

(2009) 08 DEL CK 0404

Delhi High Court

Case No: FAO No. 32 of 2009

Mr. Craig Allen Coates and Ms.
Cynthia Ann Coates through Mrs.
Rekha Arora Adoption Officer
Welfare Home for Children

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Aug. 31, 2009

Acts Referred:

- Guardians and Wards Act, 1890 - Section 17, 17(2), 26, 7

Citation: (2009) 162 DLT 605 : (2010) 1 ILR Delhi 384 : (2010) 7 RCR(Civil) 1265

Hon'ble Judges: Vidya Bhushan Gupta, J

Bench: Single Bench

Advocate: Mohinder Singh, for the Appellant; Nemo, for the Respondent

Final Decision: Dismissed

Judgement

V.B. Gupta, J.

Appellants have filed present appeal against judgment dated 18th December, 2008, passed by District Judge-III (West), Delhi, vide which their petition u/s 7 & 26 of Guardians and Wards Act, 1890 (for short as "Act") was dismissed.

2. Brief facts are that, appellants are American nationals and were married on 19th May, 1984. From their wedlock, they have three children, namely, Scott aged 21 years, female child Kacie aged 19 years and male child Jesse aged 16 years old.

3. It is stated that appellants are medically and physically fit and healthy and they have a strong desire to adopt another minor male child in order to further expand their family.

4. Appellant No. 1 is working as a Transaction Processor with U.S Bank and his salary per hour is \$8.29 while, appellant No. 2, is working as Nursing Supervisor with

Preferred Home Health Care and her current annual income is \$43,680. Both enjoy high status and sufficient means of livelihood.

5. Respondent No. 2 is a registered Society and is licensed by Government of NCT of Delhi to keep and maintain abandoned, orphaned and destitute children at their Children Homes. It has been granted recognition by Ministry of Social Justice and Empowerment, Government of India, for submitting applications to competent Court for declaration of foreigners as guardians of Indian Children under the Act.

6. Minor male child Anil (born on 19th October, 1999) was found abandoned by police officials of Police Station Okhla, New Delhi, and was transferred to respondent No. 2- institution on 20th January, 2006. Date of birth of minor has been fixed as 19th October, 1999, after medical examination. Said child has been declared as abandoned child and is certified as legally free for adoption by Child Welfare Committee. Coordinating Voluntary Adoption Resource Agency (CVARA) and Central Adoption Resource Authority (CARA) have been given clearance for inter country adoption of the child. Appellants, through their attorney moved this petition for being appointed as joint guardians of minor child and be permitted to remove the minor outside the jurisdiction of this Court for his adoption, according to local laws of their country.

7. Notice of present appeal was issued to the respondents, who filed their "No Objections..

8. It is contented by learned Counsel for appellants that child in question is an abandoned child and no Indian family has come forward to adopt the said child. Appointment of appellants as guardians of minor, would be in best interest and welfare of the child, who would get a family and stability in life, which he could never get in an orphanage.

9. It is further contended that in case appeal is not allowed the child would be deprived of warmth of family and would be forced to spend his life up to 18 years in an orphanage without getting proper education and upbringing and a family environment.

10. Lastly, it is contended that trial court wrongly dismissed the petition, even though Government of India has granted "No Objection. Certificate to appellants for adoption of the minor male child. The minor child has been rejected by Indian families, as child is suffering from mental delays and needs special care, which appellant no .2, could provide as she is qualified nurse and has been taking care of her husband also.

11. In support of his contentions learned Counsel for appellants cited various decisions of Supreme Court, namely:

(i) [Lakshmi Kant Pandey Vs. Union of India \(UOI\)](#), ;

(ii) [Laxmi Kant Pandey Vs. Union of India \(UOI\) and Another, ;](#)

(iii) [Laxmi Kant Pandey Vs. Union of India \(UOI\), ;](#)

(iv) [Laxmikant Pandey Vs. Union of India and others, ;](#)

(v) Lakshmi Kant Pandey v. Union of India and Anr., (2001) 9 SCC 379 and

(vi) Jeremy Kauffinan and Anr. v. Indian Council for Child Welfare and Anr. [FAO No. 270-271 of 2006, decided by this Court on 25th January, 2007.]

12. Section 7 of the Act, deals with the Power of the Court to make order as to guardianship. It read as under:

7. Power of the Court to make order as to guardianship-(1)Where the Court is satisfied that it is for the welfare of a minor that an order should be made-

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian.

the Court may make an order accordingly,

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

13. As per this Section, District Judge, as protector and guardian of minor, appoints guardian of the person and properties of minor and places himself in the position of the father or guardian.

14. If a person applies to be appointed guardian of the person of a minor, and the applicant is found to be unsuitable, it is not necessary for the Court to do anything more than rejecting his petition. The discretion of the Court of first instance in the appointment of a guardian will not be interfered with by the Court of Appeal, except for strong reasons.

15. Section 17 of the Act, deal with matters to be considered by the Court in appointing guardian. It read as under:

17 . Matters to be considered by the Court in appointing guardian-

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) x x x x x

(5) The Court shall not appoint or declare any person to be a guardian against his will.

16. Section 7 read with Section 17 of Act, make it incumbent on court to take into account question of welfare of minor while appointing or declaring a guardian.

17. Section 17(2) of the Act mentions and specifies a number of items for the consideration of the court in appointing or declaring a guardian.

18. The settled law is that the word "welfare" used in this section must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being.

19. In Lakshmi Kant Pandey (Supra), Supreme Court laid down guidelines with regard to adoption to be followed from time to time . In [Lakshmi Kant Pandey Vs. Union of India \(UOI\)](#), , the Court held:

But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country.

20. The court also observed;

It has been the experience of a large number of social welfare agencies working in the area of adoption that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption and even if they decide to take such child in adoption, they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility of finding adoptive parents within the country and their future lies only in adoption by foreign parents. But at the same time it is necessary to bear in mind that by reason of the unavailability of children in the developed countries for adoption, there is a

great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organizations or individuals activating themselves in the field of inter-country adoption with a view of trafficking in children and sometimes it may also happen that the immediate prospect of transporting the child from neglect and abandonment to material comfort and security by placing it with a foreigner may lead to other relevant factors such as the intangible needs of the child, its emotional and psychological requirements and possible difficulty of its assimilation and integration in a foreign family with a different racial and cultural background, being under-emphasized, if not ignored.

21. The Court further held;

We may also point out that if a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be somewhat difficult for a grown up child to get acclimatized to new surroundings in a different land and sometimes a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown child. But we make it clear that when we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty and there is no reason why they should be denied the benefit of family warmth and affection in the home of foreign parents, merely because they are past the age of 3 years.

22. In light of above observations made by Supreme Court, it is to be seen as to whether appellants have got any case for adoption of the child in question.

23. As is apparent, appellants are already blessed with three children i.e. two males and one female child. Both appellants are fifty years old, therefore, need for them to expand their family further at this stage, does not sound very convincing. Appellant No. 2 is a nurse and is already taking care of her husband, who is disabled and managing her career also.

24. It is quite likely that bringing up of additional child, may get neglected. Also one cannot completely rule out the possibility that child may be exploited and used as a mere helper for Appellant No. 1, who is disabled, once the child reach the foreign land.

25. It has also not satisfactorily been explained by the appellants as to why they are so keen, in adopting an Indian child, specifically, and not the child of their own country, who will be quicker in adapting to their family.

26. In AIR 1994 Supreme Court 658, the Court further clarified the guidelines, laid down in Lakshmi Kant Pandey's (Supra) and observed;

We would like to clarify that the guidelines laid down in Lakshmi Kant Pandey's case and adopted by the Government of India pursuant to the directions made therein have relevance on the question of welfare and must be kept in view while disposing of any case concerning adopting of Indian children by foreign couples. One of the guidelines is that before such adoption is cleared an attempt should be made to find Indian parents or parents of Indian origin for the children and if that is not possible within a reasonable time then the question regarding adopting by foreign parents may be considered. This is clearly to ensure that as far as possible Indian children should grow up in Indian surroundings so that they retain their culture and heritage, a matter which has a bearing on the question of their welfare. We would like to emphasize that the guidelines laid down in Lakshmi Kant Pandey's case are binding on all Courts including High Courts. We do not think that by the above observations the High Court intended to brush aside the guidelines laid down by the Government of India as not germane to the question pertaining to adoption u/s 7. We read the above observations made by the High Court merely to mean that the recommendations made by the Council a Voluntary Co-ordination Agency set up pursuant to the guidelines in Lakshmi Kant Pandey's case, are not final and conclusive in nature, that is to say, that the decision regarding adoption has to be taken by the Court in terms of S.7 without treating the recommendations as conclusive in character although they are entitled to great weight.

27. In Lakshmi Kant Pandey (Supra), though adoption by foreign nationals has been upheld, but it is also observed that greater care and introspection is needed in these Inter-Country adoptions.

28. The impugned judgment of District Judge is based on sound legal principles, as it deals in detail with legal as well as moral principles, that when foreign couple have already got a male child, what is the need and motive to adopt another male child. Trial court rightly came to the conclusion, that it would not be in the welfare of the child, for appellants to be appointed as his guardian. Relevant findings of trial court are as under:

(9) The child is stated to be about 9 years of age. In order to ascertain his willingness, I had summoned him to the Court and had met him in my chamber. I had tried to make him comfortable by offering some biscuits and tea. However, I found that the child hardly spoke. He did not give answers to various questions posed by me and did give an impression that he did not understand the proceedings nor can understand that he is being proposed to be sent to a foreign land amongst different people, of different race and language. He kept on looking towards the door from where he was made to come in and appeared to be apprehensive that he may not be left there. He was thus, not in a position to give an assent or otherwise regarding his willingness to be taken outside the Country for his

eventual adoption by foreign parents. In my opinion, therefore, sending such a child abroad may not be conducive to his good health and to his overall development. I am of the considered opinion that this child may not be able to adapt to the new environments, the new way of life in the foreign land where he is proposed to be taken. Since, he is about 9 years of age, it would be rather difficult for him to pick up the language and manner of their living.

(10) There is another angle to this case. The home study report filed on record shows that the proposed adoptive parents are about 50 years of age. They have 3 children with the age ranging between 16-21 years. Two of them are not residing with their parents. In these circumstances, this child will hardly get any company. Secondly, the proposed adoptive father suffers from a serious disease known as Cerebral Palsy. The home Study Report Ex. P -2 inter-alia reads as under:

Craig has had cerebral palsy since birth. It is a physical condition, one that confines him to a wheel chair. Craig cannot talk verbally, so he has a communication board that attaches to his wheel chair that helps him communicate with others.

(11) It is, therefore, clear that petitioner No. 1 is a physically handicapped person. In my opinion, he would be unable to take responsibility of a guardian for the child. I am, therefore, of the considered opinion that the grant of the petition may not be in the welfare of the child. In the result, I reject the prayer for appointment of the petitioners as the guardians of the minor.

29. It appears that respondents in the present case gave their "No Objection" without any application of mind. They did not consider this aspect, that when appellants are having three children already, then where is need for them to expand their family, any further.

30. Case of Jeremy Kauffman (Supra) is clearly distinguishable from the facts of the present case. In the present case, appellants are already having three children and both appellants are about fifty years old.

31. After going through entire record and considering the arguments advanced by learned Counsel for appellants, I find that there is no ambiguity or illegality in the impugned judgment.

32. The real intention of appellants in adopting the child who is suffering from mental delays, appears to exploit him as a domestic help for appellant No. 1, since appellant No. 2 is gainfully employed as a nurse, while appellant No. 1, has been suffering from Cerebral Palsy since birth. Moreover, appellants are already having three children, then where is the need to further expand their family.

33. Present appeal filed by appellants is nothing but an abuse of the process of law. Such frivolous and bogus appeals, deserves to be dismissed with heavy costs, so that precious time of trial court as well as appellate court are not wasted.

34. Accordingly, this appeal stand dismissed with costs of Rs. 20,000/-(Rupees twenty thousand only)
35. Costs be deposited with Registrar General of this Court within four weeks.
36. Trial court record be sent back.
37. List for compliance on 6th October, 2009.