



IN THE HIGH COURT OF KARNATAKA AT DHARWAD

DATED THIS THE 04TH DAY OF OCTOBER, 2023

BEFORE

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

W.P. NO. 104785 OF 2023 (GM-RES)

BETWEEN:

MOHANKUMAR
B SHELAR

Digitally signed
by
MOHANKUMAR
B SHELAR

...PETITIONER

(BY SRI. SAURABH A SONDUR, ADVOCATE)

AND:

NIL

...RESPONDENT

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE A WRIT IN THE NATURE OF CERTIORARI QUASHING THE IMPUGNED ORDER DATED: 16/06/2023 PASSED IN R.P. NO. 5001/2023 I ADDITIONAL DISTRICT AND SESSIONS JUDGE, BAGALKOT, TO SIT AT JAMKHANDI THE LAND ACQUISITION REHABILITATION AND RESETTLEMENT AUTHORITY JAMAKHANDI VIDE ANNEXURE-D.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 20.09.2023, COMING ON FOR PRONOUNCEMENT OF ORDER THIS DAY, THE MADE THE FOLLOWING:

ORDER

Captioned petition is filed by the petitioners assailing the order of the Court below on petition filed under Section 8 and 9 of the Hindu Adoption and Maintenance Act, 1956 (for short "the Act") seeking permission to permit petitioner No.1 to act as guardian of petitioner No.2 and consequently permit petitioner No.1 to adopt petitioner No.2.

2. Facts leading to the case are as under:

Petitioner No.1 is a retired government employee. She claims that she was working as a hostel warden in Karnataka Social Welfare Department. It is also stated in the petition that she lost her husband long back and has no issues in the wedlock. It is claimed that petitioner No.2 is a student and distant relative of petitioner No.1 and that petitioner No.2 has lost his parents during his childhood. It is further stated in the

petition that the father of petitioner No.2 died in 2005 while mother died in 2008. Therefore, a petition came to be filed to appoint petitioner No.1 as a guardian of petitioner No.2 and consequently seeking permission to permit petitioner No.1 to adopt petitioner No.2.

3. The petitioners to substantiate their claim have tendered evidence by examining petitioner No.1 and four documents are produced in all. The petitioners claim that they belong to SC community and that there is a custom of taking child aged more than 15 years in adoption. The Court below has dismissed the petition on the ground that except a paper publication, the petitioners have not placed on record any cogent evidence regarding prevailing custom or usage indicating that parties have a custom of adopting person aged more than 15 years. Therefore, the learned Judge on the ground that no evidence is let in to substantiate their claim, has dismissed the petition. The said order is under challenge.

4. Heard the counsel for petitioners and perused the order under challenge.

5. I have also given my anxious consideration to the judgment cited by the learned counsel appearing for the petitioners.

6. On examining the petition filed under section 8 and 9 of the Act, it is clearly evident that the petitioners are resident of Jamakhandi. If petitioners are permanent residents of Jamakhandi, then I am of the view that since there is no dispute that Jamakhandi which was erstwhile princely State and part of Bombay province, the custom of adopting a major child is judicially recognized and therefore, I am of the view that the proof of the said custom is not necessary. Though Section 10 of the Act creates age bar under sub-section (iv) to Section 10 of the Act, however it does not apply to the parties who are governed under Bombay School of law. What is saved by the section is the custom as to adoption and not any rule of law permitting in adoption of a person who has completed 15

years of age. The judgments rendered by the Bombay High Court and confirmed by the Hon'ble Apex Court also clearly indicate that adoption of a person over 15 years of age is valid only if recognized by custom and resort to any text or rule or interpretation of Hindu Law to the contrary is of no avail. The relaxation in Bombay School of Law regarding the age is traceable to the interpretation of original texts, viz., "Vyavahara Mayukha" and the said practice is interpreted by the High court of Bombay.

7. In view of conflict of views, the question whether word 'custom' or 'usage' occurring in Section 10(iii) and 10(iv) read with Section 3(a) of the Act includes within its sweep the rules of Bombay School of Hindu Law (Mayukha) was referred to a Full-Bench. In that case, the Court below held that custom of adopting a boy above 15 years was not proved. Nevertheless, Bombay High Court held that adoption is valid according to Vyavahar (Mayuka) and answered the question referred to Full Bench in affirmative.

8. The view expressed in some of the decisions of Bombay High Court that custom and usage that is saved must be other than that recognized in any ancient text of rule of Hindu Law appears to be a sounder view. Therefore, if parties are governed under Bombay School of Law, the Bombay High Court in catena of judgments held that person may be adopted at any age though he may be older than the adopter and though he may be married and has children. Bombay High Court has observed that custom was judicially recognized and hence, it need not be independently proved in subsequent cases. In ***Ratanlal @ Babulal Chunilal Samsuka vs. Sundarabai Govardhandas Samsuka (D) Through LRs and others***¹ the Hon'ble Supreme Court held that the custom commands legitimacy not by authority of law but from public acceptance and acknowledgment. The ingredients necessary for establishing valid custom are continuity, certainty, long usage and reasonability. If petitioners are found to be permanent resident of Jamakhandi Taluk, which is admittedly

¹ (2018) 11 SCC 119

a part of Bombay Province, then I am of the view that the custom permits a party to adopt a person aged above 15 years. Therefore, the learned Judge erred in rejecting the petition on the ground that no evidence is adduced to substantiate that there is custom of adopting a major person. Therefore, the order under challenge is not sustainable and same is liable to be set aside and the matter needs to be remitted back to the Trial Court. Hence, the following:

ORDER

- i) The writ petition is allowed.*
- ii) The matter is remitted back to the concerned Court.*
- iii) The petitioners are hereby directed to appear before the concerned Court on 06.11.2023.*
- iv) The Court below shall examine the judgments rendered by the Bombay High Court as indicated supra and pass fresh orders in accordance with law.*

- v) *The petition shall be decided in accordance with law within a period of eight weeks from the date of receipt of certified copy of this order.*

- vi) *In view of disposal of the petition, pending interlocutory applications, if any, do not survive for consideration and are disposed of accordingly.*

Sd/-
JUDGE

YAN