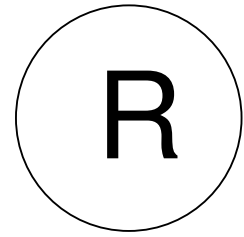


BVJ & KSHJ:
30.11.2022



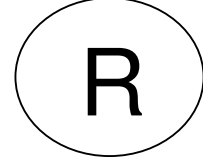
JUDGMENT

IN

MISCELLANEOUS FIRST APPEAL NO.4617 OF 2022 (GW)

KVK
List No.: 1 Sl No.: 8





IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF NOVEMBER, 2022

PRESENT

THE HON'BLE MR. JUSTICE B. VEERAPPA

AND

THE HON'BLE MRS. JUSTICE K. S. HEMALEKHA

MISCELLANEOUS FIRST APPEAL NO.4617 OF 2022 (GW)

BETWEEN:

1. SHAHISTHA,
W/O FAYAZ,
AGED 33 YEARS.

2. FAYAZ,
S/O ABDUL KHADER,
AGED 39 YEARS.

APPELLANT NOS.1 AND 2 ARE
RESIDING AT INDIRA NAGAR,
SASTHAN POST,
GUNDMI VILLAGE,
BRAHMAVARA TALUK,
UDUPI DISTRICT-576 226.

3. RAJESH ACHARY,
S/O SUKANYA ACHARY,
AGED 36 YEARS.

4. SUKANYA,
W/O RAJESH ACHARY,
AGED 32 YEARS,

APPELLANT NOS.3 AND 4 ARE
RESIDING AT NO.1-170,
KUNTADY POST,





KARKALA,
UDUPI DISTRICT-574 244.

...APPELLANTS

(BY SMT. HALEEMA AMEEN, ADVOCATE)

AND:

1. THE STATE,
REPRESENTED BY LPO, DCPU,
RAJATHADRI, MANIPAL ,
UDUPI TALUK,
UDUPI DISTRICT - 576 104.

...RESPONDENT

(BY SRI VIJAYAKUMAR A. PATIL, A.G.A., ALONG WITH
SRI KIRAN KUMAR, H.C.G.P.)

* * *

THIS MISCELLANEOUS FIRST APPEAL IS FILED UNDER SECTION 47(a) OF GUARDIANS AND WARDS ACT, 1890, AGAINST THE JUDGMENT AND DECREE DATED 31-5-2022 PASSED IN G & W.C. NO.9 OF 2021 ON THE FILE OF THE ADDITIONAL SENIOR CIVIL JUDGE, UDUPI, DISMISSING THE PETITION FILED UNDER SECTIONS 7 TO 10 AND 25 OF GUARDIANS AND WARDS ACT, 1890.

THIS MISCELLANEOUS FIRST APPEAL IS COMING ON FOR ADMISSION THIS DAY, **B. VEERAPPA J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

The biological parents, i.e. appellant Nos.3 and 4 and alleged adoptive parents, i.e. appellant Nos.1 and 2 entered into unregistered agreement of an 'unborn child' in the form of adoption, jointly filed the present appeal against the judgment and decree dated 31-5-2022 passed in G & W.C. No.9 of 2021



on the file of the Additional Senior Civil Judge, Udupi, dismissing the petition filed under Sections 7 to 10 and 25 of the Guardians and Wards Act, 1890 (for short, 'the Act').

I. Facts of the case

2. Appellant Nos.1 and 2 filed the petition before the trial Court under the provisions of Sections 7 to 10 and 25 of the G & W Act to grant permission to appoint them as the adoptive parents and guardians of a minor child, by name Inshu. Appellants Nos.3 and 4 are the biological parents of the said child. The child was born on 26-3-2020. Since appellant Nos.1 and 2 were childless and appellant Nos.3 and 4 were unable to look after the child due to poverty, appellant Nos.1 and 2 adopted the child. After adoption of the child, appellant Nos.1 and 2 have looked after raised the child for two years as their own daughter with love and affection. The respondent-State represented by Legal-cum-Probation Officer, District Child Protection Unit, Udupi, lodged a complaint against appellant Nos.3 and 4 stating that they have illegally sold the child to appellant Nos.1 and 2. However, the only mistake committed by appellant Nos.3 and 4, biological parents, and appellant



Nos.1 and 2, adoptive parents, is that due to lack of proper legal knowledge and guidance, the procedure was not complied with. Now, the child is in the custody of the respondents/appellants 3 & 4. Therefore, appellant Nos.1 and 2 are seeking to appoint them as adoptive parents of the child.

3. The order-sheet of the trial Court dated 25-11-2021 depicts that appellant Nos.3 and 4, biological parents, came up with their *vakalatnama* and also filed memo to the effect that they have no objection for the petition filed by appellant Nos.1 and 2, adoptive parents.

4. In order to prove the case of appellant Nos.1 and 2, appellant No.1 examined herself as P.W.1 and marked four documents as per Ex.P.1 to Ex.P.4(a). No evidence was adduced on behalf of appellant Nos.3 and 4, who are respondent Nos.1 and 2 before the trial Court.

5. Learned Judge of the trial Court upon careful perusal of the pleadings has framed the following issue:



"Whether the petitioners are entitled for permission to appoint them as adoptive parents and guardian of the person of minor Inshu as contemplated under Sections 7 to 10 and 25 of the Guardians and Wards Act, 1890, as prayed for them in their petition?"

6. After considering the oral and documentary evidence on record, the learned trial Judge, by judgment and decree dated 31-5-2022 dismissed the petition. Hence, the present appeal is filed.

7. We have heard Smt. Haleema Ameen, learned counsel for the appellants, Sri Vijayakumar A. Patil, learned Additional Government Advocate, along with Sri Kiran Kumar, learned High Court Government Pleader, for the respondent-State.

8. On 23-11-2022, this Court requested Sri Vijayakumar A. Patil, learned Additional Government Advocate, along with Sri Kiran Kumar, learned High Court Government Pleader, to assist the Court with reference to the Rules made by the State Government under Section 35 of the Juvenile Justice (Care and Protection of Children) Act, 2015.



II. Arguments advanced by the learned counsel for the appellants

9. Learned counsel for the appellants has contended that the impugned judgment and decree passed by the trial Court dismissing the petition filed by appellant Nos.1 and 2 to appoint them as adoptive parents and guardians is erroneous and the same cannot be sustained and is liable to be set aside. She has further contended that the trial Court failed in appreciating the sanctity of the fact that the adoptive parents of the child and the biological parents had entered into an agreement with respect of adopting the child in question even before the child was born on 26-3-2020 and hence, the question of having sold the child does not arise.

10. The learned counsel has further contended that filing of F.I.R. and taking the child into their custody by the respondent is only for their statistical purpose and not in the interest of welfare of the child. Further, the child who was under the love and care of appellant Nos.1 and 2 is kept under the shelter of persons unknown to the child and this aspect will have grave repercussions on the psychological growth of the



child. She has further contended that Section 17 of the Act emphasizes on the aspect that welfare of the minor child alone shall be considered while granting custody. She has further contended that the petition filed by the adoptive parents is dismissed only on the ground that the biological parents belonging to Hindu and learned trial court has not stated anything in respect of applicability of Hindu Adoption and Maintenance Act, 1956.

11. The further contended that the Apex Court and several High Courts have held that conversion to different faith cannot be regarded as a disqualification for custody of the minor child. Therefore, she sought to allow the appeal.

III. Arguments advanced by the learned Additional Government Advocate for the respondent

12. *Per contra*, Sri Vijayakumar A. Patil, learned Additional Government Advocate, along with Sri Kiran Kumar, learned High Court Government Pleader, while justifying the impugned judgment and decree passed by the trial Court, has contended that at the first instance, the agreement was not registered one. The appellants cannot have any agreement to



an unborn child and it is unknown to law. Appellant Nos.1 and 2 belong to Muslim community and appellant Nos.3 and 4 belong to Hindu community and thereby, Mohammedan Law does not recognise adoption. He has further contended that it is the duty of the Court to consider the welfare of the child, if really appellant Nos.3 and 4, are being biological parents, were unable to take care of the child. Very strangely, appellant Nos.3 and 4, biological parents, have filed memo through their counsel stating that they have no objection to the petition filed by appellant Nos.1 and 2, which raises the doubt of adoption and thereby, the 3rd respondent was justified in lodging the complaint before the jurisdictional Police that the child has been sold.

13. He has further contended that sub-section (2) of Section 17 of the Act provides that *'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'. Admittedly, the appellant Nos.3 & 4 are the biological parents being Hindus and appellant Nos.1 & 2 are the adoptive parents being Muslims, have entered into an unregistered agreement (Ex.P.1) of an unborn child in the form of adoption which creates a doubt. Therefore, he sought to dismiss the appeal.

IV. Point for determination

14. In view of the aforesaid rival contentions, the only point that would arise for our consideration in the appeal is:

Whether appellant Nos.1 and 2, adoptive parents, and appellant Nos.3 and 4, biological parents, have made out a case to interfere with the judgment and decree passed by the trial Court?

V. Consideration

15. We have given our anxious consideration to the arguments advanced by learned counsel for the parties and perused the entire material on record carefully.

16. It is undisputed fact that appellant Nos.1 and 2 belong to Muslim community and appellant Nos.3 and 4 belong to Hindu community. It is the case of appellant Nos.1 and 2



that on 21-3-2020, they have entered into agreement with appellant Nos.3 and 4 that post delivery of the child, they will take care of the child and raise the child. In order to verify the veracity, we have perused the agreement entered between them. In the agreement for adoption dated 21-3-2020, it is mentioned that the first party, i.e. appellant Nos.1 and 2 have adopted the child of the second party, i.e. appellant Nos.3 and 4 and they will raise the child with honour and dignity. As on the date of the agreement, the child was in the womb of appellant No.4 and the child was born on 26-3-2020, i.e. after five days of the agreement entered into between the parties. Thereby, both parties entered into agreement in respect of an "unborn child, which is unknown to law". Condition No.3 in the agreement is that, the second party will not claim any money from the first party. Thereby, this clearly depicts that the child was given in adoption for money. It is also relevant to point out at this stage that on the basis of the complaint lodged by the 3rd respondent, Kota Police registered a case against the appellants and two others, namely Balakrishna and Reshma, in Crime No.104 of 2021 for the offences punishable under Sections 80, 81 and 87 of the Juvenile Justice (Care and



Protection of Children) Act, 2015. Later, it was transferred to Karkala Town Police Station and the same was numbered as Crime No.72 of 2021 for the offences punishable under Sections 80 and 81 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and under Sections 465, 468 and 420 of the Indian Penal Code, 1860. The jurisdictional Police, after holding detailed enquiry, filed charge-sheet on 14-6-2022 before the Principal Civil Judge and Judicial Magistrate First Class, Karkala.

17. A careful perusal of the agreement entered into between the parties clearly depicts that appellant Nos.1 and 2 belong to Muslim community and appellant Nos.3 and 4 belong to Hindu community and thereby, the Mohammedan Law does not recognise adoption. Our view is fortified by the dictum of the Hon'ble Supreme Court in the case of **DAGADABAI (DEAD) BY LEGAL REPRESENTATIVES v. ABBAS ALIAS GULAB RUSTUM PINJARI** reported in **(2017) 13 SCC 705**, wherein at paragraph No.20, it has held as under:

"20. Fifth, the defendant having failed to prove that he was the adopted son of Rustum, had no



option but to suffer the decree of dispossession from the suit land. It is a settled principle of Mohammedan Law that Mohammedan Law does not recognize adoption (see-Section 347 of Mulla Principles of Mahomedan Law, 20th Edition page 430)."

18. It is shocking that an agreement is entered into between the parties in respect of an "unborn child". It is for the District Child Protection Unit to take the responsibility of all such cases. It is well settled that 'an unborn child has a life of its own and rights of its own and the rights of unborn are recognised by law. No doubt, only if the unborn can be treated as a person, the right to life of the unborn can be equated with the fundamental right of the mother guaranteed under Article 21 of the Constitution. True, an unborn is not a natural person, but it is well known that after six weeks, life is infused into the embryo, thus converting embryo into foetus and once an embryo evolves into a foetus, the heartbeat starts. In other words, the unborn has life from the stage it transforms into foetus. If the unborn has life, though it is not a natural person, it can certainly be considered as a person within the meaning of



Article 21 of the Constitution, for there is absolutely no reason to treat an unborn child differently from a born child. In other words, the right to life of an unborn shall also be considered as one falling within the scope of Article 21 of the Constitution of India. Admittedly, in the present case, as on the date of agreement, i.e. on 21-3-2020, appellant No.4 was nine months pregnant and she delivered the child on 26-3-2020, i.e. after five days of the agreement, thereby the child has a every right to lead life with dignity and honour as contemplated under Article 21 of the Constitution of India.

19. Based on the agreement, appellant Nos.3 and 4 filed the petition before the trial Court for custody. In all cases, where a Court is called upon to adjudicate the question as to whether permission shall be granted to a pregnant woman for terminating her pregnancy on a plea of infringement of her fundamental right to life guaranteed under Article 21 of the Constitution, the Court has to make a balance between the rights of the mother and the rights of the unborn. The fact remains that as on the date of agreement entered into between the parties, appellant No.4 was in verge of completing nine



months of her pregnancy and thereby, the appellants, both adoptive parents and biological parents, have violated the rights of the child guaranteed under the provisions of Article 21 of the Constitution of India. Considering the peculiar facts and circumstances of the case, very agreement for adoption on 21-3-2020 entered between the parties is invalid document and the same is not permissible under the principles of Mohammedan Law. As already stated supra, the 3rd respondent rightly lodged the complaint to the jurisdictional Police and in turn, they registered a case and now it is pending on the file of the Principal Civil Judge and Judicial Magistrate First Class, Karkala. Thereby, we resist to observe anything at this stage that it is for the concerned Court to proceed to a logical end in accordance with law.

20. The leaned trial Judge, while considering Ex.P.1 has recorded a finding that agreement for adoption does not depicts the welfare of the minor child, and rightly dismissed the petition in accordance with law. It is relevant to observe at this stage that, if really appellant Nos.3 and 4, biological parents, came forward to give the child for adoption due to poverty,



they could have surrendered the child to the concerned authority for the welfare of the child. Even if that was not possible, they could have taken care by sending the child to Government Educational institutions and now, the Government has introduced various schemes for their day-to-day essential commodities, thereby the contention of the learned counsel for appellants that appellant Nos.3 and 4 entered into agreement for adoption of their child to appellant Nos.1 and 2 due to poverty cannot be accepted. The Government has introduced many schemes to overcome, or to streamline the poverty. If they have self-confidence and respect, they can lead family by taking loan from Banks and instead of that, appellant Nos.3 and 4 have sold the child in the name of adoption, which cannot be tolerated.

21. Even under Section 35 of the Juvenile Justice (Care and Protection of Children) Act, 2015, provides that (1) a parent or guardian, who for physical, emotional and social factors beyond their control, wishes to surrender a child, shall produce the child before the Committee; (2) if, after prescribed process of inquiry and counseling, the Committee is satisfied, a



surrender deed shall be executed by the parent or guardian, as the case may be, before the Committee, and (3) the parents or guardian who surrendered the child, shall be given two months time to reconsider their decision and in the intervening period, the Committee shall either allow, after due inquiry, the child to be with the parents or guardian under supervision, or place the child in a Specialised Adoption Agency, if he or she is below six years of age, or a children's home if he is above six years.

VI. Conclusion

22. When the State Government is providing so many benefits for the welfare of the Society, that too, for the people below the poverty and Section 35 of the Juvenile Justice (Care and Protection of Children) Act, 2015, clearly explains regarding surrender of the child, the agreement entered into between appellant Nos.1 and 2 and appellant Nos.3 and 4 cannot be sustained.

23. Admittedly, from 20-5-2021, the child is in the welfare custody of Krishna Anugraha Centre, Udupi, and it is the recognised Centre of the State Government for welfare of the child. When we summoned the appellants before this



Court, appellant Nos.3 and 4, biological parents, expressed their willingness to take back their child along with them. If it is so, it is for them to approach the Child Welfare Committee and the Child Welfare Committee to take appropriate steps in accordance with law.

24. For the reasons stated above, the point raised in the present appeal is answered in the negative holding that the appellants have not made out a case to interfere with the judgment and decree passed by the trial Court.

VII. Result

25. In view of the above, we pass the following

ORDER

- i. The appeal, being devoid of merits, is hereby ***dismissed***;
- ii. The judgment and decree dated 31-5-2022 passed in G & W.C. No.9 of 2021 on the file of the Additional Senior Civil Judge, Udupi, is hereby confirmed;



- iii. It is needless to observe that appellant Nos.3 and 4, biological parents, to approach the Child Welfare Committee, if they really want their child back and it is for the Child Welfare Committee to take appropriate steps and pass orders in accordance with law, and

- iv. If the Child Welfare Committee comes to the conclusion that after considering all the pros and cons in handing over the child to appellant Nos.3 and 4, biological parents, then the jurisdictional Police is directed to monitor appellant Nos.3 and 4 and so that the child is not sold to anyone and ensure that A3 and A4 shall take care of the paramount interest of the child.

The assistance rendered by Sri Vijayakumar A. Patil, along with Sri Kiran Kumar, learned High Court Government Pleader, Smt. Haleema Ameen, learned counsel for the appellants, Sri M.V. Chadranth, IPS, Director, Directorate of Child Protection, Ms. Haleema K., Project Director, Directorate



of Child Protection, Sri Kumar Naik, District Child Protection Officer, and Sri Damodara K.B., Sub-Inspector of Police, are highly appreciated and placed on record.

**SD/-
JUDGE**

**SD/-
JUDGE**

KVK