

In Re: Alaln Esteve

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SooperKanoon Citation : sooperkanoon.com/335561

Court : Mumbai

Decided On : Sep-05-1990

Reported in : 1990(3)BomCR665; 1991CriLJ445

Judge : D.R. Dhanuka, J.

Appeal No. : Foreign Adoption Petition No. 173 of 1990

Appellant : In Re: Alaln Esteve

Advocate for Pet/Ap. : Ms. Lalita Jaya Raj, Adv/. i/b.,;M/s. S.D. Daru and Co.;Arvind S. Bobade, Adv. General,;Ms. Ganga Bharwani and;D.P. Pandya, Advs.;K.D. Kapoor, Adv., i/b.,;M/s. K.L. Kapoor and Co.,;Harshad Mohta and;

Judgement :

1. On 1st August, 1990 this Hon'ble Court issued a notice to the learned Advocate-General of Maharashtra seeking his assistance to determine the question as to whether the Bombay Children Act, 1948 has stood repealed on coming into force of the Juvenile Justice Act, 1986. This question is now being determined after hearing submissions of the learned Advocate-General and all the learned counsel appearing for the petitioner.

2. For the purpose of consideration of the above question, it is necessary to refer to the legislative history of the two Acts and, briefly, to their respective provisions.

3. On 1st December, 1986 the Juvenile Justice Act, 1986 (Act No. 53 of 1986) received the assent of the President. The said Act is a Parliamentary Statute enacted to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles.

4. On 13th day of August, 1987, the Central Government issued its Notification bearing No. C.S.R. 710(E) in exercising of the powers conferred on it under subsection (1) of Section 1 of the above-referred Act appointed 2nd of October, 1987 the date of Birthday of Mahatma Gandhi, the father of the nation, as the date on which all the provisions of the said Act would come into force in all the States except the State of Jammu and Kashmir Section 63 of the said Act provided that if immediately before the date on which the above referred Central Act comes into force in any State there was in force in that State any law corresponding to this Central Act, that State law shall stand repealed on the appointed date. Proviso to Section 63 of the Central Act is not relevant for our purposes as by the said proviso it was merely provided that such repeal shall not affect the previous operation of any law so repealed or any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed. The only question which would therefore arise for my consideration is as to whether the Bombay Children Act, 1948 is a law corresponding to the Juvenile Justice Act, 1986. If the Bombay Children Act, 1948 is a corresponding law, then it stands repealed with effect from 2nd October, 1987.

5. Prior to coming into force of the above referred Central Act, several Children Acts were in force in different States. In our State the Bombay Children Act, being Act No. LXXX of 1948, was in force. Similar Acts were in force in other States. On 26th December, 1960 our Parliament enacted the Children Act, 1960 to deal with the same subject for the Union Territories. It was observed by the Hon'ble Supreme Court in its judgment in the case of Sheela Barse v. Union of India, : [1986]3SCR562

'..... instead of each State having its own Children's Act different in procedure and content from the Children's Act in other States, it would be desirable if the Central

Government initiate Parliamentary Legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country.'

In the Statement of Objects and Reasons appended to Bill No. 103 of 1986 pertaining to the Act under consideration, it was specifically stated that the abovereferred Act would replace the corresponding law on the subject such as the Children Act, 1960 and other State laws on the subject. The abovereferred Central Act No. 53 of 1986 was enacted with a very noble object to bring the operation of the juvenile justice system in the country in conformity with the United Nations Standard Minimum Rule for the Administration of Juvenile Justice and to develop appropriate linkage and co-ordination between the formal system of juvenile justice and voluntary agencies in the welfare of the children. It is therefore obvious that the intention of the Parliament was that on Act No. 53 of 1986 coming into force, all the State laws as well as the Children Act, 1960 applicable in the Union Territories shall stand repealed. Apart from the above reference appearing in the Statement of Objects and Reasons and the recommendations made by the Hon'ble Supreme Court in Sheela Barse's case quoted above, I would examine the question of applicability of Section 63 of the above Act on its own merits and determine the question as to whether the Bombay Children Act, 1948 is a corresponding law or not.

6. The learned Advocate-General appearing for the State of Maharashtra has invited my attention to the judgment of the Hon'ble Supreme Court in the case of A. R. Abdulkadir v. The State of Kerala, : AIR 1962 SC922 . In para 11 of the judgment, the Hon'ble Mr. Justice Wanchoo speaking on behalf of the Bench of the Hon'ble Supreme Court observed as under :-

'..... Where the Act repealed provides substantially for all matters contained in the Act effecting the repeal there is correspondence between the two Acts within the meaning of Section 13(2) and the earlier Act would thus stand repealed; it is not necessary that there should be complete identity between the repealing Act and the Act repealed in every respect.'

I have, therefore, to ask the question to myself as to whether the Bombay Children Act, 1948 substantially provides for the same matters which are provided for by the Juvenile Justice Act, 1986. The expression 'corresponding law' was interpreted in the same manner in the earlier judgment of the Hon'ble Supreme Court in the case of Custodian of Evacuee Property v. Abdul Shakoor, : [1961]3SCR855 . The same view has been taken in various other judgments of the Hon'ble Supreme Court. It is not necessary to refer to all the judgments of the Court as all of them appear to take the same view.

7. Before I summarise the provisions of the two Acts and discuss the question as to whether the Bombay Children Act, 1948 is a corresponding Act or not, I must state that both the Acts are referable to Entry 5 in List III appended to the Seventh Schedule of the Constitution of India. Entry 5 in the Concurrent List reads as follows :-

'5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and petition; all matters in respect of which parties in judicial proceedings were immediately before, the commencement of this Constitution subject to their personal law.'

8. I shall now briefly refer to the Scheme and the provisions of the Juvenile Justice Act, 1986. The said Act provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles. Section 4 of the said Act provides for establishment of Juvenile Welfare Boards for exercising the powers and discharging the duties conferred or imposed on such Boards in relation to neglected juveniles as laid down under the Act. The Juvenile Welfare Board shall consist of a Chairman and such other members as the State Government thinks fit to appoint, of whom not less than one shall be a woman; and every such member shall be vested with the powers of a Magistrate under the Code of Criminal Procedure. Section 5 of the said Central Act provides for the establishment of Juvenile Courts for discharging the functions imposed on such Court in relation to delinquent juveniles under the Act. Section 5(3) of the said Act provides that every Juvenile Court shall be assisted by a panel of two honorary social workers possessing such qualifications as may be prescribed, of whom at least one shall

be a woman, and such panel shall be appointed by the State Government. Section 6(3) of this Central Act provides that no person shall be appointed as a member, of the Board or as a Magistrate in the Juvenile Court unless he has in the opinion of the State Government, special knowledge of child psychology and child welfare. Thus, the, scheme for appointment of the Juvenile Welfare Board and Juvenile Welfare Board is a substituted scheme providing for composition of competent authority and institutions for looking after the neglected juveniles and delinquent juveniles instead of the earlier machinery provided under the Bombay Children Act, 1948. Section 9 of the said Central Act provides that the State Government shall establish as many juvenile homes as may be necessary for the reception of neglected juveniles under the Act. Section 9 of the said Act emphasised that every juvenile home shall provide not only the facilities for education but also for vocational training and rehabilitation and the facilities for the development of character and abilities of the juvenile. Thus the entire emphasis is sought to be changed in case of delinquent juvenile and the reformatory theory of justice in light of the Directive Principles in the Constitution as highlighted in the provisions contained in the new Act. For this purpose the Act has provided that it shall be open to the State Government to certify social institutions concerned as juvenile homes for the purposes of this Act. These provisions are made with a view to develop appropriate linkage and co-ordination between the formal system of juvenile justice and voluntary agencies doing useful work in this field.

9. Chapter III of the Central Act provides for production of neglected juveniles before the Board and for making all the necessary enquiries. Provisions are made under the Central Act for handing over of the custody of neglected juvenile to a guardian or some other fit and proper person instead of transferring the custody of the child to the juvenile home in all cases. In other words, enough powers have been conferred on the competent authority to exercise its discretion in relation to determination of question of custody of the neglected child. The Central Act attaches much more importance to aspects of child psychology, social welfare and co-ordination between the competent authorities and voluntary agencies as compared to the legalistic approach in the past.

10. Chapter IV of the Central Act deals with the delinquent juvenile. Ch. V deals with the procedure which may be followed by the competent authorities and appeals and revision therefrom. Chapter VI of the Central Act is equally significant as it deals with the subject of special offences in respect of juveniles. If any one having the actual charge of, or control over a juvenile, assaults, abandons, or neglects the juvenile or commits any act of assault, he is liable to be punished as provided under the said Act. Section 51 of the said Act provides for contribution by the parents in respect of neglected juvenile. Section 53 of the said Act provides for constitution of an Advisory Board. Section 62 provides that the State Government must frame the necessary rules. I am given to understand that the necessary rules have already been framed by our State Government under section 62 of the said Act. I am assured by the learned Advocate General on behalf of State of Maharashtra that the Welfare Board required to be constituted under S. 4 of the said Act and the Juvenile Courts required to be constituted under Section 5 of the said Act, including making of a provision for panel of social workers to assist the Juvenile Court under Section 5(3) and all the necessary steps whatever required for full and complete implementation of the Act would be taken by the State Government on or before 31st October, 1990. I accept the said assurance solemnly given by the Government of Maharashtra through the highest law officer of the State and hope that the Act would be fully and completely implemented from 1st November, 1990 and no extension of time would be sought as the implementation of the beneficial legislation is already delayed.

11. The Bombay Children Act, 1948 substantially deals with the same subjects and occupies the same field. There is a substantial identity between the provisions of the Bombay Children Act, 1948 and the Juvenile Justice Act, 1986. The Juvenile Justice Act, 1986 is an improvement upon the provisions of the Bombay Children Act, 1948 and all other State Legislations. The Central Act has been enacted as a Parliamentary Legislation on the pattern of the Children Act, 1960 which was enacted for Union Territories and in the light of the experience gained of the working of various Children Acts throughout the country. Part II of the Bombay Children Act, 1948 provides for constitution of Juvenile Courts having jurisdiction under the Bombay Children Act. Part III of the Bombay Children Act provides for approved centres, approved institutions, classifying centres and

observation Homes. Part IV of the Bombay Children Act provides for officers, including child Welfare Officers. Part V of the said Act provide for taking of measures for the care and protection of destitute and neglected children. Part VI of the Bombay Children Act, 1948 deals with the subject of special offences, in respect of children. Part VII of the Bombay Children Act deals with the subject of youthful offenders. Part VIII of the said Act provides for the measure for detention of children and youthful offenders. Part IX of the said Act provides for maintenance and treatment of committed children and the rest of the provisions are procedural in nature. I am satisfied that the test of 'substantial identity' in respect of the matters dealt with under the two Acts is fully satisfied. The Bombay Children Act is a corresponding law within the meaning of the expression 'corresponding law' used in Section 63 of the Juvenile Justice Act, 1986.

12. Section 7(2) of the Juvenile Justice Act provides that till the Board of Juvenile Court is constituted, the District Magistrate or the Sub-Divisional Magistrate or any Metropolitan Magistrate or Judicial Magistrate of the first class would exercise the same powers which would otherwise by exercisable by the Board or the Juvenile Court constituted under section 4 or Section 5 of the said Act, respectively. Such powers can be exercised by such competent authorities under the above-referred transitory provisions until the constitution of the Welfare Boards under section 4 and the Juvenile Courts under section 5 of the said Act. It must, however, be made clear that during the transitory period, the District Magistrate or the Sub-Divisional Magistrate or the Metropolitan Magistrate or the Judicial Magistrate of the first class concerned must apply the substantive provisions of the Juvenile Justice Act and not the Bombay Children Act, 1948.

13. In this view of matter. I hold as under :-

(a) The Bombay Children Act, 1948 is a law corresponding to the Juvenile Justice Act, 1986;

(b) With effect from 2nd October, 1987 the said law has stood repealed. The law so repealed shall not affect the provisions of the said law or any order already passed or any right, privilege or liability already acquitted, accrued or incurred.

(c) Pending the constitution of the Boards and the Juvenile Courts as contemplated by Sections 4 and 5 of the Central Act the powers conferred on the Board or the Court shall be exercisable by the authorities named in Section 7(2) of the said Act.

(d) The State Government shall take all necessary steps for implementation of the Juvenile Justice Act, 1986, including the setting up of the Boards and the Juvenile Courts and setting up of panels-of honorary workers under section 5(3) of the said Act throughout the State without any further delay on or before 31st October, 1990. The State Government shall communicate this order to all the Magistrates functioning as Juvenile Magistrates throughout the State as forthwith, so that the provisions of the Act which is repealed may not be applied by any of the Courts due to inadvertence or otherwise.

13. The learned Advocates for the petitioner have substantially supported the submissions made by the learned Advocate General. The social organisations appearing before me have also taken the same view. I am thankful to all the learned counsel and the learned Advocate General and the organisations appearing before me for their assistance. I have examined the matter on merits with the assistance of the learned Counsel for the petitioner and the learned Advocate General and not based my findings on the concessions made at the Bar as such.

14. Order accordingly.