IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO.15757 of 2021

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR. JUSTICE A.S. SUPEHIA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

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CHHAYABEN @ HETALBEN ATULBHAI ASODARIYA
Versus
THE REGISTRAR OF BIRTH AND DEATH/CHIEF OFFICER

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Appearance:
S M KIKANI(7596) for the Petitioner(s) No. 1,2
MR KETAN A DAVE(255) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE A.S. SUPEHIA**

Date : 15/06/2022

CAV JUDGMENT

1. By way of the present petition under Article 226 of the Constitution of India, the petitioners, being guardians of their minor son 'Devam', are seeking a direction upon the respondent authority, directing it to amend and/or correct or mention the name of petitioner no.2 in the column of "father name" in the Birth Certificate of their son, which is issued by the respondent.

2. The short facts giving rise to filing of the present petition, stated in nutshell, are as follows.

2.1 Petitioner No.1 earlier had married with one Shaileshbhai Vallabhbhai Jadvani and out of wedlock of petitioner no.1 with the said Shailesbhai, a son 'Devam' was born on 13.06.2012. Pursuant to that, on 20.06.2012, his birth was registered with the respondent authority at serial No.665 in the Register, which is maintained by the respondent authority under the Registration of Births and Deaths Act, 1969 (for short "the Registration Act").

2.2 Since matrimonial disputes cropped-up between the petitioner no.1 and her husband, they decided to get separated and, therefore, they had executed a Deed of Divorce on 06.04.2016 as per their prevailing customs and thereby marriage of petitioner no.1 with her husband came to be dissolved by the said deed.

2.3 The petitioner no.1 got married with petitioner no.2 at Surat. After marriage of petitioner no.2 with the petitioner no.1, the petitioner no.2 also agreed to take all responsibilities of minor son of petitioner no.1 and, therefore, he has adopted the minor son

'Devam' with consent of the family members of both the petitioners and pursuant to the said adoption, a Deed of Adoption has been executed between the parties, which came to be registered before the Office of Registrar vide Registration No.2194 on 15.03.2017.

2.4 It is the case of the petitioners that since the petitioner no.1 got married with petitioner no.2 and since petitioner no.2 has adopted minor 'Devam' by way of execution of a registered adoption deed, the petitioner no.2 becomes natural/legal guardian of minor boy and, therefore, the petitioners filed representation dated 17.07.2021 to the respondent authority to replace/ mention the name of petitioner no.2 as father in place of name of earlier husband of petitioner no.1 in the column of 'father name' in the birth certificate issued by the respondent herein.

2.5 On 15.09.2021, the petitioners received the impugned communication from the respondent authority, whereby the application for correction, as stated above, has been refused by the respondent.

3. Learned advocate Mr.Kikani appearing for the petitioners has submitted that even otherwise and

without prejudice, as per Circulars dated 15.05.2015 and 31.01.2018 issued by the Ministry of Home Affairs, Government of India, only registered adoption deed is mandatory and decree of adoption from the court concerned has been discontinued. It is submitted that as per provision of the Hindu Adoptions and Maintenance Act, 1956 (for short "the Adoptions Act"), only registered adoption is mandatory. He has placed reliance on section 16 of the Adoptions Act in this regard. Thus, he has submitted that the appropriate orders may be passed.

3.1 In support of his submission, learned Advocate Mr.Kikani has placed reliance on the judgements in cases of Sukumar Mehta vs. District Registrar, Births And Deaths, 1993 (1) G.L.R. 93, Sejalben Mukundbhai Patel W/o Khodabhai Joitaram Patel, 2019 (3) G.L.R. 1866 and order dated 15.03.2017 passed in Special Civil Application No.7864 of 2016 (in the case of Tushar Kanaiyalal Vyas (Thru. POA) vs. State of Gujarat & Ors.)

4. In response to the above, Mr.Dave, learned advocate for the respondent authority has very candidly admitted that the impugned decision was premised on the circulars dated 12.08.2009 and 18.02.2016, which are subsequently canceled by the order dated 02.12.2021 issued by the State

authority. He has submitted that as per provision of Section 9 of the Hindu Adoptions and Maintenance Act, the Registrar has to verify whether the Adoption Deed is valid or not and hence, the opinion of the biological father of the child is necessary. It is submitted that as per Section 9 of the Hindu Adoptions and Maintenance Act, the biological father has to be made a party respondent in the writ petition in order to verify whether the Adoption Deed produced by the petitioners is legal or valid.

5. I have heard the learned advocates for the respective parties at length.

6. It is not in dispute that the impugned decision dated 15.09.2021 is premised on the circulars dated 12.08.2009 and 18.02.2016, which stipulates the production of an order of local court for adoption, have been subsequently canceled by the order dated 02.12.2021 issued by the State Authority. Thus, on this ground alone, the impugned decision is required to be quashed. However, since other issues are raised in the writ petition, further order is necessitated.

7. At this stage, it would be opposite to refer to the provisions of Sections 14 and 15 of the Registration of Births and Deaths Act, 1969, which are as under:

> *"**14. Registration of name of child.**— Where the birth of any child has been registered without a name, the parent or guardian of such child shall within the prescribed period give information regarding the name of the child to the registrar either orally or in writing and thereupon the Registrar shall enter such name in the registrar and initial and date the entry.*
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> ***15. Correction or cancellation of entry in the register of births and deaths.**—If it is proved to the satisfaction of the Registrar that any entry of a birth or death in any register kept by him under this Act is erroneous in form or substance, or has been fraudulently or improperly made, he may, subject to such rules as may be made by the State Government with respect to the conditions on which and the circumstances in which such entries may be corrected or cancelled correct the error or cancel the entry by suitable entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of the correction or cancellation."*

A bare perusal of the aforesaid Sections 14 and 15 of the Registration of Births and Deaths Act, 1969 reveals that the Registrar has to inquire about any entry of the birth and death in any register kept by him under the Act.

8. At this stage, I may with profit refer to the decisions of this Court. In case of ***Sukumar Mehta (supra)***, this Court, after examining the provision of section 15 of the Registration Act, has held thus:

> *"In my opinion, the Act is silent about the contingency for subsequent correction of entry already made in Birth Register by correcting the name of the child at the instance of the parents, his is the case of unmindful legislative omission. This is classic case of casus omissi, i.e., circumstances concerning which an Act is silent. The question is how to deal with such contingencies ? Should the Court leave the*

litigant in sheer helpless condition asking him to wait till the legislature curds the defect by providing for the omission ? Can the Court escape the responsibility of considering these unforseen contingencies? However, I cannot ignore the modern tendency in Courts to take the view that if a case is entirely unprovided for by a Statute, either directly or indirectly, then it must remain nobody's child - a luckless orphan of the law (In re Leicester Permanent Building Society, 1942 Ch. 340). Same was the view of Devlin L. J. in Gladstone V/s. Bower, reported in 1960 (2) QB 384 when he observed "we cannot legislate for casus omiss". This tendency has given rise to inconvenient results. One option left for me is to express regrets for a statutory lacuna and to hope that it will be remedied by legislation and occasionally the hope is fulfilled, even if tardily. However, in my opinion, in this case there is "impalpable line" of distinction which should enable the Court to come out of helplessness. In this case" the caption of Sec. 15 gives general indication to give power to correct the entry in the Birth Register. However, specific case of correction of name of the child already entered is omitted to be provided for. When the entry is erroneous, there is power to correct. When it is factually improperly made, there is power of correction. Question is when entry is rightfully made can it be corrected by resort to this power ? In my opinion, once power to correct an entry already made in the Birth Register is conceded, it should legitimately take within its sweep the correction of entries rightfully made. It is the correction of the name of the child at the instance of the parents or wards. What possible objections can there be in reading such power in the authority if power to correct erroneous entry is conceded ? The omission in the present case appears to be non-deliberate. In my opinion, omission being not deliberate and not supported by cogent reasons it would not be hazardous to read "implied will of the Legislators" in this provision so as to authorise the Registrar to correct the name of the child at the instance of the parents. I, therefore, hold that there is power in the Registrar to correct the entry already made by entertaining the application of the parents. In undertaking this exercise, I am reminded of what C. K. Alien said in his book "Law in the Making":

> *"Judges must and do carry out the express will of the legislature as faithfully as they can, but there is a wide margin in almost every statute*

> *where the Courts cannot be said to be following any will except their own. The statute then becomes, as to great part of it, not a direct "command" but simply part of the social and legal material which judges have to handle according to their customary process of judicial logic*."

Thus, the Coordinate Bench has held that while exercising powers under section 15 of the Registration Act, the Registrar can correct an entry already made in the Birth Register if the same is conceded, and such correction should legitimately take within its sweep the correction of entries rightfully made, since it is the correction of the name of the child at the instance of the parents of wards.

9. In case of ***Sejalben Mukundbhai Patel (supra***), this Court, after considering various judgments of this Court, has enunciated thus:

> ***"21*** *From the aforesaid statutory provisions and the decisions rendered by this Court, following aspects would emerge:*
>
> > *(a) The expression "erroneous in form of substance" in Section 15 of the Act of 1969 is an expression of wide amplitude and does not confine to simple typing errors or clerical mistakes and no guidelines or circulars can take away powers of the Registrar of making correction in entries which are erroneous in form or substance in register as envisaged under Section 15 of the Act of 1969 and Rule 11(1) to (7) of the State Rules, 2004.*

> *(b) The Registrar appointed under the provisions of the Act of 1969 has got powers for correction in relation to the entries and the name also in the Register/ Birth Certificate and such correction or cancellation also comes within the purview of powers under Section 15 of the Act of 1969.*
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> *(c) The competent authority appointed under the provisions of the Act of 1969 has to consider whether the entry in the Birth Certificate/ Register can be corrected or not, after making inquiry and after going through the relevant material, which may be produced by the concerned applicant or which may be called by competent authority for satisfying itself."*

It is held that the Registrar can correct the entries made in the Birth Certificate, after making inquiry and after going through the relevant material, which may be produced by the applicant. Such correction and cancellation in the entries with relation to the name also comes within the purview of powers under section 15 of the Registration Act.

10. I may also refer to Sections 9 and 16 of the Hindu Adoptions and Maintenance Act, 1956, which reads as under:

> ***"Section 9 - Persons capable of giving in adoption.*** *— (1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.*
>
> *(2) Subject to the provisions of sub-section 4, the father or mother, if live shall alone have equal right to give a son or daughter in adoption.*

Provided that such rights shall not be exercised by either of them, save with consent with other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be unsound mind."

Section 16 : Presumption as to registered documents relating to adoption. *- Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.*"

11. In a similar set of facts, this Court, in the Order dated 15.03.2017 passed in Special Civil Application No.7864 of 2016, after examining the provisions of Section 16 of the Adoptions Act has held thus:

"*11. It further appears that thereafter, a Deed of Adoption came to be registered wherein the petitioner has adopted minor Harsh and such Adoption Deed is duly registered under Registration No.7262 dated 18.11.2015. It is clear from the decree of divorce between respondent no.3 herein and wife of the present petitioner that all rights of minor son Harsh was given to Neelamben, the present wife of the petitioner and thereafter, a registered Deed of Adoption is executed, which is in accordance with law and the Adoption Deed was registered with the competent authority and at present the petitioner and his wife have become parents of minor Harsh.*

12. Section 16 of the the Hindu Adoptions and Maintenance Act, 1956, provides as under:

"Whenever any document registered under any law for the time being in force is produced before any court purporting to record an

> *adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."*
>
> *13. In the case on hand, the decree of divorce between the biological parents clearly provides that custody of minor Harsh would be with the wife of the petitioner and respondent no.3 as former husband, has given up all his rights. The Deed of Adoption is a registered deed which is not challenged by anybody.On the contrary, as noted hereinabove, respondent No.3 who happens to be the biological father of the minor child Harsh has expressed by way of an affidavit before this Court in this petition unequivocally that he has no objection if the petitioner's name is substituted as father. Thus, as provided under section 16 of the Hindu Adoptions and Maintenance Act, 1956, minor Harsh is lawfully adopted and the Deed of Adoption is registered and therefore the presumption as per the provisions of section 16 of the Act can be drawn in favour of the petitioner as there is no rebuttal by the procedure known to the law. Following the ratio laid down by this Court in the case of N.R. Trivedi v. District Education Officer, Anand, AIR 2004 Guj. 53, thus, from the record of this case, it appears that the presumption as regards adoption by a registered deed would be in favour of the petitioner."*

Thus, the Coordinate Bench has held that since the Deed of Adoption is registered and hence a presumption as per the provision of Section 16 of the Adoptions Act has to be drawn in favour of the petitioners since there is no rebuttal to the adoption deed.

12. Keeping in mind the aforenoted decisions, I may deal with the objection taken by the

respondent authority. It is the case of the respondent authority that since the biological father has not given any consent with regard to the change of father's name as per section 9 of the Adoptions Act, he can not change the name of the father i.e. Atulbhai Gordhanbhai Asodariya in place of Shaileshbhai Vallabhbhai Jadvani in the birth certificate. The other objection raised is that, for ascertaining his consent, he is required to be arraigned as a necessary party in the writ petition.

13. It is pertinent to note that a Divorce Deed dated 06.04.2016, which has been executed between petitioner No.1 and her former husband - Shaileshbhai Vallabhai Jadvani as per prevailing customs. In paragraph No.3 of the said deed, it was mutually decided that custody of minor son 'Devam' is accepted by the mother-petitioner no.1. Thereafter, the petitioner no.1 got married to petitioner no.2, and an adoption deed, adopting minor 'Devam' was registered on 15.03.2017 vide Registration No.2194. This gave rise for change in name of the father in the birth certificate registered at Serial No.665 by the respondent. An application in this regard was made to the respondent, but the same was rejected by the impugned communication asking the petitioners to produce an order of the local

court with regard to the adoption. Such reason was assigned in view of the circulars dated 12.08.2009 and 18.02.2016 issued by the State Government. Such circulars are subsequently canceled by the order dated 02.12.2021 issued by the State Authority. The aforementioned twin objections are raised in the affidavit-in-reply filed by the respondent. In the considered opinion of this Court, neither the consent of the biological father is required to be obtained by the Registrar for altering the name of father nor he is required to be arraigned as a party to the writ petition, since during the passage of more than five years, the biological father has neither raised any objection to the custody of minor child nor he has raised any objection to the marriage and subsequent adoption deed of the minor child. As per the clause of the divorce deed, the petitioner no.1 - mother was given the sole custody of the minor child and hence, the former husband of the petitioner no.1 is deemed to have given up all his rights with regard to the minor 'Devam'. The stage of obtaining consent, as defined under section 9 of the Hindu Adoptions and Maintenance Act, 1956 cannot be invoked at the stage of incorporating the father’s name (adoptive) in the birth record of the son, after the divorce and adoption deeds have been registered and have not be questioned

in any court of law or there is no other legal embargo and have remained uncontroveted. Thus, neither the biological father, i.e. the former husband of the petitioner no.1 is required to be made as a party to the writ proceedings for ascertaining his consent nor his opinion is necessary to be called for by the Registrar. The petitioner no.1 and 2 are happily married couple since more than five years and the adoption deed is also of 15.03.2017.

14. In such circumstances and in light of undisputed facts, the opinion of biological father is not necessary and if the same is sought for, it will create further complications and delay in make the correction. As per the provision of section 16 of the Hindu Adoptions and Maintenance Act, 1956, a presumption has to be drawn in favour of the petitioners since there is no rebuttal of the adoption deed of the minor 'Devam'. The Registrar, who is the competent authority under the Registration of Births and Deaths Act, 1969 can only verify the correction of the adoption deed and if the same is found to be duly registered and valid, he has to make necessary corrections/changes in the birth records of the adopted child. In the present case, the Registrar has not questioned the registration of the adoption deed.

15. As noticed hereinabove, the impugned communication since is premised on the circulars, which are not in existence, the same is quashed and set aside. The respondent authority is directed to correct the father's name and incorporate the name of the petitioner no.2 in the birth certificate of son 'Devam' and accordingly issue a fresh certificate. The same shall be issued within a period of 01 (one) month from the date of receipt of the present order.

16. The petition is allowed accordingly. Rule made absolute to the aforesaid extent.

Sd/-

(A. S. SUPEHIA, J)

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*Bhavesh-[PPS]**