

Laxmikant Pandey

Vs

Union of India and Other

Criminal Miscellaneous Petition Nos. 5704 and 8842 of 1990 in Writ Petition (Criminal) No. 1171 of 1986 (Under Article 32 of the Constitution of India)

(CJI Ranganath Misra, M.H. Kania, Kuldip Singh JJ)

14.08.1991

ORDER

1. In Lakshmi Kant Pandey v. Union of India ((1984) 2 SCC 244 : (1984) 2 SCR 795) this Court laid down the procedure to be followed in adoption of children by foreigners. The Court observed the fact that children are a supremely important national asset and the future well being of the nation depends upon how children grow and develop. It quoted with approval the report of the Study Team on Social Welfare where it was said : (Quoted at SCC p. 249, para 6)

"... the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages."

This Court also quoted with approval from the National Policy for the Welfare of Children where it was said : (quoted at SCC p. 250, para 6)

"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."

2. Thus saying, this Court laid down the procedure to be followed and while doing so, the court referred to recognised child welfare agencies and provided for their licensing or registration by the Central Government. Petitioners in this application are some of the licensed welfare agencies contemplated under the judgment of this court and petitioner 2 is the Central Voluntary Adoption Resources Agency which is a co-ordinating unit based at Delhi.

3. In these applications petitioners have made the following prayers :

(a)(i) All government/juvenile homes, nursing homes and hospitals - government or private, will apply for declaration of a child as abandoned and free for placement and if the parents of the child are not known, such children should be transferred to the recognised institution/placement agency requested for by them within a fixed time frame;

(ii) All recognised placement agencies depending upon their capacity to accommodate and care for those children after accounting for their age and qualification should be allowed to seek transfer of those children from government/juvenile homes and nursing homes/hospitals and such institutions should be obliged to transfer the children to such placement agencies;

(iii) Juvenile Welfare Boards/Courts should allow the aforesaid transfers in favour of the recognised agencies for rehabilitation through guardianship/adoption from VCAs/CVARAS or otherwise;

(iv) Juvenile Welfare Boards/Courts should not disturb the custody of children abandoned directly with the recognised placement agencies when approached for declaring them as abandoned and free for placement and such orders may be passed ex-parte and confirmed after notice to the concerned parties;

(b)(i) Quota fixed by the Central Government for placement of children with Indian families may be quashed as being contrary to the decision in Lakshmi Kant Pandey case ((1984) 2 SCC 244 : (1984) 2 SCR 795);

(ii) In the alternative, if this Court upholds the validity of the circular fixing the quota, the percentage may be suitably reduced;

(iii) This Court may direct that if the quota is to be fixed, children with handicaps, medical problems and other drawbacks should be excluded from the total count as also girls above one year and boys above two years of age should be excluded from counting;

(c) The State Governments and the various Union territories should be directed to issue birth certificates based upon attested copies of Court's certificate (decree), adoption deed or on the basis of affidavits of officials of the licensed agencies;

(d) This Court may approve by way of revision of expenses by about 25 per cent with effect from the date of the application and another 10 per cent increase annually to enable the agencies to maintain high standards of care for the children;

(e) The Indian children adopted abroad are to be allowed to retain their citizenship/nationality till they attain the age of majority whereupon they should exercise their option one way or the other;

(f)(i) The Central Government should be directed to act by itself though the State/Union territory government to issue show cause notice before refusing to extend recognition and grant personal hearing before taking official action and reasoned orders should be made in support of such action;

(ii) In the event of cancellation of recognition, a time frame should be fixed to clear all the cases already in the pipeline for being processed;

(iii) An appellate authority should be prescribed for challenge of governmental action as stated above;

(g)(i) The Court may direct stay of governmental action in the matter of setting up of Central Adoption Resource Agency (CARA) and ultimately hold that there was no longer any need for such an agency in view of the fact that many private agencies were not available to monitor the programme.

4. Notice was ordered on these petitions on September 21, 1990, and these several months that have followed have been taken by different State Governments and Union territories and others to place their affidavits for consideration of this Court.

5. We have heard counsel for the appearing parties at length. Before we deal with several prayers placed before the Court for consideration it is perhaps necessary to refer to the provisions of the Children's Act of 1960 and the Juvenile Justice Act of 1986. The scheme of these two acts is not very different. The definitions of 'neglected child' and 'neglected juvenile' is absolutely the same. The mechanism for administering the statutes is also more or less the same. Under Section 4(1) of the Children's Act, a Child Welfare Board is intended to take charge of neglected children. Under Section 4(1) of the Juvenile Justice Act, a Welfare Board for the neglected juveniles is similarly contemplated. Sub-sections (3) and (4) of either Act authorise the Board to function as a Bench of Magistrates and confers on such Board certain powers under Criminal Procedure Code conferrable on a Metropolitan Magistrate or a Judicial Magistrate of the First Class. Section 9 of the Children's Act contemplates Children's Homes and detailed provisions have been made in the matter of setting up of such homes and management thereof. Section 11 contemplates of Observation Homes. Chapter III deals with neglected children. Under Chapter II of the Act of 1986 provision has been made for setting up of Juvenile Homes (Section 9), Social Homes (Section 10) and Observation Homes (Section 11). Both the Acts provide for after Care organisations.

6. Though these two statutes in recognition of the importance of children to society have made these beneficial provisions, noting concrete and substantial appears to have been done yet for implementing either statute in a serious way. The Children's Act has been operative for more than 30 years while the Act of 1986 is in force about five years. Yet most of the provisions in the two statutes are still worked out in a real way.

7. The Union of India has set up a Department of Women and Child Development and most of the States and Union territories have corresponding departments, yet full coordination has not been achieved. The responsibility of administering the two statutes is not properly shared. Monitoring seems to be very much wanting.

8. In course of hearing of this petition we asked learned Additional Solicitor General appearing for the Union Government to tell us as to what happens to the children - both boys and girls - who are lodged in the Homes when they cease to be children under the statute. It may be pointed out that under the Children's Act boys up to 16 and a girl up to 18 years within the definition of "child". If 'children' within the meaning of the term are lodged in various types of homes indicated in the two statutes what exactly happens to them when they cease to be children by of time has remained an enigma in the absence of a clear answer. Obviously no provision has been made in these two Acts to meet such a situation. Is it the intention of the statutes then that once a boy or a girl ceases to be a child and dose not come within the purview of the statutes he/she would have to be thrown out from the home on to the street as no more cared for ? What then would be the effect of such a situation ? Since that is not very relevant for disposing of this petition. We do not intend to proceed with that aspect any longer.

9. We are inclined to keep the handicapped children out of the purview of the judgment of this Court. We do not, however, agree that Indian citizenship should continue until the adopted child attains age of majority and is legally competent to opt. Such a step would run counter to the need of quick assimilation and often stand as a barrier to the requirements of the early cementing of the adopted child into the adoptive family. In regard to the issue of the birth certificate of the adopted child we are of the view that such certificate should be obtained on the basis of application of the society sponsoring adoption. In most of these cases the registration of birth may not be available because that would not have done. We are of the view that on the basis of the application and such other material which may be relevant to be found in an affidavit to accompany the application made by a responsible person belonging to the agency the local magistrate should have the authority to make an order approving the particulars to be entered in the birth certificate and on the basis of the magisterial order the requisite certificate should be granted. This process should be done only after adoption is finalised and the particulars of the adopting foreign parents are available to be included. There is no point in having two birth certificates, one before the child is placed for adoption and another when adoption is completed. If the procedure for taking out a birth certificate is deferred until adoption is finalised the certificate can be obtained once for all. We are of the view that the Chief District Officer (CDMO) may be involved in the matter of ascertainment of the age and the magistrate may ordinarily act on the certificate granted by the CDMO.

10. We gather that many of these agencies have indeed no child care facilities. In the event of such facilities not being available maintaining children in hygienic condition and in an environment which would be healthy for the children's growth and mental development would indeed be difficult. The licensing authority should ordinarily ensure that the registered agency has proper child care facilities so that an agency which does not have such facilities may over a period of years go out of the field.

11. The affidavit of the Union Government indicates that it never intended to fix any quota for the purpose of allowing renewal of registration or licence. In view of the clear statement in the affidavit we must hold that it is not the policy of the Government of India to require the agency to satisfy the condition of any quota. In fact the Government of India's circular letter is intended to emphasise on the feature that registered societies to entitle themselves for renewal of registration or licence should exhibit their involvement in the process of adoption and the authority should have evidence to satisfy that the agency is really involved in the activity.

12. We would accept the stand taken by the petitioner that in the event of registration/licence being proposed to be cancelled, an opportunity should be granted to such agency. That would answer the requirements of natural justice and would uphold a healthy scheme of administration. We have not been able to see any positive justification for opposition to the setting up of CARA. Such an institution would be an organisation of primacy and would work as a useful agency in the field. While we agree that there should be no keen competition for offering adoptions, regulated competition may perhaps keep up the system in a healthy condition. Existence of CARA in that field is, therefore, welcome. We do not agree with the stand of the petitioner that the scheme envisaged by the main judgment should be altered in this regard.

13. The judgment laid down a scale of expenses to be recovered by the agency offering placement for maintaining the child from the adoptive parents. There was some modification in 1986. Keeping in view the general rise in cost of living we are prepared to allow escalation by 30 per cent. We do not, however, agree to an escalation of 10 per cent every year. The matter may be reviewed once in three years so far as escalation of expenses is concerned.

14. Only one aspect is left for consideration and that is the petitioner's prayer for transfer of children from statutory homes to recognised agencies for placement. The children who can be transferred for such purposes would be those whose parents are not known, orphans and perhaps those who are declared as abandoned children. We have pointed out already that the homes are not set up in several States and areas. Even Juvenile Boards not been properly functioning and the recognised agencies do not have the facility of child care. In these circumstances to order transfer of children from statutory homes to recognised agencies can indeed not be accepted as rule. We are prepared to observe that as and when such a request is received from recognised agencies, the Juvenile Court or the Board set up under the Act may consider the feasibility of such transfer and keeping the interest of the child in view, the possibility of an adoption within a short period and the facilities available in the recognised agency as also other relevant features, make appropriate orders. A strait-jacket formula may very often be injurious to the interest of the child.

15. This order disposes of the petitions.

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