

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

WRIT PETITION NO. 7836 OF 2020

1. Nitin s/o Suresh Adukia,
Age : 36 years, Occu.: Business,
2. Priyanka w/o Nitin Adukia,
Age : 32 years, Occu.; Housewife & small business

R/o.: At post : House No.5-1-527,
Troop Bazar, Jam Bagh Road,
Jamuna Arcade, (Navarang Compled),
B-Block, Flat No. 107,
Hyderabad-5500 095 (Telengana) ...

PETITIONERS

VERSUS

1. The Union of India,
Through the Secretary,
Department of Women and Child Development,
1, Canning Lane (Pandit Ravi Shankar Shukla Lane),
Near Bhatiya Vidya Bhavan Bus Stop,
Kasturba Gandhi Marg,
New Delhi – 110 001-wcd@nic.in
2. Central Adoption Resource Authority,
Through the Member Secretary and CEO,
Or through the Director,
Ministry of Women and Child Development,
West Block 8, Wing 2, 1st Floor, R. K. Puram,
New Delhi – 110 006 (India)
Email-carahdesk.wcd@nic.in
3. The State of Maharashtra,
Through the Secretary,
Women and Child Development Department,
3rd Floor, New Administrative Building,
Madam Cama Road, Hutatma Raiguru Chowk,
Mumbai – 400 032. Maharashtra, India.

4. The State Adoption Resource Agency,
Through The Commissioner,
2nd Floor, Women and Child Development
Commissionerate, 28, Queens Garden,
Near Old Circuit House, Pune-411 001.
sara.mspps@gmail.com
 5. District Women and Child Development Officer,
Age : Office of the District Woman and Child
Development, Administrative Building,
Office of the District Collector,
Ground Floor, Jalna- 431203
 6. The Chairman,
Child Welfare Committee,
c/o.: Observation Home, Near Bachat Bhavan,
Old Jalna, Jalna, Tal. & Dist. : Jalna.
Email ID- cwcjalna2018@gmail.com
 7. The Director,
Bhartiya Samaj Seva Kendra,
N-4, Plot No. 151, F- Sector,
Guru Sahani Nagar, CIIDCO,
Aurangabad.
- ... **RESPONDENTS**

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Mr. Chaitanya V. Dharurkar, Advocate for petitioners.
Mr. A.G. Talhar, Assistant Solicitor General for respondent nos.1
& 2.
Mr. K.N. Lokhande, AGP for respondent nos. 3 to 5.
Mr. P.S. Agrawal, Advocate for respondent no.7.
Respondent No.6- Absent

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**CORAM : S. V. GANGAPURWALA &
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) :

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

2. The petitioners are husband and wife and permanent resident of Hyderabad, State of Telengana. Petitioner no.2 is childless because of infertility problem. Petitioner No.2 took medical treatment but no fruitful outcome. Therefore, the petitioners decided to adopt a child. They had been to the institution at Jalna. They attracted towards a child namely Dhanashri @ Reeya, who was having medical problems. The petitioners decided to take responsibility of that child on their shoulders. They were ready to incur all the medical expenses. They have decided to adopt the child Dhanshri @ Reeya and accordingly approached to the CWC at Jalna by filing an application. On 01.01.2020 the CWC passed an order and Dhanshri @ Reeya was handed over to the petitioners on the basis of Foster Care Order. The petitioners had decided to file petition for adoption before the District Court at Jalna but considering the health and medical condition of the child, they

could not file petition immediately. But the petitioners have registered themselves with the Central Adoption Research Authority, New Delhi on 14.01.2020 as per procedure. The petitioners could not file the petition for adoption due to COVID-19 pandemic. The child was 3 months old when custody was given to the petitioners on the basis of Foster Care.

3. According to the petitioners, the child is now very much happy with the petitioners. On 10.09.2020 the petitioners received call from CWC, Jalna to remain present on 29.09.2020. On 29.09.2020 the child Dhanshri @ Reeya was not well and was under medical treatment since 06.09.2020. Moreover, due to Covid-19 pandemic it was not possible for the petitioners to travel from Hyderabad to Jalna. The petitioners requested to CWC Jalna to extend the time in background of illness of the child and Covid-19 pandemic.

4. On 30.09.2020 a notice was received by the petitioners on WhatsApp addressed to the Police Officials directing them to produce the petitioners and the child before the Child Welfare Committee on 05.10.2020. But due to some medical reasons and Covid-19 pandemic, it was not possible for the petitioners to

travel with child of 10 months old from Hyderabad to Jalna and therefore, the petitioners again prayed for time.

5. On 16.10.2020, the petitioners filed an application before the CWC at Jalna to extend Foster Care period / agreement and also filed an application before the Central Adoption Resource Authority and State Adoption Resource Authority requesting to give the child Dhanashri @ Reeya to them in adoption. No reply was received by the petitioners.

6. Feeling aggrieved and dissatisfied by the impugned notices dated 10.09.2020 and 30.10.2020 the petitioners apprehended that their child may be removed from their custody and in that premise rushed to this court by invoking writ jurisdiction under Article 226 of the Constitution of India.

7. Heard Mr. Chaitanya V. Dharurkar, learned Advocate for petitioners, Mr. A.G. Talhar, Learned Assistant Solicitor General for respondent nos.1 & 2, Mr. K.N. Lokhande, learned Assistant Government Pleader for respondent nos. 3 to 5 and Mr. P.S. Agrawal, learned Advocate for respondent no.7.

8. Respondent No.6/Child Welfare Committee, Jalna, though served, did not respond and marked absent.

9. Perused the Foster Care order dated 01.01.2020 passed by the Child Welfare Committee, Jalna (CWC), impugned notices dated 10.09.2020 ad 30.10.2020 and other documents and papers produced by the petitioners along with list at page no.23. We have also perused copy of affidavit in reply sworn by the District Women and Child Development Officer, Jalna filed on behalf of respondent nos. 3 and 5 and the documents and papers produced by the State.

10. Mr. Dharurkar, the learned Advocate for the petitioners strenuously submitted that the impugned notices issued by the CWC, Jalna asking them to handover custody of the child after a long period is erroneous and against the principles of justice, equity and good conscious. He submitted that the petitioners could not produce the child before the CWC as per the impugned communication due to illness of the child as well as Covid-19 pandemic. There was no intention of the petitioners to overlook the communication sent by the CWC, Jalna. The learned counsel submitted that the petitioners have already registered on the portal viz. CARA, New Delhi on 14.01.2020 as per the procedure. The petitioners could not file petition for

adoption due to Covid-19 Pandemic at Jalna. Due to extraordinary situation of Covid-19 pandemic, the petitioners could not complete the adoption procedure. They are not at fault. They have taken good care of the child during the foster care and looked after the child with love and affection.

11. Mr. Dharurkar further submitted that the petitioners are ready to complete all the legal formalities of adoption of child as per CARA guidelines and provisions of Juvenile Justice (Care and Protection of Children)Act, 2015 (hereinafter referred to as 'the JJ Act, 2015'). In the meanwhile, child Dhanashri @ Reeya may be given in the custody of the petitioners by considering the best interest of the child.

12. Mr. Dharurkar, the learned Advocate for the petitioners has placed reliance on the following stock of citations to buttress his arguments.

- (1) Sivarama K and ors Vs. State of Kerala, MANU/KE/0027/2020
- (2) Harishbhai C Limbachiya Vs State of Maharashtra, in Writ petition No.1489/2017(Principal Seat,Bombay High Court)

- (3) Patrik Francis Rodrigues and anr. Vs. State of Maharashtra, in Writ Petition No. 334/2017, Bombay High Court.
- (4) Aniruddha M. Railkar Vs. Indian Counsel for Social Welfare, 2007, STPL 8235 Bom.
- (5) In Re Contagion of Covid-19 virus in Children Protection Homes.
- (6) Sangram Singh Vs. Election Tribunal, Kotah, AIR 1955 SC 425
- (7) State of Punjab and anr. Vs. Shyamlal Murari and anr. AIR 1976 SC 1177.

13. Mr. A.G. Talhar, learned ASG appearing for respondent nos.1 and 2 submitted that the procedure laid down under the JJ Act, 2015 and the Maharashtra State Juvenile Justice (Care and Protection of Children) Rules 2018 (hereinafter referred to as the Rules, 2018) need to be strictly followed. He submitted that Section 35 of the JJ Act, 2015 provides surrender of a child and giving child in foster care. He submitted that as per the JJ Act, 2015 before the child is given in adoption, child should be free as contemplated under Section 38 of the JJ Act, 2015. He submitted that in the present case provisions of the JJ Act and Rules made thereunder are not followed while giving custody of

a child to the petitioners under foster care order. Both, the CWC and Specialized Adoption Agency at Jalna have acted in violation of the provisions of the JJ Act, 2015 and Rules 2018. In that background, the petitioners are not entitled to get back custody of the child.

14. Mr. K. N. Lokhande, the learned AGP for respondent Nos. 3 to 5 submitted that the CWC Jalna had handed over interim custody of the child by passing foster care order without conducting proper home study of foster family, social investigation and individual care plan of the said child. The CWC has passed the foster care order on the basis of social investigation report submitted by the Special Adoption Agency which is also incomplete. He submitted that the CWC Jalna and Specialized Adoption Agency have given complete go by to the mandatory provisions of the JJ Act, 2015 and Rules, 2018 while giving interim custody of the child to the petitioners on the basis of foster care order. He submitted that the child is now admitted with respondent No.7, Institution of Specialized Adoption Agency and the said Agency is taking good care of the child. The petitioners have registered their names on the portal CARA

and they have to wait as per their turn. They have no right to select a particular child for adoption. Mr. Lokhande, the learned AGP submitted that the petitioners are not entitled to get back custody of the child in the best interest of the child.

15. We have considered the arguments advanced by the learned Advocates for respective sides, A.S.G. and A.G.P.

16. The Juvenile Justice (Care and Protection of Children) Act, 2015 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.

17. 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. The JJ Act introduced expression "child in need of care and protection."

18. 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 the 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 Report) 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."*

19. Now coming back to the factual scenario of the case in hand. It appears from the affidavit sworn by the District Women and Child Development Officer, Jalna that one Shri Dilip Ramesh Rathod R/o Pathrud Dist. Jalna happened to be the father of the child Dhanashri @ Reeya. He has moved an application for surrender of child before the CWC, Jalna due to death of the child's mother. He has executed surrender deed on 19.10.2019. The child is given by way of interim custody on 02.01.2020 by the CWC Jalna by passing foster care order dated 02.01.2020. The custody was for a period of three months as per the foster care agreement.

20. It is further evident from the record that child Dhanashri @ Reeya was not produced before the CWC, Jalna after the period of three months of foster care agreement inspite of communication issued by the CWC Jalna. The CWC Jalna has issued impugned communication asking the petitioners to produce the child, however the petitioners did not produce the child by assigning reason of illness of child and Covid-19 Pandemic. Be that as it may, at present, the child is admitted in the institution of respondent No.7, a Specialized

Adoption Agency under the orders of the Child Welfare Committee, Aurangabad dated 06.11.2020.

21. In the above factual scenario, we have to consider whether custody of child can be given back to the petitioners only because the petitioners had taken good care of the child during foster care period and looked after her health by providing proper medical treatment at Hyderabad.

22. Section 35 of the JJ Act provides that CWC needs to complete the process of enquiry and counselling of the parents, who wish to surrender the child before CWC. After completion of inquiry and counselling of said parents, if CWC satisfies, then only parents shall execute a surrender deed. Before giving a child in foster care, the CWC ought to have conducted proper enquiry in respect of parents of the child who intend to surrender the child before the CWC.

23. As per Rule 25(11) of the M.S. JJ Rules, 2018, it is necessary to obtain home study report of foster family, social investigation report and individual care plan of the said child before giving custody of the child to the prospective adoptive

parents under foster care agreement. The best interest of the child needs to be protected through out the process of adoption. It is noticed by us that in the present case, no home study report of foster family is placed on record. No social investigation report and individual care plan of the child are placed on record. The CWC, Jalna has simply obtained social investigation report on 19.10.2019 that too from the Special Adoption Agency, which is also incomplete and on that basis, the CWC Jalna seems to have passed order of foster care dated 02.01.2020. It is a clear-cut violation of Rule 19(22) of the Rules, 2018. Rule 25 (22) provides that enquiry under sub-section 3 of Section 35 of of the Act shall be conducted by the Committee expeditiously and the committee shall declare the surrendered child as legally free for adoption after the expiry of two months from the date of surrender.

24. Further it is evident that there are no medical reports as contemplated under section 52 of the JJ Act, 2015. Section 52 of the JJ Act, 2015 provides that the Committee shall, after due verification of credentials, recognize any person fit to temporarily receive a child for care, protection and treatment of

such child for a specified period. There is no medical report to certify that child is fit to be in foster care. There is no home study report to assess the suitability of the petitioners as foster parent as contemplated under the JJ Act, 2015 and the Rules, 2018. In the present case, the CWC Jalna seems to have passed foster care order in breach of statutory procedure discussed above.

25. As per Regulation 7(10) of Adoption Regulation, 2017, it is mandatory on the part of CWC to make every attempt of counselling of the parents who intend to surrender the child. No such exercise seems to have been made by the CWC Jalna. Further, it is noticed by us that CWC Jalna has violated section 35 (3) of the JJ Act, 2015. Section 35(3) of the Act provides that a 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 enquiry, the child to be with the parents or guardian under the supervision, or place the child in a Specialized Adoption Agency, if he or she is below six years of age, or a children's home if child is above six years. There is no document on record to

show that the CWC Jalna has made any attempt for counselling with the parents of the child before exercise of surrender.

26. According to Rule 25 read with Rule 46 of Rules 2018 the CWC shall take decision related to placement of a child for foster care when child is in the age group of 0 to 6 years and that may be considered for placement in foster care in the circumstances mentioned in sub-Rule 1 of Rule 46. The child to be given in foster care must be legally free for adoption. Such child shall be provided a permanent family through adoption as per adoption regulations. In the case at hand, the CWC Jalna has given custody of the child by passing foster care order which is contrary to Rule 46(v) of the Rules, 2018. It is further noticed by us that age of petitioner No.1 is 36 years and age of Petitioner No.2 is 32 years. They are stated to be prospective adoptive parents. As per Rule 25 (13) of the Rules 2018, the age of foster parents should be above 35 years of age. In the case at hand, age of petitioner No.2 is 32 years, which is hurdle in the way of the petitioners to complete the adoption procedure as per the JJ Act, 2015 and the Rules, 2018.

27. We have considered the citations relied upon by Mr. Dharurkar, the learned counsel for the petitioners.

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. Patil, 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. Patil, 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.

vi) The Case of *Sangram Singh Vs. Election Tribunal, Kotah and another, reported in AIR 1955 SC 425* is on the point of invoking of powers under Article 226 by the High Court. In para 14 and 16 of the judgment, it is observed as under:

(14) That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these

special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.

(16) Now a code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to tip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it."

28. The facts of the case at hand are very much disturbing. The CWC, Jalna and the Specialized Adoption Agency, Jalna have committed breach of mandatory provisions of the JJ Act, 2015 and the Rules, 2018 before accepting surrender of the child and giving interim custody of child by way of foster care order. The JJ Act, 2015 is a complete code itself which governs the field. When statute requires that a particular thing has to be done in a particular way, it must be done in that way only. In the case at hand, the Specialized Adoption Agency and the CWC Jalna have flouted the mandatory provisions of the JJ Act,

2015 and the Rules, 2018 as noticed above by us. Certainly, it is difficult to take sympathetic view in the above background.

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

30. Mr. Dharurkar, the learned counsel for the petitioners placed reliance on the decision in case of **State of Punjab and another Vs. Shyamlal Murari and another reported in AIR 1976 SC 1177** and submitted that Courts are to do justice, not to wreck this end product on technicalities. Procedural laws are handmade and should not be hurdle in the administration of justice.

31. We are not impressed by the argument advanced by Mr. Dharurkar. We have to protect the best interest of the child through out the process of adoption. Unfortunately, in the case at hand, best interest of the child seems to have not been

protected to give purposeful interpretation to the definition of child in need of care and protection under Section 2 (14) of the JJ Act, 2015.

32. 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 of Marwadi Charitable Trust, Jalna regarding illegalities committed in the process of adoption.

33. In the above background, the entire process of giving interim custody of child on execution of foster care agreement in this case is in breach of mandatory provisions of the JJ Act 2015 and Rules 2018.

34. In view of the above, the prayers made by the petitioners cannot be granted. We arrived at this conclusion by keeping the best interest of the female child as being paramount consideration.

35. We find that there is no merit in the writ petition. Accordingly, the writ petition is dismissed. Rule is discharged. No order as to costs.

(SHRIKANT D. KULKARNI, J.)

(S. V. GANGAPURWALA, J.)

JPC