

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 7896 OF 2020

1. Mahesh s/o Lavnkush Dubey,
Age : 44 years, Occu.: Service,
2. Mohini w/o Mahesh Dubey,
Age : 43 years, Occu.; Housewife
R/o.: N-9, H-24/1, H-Sector,
Shrikrushna Nagar,
CIDCO, Aurangabad

... PETITIONERS

VERSUS

1. The State of Maharashtra
Through the Secretary,
Ministry of Women and Child Development
Department Mantralaya,
Mumbai-32
2. The District Collector,
Jalna, District : Jalna
3. The District Collector,
Aurangabad, District : Aurangabad
4. The Child Welfare Committee,
Jalna, District : Jalna
5. The Superintendent Late Rajkunwar
Rameshchandra Bang Shishugrah,
Sneh Sadan, Mantha-Ambad Bypass
Maa Rani Sati Nagar, behind
Vyankatesh Nagar, Saraswati Chowk,
Jalna
6. SAKAR (Society for Adoption, Knowledge,
Awareness and Resource) Ajmera Complex,
Plot No. 177, Jyoti Nagar,
Aurangabad.
7. Central Adoption Resource Authority (CARA).
SARA, 2nd floor, Commissionerate Women
and Child Development,
28 Queens Garden
Near Old Circuit House, Pune

... RESPONDENTS

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Mr. S.N. Pagare, Advocate for petitioners.

Mr. K.N. Lokhande, AGP for respondent nos. 1 to 4.

Mr. S.E.Siddiqui, Advocate for respondent no.5.

Mrs. A.V. Gondhalekar & Ms. Priya Gondhalekar, Advocates for respondent no.6.

Mr. A.G. Talhar, Assistant Solicitor General for respondent no.7.

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**CORAM : S.V. GANGAPURWALA AND
SHRIKANT D. KULKARNI, JJ.**

JUDGMENT RESERVED ON : 9th APRIL, 2021

JUDGMENT PRONOUNCED ON : 7th MAY, 2021

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JUDGMENT : (PER SHRIKANT D. KULKARNI, J.)

1. Rule. Rule made returnable forthwith. Heard finally with consent of all the parties at admission stage.

2. The petitioners are husband and wife. They are childless. They have decided to adopt a child when doctors opined that there is no chance to have a child from their wedlock. The petitioners approached respondent no.5 / The Superintendent Late Rajkunwar Rameshchandra Bang Shishugrah, Sneh Sadan, Jalna in search of adoption of a child. They met with the officials of the said institution and disclosed their intention to adopt a baby child. Respondent no.5 / institution agreed for the adoption and accordingly the petitioners were asked to execute Foster Care Agreement.

Accordingly, the petitioners had executed Foster Care Agreement on 25/10/2019. As per the Foster Care Agreement, custody of an orphan baby namely Poonam was handed over to the petitioners on 29/10/2019. As per the Foster Care Agreement, during the period of foster care of child, it was agreed to complete legal formalities under the provisions of Law of Adoption by filing necessary adoption petition before the District Court at Jalna. It was agreed that custody of the child would be temporary with the petitioners in view of Foster Care Agreement.

3. Respondent no.5 / institution has also decided to seek police verification of the background of the petitioners' family for adoption purpose. According to the petitioners, the baby child was under their care and custody from 29/10/2019 to 30/12/2019. They had taken utmost care during the said period and raised the child with love and affection. The petitioners received a call from respondent no.5 / institution instructing to hand over the custody of the child immediately. Accordingly, the petitioners handed over the custody of the bay child on 30/12/2020 to respondent no.5 / institution. According to the petitioners, it was obligatory on the part of respondent no.5 / institution to guide the petitioners to complete legal procedure of adoption. Respondent no.5 / institution did not

follow due procedure of adoption while handing over the custody of the child to the petitioners. The petitioners are financially sound and capable to take care of the child. They have also registered their names on the Government Portal 'CARA' for adoption of their child and same is acknowledged by CARA by which the petitioners were instructed to upload all the requisite documents within 30 days and the petitioners have complied with the same. The petitioners received the response from CARA. The petitioners were instructed to contact the agency i.e. respondent no.5 / institution, who is running orphanage under the Maharashtra Charitable Foundation at Jalna.

4. Accordingly, the petitioners approached respondent no.5 / institution. Home study of the petitioners was conducted and same was approved by Specialized Adoption Agency. The petitioners were advised for further instructions. According to the petitioners, they have been orally informed that their names are incorporated in the waiting list for adoption and it would take at least 2 years for adoption of a child. They have been informed that as per their turn, the child would be made available. According to the petitioners, they would not get the custody of the child Poonam, who was under care and custody of the petitioners from 29/10/2019 to 30/12/2019. According to the petitioners, the child is presently under the care of

charitable institution namely SAKAKR / respondent no.6. In the above premise, the petitioners are seeking directions to respondent nos. 2 to 7 to hand over the custody of the baby child Poonam by initiating legal proceedings for adoption and till completion of procedure, custody of the child may not be given to other parents, who are on the wait list of CARA.

5. Heard Mr. S.N. Pagare, learned counsel for the petitioners, Mr. A.G. Talhar, learned A.S.G. for respondent No.7, Mr. K.N. Lokhande, learned A.G.P. for respondent Nos.1 to 4 / State, Mr. S.I.Siddiqui, learned counsel for respondent No.5 and Mrs. A.V. Gondhalegar and Ms. Priya Gonhalekar, learned Advocates for respondent No.6.

6. Perused the copy of Foster Care Agreement, copy of communication dated 0712.2019 and copies of e-mails produced by the petitioners. We have also gone through the affidavit filed on behalf the State in connected writ petition Nos. 6314 of 2020 and 7836 of 2020 and affidavit filed on behalf on respondent No.6 / SAKAR.

7. Mr. Pagare, learned counsel for the petitioner vehemently submitted that the child was under care and custody of the petitioners from 29.10.2019 to 3012.2019. The petitioners have taken utmost

care of the child namely Poonam. The custody of the child was with the petitioners on the basis of the Foster Care Agreement. It was necessary on the part of respondent No.5 to complete the legal procedure of adoption. The names of the petitioners have been uploaded on the Government portal CARA. As per the instructions, the petitioners have uploaded all the necessary documents within 30days. The petitioners have approached respondent No.5 as per the instructions of CARA. The home study report of the petitioners was also approved by the Specialized Adoption Agency. Now, respondent No.5 is telling that the petitioners have to wait at least two years for adoption. They would get the child as per their turn and would not get custody of child Poonam. As per the instructions of respondent No.5, the petitioners have handed over the custody of child Poonam to respondent No.5 on 30.12.2019, who is presently under care of SAKAR / respondent No.6. Mr. Pagare submitted that the petitioners are entitled to get custody of child Poonam by completing procedure of adoption.

8. Mr. Lokhande, learned A.G.P for State / Respondent Nos. 1 to 4 submitted that respondent No.5 has not followed the mandatory procedure for adoption as per the provisions of the new Juvenile Justice Act, 2015 ((hereinafter referred to as the “JJ Act 2015”) and

Rules made thereunder of 2018. He submitted that CWC has passed the order of Foster Care Agreement without assessing the suitability of the petitioners of foster parents. He submitted that at present the child Poonam is admitted in SAKAR (Specialized Adoption Agency) at Aurangabad and said institution is taking good care of the child. He submitted that the petitioners have no right to select the child. He submitted that in SMPIL No.2 of 2020, this Court has issued certain directions and in pursuance of the directions given by this Court, F.I.R is filed against the members of the CWC, Jalna and respondent No.5 as well for illegalities committed in the process of adoption. Mr. Lokhande, learned AGP submitted that the petitioners are not entitled to get back custody of the child Poonam.

9. Mrs. Gondhalekar, learned advocate for respondent no.6 invited our attention to the provisions of the Juvenile Justice Act and Rules. She submitted that mandatory Rules are not followed while giving custody of a child under Foster Care Agreement. The CARA guidelines are not followed. She submitted that the child is now in safe hands of Specialized Adoption Agency / SAKAR. The procedure for adoption and CARA guidelines are mandatory. The child Poonam cannot be given back into the custody of the petitioners.

10. Mr. Talhar, learned A.S.G. for respondent No.7 argued in tune with argument advanced by learned A.G.P and learned counsel for respondent No.6. Mr. Siddiqui, learned counsel for respondent No.5 supported the action and stand taken by respondent No.5 / SAA.

11. The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'JJ Act' for brevity) came into force with effect from 31/12/2015. The Government of India has also framed JJ Act, 2015 Models Rules 2016 and the Adoption Regulations, 2017. The State is empowered to frame its own rules by invoking Section 110 of the JJ Act. In exercise of the powers conferred by Sub-Section (1)(2) of Section 110 of the JJ Act, (2) of 2016 and all other powers enabling in that behalf the Government of Maharashtra has framed the Rules known as the Maharashtra State Juvenile Justice (Care and Protection of Children) Rules 2018 effective from 13th March, 2018.

12. The above referred Act, Rules and Regulations governed the field of adoption in India. Adoption is a process other than the birth process, which creates parents and child relationship. It is a social and legal process by which a child of one set of parents becomes the child of another set of parents. Adoption as defined is the process

through which the adopted child is permanently separated from the biological parents and becomes the legitimate child of the adoptive parents with all rights, privileges and responsibilities that are attached to the relationship. JJ Act introduced expression “child in need of care and protection.”

13. Section 68 of the JJ Act relates to Central Authority known as Central Adoption Resource Authority to promote in-country adoptions and to facilitate inter-state adoptions in coordination with State Agency. CARA also perform the function of inter-country adoptions. Chapter 8 of JJ Act, 2015 deals with adoption. Section 56 relates to adoption. Section 57 relates to eligibility of a prospective adoptive parents. Section 58 provides procedure for adoption by adoptive parents living in India. Section 61 provides court procedure for adoption. Section 67 deals with State Adoption Resource Agency. The new guidelines issued by the Central and State Government simplify entire process of adoption and bring in greater transparency and clarity in the process. The following is broadly the process followed for adoption:

“a) Parents register online on CARINGS (Child Adoption Resource Information and Guidance System) and select

the preferred Adoption Agency for HSR (Home Study Reporty) and State

b) Required documents have to be uploaded within 30 days of registration.

c) Specialized Adoption Agency (SAA) conducts Home Study Report (HSR) of the PAPs and uploads it on CARINGS within 30 days from the date of submission of required documents on CARINGS.

d) Suitability of PAPs is determined (if not found suitable, PAPs informed with reasons for rejection)

e) PAPs reserve one child, as per their preference from up to 6 children.

f) PAPs visit the adoption agency within 15 days from the date of reservation and finalize.

g) If the child is not finalized within stipulated time, the PAPs come down in the seniority list.

h) On acceptance of the child by the PAPs, SAA completes the referral and adoption process (on CARINGS)

i) PAPs take the child in pre-adoption foster care and SAA files petition in the court and the adoption Court order is issued.

j) Post-adoption follow-up report is conducted for a period of two years.”

14. In the case at hand, it is evident that the petitioners approached to respondent No.5 for adoption of child. It is noticed that the petitioners were asked to execute Foster Care Agreement and

accordingly they seem to have executed the same on 25.10.2019. On going through the Foster Care Agreement, it is noticed by us that respondent No.5 has given go by to the procedure while giving a child in Foster Care Agreement. Respondent No.5 is a Specialized Adoption Agency and obviously required to adhere the JJ Act and Rules. The child is in need of care and protection required to be produced before the CWC, it is mandatory for the CWC to put up a child (up to age of six years) with Specialized Adoption Agency. It is mandatory for Specialized Adoption Agency to upload the information of a child in need of care and protection within three days of CARINGS, which is a portal of CARA. It facilitates guidance for adoption process. It is necessary for CWC to pass an order declaring the child is free for adoption as per Adoption Regulations 2017. After the child is made free for adoption, the Specialized Adoption Agency needs to upload that information within 30 days from the order (i) child status report, (ii) medical examination report and (iii) photograph of the child on CARINGS. Then only as per the Regulation 10(2) only legally free child is referred to PAP by CARA. After referral by CARA, PAP is supposed to reserve the child and within 48 hours PAP is required to visit SAA. The suitability of the proposed adoptive parents needs to be

assessed by the Adoption Committee. The seniority list needs to be maintained.

15. On going through the pleadings of the parties and documents on record, it is evident that Foster Care Agreement was executed on 25.10.2019 without following the above referred mandatory provisions of Adoption Regulations 2017. Certainly the Foster Care Agreement dated 25.10.2019 is not in consonance with the Rule 25 of Rules 2018.

16. It is pointed out by Mrs. Gondhalekar, learned counsel for respondent No.6 that in the case at hand Rule 25(9) of Maharashtra State Juvenile Justice (Care and Protection of Children) Rules, 2018 are not adhered to. It is mandatory to conduct home study before placing the child in Foster Care. The home study report from the District Child Protection Unit is not placed on record. The medical reports of the petitioners are not placed on record and certainly that Foster Care Agreement of child Poonam is in blatant violation of the JJ Act 2015 and Rules 2018. Section 55 of the Act of 2015 is not complied with before execution of Foster Care Agreement. The CWC has not followed due procedure.

17. Mr. Pagare, learned counsel for the petitioners has relied upon the following citations in support of his argument, which are considered with the facts of the case on hand.

(i) In case of ***Sivarama K. and others vs. The State of Kerala and others, 2020(1)KLT, 294***, the writ petition was filed to produce a child. It was a writ of habeas corpus. In that case the biological parents had given their child in adoption to the adoptive parents after fulfilling all the provisions of the Hindu Adoption and Maintenance Act, 1956, that too, after executing a registered adoption deed. The facts of the cited case and the facts of the case at hand are quite distinguishable and as such said decision is not anyway helpful to the petitioners.

(ii) In case of ***Aniruddha M. Railkar Vs. Indian Council for Social Welfare*** reported in ***AIR Bombay R 2007 page 471***, the Division Bench of this Court was pleased to quash and set aside the order passed by the Family Court, Pune rejecting the petitioners prayer for adoption of an Indian child Shubham. On going through the citation, it is noticed that CARA had given clearance for adoption and in that background the parents who are foreign nationals of Indian origin residing in the U.S.A. allowed to complete the adoption procedure. The facts of the case on hand are quite different.

(iii) Mr. Pagare, learned advocate further placed his reliance in the case of *Harishbhai C. Limbachiya and another vs. State of Maharashtra and others (Writ Petition No. 1489 of 2017)* decided by the Division Bench at principle seat on 31st August, 2017. On going through the same, we noticed that it was a writ of habeas corpus. The Division Bench was pleased to pass interim order regarding custody of the minor child to the petitioners. It is not a final order and does not render any assistance to the petitioners.

(iv) Mr. Pagare, learned advocate for petitioners further relied upon in case of *Petrik Francis Rodrigues and another vs. State of Maharashtra and others, (Criminal Writ Petition No. 334 of 2017)* decided by the Division Bench at principle seat on 14/02/2017. Again it was a case of writ of habeas corpus and by way of interim order and taking into consideration welfare of the minor child, interim custody was handed over to the petitioners. It is not a final order.

(v) In *Suo Moto Writ Petition (Civil) No.4 of 2020*, decided on 03/04/2020 by the Supreme Court, it is held by taking into situation COVID-19 pandemic, interest of the children should be looked into. Interest of these children all of whom fall within the ambit of Juvenile

Justice (Care and Protection of Children) Act, 2015 should be protected and to prevent the same, certain directions are issued.

18. Having regard to the stock of citations (supra) relied upon by Mr. Pagare, learned advocate for the petitioners, none of them supports to his case.

19. The case at hand is a classic example of breach of provisions of JJ Act, 2015 and Rules 2018 which deals with adoption of child who is termed as child in need of care and protection. The Foster Care Agreement executed between the petitioners and respondent No.5 is found to be in breach of provisions of JJ Act and Rules. The CWC, Jalna seems to have given custody of a child Poonam to the petitioners by way of Foster Care Agreement by violating mandatory provisions of JJ Act, 2015 and Rules 2018. The entire process is found to be defective in the eye of law.

20. We understand the feelings and emotions of petitioners. We also understand the petitioners' may have developed attachment with the child Poonam. At the same time, we cannot overlook mandatory provisions of JJ Act, 2015 and Rules 2018, which provides welfare of a child before giving a child in adoption.

21. In case of *S. Vanitha (Smt. Vs. Deputy Commissioner, Bengaluru Urban District and Others, reported in 2020 SCC online SC 1023*, the Hon'ble Supreme Court has emphasized upon the necessity to protect the rights of the children so as to give purposeful interpretation to the definition of child in need of care and protection under Section 2 (14) of the JJ Act, 2015.

22. It is further brought to our notice that in SMPIL No. 2 of 2020 (Registrar (Judicial) Vs. Union of India and others), this Court has issued certain directions and in pursuance of directions issued by this Court, the District Women and Child Development Officer, Jalna has filed F.I.R. bearing No.0577 of 2020 dated 18.12.2020 against the members of Child Welfare Committee, Jalna and Directors / Trustees of Marwadi Charitable Trust, Jalna regarding illegalities committed in the process of adoption.

In view of the above, the prayers made by the petitioners cannot be granted. The best interest of the child shall be kept in mind through out the adoption process. Unfortunately, the best interest of the child seems to have been defied.

23. Having regard to the above reasons and discussion, we do not find any merit in the petition. Hence, we pass the following order.

ORDER

- (i) The writ petition is dismissed.
- (ii) Rule discharged.
- (iii) No order as to costs.

(SHRIKANT D. KULKARNI)
JUDGE

(S.V. GANGAPURWALA)
JUDGE

S.P. Rane