

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Decided on: 8th February, 2017**

+ **CRL.M.C. 301/2017**

SMT LAVANYA ANIRUDH VERMA

..... Petitioner

Represented by: Mr. Siddharth Aggarwal with
Ms. Tejaswi Shetty, Mr.
Vishakh Ranjit and Ms. Jhanvi
Dubey, Advs.

versus

STATE OF NCT OF DELHI

..... Respondent

Represented by: Ms. Rajni Gupta, APP with
Insp. Saroj Bala, PS Ambedkar
Nagar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. By this application, the petitioner seeks setting aside of orders dated 21st December, 2016 and 26th October, 2016 whereby the application for inspection of records filed by the petitioner on behalf of Minor 'X' was dismissed on the ground that the petitioner has no locus standi to make such application and inspect the records.

2. A brief exposition of facts is that on 12th April, 2016, Minor 'X', a girl aged 12 years and her brother aged 9 years, were found abandoned at K Block Park, Dakshinpuri, Delhi by the officers of P.S. Ambedkar Nagar, who handed over the two children to Child Welfare Officer, Foundling Home - Welfare Home for Children, for immediate care and protection. On 13th April, 2016, Minor 'X' and her brother were counselled by the Child Welfare Officer when they stated that they had left the home voluntarily as

their father had been sexually assaulting Minor 'X' and was also physically violent with both of them. Their mother had abandoned them three years back and had married another man. They stated that they did not wish to return home to their father. The Child Welfare Officer filed a report before the Child Welfare Committee (CWC). On the same day, Chairman, CWC directed short term placement of Minor 'X' and her brother at Foundling Home - Welfare Home for Children. On 18th April, 2016, FIR No. 234/2016 was registered for the offences punishable under Section 376 IPC and Section 6 of Protection of Children from Sexual Offences (in short POCSO) at PS Ambedkar Nagar at the instance of Minor 'X' against her father, whereafter statement of Minor 'X' was also recorded under Section 164 Cr.P.C.

3. On 2nd May, 2016, CWC passed an order transferring Minor 'X' to "Global Home" for further rehabilitation. Thereafter, on 25th May, 2016, another order was passed by CWC whereby Minor 'X' was transferred to "Samarpan Home for Girls". CWC on 26th September, 2016 passed an order directing that Minor 'X' shall remain in the long term care and custody of "Samarpan Home for Girls" till 25th September, 2017. On 24th October, 2016, an application was filed by the petitioner for inspection of records which was dismissed on 26th October, 2016. In view of the aforesaid order, an application was made to CWC to appoint the petitioner as the guardian of Minor 'X' in terms of Section 2(31) of the Juvenile Justice Act, 2015 (in short 'JJ Act, 2015'). On 9th November, 2016, CWC while exercising its powers under Section 29(1) and in furtherance of its responsibilities under Section 30(vi) of the JJ Act, 2015, appointed the petitioner as the guardian of Minor 'X'. The order dated 9th November, 2016 passed by CWC is as under:

“Minor X (name deleted), aged 13 years, with case no. 365/16, has been found to be in need of care of protection due to sexual abuse by her father on many occasions. The child finally ran away from her home along with her brother and was found by a lady who came to their help and informed the police.

The child's case was registered under FIR no. 234/16 dated 18.04.2016 u/s IPC 376 and Section 6 of the POCSO Act (hereinafter "the Proceedings").

It has been found that the child's guardian is the accused in the case and the mother has left them and remarried and hence not a fit person to provide care and protection to the child.

By section 30 (vi) read with section 2(31) of the Juvenile Justice Act, 2015, this Committee is charged with the responsibility of ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard.

In exercise of the said power, the Child Welfare Committee hereby appoints the Director of Samarpan Home for Girls, located at B-24, Maharani Bagh, Back Lane, New Delhi - 110065, who has the custody and charge of the child, as the "Guardian" of the child during the course of the Proceedings mentioned in the title above, and in further legal proceedings to protect the interests of the child, including appeals, review, revisions, writ petitions or other matters arising from the Proceedings.

The Guardian shall be entitled to appoint lawyers, sign vakalatnamas, verify pleadings, sign affidavits and take all other necessary steps in relation to the Proceedings and other matters arising from the Proceedings”

4. Thereafter, again an application for inspection of record was filed before the learned Additional Sessions Judge, bringing on record the order dated 9th November, 2016 of CWC appointing the petitioner as the Guardian

of Minor 'X', which was also dismissed vide the impugned order dated 21st December, 2016. Hence, the present petition.

5. The learned Additional Sessions Judge vide the impugned order noting the two definitions of 'Guardian' in the JJ Act, 2000 and JJ Act, 2015 observed that the application for inspection was not signed by any person much less the victim or her family member. It was made at the strength of a vakalatnama, signed by Mr. Zeeshan Iskandari, Advocate which has been executed by one Lavanya Anirudh Verma, the Director of Samarpan Foundation, 63, Jorbagh, New Delhi, who at the strength of the order dated 9th November, 2016 passed by the Child Welfare Committee claims to be guardian of the victim. However, the said order neither mentions Lavanya Anirudh Verma nor Samarpan Foundation instead notes the description of the person as Director of Samarpan Home for Girls. Thus, the order passed by the Child Welfare Committee is vague and open without naming any person. The Court expressed its doubt whether any entity other than a natural person could be appointed as a guardian. Learned Additional Sessions Judge also noted that deletion of the word "before that authority" in the definition of word "Guardian" does not make any change in the legal position since the Samarpan Foundation or its Director Ms. Lavanya Anirudh Verma were not a family member or natural guardian of the victim or her guardians appointed under the provisions of Guardianship and Wards Act, 1890. It was thus held that neither Samarpan Foundation nor its director Ms. Lavanya Anirudh Verma had any locus to present the application and inspect the record.

6. Section 2(j) of The Juvenile Justice (Care and Protection of Children) Act, 2000 (in short "JJ Act 2000") defined "guardian" as-

(j) “guardian”, in relation to a child, means his natural guardian or any other person having the actual charge or control over the child and recognised by the competent authority as a guardian in course of proceedings before that authority.

However, Section 2(31) of the JJ Act, 2015 defines "guardian" as-

(31) “guardian” in relation to a child, means his natural guardian or any other person having, in the opinion of the Committee or, as the case may be, the Board, the actual charge of the child, and recognised by the Committee or, as the case may be, the Board as a guardian in the course of proceeding.

7. Thus in the JJ Act 2015, the words, “before that authority” have been consciously deleted from the definition of word ‘guardian’. It is trite law that when a conscious modification is made in a provision when found to be needed and necessitated to implement effectively the legislative intention and to prevent a social mischief against which the provision is directed, a purposive construction is a must and the only inevitable solution. Supreme Court in the decision reported as (2006) 3 SCC 434 Bombay Dyeing & Mfg. Co. Ltd.(3) Vs. Bombay Environmental Action Group & Ors. held-

“90. It is also a fundamental proposition of construction that the effect of deletion of words must receive serious consideration while interpreting a statute as this has been repeatedly affirmed by this Court in a series of judgments. (See CIT v. Bhogilal Laherchand [1954 SCR 444 : AIR 1954 SC 155] , Mangalore Electric Supply Co. Ltd. v. CIT [(1978) 3 SCC 248 : 1978 SCC (Tax) 167] , Kesavananda Bharati v. State of Kerala [(1973) 4 SCC 225] and Onkarlal Nandlal v. State of Rajasthan [(1985) 4 SCC 404 : 1986 SCC (Tax) 34] .)

91. It is furthermore well known that when the statute makes a distinction between two phrases and one of the two is expressly deleted, it is contrary to the cardinal principle of statutory

construction to hold that what is deleted is brought back into the statute and finds place in words which were already there in the first place.”

8. The three Judge Bench of the Supreme Court in the decision reported as (2010) 5 SCC 1 Lalu Prasad Yadav & Anr. Vs. State of Bihar & Anr. held-

“38. In Bengal Immunity Co. Ltd. v. State of Bihar [AIR 1955 SC 661 : (1955) 2 SCR 603] Venkatarama Ayyar, J. observed: (AIR p. 749, para 197)

“197. ... It is a well-settled rule of construction that when a statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them under the repealed Act, because the legislature is presumed to be acquainted with the construction which the courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the court as correctly reflecting the legislative mind.”

39. However, if the later statute does not use the same language as in the earlier one, the alteration must be taken to have been made deliberately. In his classic work, Principles of Statutory Interpretation by G.P. Singh, 12th Edn., 2010 at p. 310, the following statement of law has been made:

“Just as use of same language in a later statute as was used in an earlier one in pari materia is suggestive of the intention of the legislature that the language so used in the later statute is used in the same sense as in the earlier one, change of language in a later statute in pari materia is suggestive that change of interpretation is intended.”

The learned author also refers to the observations of Lord MacMillan in D.R. Fraser & Co. Ltd. v. Minister of National Revenue [AIR 1949 PC 120] : “When an amending Act alters the

language of the principal statute, the alteration must be taken to have been made deliberately.””

9. The learned ASJ in the impugned order not only failed to notice the import of the conscious deletion of the words “before that authority” and the impact of deletion, it also ignored the various pronouncements of this Court, laying down guidelines mandating the Court to appoint ‘guardian ad litem’ for the victim.

10. The Division Bench of this Court in the decision reported as (2010) 172 DLT 65 Delhi Commission for Women v. Delhi Police laid down the following guidelines to enable the authorities to tackle sexual offences effectively including the sexual abuse offences against children which defined a ‘guardian’ and imposed a duty on the Court to provide legal aid to a victim of sexual offence. Relevant portion of the guidelines to be followed are:

“1. Pursuant to the order dated 10.2.2008, Delhi Commission for Women has filed draft guidelines to enable the authorities to effectively tackle sexual offences including incest and child sexual abuse offences. The guidelines have been prepared in consultation with all departments, police and the Judges of Delhi Higher judicial Service. A modified draft has also been placed on record keeping in view the suggestions made by the State as well as the Registry of the High Court. Having considered the modified draft and also the submissions made at the Bar, we issue the following guidelines to police, hospitals/doctors, Child Welfare Committees, Sessions Court, Magistrate Courts, Prosecutors and other concerned authorities. The guidelines enumerated hereinafter shall be read in the context of the following definition:

(a) “Crises Intervention Centre” means a recognized agency, appointed by the Delhi Police and the Delhi Commission for Women for responding to calls of sexual

assault at the police station to provide counselling and other support services to victims of rape;

- (b) “Expert means a person who is qualified and has experience in dealing with cases of sexual violence;*
- (c) “Guardian” includes besides the natural guardian, support person or any person appointed by the Child Welfare Committee for a specified period to take case of the victim during the pendency of the trial;*
- (d) “Rape Crises Cell” means a cell established under the Delhi Commission for Women to provide legal assistance in the cases of sexual assault who would coordinate the Crises Intervention Centres and provide legal support to the victim and her family;*
- (e) “Support person” means a person working in the capacity of a Counsellor working with a recognized and registered Crises Intervention Centres, approved by the Delhi Commission for Women.*
- (f) The expression “offence” for the purpose of these guidelines shall means and include offences of rape, attempt to rape and unnatural offences.*

(I) POLICE

- (f) The statement of victim shall be recorded in private, however, the presence of family members while recording statement may be permitted with a view to make the victim comfortable. In incest cases where there is a suspicion of complicity of the family members in the crime such family members should not be permitted.*
- (g) The Investigating Officer shall bring the cases relating to “child in need of case and protection” and the child victim involving in incest cases to the Child Welfare Committee.*

(IV) PROSECUTORS

- (a) In cases where the child is placed in a shelter following the orders of the Child Welfare Committee or a Metropolitan Magistrate, the application seeking custody*

of the child made by the parents/relatives of the victim should not be acceded to till such time, the Public Prosecutor gets the status of the applicants verified with the Rape Crisis Cell and also call for the records of the Child Welfare Committee if it is not available.

(V) COURTS

(c) The Hon'ble Supreme Court in Delhi Domestic Working Women Forum v. Union of India, (1995) 1 SCC 14 and reiterated by this Hon'ble Court in Khem Chand v. State of Delhi, 2008 (4) JCC 2497 had directed that the victim be provided with a Counsel. The existing practice of the victims being represented by a Counsel from the Rape Crisis Cell may continue. In cases where the victim has a private lawyer, she may be allowed to retain the private lawyer."

11. The term "guardian ad litem" was defined in *The UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime* published by UN Office on Drugs and Crime, Vienna, UN, New York 2009 as-

(g) "Guardian ad litem" means a person appointed by the court to protect a child's interests in proceedings affecting his or her interests.

12. Article 10 of *The UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime* published by UN Office on Drugs and Crime, Vienna, UN, New York 2009 which also provides for legal assistance to the child victim or witness, reads as under:

"Article 10. Legal assistance

A child victim or witness shall be assigned a lawyer by the State free of charge throughout the justice process in the following instances:

- (a) At his or her request;*
- (b) At the request of his or her parents or guardian;*

- (c) *At the request of the support person, if one has been designated;*
- (d) *Pursuant to an order of the court on its own motion, if the court considers the assignment of a lawyer to be in the best interests of the child.”*

13. The High Court of Delhi, after taking a valuable insight from ‘*The UN Model Law on Justice in matters involving Child Victims and Witnesses of Crime*’ published by the UN Office on Drugs and Crime, Vienna, UN, New York 2009, formulated the *Guidelines for recording of evidence of vulnerable witnesses in criminal matters* which were reiterated in the decision of the Division Bench of this Court reported as (2015) 224 DLT (CN 13) 13 *Arsheeran Bahmeech Vs. State*. Paras 15, 16 and 17 of the guidelines provide for ‘*Appointment of Guardian ad litem*’, ‘*Duties of Guardian ad litem*’ and ‘*Legal Assistance*’ respectively, which read as under:

“15. Appointment of Guardian ad litem.-

The Court may appoint any person as guardian ad litem as per law to a witness who is a victim of, or a witness to a crime having regard to his best interests after considering the background of the guardian ad litem and his familiarity with the judicial process, social service programs, and child development, giving preference to the parents of the child, if qualified. The guardian ad litem may be a member of bar/practicing advocate, except a person who is a witness in any proceeding involving the child.

16. Duties of guardian ad litem:

It shall be the duty of the guardian ad litem so appointed by court to:

- (i) attend all depositions, hearings, and trial proceedings in which a vulnerable witness participates.*

(ii) make recommendations to the court concerning the welfare of the vulnerable witness keeping in view the needs of the child and observing the impact of the proceedings on the child.

(iii) explain in a language understandable to the vulnerable witness, all legal proceedings, including police investigations, in which the child is involved;

(iv) assist the vulnerable witness and his family in coping with the emotional effects of crime and subsequent criminal or non-criminal proceedings in which the child is involved;

(v) remain with the vulnerable witness while the vulnerable witness waits to testify;

“17. Legal assistance

A vulnerable witness may be provided with legal assistance by the court, if the court considers the assignment of a lawyer to be in the best interests of the child, throughout the justice process in the following instances:

(a) at the request of the support person, if one has been designated; (b) pursuant to an order of the court on its own motion.”

14. The Directive Principles of State Policy enshrined in the Part IV of Constitution of India cast an obligation on the State to provide children opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and moral and material abandonment. In the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance. The United Nations Convention on the Rights of Children which was ratified by India on 11th December, 1992, also recognised the need for special safeguards and care for children including appropriate legal protection. Article 3 of the Convention on the Rights of Child provides that the primary consideration, in the all

actions concerning children, is the best interest of the child.

15. The JJ Act, 2000 was enacted to provide for the protection of children and was amended from time to time to address gaps in its implementation and make the law more children friendly. The amendment to the Act made in 2015 was in consonance to the Directive Principles of State Policy. The JJ Act, 2015 provides for ensuring proper care, protection, development, treatment and social re-integration of children in difficult circumstances by adopting a child-friendly approach keeping in view the best interest of the child. Section 3 of the JJ Act, 2015 provides for the general principles to be followed in administration of justice. Section 3(iii), (iv) and (xvi) provide for Principle of participation, Principle of best interest and Principles of natural justice respectively as under:

“(iii) Principle of participation: Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child’s views shall be taken into consideration with due regard to the age and maturity of the child.

(iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

(xvi) Principles of natural justice: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.”

16. The POCSO Act was enacted to protect children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interests and well being of children at every stage of the judicial process. Section 39 of POCSO Act provides that the State

government shall prepare guidelines for use of non- governmental organisations, professionals and experts or other persons having special knowledge to be associated at the pre-trial and trial stage to assist the child.

17. Article 39A of the Constitution of India casts an obligation upon the State to provide free legal aid. Section 40 of POCSO which is in harmony with Article 39A of the Constitution of India recognizes the right of the child to take legal assistance of legal practitioner. Thus, it casts an obligation on Courts to ensure that the child is provided legal aid. POCSO Rules, 2012 also provides that the concerned authority shall inform the child and his parent or guardian or other person in whom the child has trust and confidence as to the right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with Section 40 of the POCSO Act.

18. The Model Guidelines formulated by the Ministry of Women and Child Development under Section 39 of POCSO Act which provide for the services that may be provided by Legal Aid Authorities are enumerated below:

“i) Legal Representation

The abused child should be provided with such care and protection as required by law. Any such action shall be in accordance with the procedures established by the State Legal Services Authority and the National Legal Services Authority. The Form for Application for Legal Services should be provided to the child by the police at the time of making the report under Section 19(1).

ii) Legal Counselling

Complainants in need of legal aid/ assistance/ advice in cases of violations of child rights may seek aid/ assistance from the Legal Aid Cell so that the child is able to testify in court without fear.

iii) Legal Advice

The Cell shall render such aid/ assistance/ advice to the complainant as well as send its legal opinion in such cases to the concerned govt. authorities for suitable action. Governmental and Non Governmental Organizations, Civil Society Organizations, voluntary organizations, parents, relatives, concerned friends and members of the public may, on behalf of the child in need of care & protection, approach the Cell and receive legal advice regarding the legal rights of the child and the means for accessing those rights. The Cell will provide requisite information and advice to the concerned persons regarding the legal options available for protecting the interests of the child. The Cell will also assist the concerned in making a decision regarding various options available to pursue the case and if required help in formulation of complaints, petitions, etc.”

19. Clause (g) of sub section 1 to Section 37 of the JJ Act, 2015 provides that the Committee can pass the following orders in terms of a child who is in need of care and protection:

“(g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;”

20. In the present case, since the father of Minor ‘X’ was the accused and the mother had abandoned the family and remarried, the Child Welfare

Committee (CWC) had rightly appointed the petitioner as the guardian of Minor 'X' as there was no natural guardian. The Learned Additional Sessions Judge opined that CWC had the power to appoint a guardian only for the proceeding before it which is contrary to the interpretation of the word "guardian" as now defined under Section 2 (31) of the JJ Act, 2015 wherein the words '*before that authority*' have been consciously deleted. Even if the Learned ASJ was of the opinion that a guardian appointed by the CWC cannot act as a guardian in the proceedings before it, the Court should have appointed a *Guardian Ad Litem* for the proceedings going on before it. Despite the fact that the learned Additional Sessions Judge was under a constitutional obligation and bound by the decisions of the Supreme Court and this Court laying down guidelines to be followed and mandated the Court to ensure that the victim had a *guardian ad litem* and was given legal representation, the learned Additional Sessions Judge failed to comply with the same by not only not recognizing the guardian so appointed by the Child Welfare Committee but also by not appointing a *guardian ad litem*.

21. The repeated advertence of the learned Additional Sessions Judge in the impugned orders that the guardian was not a family member fails to notice that the mother of the victim had abandoned her and the father was the accused. Learned Additional Sessions Judge also not only failed in its constitutional and statutory obligation but also failed to exercise its *parens patriae* jurisdiction for watching the best interest of the child victim.

22. Consequently, the impugned orders passed by the learned Additional Sessions Judge are set aside. Ms. Lavanya Anirudh Verma who is Director of Samarpan Homes for Girls which fact has been verified by the State will act as *guardian ad litem* for the child victim and would thus be permitted to

exercise all rights in the interest of the child victim. At any stage of the proceedings if the Trial Court finds that the '*Guardian Ad Litem*' is either not taking due care of the legal proceedings or acting contrary to the best interest of the child, the court would then pass appropriate orders as per the mandate noted above.

23. Petition is disposed of.

24. Copy of the order be circulated by the Registrar General to all the District/Sessions Courts in Delhi so that the Courts ensure that the minor victims have proper legal assistance.

(MUKTA GUPTA)
JUDGE

FEBRUARY 08, 2017
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