



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6461 OF 2023

- | | | |
|----|----------------------------------|-----------------------|
| 1] | Jeetendra Gorakhnath Singh, |] |
| | Aged 43 years of Hindu, Indian |] |
| | Inhabitant, Occupation Business. |] |
| | |] |
| 2] | Neetu Ojha Singh |] |
| | Aged 41 years of Hindu, |] |
| | Indian Inhabitant, |] |
| | Occupation : Housewife, |] |
| | both residing at R/0700, Shipra |] |
| | Building, Khandelwal Lay Out, |] |
| | Evershine Nagar, |] |
| | Malad Link Road, |] |
| | Mumbai – 400064. |] |
| | | ..Petitioners. |

Versus

- | | | |
|----|--------------------------------------|-----------------------|
| 1] | Yash Suresh Malani, |] |
| | Aged 25 years, |] |
| | Hindu Indian Inhabitant, |] |
| | Occupation : NIL. |] |
| | |] |
| 2] | Tanya Yash Malani |] |
| | @ Tanya Hubert Arlappan |] |
| | Aged 30 years, Hindu, Indian, |] |
| | Occupation housewife, |] |
| | both residing at R/o : Flat No. 308, |] |
| | Mata Sagar Apartment, |] |
| | Section – 20, Ulhasnagar-3, |] |
| | Thane – 421 002. |] |
| | | ..Respondents. |

*Ms. Sneha **Phene**, Ms. Savita Sawalkar and Ms. Gunjan Tamhane i/b Ajit Tamhane for the petitioner.*

*Ms. Edith Dey i/b **Mikhail** Dey for respondents.*

Coram : Sharmila U. Deshmukh, J.

Reserved on : July 13, 2023.

Pronounced on : August 19, 2023.

Judgment :

1. Rule. Rule made returnable forthwith with the consent of parties and taken up for final disposal.

2. This is one of the unfortunate cases at the centre of which is a minor child aged 2 years. The petitioners are the adoptive parents and the respondents are the biological parents. The adoptive parents claim that the biological parents have given the child in adoption and have executed deed of adoption dated 16th July 2021, which is disputed by the biological parents. The minor child is with the adoptive parents from the time he was two days old.

3. An Adoption Petition No.189 of 2021 was preferred on 18th September 2021, which came to be rejected vide order dated 16th March, 2022. The review preferred against the order of dismissal came to be rejected vide order dated 8th March, 2023. Vide order dated 8th March, 2023 passed in Miscellaneous Application No.137 of 2023 filed

in Adoption Petition No.189 of 2021, the City Civil Court, Greater Mumbai directed the custody of minor child to be handed over to the biological parents. In the present petition, the dismissal of adoption petition, the dismissal of review petition and the order passed in miscellaneous application directing the handing over of custody of minor child has been assailed.

FACTS:

4. The facts of the case discernible from the material produced on record are as under:

. On 16th July 2021, a document styled as “Deed of Adoption” came to be executed on a stamp paper of rupees one hundred, which was notarised. The deed bears the signatures of adoptive parents as well as the biological parents and as also the photographs of both sets of parents. There are no witnesses to the said deed. The recitals in the document read thus :

- “1. Both the parties are agreed that since this deed of adoption the above said Child New Born Boy Baby will be known as New Born Boy Baby in the concerned record of the above Child in his future record and henceforth the Child will be known as New Born Boy Baby.
2. Both the parties declare that the second party will be Adoptive Father and all the rights of the child in respect of both the parties and inheritance in respect of personal and

real estate of the second party.

3. The First party has no objection if the Adoptive Father will change the name of the said Child by way of Government Gazette as per Law and Procedure.
4. Biological parents undertake to be present before the Court for further decree, shall not evade the proceedings.
5. Biological parents shall not try to maintain contact or file any complaint before police.
6. The First party has maintained the Child having responsibility of natural mother and liability of father and the Child requires the natural love and affection of father and the second party desirous to provide such and affection to the Child above mentioned.
7. All the parties declare that the Second parties desire to provide love and affection to the Child and he shall perform all the legal liabilities of father respectively for the purpose of education maintenance and better future of the Child and the Child shall be maintained as his own Child and in the properties of the Second parties the Child shall be entitled to get his lawful rights as per the Provisions of Law of Succession Act or any other Act, being enforce.
8. Both the parties declare that Second Party has adopted the above said Child with their free consent and desire without any force, collusion, connivance and pressure of whatsoever in nature from any one and his consent is free and valid in all respect."

5. On 18th September, 2021, the adoptive parents filed Adoption Petition bearing No.189 of 2021 before the City Civil Court, Greater Mumbai. It was pleaded that the actual custody of child is given to the adoptive parents by the biological parents by way of execution of

deed of adoption dated 16th July, 2021. It was pleaded that the biological mother had confirmed the intention of surrender of child permanently by filing her affidavit and that all necessary consents, relinquishment or termination of the parental rights have been acquired and filed with the said petition. It was further pleaded that in order to legally adopt the child it was necessary to have appropriate orders of the Court. The relief sought was for adoption of child by the proposed adopters under the Hindu Adoptions and Maintenance Act, 1956 [for short "**the HAMA**"], for declaring the proposed adopters as adoptive parents of the child and all parental rights, liabilities and responsibilities over the said child, that the proposed adopters may be permitted to remove the child from the jurisdiction of this Court and to take the child anywhere and wherever they may reside in future. To the said petition were annexed a number of documents which included the birth certificate of the said child, the health report, the adoption deed, the identity cards of petitioners and respondents, the photographs of biological parents and adoptive parents with the said child, mishap certificate, the consent of biological mother, the consent of adoptive mother, the references, the investment statements, the follow up undertaking.

6. During the hearing of adoption petition, the City Civil Court

directed the adoptive parents to get the consent affidavit of their minor daughter and of the biological father. The consent affidavit of minor daughter Suhana was submitted on 4th March, 2022 along with photo identification.

7. The biological father opposed the petition by filing affidavit-in-reply dated 9th March, 2022. It was contended that in the month of March 2018, the biological father-Yash became friendly with Tanya which friendship turned into a love relationship and in the month of January 2021 he was informed by Tanya that she was pregnant. It was stated that due to Corona outbreak, the biological parents lost their jobs and were in financial problems and in such situation, Tanya approached her friend and decided to keep the child in an institution for some days. It was contended that Tanya came in contact with Julia and they decided to keep the child in the institution or for adoption. It was contended that the child was born on 14th July 2021, and on 16th July 2021 the said Julia took them and the new born child at Bandra and got executed the documents which were done without reading, explaining and understanding the consequences and they were not provided with copy of the document. It is contended that after discussion with their families, they decided to take back their son and that they are ready and willing to maintain their son as

biological parents and sought rejection of adoption petition. Similar affidavit was filed by the biological mother Tanya seeking rejection of the petition.

8. A written reply came to be filed by the adoptive parents to the affidavit filed by the respondents, which for some strange reason changed the initial cause title of adoption petition from the petitioners versus the respondents to the petitioners and co-petitioners. In the written reply of petitioners it was stated that the present consent petition was filed by the petitioners and the co-petitioners after the adoption deed was executed on 16th July 2021. It was stated that since the child was 3 days old, custody was handed over to the petitioners and since the filing of petition in September 2021, the co-petitioners neither denied the adoption nor shown their concern about the child. It was contended that there is a duly notarised adoption deed which was made without any undue influence, force or coercion.

9. On 16th March 2022, the City Civil Court passed an order dismissing the adoption petition. The trial Court after examining the provisions of section 9 of the HAMA observed that consent of both father and mother are required to give their child in adoption. The trial Court further held that the adoption deed executed between the

parties is not registered and as such under the provisions of section 16 of HAMA, the Court shall not presume that the adoption has been made in compliance of the provisions of HAMA. The trial Court held that the adoption process cannot be completed without the consent of respondents and in view thereof dismissed the petition. As against the dismissal, Review Petition No.190 of 2022 was filed before the City Civil Court, which came to be rejected vide order dated 8th March 2023 for the reason that there were no grounds to review the judgment and order passed in the adoption petition.

10. After the dismissal of adoption petition on 16th March, 2022, the biological parents filed Miscellaneous Application No.137 of 2022 on 18th August, 2022 in Adoption Petition No.189 of 2021, which was opposed by the adoptive parents. Vide order dated 8th March, 2023, the City Civil Court directed the adoptive parents to hand over the custody of minor child to the biological parents. The trial Court held that from the contents of adoption deed it is seen that the parties have expressed their desire regarding adoption of child however nothing further was done and that there is no recital regarding “giving and taking” of the child in adoption deed. The trial Court held that in such circumstances, mere custody of child with the adoptive parents is not sufficient to come to a conclusion that the child was legally given

in adoption and as the applicant was the biological mother of child, she was entitled to custody.

11. The present petition questions the orders passed in the adoption petition, the review petition and the miscellaneous application.

SUBMISSIONS :

12. Heard Ms. Sneha Phene, learned counsel appearing for the petitioners and Ms. Edith Dey, learned counsel appearing for the respondents.

13. Ms. Phene, learned counsel for the petitioners (the adoptive parents) has taken this Court through the adoption deed dated 16th July 2021, and the consent affidavit filed by the biological mother. Based on these documents, she would urge that the biological parents have given the minor child in adoption. She would submit that the adoption had taken place through an NGO named AHAM Foundation with which Ms. Julia was associated. Drawing attention to the provisions of section 9 of HAMA, she would contend that both parents have, by the deed of adoption, given their consent for adoption. She would further submit that the provisions of section 16 of HAMA raises a statutory presumption and cannot be interpreted to mean that the

adoption deed is required to be registered. She would further submit that along with the adoption deed, there are consent affidavits filed by the biological mother and the adoptive mother, which are annexed at page nos.75 of 78 of petition signifying the willingness and voluntary consent of the biological mother. She would urge that the execution of adoption deed not being disputed and the giving and taking of the child having been done, adoption is complete. She would further contend that under the provisions of section 15 of HAMA, a valid adoption cannot be cancelled.

14. She assails the order dated 8th March 2023 passed in Miscellaneous Application No.137 of 2022 on the ground that after disposing of the adoption petition, the City Civil Court has become *functus officio* and as such order dated 8th March, 2023 is a nullity. She would further submit that the child was given in adoption as at that relevant time, the biological parents were not married and the marriage was subsequently solemnised in the month of March 2020. She invites the attention of this Court to the affidavit-in-reply filed in Adoption Petition No.189 of 2021 by the biological mother stating that she decided to keep the child in an institution or give child for adoption. She would further submit that the contention now sought to be raised that the provisions of HAMA do not apply to the

biological mother, for the reason that she is practicing Christianity cannot be accepted as no such ground was taken before the City Civil Court. She would further submit that it is evident from the roznama of City Civil Court that after the adoption petition was filed, on 13th January 2022 the petitioners and the co-petitioners were present and no objection was raised. She would further point out that it is only on 9th March 2022 when the matter was adjourned for filing of the consent affidavit that the objection was raised by the biological father and prior to that there was no objection and in fact the biological parents had participated in the hearing of adoption petition as co-petitioners. She would further submit that the adoptive parents have now filed a substantive suit being Suit No. 2830 of 2022 *inter alia* for a declaration that the deed of adoption is in conformity with the provisions of HAMA and the adoption of minor child is legal and valid. She has filed her response to the compilation of documents relied upon by the respondents. She places reliance on the following decisions :

- a] *M. Gurudas v. Rasaranjan [(2006) 8 SCC 367];***
- b] *L. Debi Prasad v. Smt. Tribeni Devi and Ors [1970(1) SCC 677];***
- c] *Dhamraj v. Suraj Bai [AIR 1973 SC 1103];***
- d] *Madhusudan Das v. Smt. Narayani Bai [(1983) 1 SCR 851];***
- e] *Mausami Moitra Ganguli v. Jayant Ganguli [(2008) 7 SCC 673];***
- f] *Gayatri Bajaj v. Jiten Bhalla [(2012) SCC 471];***

g] Thrity Hoshie Dolikuna v. Hoshiram Shavaksha Dolikuna [(1982) 2 SCC 544];

h] Iftekar S. Hussain v. Vakil Ansari [2022(1) Bom C. R. 574]; and

i] Sahib Singh v. Arvinder Kaur [2013 134 DRJ 445].

15. *Per contra*, Ms. Dey, learned counsel appearing for the respondents would contend that the petitioners have indulged in multiple proceedings. She would further contend that the petitioners sought to adopt the child through a NGO which is not a government recognised adoption agency and in fact Ms. Julia who is the trustee of AHAM Foundation is involved in a baby selling racket since 2017 and was caught red handed by the social service branch of Mumbai Police in 2022. She would further contend that the consent affidavits are forged one. She would further urge that the adoption deed is not a registered document, which is a requirement by virtue of circulars issued by the State of Maharashtra. She would further submit that in the suit filed by petitioners, a notice of motion bearing No.4791 of 2022 was taken out, which has been dismissed by the City Civil Court holding that the plaintiffs have no right to retain the child with them. She would further submit that the appeal from order is pending before this Court. In so far as the adoption deed is concerned, she would contend that although signature of the biological parents is not

disputed, the same was executed under a misrepresentation that the child is being given for temporary institutional care. She points out that there are no witnesses to the adoption deed and that perusal of adoption deed would indicate that there was no ceremony of give and take. She would further submit that in the adoption petition, the biological parents are arrayed as respondents and the petition has not been signed by the biological parents and also the respondents were not represented by any lawyer. She would further submit that the document which is annexed to the adoption petition, i.e., the consent affidavit would indicate that the same has been signed on 16th July 2021, i.e., at the time of execution of the alleged adoption deed and they were used subsequently in the adoption petition which was admittedly been filed in September 2021. She would further draw the attention of this Court to the references which are annexed to the adoption petition, in particular reference of Ms. Julia, wherein it is stated that she knows the adoptive parents since last 5 years, whereas the admitted position, as per the pleadings in the petition, is that the adoptive parents had recently met Ms. Julia and as such it can be said that the references which are provided are forged and fabricated. She has tendered a compilation of documents to show the multiple litigation by the petitioner and the government circulars. In support of her contentions, learned counsel for the respondents relies upon

following decisions :

- a] *Municipal Corporation of Delhi v. yashwnat Singh Negi [(2020) 9 SCC 815];***
- b] *M. Vanaja v. M. Sarla Devi [(2020) 5 SCC 307];***
- c] *Neha w/o Rahul Malivya v. State [Bombay High Court Nagpur / Bench Crim. W.P. 463 of 2021, dtd. 23rd September 2021];***
- d] *Kumar Sursen v. State of Bihar [AIR 2008 Pat 24]; and***
- e] *Deen Dayal v. Sanjeev Kumar [(AIR 2009 Raj 122].***

16. In rejoinder, learned counsel for the petitioner has pointed out that there is no requirement of any witness in the adoption deed. She has further pointed out that the recitals of adoption deed make it clear that the child has been given in adoption. As regards the circular, she would submit that the circulars do not mandate the registration of adoption deed. She would further submit that in the affidavit-in-reply to the miscellaneous application No. 137 of 2022 the specific case is that the biological parents had handed over the custody of child to the respondents.

LEGAL PROVISIONS:

17. Before dealing with the facts of the case, it will be profitable to refer to the various legal provisions as regards adoption of a child. Although it is now sought to be contended that the biological mother

is not a Hindu, the said submission was not canvassed before the trial Court. The photographs on record indicates marriage of the biological parents was as per the Hindu vedic rituals and there is no document produced on record to show that there was no conversion and that after marriage, Tanya continued to profess Christianity. As such the provisions of the Hindu Law in the context of adoption of child is being considered.

18. In **Mulla's Principles of Hindu Law** 22nd Edition p 686 to 687 it is stated as under :

"§ 485. Ceremonies relating to adoption.-(1) The ceremonies relating to an adoption are:

- (a) the physical act of giving and receiving, with intent to transfer the boy from one family into another (§ 486);
- (b) the *datta homam*, i.e., oblations of clarified butter to fire (§ 487); and
- (c) other minor ceremonies, such as *putresti jag* (sacrifice for male issue).

(2) The physical act of giving and receiving is essential to the validity of an adoption (§ 486).

As to *datta homam*, it is not settled whether its performance is essential to the validity of an adoption in every case (§ 487).

As to the other ceremonies, their performance is not necessary to the validity of an adoption."

(3) No religious ceremonies, not even *datta homam*,

are necessary in the case of *Sudras*," nor are religious ceremonies necessary amongst Jains or in the Punjab."

"§ 486. Giving and receiving.- (1) The physical act of giving and receiving is absolutely necessary to the validity of an adoption. This is not only in the case of the twice-born classes, but also in the case of *Sudras*. This ceremony is of the essence of adoptions, and the law does not accept any substitute for it. Mere expression of consent, or the execution of a deed of adoption, though registered, but not accompanied by an actual delivery of the boy, does not operate as a valid adoption. To constitute giving and taking in adoption all that is necessary is that there should be some overt act to signify the delivery of the boy from one family to another.

No particular form is prescribed for the ceremony, but the law requires that the natural parent should hand over the adoptive boy and the adoptive parent should receive him. The nature of the ceremony may vary depending upon the circumstances of the case. However, the ceremony of giving and taking should necessarily be there. In case of an old adoption, strict proof of the performance of the ceremonies may not be available. An adoption acquiesced in and recognised for a number of years by the person making the adoption and a long course of recognition on the part of persons who would be expected to know of the fact and who were best acquainted with the circumstances, can give rise to the inference that the conditions relating to the adoption were fulfilled.

(2) Diverse circumstances may necessitate that the act of actual giving or taking should be delegated to a third person and therefore, the parents after exercising their volition to give and take the boy in adoption, can both or either of them delegate the physical act of handing over the boy or receiving him by way of adoption to a third party.

However, the power (or right) to give a son in adoption cannot be delegated to any person. The delegation can only be of the physical act mentioned above. Accordingly, the father or mother may authorise another person to perform the physical act of giving a son in adoption to a named person, and can delegate someone to accept the child in adoption on his or on her behalf."

"§ 488. Free consent.— Every valid adoption implies the free consent to the adoption of the person giving and the person receiving in adoption, and also, it seems, of the person adopted, if he is a major at the date of adoption.

Where the consent to an adoption is obtained by misrepresentation, coercion, fraud, undue influence, or mistake, the consent is not free, and the adoption is voidable at the option of the party whose consent was so obtained. However, it may be ratified by such party, provided the ratification does not prejudice the rights of other persons."

"§ 489. Consideration for adoption.— An adoption is valid merely because the person giving in adoption receives a consideration for the adoption from the person taking in adoption, though the promise to pay cannot be enforced in law."

"§ 490. Adoption cannot be cancelled: renunciation by adopted son of right of inheritances.— A valid adoption once made cannot be cancelled by the adoptive father, or other parties thereto, nor can the adopted son renounce his status as such and return to his family of birth. However, there is nothing to prevent him from renouncing his right of inheritance in the adoptive family, in which case, the inheritance would go to the next heir.

The *Goda-datta* form of adoption was a customary

form prevalent in certain families and could, by custom, be revoked and annulled at the instance of either party."

19. The law relating to adoptions and maintenance came to be codified by the Hindu Adoptions and Maintenance Act, 1956. The provisions of Section 4 of HAMA gave an overriding effect to the provisions of HAMA and reads thus:

"4. Overriding effect of Act.- Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

20. Section 4 of the HAMA indicates that save as otherwise expressly provided in HAMA, any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before commencement of HAMA will cease to have effect with respect to any matter for which provision is made in HAMA. Considering the provisions of Section 4 as Chapter II of HAMA codifies the provisions as regards adoptions, in the absence of any provision to the contrary, in my opinion, it is the provisions of Chapter II of HAMA

which will govern the adoption and not the text of Hindu Law.

21. The relevant provisions contained in Chapter II of HAMA are reproduced for ease of reference:

"5. Adoptions to be regulated by this Chapter.- (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth."

"6. Requisites of a valid adoption. – No adoption shall be valid unless--

- (i) the person adopting has the capacity, and also the right, to take in adoption;
- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption; and
- (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter."

"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 the mother, if alive, shall have equal right to give a son or daughter in adoption:

Provided that such right shall not be exercised by either of them save with the consent of the 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 of unsound mind.

(3) *****

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.”

“11. Other conditions for a valid adoption.—In every adoption, the following conditions must be complied with:—

- (i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son’s son or son’s son’s son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son’s daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;
- (iv) if the adoption is by a female and the person to be

adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

- (v) the same child may not be adopted simultaneously by two or more persons;
- (vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption:

Provided that the performance of *datta homam* shall not be essential to the validity of an adoption."

"12. Effects of adoption.— An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that—

- (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
- (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
- (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

"15. Valid adoption not to be cancelled.— No adoption which has been validly made can be cancelled by the adoptive father

or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.”

“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.”

22. Section 9 of HAMA provides that no person except the father or mother shall have the capacity to give the child in adoption and that both parents have equal rights which cannot be exercised save with the consent of the other. The provisions contained in Chapter II of HAMA does not prescribe for any particular form of adoption. However, Section 11 of HAMA prescribes the other conditions for valid adoption and the relevant sub section (vi) of Section 11 provides that the child to be adopted must be actually given and taken in adoption by the parents or guardians concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption. The proviso to Section 11 provides that performance of *datta homam* shall not be essential to the validity of an adoption.

23. In the present case, the relevant consideration would be

whether the child was actually given and taken in adoption with intent to transfer the child from one family to the other, as there is no dispute about the capability of the parties to give and take the child in adoption.

24. In the year 2015, the Juvenile Justice (Care and Protection of Children) Act, 2015 [for short "**the JJ Act**"] was enacted which *inter alia* applies to the procedures and decisions and orders relating to adoption. Under the JJ Act, the Child Welfare Committee has been established and procedure has been laid down in relation to children in need of care and protection. Section 35 of the JJ Act deals with surrender of children by parent for factors beyond their control and sub-section (3) of Section 35 permits the parents who have surrendered their children, two months time to reconsider their decision. After an inquiry by the Committee, the child is declared free for adoption. Detailed rules and regulations are framed under the provisions of the JJ Act and constitution of State Adoption Resource Authority and Central Adoption Resource Authority is provided. The provisions as regards adoption is found in Chapter VIII of JJ Act and Section 56(3) provides that the provisions of JJ Act shall not apply to the adoption of the children made under HAMA.

25. The reason why I have referred to the provisions of JJ Act is to emphasize that in relation to adoption, sufficient safeguards are provided to ensure minimal challenge to the adoption process by safeguarding the rights of adoptive parents as well as biological parents. Probably, in the present case if the adoption would have taken place under the provisions of JJ Act, the emotional turmoil faced by both sets of parents could have been mitigated. This should not be interpreted to mean that the provisions of HAMA are in any manner inferior or inadequate to deal with the process of adoption or to safeguard the interest of both sets of parents.

REASONS & CONCLUSIONS :

26. This Court is tasked with dealing with the validity and legality of three orders passed by the Civil Court. The first is the order dated 16th March, 2022 rejecting the adoption Petition.

27. Adoption Petition No. 189 of 2021 has been filed before the City Civil Court under section 9 of HAMA. The provisions of sub-section (4) of section 9 of HAMA mandate the previous permission of the Court where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared to be of unsound mind or where the

parentage is not known, guardian of the child may give the child in adoption with the previous permission of the Court to any person including the guardian himself. By virtue of sub-section (5) of section 9 of HAMA before granting such permission, the Court is required to be satisfied that the adoption will be for the welfare of child. Section 9 of HAMA prescribes the previous permission of the Court for adoption in the situations contemplated in the sub section (4). Admittedly none of the situations contemplated by sub section (4) of Section 9 exists in the present case. In such situation, the requirement contemplated by the provisions of section 11 of HAMA applies. Despite there being no requirement of seeking permission of the Court, the adoption petition has been filed in the City Civil Court probably for seeking imprimatur of the Court to the adoption. and has been adjudicated by the said Court. It is in these proceedings, that a refusal by the biological parents has taken place by opposing the said petition.

28. The contention of learned counsel for the petitioners that the biological parents were the co-petitioners is not reflected from the adoption petition which shows that the biological parents as respondents and it is only when the affidavit-in-reply objecting the order being passed that the written reply was filed in which curiously

the cause title was changed showing the biological parents as co-petitioners. Further the consent affidavit of biological mother bears the date of 16th July 2021 which indicates that the same were signed on 16th July 2021 at the time of execution of adoption deed. The City Civil Court has adjudicated the adoption petition in a summary manner and in fact has called upon the petitioners to produce the consent affidavit of minor daughter of petitioners, who is aged 7 years, who is not competent to give consent. However, an affidavit has been filed by the said minor child giving her consent. This is quite unheard of. Subsequently, the trial Court by reason of the objection of biological parents has rejected the adoption petition. As none of the parties assailed the jurisdiction of the Court to decide the adoption petition against the background of Section 9 of HAMA, there was no adjudication and the Trial Court has rejected the petition on the ground that consent of both father and mother of the child are required to give their child in adoption. The requirements of Section 11 of HAMA prescribing the conditions for valid adoption and Section 15 of HAMA which provides that valid adoption cannot be cancelled was not brought to the notice of the Trial Court. The trial Court considered the provisions of sub section (1) of Section 9 of HAMA and rejected the Petition by holding that consent of both father and mother is required.

29. In my view, there was no necessity of filing the adoption petition as the provisions of sub-section (4) of Section 9 of HAMA are not applicable to the facts of present case. Considering that the biological parents had taken objection to the adoption on the ground that the documents were executed without reading, explaining and understanding consequences and had disputed the adoption, the appropriate course would have been to direct the parties to file substantive suit so that the matter can be adjudicated by leading evidence to establish that the conditions of valid adoption were satisfied. It is to be noted that as per provisions of Section 15 of HAMA, valid adoption cannot be cancelled and, as such, inquiry into the validity of adoption by leading evidence is necessitated.

30. At this stage it would be beneficial to refer to the decision of the Apex Court in the case of ***Mst. Param Pal Singh v. National Insurance Co., [AIR 2013 SC 974]*** where, the Apex Court had an occasion to consider the law as regards the adoption on the context of compensation to be paid under the provisions of Employees Compensation Act to an adopted child. The Apex Court referred to the decision in the case of ***Laxman Singh Kothari v. Smt. Rup Kanwar [AIR 1961 SC 1378]*** wherein the apex Court has laid down the law thus :

"10. The law may be briefly stated thus: Under the Hindu law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party."

Further, the Apex Court has referred to the decision in **M. Gurudas and others v. Rasaranjan [2006(8) SCC 367]** and relied upon the following observations in the said decision :

"26. To prove valid adoption, it would be necessary to bring on record that there had been an actual giving and taking ceremony. Performance of "datta homam" was imperative, subject to just exceptions. Above all, as noticed hereinbefore, the question would arise as to whether adoption of a daughter was permissible in law.

27. In Mulla's Principles of Hindu Law, 17th Edn., p. 710, it is stated:

"488. Ceremonies relating to adoption.—(1) The ceremonies relating to an adoption are—

(a) the physical act of giving and receiving, with intent to transfer the boy from one family into another;

(b) the datta homam, that is, oblations of clarified butter to fire; and

(c) other minor ceremonies, such as putresti jag (sacrifice for

male issue)."

(2) The physical act of giving and receiving is essential to the validity of an adoption.

As to datta homam it is not settled whether its performance is essential to the validity of an adoption in every case.

As to the other ceremonies, their performance is not necessary to the validity of an adoption.

(3) No religious ceremonies, not even datta homam, are necessary in the case of shudras. Nor are religious ceremonies necessary amongst Jains or in the Punjab."

31. The Apex Court by considering various decisions had held that there cannot be a valid adoption unless the adoptive child is transferred from one family to another and that can be done only by ceremony of giving and taking and to achieve this object it is essential to have a formal ceremony. It is further observed that no particular form is prescribed but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him.

32. The civil court rejected the petition on two grounds firstly that the biological parents have taken objection for giving the child in adoption and secondly that adoption deed is not registered as per Section 16 of HAMA. As regards the rejection on the ground of absence of consent is concerned, as indicated above, the proper course would have been to relegate the parties to the remedy of

substantive suit. This was not done and the petition was rejected. The second ground was that the adoption deed was not registered. In that context if we peruse Section 16 of HAMA, it raises a statutory presumption as to registered documents relating to adoption provided that the condition precedent is satisfied and cannot be interpreted to mean that the adoption deed is required to be registered. In that context if we peruse the provisions of Section 17 of Indian Registration Act, 1908, the deed of adoption does not find mention in the documents required to be compulsorily registered. In face of the objection raised by the biological parents, the issue could not be decided in summary manner as decided by the Civil Court in the Adoption Petition. The inquiry contemplated under the provisions of HAMA as regards the actual giving and taking of the child in adoption with the intent of transferring the child from the family of the biological parents to the family of adoptive parents was not conducted in the proceedings of Adoption Petition No 189 of 2021. The biological parents have disputed that the adoptive parents were present at the time of execution of the Deed of Adoption and it is their contention that the child was handed over to Ms. Julia of AHAM Foundation. Clause (vi) of section 11 of HAMA emphasizes give and take of child with intent to transfer the child from one family to another. The intention will have to be gathered from the conduct of

parties at the time of actual give and take of the child which can be only conclusively proved after the evidence in that behalf has been led. In wake of the dispute being raised as regards the actual giving and taking of the child with intent to transfer the child from one family to another, evidence was required to be led. The provisions of HAMA do not require a document to be registered, however, there is a statutory presumption which arises in respect of the registered document relating to adoption. In the present case, as the deed of adoption is not registered, the condition precedent for statutory presumption to be raised is not satisfied and as such without evidence being led, there can be no presumption relating to adoption as regards the unregistered deed of adoption.

33. In my opinion, the impugned order which rejects the petition on the ground of absence of consent without noticing the provisions of Section 15 of HAMA which provides that no valid adoption can be cancelled cannot be sustained. However although the impugned order dated 16th March, 2022 is unsustainable as no inquiry as required was conducted, the issue is now required to be adjudicated in Short Cause Suit No.2830 of 2022 instituted by the adoptive parents seeking declaration as regards the validity of adoption and the setting aside of the impugned order dated 16th March, 2022 cannot be said to

conclude the issue of adoption in favour of the adoptive parents.

34. The second order which is challenged is the order in Review Petition No 190 of 2022. The Civil Court did not find compliance with the requirements of Order XLVII of CPC which deals with the review of judgment and has rejected the same. There are no submissions canvassed in respect of the order passed in the review petition. In any event, the same will not be required to be dealt with in view of the directions which I propose to pass.

35. The third order under challenge is dated 8th March, 2023 passed in Misc. Application No 137 of 2022 directing the child to be handed over to the biological parents. It will be necessary to deviate a little to advert to the proceedings of the substantive suit being Short Cause Suit No 2830 of 2022 filed by the adoptive parents. In these proceedings an interim application came to be filed *inter alia* seeking the continued custody of the minor child which came to be rejected vide order dated 8th March, 2023. It appears that on 8th March, 2023 the same Court passed the order in the Review Petition No 190 of 2022, the order in Misc. Application No 137 of 2022 in Adoption Petition No 189 of 2021 and the order in Notice of Motion No 4791 of 2022 in Short Cause Suit No 2830 of 2022.

36. As against the order dated 8th March, 2023 passed in Notice of Motion No. 4791 of 2022, the adoptive parents filed Appeal from Order No.243 of 2023 before this Court and this Court vide order dated 5th April, 2023 held that the remedy was to seek interim relief in proceeding in which the order passed in Misc. Application No.137 of 2022 dated 8th March, 2023 is challenged and interim relief was not granted. It appears that the Appeal from Order is pending adjudication.

37. The contention of learned counsel for Petitioners is that the Civil Court became *functus officio* once the adoption petition was disposed of. In the order dated 8th March, 2022 passed in Misc. Application No.137 of 2022, a finding has been given that the petitioners had not brought on record the reliable and convincing evidence to establish the fact regarding giving and taking of child in adoption. The City Civil Court failed to appreciate that the adoption petition was dismissed in a summary manner without giving any opportunity to the parents to lead any evidence and the matter was decided on the basis of affidavits. Considering that the compliance of conditions of adoption were required to be taken into consideration, it was necessary for issues to be framed in that regard and evidence be permitted to be led and as the same was not done, there was no

question of bringing on record any reliable or convincing evidence to establish validity of adoption.

38. The adoption petition was disposed of on 16th March, 2022 and Misc. Application was filed on 18th August, 2022. The provisions of Order 20 Rule 3 of Code of Civil Procedure (CPC) provides that the judgment once signed shall not afterwards be altered or added to save as provided by Section 152 or on review. I find considerable force in the submission of learned counsel for Petitioner that once the adoption petition was disposed of by order dated 16th March, 2022, the City Civil Court became *functus officio* and could not have entertained Misc Application No.137 of 2022. Pertinently at the time of passing of the order dated 8th March, 2023 in Misc. Application No.137 of 2022, the same Court was seized of Short Cause Suit No.2830 of 2022 and passed the order in Notice of Motion No.4791 of 2022 on the same day. In spite of being *functus officio*, the City Civil Court has, on the basis of arguments and documents, decided the miscellaneous application and vide order dated 8th March, 2023 directed the custody to be handed over to the respondents herein which cannot be sustained.

39. As regards the Government Circulars relied upon by learned counsel for the respondents, the circular dated 15th May, 2015

provides that as regards non institutional adoptions, registered adoption deed is enough and there is no need to produce adoption order of a court for such cases. The circular dated 31st January, 2018 the same is in respect of adoptions through institutions. A reading of the said circulars cannot be interpreted to mean that the adoption deed is required to be mandatorily registered. In any case the government circulars cannot override the statutory provisions and the circulars have been issued to facilitate the registration of births and issuance of birth certificate in respect of adopted child.

40. As regards the decisions relied upon by learned counsel for the petitioners and the respondents, considering the directions which I propose to issue, it will not be necessary to consider the decisions cited at the bar.

41. In light of the discussion above, the writ petition is disposed of with the following directions:

- (a) The impugned orders dated 16th March, 2022 passed in Adoption Petition No.189 of 2021 and the order dated 8th March, 2023 passed in Misc. Application No.137 of 2022 are hereby quashed and set aside.
- (b) The setting aside of the orders as stated in clause (a) above

does not conclude the issue of adoption in favour of the Petitioners and the issue is required to be adjudicated in Short Cause Suit No.2830 of 2022.

- (c) Considering the sensitivity of the matter, the trial Court is directed to decide Short Cause Suit No.2830 of 2022 expeditiously and in any event within a period of six months from today. It is made clear that no extension of time will be granted.
- (d) In wake of the factual position that the child is with the adoptive parents from last two years since he was two days old, the child to remain with the adoptive parents till the final adjudication of Short Cause Suit No.2830 of 2022.

[Sharmila U. Deshmukh, J.]