETARY, OFFICE OF
THE CHILD WELFARE COMMITTEE, KASARAGOD-671121.
- 5 THE STATION HOUSE OFFICER,
KUMBLA POLICE STATION, KASARAGOD DISTRICT-671321.
- 6 SISU VIKAS BHAVAN,
THIRUVAKOLI, PALAKKUNNU, PANAYAL POST, KASARAGOD
DISTRICT-671318, REPRESENTED BY ITS SECRETARY.

BY GP SRI.K.B.RAMANAND

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
07.01.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“CR”

JUDGMENT

(Dated this the 7th day of January, 2020)

C.S.DIAS, J.

This writ petition is filed seeking a writ of Habeas Corpus to direct the respondents 4 to 6 to produce a child named 'Thanmayi' born on 11.7.2019, said to be in the illegal detention of the respondents 4 to 6.

2. The thumb nail sketch of the facts in the writ petition is that the petitioners 3 and 4 are the biological parents of the child 'Thanmayi'. The petitioners 3 and 4 (in short 'biological parents'), by Ext P-1, registered adoption deed dated 5.8.2019 of the Malavalli Sub-Registry Office, Mandya, Karnataka, placed the child 'Thanmayi' (in short 'child') in adoption to the petitioners 1 and 2 (adoptive parents). The adoptive parents, though married for many years, are issueless. As the petitioners are all Hindus by religion, they are governed by the provisions

of the Hindu Adoption and Maintenance Act, 1956 (for brevity, referred to as 'HAM Act'). The biological parents and the adoptive parents on their own free will and volition decided to give and take the child in adoption. Accordingly, Ext P-1 adoption deed was executed and registered, and the child was handed over by the biological parents to the adoptive parents. Since 5.8.2019, the child was in the care and custody of the adoptive parents.

3. While so, on 9.12.2019, the fifth respondent purportedly on the directions of the fourth respondent – the Child Welfare Committee ('CWC' for short), Kasargod, forcefully took away the child from the adoptive parents and placed the child in the custody of the sixth respondent – a child care institution. The fifth respondent registered Ext P-2 FIR (crime No.458/2019) against the petitioners for an offence punishable under Sec.80 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for brevity, referred to as 'J.J Act').

4. According to the petitioners, the act of the fourth respondent in directing the fifth respondent to register Ext P2 FIR, and in taking away the child from the custody of the adoptive parents is ex facie illegal and without any authority of law. Thus, they have contended that the child is in the unlawful detention of the respondents 4 to 6.

5. When the writ petition came up for hearing on 16.12.2019, the learned Government Pleader took notice for respondents 1 to 5, and notice to the sixth respondent was issued by special messenger. The case was posted on 19.12.2019.

6. On 19.12.2019, when the writ petition was taken up for hearing, the learned Government Pleader handed over the orders passed by the CWC. The CWC found that the child was handed over by the biological parents to the adoptive parents in contravention to Sec.80 of the J.J Act. Hence, the CWC held that Ext P-1 adoption is void and illegal, and therefore, the child is a

child in need of care and protection. Accordingly, the child was directed to be placed with the child care institution. All the petitioners were present in Court.

7. We had by our interim order dated 19.12.2019, on prima facie finding the action of the fourth respondent to be wrong and irregular, directed the child to be restored to the adoptive parents.

8. Heard Sri.T.Madhu, the learned counsel for the petitioners and Sri.Ramanand K.B, the learned Government Pleader for respondents 1 to 5. There was no appearance for the sixth respondent.

9. The questions that emerge for consideration in this writ petition are as follows:

(i) Whether P-1 adoption effected as per the provisions of the HAM Act can be said to be in contravention of the J.J Act?

(ii) Whether the J.J Act overrides the HAM Act?

(iii) Whether the child is in the unlawful detention of respondents 4 to 6?

10. As the above questions are intertwined, we are considering them together.

11. It is undisputed that the petitioners 3 and 4 are the biological parents of the child; that the adoptive parents are issueless and that all the petitioners are Hindus by religion.

12. The Hindu Adoption and Maintenance Act, 1956, was enacted for the purpose of amending and codifying the law related to adoption and maintenance among Hindus.

13. Sec. 2(1) of the HAM Act reads as follows:

2. Application of Act -(1) This Act applies-

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist,

Jaina or Sikh by religion, and
(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

14. Sec.5 of the HAM Act reads as follows:

5. Adoptions to be regulated by this Chapter- (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.
(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

15. The Juvenile Justice (Care and Protection of Children)

Act was initially enacted in the year 2000. Subsequently, to re-enact a comprehensive legislation, the Juvenile Justice (Care and Protection of Children) Act, 2015 was re-enacted.

16. The preamble of the J.J Act, 2015, reads as follows:

An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto.

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AND WHEREAS, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) to make comprehensive provisions for children

alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993), and other related international instruments.

17. Chapter VIII of the J.J Act deals with adoption.

18. Sub-sec.(3) of Sec.56 reads as follows:

(3) Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956 (78 of 1956).

19. The above extracted provisions establish that both the HAM Act and the J.J Act are central enactments occupying their respective fields. The former statute deals with adoption

and maintenance among Hindus, and the latter statute is an Act to consolidate and amend the law relating to children found in conflict with law and children in need of care and protection. On a close scrutiny of the two statutes, we do not find any repugnancy between the two legislations.

20. The Hon'ble Supreme Court in **Shabnam Hashmi vs Union of India [2014 (2) KLT 444(SC)]** has held:

“11. The J.J 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 Art.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”.

(emphasis

supplied)

21. Even though the above judgment was rendered under the J.J Act, 2000, the obiter dictum applies on all fours to the subsequent Act, 2015 because the 2015 statute is only a more comprehensive legislation of the Act, 2000.

22. The Parliament has in its wisdom, specifically included Sec.56(3) in the J.J Act, 2015, which substantiates that adoptions carried out under the HAM Act are saved, and that the HAM Act is not repugnant with the J.J Act.

23. The CWC without considering any of the above statutory provisions under the two statutes, directed the police to register Ext P2 FIR, on the allegation that the petitioners have contravened Sec.80 of the J.J Act.

24. Sec.80 of the J.J Act reads as follows:

80. Punitive measure for adoption without following prescribed procedures

- If any person or organization offers or gives or receives, any orphan, abandoned or surrendered child, for the purpose of adoption without following the provisions or procedures as provided in this Act, such person or organization shall be punishable with imprisonment of either description for a term which may extend upto three years, or with fine of one lakh rupees, or with both;

(emphasis

supplied)

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25. It is indubitable as per Sec.80 that if any person or organisation gives or receives any orphan, abandoned or surrendered child in adoption without following the provisions or procedures as per the J.J Act would be punishable under Sec.80.

26. In the case before us, the biological parents gave their child in adoption to the adoptive parents after fulfilling all the provisions of the HAM Act, that too, after executing a registered adoption deed.

27. Sec.16 of the HAM Act reads as follows:

16. Presumption as to registered documents relating to adoption- Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

28. Therefore, once an adoption deed is executed and registered under the HAM Act, the Court shall presume that the adoption has been made in compliance with the provisions of the Act until it is disproved.

29. On the giving of the child by the biological parents and the taking of the child by the adoptive parents, which is evidenced by Ext P-1 registered adoption deed, the child can never be labelled as an orphan, abandoned or surrendered child, as interpreted by the fourth respondent. If such a view is taken, it would render the HAM Act otiose and redundant and make it appear that the former enactment is repugnant with the J.J Act, which never is the intention of the lawmakers. Such a narrow and oppressive interpretation cannot be given, particularly when the legislature has consciously included Sec.56(3) in the J.J Act, the later enactment, with the intention to permit adoptions under the HAM Act. There may be instances where a

person may qualify to adopt a child under the provisions of both the HAM Act and the J.J Act. In such an eventuality, especially where there is no repugnancy between the two statutes, it would be the choice of such person to opt for the HAM Act or the J.J Act, 2015, adoption. No authority can compel such person to resort to only the J.J Act, 2015.

30. The CWC does not have a case that Ext P-1 adoption deed executed between the petitioners is not in compliance with the provisions of the HAM Act or that the petitioners are not eligible to give and take the child in adoption under the former enactment. Even if the CWC has such a case, it is for the CWC to disprove Ext P-1 deed. Merely by raising an allegation that the child was placed and taken in adoption in contravention of Sec.80 of the J.J Act is not sufficient, to direct the child to be placed with a child care institution. Moreover, Chapter VIII of the J.J Act, which deals with rehabilitation and reintegration of children, makes it apparent that the intention of the legislature

is to restore orphan, abandoned or surrendered children to their parents, adoptive parents, foster parents, guardian and fit person, in that priority. The aim and object of the Act is to de-institutionalise children and see that they are restored to their families at the earliest, and not to place the above category of children in institutions.

31. The action of the CWC in directing the police to register a crime and then place the child in the custody of the sixth respondent is erroneous and is in total contravention of the provisions of the HAM Act. Thus, we hold that the placing of the child with the sixth respondent is arbitrary and unwarranted, and tantamounts to illegal detention. We, therefore, confirm the interim order dated 19.12.2019 and hold that the child shall be restored to its adoptive parents.

32. Therefore, in exercise of this Court's jurisdiction under Article 226 of the Constitution of India, we direct that the child shall live her life as the adoptive child of petitioners 1 and

2, the adoptive parents. However, we reserve the right of the petitioners to file their written objections to the orders passed by the CWC, if they are so advised. If such objection is filed, the CWC shall consider the written objections, keeping in mind the findings in this judgment, and pass a speaking order as expeditiously as possible, at any rate within a period of one month from the date of production of a copy of this judgment.

This writ petition is allowed accordingly.

Sd/-

K.HARILAL

JUDGE

SKS/21.12.2019

Sd/-C.S.DIAS

JUDGE

/True copy/

P.A to Judge

APPENDIX

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1 THE TRUE COPY OF THE ADOPTION DEE DATED
05/08/2019 REGISTERED WITH THE SRO,
MALAVALLI, MANDYA DISTRICT OF THE STATE
OF KARNATAKA.
- EXHIBIT P1 A THE TRUE ENGLISH TRANSLATION OF EXHIBIT
P1.
- EXHIBIT P2 THE TRUE COPY OF THE FIR DATED
09/12/2019 IN CRIME NO.458/2019 OF
KUMBLA POLICE STATION.